Sheiffer v Fox
2021 NY Slip Op 32364(U)
November 19, 2021
Supreme Court, New York County
Docket Number: Index No. 162180/2015
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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JAIME SHEIFFER,

Plaintiff,

- v -

NATHAN FOX, M.D., ADRIENNE BARASCH, M.D., SUSAN PESCI, M.D., SAMUEL BENDER, M.D., MICHAEL SILVERSTEIN, M.D., STEPHANIE MELKA, M.D., NEIL GRAFSTEIN, M.D., CIARA MARLEY, M.D., PAUL CHOI, M.D., JERRY BLAIVAS, M.D., MATERNAL FETAL MEDICINE ASSOCIATES, PLLC, THE MOUNT SINAI HOSPITAL, NEW YORK UROLOGICAL ASSOCIATES, P.C., EAST RIVER IMAGING, P.C., and UROCENTER OF NEW YORK,

Defendants.

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INDEX NO. 162180/2015

MOTION DATE 07/28/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 126, 128, 130, 132, 134, 135, 136, 137, 138, 139, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice, based on alleged departures from good and accepted medical practice and failure to obtain the plaintiff's informed consent, the defendants Ciara Marley, M.D., and New York Urological Associates, P.C. (together the NYUA defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion and cross-moves pursuant to CPLR 3126 to strike the NYUA defendants' answer or, in the alternative, for the issuance of a negative inference charge at trial, as a sanction for those defendants' spoliation of evidence. The NYUA defendants oppose the cross motion. The NYUA defendants' motion is granted only to the extent that they are awarded summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them, and the motion is otherwise denied. The plaintiff's cross motion for spoliation sanctions is denied.

In her complaint, the plaintiff asserted that Marley was a urologist employed by New York Urological Associates, P.C. (NYUA), between March 13, 2014 and June 28, 2014, and that, during that period of time, the plaintiff was a patient of the NYUA defendants. The plaintiff further alleged that the NYUA defendants departed from good and accepted medical practice in failing to diagnose her medical conditions, and that this departure caused her to sustain injuries. In addition, the plaintiff asserted that the NYUA defendants failed to obtain her informed consent to engage in the course of treatment that they rendered to her. The plaintiff also contended that NYUA was vicariously liable, as Marley's employee, for any malpractice that Marley may have committed.

In her bill of particulars as to the NYUA defendants, the plaintiff limited her allegations of malpractice against them to the period from May 9, 2014 to June 28, 2014. The plaintiff contended that the NYUA defendants departed from good and accepted medical practice in negligently failing to diagnose the presence of a vesicovaginal fistula, an opening that develops between the bladder and the wall of the vagina. As elements of the alleged negligence leading up to the failure to make a proper diagnosis, the plaintiff asserted that the NYUA defendants failed to consider vesicovaginal fistula as a differential diagnosis that explained the plaintiff's signs and symptoms, ignored those signs and symptoms, and ignored the plaintiff's subjective complaints. In addition, the plaintiff asserted that the NYUA defendants negligently failed to recommend and order that she immediately undergo a CT cystogram, instead improperly ordering an abdominal CT scan. She further alleged that, when a cystogram was finally performed on May 14, 2014, the NYUA defendants negligently misinterpreted the results and failed properly to review the plaintiff's prior radiological studies. The plaintiff avers that, consequently, the NYUA defendants negligently delayed the commencement of treatment for a vesicovaginal fistula.

With respect to the allegations that the NYUA defendants failed to obtain the plaintiff's informed consent to various procedures and treatments, the plaintiff included in her bill of

particulars a long boilerplate paragraph asserting that those defendants failed to inform her or risks, alternative treatments, and the like, but she does not identify what treatment, procedure, or course of therapy was rendered or performed by the NYUA defendants that she would not have approved had she been informed of any risks or alternative treatment.

The plaintiff asserted, in her bill of particulars as to the NYUA defendants that, as a consequence of their malpractice, she was caused to suffer dysuria, or pain upon urinating, a urinary tract infection with concomitant pain, urinary incontinence, lower back pain, as well as pain while walking, sitting, and standing, and to continue to suffer the effect of a vesicovaginal fistula extending from the left midline bladder dome to the left anterior vaginal vault. The plaintiff further asserted that she was ultimately caused to undergo surgery to close the fistula on June 28, 2014, and suggests that, had the NYUA defendants properly diagnosed that condition at the appropriate juncture, she would have undergone surgery earlier, thus shortening the period of time that she experienced pain.

In support of their motion, the NYUA defendants submit the pleadings, the plaintiff's bill of particulars, the parties' deposition transcripts, and relevant medical and hospital records. They also submit the expert affirmation of Robert Waldbaum, M.D., a board-certified urologist licensed to practice medicine in New York. He provided his opinion, with a reasonable degree of medical certainty, that the NYUA defendants did not depart from good and accepted medical practice in examining and treating the plaintiff, and that such and examination and treatment did not cause or contribute to the plaintiff's injuries in any event. Specifically, he opined that Marley and NYUA properly performed or ordered the proper diagnostic tests in the correct sequence and did not misread or misinterpret any of the scans or test results that she reviewed.

As Dr. Waldbaum described it, the medical records revealed that the plaintiff underwent cesarean section on March 20, 2014 at the defendant Mount Sinai Hospital, during which a bladder laceration was detected. Dr. Waldbaum explained that this "complication" was repaired by the defendant Neil Grafstein, M.D., who thereupon performed a cystogram at that

hospital that was negative for fistula. According to Dr. Waldbaum, his review of the records and deposition transcripts indicated that the plaintiff visited Grafstein at his office on April 1, 2014, where he performed a second cystogram that also was negative for fistula.

As Dr. Waldbaum explained it, the plaintiff first visited Marley at NYUA on May 9, 2014, or seven weeks after surgery, complaining that, for at least one week, she felt like she was leaking urine. The plaintiff did not have blood in her urine, painful urination, or cloudy discharge of urine. A urinalysis ordered by Marley was negative. The plaintiff told Marley that, when she resumed her intake of alcohol subsequent to the cesarean section, she observed urinary leakage, in response to which Marley advised her to discontinue the intake of alcohol and caffeine. According to Dr. Waldbaum's review of Marley's chart, Marley conducted a physical examination of the plaintiff, consisting of general abdominal and pelvic exams, as well as a methylene blue test to rule out dysplasia, or pre-cancerous lesions, and that both the examinations and the chemical test were negative for any adverse conditions. The plaintiff exhibited a healing pfannenstiel incision from the cesarean section procedure, her introitus, or vaginal opening, was moist, and there was no cystocele or rectocele. According to Dr. Waldbaum, Marley's differential diagnoses did, in fact, address concerns that the plaintiff may have had either a ureterovaginal or vesicovaginal fistula, and that, inasmuch as the moist introitus raised suspicion of a fistula, Marley properly ordered an abdominal CT scan, also known as a urogram, and referred the plaintiff to the defendant East River Medical Imaging, P.C. (East River).

As Dr. Waldbaum recounted it, on May 10, 2014, the defendant Paul Choi, M.D., a neuroradiologist at East River, interpreted the abdominal CT test, and reported to Marley that it was negative for the presence of either a ureterovaginal or vesicovaginal fistula. Dr. Waldbaum explained that relevant medical records revealed that the plaintiff returned to Marley on May 14, 2014, at which time Marley performed a cystogram that was negative. In addition, at this visit, routine urinalysis and urine cultures were taken, and Marley again instructed the plaintiff to cut

back on her intake of alcohol and caffeine and to follow up if her symptoms persisted. The medical records reflect that Marley called the plaintiff several weeks later to follow up on the plaintiff's condition, and left a voicemail message for her, but that the plaintiff did not return the call.

Dr. Waldbaum opined that Marley obtained a proper and appropriate medical history from the plaintiff, eliciting information concerning the March 20, 2014 cesarean section, the bladder injury that Grafstein repaired, and the subsequent removal of a Foley catheter on April 1, 2014. The defendant's expert also noted that Marley properly elicited from the plaintiff that the plaintiff had no complaints for the first seven weeks after the surgery, and only began to have urinary "accidents" without warning or stress on or about May 1, 2014, when she began leaking urine when moving to a standing position. Dr. Waldbaum concluded that Marley properly elicited the plaintiff's complaint that, although she felt like her bladder was empty, she still had leakage, and that these occurrences only began around the time when she reintroduced alcohol to her beverage intakes. Dr. Waldbaum also noted that, as of the plaintiff's first visit on May 9, 2014, Marley had available to her a report from the defendant Nathan Fox, M.D., certain records generated by the defendant Maternal Fetal Medicine Associates, PLLC, and Grafstein's records and reports, including a report of his operative repair and cystogram performed on April 1, 2014. Dr. Waldbaum thus concluded that that the history obtained and reviewed by Marley at both of the plaintiff's visits with her was complete and within the standards of accepted practice.

With respect to the plaintiff's allegation that the NYUA defendants departed from good and accepted medical practice by ignoring relevant signs, symptoms, and complaints, Dr. Waldbaum opined that Marley's consideration of those signs, symptoms, and complaints was within the standard of care.

Moreover, Dr. Waldbaum concluded that Marley properly first performed a methylene blue test at the initial May 9, 2014 visit, which was negative, and thereafter properly ordered a

follow-up CT urogram, and that her prescription for these CT scans of the abdomen and pelvis, with and without nonionic contrast, properly memorialized clinical information that the patient was "s/p cystotomy 7 weeks ago now with urinary leakage." As Dr. Waldbaum noted, the prescription for the scans was given for the purpose of ruling out both ureterovaginal fistula and vesicovaginal fistula, and that those scans were appropriate diagnostic tests for determining the presence of those types of fistula. More particularly, as Dr. Waldbaum explained it, this imaging study was ordered precisely for the purpose of detecting whether there was leakage from the ureters that would indicate a ureterovaginal fistula or leakage from the bladder that would indicate a vesicovaginal fistula. Inasmuch as the results of the CT urogram, as reported by East River to Marley, indicated "no evidence of extraluminal contrast adjacent to the ureters or bladder or within the vaginal vault" and "unremarkable [kidneys and] urinary tracts bilaterally," Dr. Waldbaum concluded that the scan ruled out the presence of a ureterovaginal fistula and that Marley thus ordered the correct and proper study and properly relied upon the results.

Dr. Waldbaum also opined that, inasmuch as a cystogram properly was scheduled to be conducted only four days after the CT urogram, and only five days after the plaintiff's first visit with Marley, the NYUA defendants timely and appropriately ordered the proper diagnostic tests in the correct sequence As he phrased it,

> "[i]t is my opinion within a reasonable degree of urological certainty that had DR. MARLEY performed a cystoscopy on either of the first two (2) office visits, that test would have shown a healing bladder, *but a fistula would not have been visualized.* Since the plaintiff had a bladder injury and surgical repair of that injury only seven (7) weeks earlier, a cystoscopy in such a patient would reveal the presence of a healing bladder. *Thus, a cystoscopy was not the indicated test to perform at those points in the work-up of a patient for a suspected fistula*"

(emphasis added). In addition, Dr. Waldbaum concluded that Marley properly performed and interpreted the May 14, 2014 cystogram and that his own reading of the scan's image indicated that it was negative for a fistula, as were Grafstein's April 2014 cystograms.

With respect to the issue of causation, Dr. Waldbaum opined that

> "there exists no causation between the claims of alleged malpractice as to DR. MARLEY and NEW YORK UROLOGICAL ASSOCIATES. P.C. and the injuries alleged by plaintiff. It is my opinion within reasonable urological certainty that had a fistula been diagnosed on May 9, 2014, the plaintiff still would have gone through the same course of treatment, including surgery."

According to Dr. Waldbaum's review of the plaintiff's records, "Dr. Jaspreet Sand[h]u saw the plaintiff on May 29, 2014 and was finally able to diagnose the fistula. He inserted a Foley catheter that remained for approximately three (3) weeks and then proceeded with the surgical repair of a fistula at Memorial Sloan Kettering Cancer Center on June 28, 2014 because the fistula did not heal." Inasmuch as the plaintiff testified at her deposition that she had not had any urinary leakage since she underwent surgery to repair the fistula, Dr. Waldbaum opined that, regardless of the results or the accuracy of the NYUA defendants' examinations, the plaintiff would have undergone the same course of treatment from May 9, 2014 forward, and she would not have avoided the insertion of a Foley catheter and surgery to repair the fistula.

Finally, Dr. Waldbaum concluded that there was no merit to the plaintiff's claim that the NYUA defendants failed to obtain her informed consent to the examinations and diagnostic tests that they conducted, that Marley did not fail to discuss alternatives, risks, or complications of her treatment, and that there was no direct injury or harm arising from any of the treatment, tests, or procedures performed by the NYUA defendants.

In opposition to the NYUA defendants' motion, the plaintiff relied upon the same pleadings, deposition transcripts, medical and hospital records, scans, and images as the NYUA defendants, and also submitted the expert affirmation of Jerry J. Weinberg, M.D., a urologist and general surgeon licensed to practice medicine in New York.

After describing the nature of a vesicovaginal fistula, which he abbreviated as VVF, and summarizing the history of the plaintiff's medical treatment, Dr. Weinberg asserted that

> "Dr. Marley departed from good and accepted standard of medical care in her care and treatment of Ms. Sheiffer in failing to diagnose Ms. Sheiffer's VVF on May 14, 2014. On that visit, Dr. Marley performed a cystogram on Ms. Sheiffer. During the cystogram, Dr. Marley obtained scout, filling, and voiding images. *Dr. Marley's erroneous finding was a 'negative cystogram.'* I have reviewed 16

> images related to the May 14, 2014 cystogram ('the cystogram') from Dr. Marley's counsel for this matter, namely, images number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17, and 19. It is my opinion, to a reasonable degree of medical certainty, *that the images from the cystogram show a VVF. Moreover, the post-void films show pooled urine in the vaginal vault, which is consistent with a VVF.* As such, to a reasonable degree of medical certainty, it is my opinion that departed from good and accepted standard of medical and urological care *in failing to diagnose Ms. Sheiffer's VVF in light of the cystogram and her urinary complaints*"

(emphasis added).

Dr. Weinberg further concluded that Marley's failure to diagnose vesicovaginal fistula on May 14, 2014 caused or contributed to the plaintiff's injuries, as it led to a two-week delay in properly diagnosing the condition, and that, "[a]lthough Ms. Sheiffer would likely have needed surgery for her VVF, her loss of bladder control worsened and became more frequent after the May 14, 2014 visit. Thus, her urinary symptoms unnecessarily persisted and worsened and for two weeks because of Dr. Marley's negligence."

In addition, Dr. Weinberg noted that images 11, 16, and 18 from the May 14, 2014 cystogram were missing from the NYUA defendants' office records, and were not provided to him by their attorneys. He further explained that, among the 16 images that were provided to him and that he did review, there were no lateral views. As he concluded:

> "[a]ssuming that Dr. Marley failed to take lateral views during the cystogram, it is my opinion, to a reasonable degree of medical and urological certainty that she departed from good and accepted standard of care. The lateral views would show any vesicovaginal tract, if any, which makes it easier to diagnose a VVF. It is my opinion, to a reasonable degree of medical and urological certainty, that Dr. Marley's failure to take lateral views during the cystogram caused her to misdiagnose Ms. Sheiffer's VVF on May 14, 2014."

Dr. Weinberg did not address the issue of whether the NYUA defendants obtained the plaintiff's informed consent to the examinations and procedures that they conducted.

In reply, the NYUA defendants submitted the affidavit of Rebecca Fontaine, a licensed radiological technician employed by the NYUA defendants who was responsible for taking and storing all radiological images of patients at the NYUA defendants' offices during the relevant period of time. Fontaine stated that, in performing a cystogram, lateral views of a patient are not

taken, as the positioning of the patient in the lateral position will not allow a proper view of the bladder. She described how the cystogram and all images are taken with a patient in either the supine or oblique position, and attested that it was standard practice to perform a cystogram in that manner, not only in May 2014, but prior and subsequent thereto.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (s*ee id.*; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (s*ee*

Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's

bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Consequently, where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24 *Cruz v St. Barnabas Hospital,* 50 AD3d 382 [1st Dept 2008]).

The NYUA defendants established their prima facie entitlement to judgment as a matter of law dismissing the medical malpractice cause of action based upon allegations of departures from good and accepted medical practice. The plaintiff, however, raised triable issues of fact as

to whether the NYUA defendants departed from good practice by delaying the CT cystogram until after conducting the methylene blue test and the CT urogram, by failing to take scans from certain views during the May 14, 2014 cystogram, and by misreading or misinterpreting the images that were taken during that cystogram. She also raised a triable issue of fact in opposition to the NYUA defendants' showing of lack of causation with her expert's affirmation, in which the expert concluded that the delay in conducting the appropriate test and the misinterpretation of that test when finally conducted led to several additional, unnecessary weeks of pain, discomfort, and urinary dysfunction before the fistula was repaired and these adverse conditions were resolved. Hence, that branch of the NYUA defendants' motion seeking summary judgment dismissing the cause of action based on departures from good practice must be denied.

The elements of a cause of action for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the 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 position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept. 2013]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless. a defendant may satisfy his or her burden of demonstrating his or her prima facie entitlement to judgment as a matter of law in connection

with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

Crucially, "[a] failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d 450, 456 [1st Dept 2017]). Here, the only procedure performed by the NYUA defendants was minimally invasive cystography that the plaintiff herself does not allege caused or contributed to her injuries, but only that it failed to reveal the vesicovaginal fistula that required repair.

The NYUA defendants established, prima facie, that they obtained the plaintiff's informed consent to perform the various diagnostic tests that they performed, and that the plaintiff was not directly injured as a consequence of any of those tests. In opposition to that showing, the plaintiff failed to raise a triable issue of fact. Hence, the NYUA defendants are entitled to an award of summary judgment dismissing that cause of action insofar as asserted against them.

With respect to the plaintiff's cross motion for the imposition of sanctions upon the NYUA defendant for spoliation of evidence, or the issuance of a negative inference charge at trial, the plaintiff's expert, Dr. Weinberg, asserted that

> "Of note, no lateral views from the [May 14, 2014] cystogram were included and three images are missing: image numbers 11, 16, and 18. It is my opinion, to a reasonable degree of medical certainty, that: (a) lateral views were taken during the cystogram; (b) that the images from the lateral views existed; and (c) the images from the lateral views were intentionally withheld, or otherwise destroyed, by Dr. Marley or her counsel. It is also my opinion, to a reasonable degree of medical certainty, that the loss of images from the lateral views deprives Ms. Sheiffer and her attorneys of an important means to prove that the cystogram shows VVF."

Dr. Weinberg suggested that image numbers 11, 16, and 18 were indeed the images of lateral views, that they were taken on May 14, 2014, that they were intentionally withheld or destroyed, and that they likely depicted the presence of a vesicovaginal fistula.

In opposition to the cross motion, the NYUA defendants submitted an affirmation of counsel and also relied upon Fontaine's affidavit. Counsel averred that he had provided the plaintiff's attorney with all relevant images in the NYUA defendants' possession four years prior to submitting the instant summary judgment motion, and that the plaintiff's counsel, despite having the opportunity over that period of time to claim that images were missing or to request further images, did not so do. Fontaine asserted that images number 11, 16 and 18 were not saved into the NYUA defendants' image retrieval system on May 14, 2014 because they were redundant, or unreadable and not subject to interpretation. She also averred that no one negligently or intentionally destroyed any radiological images.

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*Kirkland v New York City Housing Auth*., 236 AD2d 170, 173 [1st Dept 1997]) and after being placed on notice that such evidence might be needed for future litigation (*see New York City Housing Auth.v Pro Quest Security, Inc*., 108 AD3d 471 [1st Dept 2013]; *Sloane v Costco Wholesale Corp*., 49 AD3d 522 [2d Dept 2008]). Furthermore, the Supreme Court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation . . . or employing an adverse inference instruction at the trial of the action" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *see* CPLR 3126; *VOOM HD Holdings LLC v Echostar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 249 [1st Dept 2011]; *General Security Ins. Co. v Nir*, 50 AD3d 489 [1st Dept 2008]).

> "On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense. In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness. The burden is on the party requesting sanctions to make the requisite showing."

(*Duluc v AC & L Food Corp*., 119 A.D.3d 450, 451-452 [1st Dept 2014]]some internal quotation marks omitted]; *see VOOM HD Holdings LLC v EchoStar Satellite, LLC,* 93 AD3d at 45 [1st Dept 2012]; *Mohammed v Command Sec. Corp*., 83 AD3d 605 [1st Dept 2011]; *Ahroner v Israel Discount Bank of N.Y*., 79 AD3d 481 [1st Dept 2010]; *Standard Fire Ins. Co. v Federal Pac. Elec. Co*., 14 AD3d 213, 218 [1st Dept 2004]).

Moreover, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct" (*Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]; *see Melcher v Apollo Medical Fund Mgt. LLC*, 105 AD3d 15 [1st Dept 2013]; *Russo v BMW of North America, LLC*, 82 AD3d 643 [1st Dept 2011]). Thus, the sanction of the striking of an answer is warranted only where the alleged spoliation prevents the plaintiff from inspecting a key piece of evidence which is crucial to the plaintiff's case (*see Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc*., 221 AD2d 243 [1st Dept 1995]; *Bach v City of New York*, 33 AD3d 544 [1st Dept 2006]) or has left the movant "'prejudicially bereft' of the means of presenting their claim" (*Kirkland v New York City Housing Auth*., 236 AD2d at 174, quoting Hoenig, *Products Liability*, Impeachment Exception: Spoliation Update, NYLJ, Apr. 12, 1993, at 6, col 5; *see Canaan v Costco Wholesale Membership, Inc*., 49 AD3d 583 [2d Dept 2008]).

The plaintiff failed to sustain her burden of establishing that image numbers 11, 16, and 18 from the May 14, 2014 cystogram were intentionally withheld, misplaced, or destroyed. Her expert's opinion in this regard is based on speculation, particularly in light of Fontaine's affidavit, in which she attested that those images were never uploaded into the NYUA defendants' image

storage system because they were redundant or unreadable, and did not depict lateral views in any event.

In light of the foregoing, it is

ORDERED that the motion of the defendants Ciara Marley, M.D., and New York Urological Associates, P.C., is granted only to the extent that they are awarded summary judgment dismissing the cause of action alleging that they failed to obtain the plaintiff's informed consent to examination and treatment insofar as asserted against them, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's cross motion is denied.

This constitutes the Decision and Order of the court

11/19/2021
DATE

JOHN J. KELLEY, J.S.C.

MOTION:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**
CROSS MOTION:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**