Krug v Fox
2020 NY Slip Op 34712(U)
December 25, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 606031/2015
Judge: Sanford Neil Berland

SHORT FORM ORDER

INDEX 606031/2015
CAL. No. 201902546MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 7/7/20
ADJ. DATE 10/27/20
Mot. Seq. # 002 MotD

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LILY M. KRUG,

Plaintiff,

- against -

JOSHUA L. FOX, M.D., ROBERT ECKER, M.D., and ADVANCED DERMATOLOGY, P.C.,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants Mitchell Kramer and Huntington Medical Group, filed December 23, 2019, and by defendant Laura Davide, filed January 24, 2020; Answering Affidavits and supporting papers by plaintiff, filed May 5, 2020; and Replying Affidavits and supporting papers by defendants Kramer and Huntington Medical Group, filed May 18, 2020 and by defendant Laura Davide, filed May 18, 2020, it is

ORDERED that the motion by defendants Joshua Fox, M.D., Robert Ecker, M.D., and Advanced Dermatology, P.C., for summary judgment dismissing the complaint is granted to the extent of dismissing the complaint as asserted against defendant Joshua Fox, M.D. only, and is otherwise denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Lily Krug by defendants. The medical malpractice claims against defendants arise from their treatment of plaintiff from approximately November 2011 through June 2013. Plaintiff alleges that defendants were negligent in, among other things, not waiting the requisite period of time after the cessation of Accutane before undertaking a chemical peel treatment of her facial acne. Plaintiff alleges that Advanced Dermatology, P.C., is vicariously liable for claimed negligence of Drs. Fox and Ecker. Plaintiff also alleges a cause of action for lack of informed consent.

Defendants now move for summary judgment dismissing the complaint against them on the grounds that Dr. Fox did not render any medical treatment to plaintiff; that Dr. Ecker did not depart from good and

accepted practices in the medical treatment he provided to plaintiff and that such medical treatment did not cause her injuries; that Dr. Ecker obtained plaintiff's informed consent to the medical treatment he rendered to her; and that Advanced Dermatology does not have vicariously liability for the medical treatment plaintiff received. They submit, among other things, copies of the pleadings, the bills of particulars, the transcripts of the deposition testimony of plaintiff and of Dr. Ecker, Dr. Fox's affidavit/affirmation, medical records and the expert affirmation of Karen Wesson, M.D. In opposition, plaintiff argues that triable issues of fact remain as to whether Dr. Ecker deviated from the accepted standard of care and whether such deviations caused her injuries and as to whether Dr. Ecker obtained her informed consent. Plaintiff submits, in opposition to defendants' motion, the bills of particular, the transcripts of the deposition testimony of herself and of Dr. Ecker and the affirmed medical report of Eve Lupenko, M.D.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (***Dupree v Giugliano***, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice, and that such departure proximately caused his or her injuries (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Macancela v Wyckoff Heights Med. Ctr.***, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a *prima facie* entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that such departure did not proximately cause the plaintiff's injuries (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Wodzenski v Eastern Long Is. Hosp.***, 170 AD3d 925, 96 NYS3d 80 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]). However, "bare conclusory assertions by defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (***DiLorenzo v Zaso***, 148 AD3d 1111, 1112, 50 NYS3d 503 [2d

Dept 2017], quoting ***Winegrad v New York Univ. Med. Ctr.***, *supra* at 853; *see* ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]).

After making this *prima facie* showing, the burden shifts to the plaintiff to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a proximate- cause of plaintiff's injuries (***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the *prima facie* burden (***Bueno v Allam***, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; ***Hernandez v Hwaishienyi***, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (***Alvarez v Prospect Hosp.***, *supra* at 325; *see* ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, *supra*; ***Hernandez v Hwaishienyi***, *supra*). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

Defendants established a *prima facie* case of entitlement to summary judgment dismissing the complaint as asserted against Dr. Fox. Dr. Fox avers that he was not involved in the care and treatment rendered to plaintiff at Advanced Dermatology. Specifically, he states in his affidavit/affirmation that during the period in question, he did not consult with or regarding plaintiff and "never saw, treated, or made any medical recommendations as to plaintiff during the alleged dates of negligence" set forth in plaintiff's supplemental bill of particulars. In addition, plaintiff testified that although Dr. Fox's "name sounds familiar," she has no recollection of receiving treatment from him, and there are no notions by Dr. Fox in plaintiff's relevant medical records. In opposition, plaintiff agrees to discontinue the action against Dr. Fox. Therefore, the portion of the motion seeking summary judgment dismissing the complaint as asserted against Dr. Fox is granted.

Defendants failed to establish a *prima facie* case of entitlement to summary judgment in their favor on the medical malpractice claims against Dr. Ecker and Advanced Dermatology, as they failed to demonstrate the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment Dr. Ecker rendered to plaintiff. By her affirmation, Dr. Wesson recounted the relevant treatment Dr. Ecker rendered to plaintiff and opined in a conclusory manner that such treatment was appropriate and did not depart from good and accepted medical practice (*see* ***Wodzenski v Eastern Long Is. Hosp.***, *supra*; ***Kelly v Rosca***, 164 AD3d 888, 83 NYS3d 317 [2d Dept 2018]; ***Barlev v Bethpage Physical Therapy Assoc.***, P.C., 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]). Dr. Wesson opined that the performance and timing of the TCA application on November 28, 2012 and the performance of the 40% glycolic peel on December 12, 2012 were appropriate and within the standard of care. Dr. Wesson also opined that the care and treatment rendered by defendants neither caused nor contributed to plaintiff's alleged injuries. However, Dr. Wesson's affirmation failed to set forth definitively the requisite standard of care (*see* ***Garcia-DeSoto v Velpula***, *supra*). As Dr. Ecker and Advanced Dermatology did not meet their

prima facie burdens, the portion of the motion for summary judgment dismissing the claims of medical malpractice against them must be denied without regard to the sufficiency *vel non* of plaintiff's opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment and failed to inform the plaintiff of the reasonably foreseeable risks associated with such treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see* Public Health Law § 2805-d [1]; ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Dyckes v Stabile***, 153 AD3d 783, 785, 61 NYS3d 110 [2d Dept 2017]; ***Schussheim v Barazani***, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (***Thompson v Orner***, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; ***Trabal v Queens Surgi-Center***, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; ***Mondo v Ellstein***, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]). However, the mere fact that a plaintiff signed a consent form prior to treatment does not establish the defendant's *prima facie* entitlement to judgment as a matter of law (*see* ***Whitnum v Plastic & Reconstructive Surgery, P.C.***, 142 AD3d 495, 36 NYS3d 470 [2d Dept 2016]; ***Schussheim v Barazani***, *supra*; ***Walker v Saint Vincent Catholic Med. Ctrs.***, 114 AD3d 669, 979 NYS3d 697 [2d Dept 2014]).

Dr. Ecker and Advanced Dermatology failed to establish entitlement to summary judgment dismissing the lack of informed consent claim against them, as their submissions demonstrate that there is a factual dispute as to whether Dr. Ecker informed plaintiff of the foreseeable risks, benefits or alternatives to her procedures (***Dyckes v Stabile***, *supra*). Plaintiff testified that with respect to the chemical peel, Dr. Ecker "[did not] explain the treatment or how it was going to be done . . . he just started doing it." Plaintiff also stated that Dr. Ecker did not explain that the chemical peel was going to be a spot-treatment instead of a full-face treatment. Dr. Ecker testified that he could not recall whether he had a conversation with plaintiff about waiting six months or one year before undergoing the chemical peel. Having determined that Dr. Ecker and Advanced Dermatology failed to meet their *prima facie* burden as to the cause of action for lack of informed consent, it is unnecessary to consider whether plaintiff's papers in opposition are sufficient to raise a triable issue of fact as to that specific issue (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

As "business corporations are liable under the doctrine of *respondeat su*perior for the torts of their employees committed within the scope of the corporate business . . . professional service corporations are similarly vicariously liable for the torts of their servants" (***Poplawski v Gross***, 81 AD3d 801, 802-803, 917 NYS2d 247 [2d Dept 2011], quoting ***Connell v Hayden***, 83 NY2d 30, 46, 443 NYS2d 383 [2d Dept 1981]). As Advanced Dermatology is a professional corporation, it is vicariously liable, under the doctrine of *respondeat superior* for wrongful acts committed by its employees (*see* ***Poplawski v Gross***, *supra*; ***Keitel v Kurtz***, 54 AD3d 387, 866 NYS2d 195 [2d Dept 2008]; ***Monir v Khandakar***, 30 AD3d 487, 818 NYS2d 224 [2d Dept 2006]). Therefore, as Dr. Ecker was an employee of Advanced Dermatology at the time of the alleged malpractice and triable issues of fact remain as to whether he was negligent in plaintiff's medical treatment, defendants failed to demonstrate that Advanced Dermatology is not subject to vicarious liability

(*cf.* ***Poplawski v Gross***, 81 AD3d 801, 917 NYS2d 247 [2d Dept 2011]). Therefore, to the extent Advanced Dermatology is seeking dismissal of the third cause of action of the verified complaint, its application is premature.

Accordingly, the motion is granted to the extent of dismissing the complaint as asserted against defendant Joshua Fox, M.D., and is otherwise denied.

The foregoing constitutes the decision and order of the court.

Dated: December 25, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION **X** **NON-FINAL DISPOSITION**