

Napolitano v Gustavson
2022 NY Slip Op 31333(U)
April 10, 2022
Supreme Court, New York County
Docket Number: Index No. 800281/2011
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA EDWARDS PART 10M

Justice

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CATHERINE E. NAPOLITANO,
Plaintiff,

- v -

SUSAN M. GUSTAVSON, R.V.T. and MOUNT SINAI
MEDICAL CENTER a/k/a MOUNT SINAI HOSPITAL,

Defendants.

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INDEX NO. 800281/2011
MOTION DATE 05/22/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, disks and oral argument held on March 9, 2022, the court denies Defendants Susan M. Gustavson, R.V.T.’s (“Gustavson”) and Mount Sinai Medical Center a/k/a Mount Sinai Hospital’s (“Mt. Sinai”) (collectively “Defendants”) summary judgment motion to dismiss Plaintiff Catherine E. Napolitano’s (“Plaintiff”) complaint, however the court limits Plaintiff’s claims by dismissing Plaintiff’s allegation that Defendant Gustavson departed from good and accepted medical practice by requiring Plaintiff to remove her surgical stocking during the subject ultrasound.

Plaintiff brought this medical malpractice action against Defendants and alleges in substance that Defendant Gustavson, who is a vascular technician employed by Mr. Sinai, departed from good and accepted medical practice by negligently, carelessly and recklessly administering a bilateral lower extremity venous duplex ultrasound study on Plaintiff’s left leg and treating Plaintiff on February 26, 2009. Plaintiff alleges in substance that she had a long history of vascular complaints and insufficiency, vascular tumor and Defendant Gustavson failed

to conduct the test in a manner necessary to protect Plaintiff's left leg from trauma, which should have included having Plaintiff lie down with her legs elevated, instead of forcing her to stand while she applied excessive, forceful pressure to Plaintiff's lower extremity.

Plaintiff also alleges in substance that Defendant Gustavson required Plaintiff to stand without wearing her compression surgical stocking for an extended period of time; exerted excessive pressure on her lower extremity, abdomen and groin; restricted her blood flow; ignored Plaintiff's complaints of pain, discomfort, dizziness, loss of consciousness, left leg swelling and her requests to stop the examination; and lack of informed consent. Plaintiff further alleges in substance that Defendant Gustavson's negligence caused Plaintiff to fall and hit her groin; suffer pain; heaviness; swelling; discoloration; vascular pooling; bleeding of veins; increased venous insufficiency; disfigurement of her left leg; dizziness; loss of consciousness; depression; anxiety; mental anguish; loss of enjoyment of life and possible future surgery.

The court initially granted Defendants' motion to strike Plaintiff's supplemental bill of particulars and denied Plaintiff's cross-motion for leave to amend her initial bills of particulars. However, on appeal after the motions were filed, the First Department reinstated most of the injuries claimed in the supplemental bill of particulars, "specifically those related to the left leg, syncope and psychological and emotional trauma," and held that these alleged injuries "were not new injuries, but were amplifications and elaborations of the injuries set forth in the (initial) bills of particulars . . . or were the anticipatable sequellae (sic) thereof" (*Napolitano v Gustavson*, 190 AD3d 530, 530 [1st Dept 2021]). Additionally the First Department found that Plaintiff's theories of liability expounded on the theories set forth in Plaintiff's initial bills of particulars and to the extent they are new theories of liability, except for battery, Plaintiff is permitted to amend them as a matter of course (*id.* at 530-531).

As such, the court will include the injuries and theories of liability set forth in Plaintiff's supplemental bill of particulars and initial bills of particulars in determining this motion.

Defendants now move for summary judgment dismissal of Plaintiff's complaint. Defendants rely on an expert affirmation from William Suggs, M.D. and argue that Defendant Gustavson conducted the diagnostic study properly and the techniques used did not depart from good and accepted vascular surgical and medical practice. Defendants argue that the ultrasound did not proximately cause, contribute or exacerbate Plaintiff's alleged injuries and that any pain that was felt was only momentarily. Defendants further argue in substance that Plaintiff's alleged injuries were caused by the progression of Plaintiff's preexisting vascular disease and her subsequent diagnosis of Klippel-Trenauney Syndrome ("KTS"), that it was unrelated to the ultrasound and that it was impossible for ultrasound to cause any of Plaintiff's alleged injuries. Defendants further argue in substance that Plaintiff had vascular insufficiencies with several preexisting and congenital conditions and a subsequent automobile accident. Plaintiff was treated conservatively, she wore a compression stocking and underwent many venous duplex ultrasounds throughout the years with no additional complications. Defendants further argue that Defendant Gustavson had to apply gentle pressure, have Plaintiff remove her compression stocking, have her stand for a portion of the test and hold her breath to properly perform the test. Defendants argue that there is no evidence of Plaintiff falling and losing consciousness in the exam room. Defendants further argue that they did not ignore Plaintiff's complaints of pain and lightheadedness and that they had resolved by the time she was examined by her doctor.

Plaintiff opposes Defendants' motion and relies on her own expert affirmation. Plaintiff argues that Defendant Gustavson's performance of the bilateral lower extremity venous duplex ultrasound study on February 26, 2009 and Plaintiff's follow up medical treatment was a

departure from good and accepted medical practice and caused Plaintiff's injuries. Plaintiff further argues that prior to the exam, Plaintiff had her condition under control, she managed it well and led an active life, however, the exam caused her to live like a hermit because it caused an unnatural progression of her disease; worsened circulation; leg varicosities; pronounced venous insufficiency; edema; orthostatic hypotension from forced blood pooling to Plaintiff's lower extremities and dizziness causing her to fall and hit her groin into the examination table.

Plaintiff's expert opined in substance that Defendant Gustavson departed from using good and acceptable practices for conducting the vascular testing on Plaintiff by using excessive manual pressure, requiring her to stand for the 45-minute test, and using excessive, incorrect and improper Valsalva maneuvers, all of which caused Plaintiff to suffer excessive dilation, stretching, leakage and permanent damage to her veins and valves. Plaintiff further argues in substance that Plaintiff had no reflux prior to the test and that her doctors did not diagnose her with KTS, but Defendants' expert improperly relies on it to conclude that Plaintiff's injuries are a natural progression of her illness.

Plaintiff's expert opined that it was not a departure to require Plaintiff to have the test and to remove her surgical stocking to properly perform the test, however a different, more invasive test was not required to properly diagnose and treat Plaintiff.

Neither expert addressed Plaintiff's claim for lack of informed consent.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial

burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, 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 the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden,

then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

As an initial matter, the court considers Plaintiff’s affirmation and Plaintiff’s expert affirmation in deciding this motion, but not the photograph of Plaintiff’s leg as Defendants claim that Plaintiff failed to previously disclose such photograph during discovery.

Here, the court finds that Defendants, through their expert’s affirmation, met their initial burden of demonstrating their entitlement to summary judgment in their favor as a matter of law, however, Plaintiff established by admissible evidence the existence of several factual issues requiring a trial of this action. Such disputed factual issues include, but are not necessarily limited to, whether Defendant Gustavson departed from using good and acceptable practices for conducting the vascular testing on Plaintiff; whether the ultrasound using more aggressive techniques was required to provide adequate findings to properly diagnose and treat Plaintiff’s conditions; whether she used excessive manual pressure, whether she required Plaintiff to stand for an excessive period of time, whether she used excessive, incorrect and improper Valsalva maneuvers, whether she knew or should have known that Plaintiff was dizzy, whether she should have stopped the test and/or taken precautions to prevent Plaintiff from falling, and whether Defendant Gustavson’s actions were the proximate cause of Plaintiff’s alleged injuries.

As set forth above, Plaintiff’s expert opined in substance that Defendant Gustavson departed from good and acceptable practices in her administration of the ultrasound on Plaintiff by using excessive manual pressure, requiring her to stand for the 45-minute test, and using

excessive, incorrect and improper Valsalva maneuvers. Additionally, Plaintiff's expert opined that Defendant Gustavson's actions caused Plaintiff's injuries, which included reflux in her veins; formation and progression of new vascular pathways in the form of new varicose veins; changes in the vein of Giacomini in the form of leaking, constriction, collateral varicose veins, and internal bleeding; trauma to her left groin causing obstruction of the flow in her common iliac vein which led to complications in other veins and new veins to form requiring surgical intervention and the additional injuries set forth above.

Therefore, the court finds that Plaintiff's expert affirmation sufficiently rebutted Defendants' prima facie showing based on facts sufficiently supported in the record. Plaintiff's expert's opinions regarding Defendant Gustavson's alleged departure from accepted medical practice and proximate cause of Plaintiff's alleged injuries are sufficient to defeat Defendant's motion. However, Plaintiff's expert admitted that it was proper for Defendant Gustavson to have Plaintiff remove her surgical stocking to properly conduct the test.

Therefore, the court denies Defendants' summary judgment motion, but limits Plaintiff's claims by dismissing Plaintiff's claim that Defendant Gustavson departed by requiring Plaintiff to remove her surgical stocking during the ultrasound. However, Plaintiff is permitted to argue that she was required to stand for an excessive period of time without wearing her surgical stocking.

The court has considered all arguments raised by the parties and denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Defendants Susan M. Gustavson, R.V.T.'s and Mount Sinai Medical Center a/k/a Mount Sinai Hospital's summary judgment motion to dismiss

Plaintiff Catherine E. Napolitano’s complaint, however the court limits Plaintiff’s claims by dismissing Plaintiff’s allegation that Defendant Gustavson departed from good and accepted medical practice by requiring Plaintiff to remove her surgical stocking during the ultrasound on Plaintiff’s left leg on February 26, 2009; and it is further

ORDERED that the parties are directed to appear for an in person settlement conference before the court on May 17, 2022, at 9:30 a.m.

This constitutes the decision and order of the court.

Erika M. Edwards
20220410104204 FILED WARD 9364E382810024036C0E9E17EE166D

4/10/2022
DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE