

Rubin v Lester

2016 NY Slip Op 31877(U)

October 7, 2016

Supreme Court, Suffolk County

Docket Number: 10-11225

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

PUBLISH

INDEX No. 10-11225

CAL. No. 15-01133MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11-19-15
ADJ. DATE 4-14-16
Mot. Seq. # 001 - MD

-----X

SHARON RUBIN and DANIEL RUBIN,

Plaintiffs,

- against -

DENISE E. LESTER, MARGARITA
JURAK, and GOOD SAMARITAN
HOSPITAL MEDICAL CENTER

Defendants.

-----X

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Upon the following papers numbered 1 to 48 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 41 - 45; Replying Affidavits and supporting papers 46 - 48; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

In this action to recover damages for medical malpractice, defendants Denise E. Lester, M.D., and Margarita Jurak, M.D., move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them.

In this action the plaintiffs seek to recover for damages alleged sustained by plaintiff Sharon Rubin during her admission to defendant Good Samaritan Hospital Medical Center from July 24, 2008, to July 28, 2008. On July 24, 2008, Sharon Rubin (hereinafter referred to as "Sharon Rubin") arrived at defendant Good Samaritan Hospital Medical Center (hereinafter referred to as "the Hospital") for a scheduled surgical removal of a large ovarian mass and bilateral salpingo-oophorectomy by defendant Denise E. Lester, M.D.. Dr. Lester attempted to perform the surgery laparoscopically, but was unable to do so due to multiple adhesions resulting from Sharon Rubin's

prior abdominal surgeries. Dr. Lester, with the assistance of defendant Margarita Jurak, M.D., proceeded via laparotomy and surgically removed the mass, ovaries, and fallopian tubes. From the morning of July 25, 2008 until 7:30 a.m. on July 26, 2008, Dr. Jurak managed Sharon Rubin's post-operative care. During this time, Sharon Rubin was afebrile, her vital signs were stable, the results of examinations of her abdomen were within normal limits, and her post-operative pain was managed by Dilaudid. At around noon on July 26, 2008, the Hospital's nursing staff contacted Dr. Lester to inform her that Sharon Rubin had a white blood cell count of 20.4. In response, Dr. Lester changed Sharon Rubin's antibiotic from Mefoxin to Flagyl and Levaquin due to concerns of possible infection.

Thereafter, Dr. Lockhart, a physician from Dr. Lester's practice, evaluated Sharon Rubin and found no evidence of acute abdomen. On the morning of July 27, 2008, Sharon Rubin's white blood cell count dropped to 18.1. Dr. Lockhart re-evaluated Sharon Rubin and performed another abdominal examination, which was benign. At around 11:00 a.m. on July 28, 2008, the Hospital's nursing staff contacted Dr. Lester to inform her that Sharon Rubin was complaining of nausea and pain. Dr. Lester examined Sharon Rubin, finding that her temperature was 100.8, that her most recent white blood cell count was 18, and that her abdomen was moderately distended with diffuse tenderness. Dr. Lester ordered an abdominal CT scan and an x-ray to rule out ileus or obstruction and called for a surgical consult. At around 8:45 p.m. that evening, the CT scan was performed, revealing extensive free intraperitoneal air, a small amount of free fluid in the abdomen, and a 10 x 10 cm abscess, with the possibility of smaller intraloop abscesses. At around 11:00 p.m., Dr. Lester was notified of these findings and she consulted with an infectious disease specialist. Thereafter, Sharon Rubin's antibiotics were changed to Primaxin and Vancomycin. Sharon Rubin was then evaluated by interventional radiology, who determined that the abscesses could not be treated via CT-guided drainage.

At around noon on July 29, surgeon Dr. Manal Hegazy, M.D., who is not a party to this action, performed an exploratory laparotomy on Sharon Rubin with the assistance of Dr. Lester. During this procedure, stool was found throughout the abdomen, as well as a 0.5 cm perforation of the colon. Dr. Hegazy performed a rectosigmoid resection of Sharon Rubin's colon, drained the abscess, and placed a Hartman colostomy. On August 15, 2008, Sharon Rubin was discharged home with a peripherally inserted central catheter (PICC line). On December 19, 2008, Sharon Rubin underwent a laparoscopic reversal of the colostomy.

Plaintiffs allege that Sharon Rubin was injured as a result of defendants' medical malpractice, namely, a bowel perforation and resulting sepsis. Plaintiff's spouse, Daniel Rubin, also sues derivatively for loss of consortium. As relevant to the instant motion, the plaintiffs allege that Drs. Lester and Jurak were negligent in, among other things, surgically removing Sharon Rubin's ovarian mass, performing Sharon Rubin's bilateral salpingo-oophorectomy, and failing to timely diagnose and treat Sharon Rubin's perforated bowel and sepsis. Further, plaintiffs allege that Dr. Lester failed to obtain Sharon Rubin's informed consent before performing this surgery. With respect to the Hospital, the plaintiffs allege that it was negligent, among other things, in failing to properly attend

to Sharon Rubin's medical health and welfare, and in failing to properly perform medical hospital functions. Plaintiffs allege that, as a result of defendants' malpractice, Sharon Rubin suffered a bowel perforation and sepsis, requiring that she undergo further surgery to remove portions of her colon and placement of a colostomy.

Drs. Lester and Jurak now move for summary judgment dismissing the complaint against them, arguing that they did not depart from good and accepted medical practice in its treatment of Sharon Rubin, or that if there was such a deviation or departure, Sharon Rubin was not injured as a result. In support of their motion, they submit, among other things, the transcripts of their deposition testimony and plaintiffs' testimony, and copies of Sharon Rubin's hospital records during her July 24, 2008, to July 29, 2008, admission. Dr. Lester and Dr. Jurak also submit an affirmation of Dr. Michael Nimaroff, M.D., a board-certified obstetrical and gynecological surgeon. Plaintiffs oppose the motion, arguing that there is a question of fact as to whether the movants departed or deviated from good and accepted medical practice in their treatment of Sharon Rubin and whether such deviation or departure was a proximate cause of her injuries. In opposition, plaintiffs submit, among other things, an affirmation of their attorney and an affirmation of a board-certified physician of internal medicine and gastroenterology.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused the plaintiff's injuries (*see Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]). To establish entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, either the absence of any such departure, or that its conduct was not a proximate cause of the plaintiff's alleged injuries (*see Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). To sustain this burden, the defendant must address and rebut any specific allegations

of malpractice set forth in the plaintiff's bill of particulars (*see Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 33 NYS3d 369 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]). If such a showing is made, the burden then shifts to the plaintiff patient to submit evidentiary facts or materials in rebuttal, but only as to those elements on which the defendant met his or her prima facie burden (*see Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]; *Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]).

To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and the alternatives, and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see Public Health Law § 2805-d [1]*; *Schussheim v Barazani*, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]; *Lavi v NYU Hospitals Center*, 133 AD3d 830, 21 NYS3d 143 [2d Dept 2015]; *Zapata v Buitriago*, 107 AD3d 977, 969 NYS2d 79 [2d Dept 2013]). However, the mere fact that a plaintiff signed a consent form prior to treatment does not establish the defendants' prima facie entitlement to judgment as a matter of law (*see Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 36 NYS3d 470 [2d Dept 2016]; *Schussheim v Barazani, supra*; *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 979 NYS2d 697 [2d Dept 2014]).

Based upon a review of the papers before this Court, Dr. Lester and Dr. Jurak have established their entitlement to partial summary judgment by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the treatment they rendered to Sharon Rubin, and that their treatment was not a substantial contributing factor in causing her injuries (*see Bongiovanni v Cavagnuolo, supra*; *Mitchell v Grace Plaza of Great Neck, Inc., supra*; *Faccio v Golub, supra*). By his affirmation, Dr. Nimaroff opines, within a reasonable degree of medical certainty, that surgery was indicated and necessary to remove Sharon Rubin's ovarian mass and not contraindicated because of her surgical history. The further opines that Dr. Lester and Dr. Jurak performed the bilateral salpingo-oophorectomy within the accepted standards of medical practice; and that, during the surgery, Dr. Lester properly converted the laparoscopic procedure to a laparotomy because the extent of Sharon Rubin's adhesions could not have been fully appreciated prior to surgery. Dr. Nimaroff states that, during the post-operative period, Sharon Rubin was properly and timely evaluated by Dr. Lester and her colleagues, who properly appreciated the significance of the abdominal examination findings and Sharon Rubin's complaints of pain. He also opines that the slight elevation of Sharon Rubin's white blood cell count on July 26, 2008, along with her complaints of pain, were consistent with the stress of surgery, but Dr. Lester properly ordered prophylactic antibiotics in an exercise of due caution. Dr. Nimaroff states that Dr. Lester properly considered an ileus or bowel obstruction on July 28, 2008 when Sharon Rubin's abdomen

reflected an acute change, and she properly ordered an abdominal CT scan and a surgery consult at that time. He also opines that the CT scan did not reveal a bowel perforation; and that it was proper to continue conservative management of Sharon Rubin's care with observation. Moreover, Dr. Nimaroff opines that a reparative laparotomy with colon resection and colostomy would have been necessary, even if the perforation had been discovered earlier, having no effect on Sharon Rubin's outcome. He states that a bowel perforation is a known and accepted complication of laparotomy and removal of an ovarian mass in the presence of adhesions; and that, as the perforation was only 0.5 cm in its greatest dimension, its etiology cannot be definitively attributed to the surgery. As to Dr. Jurak's treatment of Sharon Rubin, Dr. Nimaroff opines that Dr. Jurak could not have caused or contributed to Sharon Rubin's bowel injury, as Dr. Jurak made no incisions, did not participate in the lysis of adhesions, did not use the cautery, and did not place any Gelfoam during the surgery. Dr. Nimaroff further concludes that Sharon Rubin did not exhibit any signs or symptoms of a "surgical abdomen" while she was under Dr. Jurak's post-operative care from July 25, 2008, to July 26, 2008, and that Sharon Rubin's presentation while under Dr. Jurak's post-operative care was consistent with typical post-operative complaints. Dr. Nimaroff's affirmation properly addresses each specific allegation of malpractice set forth in plaintiffs' bill of particulars (*see Schuck v Stony Brook Surgical Assoc.*, *supra*; *Seiden v Sonstein*, *supra*; *Lormel v Macura*, *supra*). Further, as Dr. Nimaroff bases his conclusions upon plaintiff's relevant medical records and the parties' deposition testimony, in addition to his education, knowledge, and medical experience, Drs. Lester and Jurak have met their initial burden on the motion (*see Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; *Lahara v Auteri*, 97 AD3d 799, 948 NYS2d 693 [2d Dept 2012]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]).

With respect to the informed consent cause of action, the movants' submissions fail to demonstrate, *prima facie*, that Sharon Rubin gave her informed consent for the initial surgery to remove the mass, her ovaries, and her fallopian tubes (*see Schussheim v Barazani*, *supra*; *Lavi v NYU Hospitals Center*, *supra*; *Zapata v Buitriago*, *supra*). At her deposition, Sharon Rubin testified that she did not recall signing an informed consent form before this surgery, although she identified her signature upon such a form contained within the Hospital's records. However, this form is used by the Hospital for all procedures performed there and no specific risks or complications for an ovarian mass removal or a bilateral salpingo-oophorectomy are listed. Therefore, Sharon Rubin's signature on this form is not *prima facie* proof that she was fully advised of all the risks and potential complications of this procedure (*see Whitnum v Plastic & Reconstructive Surgery, P.C.*, *supra*; *Schussheim v Barazani*, *supra*; *Walker v Saint Vincent Catholic Med. Ctrs.*, *supra*). There is a question of fact as to whether Dr. Lester apprised Sharon Rubin of the risks and potential complications of performing the surgery via laparotomy, namely bowel perforation and infection. Dr. Nimaroff opines, within a reasonable degree of medical certainty, that Dr. Lester properly obtained Sharon Rubin's informed consent based on Dr. Lester's deposition testimony that she fully discussed with Sharon Rubin that an exploratory laparotomy was possible and that she made Sharon Rubin aware that this procedure carried the risk of injury to the bowel. However, Sharon Rubin testified Dr. Lester explained to her that, although she would attempt to perform the procedure laparoscopically, there was a possibility that a laparotomy would

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be necessary due to Sharon Rubin’s previous abdominal surgeries. Sharon Rubin further testified that Dr. Lester explained recovery following a laparotomy would take longer, but never discussed the risk of a bowel perforation. As it is not the Court’s function to determine credibility on a motion for summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631, 665 NYS2d 25, 30 [1997]; *Schwartz v Gold Coast Rest. Corp.*, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]), Dr. Lester and Dr. Jurak’s motion with respect to Sharon Rubin’s lack of informed consent claim must be denied.

Dr. Lester and Dr. Jurak having met their initial burden on the motion as to the medical malpractice cause of action, the burden shifted to plaintiffs to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*; *Keesler v Small*, *supra*; *Abakpa v Martin*, *supra*; *Williams v Bayley Seton Hosp.*, *supra*). In opposition, plaintiffs submit an affirmation of their attorney and an expert affirmation, with the affirmant's name and signature redacted. The unredacted affirmation was made available for in camera review. The expert states that the delay in appropriate treatment, including the delay of one day for corrective surgery after the CT scan confirmed a pelvic abscess, was “a proximate cause of the extensive surgery Mrs, Rubin finally underwent on July 29, 2008, and caused or contributed to her extended period of disability.” He opines that “based upon a reasonable degree of medical certainty that the delay by Dr. Lester and Dr. Jurak in performing and or ordering appropriate post-surgical care... was a departure from good medical practice and a proximate cause of Mrs. Rubin’s injuries.” The plaintiffs have raised triable issues of fact as to whether Dr. Lester and Dr. Jurak deviated or departed from good and accepted medical practice in their treatment of Sharon Rubin or whether such departure or deviation was a competent cause of her injuries (*see Capobianco v Marchese*, *supra*; *Keesler v Small*, *supra*; *Williams v Bayley Seton Hosp.*, *supra*).

In light of the foregoing, Dr. Lester and Dr. Jurak’s motion for summary judgment as to the medical malpractice cause of action as asserted against them is denied.

Dated: OCT 07 2016



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION