SHORT FORM ORDER

INDEX
NO.: 12549-06

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 10-21-09
SUBMITTED: 1-21-09
MOTION NO.: 001-MD

CORRINE MANNIX

Plaintiff,

-against-

ISLAND OB/GYN CENTER AND JERRY G. NINIA, M.D.,

Defendants.

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Upon the following papers numbered 1 36 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-16 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-30 ; Replying Affidavits and supporting papers 31-34; 35-36 ; it is,

ORDERED that this motion (001) by the defendants, Island Ob/Gyn Center and Jerry G. Ninia, M.D., pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint is denied.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent wherein the plaintiff, Corrine Mannix, alleges that from on or about January 16, 2003 and continuing through May 12, 2004, the defendants, Island Ob/Gyn Center and Jerry Ninia, M.D., undertook to treat her for certain gynecological complaints, and during that care and treatment, the defendants departed from good and accepted standards of medical care and failed to inform her of the reasonably foreseeable risks and benefits of, and alternatives to, the treatment proposed and rendered, and failed to obtain an informed consent, causing her to sustain personal injury including, but not limited to, sterility, a total abdominal hysterectomy and bilateral salpingo-oophorectomy.

The defendants, Island Ob/Gyn Center and Jerry Ninia, M.D., now move for

summary judgment dismissing the complaint on the basis that the surgery performed was warranted and performed properly and that proper informed consent was given to the plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented **(Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment **(Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers **(Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form **(Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established **(Castro v Liberty Bus *Co.***, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law **(Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answer, bill of particulars and supplemental bill of particulars; IRS records; medical records of Stony Brook University Hospital dated May 21, 2001, Brookhaven Memorial Hospital dated March 4, 2000, and Dr. Kenigsburg; copies of the transcripts of the examinations before trial of Corrine Mannix dated May 24, 2007, and Louise Bertone dated August 28, 2008; and the affirmation of the defendants' expert, Boris Petrikovsky, M.D.

In opposing this motion the plaintiff has submitted an attorney's affirmation; plaintiff's various medical and operative records; a copy of the transcript of the examination before trial of Jerry G. Ninia, M.D. dated November 30, 2009; and the affirmation of plaintiff's medical expert.

Corrine Mannix testified to the effect that her date of birth is July 17, 1975, and she has never been married. She has a history of interstitial cystitis, polycystic kidney disease and endometriosis. She was first advised that she had endometriosis when she was fifteen years of age, diagnosed by Dr. Adrian Thomas who performed a biopsy procedure at Stony Brook Hospital. From age sixteen to nineteen she was treated by Dr. Lyle Brykov in Manhattan. Two

surgeries were performed by laparoscope for endometriosis and cysts and she was placed on Synarel and Danocrine but developed allergic reactions to both and was then placed on birth control pills. She then treated with another physician for about a year and a half but could not remember the doctor's name. During that time, she had another laproscopic procedure performed at Stony Brook Hospital by Dr. Hardart for endometriosis and she was placed on the medication Lupron to which she reacted. She was also treating with Dr. Polidoro who also performed a laprocopic examination and laser treatment for pelvic endometriosis and scar tissue. Additionally, she presented to the emergency rooms of various hospitals due to heavy bleeding and pain. She was treated next by Dr. Droesch who also performed laser treatment at Stony Brook for endometriosis. The procedure made her period lighter and less painful for about four to five months. She had two miscarriages, one in 1994 and one in 2002. When she was in her late twenties, she was diagnosed with polycystic kidney disease. Thereafter, she began treatment with Dr. Ninia.

On her first visit with Dr. Ninia, Ms. Mannix states she advised him that she had been trying to conceive for four months, but her blood test for pregnancy was negative. Thereafter she was admitted by Dr. Ninia to St. Charles Hospital for about a week to treat an infection. Dr. Ninia called a urology consult with Dr. Rose and Dr. Martinis and she was diagnosed with interstitial cystitis. Her next visit with Dr. Ninia was for a painful and heavy period. He referred her to the reproductive specialist, Dr. Kenigsberg for fertility issues. She testified she was advised by Dr. Kenigsberg that she could have children, but not with her current partner who had a low sperm count. Thereafter, she stated, Dr. Ninia told her it was time to consider having a hysterectomy as that was her only cure for the endometriosis. He explained that a hysterectomy would give her a better life with no more periods although she could have some hot flashes and a few night sweats. She stated Dr. Ninia also gave her the name of an allergist to see about desensitizing her to some of the medication she had previously reacted to and used in the treatment of endometriosis. She did not see the allergist, but returned to Dr. Ninia and had a conversation with him about having the hysterectomy, which was thereafter scheduled. On the day of surgery, she states, Dr. Ninia advised her to trust him, and that he advised her that if he could just do a cleaning he would do that. Just before she was administered anesthesia, she was advised that stents would be placed in her ureters so they would not be cut during surgery. After surgery she woke up crying and felt something was wrong. A week later she was in pain on her right side and she was still bleeding, but was advised by Dr. Ninia that she was going to be healing slowly. She also was experiencing hot flashes, couldn't sleep, and her bones were hurting. She continued to bleed for a month or more. She was started on Climara patch for hormone replacement. She saw both Dr. Martinis and Dr. Ninia post-operatively for several visits. She developed problems urinating and was diagnosed with interstitial cystitis due to hydro-distention. She was still experiencing pain in her right side and vaginal bleeding. She testified that Dr. Ninia told her to see a counselor, that he was not ordering any tests and that there was nothing wrong with her. She then saw Dr. Robert Okey.

Dr. Okey examined her and found a large mass on her right side and referred her

to Dr. Ava Chalas who also referred her to Dr. Waltzer for an evaluation of her kidneys and who advised her that she had polycystic kidneys. Dr. Chalas performed surgery and advised her that the tests revealed part of her ovary had been left at the time the hysterectomy was performed. The ovary had filled with blood, which was why she had so much pain when the estrogen patch was on. Dr. Chalas also removed more endometrial tissue and recommended that she see Dr. Seckin in Manhattan.

Dr. Seckin ordered a CAT scan and performed laser surgery for endometriosis and scar tissue removal and recommended her to Dr. Florio due to her inability to urinate on her own since the hysterectomy and for treatment of a bladder infection. Dr. Seckin also referred her to Dr. Goretski as she had a bloody bowel movement. She testified that Dr. Seckin advised her she did not need the hysterectomy, that Dr. Ninia took out the organs but left the disease behind, that the disease would only continue, and that she should have only had a good cleaning instead of the hysterectomy.

Louise Bertone testified, inter alia, to the effect of her experiences accompanying Ms. Mannix to the various treating physicians, and the pain and problems encountered by Ms. Mannix.

Dr. Boris Petrikovsky, the defendants' expert, has set forth in his affirmation that he is licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. It is his opinion based upon a reasonable degree of medical certainty that Dr. Ninia and Island Ob/Gyn Center did not depart from accepted standards of care and practice and did not proximately cause any harm to Ms. Mannix.

Defendants' expert states that endometriosis occurs when the lining of the uterus grows outside the uterus, often causing complaints of painful periods and heavy bleeding. There is often tenderness on physical examination of the cervix and nodularity to the uterosacral ligament. The proliferation of endometriosis is caused by estrogen, which is produced by the ovaries. He states that Ms. Mannix had failed trials of several different medications to treat endometriosis, including Danocrine, Synarel and Lupron; that she had approximately six or seven prior laparoscopies to treat the endometriosis; and that she had stage IV endometriosis by the time she presented to Dr. Ninia. He opines that endometriosis in some women can be controlled using medical management and endoscopic treatment to remove the visible endometrial tissue, however, as long as the ovaries are in place, estrogen will drive the endometriosis and it will always occur. He further states that where the medical management has failed due to allergies, and laparoscopies are not effective in controlling the pain from endometriosis, such as in Ms. Mannix's situation where she has been suffering pain since her teenage years, then a hysterectomy provides definitive treatment with removal of not only the uterus, the source of the endometrial tissue, but also removal of the ovaries.

It is set forth by defendants' expert that Ms. Mannix consented to and underwent a

total abdominal hysterectomy and bilateral salpingo-oophorectomy by Dr. Ninia on August 8, 2003, after Dr. Ninia evaluated and examined her, and listened to her complaints. It is Dr. Petrikovsky's opinion that the procedure was performed well within good and accepted standards of medical care and practice, and although Dr. Chalas subsequently removed an ovarian remnant, it does not mean that the hysterectomy performed by Dr. Ninia was performed improperly, but that instead, it was a complication due to scar tissue on a patient who had been operated on multiple times prior to the hysterectomy. He also states that the subsequent surgical procedures have failed to find any significant or substantial evidence of endometriosis on pathology and that Ms. Mannix's ongoing complaints can be attributed to a variety of factors including polycystic kidney disease, interstitial cystitis, multiple hepatic cysts, and multiple adhesions and scarring from numerous prior surgeries. He then set forth Ms. Mannix's medical and surgical history and states that, of interest in 1999, Ms. Mannix reported to Dr. Harrison long standing gastrointestinal problems for more than ten years and was told that if in six months the medication prescribed to treat the endometriosis did not work that she would need a hysterectomy or laser oblation for the endometriosis. In March 2005, Dr. Chalas stated that at the time of the November 2004 surgery, no endometriosis was identified. Dr. Petrikovsky further indicates that Dr. Seckin, in July 2005, performed a laparoscopic procedure which did not show endometriosis but documented extensive adhesions from stage IV endometriosis.

Dr. Petrikovsky further sets forth in his affirmation that Ms. Mannix began treatment with Dr. Douglas Heymann who notes in his records that he had specifically told her that her complaints are not due to endometriosis but are instead due to polycystic kidney disease and hepatic cysts and that there was no evidence of endometriosis upon laparoscopy, noting that the liver and renal cysts are separate processes from endometriosis and that the significance of the role of endometriosis seems less than previously attributed except at the pelvic floor. In March 2007, Dr. Heymann opined that the "issue of endometriosis was totally controlled and that this was told to the patient...." Dr. Petrikovsky further sets forth that when Ms. Mannix saw Dr. Shah at Manhattan Minimally Invasive and Bariatric Surgery in September 2006, he essentially doubted that the endometriosis was the cause of her complaints.

Dr. Petrikovsky states that the record reflects that in 2008, Ms. Mannix had procedures performed at Lenox Hill Hospital due to ongoing complaints of abdominal pain. The history taken included 15 prior abdominal surgeries in one part of the chart, and another part documents 23 prior surgeries. A diagnostic laparotomy in April 2008 with extensive lysis of adhesions, then converted to an open laparotomy, revealed that only one of the several biopsies showed evidence of some residual endometriosis on the left parauteroscaral ligament. There was no endometriosis involving the recto sigmoid colon found. Dr. Petrikovsky opines that this in no way evidences that Dr. Ninia's procedure was either unwarranted or done improperly.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (**Holton v Sprain Brook Manor Nursing Home**, 253 AD2d 852, 678

NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* **Derdiarian v Felix Contracting Corp.**, 51 NY2d 308, 434 NYS2d 166 [1980]; **Prete v Rafla-Demetrious,** 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* **Fiore v Galang**, 64 NY2d 999, 489 NYS2d 47 [1985]; **Lyons v McCauley,** 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; **Bloom v City of New York,** 202 AD2d 465, 465, 609 NYS2d 45 [1994]). In the instant action, the defendants have established prima facie entitlement to summary judgment dismissing the complaint. The defendants' expert has opined within a reasonable degree of medical certainty that the hysterectomy bilateral salpingo-oophorectomy was necessary and properly performed, that there were no departures from accepted medical/surgical standards of care, and there was nothing the defendants did nor did not do that caused her harm.

The plaintiff has opposed this motion for summary judgment. To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see,* **Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.,** 7 AD3d 759, 776 NYS2d 907 [2004]; **Domaradzki v Glen Cove OB/GYN Assocs.,** 242 AD2d 282, 660 NYS2d 739 [1997]).

Dr. Ninia testified at his examination before trial to the extent that endometriosis is a condition where the lining of the uterus grows outside the uterus in places it is not customarily found such as the bladder, the bowel, the ovaries and the uterus itself, causing abdominal pain and gynecological bleeding irregularly or most notable at the time of anticipated menses. There may be cervical motion tenderness and adnexal tenderness and nodularity in the area of the uterosacral ligament. Proliferation of the endometrium is caused by the hormone estrogen which is found in the ovaries. Removing the ovaries might stop the proliferation of the endometriosis, but there is still the source of the endometriosis which is the uterus itself. Abdominal and pelvic pain can be stopped by removing the ovaries but has to be done in conjunction with removal of the uterus as well. Beside physical examination and a history of pain and bleeding, laparoscopy is most commonly used to diagnose endometriosis wherein amorphous, rusty reddish-brown or blue coloring is found. If it is not seen on laproscopic examination, he state that he would say it was not there. He would want to see the operative report and biopsies if he received the diagnosis of endometriosis from another physician.

Endometriosis, Dr. Ninia stated, could go away. In 2003, endometriosis could be treated medically with medication from Tylenol to Motrin, birth control pills, Danocrine ,

Danazol or Lupon which suppresses the production of estrogen, and the patient's response would be noted. In 2003, surgical treatment could be laparoscopy wherein visible endometriosis with either electrocautery or a laser could be done, with or without a D&C, or a hysterectomy could be done. He stated removal of the endometriosis does not solve the condition and once a patient has endometriosis you always have it unless you don't have a uterus and ovaries or unless there is a natural menopause which terminates endometriosis. He might recommend an open laparotomy, which is more extensive than laproscopy, to remove endometrial lesions when a patient is unresponsive to prior therapies or there is an endometrioma. Ultrasound does not detect endometrial lesions unless they are confined to the ovary in the form of a cyst, but is part of the workup. In 2003 he would recommend a total abdominal hysterectomy and bilateral removal of the ovaries in a patient with endometriosis who did not tolerate or was unwilling to tolerate medical therapy or had failed prior medical therapy, or one who had prior less definitive therapies in the form of one or more laparoscopies, but he would first evaluate the severity of the endometriosis before doing so. Age would be a factor as well as whether the patient had ever been pregnant or wished to become pregnant as the procedure is non-fertility sparing. There would be no findings on blood tests which would contraindicate a diagnosis of endometriosis. He testified that surgical removal is performed on endometrial lesions that were able to be removed safely without any complications. After the total abdominal hysterectomy and bilateral salpingo-oophorectomy, residual endometrial lesions would undergo atrophy once the definitive therapy was done. Differential diagnosis would be made prior to surgery.

Dr. Ninia testified he has been practicing in obstetrics and gynecology for fifteen years and is board certified in the specialty. He has treated over a hundred patients with endometriosis, all of which were managed medically in one way or another. On half to seventy-five percent of those patients have been treated surgically for endometriosis via laproscopy. About fifty or seventy-five patients have been treated via open laparotomy, including those with endometriomas or large cysts of endometriosis. Twenty five to thirty patients he as treated with total hysterectomy and bilateral salpingo-oophorectomy with about twenty five per cent of those patients being under the age of thirty. Twenty to thirty surgeries were done via open procedure.

Plaintiff's expert has submitted an affirmation which sets forth that the expert is a physician licensed to practice medicine in the State of New York and is board certified in obstetrics and gynecology. Upon review of the medical records, together with the expert's experience, it is plaintiff's expert's opinion with a reasonable degree of medical certainty that Jerry G. Ninia, M.D. departed from accepted standards of medical care in the treatment of Corinne Mannix when he performed a total abdominal hysterectomy and bilateral salpingo-oophorectomy and that these departures are the proximate cause of injury to her. The opinion is based upon Dr. Ninia failing to consider medical conditions other than endometriosis as the cause of, or contributing to, her chronic pelvic pain before performing the hysterectomy and bilateral salpingo-oophorectomy; Dr. Ninia failed to provide Ms. Mannix with adequate information about the risks, benefits and alternatives to the surgery to enable her to give an informed consent; the pathology report and operative records do not support Dr. Ninia's

diagnosis of "severe endometriosis;" and that she continues to have chronic pelvic pain after Dr. Ninia's "definitive" gynecologic surgery.

The plaintiff's expert sets forth the physiology of endometriosis and states that while endometriosis can cause chronic pelvic pain, there are many additional gynecologic conditions that may be the source of chronic pain, and that other diseases, such as irritable bowel syndrome and interstitial cystitis can also cause pelvic pain. Psychological factors may contribute to the pain as well as the production of adhesions pulling on normal tissue. When Ms. Mannix presented to Dr. Ninia, she thought she might be pregnant and miscarrying, but was not pregnant. Two weeks later, in January 2003, she had severe left lower back pain, complaints strongly suggestive of kidney problems, and Dr. Ninia sent her to St. Charles Hospital for admission and evaluation. The pelvic CT scan showed multiple cysts scattered throughout the liver, a left ovarian cyst, and bilateral medullary sponge kidneys. She was treated with antibiotics and discharged.

On the third visit, on February 10, 2003, Dr. Ninia diagnosed Ms. Mannix as having endometriosis causing her pelvic pain, and referred her to Dr. Kenigsberg, a fertility specialist, as she was trying to conceive. Dr. Kenigsberg performed intra-vaginal insemination, but due to a low sperm count of her partner, it was not successful. On April 14, 2003, Dr. Ninia advised Ms. Mannix her treatment options for the pelvic pain were desensitization of her allergies to Lupron and Danocrine, or a hysterectomy. On August 8, 2003, Dr. Ninia performed the hysterectomy and bilateral salpingo-oophorectomy, advising Ms. Mannix that this would terminate her endometriosis and eliminate her pelvic pain, however, it did not relieve the pelvic pain which has been diagnosed as being caused by multiple GU, GI, and pelvic problems, including interstitial cystitis, hepatic cysts, and adhesions.

The plaintiff's expert opines that Dr. Ninia departed from the accepted standards of care by adopting a "diagnostic bias" by adopting the patient's history of endometriosis as the cause of her pain and stopped there instead of investigating the other possible causes of the pain. The plaintiff's expert opines that Dr. Ninia departed from the standard of care by not providing Ms. Mannix with adequate medical information that the surgery may not resolve her chronic pelvic pain; and that her pain could be caused or contributed to by other conditions, or that adhesions could cause pain or worsen her condition. The plaintiff's expert sets forth that sterilization to treat pain in a woman of child-bearing years is a surgery of last resort, and "definitive" surgical treatment is reserved for patients for whom future fertility is not a consideration, and that Dr. Ninia failed to discuss with Ms. Mannix the psychological impact of removal of both ovaries, her cervix and uterus while she was still considering the possibility of pregnancy, and further failed to refer her to a therapist regarding the possible emotional sequelae to sterilization.

The plaintiff's expert further opines that the surgical pathology report August 8, 2003 does not support Dr. Ninia's representation that Ms. Mannix had severe and extensive stage

IV endometriosis as it reveals only modest endometriosis on one fallopian tube and equivocates as to whether there was a cyst or endometrioma on the ovary. Based on this report, it is the plaintiff's expert's opinion that Dr. Ninia should not have removed all the organs as it was not indicated.

Based upon the foregoing, it is determined that there are factual issues raised by the experts' conflicting opinions concerning, inter alia, whether or not the total abdominal hysterectomy and bilateral salpingo-oophorectomy was indicated; whether other causes of the pain were ruled out prior to the surgery; whether proper informed consent was given to the plaintiff of child-bearing years who was trying to conceive; whether failing to remove the entire right ovary caused or contributed to her pain and injury; whether differential diagnoses were made prior to surgery; and whether or not the defendants departed from accepted standards of care in the care and treatment of Ms. Mannix, and if those departures were the proximate cause of her claimed injuries.

Accordingly, motion (001) is denied.

Dated: **April 13, 2010**

HON. ELIZABETH HAZLITT EMERSON

J.S.C.