

**Larsen v Loychusuk**

2007 NY Slip Op 30716(U)

March 12, 2007

Supreme Court, Suffolk County

Docket Number: 0005846/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 2/9/07  
ADJ. DATE 2/15/07  
Mot. Seq. # 005 - MD

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	:	
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 18 - 33; Replying Affidavits and supporting papers 35 - 37; Other 34; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Kitti Loychusuk, M.D., Ravindra Kumar Kota, M.D. and CareMax Surgical, P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint against them, opposed by plaintiffs, is denied.

This is an action sounding in medical malpractice. On June 28, 2002, plaintiff Catherine Larsen underwent gynecological surgery consisting of an abdominal hysterectomy and right salpingo-oophorectomy performed by defendants Emily F.M. Gubert, M.D. and South Shore Gynecology-

Obstetrics Associates, P.C. at Good Samaritan Hospital. A review of plaintiff's deposition on July 6, 2005 (Defendants Exhibit F, p.74), reveals that in November, 2002, plaintiff began to experience brownish-red vaginal bleeding . She was seen by defendant Gubert, who, during internal examination, found something inside the vagina and cauterized it (Id, p. 94) The vaginal discharge ceased thereafter, but within about two to three days, plaintiff began to experience severe stomach aches in the lower abdominal area, constipation, vomiting and fever (ID, p.101). She went to a walk-in clinic in Sayville, where she was seen by a Dr. Debra Shafer, who performed x-rays and referred her to an emergency department (Id, p.111-112). Plaintiff then presented at defendant Brookhaven Memorial Hospital Medical Center emergency department, where she was examined and discharged home with instructions to take "Go Light" (sic) for constipation (Id, p.118). When she arrived home and attempted to swallow the solution, she began vomiting (Id, p.123). When the pain became worse, she returned to the emergency department at Brookhaven Memorial Hospital Medical Center (Id, p.134).

On December 4, 2002, defendants Kitti Loychusuk, M.D., Ravindra Kumar Kota, M.D. of CareMax Surgical, P.C. performed surgery on plaintiff at Brookhaven Memorial Hospital Medical Center, consisting of an exploratory laparotomy, lysis of adhesions, draining of a pelvic abscess, sigmoidoscopy, Hartman's resection of the colon, and an end colostomy (Defendant's Exhibit H). On December 6, 2002, defendant Loychusuk noted vaginal bleeding. After performing a vaginal examination, it was his impression that plaintiff had a vaginal fistula located at the vaginal vault at the apex of the vagina at the vaginal cuff connecting to the pelvis and opined that it possibly will close by itself (Defendants' Exhibit G, p.44). No further testing was ordered to determine where the fistula was connecting to (Id, p. 45).

On March 12, 2003, defendant Kota of CareMax again performed surgery on plaintiff at Brookhaven Memorial Hospital in the nature of an exploratory laparotomy, extensive lysis of adhesions, resection of the descending colon, reversal of the Hartman's procedure and appendectomy (Defendants' Exhibit J). This unsigned operative note of defendant Kota at page 2 indicates a distal stapler was inserted through plaintiff's anus to staple in the operative site. After being discharged from the hospital, plaintiff presented to the emergency department at Brookhaven Memorial Hospital Medical Center on March 22, 2003, where she was seen by defendant Dr. Kota for complaints of nausea, vomiting and no bowel movement for two days for which she was prescribed Zofran for nausea, was given intravenous fluids and discharged home (Defendants' Exhibit I, p.108, 112, 113). On March 26, 2003, plaintiff was seen by defendant Kota in his office (Id, p.118).

On March 27, 2003, plaintiff was admitted to Brookhaven Memorial Medical Center through the emergency department (Id, p 120) for a rigid sigmoidoscopy associated with complaints of nausea and passing flatus through her vagina since the March 2003 reversal of the colostomy (Id, p. 122) . A CAT scan did not reveal a fistula due to lack of contrast material (Id, pp. 123-124). On March 28, 2003, plaintiff was noted to have minimal flatus from her rectum and yellowish golden drainage from the vagina (Id, p.124). Defendant Kota discussed the case with defendant Loychusuk concerning the complaints of flatus and vaginal drainage (Id, p. 125). Thereafter, on March 29, 2003, plaintiff underwent an examination under anesthesia for a pre-operative diagnosis of rectovaginal fistula (Id, p. 126). The examination revealed a lot of stool in the vagina, and after irrigation of the vagina to remove the stool, a defect was found at the vaginal apex, about 2 cm, and a connection was identified between

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the vagina and the rectum approximately 6 cm from the opening of the rectum, in the same location as where the vaginal fistula was located during plaintiff's December 2002 admission (Defendants' Exhibit K). Plaintiff was discharged on April 1, 2003 and was next seen by Dr. Kota on April 7, 2003. She was referred to Dr. Frank Sconzo, a colo-rectal surgeon, for assessment of the rectovaginal fistula by examination under anesthesia, but Dr. Sconzo was unable to locate the fistula on examination and consequently could not perform a repair of the fistula transrectally (Defendants' Exhibit I, p. 142, 145). She was thereafter referred to Dr. Lieboff, another colo-rectal surgeon, for a second opinion (id, p. 142). Per defendant Kota's testimony (Id, p. 153), Dr. Lieboff told him where the rectovaginal fistula was, gave a description of the findings, and said it was too low for him to repair at 6 cm from the anus; thus, he was sending her to Dr. Korman (sic) (Id, p. 153).

Review of plaintiff's Exhibit N reveals that on July 21, 2003, Dr. Marvin L. Corman, M.D. performed a transcoccygeal excision of a rectovaginal fistula and coccygectomy. During that procedure, a 3 cm hole was found between the anterior rectal and the posterior vaginal wall. The hole was noted to be surrounded by staples. Loose staples were removed along with fibrotic tissue, and a repair was made of the fistula.

Defendants Kitti Loychusuk, M.D., Ravindra Kumar Kota, M.D., and CareMax Surgical, P.C. now seek an order granting summary judgment dismissing the complaint.

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). 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). 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 ). 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) 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). 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).

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 et al*, 253 AD2d 852, 678 NYS2d 503)

In reviewing defendants' supporting submissions, it is determined that defendants have submitted

with the moving papers only a partial, unsworn copy of plaintiff's deposition; an unsworn copy of defendant Loychusuk's deposition (with the signed, sworn signature page dated February 8, 2007 submitted after plaintiffs' opposing papers); and only uncertified, partial hospital records concerning the December 4, 2002, March 12, 2003 and March 29, 2003 surgeries of plaintiff, which are not in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods., supra*). Although no affidavits on behalf of the moving defendants have been submitted in support of the application for summary judgment, copies of defendants' depositions have been provided. The affidavit of defendants' counsel has been submitted; however, the affidavit of an attorney lacking personal knowledge of the events giving rise to the cause of action or defenses without setting forth evidentiary facts cannot support or defeat a motion for summary judgment (*Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 105 AD2d 653, 481 NYS2d 370).

It is noted that the moving defendants have not exchanged or submitted a copy of their expert report to plaintiff or in support of the application for summary judgment. Instead, the moving defendants have submitted the affirmation of Dr. Stephen Gorfine, M.D. Counsel for defendants sets forth in the reply at page 6 that Dr. Gorfine can be cross-examined as a witness at trial "should he be called as a witness." Counsel further states it is not known if he will be called as a witness. Even if all the exhibits were found to be in admissible form, it is determined that Dr. Gorfine's affirmation is insufficient as a matter of law to entitle the moving defendants to an order granting summary judgment and dismissing the complaint as there are outstanding issues of fact which preclude the same.

In reviewing Dr. Gorfine's affirmation, it is determined that the affirmation addresses only some of the departures from good and accepted standards of medical care alleged by plaintiffs. Dr. Gorfine's opinions are general and unsupported conclusory statements which leave many factual issues unanswered, especially with regard to the rectovaginal fistula. The elements of causation and whether defendants failed to properly and timely diagnose and treat the rectovaginal fistula are factual issues left unaddressed by Dr. Gorfine. Dr. Gorfine, by way of his affirmation, merely attempts to eliminate only one possible departure concerning the fistula by associating the departure solely with the use of a stapler during the December 4, 2002 and March 12, 2003 surgeries and stating the location of the staples did not cause the fistula. However, on July 21, 2003, when Dr. Marvin L. Corman, M.D. performed a transcoccygeal excision of a rectovaginal fistula and coccygectomy, he found a 3 cm hole between the anterior rectal and the posterior vaginal wall and noted the hole to be surrounded by staples.

The uncertified copies of the operative reports do not indicate the exact placement of the staples during either the December 2002 or March 2003 surgeries. The March 12, 2003 operative report by Dr. Kota (defendants' Exhibit J, p.2) clearly indicates a distal stapler was inserted through plaintiff's anus to staple the bowel. Pathology reports relative to the surgery performed by Dr. Corman have not been provided.

Dr. Gorfine has failed to address the other alleged departures from good and accepted standards of medical care concerning the alleged failure of defendants to timely diagnosis and treat the rectovaginal fistula. Dr. Kota, in his deposition at p. 147, stated that on June 18, 2003 he was unsure whether the recto-vaginal fistula was present before the second surgery. At p. 166, he states that if plaintiff had the fistula before, he would not have done the second operation. His attorney would not let

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him respond to the question, "What would you have done instead?" There are issues of fact concerning the dissection of the pelvic mass from the vaginal wall and the top of the vagina at the apex of the cuff by defendants and the placement of the staples.

Accordingly, factual issues have been raised in the affirmations submitted by Dr. Gorfine and Dr. Corman concerning causation, actual location and placement of the staples and standards of care in the diagnosis and treatment rendered to plaintiff by the moving defendants. Therefore, the moving defendants have failed to demonstrate entitlement to an order granting summary judgment as they have failed to tender sufficient evidence to eliminate these material issues of fact.

Accordingly, the motion by defendants Kitti Loychusuk, M.D., Ravindra Kumar Kota, M.D. and CareMax Surgical, P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint against them is denied as a matter of law.

Dated: 3/12/07

Emily Pines  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION