Donnally v Alamia
2020 NY Slip Op 34978(U)
September 23, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 619871/2016
Judge: George Nolan

SHORT FORM ORDER

INDEX No. 619871/2016
CAL. No. 201902452MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 4/17/20
ADJ. DATE 7/16/20
Mot. Seq. # 001 MotD

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LILLIAN DONNALLY and BRIAN DONNALLY,

Plaintiffs,

- against -

VITO ALAMIA and PEDRO SEGARRA,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendants, on March 17, 2020 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers filed by plaintiffs, on June 23, 2020 ; Replying Affidavits and supporting papers filed by defendants, on July 15, 2020 ; Other ___; it is

ORDERED that the motion by defendants Vito Alamia, M.D., and Pedro Segarra, M.D., for summary judgment dismissing the complaint as asserted against them is granted in part, and denied in part.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Lillian Donnally by defendants Vito Alamia, M.D., and Pedro Segarra, M.D. Plaintiff alleges, inter alia, that Dr. Alamia negligently injured her right ureter during a hysterectomy procedure, and that Dr. Segarra failed to diagnose her transected ureter during a follow-up appointment. Plaintiff asserts causes of action sounding in medical malpractice and, as against Dr. Alamia, lack of informed consent. Plaintiff's husband, Brian Donnally sues derivatively for loss of services.

Lillian Donnally was a 50-year-old woman with a history of painful menstrual periods and uterine fibroids. On June 8, 2016, plaintiff consulted with Dr. Alamia to explore possible surgical options because previous, less-invasive treatments were unsuccessful at ameliorating her condition. Dr.

After reviewing plaintiff's ultrasound which revealed the presence of multiple fibroids and an enlarged uterus, Dr. Almia recommended a total hysterectomy. Dr. Alamia presented plaintiff with the option of an open or a laparoscopic procedure, and explained the risks and benefits of both. Plaintiff opted for a laparoscopic procedure and requested it be performed as soon as possible.

On June 15, 2016, plaintiff presented to Southampton Hospital for surgery with Dr. Alamia who was assisted by general surgeon, nonparty Dr. Larry Tarasuk. Dr. Alamia testified that the surgery proceeded as normal, but that plaintiff's uterus was larger than anticipated based on physical examination and ultrasound. However, plaintiff's uterus was still within normal size limits for a laparoscopic procedure. During the procedure, Dr. Almia utilized a RUMI cup device to separate the the bladder and ureters from the operating field, minimizing the risk of damage to these structures. He removed plaintiff's cervix, uterus and fallopian tubes and dissected the uterus into two halves before removing it due to its enlarged size. After the removal was complete, Dr. Almia filled plaintiff's abdomen with gas and examined the remaining structures for damage or bleeding, including her bladder and ureters. He testified that injuries can occur to the ureters due to dissection or a crush injury from a large uterus. Dr. Alamia did not observe any fluid, blood, or urine in plaintiff's pelvis and he checked her urine output for the presence of blood. He testified that the ureters were peristalsing normally, draining into the bladder normally, and that he did not visualize any damage. The following morning, at approximately 7:30 a.m., Dr. Alamia observed plaintiff and noted that her pain was controlled with oral medications, that she was voiding normally without a Foley catheter, and he ordered her discharged from the hospital.

On June 17, at approximately 12:00 p.m., plaintiff contacted Dr. Alamia's office with complaints of bloating, shaking and chills. She reported constant, dull pain, with sharp and stabbing pain every 20 minutes. Dr. Alamia, who was working in his Riverhead office, scheduled her to come into the office at 2:30 p.m. that day. Instead plaintiff visited Dr. Alamia's Southampton office, due to its proximity to her home. Plaintiff was seen by Dr. Segarra, another physician in the practice, who noted that plaintiff was experiencing post-operative pain without vomiting, fever, or diarrhea. Dr. Segarra performed a physical examination and an ultrasound examination which showed urine retained in plaintiff's bladder, and a small area of clotted blood behind her bladder, which was within normal limits for post-operative day two. According to Dr. Segarra, urinary retention is a common condition post-hysterectomy due to mobilization and inflammation of the bladder and pelvic organs. His differential diagnosis included bleeding and infection, but he concluded that plaintiff was suffering from urinary retention becauase she did not show symptoms of bleeding and because she was afebrile. Dr. Segarra inserted a Foley catheter, providing immediate relief to plaintiff. Dr. Segarra provided instruction for caring for the catheter, and instructed her to follow-up with Dr. Alamia.

The following day, plaintiff presented to the emergency department of Southampton Hospital with continued pain. She was seen by Dr. Florence Rolston, a physician in the same group as Dr. Alamia, and the urologist on call. A CT scan revealed damage to plaintiff's right ureter and fluid in her pelvis. Plaintiff underwent surgery to reimplant her ureter, which had been transected at the distal end, closest to the bladder. Dr. Alamia testified that this type of injury is common in gynecological surgery, and he suspected the injury may have been caused when plaintiff's enlarged uterus was removed during

her hysterectomy. Dr. Alamia testified that this type of injury would not typically be obivous during a hysterectomy.

Dr. Alamia and Dr. Segarra now collectively move for summary judgment, arguing that they did not deviate or depart from the accepted standard of care in treating plaintiff, and that the care they provided was not the proximate cause of plaintiff's alleged injuries. Dr. Alamia also argues that he obtained proper informed consent from the plaintiff prior to the hysterectomy procedure. In support of their motion, Dr. Alamia and Dr. Segarra submit, inter alia, the affirmation of Gary Mucciolo, M.D., plaintiff's uncertified medical records from Dr. Nirit Rosenblum, plaintiff's certified medical record from Southampton Hospital and Hamptons Gynecology and Obstetrics, P.C., and the parties' deposition transcripts. Plaintiffs oppose the motion, arguing that questions of fact exist with respect to whether Dr. Alamia and Dr. Segarra deviated from the accepted standard of medical care, and whether that deviation was the proximate cause of plaintiff's injuries. Plaintiffs do not oppose the branch of defendants' motion for summary judgment on the cause of action for lack of informed consent as asserted against Dr. Alamia. Plaintiffs submit the affirmation of an expert in obstetrics and gynecology.

Initially, the Court notes that while Dr. Alamia and Dr. Segarra have submitted uncertified copies of plaintiff's medical records from Dr. Rosenblum, plaintiffs do not challenge their admissibility and reference their contents in opposition. Since there is no prejudice to any substantial right of the plaintiffs by the lack of certification, the records will be considered admissible (***Matter of Robert E. Havell Revocable Trust v Zoning Bd. of Appeals of Vil. of Monroe***, 127 AD3d 1095, 8 NYS3d 353 [2d Dept 2015]; *see* CPLR 2001). Additionally, in civil cases, "inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess" (***Rosenblatt v St. George Health & Racquetball Assoc., LLC***, 119 AD3d 45, 54, 984 NYS2d 401 [2d Dept 2014]).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider and hospital: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting* ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). A plaintiff must also present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (*see* ***Wild v***

Catholic Health Sys., 21 NY3d 951, 969 NYS2d 846 [2013]; ***Zak v Brookhaven Memorial Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Mackauer v Parikh***, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; ***Feuer v Ng***, 136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Sheppard v Brookhaven Mem. Hosp. Ctr.***, 171 AD3d 1234, 98 NYS3d 629 [2d Dept 2019]; ***Mackauer v Parikh***, *supra*; ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). The burden is not met "if defendant's expert renders an opinion that is conclusory in nature or unsupported by competent evidence" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *see* ***Smarkucki v Kleinman***, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Duvidovich v George***, *supra*). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting ***Deutsch v Claglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Gray v Patel***, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (***Stukas v Streiter***, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]).

Lack of informed consent "is a distinct cause of action which requires proof of facts not contemplated by an action based merely on allegations of negligence" (***Kleinman v North Shore Univ. Hosp.***, 148 AD3d 693, 694, 48 NYS3d 455 [2d Dept 2017]; *see* Public Health Law § 2805-d). To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must establish (1) that the physician failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the procedure that a physician in a similar circumstance would have disclosed; (2) that a reasonably prudent person in the plaintiff's position would not have undergone the procedure if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the procedure; and (3) that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d [1]; ***Orphan v Pilnik***, 15 NY3d 907, 914 NYS2d 729 [2010]; ***Lynn G. v Hugo James v Greenberg***, 96 NY2d 306, 728 NYS2d 121 [2001]; ***Gilmore v Mihail***, 174 AD3d 686, 105 NYS3d 504 [2d Dept 2019]; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Schussheim v Barazani***, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]; ***Lavi v NYU Hospitals Center***, 133 AD3d 830, 21 NYS3d 143 [2d Dept 2015]). However, the mere fact that a plaintiff signed a consent form prior to treatment does not establish the defendants' 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 NYS2d 697 [2d Dept 2014]).

Dr. Alamia and Dr. Segarra have established, prima facie, their entitlement to summary judgment dismissing the cause of action for medical malpractice, and Dr. Alamia has established, prima facie, his entitlement to summary judgment on the cause of action for lack of informed consent. Dr. Alamia and Dr. Segarra submit the affirmation of Gary Mucciolo, M.D., who avers that he is licensed to practice medicine in New York and that he is board certified in obstetrics and gynecology. With respect to Dr. Alamia, Dr. Mucciolo opines, within a reasonable degree of medical certainty, that the care rendered by Dr. Alamia was at all times within the proper standard of care. Dr. Mucciolo opines that it was clinically indicated to perform a laparoscopic hysterectomy on plaintiff considering her history of fibroids, painful periods, and proximity to menopause. Dr. Mucciolo notes that less invasive surgical ablation and hormone therapy were unsuccessful at treating plaintiff's condition. Dr. Mucciolo opines that ureteral injury is a known and accepted complication of laparoscopic hysterectomy and can happen in the absence of negligence and the incidence of ureteral injury is between one and two percent. According to Dr. Mucciolo, Dr. Alamia took proper protective measures intraoperatively to reduce the risk of ureteral injury, including broad ligament dissection, the use of a harmonic scapel and the use of a RUMI cup. Dr. Mucciolo states that Dr. Alamia properly inspected plaintiff's ureters and bladder for injury before concluding the procedure and that Dr. Alamia observed them to be intact and peristalsing, which is illustrative of normal function. Dr. Mucciolo states that it is not the accepted standard of care to use dye intraoperatively where an injury is not suspected. Dr. Mucciolo opines that the majority of ureter transections are diagnosed postoperatively, within days of the procedure. With respect to the postoperative care provided, Dr. Mucciolo opines that Dr. Alamia appropriately managed plaintiff's care prior to her discharge and that plaintiff did not show signs of ureteral injury before she was discharged. For these reasons, Dr. Mucciolo opines that the care provided by Dr. Alamia was not a proximate cause of plaintiff's injuries. Further, Dr. Mucciolo opines that Dr. Alamia properly obtained plaintiff's informed consent during her initial consultation. Dr. Mucciolo notes that Dr. Alamia had several, lengthy conversations with plaintiff before her surgery, which were documented in the medical record and plaintiff signed the informed consent form.

Dr. Mucciolo also opines, within a reasonable degree of medical certainty, that Dr. Segarra's care and treatment of plaintiff conformed to the applicable standard of care, and did not proximately cause plaintiff's injuries. Dr. Mucciolo notes that Dr. Segarra did not consult with plaintiff before her procedure, nor did he participate in her hysterectomy surgery, but rather saw her for a post-operative visit on June 17, and briefly as a rounding physician on June 22 in Southampton Hospital. Dr. Mucciolo opines that plaintiff's condition on June 17 was not consistent with what would be expected in a patient with a severed ureter. Dr. Mucciolo notes that plaintiff reported voiding frequently, but that she did not have nausea or vomiting, blood in her urine, or a fever. Dr. Mucciolo opines that plaintiff did not present with clinical signs of an injured ureter and that Dr. Segarra's diagnosis of urinary retention was supported by the finding of retained urine by ultrasound and, further, that a finding of retained urine after a hysterectomy was reasonable. Further, Dr. Mucciolo opines that Dr. Segarra's interpretation of plaintiff's ultrasound was appropriate. Further, Dr. Mucciolo opines that it was appropriate for Dr. Segarra to insert a Foley catheter, and check for the presence of blood. According to Dr. Mucciolo , Dr.

Segarra's treatment did not proximately cause plaintiff's injuries or change her outcome and that she would have required the same surgical repair regardless of when the ureter injury was diagnosed.

Dr. Alamia and Dr. Segarra having met their prima facie burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiffs submit the affirmation of a physician, who avers that he or she is licensed to practice medicine in Connecticut, that he or she is board certified in obstetrics and gynecology, and that he or she is familiar with the applicable standard of care. Plaintiff's expert opines, within a reasonable degree of medical certainty, that the care and treatment rendered by Dr. Alamia and Dr. Segarra deviated from good and accepted medical practice, and that the care that they rendered individually and jointly contributed to plaintiff's alleged injuries. Plaintiff's expert opines that, with respect to the hysterectomy procedure, Dr. Alamia deviated from accepted practice by failing to recognize that plaintiff was at risk for complications due to the presence of uterine fibroids and as a result he failed to take measures to protect and preserve her ureters. Plaintiffs' expert opines that Dr. Alamia should have consulted a urologist pre-operatively for the placement of ureter stents to allow for intra-operative identification of plaintiff's ureters. Further, plaintiff's expert notes that the operative report states that Dr. Alamia encountered "brisk bleeding" after incising the uterine vessels. Plaintiff's expert opines that in response to this bleeding, it was a deviation from the standard of care to continue to use "blind cautery" before identifying the ureters. Plaintiff's expert further opines that Dr. Alamia deviated from the applicable standard of care by failing to use intravenous dye to identify the ureters, and that doing so would have identified plaintiff's transected ureter, and would have allowed for immediate surgical repair. With respect to Dr. Segarra, plaintiff's expert opines that it was a deviation from the accepted standard of care for Dr. Segarra to fail to consider ureteral injury or blockage when plaintiff presented with post-operative pain and urinary retention. Plaintiff's expert states that several days of urinary retention post-hysterectomy is not normal, and would not explain plaintiff's symptoms. Plaintiff's expert opines that Dr. Segarra should have referred plaintiff for testing, including a CT scan, on June 17, and that his failure to do so resulted in a delay in repair.

Plaintiffs have submitted evidence sufficient to raise triable issues of fact with respect to their cause of action for medical malpractice, as the opinion of their expert describes the applicable standard of care under the circumstances, explains how Dr. Alamia and Dr. Segarra deviated or departed from such standards, and concluded that these departures were competent causes of plaintiff's alleged injuries (*see* ***Smith v Mollica***, 158 AD3d 656, 70 NYS3d 234 [2d Dept 2018]; ***Omane v Sambaziotis***, 150 AD3d 1126, 55 NYS3d 345 [2d Dept 2017]; ***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, and as to the proximate cause of plaintiff's injuries, an order granting summary judgment to Dr. Alamia and Dr. Segarra is not appropriate (*see* ***Lefkowitz v Kelly***, *supra*; ***Jagenburg v Chen-Stiebel***, *supra*).

With respect to plaintiffs' cause of action for lack of informed consent as asserted against Dr. Alamia, plaintiffs have failed to oppose this branch of Dr. Alamia's application or specifically address such a cause of action (*see* ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Stukas v Streiter***, *supra*). Further, plaintiffs' counsel states in his affirmation that plaintiffs are "withdrawing the cause of action alleging lack of informed consent." Therefore, plaintiffs' cause of action for lack of informed consent, as asserted against Dr. Alamia only, is dismissed.

Accordingly, the motion by Dr. Alamia and Dr. Segarra for summary judgment dismissing the complaint as asserted against them is granted to the extent that plaintiffs' cause of action for lack of informed consent as asserted against Dr. Alamia is dismissed, and is otherwise denied.

The unredacted affirmation of plaintiff's medical expert submitted in opposition to defendants' motions is being returned by mail to plaintiff's counsel simultaneously with the issuance of this order.

Dated: September 23, 2020

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION