

Scarcello v New York & Presbyt. Hosp.

2023 NY Slip Op 31452(U)

May 1, 2023

Supreme Court, New York County

Docket Number: Index No. 805111/2019

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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ROBERT SCARCELLO, MAUREEN SCARCELLO

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL,
MATTHEW BACCHETTA,

Defendant.

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INDEX NO.	805111/2019
MOTION DATE	02/06/2023
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, the motion for summary judgment of the defendants The New York and Presbyterian Hospital (hereinafter “NYPH”) and Matthew Bacchetta, M.D. (Motion Seq. No. 001) is denied in its entirety. The Court notes that at the time of trial of this matter, NYPH will be held vicariously responsible for the conduct of Dr. Bacchetta, for whom this Court has no proof that defendant-surgeon was not an employee of the hospital during the time of the alleged malpractice (*see, e.g.*, March 4, 2022, deposition of Matthew Bacchetta, M.D.; NYSCEF Doc. No. 41, p. 14, ll 15-23).

This matter arises out of alleged medical malpractice rendered to the fifty-four-year-old Robert Scarcello, who claims, *inter alia*, that thoracic surgeon Matthew Bacchetta, M.D. performed an unnecessary Nissen fundoplication surgery to repair a hiatal hernia that did not show

up on pre-operative testing¹, negligently performed the Nissen fundoplication surgery at NYPH on February 13, 2017, and then attempted a corrective balloon dilation procedure on March 10, 2017 during which the surgeon perforated plaintiff's esophagus, requiring an esophageal stent and feeding tube for an additional year and three months. In addition to negligence and medical malpractice, plaintiffs assert causes of action for failure to obtain informed consent, and for loss of services on behalf of Maureen Scarcello.

Robert Scarcello presented to thoracic surgeon, Dr. Bacchetta at NYPH for a consultation on January 4, 2017, with complaints of epigastric pain that became worse after eating. Plaintiff denied reflux or trouble swallowing, and informed that two years prior to this consult he had been diagnosed with 2 cm hiatal hernia. This was plaintiff's sole visit with Dr. Bacchetta prior to undergoing a laparoscopic repair of hiatal hernia and laparoscopic Nissen fundoplication on February 13, 2017.

Dr. Bacchetta ordered a barium swallow and CT scan of the chest on January 13, 2017, neither of which revealed evidence of hiatal hernia (*see* NYSCEF Doc. No. 42, pp. 640-641).

The medical records include a January 13, 2017, signed consent by plaintiff for the February 13, 2017, Nissen fundoplication procedure (*see* NYSCEF Doc. No. 42, pp 13-14) and a signed consent for the March 10, 2017, Botox injection and balloon dilation procedure (*see* NYSCEF Doc. No. 42, p. 113). The records are otherwise silent as to the extent of information provided for the procedures.

Plaintiffs allege, *inter alia*, that defendants failed to properly work up, diagnose, care for, and treat Mr. Scarcello, and that defendants departed from accepted standards of medical care in

¹ Dr. Bacchetta ordered a non-contrast CT scan of the chest on January 13, 2017, which revealed "mild thickening of the distal esophagus, possibly related to reflux" (*see* NYSCEF Doc. No. 42, p. 640) as well as an esophagram, which revealed "no evidence of a hiatal hernia [and] no evidence of gastroesophageal reflux" (*id.*, p. 641).

performing an “unnecessary laparoscopic hiatal hernia repair and Nissen fundoplication on February 13, 2017” and in negligently performing an “endoscopic Botox injection and balloon dilation which resulted in esophageal perforations on March 10, 2017.” As a result, plaintiff purportedly suffered constant nausea, and episodes of vomiting and dysphagia through May 14, 2018, and had to undergo a laparoscopic takedown of the Nissen fundoplication, closure of crura and primary repair of a hiatal hernia on May 14, 2018.

In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of their motion, defendants submit the expert affirmation of a gastroenterologist², Gregory B. Haber, M.D. (*see* NYSCEF Doc. No. 29) who opines within a reasonable degree of medical certainty that the care and treatment rendered by Dr. Matthew Bacchetta and the staff at NYPH was entirely within the standards of care, that Dr. Bacchetta and NYPH staff utilized good medical judgment and that neither Dr. Bacchetta nor NYPH staff negligently caused or contributed to plaintiff’s alleged injuries (*id.*, para 46). Dr. Haber attests that: (1) the February 13, 2017 procedure was indicated, because a negative esophagram or CT scan

² While the Court appreciates plaintiffs’ argument that defendants are unable to meet their *prima facie* burden on the motion since defendants’ expert is a gastroenterologist rather than a thoracic surgeon, it finds that Dr. Haber is qualified to render an opinion under the facts herein presented, and the jury will decide what weight it will give to his testimony.

does not necessarily mean that the patient does not have a hiatal hernia, especially in this case, where plaintiff had been previously diagnosed (after a January 30, 2015 GI endoscopy) with a 2 cm *sliding* hiatal hernia; (2) the February 13, 2017 procedure was performed properly by Dr. Bacchetta, no complications were documented, and the dysphagia that the plaintiff ultimately developed is a known complication of the procedure that can occur in the absence of negligence; (3) the March 10, 2017 Botox and balloon dilation procedure was performed properly, and (4) an esophageal tear is a known complication of a balloon dilation.

“The affirmation of defendants’ expert was sufficient to meet defendants’ *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff’s alleged injuries” (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]). “An expert’s opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert’s opinion is without probative force” (*Pascocello v. Jibone*, 161 AD3d 516 at 516 [1st Dept. 2018]; [*internal citations omitted*]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567 at 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion, plaintiffs submit the affirmation of thoracic surgeon Jason Morgan Wallen, MDCM, MBA, FACS, FCCP (*see* NYSCEF Doc. No. 59), who attests that Dr. Bacchetta (1) did not have an objective basis for performing the surgery of February 13, 2017; (2) failed to perform a proper work up to confirm the necessity for surgery; (3) negligently performed the Nissen fundoplication surgery on February 13, 2017; (4) negligently performed the March 10, 2017 balloon dilation, which resulted in a “large full thickness esophageal perforation that required insertion of an esophageal stent and feeding tube on March 12, 2017” (*id.*, para 26), and concludes that (5) the medical malpractice committed by defendants was the proximate cause of plaintiff’s serious and permanent injuries and pain and suffering, including but not limited to the need for a takedown procedure, nausea, vomiting, odynophagia, dysphagia and chest pain” (*id.*, para 32).

The foregoing expert affirmation raises clear questions of fact sufficient to defeat summary judgment. “The medical experts’ conflicting opinions...raise issues of fact that must be resolved at trial” (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1st Dept. 2018]). As such, the motion for summary judgment by defendants NYPH and Dr. Matthew Bacchetta must be denied.

Finally, so much of defendants’ motion which seeks to dismiss plaintiffs’ cause of action for lack of informed consent, and plaintiffs’ claim for lost earnings is denied. The underlying record, particularly the deposition testimony of Mr. Scarcello, serves to raise triable issues of fact which preclude this Court from dismissing plaintiffs’ claims herein as a matter of law.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants New York and Presbyterian Hospital and Matthew Bacchetta, M.D., to dismiss plaintiffs’ complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that any and all additional requests for relief are hereby denied; and it is further ORDERED that the parties appear for a virtual pre-trial conference via Microsoft Teams on May 16, 2023, at 12:00 p.m.

5/1/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN

Hon. Judith No. McMahon
J.S.C.

