Sarti v Melnick
2020 NY Slip Op 32260(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 805016/2018
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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ALEXA SARTI, **Index №.805016/2018**

Plaintiff

-against-

ALEXIS MELNICK, M.D., NEW YORK WEILL CORNELL MEDICAL CENTER FUND, INC., WEILL CORNELL MEDICAL COLLEGE AND THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendants ALEXIS MELNICK, M.D. ("Dr. Melnick"), CORNELL UNIVERSITY s/h/a WEILL CORNELL MEDICAL COLLEGE, THE NEW YORK AND PRESBYTERIAN HOSPITAL ("NYPH") (collectively "defendants") move for summary judgment and an order dismissing plaintiff ALEXA SARTI's ("plaintiff") complaint as against it. Plaintiff opposes defendants' application.

BACKGROUND

Plaintiff, then 35-years-old, presented to Dr. Melnick in November of 2016 after three miscarriages in the preceding sixteen (16) months. She subsequently became pregnant under Dr. Melnick's care and was diagnosed with an ectopic pregnancy. Dr. Melnick surgically treated the ectopic pregnancy, and in the ensuing two years, plaintiff had two successful subsequent pregnancies without fertility treatment. Plaintiff's counsel's allegations center upon the diagnosis and treatment of the ectopic pregnancy. Specifically, plaintiff alleges that defendants failed to timely diagnose and treat the ectopic pregnancy, and that they failed to provide informed consent regarding the options of either medical management or surgery for treating the ectopic pregnancy. As a result of Dr. Melnick's failure to obtain informed consent, plaintiff contends that she was forced to endure an unindicated, unnecessary and unwarranted surgery. Plaintiff also alleges various claims against the institutional defendants, including, *inter alia*, negligent hiring and supervision. As a result of the alleged negligence, plaintiff claims that she sustained, *inter alia*, the following injuries: a large ectopic pregnancy, abortion, fallopian tube and tissue disruption and removal, hemoperitoneum (blood in the peritoneal cavity), shock to the nervous system, depression, anxiety, and fertility issues.

ARGUMENTS

In support of the instant motion, defendants annex the expert affirmation of Hugh Taylor, M.D. ("Dr. Taylor"), a physician board-certified obstetrics and gynecology, who opines that care and treatment rendered by defendants was, at all times, timely and appropriate, and in conformance with the good and accepted standards of medical practice, including, but not limited to, the period from on or about November 17, 2016 through and including on or about December 23, 2016. It is further Dr. Taylor's opinion, within a reasonable degree of medical certainty, that none of the care and treatment rendered was a proximate cause, or a substantial contributing factor in, the claimed injuries and damages.

Specifically, Dr. Taylor opines that plaintiff's medical history was appropriately appreciated upon plaintiff's initial presentation to Dr. Melnick on November 17, 2016 for an infertility consultation. To be sure, Dr. Taylor highlights that Dr. Melnick documented that plaintiff had three miscarriages in the past sixteen (16) months, and testified that she appreciated plaintiff's concerns regarding a possible ectopic pregnancy. Regarding plaintiff's claim that Dr. Melnick failed to timely diagnose plaintiff's ectopic pregnancy, Dr. Taylor opines that plaintiff's pregnancy was appropriately monitored, and her ectopic pregnancy was timely and properly appreciated, recognized, diagnosed and treated by defendants. Indeed, an ultrasound in June of 2015 showed no ectopic pregnancy. Further, the records reveal that an ectopic pregnancy was never definitively diagnosed or documented. Indeed, Dr. Taylor references records that show that plaintiff underwent serial blood tests between December 7, 2016 and December 23, 2016 to monitor critical indicators, including hCG and progesterone, to determine whether plaintiff's pregnancy was progressing normally, and that her blood results were consistent with a normal pregnancy. With regard to plaintiff's allegations that an ultrasound was untimely performed, Dr. Taylor opines, within a reasonable degree of medical certainty that Dr. Melnick properly and timely performed an ultrasound on December 23, 2016 and at no time improperly refused plaintiff's request for an ultrasound. Dr. Taylor further opines that even if an associated diagnosis of an ectopic pregnancy had been found sooner, plaintiff's course of treatment course and outcome would have remained unchanged. Additionally, Dr. Taylor opines, within a reasonable degree of medical certainty, that surgical management in this case was entirely appropriate because it is the safest and most effective means of terminating an ectopic pregnancy. Finally, Dr. Taylor states that plaintiff consented to surgical intervention only after signing a form acknowledging that certain risks and alternatives had been explained to her, and that she had an opportunity to ask questions. In light of the foregoing, Dr. Taylor concludes that plaintiff's treatment comported with applicable standards of care, and that no actions by defendants proximately caused the injuries alleged.

In opposition, plaintiff contends that Dr. Melnick's own testimony establishes that plaintiff was not a candidate for surgery as the size of the ectopic pregnancy was less than 3.5cm, and there was no fetal heartbeat. As such, plaintiff argues that it is beyond dispute that Dr. Melnick deviated from the standard of care when she recommended surgery instead of medicinal therapy. Therefore, regardless of what happened after the surgery, plaintiff contends that Dr. Melnick performed an unindicated surgery on plaintiff that has resulted in the injuries and damages alleged. In addition, plaintiff states that Dr. Melnick never discussed the risks, alternatives, or the actual surgery with plaintiff prior to or on December 23, 2016. As a result of Dr. Melnick's failure to obtain informed consent and improper performance of an unindicated surgery,

plaintiff contends that she was forced to endure a painful postoperative course and had one of her fallopian tubes removed. Plaintiff annexes the expert affirmation of a board-certified physician in obstetrics and gynecology who opines that defendants committed there were numerous deviations from the applicable standard of care that were substantial contributing factors in causing the injuries suffered by plaintiff, which include the performance of an allegedly unnecessary surgical procedure on December 23, 2016. Among other things, plaintiff's expert states that that Dr. Melnick deviated from the standard of care in not taking immediate steps to rule out ectopic pregnancy. Plaintiff's expert also states that the records reveal that Dr. Melnick did not obtain plaintiff's informed consent prior to performing the surgery. Based on a review of the record, plaintiff's expert concludes that defendants deviations were material, and contributed to plaintiff's alleged injuries. As such, plaintiff contends that judgment in defendants' favor is unwarranted.

In reply, defendants challenge the conclusions of plaintiff's expert and reiterate their position that they are entitled to judgment in their favor.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well-settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers*, 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

Here, defendants' submission of deposition transcripts, medical records and expert affirmations based upon the same established a prima facie defense entitling defendants to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Taylor specifically provided that the care and treatment rendered to defendants was within the parameters of good and accepted medical practice. To be sure, Dr. Taylor opines that plaintiff's pregnancy was appropriately monitored, and her ectopic pregnancy was timely and properly appreciated, recognized, diagnosed and treated. Illustratively, Dr. Taylor references records that show that plaintiff underwent serial blood tests between December 7, 2016 and December 23, 2016 to monitor critical indicators, and that defendants determined, based on the results of those tests, that plaintiff's levels were consistent with a normal pregnancy. With respect to plaintiff's allegations that an ultrasound was untimely performed, Dr. Taylor opines, within a reasonable degree of medical certainty, that Dr. Melnick properly and timely performed an ultrasound on December 23, 2016 and at no time improperly refused plaintiff's request for an ultrasound. Dr. Taylor further opines that surgical management in this case was entirely appropriate because it is the safest and most effective means of terminating an ectopic pregnancy. Finally, Dr. Taylor states that plaintiff consented to surgical intervention only after signing a form acknowledging that certain risks and alternatives had been explained to her, and that she had an opportunity to ask questions. As Dr. Taylor's opinion is predicated upon ample support within the record, defendants has shown that plaintiff was treated in full accord with good and accepted standards of medical care, and that there were no departures of care attributable to defendants and its staff that proximately caused plaintiff's injuries.

In opposition to defendants' prima facie showing, plaintiff raises triable issues of fact sufficient to preclude summary judgment. To be sure, plaintiff highlights that while defendants' contend that surgical intervention was appropriate, plaintiff's expert takes issue with that conclusion, categorizing defendants' surgical intervention on December 23, 2016 as unnecessary and contraindicated in light of medicinal alternatives. It is also plaintiff's expert's medical opinion that the simple fact that plaintiff happened to get pregnant following the surgical intervention at issue does not justify the surgery itself, and diminishes the significance of plaintiff's other alleged injuries, including the loss of a fallopian tube. Moreover, it is plaintiff's expert's opinion, within a reasonable degree of medical certainty, that defendants' did not obtain plaintiff's informed consent prior to performing the surgery to remove plaintiff's ectopic pregnancy.

Plaintiff's expert concludes that it is axiomatic that plaintiff's outcome would have been better had defendants opted for medicinal intervention rather than surgery, and had defendants' appropriately discussed the risks and alternatives of surgical intervention with plaintiff. In the realm of medical malpractice jurisprudence, a plaintiff's claim of injury can be premised on such a diminished chance at a better outcome (*see Goldberg v. Horowitz*, 73 AD3d 691 [2d Dept 2010]). Defendants' challenges to plaintiff's expert's conclusions are without merit. To be sure, plaintiff's expert's credentials are adequate, and do not place him within the ambit of medical professionals devoid of the requisite knowledge or experience to render an opinion (*see Atkins v Beth Israel Health Servs.*, 133 AD3d 491 [1st Dept 2015]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]). Moreover, plaintiff's expert specifically mentions the records upon which plaintiff's expert relied upon when forming an opinion. As such, it is axiomatic that plaintiff's expert has provided a requisite foundation for his opinions.

Turning to plaintiff's expert's observations, it is notable that defendants' argument that plaintiff was timely monitored and treated is contravened by the content of plaintiff's expert affirmation, which repeatedly takes aim at the fact that defendants did not immediately detect plaintiff's ectopic pregnancy, and delayed the performance of an ultrasound. Contrary to defendants' assertions, plaintiff contests defendants' arguments that they acted emergently. Because plaintiff's expert's opinion cannot be discounted as a matter of law, an issue of fact has been raised relative to defendants' response to plaintiff's ectopic pregnancy, and decision to proceed with surgical rather than medicinal intervention. Moreover, an issue of fact exists with respect to plaintiff's informed consent. To be sure, despite defendants' argument that that proper informed consent was obtained in this case, plaintiff has testified that at no point prior to undergoing surgery with Dr. Melnick was she given alternatives to the procedure and a full explanation regarding what the surgery would entail. In fact, plaintiff explicitly testified that she was sent to the emergency room then to the operating room without ever being given the option to terminate the ectopic pregnancy with medication. The very fact that plaintiff's expert's opinions differ from those proffered by Dr. Taylor illustrates the existence of issues of triable fact. To be sure, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*).

Finally, summary judgment as to NYPH on the issue of vicarious liability is unwarranted. "As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment" (*Adams v. New York City Transit Auth.*, 88 NY2d 116, 119 [1996]). The rule extends to medical facilities, who can be vicariously liable for the negligence or malpractice of their employees including their physicians (*Hill v. St. Clare's Hospital*, 67 NY2d 72 [1986]). A medical facility may also be held vicariously liable for non-employees on the theory of agency/control in fact, or in the alternative theory of ostensible agency (*id.*). For example, agency has been applied to hold a medical facility responsible for the malpractice of a physician providing services there, despite the physician's status as an independent contractor, where medical care was sought by a patient from the facility rather than from a particular physician (*id.*). Of course the application of this rule depends upon whether the plaintiff could have reasonably believed, based upon all of the surrounding circumstances, that the physician

was provided by the facility or was otherwise acting on their behalf (*Soltis v. State of New York*, 172 AD2d 919 [3rd Dept 1991]). Where issues of facts exist as to the issue of control and ostensible agency, courts have generally denied summary judgment on the issue of vicarious liability (*see Welch v. Scheinfeld*, 21 AD3d 802, 808-809 [1st Dept 2005]; *Santiago v. Archer*, 136 AD2d 690, 691 [2d Dept 1988]; *Mduba v. Benedictine Hosp.*, 52 AD2d 450 [2d Dept 1976]).

Here, Dr. Melnick herself indicated that she provided treatment to plaintiff in her capacity as an employee of NYPH. Even if that testimony were to be discounted, summary judgment on the issue of vicarious liability would be unwarranted since plaintiff "entering the hospital through the emergency room, could properly assume that the treating doctors and staff of the hospital were acting on behalf of the hospital" (*Mduba*, 52 AD2d at 453, *supra*). Because there is no unequivocal evidence to the contrary, issues of fact surround NYPH's potential vicarious liability, thereby rendering summary judgment inappropriate.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a conference before the court on July 15, 2020 at ~~9:30 AM~~ at a time to be determined at ~~the courthouse located at 111 Centre Street, Room 1227 (Part 10)~~.

This constitutes the decision and order of the court.

Dated: June 12, 2020

George J. Silver

HON. GEORGE J. SILVER

805016/18