

<b>Kahn v Fishbane-Mayer</b>
2007 NY Slip Op 33064(U)
September 18, 2007
Supreme Court, New York County
Docket Number: 0101879/2005
Judge: Sheila Abdus-Salaam
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Sandra Kahn

INDEX NO. 101879/05

MOTION DATE 5/17/07

MOTION SEQ. NO. 001

- v -

Dr. Jill Fishbane-Mayer, Dr. J. Rahman  
Dr. Gandhi and Mt. Sinai Hospital

MOTION CAL. NO. \_\_\_\_\_

**FILED**

SEP 28 2007

NEW YORK COUNTY CLERKS OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendants Dr. Jill Fishbane-Mayer, Jamal Rahaman, M.D. s/h/a Dr. J. Rahaman and The Mount Sinai Hospital s/h/a Mt. Sinai Hospital for summary judgment is granted to the extent that the complaint is dismissed against defendants Dr. J. Rahaman and Mount Sinal Hospital. The motion by defendant Manisha Gandhi, M.D. in the companion case bearing Index No. 102573/06 for summary judgment dismissing the complaint is also granted.

This medical malpractice action concerns a hysteroscopy procedure that was performed on plaintiff Sandra Kahn on September 8, 2003 by defendant Dr. Fishbane-Mayer, a private attending gynecologist, at Mount Sinal Hospital. The record shows that Dr. Gandhi was a resident who assisted Dr. Fishbane-Mayer and that Dr. Rahaman, who was on staff at the hospital, came to the operating room at the request of Dr. Fishbane-Mayer to

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

consult with Dr. Fishbane-Mayer during the procedure. As was explained by defendant Dr. Fishbane-Mayer in her deposition, during the hysteroscopy, she identified fatty tissue and because fatty tissue is not typically found within the uterus, there was a likelihood that the uterus had been perforated and that the tissue had been retrieved outside the uterus. She converted the procedure to an exploratory laparoscopy, and she requested that Dr. Rahaman, a gynecologic oncologist, visualize the monitor that was displaying the images during the laparoscopy. Both physicians concluded that there was no indication of a perforation and there was no further surgical intervention at that time.

A hysterectomy that was performed by non-party Dr. Richard Barakat on October 21, 2003 at Memorial Sloan Kettering Medical Center revealed that the right ureter was plastered to the pelvic side wall. A urologist was called into the operating room to perform a right ureteral reimplantation.

Plaintiff alleges that the injury to her right ureter occurred during the September 8, 2003 procedure performed by Dr. Fishbane-Mayer as a result of a perforation of her uterus. Plaintiff asserts that while perforation of the uterus is a known complication of a hysteroscopy, defendants were negligent in failing to take appropriate steps to evaluate the perforation and failing to perform certain intra-operative procedures on the ureter. Plaintiff claims that as a result of this negligence, she had pain and suffering, her right ureter atrophied and required implantation, and she suffers from loss of kidney function, Incontinence and other Injuries.

The motion is denied with respect to Dr. Fishbane-Mayer. Regarding the first cause of action sounding in negligence, the experts' submissions raise triable issues including whether this defendant departed by failing to clear the ureter by passing a stent intra-operatively; by failing to further evaluate the possibility of the injury by ordering a post-operative CT scan or

intravenous pyelogram which would have disclosed the ureteral injury prior to discharge of the patient and by failing to repair the injury in a timely manner. As for the second cause of action sounding in lack of informed consent, Dr. Fishbane-Mayer has failed to make a prima facie showing that she should be granted summary judgment. The consent form signed by plaintiff indicates in general terms that plaintiff was informed of the benefits and complications of the procedure, but movant has not pointed to any deposition testimony or medical records establishing that plaintiff was adequately informed and defendant's expert has not even addressed this issue (compare Lynn G. v. Hugo, 96 NY2d 306 [2001]).

The motion is granted with respect to Dr. Gandhi, Dr. Rahaman and Mount Sinai Hospital. Dr. Gandhi testified that she did not recall the specifics of her role during the procedure, but that she was a gynecology resident at the hospital and that any assistance she would have rendered would be "Dr. Fishbane-Mayer's call" (Gandhi EBT, p. 24). There is no evidence that Dr. Gandhi exercised any independent judgment or proof that Dr. Fishbane-Mayer's directions so greatly deviated from normal practice that Dr. Gandhi had a duty to intervene (see Soto v. Andaz, 8 AD3d 470 [2004]; Filippone v. St. Vincent's Hosp. & Med. Ctr., 253 AD2d 616 [1998]). Accordingly, summary judgment is appropriate as to Dr. Gandhi.

Dr. Rahaman has also shown that he is entitled to summary judgment. He was not plaintiff's treating physician, but consulted with Dr. Fishbane-Mayer at that doctor's request. The issue of whether, under the circumstances, the consulting physician owed a duty to the patient is a question of law (Lipton v. Kaye, 214 AD2d 319 [1995]). The record here indicates that Dr. Fishbane-Mayer asked Dr. Rahaman to view the monitor during the laparoscopy and that he concurred with her conclusion that there was no evidence of a uterine perforation. Dr. Rahaman did not participate in

the surgery. He was essentially a second set of eyes during the laparoscopy. Dr. Fishbane-Mayer exercised her own independent judgment, as is evident by the fact that she did not order a post-operative CT scan as was suggested by Dr. Rahaman and she did not subordinate her judgment to that of Dr. Rahaman, or rely on any special expertise of Dr. Rahaman in concluding that there was no uterine perforation<sup>1</sup> (see generally Gilinsky v. Indelicato, D.C., 894 F.Supp 86 [E.D.N.Y. 1995]). As was observed by the First Department in Sawh v. Schoen (215 AD2d 291 [1995]):

Where, as here, the consulting physician is not involved in the treatment of the patient's condition, he can be said to have given at most an informal opinion to an associate regarding a case with which he otherwise had no connection (see, Ingber v. Kandler, 128 AD2d 591). In addressing the public policy advanced, it has been held that "[i]mposition of liability under these circumstances would not be prophylactic but instead counter-productive by stifling efforts at improving medical knowledge" (Rainer v. Grossman, 31 Cal App 3d 539, 544, 107 Cal Rptr 469, 472).

Id. at 294.

Under these circumstances, I find that Dr. Rahaman did not owe a duty to the plaintiff, who was not his patient.

Based upon the foregoing, it is

ORDERED that the Clerk enter judgment dismissing the complaint against defendants Dr. J. Rahaman, Dr. Gandhi and Mt. Sinai Hospital and severing the action against defendant Dr. Jill Fishbane-Mayer; and it is further

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<sup>1</sup>Dr. Rahaman did offer his opinion that a fibroid observed during the procedure was sufficiently "suspicious" to warrant a hysterectomy at a later date. However, the hysterectomy is not at issue in this action.

ORDERED that the Clerk enter judgment dismissing the complaint filed under index number 102573/06.

Dated: 9/18/07

SA-S

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
SEP 28 2007  
NEW YORK  
COUNTY CLERK'S OFFICE