

**Feliz v Clark**

2009 NY Slip Op 32530(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 111866/05

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 29

LUZ FELIZ and OSIRIS RODRIGUEZ,

INDEX NO. 111866/05

Plaintiffs,

- v -

Motion Sequence No.: 2-4

JOHN F. CLARK, M.D., MEDICAL AND  
HEALTH RESEARCH ASSOCIATION OF  
NEW YORK and THE PRESBYTERIAN  
HOSPITAL IN THE CITY OF NEW YORK  
AT COLUMBIA-PRESBYTERIAN MEDICAL  
CENTER,

Defendants.

**FILED**  
OCT 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

004

The following papers, 1- 76, were read on this motion by defendant Medical and Health Research Association of New York City Inc., d/b/a MIC - Women's Health Services for summary judgment dismissing the complaint; cross-motion by plaintiffs for summary judgment against defendant Medical and Health Research Association of New York City Inc. d/b/a MIC - Women's Health Services; a separate motion by defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center for summary judgment dismissing the complaint; cross-motion by plaintiffs for summary judgment against defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center; a separate motion by defendant John F. Clark, M.D. for summary judgment dismissing the complaint; cross-motion by plaintiffs for summary judgment against defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center.

Motion Sequence Number 2:

Papers Numbered

Notice of Motion - Affidavits - Exhibits  
Notice of Cross-Motion - Affidavit in Support of  
Cross-motion/Opposition to Motion - Exhibits  
Affirmation in Reply/Opposition to Cross-Motion  
- Exhibits  
Replying Affirmation in Further Support of  
Cross-Motion

1-11  
12-24  
26-26  
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Motion Sequence Number 3:

Notice of Motion - Affidavits - Exhibits  
 Notice of Cross-Motion - Affidavit in Support of  
 Cross-motion/Opposition to Motion - Exhibits  
 Affirmation in Reply/Opposition to Cross-Motion  
 - Exhibits  
 Replying Affirmation in Further Support of  
 Cross-Motion

Papers Numbered

28-34  
35-47  
48-51  
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Motion Sequence Number 4:

Notice of Motion - Affidavits - Exhibits  
 Notice of Cross-Motion - Affidavit in Support of  
 Cross-motion/Opposition to Motion - Exhibits  
 Affirmation in Reply/Opposition to Cross-Motion  
 - Exhibits  
 Replying Affirmation in Further Support of  
 Cross-Motion - Exhibits

Papers Numbered

53-59  
60-72  
73-74  
75-76

Cross-Motion:  Yes  No

Plaintiffs commenced the instant action against the above captioned defendants with the filing of a summons and complaint on August 24, 2005. Plaintiffs allege that while undergoing an elective caesarian section on June 29, 2004, defendant Dr. John Clark negligently performed a bilateral tubal ligation rendering Luz Feliz sterile. The subject surgery was performed at New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center (hereinafter "NYPH"). Defendant Medical and Health Research Association of New York City Inc., d/b/a MIC - Women's Health Services (hereinafter "MIC - Women's Health Services") provided pre-natal care to Ms. Feliz. It is noted that although Dr. Clark was an employee of NYPH, it appears that part of his duties included working at the MIC - Women's Health Services clinic and deliver the MIC - Women's Health Services patients. The complaint asserts three separate causes of action against defendants, which include a cause of action for medical malpractice, a cause of action for lack of informed consent, as well as a derivative cause of action asserted by Ms. Feliz's husband, Osiris Rodriguez. Discovery has been completed and a note of Issue/ certificate of readiness has been filed. The defendants, respectively, move for summary judgement dismissing the complaint, arguing that plaintiffs failed to state a cause of action for medical malpractice as this action sounds in battery. Defendants further argue that plaintiffs battery action is time barred as it is subject to a one year statute of limitations, and was brought more than one year after the alleged battery. Plaintiffs presently cross move against all defendants for summary judgment.

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991]; quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "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 demonstrate the absence of any material issues

of fact.” Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, *prima facie*, its entitlement to judgment, as a matter of law, requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a *prima facie* showing of entitlement to judgment, as a matter of law, has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

The defendants move for summary judgement dismissing the complaint, arguing that the plaintiffs’ complaint must be dismissed because this action is one for battery, rather than one for medical malpractice, and is barred by the statute of limitations. Defendants contend that the evidence demonstrates that Ms. Feliz did not want a bilateral tubal ligation under any circumstances, and never consented to such procedure. According to defendant, the Courts of this state have repeatedly held that where a physician performs a medical procedure on a patient without consent, the action is one for battery and not medical malpractice. Defendants rely on Messina v. Matarasso, 284 AD2d 32 [1st Dept. 2001], wherein plaintiff alleged that during a facial surgery performed under general anesthesia, a physician performed a procedure on her breasts, without her consent. The trial Court held that plaintiff’s action was one for battery, and dismissed the case as time-barred, concluding that the one-year statute of limitations for battery applied. The Appellate Division, First Department, affirmed the dismissal of plaintiff’s action, holding that a situation where a procedure is completely unauthorized is distinguishable from those situations where patients allege that they were not fully advised of the risks and consequences of a procedure. According to the First Department, the former situation involves allegations of intentional conduct that cannot simply be construed as a deviation from reasonable care, and sounds in battery.

Defendants also rely on Cross v. Colen, 6 AD3d 306 [1st Dept. 2004], where a physician advised plaintiff therein that her condition could be treated by either of two surgical procedures, and recommended one of the two choices. Despite the physician’s recommendation, the plaintiff chose the other procedure. Contrary to the plaintiff’s instructions, the surgeon performed the surgical procedure that he recommended. The Court held that the plaintiff’s claim relating to consent was one for lack of consent<sup>1</sup>, as opposed to lack of informed consent, and sounded in battery. As a result, the plaintiff’s action, as it related to lack of consent, was time-barred, under the one-year statute of limitations for battery. Defendants further cite to Wiesenthal v. Weinberg, 17 AD3d 270 [1st Dept. 2005], where the Court found that a cause of action based on a physician’s implant of a silicone gel prosthesis into plaintiff’s breast against her wishes was an action for battery.

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<sup>1</sup> It is noted that in Cross v. Colen, *supra*, plaintiff’s claim relating to consent was an unpleaded cause of action discerned by defendant from the allegations contained in plaintiff’s bill of particulars, as well plaintiff’s deposition testimony. The decision relates only to defendant’s motion to dismiss any claim relating to consent, on the grounds that it sounded in battery, and was time-barred. Plaintiff therein also asserted a cause of action for medical malpractice, and cause of action for loss of consortium, neither of which were addressed by the Court in the decision.

In opposition to the instant motion plaintiffs first argue that defendants' negligent conduct does not constitute battery. Plaintiffs contend that defendants have failed to demonstrate that Dr. Clark, or the other defendants herein, intended to cause a bodily contact that a reasonable person would find offensive, and, thus, their actions do not amount to battery. Plaintiffs point out that Dr. Clark was confused about whether he was to perform the bilateral tubal ligation during Ms. Feliz's cesarian section, and was not aware of his error until after the surgery. Ms. Feliz testified that she never had any discussions with Dr. Clark, or anybody else, with respect to the performance of the tubal ligation. Nevertheless, Dr. Clark was under the impression he was to perform the tubal ligation under certain circumstances.<sup>2</sup> Plaintiffs note that Ms. Feliz is Spanish speaking and, according to her testimony, had all conversations with Dr. Clark through an interpreter. Plaintiffs further note that although Ms. Feliz signed a Spanish language preprinted consent form issued by NYPH authorizing the performance of a "Repeat Cesarian Section With BTL [bilateral tubal ligation]," she did not recognize the form at the time of her deposition, and was unable to read what type of procedure was to be performed because it was written by Dr. Clark in English.

Plaintiffs further argue that defendants were negligent in failing to follow Federal, State, and City requirements relating to the sterilization of a patient, as well as rules and regulations of NYPH, which aim to insure that these laws are followed. It is required that an individual undergoing sterilization complete a consent form, at least thirty (30) days prior to the sterilization procedure. Moreover, it is further required that a patient reaffirm the consent form upon admission for the procedure. According to plaintiffs, the failure on the part of defendants in complying with these pre-sterilization procedures is actionable negligence that is not time-barred under the one-year statute of limitations for battery.

Based upon the evidence, it appears that Ms. Feliz did not provide any consent with respect to the performance of the bilateral tubal ligation performed by Dr. Clark, and, thus, the essence of plaintiffs' cause of action relating to consent is for lack of consent, not lack of informed consent. As a result, such cause of action sounds in battery, and is time-barred as it was not commenced within the one-year statute of limitations. See Messina v. Matarasso, supra; Cross v. Colen, supra. Although plaintiffs argue that the evidence demonstrates that Dr. Clark was confused about whether he was to perform the bilateral tubal ligation, and, therefore, his performance of same was not intentional, the case law is to the contrary. Unauthorized contact is deemed offensive, and when such contact is intentional, it constitutes a battery. See Messina v. Matarasso, supra. The intent that must be demonstrated is the intent to make the contact, not the intent to cause harm. See Id. It is obvious that Dr. Clark did not intend to cause harm to Ms. Feliz by sterilizing her against her wishes, however, he intentionally performed the sterilization surgery. Even though he was mistaken in believing that Ms. Feliz consented to the surgery, Dr. Clark intended to sterilize Ms. Feliz by performing a bilateral tubal ligation. Accordingly, this Court finds that the unauthorized

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<sup>2</sup> Dr. Clark was not only mistaken in his belief that Ms. Feliz wanted a bilateral tubal ligation, he was also unsure under what circumstances it was to be performed. It appears that despite the fact that Ms. Feliz had two daughters at the time of the subject incident, Dr. Clark was under the impression that she had two sons, and that he was to perform the bilateral tubal ligation only in the event that Ms. Feliz gave birth to another son. When Dr. Clark performed the bilateral tubal ligation after Ms. Feliz gave birth to a girl, he was under the impression that he had incorrectly performed the surgery, and noted same in the operative report.

bilateral tubal ligation performed by Dr. Clark on Ms. Feliz constituted a battery.

Notwithstanding, the Court finds plaintiffs' medical malpractice cause of action timely, as is the derivative cause of action asserted by Ms. Feliz's husband, and denies summary judgment with respect to those causes of action. As plaintiffs point out, their cause of action for medical malpractice is not based solely on the actual performance of the unauthorized sterilization of Ms. Feliz. Plaintiffs alleged in the complaint that defendants were negligent on occasions prior to the performance of the unauthorized surgery. Such allegations were amplified in the bills of particulars, wherein plaintiffs allege that defendants were negligent, *inter alia*, in failing to implement and promulgate the necessary rules and safeguards to prevent the performance of such an unauthorized surgery, and failing to properly treat Ms. Feliz prior to the performance of the subject surgery. Additionally, in opposition to the defendants' instant motions, plaintiffs correctly argue that defendants failed to follow Federal, State, and City requirements relating to the sterilization of a patient, as well as rules and regulations of NYPH, which aim to insure that these procedures are followed. Such failures on the part of the defendants, according to plaintiffs, is evidence that defendants were negligent.

It is undeniable that the right to procreate is extremely important and is given great protection under the law. See Skinner v. Oklahoma, 316 US 535 [1942][“[m]arriage and procreation are fundamental to the very existence and survival of the race”]. To insure that an individual's ability to reproduce is not mistakenly tampered with, safeguards have been put in place, including the required completion of a Federal and State mandated consent form that is to be filled out by the individual undergoing sterilization, at least thirty (30) days prior to the scheduled procedure. Such form is also to be completed by the individual obtaining consent at the time consent is given, as well as the physician performing the procedure, wherein such physician sets forth that shortly before the sterilization procedure, information was provided with respect to the nature of the procedure, and alternatives to sterilization. Moreover, for all sterilizations performed in New York City, the sterilization consent form requires a witness certification, and also requires the individual undergoing the sterilization to reaffirm the consent form upon admission for the procedure. In addition to the aforementioned governmental safeguards, defendant NYPH has a section in its Hospital and Procedures Manual, entitled Sterilization, for the purpose of ensuring that its obstetrics/gynecological staff follows New York State and City laws regarding sterilization.

Based upon the evidence presented in opposition to defendants motion, it is clear that defendants, in advance of Ms. Feliz's surgery, did not abide by the requirements set forth above. Ms. Feliz never completed the required sterilization consent form, nor did she reaffirm her desire for sterilization, upon admission for the procedure. If any efforts were made on the part of defendants to determine that Ms. Feliz had completed the required form well in advance of the procedure, and that she was prepared to reaffirm its contents upon admission for such procedure, it would have certainly become apparent that Ms. Feliz did not wish to be sterilized, under any circumstances. Plaintiffs' medical malpractice cause of action, which is based upon the allegations that defendants were negligent, or departed from good and accepted standards of medical practice, in failing to comply with mandated pre-sterilization requirements, does not sound in battery, and, thus, is not time-barred. Additionally, the Court finds it important to note that defendants' failure in complying with the safeguards relating to sterilization consent transcends the mere failure of a physician to obtain informed consent of a patient with respect to the performance of a medical procedure. These requirements are not put in place to simply inform a patient as to the risk, benefits, and alternatives of a specific medical procedure. They

are put in place to insure that an individual is aware that sterilization is permanent, regardless of whether performed on a male by vasectomy or a female by tubal ligation, and that temporary methods of birth control are available. A multi-step process has been established to protect against the sterilization of an individual against his or her wishes, and such process was not followed by defendants herein.

Lastly, with respect to plaintiffs' cross motions for summary judgment as against the defendants, those motions are denied. It is well settled that to establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove that the defendant physician or medical treatment facility, through the acts or omissions of an employee, departed from good and accepted standards of medical practice, and that such departure was the proximate cause of plaintiff's injury. See, Johnson v. Jacobowitz, 65 AD3d 610 [2d Dept. 2009]; Flanagan v. Catskill Regional Medical Center, 65 AD3d 563 [2d dept. 2009]. A motion for summary judgment requires the submission of competent medical evidence, such as a physician's affidavit, attesting to the defendant's departure from accepted practice, and that such departure was a competent producing cause of the injury. Rebozo v. Wilen, 41 AD3d 457 [2d Dept. 2007]; Flanagan v. Catskill Regional Medical Center, *supra*. In support of plaintiffs' cross motions they only submit evidence demonstrating that defendants failed to abide by the procedures put in place to safeguard against unauthorized sterilization. Such failures on the part of the defendants, as argued by plaintiffs, may be used as some evidence of negligence. However, this alone is clearly not sufficient to establish that defendants are liable, as a matter of law.

Based on the foregoing, it is hereby

ORDERED that this motion by defendant Medical and Health Research Association of New York City Inc., d/b/a MIC - Women's Health Services for summary judgment dismissing the complaint is granted only to the extent that plaintiffs' cause of action for lack of informed consent is dismissed, and the remainder of such motion is denied; and it is further

ORDERED that this cross-motion by plaintiffs for summary judgment against defendant Medical and Health Research Association of New York City Inc. d/b/a MIC - Women's Health Services is denied; and it is further

ORDERED that this motion by defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center for summary judgment dismissing the complaint is granted only to the extent that plaintiffs' cause of action for lack of informed consent is dismissed, and the remainder of such motion is denied; and it is further

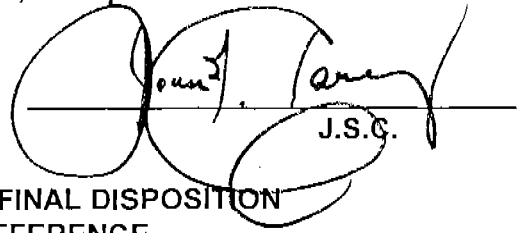
ORDERED that this cross-motion by plaintiffs for summary judgment against defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center is denied; and it is further

ORDERED that this motion by defendant John F. Clark, M.D. for summary judgment dismissing the complaint is granted only to the extent that plaintiffs' cause of action for lack of informed consent is dismissed, and the remainder of such motion is denied; and it is further

ORDERED that this cross-motion by plaintiffs for summary judgment against defendant New York Presbyterian Hospital s/h/a The Presbyterian Hospital in the City Of New York at Columbia-Presbyterian Medical Center.

ORDERED that counsel for all parties are to appear before the court on November 19, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a pre-trial conference.

Dated: 10/19/2009

  
J.S.C.

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