

**Ferguson v Capella**

2007 NY Slip Op 30781(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0016842/2004

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 10/20/06  
ADJ. DATE 12/8/06  
Mot. Seq. # 001 - MD

-----X  
CARLINE FERGUSON and MARK FERGUSON, :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 RAFAEL F. CAPELLA, M.D. and RAFAEL F. :  
 CAPELLA, M.D., F.A.C.S., P.C., :  
 :  
 Defendants. :  
-----X

SANOCKI, NEWMAN & TURRET, LLP  
Attorneys for Plaintiffs  
225 Broadway, 8<sup>th</sup> Floor  
New York, New York 10007  
  
HEIDELL, PITTONI, MURPHY & BACH  
Attorneys for Defendant  
99 Park Avenue  
New York, New York 10016

Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 19 - 37; Replying Affidavits and supporting papers 38 - 40; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor is denied.

This is a medical malpractice action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Carline Ferguson as a result of the negligence of defendant Rafael F. Capella, M.D. (Dr. Capella) in, among other things, improperly performing unnecessary distal gastric bypass bariatric surgery on July 2, 2002 at Hackensack University Medical Center. Plaintiffs emphasize that said surgery should not have occurred inasmuch as plaintiff was no longer morbidly obese and had a history of post-surgical complications since the beginning of her bariatric treatment with Dr. Capella in 1990 in an effort to lose weight.

Prior to the subject surgery, plaintiff had undergone other surgeries performed by Dr. Capella: a proximal gastric bypass surgery (a Vertical Banded Gastroplasty-Roux-en-Y-Gastric By-Pass) on July 26, 1990 when she was 31 years old, 5 feet, 4 inches tall and weighed 234 pounds; a revision of said surgery on April 14, 1992, and a second revision on October 20, 1992. In January 1992, plaintiff had "tummy tuck" (panniculectomy) and breast reduction procedures performed by other physicians. Between November 1992 through February 2001, plaintiff was not evaluated at Dr. Capella's office. During said interim, in 1998 and 1999 plaintiff was diagnosed with breast cancer and received treatment including surgery and in 2000 she suffered an intestinal blockage.

When plaintiff returned to Dr. Capella's office in May 2001, she weighed 158 pounds and had

complaints of joint pain while walking, chronic fatigue and difficulty sleeping and reported to Dr. Capella that she had undergone breast cancer surgery, had suffered an intestinal blockage in 2000, and had gone to see another bariatric surgeon. At her next office visit in September 2001, plaintiff weighed 188 pounds. In the following visit in November 2001 plaintiff weighed 206 pounds and Dr. Capella recommended the malabsorption surgical procedure of a distal gastric bypass.

Plaintiff underwent the subject procedure in July 2002 and was seen by Dr. Capella at follow-up office visits on July 23, 2002 and August 23, 2002, at which time she weighed 196 pounds and had complaints of frequent diarrhea. Plaintiff did not return to Dr. Capella's office until June 2003 and during said interim plaintiff had suffered severe nutritional problems resulting in, among other things, the loss of her hair and teeth. By October 23, 2003 when plaintiff underwent revision surgery to reverse the surgery to a proximal gastric bypass and repair an incisional hernia and scar revision, again performed by Dr. Capella, plaintiff's weight had dropped to 135 pounds and attempts at parenteral hyperalimentation had failed and her central and PIC line had been infected on several occasions.

Plaintiffs allege that Dr. Capella's negligence with respect to the surgery on July 2, 2002 resulted in plaintiff suffering from post-surgical complications, malnutrition and hypoalbuminemia<sup>1</sup>, and having to undergo revision surgery and repair of incisional hernia and scar revision in October 2003. The complaint alleges a first cause of action for medical malpractice based on negligence; a second cause of action for medical malpractice based on lack of informed consent; and a derivative cause of action on behalf of plaintiff's spouse, plaintiff Mark Ferguson, for loss of services. The Court's computer records indicate that the note of issue in this action was filed on June 1, 2006.

Defendants now move for summary judgment dismissing the complaint in its entirety on the grounds that Dr. Capella believed plaintiff to be a candidate for distal gastric bypass surgery based on the information plaintiff provided him concerning her rapid weight gain within a few months, that Dr. Capella explained the procedure in detail as well as the potential for nutritional problems and the need for close control after the procedure, and that plaintiff executed detailed consent forms prior to the procedure. In addition, defendants assert that the surgery had to subsequently be reversed in October 2003 because plaintiff failed to follow-up with Dr. Capella as directed and was doing poorly. Defendants add that prior to the revision surgery, plaintiff signed a consent form and tolerated the procedure well and was discharged on November 3, 2003. In support of the motion, defendants submit Dr. Capella's affidavit dated September 20, 2006; the summons and complaint; the answer; plaintiffs' bill of particulars; plaintiff's treatment records with Dr. Capella; plaintiff's records for hospital admissions and treatment with other medical providers; and plaintiff's records of admission to Hackensack University Medical Center.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant hospital or physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To rebut a prima facie showing by the defendant hospital or physician, a plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or

---

<sup>1</sup>Hypoalbuminemia is defined as an abnormally low concentration of albumin, a type of simple protein, in the blood (Stedman's Medical Dictionary 41, 858 [27<sup>th</sup> ed 2000]).

departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the patient (*see, Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001] [citations omitted]; *see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

Here, the evidence adduced by defendants reveals a tragic series of unsuccessful attempts over a decade by plaintiff to lose weight through elective bariatric surgery. Plaintiff's deposition testimony reveals extreme concern about being overweight and numerous attempts at weight loss through diets and other methods prior to finding defendants' advertisement in a magazine and her first visit in 1990. Plaintiff's deposition testimony also reveals that said concern about being overweight continued throughout the years that she sought treatment from Dr. Capella as well as consulted with other bariatric surgeons and physicians, despite the complications and side effects of the bariatric surgeries and her other health problems. Plaintiff testified that following her cancer surgery she became addicted to pain medication and that she was being treated by a psychiatrist in 2001, although gaining weight was not a topic that she normally discussed with the psychiatrist.

Plaintiff stated that she returned to see Dr. Capella in 2001 after her cancer surgery to tell him that she was gaining weight again, not with the intention of undergoing more surgery or to obtain treatment, but to find out why she was gaining weight and why she was able to eat more than she could previously. She recalled that Dr. Capella told her that he was going to perform the most severe surgery on her and to follow-up with him. Plaintiff testified that she did not know of any health risks if she chose not to have surgery and stated that she agreed to this one last surgery because Dr. Capella told her that she needed it to lose the weight. Plaintiff also testified that prior to agreeing to undergo the 2002 surgery, she consulted another bariatric surgeon who told her that he would not perform the surgery and that she should return to Dr. Capella because he had performed all of her prior surgeries.

At her deposition, plaintiff identified her signature on a consent form for the July 2002 surgery and acknowledged that one of the listed risks was malabsorption but did not remember reading the consent form nor did she remember Dr. Capella explaining the risks of the surgery to her. In addition, plaintiff did not remember that she only visited him in July and then in August of 2002 but remembered that Dr. Capella told her during her last visit that he did not need to see her anymore.

According to plaintiff, she started getting sick in March 2003 when her leg swelled; she felt weak; she could not walk; she was falling; she was getting dark patches on her face; she became incontinent; she was vomiting; she had stomach pain; and she lost her hair and teeth. A week after experiencing these symptoms, plaintiff went to an emergency room and was diagnosed with malnutrition and malabsorption and low calcium levels. Plaintiff stated that she was in and out of the hospital for many months and that in September 2003 her physician could not determine what was wrong with her so he contacted Dr. Capella who recommended her transfer to Hackensack University Medical Center. Plaintiff remained in a nursing home for about a month and Dr. Capella told her that he needed to reverse the prior surgery because plaintiff was dying.

During his deposition, Dr. Capella explained that distal gastric bypass surgery, moving the previous connection down the bowel to produce a certain degree of malabsorption is an operation that is performed on patients whose prior surgeries have been unsuccessful. According to Dr. Capella, the expected result of plaintiff's prior surgeries was that she would lose 50 percent of the excess weight. Dr. Capella recalled that plaintiff was very eager to have something done and was very depressed that she was gaining weight. He did not think that he recommended the malabsorption procedure but stated to the effect that it was the only solution left.

In his affidavit, Dr. Capella opined to a reasonable degree of medical certainty that the performance of the distal gastric bypass procedure was medically indicated to decrease the level of absorption to help plaintiff lose weight and to improve plaintiff's depressive state caused by the weight gain and her prior cancer operations. Dr. Capella noted that plaintiff had gained a substantial amount of weight in the years preceding the July 2002 surgery and that as of November 7, 2001, plaintiff weighed 206 pounds, had gained 18 pounds in two months and 48 pounds in six months, and continued to gain weight up until the July 2002 surgery. According to Dr. Capella, plaintiff's failure to return to his office in October 2002 and failure to follow the post-surgical treatment regimen, as Dr. Capella had instructed to be imperative, resulted in plaintiff's state of malnutrition necessitating the reversal procedure in 2003.

In addition, Dr. Capella opined to a reasonable degree of medical certainty that the fact that plaintiff had undergone several prior surgeries with Dr. Capella, the last one occurring almost ten years earlier, did not necessarily lead to the conclusion that the July 2002 surgery was contraindicated. He added that the fact that plaintiff developed complications from the initial surgery in 1990 which caused plaintiff to have additional surgeries in 1992 had no bearing on the decision to perform the 2002 surgery.

In response to plaintiff's allegations that the July 2002 procedure was contraindicated since plaintiff's Body Mass Index (BMI) results were not high enough to characterize her as morbidly obese, Dr. Capella asserted that in 2002 it was not the standard of care to rely solely on a BMI to make the determination of whether a patient required further bariatric surgery where a patient had already undergone bariatric surgery that had failed. Dr. Capella further asserted that he considered not only plaintiff's BMI and weight gain from the failed first surgery but also that plaintiff was experiencing problems due to her weight including, joint pain while walking, chronic fatigue and difficulty sleeping and opined that based on said factors he appropriately exercised his clinical judgment in scheduling plaintiff for a distal bypass procedure. He also opined, in response to plaintiff's allegations, that good and accepted practice and the standard of care at the time did not require him to arrange for a psychiatric evaluation of plaintiff prior to the 2002 surgery particularly since plaintiff was not manifesting psychiatric problems that warranted such a consultation.

Regarding the lack of informed consent claims, Dr. Capella pointed to two consent forms that plaintiff executed prior to the July 2002 surgery both of which advised of all the potential complications of the surgery including the development of malnutrition and the need for additional surgery. He added that his office chart indicated that on February 14, 2002 he discussed in detail with plaintiff the proposed surgery, the expected benefits, the potential side effects and the need for plaintiff to be in "close control" after the procedure.

Here, although Dr. Capella submitted a detailed affidavit, his conclusions that plaintiff was a proper candidate for the malabsorption procedure and that a psychiatric evaluation of plaintiff was not warranted because plaintiff was not manifesting any psychiatric problems are not adequately explained nor supported by his own submissions on the motion. Dr. Capella's opinion that plaintiff was a proper candidate for the

malabsorption procedure because she had not lost 50 percent of the excess weight lacks sufficient explanation given that the record reveals that plaintiff's weight fluctuated up and down greatly during the years of his treatment, falling to 120 pounds in July 1996 and then down to 116 pounds in January 1997, as well as the interim years and most particularly and dramatically in the year prior to the July 2002 surgery. In addition, although a patient information sheet from June 14, 1990 indicates plaintiff's ideal weight to be 131 pounds, Dr. Capella does not explain in either his affidavit or his deposition testimony exactly what he had determined plaintiff's ideal weight goal to be and whether it was expected that plaintiff would maintain a certain weight or weight range after the 1990 and 1992 surgeries. Moreover, Dr. Capella was admittedly aware prior to the procedure that plaintiff was psychologically depressed from the cancer surgeries as well as the subsequent rapid weight gain but did not consider the depression a psychiatric problem warranting a consult. Thus, defendants failed to establish their prima facie entitlement to summary judgment by failing to demonstrate that Dr. Capella followed accepted medical practice in suggesting and performing the malabsorption procedure on plaintiff whom he was aware was gaining weight quite rapidly despite his non-surgical suggestions, was depressed due to her weight gain and cancer operations, and who had already undergone numerous surgical procedures in a relatively short period of time (*see, Schwartz v Speaker*, 35 AD3d 583, 825 NYS2d 646 [2d Dept 2006]; *Johnson v Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]). The submissions also raise issues of fact concerning informed consent (*see, Santiago v Filstein*, 35 AD3d 184, 826 NYS2d 216 [1st Dept 2006]).

In any event, plaintiffs raised issues of fact through their own submissions (*see, Ortaglia v Scanlon*, 35 AD3d 421, 825 NYS2d 256 [2d Dept 2006]). In opposition to the motion, plaintiffs contend that Dr. Capella departed from good and accepted standards of care and treatment in failing to obtain a psychological consult prior to plaintiff's surgery on July 2, 2002 given that there may have been underlying emotional problems for her weight gain and in performing the distal gastric bypass procedure when plaintiff was no longer morbidly obese. In support of their opposition, plaintiffs submit, among other things, a redacted<sup>2</sup> affirmation of plaintiff's expert physician board certified in general and thoracic surgery; plaintiff's treatment records with Dr. Capella; portions of the parties' deposition transcripts; and a questionnaire used by Dr. Capella in June 1990 with respect to her upcoming gastric bypass surgery to determine if plaintiff understood the nature and risks of the surgery.

Plaintiff's expert opines by affirmation that plaintiff was not a candidate for the distal gastric bypass procedure performed by Dr. Capella on July 2, 2002 because she lacked co-morbid conditions together with her BMI between 35 and 40, such conditions including severe sleep apnea, Pickwickian syndrome, cardiomyopathy, severe diabetes mellitus or physical problems interfering with lifestyle. Plaintiff's expert notes that although plaintiff had a sudden weight gain between May 2001 and November 2001, prior to that period plaintiff's weight had been relatively stable. According to plaintiff's expert, such circumstances mandated circumspect analysis regarding what was occurring with plaintiff's physical and emotional condition that caused or contributed to this sudden weight gain. Plaintiff's expert opines to a reasonable degree of medical certainty that Dr. Capella departed from good and accepted standards of care by failing to obtain a psychiatric/psychological consult prior to the July 2, 2002 surgery, particularly in light of his knowledge of plaintiff's two recent mastectomy procedures and reconstruction, the numerous psychiatric medications that

---

<sup>2</sup>Plaintiffs may submit an unidentified expert's affidavit provided that the Court may require submission of an unredacted copy for in camera inspection (*see, Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 998]; *McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]).

she was taking and plaintiff's rapid weight gain. Plaintiff's expert adds that it is well known that the medication Zyprexa, which plaintiff was taking, can cause substantial weight gain. Plaintiff's expert further opines to a reasonable degree of medical certainty that had Dr. Capella obtained a psychiatric consult, it would have been determined that she was not a candidate for a distal gastric bypass procedure in July 2002 and therefore she would not have been cleared for surgery.

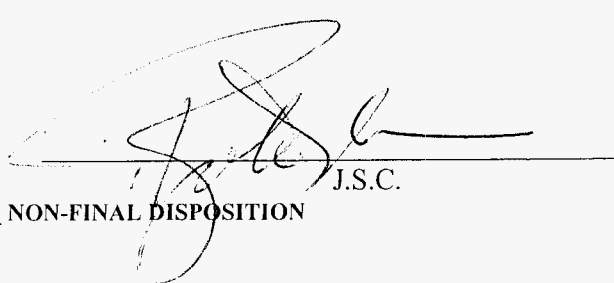
Plaintiff's expert points out that the record is devoid of evidence that plaintiff reviewed and filled out a questionnaire as she did in June 1990 to ensure that plaintiff was fully aware of the risks, complications and alternatives to the bypass procedure in 2002. The expert opines that had Dr. Capella provided plaintiff with sufficient information concerning the risks and complications of the distal bypass procedure, she would have been in a position to make an informed decision and would have avoided the injuries that she ultimately suffered. Plaintiff's expert concludes by opining with a reasonable degree of medical certainty that as a direct and proximate result of the aforementioned departures from good and accepted medical practice by Dr. Capella, plaintiff sustained significant injury including malnutrition, hyperproteinemia, hypoalbuminemia and was required to undergo two subsequent abdominal surgeries and prolonged hospitalizations and physical sequelae.

Here, the expert affirmation submitted by plaintiffs demonstrates the existence of triable issues of fact as to, *inter alia*, whether plaintiff had given her informed consent and whether Dr. Capella departed from good and accepted medical practice by failing to examine the reason for plaintiff's sudden and extreme weight gain when she returned to see him in 2001 and by failing to obtain a psychiatric/psychological consult to determine whether plaintiff was a proper candidate for the extreme malabsorption procedure and whether that departure was a substantial factor in causing injury to the plaintiff (*see, Ortaglia v Scanlon, supra; Taylor v Nyack Hosp.*, 18 AD3d 537, 795 NYS2d 317 [2d Dept 2005]; *Blonar v Dickinson*, 296 AD2d 431, 745 NYS2d 65 [2d Dept 2002]; *see also, Beck v Northside Med.*, 25 AD3d 631, 810 NYS2d 202 [2d Dept 2006]).

In their reply, defendants contend that plaintiffs set forth allegations that they did not plead in their bill of particulars particularly, that Dr. Capella failed to obtain proper psychiatric or psychological consults and that Dr. Capella failed to confirm that plaintiff's weight gain was not caused by pharmaceutical influences and underlying psychological pathology. "The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial" (*Twiddy v Standard Mar. Transp. Servs.*, 162 AD2d 264, 265, 556 NYS2d 622 [1st Dept 1990]). It need not set forth a matter that is evidentiary in nature, which is more appropriately obtained through depositions and expert disclosure (*see, Felock v Albany Med. Ctr. Hosp.*, 258 AD2d 772, 773, 685 NYS2d 844 [3d Dept 1999]). Both allegations relate to the claim in the bill of particulars that Dr. Capella ignored plaintiff's signs, symptoms and complaints and that Dr. Capella failed to take the standard and accepted precautions to avoid and/or prevent plaintiff's injuries. In any event, Dr. Capella had been questioned at his deposition concerning the claim of failure to obtain a psychiatric consult and addressed said allegations in his affidavit on the motion such that defendants cannot claim surprise as to said claim. Defendants' remaining contentions lack merit.

Accordingly, the instant motion is denied.

Dated:                     MAR 27 2007                    

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION