

Fadl v Katz

2023 NY Slip Op 31538(U)

May 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805404/2019

Judge: Judith N. McMahon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

STACEY FADL,

Plaintiff,

- v -

L. BRIAN KATZ, SUE HAHN, LAPAROSCOPIC SURGICAL
CENTER OF NEW YORK, THE MOUNT SINAI HOSPITAL

Defendant.

-----X

INDEX NO.	805404/2019
MOTION DATE	01/25/2023
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

Upon the foregoing documents, the motion for summary judgment of the defendants Lester Brain Katz, M.D., s/h/a L. Brian Katz, M.D., Sue J. Hahn, M.D., Laparoscopic Surgical Center of New York, and the Mount Sinai Hospital (hereinafter collectively, “the defendants”), is granted to the extent that the complaint is severed and dismissed as against the resident, Sue J. Hahn, M.D., and her employer, The Mount Sinai Hospital. The balance of the motion is denied.

This matter arises out of alleged medical malpractice rendered to the fifty-one-year-old plaintiff, Stacey Fadl, in connection with a laparoscopic epigastric hernia repair performed on June 14, 2017. Plaintiff claims that her private attending surgeon, Dr. Katz, and a Mount Sinai resident, Sue Hahn, M.D. improperly used an oversized 12 cm round Parietex mesh and an excessive number of metal tacks to repair a hernia defect, which caused plaintiff to sustain, *inter alia*, “hernia recurrence, foreign body rejection, injury to her intestine and mesh migration” which necessitated multiple corrective surgeries (*see* NYSCEF Doc. No. 10). Plaintiff further

alleges that defendants failed to provide informed consent, and that the resident, Sue Hahn, M.D., actually performed the surgery and was ill equipped to do so.

It appears undisputed that plaintiff initially presented to Dr. Katz on May 22, 2017, for complaints of increasing discomfort in the epigastric area with a bulge that had recently become more symptomatic. Plaintiff's past surgical history includes an abdominoplasty.¹ Dr. Katz diagnosed an epigastric hernia and recommended a laparoscopic hernia repair with placement of intraperitoneal mesh, which was performed at Mount Sinai on June 14, 2017.

Dr. Katz' operative report reflects that the hernia measured 2-3 cm in size and that he used the 12 cm round mesh which he secured to the abdominal structures (including the sternum and ribs) by "double crown technique," placing tacks every 1 to 1.5 cm along the outer ring of the mesh. A total of 22 tacks were used. The surgery commenced at 11:50 a.m. and finished at 12:34 p.m.

At her deposition, plaintiff testified that she was in tremendous pain for hours after the surgery and that while in recovery, an operating room nurse told her that the resident performed the procedure: "I remember someone identifying themselves as the operating room nurse. I remember her telling me that my doctor did not perform my surgery" (*see* Plaintiff's deposition, NYSCEF Doc. No. 40, pp 109-110).

A July 25, 2017, surgical follow up was uneventful, and plaintiff reported no epigastric discomfort. In August of 2017, however, plaintiff informed Dr. Katz that she felt pain in her abdomen, and the doctor ordered an ultrasound and an abdominal CT scan with oral contrast, neither of which showed evidence of hernia recurrence or a defect with the mesh or its placement. On January 9, 2018, plaintiff again complained to Dr. Katz that she felt pain at the

¹ According to defendants' expert, patients can develop hernias following an abdominoplasty, in the area where the rectus muscle was sewn together.

edge of her ribs. The doctor injected Lidocaine and steroids into the left sided area of tenderness and offered to remove the tacks at a future date.

Plaintiff discontinued her care with Dr. Katz and presented to two additional surgeons for a second opinion. In March of 2018, plaintiff chose to undergo laparoscopic exploration with conversion to laparotomy with Northwell surgeon, Dr. Asaf Gave. Dr. Gave found a significant amount of intra-abdominal adhesions. His open laparotomy included lysis of adhesions and removal of the mesh and 22 metal tacks which he replaced with a smaller mesh using significantly fewer tacks. Dr. Gave observed that the original 22 tacks were adherent to the transverse colon, the omentum, and the anterior surface of the liver.

A CT scan of the abdomen and pelvis performed on May 8, 2019, revealed that the replacement mesh had migrated and was not sitting flat. A non-party surgeon removed the replacement mesh in June of 2019 and performed a primary hernia repair using the bilateral component separation technique. Plaintiff testified that she was pleased with the surgical outcome and that her abdominal pain and swelling disappeared.

On October 21, 2019, plaintiff underwent a CT abdomen pelvis that showed no abdominal wall hernia and no abnormality in the left upper quadrant. On July 6, 2020, a CT abdomen was performed and revealed no evidence of recurrence of epigastric hernia.

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 the motion, defendants submit the expert affirmation of surgeon Ronald Chamberlain, M.D. (*see* NYSCEF Doc. No. 36) who opines to a reasonable degree of medical certainty that “at all times defendants adhered to accepted standards of medical practice while rendering care to plaintiff [and]...that the alleged departures are not causally connected to plaintiff’s claimed injuries [and] that the moving defendants’ actions or inactions did not cause or contribute to the plaintiff’s alleged injuries” (*id.*, para 5). According to defendants’ expert, (1) the laparoscopic epigastric hernia repair with mesh was indicated; (2) Dr. Katz properly chose to perform a laparoscopic procedure rather than an open surgical procedure; (3) Dr. Katz’ use of a 12 cm round Parietex mesh that he secured with metal tacks via the double crown technique was within the standard of care, and (4) Dr. Katz properly performed the surgery using 22 tacks to secure the mesh which prevented mesh migration². Dr. Chamberlain further opines that Dr. Katz appropriately supervised the resident, Dr. Hahn, who served as his assistant, and who remained under Dr. Katz’ direct supervision throughout the entirety of the procedure.³ Dr. Katz’s postoperative care during the July 25, 2017 office visit, his referral of plaintiff for an abdominal CT scan and ultrasound in August of 2017, and his office visit of January 9, 2018 during which he evaluated plaintiff for complaints of pain and tenderness at the edge of her ribs and injected Lidocaine and offered to remove the tacks, were all within the standard of care.

² Defendants’ expert explains that the tacks can be connected to various abdominal structures including the sternum and ribs.

³ Dr. Katz testified at his deposition that: (1) he performed the June 14, 2017, surgery; (2) his resident Dr. Sue Hahn assisted him in the operating room, and (3) he “is responsible for every part of the operation” (*see* NYSCEF Doc. No. 41, pp 61-63). Dr. Hahn testified at her deposition that she “was assisting Dr. Katz” and that Dr. Katz as attending surgeon “was there for the entire procedure and thus supervising everything for that procedure” (*see* NYSCEF Doc. No. 42, p. 45) and that “he was the attending surgeon of record [and] decided everything for this procedure” (*id.*, p. 71).

In paragraph 10 of his affirmation, Dr. Chamberlin sets forth that prior to performing the surgery, Dr. Katz obtained the appropriate informed consent, appropriately discussed the laparoscopic hernia repair surgery including the risks, complications and alternatives to surgery, the use of the mesh, the purpose of the mesh and potential complications surrounding the mesh implant.

“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]).

Regarding the liability of Dr. Hahn and the potential concomitant vicarious liability of The Mount Sinai Hospital, it is generally settled that a hospital staff member who is following the orders of a private attending physician and is not acting independently is not liable for malpractice

attributable to the private physician, (*see Toth v. Comm. Hosp. at Glen Cove*, 22 NY2d 255 [1968]), so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be liable for failing to intervene" (*Tsocanos v. Zaidman*, 180 AD3d 841 [2d Dept. 2020]; [*internal quotations and internal citations omitted*]). A hospital may not be held concurrently liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits 'independent acts of negligence or the attending physician's orders are contraindicated by normal practice' (*Suits v. Wykoff Heights Med. Ctr.*, 84 AD3d 487, 488 [1st Det 2011], *quoting Cerny v. Williams*, 32 AD3d 881, 883 [2d Dept. 2006]; *see also Hill v. St. Claire's Hosp.*, 67 NY2d 72 [1986]).

Here, defendants made a *prima facie* showing of Dr. Hahn's entitlement to judgment as a matter of law through plaintiff's hospital record and the deposition testimony of both Dr. Katz and Dr. Hahn, which demonstrated that Dr. Katz had complete control over plaintiff's diagnosis, surgical approach and performance of the surgery. While Dr. Hahn actively participated in the surgery, she did so under Dr. Katz' direction and close supervision, and Dr. Katz did not so greatly deviate from normal practice that Dr Hahn should have intervened.

Plaintiff has failed to raise a triable issue of fact in opposition to those branches of the summary judgment motion relating to Dr. Hahn and The Mount Sinai Hospital. Plaintiff's reliance upon a hearsay statement made by an unidentified operating room nurse while plaintiff was coming out of sedation does not serve to raise an issue of fact as to whether resident, Dr. Hahn, acted as primary surgeon during this laparotomy. While plaintiff's expert vaguely questions whether a surgeon as experienced as Dr. Katz would have performed the surgery in the manner described, this conjecture is insufficient to raise a triable issue of fact as to Dr. Hahn's role as a surgical

assistant on June 14, 2017. Plaintiff has likewise failed to present medical testimony or documentary evidence to suggest that The Mount Sinai Hospital staff did anything other than follow Dr. Katz' orders and provide appropriate care.

In opposition to the balance of defendants' motion, plaintiff submits the redacted affirmation of her surgical expert (*see* NYSCEF Doc. No. 53) who sets forth that Dr. Katz departed from the standard of care by (1) using a 12 cm round mesh (too large) to repair a 2-3 cm hernia defect; (2) using 22 tacks (too many) for this procedure and (3) affixing tacks to the center or middle of the mesh, since that placement increases the patient's risk of unnecessary pain.

The Court notes herein that plaintiff's expert is silent as to all claims related to (1) plaintiff's preoperative care from May 22, 2017, to June 14, 2017; (2) plaintiff's postoperative care from June 14, 2017 to January 9, 2018; (3) lack of informed consent and (4) negligent hiring and retention. Accordingly, those claims made by plaintiff are severed and dismissed.

However, the plaintiff's expert affirmation raises triable issues of fact sufficient to defeat summary judgment on behalf of Dr. Katz and the Laparoscopic Surgical Center of New York. "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 L. Brian Katz, M.D. and Laparoscopic Surgical Center of New York is denied.

Accordingly, it is

ORDERED that those branches of the motion for summary judgment by the defendants Sue Hahn, M.D. and The Mount Sinai Hospital is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint as against the defendants Sue Hahn, M.D. and The Mount Sinai Hospital; and it is further

ORDERED that the balance of defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied; and it is further

ORDERED that any and all additional claims for relief are denied; and it is further

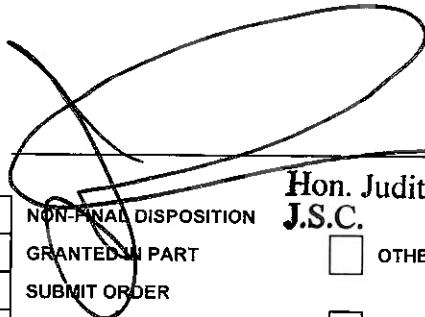
ORDERED that the parties shall appear for a pre-trial conference via Microsoft Teams on **June 14, 2023, at 2:30 p.m.**

5/5/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE


Hon. Judith N. McMahon
J.S.C.