

Santin v Lem

2010 NY Slip Op 31346(U)

May 6, 2010

Sup Ct, NY County

Docket Number: 113254/05

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 113254/2005
SANTIN, ISABEL
 VS.
LEM, RICHARD M.D.
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 1/27/10
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

in this motion to/for _____

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

PAPERS NUMBERED
1-14
15-19
20-22

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
 MAY 14 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 5/6/10

JBL
J.S.C.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: LAS PART 6**

-----X
ISABEL SANTIN,

Plaintiff,

Index No. 113254/05

-against-

Decision and Order

RICHARD LEM, M.D., LENOX HILL HOSPITAL,
LENOX HILL ANESTHESIOLOGY, PLLC, AUGUSTO
LIZARAZO, M.D., KAVEN ALIZADETH, M.D.,
LONG ISLAND PLASTIC SURGICAL GROUP,
and RICHARD RIZZUTO, M.D.,

Defendants.

FILED
MAY 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
JOAN B. LOBIS, J.S.C.:

Defendants Augusto Lizarazo, M.D., Kaveh Alizadeh, M.D., s/h/a Kaven Alizadeh, M.D., and Long Island Plastic Surgical Group, P.C. s/h/a Long Island Plastic Surgical Group (the "Group"), move, pursuant to C.P.L.R. Rule 3212, for an order granting them summary judgment and dismissing the complaint as against them. Plaintiff Isabel Santin opposes the motion as to Dr. Alizadeh and the Group.¹ Plaintiff's opposition papers set forth that she has signed a stipulation of discontinuance as to Dr. Lizarazo, indicating that she wishes to voluntarily discontinue the action against him. This stipulation was not submitted to the court, but since Dr. Lizarazo has demonstrated his prima facie entitlement to summary judgment and plaintiff has not opposed as to him, that branch of the moving defendants' motion as pertains to Dr. Lizarazo is granted.

This action sounding in medical malpractice and lack of informed consent arises out of defendants' treatment of plaintiff related to a scheduled breast reconstruction surgery. Plaintiff

¹ A review of plaintiff's pleadings indicates that the Group is named in the action for its alleged vicarious liability for Dr. Alizadeh, and so for the purposes of this motion, Dr. Alizadeh and the Group will be considered the same entity.

first consulted Dr. Alizadeh, a plastic surgeon, on October 12, 2004, regarding breast reconstruction surgery. She had undergone a mastectomy approximately five years earlier, and she relayed to Dr. Alizadeh that she was tired of wearing a prosthesis. Dr. Alizadeh's records indicate that he believed she would benefit from a breast reconstruction surgery, after she had quit smoking for at least six weeks and after she had been medically cleared for the surgery. On January 19, 2005, plaintiff's internist, Dr. Lizarazo, cleared her for the surgery.

Plaintiff presented to Lenox Hill Hospital on February 3, 2005, for the planned breast reconstruction surgery by Dr. Alizadeh. Richard Lem, M.D., a named defendant, was the anesthesiologist for plaintiff's surgery. Dr. Lem's pre-operative evaluation noted that plaintiff had a receding chin (which indicated to Dr. Lem that she might have an anterior larynx) and poor teeth. He also noted that plaintiff had undergone general anesthesia at least twice before without problems. Dr. Lem started an intravenous induction of anesthesia at about 7:35 a.m., and then attempted a direct laryngoscopy in order to intubate plaintiff. Apparently, Dr. Lem was unable to visualize the larynx due to what was confirmed as an anterior larynx, so he then attempted a blind intubation, which was unsuccessful. Dr. Lem called in another anesthesiologist, Patricia Yeh, M.D., to assist him, but the second attempt at intubation was also unsuccessful. A third anesthesiologist, Darius Rudz, M.D., came in to the operating room to assist in using a fiberoptic scope, but this third attempt at fiberoptic intubation was similarly unsuccessful. A fourth attempt was made to intubate the plaintiff nasally, and after this attempt was unsuccessful, the anesthesiologists decided to abort the procedure. Dr. Alizadeh did not perform the breast reconstruction surgery. Although he was present in the operating room during the attempted intubations, he did not "scrub in." Notes in the

medical record at 9:00 a.m. indicate that plaintiff was to go to the recovery room, and then she was to be discharged home "once stable [and] criteria met."

Plaintiff was transferred to the post-anesthesia care unit ("PACU") to recover at about 9:45 a.m. Dr. Alizadeh checked on plaintiff and spoke to her around 10:00 a.m., which was the last time he saw her prior to discharge. He testified that he asked the plastic surgery fellow to check in with plaintiff before she was discharged, which did occur. Dr. Alizadeh testified at his deposition that after surgery is performed, he would be in charge of deciding when a surgical patient is going to be discharged; however, in this case, because no surgery was performed, the decision to discharge plaintiff would be made by the anesthesiologist.

By 10:30 a.m., plaintiff's breathing was noted as easy and regular. Although she complained of a sore throat, no active bleeding was noted. At 11:00 a.m., the notes reflect that she had no dizziness or complaints and had been out of bed to go to the bathroom. At 11:30 a.m., plaintiff was discharged home, accompanied by her daughter. The following day, plaintiff was taken emergently to St. John's Queens Hospital ("St. John's"), where it was discovered that she had a perforated esophagus.

Plaintiff testified that she had been bleeding from her nose and mouth in the recovery room and had a swollen neck, but that she was discharged anyway. At home, she had trouble swallowing, pain through her neck and throat, and intermittent bleeding. Eating or taking anything by mouth was difficult because of the pain. She stayed in bed that day and when she woke up the next day, her neck was still swollen, she could not swallow, and she was having problems breathing

accompanied by pain in her chest. Plaintiff went to the emergency room at St. John's by taxi. Physicians at St. John's informed her, after tests, that her esophagus was damaged and that her lungs were infected, and they performed emergency surgery that day. Plaintiff remained in the medical intensive care unit after the surgery for three weeks, with a feeding tube, a drain for the infection, and intravenous antibiotics and painkillers. When she was eventually discharged to home from St. John's, she remained on a feeding tube for a period of time.

Dr. Lem, the anesthesiologist, testified at his deposition that after the attempted intubations, he did perceive blood in plaintiff's pharynx caused by the trauma of the attempted intubations. He testified that when blood is perceived, the general procedure is that the patient is brought to the recovery room and monitored for pain or continued bleeding. The persons responsible for monitoring the patient in the PACU would be a one-on-one nurse and an anesthesiologist assigned to the PACU, who in this case was Dr. Yeh. Dr. Lem testified that he performed his own assessment of plaintiff's airway before surgery. While he did speak with Dr. Alizadeh in the operating room, he did not discuss his findings with respect to plaintiff's larynx or loose teeth. He did not have a discussion with Dr. Alizadeh about his method of intubating plaintiff or the equipment he planned to use. Dr. Lem testified that the surgeon would not be involved in any decisions regarding the method of anesthesia induction.

Plaintiff alleges, inter alia, that Dr. Alizadeh failed to inform plaintiff of the risks of the procedure; failed to properly evaluate her prior to the surgery; and failed to prevent, diagnose, and treat, and follow-up on plaintiff's esophageal retro pharynx tear. She alleges that Dr. Alizadeh's departures from the standard of care caused her to suffer from, inter alia, traumatic intubation; an

esophageal retro pharynx tear/perforation; difficulty swallowing; pain; sepsis; subsequent surgeries, extensive hospitalization, and resulting sequelae; and feeding tube placement.

Dr. Alizadeh now moves for summary judgment, asserting that there are no triable issues of fact. The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 2010 N.Y. Slip Op. 3177, ___ A.D.3d ___ (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, however, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, at 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted). Plaintiff’s expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant’s prima facie showing. Id.

In support of his motion for summary judgment, Dr. Alizadeh provides an affidavit from Robert Grant, M.D., a physician licenced in New York and board certified in plastic surgery. Dr. Grant opines that the care and treatment rendered by Dr. Alizadeh was at all times in accordance with good and accepted medical practice and in no way caused or contributed to plaintiff's injuries. He sets forth that, as the plastic surgeon, Dr. Alizadeh had no responsibility to assess the patient's airway for suitability for endotracheal anesthesia. Dr. Grant sets forth that it is not the standard of care to perform such evaluation because it is the anesthesiologist's responsibility to do so. In light of Dr. Lem's testimony that he was responsible for the intubation procedures, Dr. Grant opines that plaintiff's allegations that Dr. Alizadeh departed from the standard of care with respect to the anesthesia are without merit, and that Dr. Alizadeh, as the operating surgeon, acted entirely within good and accepted medical practice by leaving the decisions regarding anesthesia to the anesthesiologist. Dr. Grant further opines that unless the anesthesiologist is doing something so egregious or outrageous, the surgeon should not interfere with the anesthesiologist's work. There was no reason for Dr. Alizadeh to stop the intubation attempts or direct the anesthesiologists to use a different method, and the fact that he did not is within the standard of care.

With respect to the discharge of Ms. Santin home from Lenox Hill Hospital, Dr. Grant asserts that once the patient is under the care of the anesthesia team in the PACU, it is the anesthesia team's responsibility to monitor the patient and decide when discharge is appropriate. Dr. Alizadeh did see the patient for a few minutes in the recovery room, found her to be stable, and did tell a plastic surgery fellow to see the patient before she went home, which did occur. Dr. Yeh, the anesthesiologist, was to follow the patient in the recovery room. Dr. Grant sets forth that the

records show that plaintiff was monitored and that there were no complaints of bleeding found. As Dr. Alizadeh rendered no medical treatment to plaintiff that day, he had no responsibility to follow her or discharge her from the hospital. Thus, Dr. Grant opines that the alleged failures regarding monitoring or discharging the patient after surgery are more appropriately directed to the anesthesiologists.

Defendant's expert further sets forth that any alleged delay in diagnosing plaintiff's esophageal tear would have made no difference in the outcome of the case, because plaintiff still would have had to have the surgery to repair the tear. Dr. Grant maintains that since Dr. Alizadeh did not cause the perforation, and since the perforation was timely diagnosed, Dr. Alizadeh cannot and should not be held responsible for any of the claimed damages. Finally, Dr. Grant sets forth that Dr. Alizadeh appropriately provided plaintiff with informed consent.

Dr. Alizadeh has demonstrated his entitlement to summary judgment. He has presented the expert opinion of a board certified plastic surgeon, who opines that Dr. Alizadeh was not negligent in treating plaintiff, he did not depart from the standard of care with respect to the care and treatment of plaintiff, nor did any alleged failure on his part cause plaintiff's injuries. The expert's opinion is detailed; relies on the facts, medical records, and testimony; and addresses the departures alleged in the pleadings. It is clear that Dr. Alizadeh did not perform any procedure on plaintiff on February 3, 2005. Furthermore, the expert's opinion, and Dr. Alizadeh's testimony, that Dr. Alizadeh was neither responsible for plaintiff's anesthesiology care nor her post-anesthesiology care, are corroborated by Dr. Lem's testimony.

Plaintiff, in response, maintains that there are clear issues of fact as to Dr. Alizadeh's liability for plaintiff's injuries. Plaintiff asserts that Dr. Alizadeh departed from accepted medical practice and procedure in a "variety of areas." In support of her contention, plaintiff presents an affirmation from Debra A. Taubel, M.D., a physician licensed in New York and the Medical Director at Weil [sic] Medical College of Cornell University, New York Presbyterian Hospital. Dr. Taubel opines, to within a reasonable degree of medical certainty, that Dr. Alizadeh departed from accepted medical practice and procedure when he ordered plaintiff to be discharged without a full and proper medical examination; when he ignored the signs and symptoms regarding plaintiff's esophagus from an "overly aggressive attempted intubation"; when he failed to stop the overly aggressive intubation; when he failed to appreciate the signs and symptoms of blood in plaintiff's mouth and nose; and when he failed to diagnose or perform tests to diagnose the perforated larynx and esophagus prior to plaintiff's discharge. Plaintiff's expert sets forth that had Dr. Alizadeh performed the appropriate tests prior to discharging plaintiff, such as a CT scan or an MRI, both studies would have shown plaintiff's injuries. Dr. Taubel further maintains that the delay in diagnosing plaintiff's injuries "caused a massive exacerbation of those injuries, additional injuries and sequelae."

Plaintiff's expert's affirmation is conclusory, unsupported by facts in the record, and fails to raise a triable issue of fact to rebut defendants' prima facie showing. The expert fails to address defendant's showing that he was not responsible for the anesthesia or post-anesthesia care of plaintiff. The expert does not rely on any facts or further elaborate on her opinion that Dr. Alizadeh should have stopped the intubation attempts. Also, a review of the records and the deposition testimony shows that Dr. Alizadeh was not responsible for discharging plaintiff. While a plastic surgery resident signed the discharge note, the PACU staff and the anesthesia team were

responsible for the decision that plaintiff would go home. Plaintiff's expert does not explain how the delay in diagnosing the perforation caused the injuries to be exacerbated, especially in the face of Dr. Grant's opinion that, once plaintiff's esophagus became perforated, she would have required the same surgery immediately as she would have upon the delayed diagnosis. Further, Dr. Taubel does not address the medical records and Dr. Alizadeh's testimony that plaintiff was not actively bleeding from her mouth and nose when Dr. Alizadeh last saw her in the PACU. Therefore, Dr. Taubel's conclusion that Dr. Alizadeh should have been alerted to perform certain diagnostic tests was not grounded in the record. Plaintiff's expert's broad and general statements of departures fail to rebut defendant's prima facie entitlement to summary judgment, and as such, the moving defendants are entitled to summary judgment. Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted, and the complaint is hereby severed and dismissed as against defendants Augusto Lizarazo, M.D., Kaveh Alizadeh, M.D., s/h/a Kaven Alizadeth, M.D., and Long Island Plastic Surgical Group, P.C. s/h/a Long Island Plastic Surgical Group, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue and the parties shall appear for a pre-trial conference on June 8, 2010, at 9:30 a.m.

This constitutes the decision and order of the court.

Date: May 6, 2010

FILED
MAY 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.