Lecodet v Kaufman
2023 NY Slip Op 32829(U)
August 14, 2023
Supreme Court, Kings County
Docket Number: Index No. 509208/2020
Judge: Consuelo Mallafre Melendez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
---X
ROSE MARIE FAJARDO LECODET
Plaintiff,
-against-

JANE KAUFMAN, M.D. and CHOICES WOMAN'S MEDICAL CENTER,
Defendants,
---X

SHORT FORM ORDER
Index No.: 509208/2020
Mo. Seq.: 4 & 5

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 72, 73-83, 84, 85, 86; 93-97; 87, 88-89; 98-102, 104-105.

Defendants JANE KAUFMAN, M.D. and CHOICES WOMEN'S MEDICAL CENTER, INC. s/h/a CHOICES WOMAN'S MEDICAL CENTER (Choices) move this court for an order pursuant to CPLR § 3212, granting summary judgment for the moving defendants and dismissing all causes of action in the plaintiff's Complaint with prejudice asserted against the moving defendants and directing entry of judgment in favor of defendants. Plaintiff submitted opposition to these motions.

Although defendant Choices has submitted the within motion for summary judgment two days late, the court will grant Choices' request to consider the motion on the merits on the grounds that good cause is shown as co-defendant Dr. Kaufman submitted a timely motion for summary judgment seeking relief on nearly identical grounds. *Grande v. Peteroy*, 39 AD3d 590, 591-2 [2d Dept. 2007].

"'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. "Thus, in moving for summary judgment, a physician

defendant must establish, prima facie, 'either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.'" *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. "Once this showing has been made, the burden shifts to the plaintiff to rebut the defendant's prima facie showing with evidentiary facts or materials 'so as to demonstrate the existence of a triable issue of fact.'" *Paglinawan v. Ing-Yann Jeng,* 211 AD3d 743, 744 [2d Dept. 2022] citing *Assunta v. Rubin,* 189 AD3d 1321, 1323 [2d Dept. 2020].

"'When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.'" *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo,* 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. As relevant here, "[a]ny conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve." *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.,* 133 A.D.3d 830, 832 [2d Dept. 2015].

Defendants' expert, Jonathan Lanzkowsky, M.D., a physician board-certified in Obstetrics and Gynecology, established that he is qualified to opine as to the care and treatment rendered in this case. Plaintiff's expert, a physician board-certified in Obstetrics and Gynecology, also established expertise to opine as to the care and treatment at issue in this case. Based on their submissions and expert affirmations the court finds that defendant Dr. Kaufman has met their *prima facie* burden for summary judgment. However, in opposition the plaintiff raises material issues of fact through their submissions and expert affirmation.

Plaintiff's expert raises issues of fact, namely as to the force defendant Dr. Kaufman employed using the dilators, noting that the perforations identified in the uterine wall and bowel were significantly larger than the instrument that caused them. Plaintiff's expert opines that a

dilator that size would not cause a perforation of the uterine wall larger than the dilator itself after only one contact made with a reasonable degree of force. The expert also states that the dilator actually punctured through the uterine wall and into the bowel with enough force to shear the sigmoid colon off of the mesentery and cause a 5 cm complete transection of the sigmoid colon mesentery. This, the expert opines unquestionably shows that the dilator was inserted with excessive and improper force. Ms. Lecodet's injury occurred at the right side of the uterus and Plaintiff's expert opines that a proper midline approach was not maintained when inserting the dilators, and that the dilator deviated to the right of midline by an unacceptable margin. On the basis that the perforation that occurred in the posterior wall of the uterus, Plaintiff's expert opines that the instrument was not inserted parallel to the axis of the uterus, but instead into and through the uterine wall. Plaintiff's expert opines that this is a clear departure from the standard of care.

Plaintiff's expert also raises an issue of fact as to how Dr. Kaufman pulled the bowel through the uterine wall. Specifically, that the dilator punctured through the uterine wall and into the bowel causing a 5 cm bowel injury. Plaintiff's expert opines that the standard of care requires the dilator to be used "carefully enough to allow the practitioner to appreciate and respond to resistance caused by encountering a vital structure." The expert further opines that, had the requisite degree of care been exercised, Dr. Kaufman would have sensed resistance when the dilator contacted the uterine wall, and would have withdrawn the dilator before puncturing the uterine wall and then the bowel. The expert states that nothing in the record indicated that such steps were taken, and this is a deviation from the standard of care. As supported by the record, Plaintiff's expert raises issues of fact with respect to Dr. Kaufman's alleged deviations from the standard of care in this case.

Lastly, the experts disagree as to whether the injury was a risk of the procedure in light of the gestational age of the pregnancy and the plaintiff's medical history. This, again, is an issue of fact for trial.

Defendant Choices' motion for summary judgment is for dismissal of claims of vicarious liability for the acts of Dr. Kaufman and its staff. Choices has established its *prima facie* burden for summary judgment for claims based on vicarious liability for its staff. Choices established that the staff did not exercise any independent medical judgment and that all medical decisions were made by Dr. Kaufman. As defendant Choices stated in their motion, the law in New York is well settled that the employees of a facility are generally protected from liability when following the direction of the patient's physician unless the directions of the physician are clearly contraindicated. *Toth v. Community Hospital at Glen Cove*, 22 NY2d 255 [1968]; *Doria v. Benisch,* 130 AD 3d 777, 778 [2d Dept. 2015]. There is nothing in the record to indicate that the staff had any reason to question Dr. Kaufman's direction. Further there is no indication that the acts of the staff contributed to the plaintiff's injuries. Thus, summary judgment is granted to Choices for claims of malpractice relative to the acts of its staff; however, it is denied as to claims for vicarious liability relative to Dr. Kaufman's acts or omissions in accordance with the discussion relative to the claims against Dr. Kaufman.

Each defendant moved for summary judgment on the claim of lack of informed consent. "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (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. *Friedberg v. Rodeo*, 193 A.D.3d 825 [2d Dept. 2021]. "A cause of action premised on a lack of informed consent "is meant to redress a 'failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.'" *Walker v St. Vincent Catholic Med. Centers*, 114 AD3d 669 [2d Dept 2014] (quoting, *Karlin v. IVF America, Inc*., 93 N.Y.2d 282, 292 [1999]). "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" (internal citations omitted). *Friedberg v Rodeo*, 193 AD3d 825 [2d Dept 2021]; *Guinn v New York Methodist Hosp*., 212 AD3d 787 [2d Dept 2023].

As it is the responsibility of the operating surgeon to obtain informed consent, Choices' motion for summary judgment dismissing claims for lack of informed consent is granted.

Defendant Dr. Kaufman has not established their burden as to the claim of lack of informed consent. While the expert reviewed the consent form that plaintiff signed and discussed plaintiff's deposition testimony in reference to it, he fails to opine as to the sufficiency of the information given. Significantly, the expert did not consider the extent of the disclosure with reference to the plaintiff's history of prior terminations of pregnancy which is claimed to be a defense in this case. The court is aware that Plaintiff may not have disclosed the complete history of her prior abortions, but Dr. Kaufman was aware that this was not Plaintiff's first termination of pregnancy, and that plaintiff was 16 weeks pregnant. Given these circumstances, Dr. Kaufman's expert does not opine whether risks attendant to plaintiff, if any, under these

circumstances were disclosed. The opinion also fails, among other things, to aver that the consent obtained from the plaintiff complied with the prevailing standard for such disclosure applicable to reasonable practitioners performing the same kind of surgery, and that a reasonably prudent person in the plaintiff's position would not have declined to undergo the procedure if he or she had been fully informed. S*ee Walker v. Saint Vincent Catholic Med. Ctrs.,* 114 A.D.3d 669, 671 [2d Dept 2014]; *Orphan v. Pilnik*, 15 NY3d 907 [2010]; *Thaw v N. Shore Univ. Hosp*., 129 AD3d 937 [2d Dept 2015]; *Guinn,* 212 AD3d 787 [2d Dept 2023]. Thus, summary judgment is denied as to the claim for lack of informed consent.

Accordingly, the motion for summary judgment as to Dr. Kaufman is DENIED in its entirety. Defendant Choices' motion for summary judgment is GRANTED only to the extent that the claims asserted against Choices based on vicarious liability for its staff are dismissed, and the motion is DENIED as to claims asserted against Choices based on vicarious liability for Dr. Kaufman.

This constitutes the decision and order of the court.

Dated: August 14, 2023

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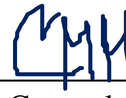

Hon. Consuelo Mallafre Melendez,
J.S.C.