

**Mitchell v Rimpel**

2023 NY Slip Op 31801(U)

May 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 517975/2018

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 24th day of May 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

CHERYL MITCHELL,

Index No. 517975/2018

Plaintiff,

-against-

BERNARD RIMPEL, M.D., ADVANTAGE CARE PHYSICIANS, REBECCA J. RHEE, M.D., and MAIMONIDES MEDICAL CENTER,

Defendants.

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion and Affidavits (Affirmations) Annexed And Exhibits.....	155-175
Answering Affidavit (Affirmation) and Exhibits.....	202-215
Reply Affidavit (Affirmation) and Exhibits.....	225-226
Stipulation of Adjournment.....	186, 199
Letters.....	227-228

In this action to recover damages for medical malpractice and lack of informed consent, plaintiff alleged that she had an anal tumor that defendants Rebecca J. Rhee, M.D. and Maimonides Medical Center failed to properly diagnose and treat, causing her to develop a rectovaginal fistula and undergo fecal diversion (permanent colostomy

placement).<sup>1</sup> Defendants moved for summary judgment dismissing the complaint.

Plaintiff opposed the medical malpractice part of the motion but not the part that sought dismissal of the lack of informed consent cause of action.

The elements of a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. *See Templeton v. Papathomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022); *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). "When moving for summary judgment, a defendant . . . must establish the absence of any departure from good and accepted medical practice or that . . . plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept 2023). To sustain the burden, a defendant "must address and rebut any specific allegations of malpractice set forth in plaintiffs bill of particulars." *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017).

In opposition, a plaintiff must "raise a triable issue of fact regarding the element or elements on which defendant has made its prima facie showing." *Aliosha v. Ostad*, 153

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<sup>1</sup> Dr. Rebecca J. Rhee worked at Maimonides Medical Center as a colorectal surgeon. Plaintiff was referred to Maimonides Medical Center following an April 6, 2016, colonoscopy that "noted the presence of a large 2 cm, deep ulcer with bleeding on contact with the colonoscope with surrounding heaped up edematous irregular borders located at the dentate line." *Notice of Motion, Attorney Affirmation*, ¶ 28. Before that, on March 30, 2016, plaintiff saw her primary care physician and gynecologist at defendant Advantage Care Physicians. The gynecologist noted the presence of hard nodules at the introitus at 11:00 and 1:00 and bright red bleeding and referred plaintiff to the general surgery department for a biopsy of the nodules palpated. Plaintiff presented to the primary care physician with complaints of rectal bleeding for two weeks and was referred to the gastroenterology department for an evaluation.

A.D.3d 591, 61 N.Y.S.3d 55 (2d Dept. 2017). To do so, a plaintiff must submit the affidavit of “a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician’s opinion that the alleged departure was a competent producing cause of plaintiffs injuries.” *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). See *Burns v. Goyal*, 145 A.D.3d 952, 44 N.Y.S.3d 180 (2d Dept. 2016) (“Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.”).

Here, defendants established their prima facie entitlement to judgment as a matter of law, dismissing the action insofar as asserted against them by submitting the affirmation of an expert physician, who stated that Dr. Rhee took an appropriate history, and performed proper evaluations and examinations of plaintiff on April 18, 2016, February 27, 2017, July 13, 2017, and August 14, 2017. Dr. Rhee identified a rectal ulcer on April 18, 2016 and informed plaintiff she could have it biopsied under anesthesia or have a trial of medical management to see if the ulcer resolved. Plaintiff scheduled the biopsy but canceled it. The ulcer resolved by the February 27, 2017 visit, and no ulcer or mass was detected on subsequent visits during anoscopic or digital rectal examinations.<sup>2</sup> Thus, defendants’ expert opined there was no need for a biopsy or for Dr. Rhee to suspect cancer. Moreover, the expert indicated that Dr. Rhee had advised plaintiff to follow up

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<sup>2</sup> Dr. Rhee performed a digital rectal examination on February 27, 2017. On July 13, 2017, she performed digital rectal and anoscopic examinations. Finally, on August 14, 2017, she performed a digital rectal examination. According to Dr. Rhee’s expert, another anoscopic examination was inappropriate because one was performed a month prior.

with her gynecologist regarding vaginal pain. Plaintiff was diagnosed with invasive squamous cell vaginal cancer, not rectal, anal, or cloacal cancer.

In opposition, plaintiffs expert affirmation raised triable issues of fact regarding the February 27, 2017, July 13, 2017, and August 14, 2017 visits. Among other things, plaintiffs expert opined that had Dr. Rhee performed proper rectal examinations, the tumor would have been treated and plaintiff would not have developed a rectovaginal fistula or needed a permanent colostomy placement. Nine days after seeing Dr. Rhee, on August 23, 2017, plaintiff presented at Brookdale Hospital Medical Center (“Brookdale”) with fecal matter coming from her vagina. A physical examination of plaintiff’s rectum noted “firm, immovable mass of distal rectum; unable to determine whether this is inflammatory vs. neoplastic.” *Brookdale Hospital Medical Center Records*. A genitourinary examination noted “defect in the posterior wall of the vagina, Frank stool noted in the vaginal vault.” *Brookdale Hospital Medical Center Records*. Upon examination under anesthesia with biopsy and sigmoidoscopy, Brookdale detected a “hard, fixed, friable mass palpable along [plaintiffs] posterior vaginal wall and anterior rectal wall.” *Brookdale Hospital Medical Center Records*. “The mass was noted to extend proximally and laterally with a 0.5 cm x 0.5 cm opening between the vagina and the rectum about 1 cm from the anal verge” and “on digital rectal examination, the mass could be felt along the anterior rectal wall.” *Brookdale Hospital Medical Center Records*. “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147 (2d Dept 2021).

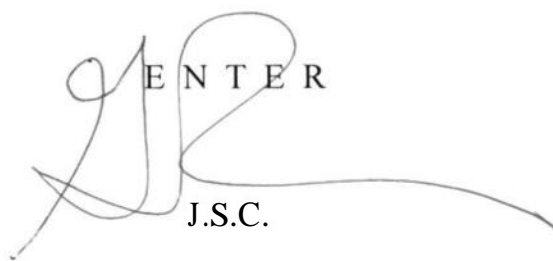
Accordingly, defendants' motion for summary judgment is granted to the extent that the lack of informed cause of action is dismissed. Issues of fact exist on the medical malpractice cause of action. The parties shall appear for an Alternative Dispute Resolution conference on August 22, 2023, at 12PM.

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Motion Seq.#: 5



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J.S.C.

**HON. GENINE D. EDWARDS**