

Zucker-Rosenfeld v Mehlman

2010 NY Slip Op 31490(U)

June 7, 2010

Sup Ct, Nassau County

Docket Number: 8571/08

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

SCAN

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RACHELLE ZUCKER-ROSENFELD and DAVID
ROSENFELD,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 8571/08
Motion Seq. Nos.: 01 & 02**

JAY MEHLMAN, M.D., JAY K. MEHLMAN, M.D., P.C.,
HEALTHGUARD MEDICAL, P.C., and PENINSULA
HOSPITAL CENTER,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Defendant Jay Mehlman's Notice of Motion	01
Plaintiffs' Affirmation in Opposition	xx
Defendant Peninsula Hospital's Notice of Cross-Motion	02

In motion sequence number one, the Defendants Jay Mehlman, M.D. and Jay K. Mehlman, M.D., P.C. move for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint against them.

In motion sequence number two, the Defendant Peninsula Hospital Center moves for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint.

In this action, the plaintiff Rachelle Zucker-Rosenfeld ("Plaintiff") and her husband Plaintiff David Rosenfeld seek to recover damages for medical malpractice which they allege occurred when Dr. Mehlman perforated the Plaintiff's duodenum while performing an upper endoscopy on March 15, 2007 at Peninsula Hospital. The Plaintiffs also seek to recover for lack of informed consent. Dr. Mehlman and Peninsula Hospital both seek summary judgment dismissing the complaint.

The pertinent facts are as follows:

The Plaintiff first saw Dr. Mehlman on May 13, 2003. He performed a colonoscopy on the

Plaintiff at Peninsula Hospital on May 30, 2003 to relieve her abdominal pain and constipation. The colonoscopy revealed mild left sided diverticulosis and small internal and external hemorrhoids. Dr. Mehlman advised a follow up colonoscopy in three to five years or as needed.

The Plaintiff returned to Dr. Mehlman per referral by her primary physician on March 5, 2007 complaining of burning upper abdominal pain. She presented with copies of her CT scans performed at Peninsula Hospital on February 3, 2007 and New York University Hospital on February 7, 2007. The February 3, 2007 CT scan showed an ovarian cyst, cul-de-sac fluid, duodenal diverticulum and possible pancreatitis. The February 7, 2007 CT scan showed a possible gallbladder polyp. Dr. Mehlman diagnosed the Plaintiff as having epigastric pain atypical for biliary or pancreatic problems. He prescribed Nexium and scheduled an upper endoscopy. Pre-procedure testing was done at Peninsula Hospital on March 7, 2007 and no contraindications were found. The upper endoscopy was performed on March 15, 2007 at Peninsula Hospital. It began at 10:44 a.m. and ended at 10:54 a.m. During the procedure, Dr. Mehlman had limited visuability which he attributed to a "J" shaped stomach. The nurses' notes indicate that the Plaintiff was drowsy and not complaining at 10:58 a.m. and that her abdomen was soft, lower bowels sounds were present and she had no complaints of pain and passing flatus at 11:50 a.m. The Plaintiff testified at her examination-before-trial that she complained to the hospital staff of feeling bloated and uncomfortable after the procedure but they told her that that was typical following an endoscopy. She was discharged at 11:50 a.m. via stretcher. The Plaintiff made no post-operative complaints and was discharged at 12:30 p.m.

The Plaintiff testified at her examination-before-trial that later that afternoon, her husband called Dr. Mehlman to tell him that she was not feeling well and that she was complaining of bloating and abdominal pain. The Plaintiff testified at her examination-before-trial that Dr. Mehlman told her

husband that air had been used and that was why she was feeling bloated and that she should rest but if the symptoms worsened, to call him. The Plaintiff testified that her husband called Dr. Mehlman again about a half hour later to further inform him that she was nauseous and vomiting a black tarry substance and was in excruciating back pain. Dr. Mehlman instructed them to return to Peninsula Hospital. The Plaintiff was immediately seen in radiology where a CT scan of her abdomen was performed and revealed a ruptured duodenal diverticulum. The Plaintiff was given antibiotics and admitted to Peninsula Hospital at 5:40 p.m. Dr. Te performed an exploratory laparotomy and repaired the Plaintiff's perforated duodenal diverticulum with an omental patch and excision of diverticula. The Plaintiff was discharged from Peninsula Hospital on March 23, 2007.

The Plaintiffs allege that the upper endoscopy was contraindicated and negligently performed; that Dr. Mehlman failed to appreciate and convey the increased risks that the Plaintiff was at and therefore failed to procure her informed consent; and, that the diagnosis of the Plaintiff's perforation duodenum was delayed with ensuing consequences.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent 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." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence

presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

“To establish a *prima facie* case of liability for medical malpractice, a Plaintiff must prove that the Defendant deviated from accepted practice, and that such deviation proximately caused his or her injuries.” *Dehaarte v Ramenovsky*, 67 AD3d 724, 725 (2d Dept 2009), citing *Novik v Godec*, 58 AD3d 703 (2d Dept 2009); *Monroy v Glavas*, 57 AD3d 631 (2d Dept 2008); *Rabinowitz v Elimian*, 55 AD3d 813 (2d Dept 2008); *see also, Ellis v Eng*, 70 AD3d 887 (2d Dept 2010). “On a motion for summary judgment dismissing the complaint in a medical malpractice action, a Defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice, or, if there was a departure, that the Plaintiff was not injured thereby.” *Shectman v Wilson*, 68 AD3d 848 (2d Dept 2009), citing *Murray v Hirsch*, 58 AD3d 701 (2d Dept 2009), *lv den.*, 12 NY3d 709 (2009); *Shahid v New York City Health & Hospitals Corp.*, 47 AD3d 800 (2d Dept 2008); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *see also, Ellis v Eng, supra*. “[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law.” *Grant v Hudson Valley Hosp. Center*, 55 AD3d 874 (2d Dept 2009), citing *Berkey v Emma*, 291 AD2d 517, 518 (2d Dept 2002); *Drago v Chung Ho King*, 283 AD2d 603, 603-604 (2d Dept 2001); *Terranova v Finklea*, 45 AD3d 572 (2d Dept 2007); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007).

If the moving Defendant meets his burden, “[i]n opposition, a Plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician’s opinion that the alleged departure was a competent producing cause of the Plaintiff’s injuries.”

Shectman v Wilson, *supra*, citing *Sweezy v Montague Rehab & Pain Management, P.C.*, 59 AD3d 431 (2d Dept 2009); *Murray v Hirsch*, *supra*; *Shahid v New York City Health & Hospitals Corp.*, *supra*; *see also, Ellis v Eng*, *supra*. “[G]eneral allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice” do not suffice. *Shectman v Wilson*, *supra*, citing *Alvarez v Prospect Hosp.*, *supra*; *Shahid v New York City Health & Hospitals Corp.*, *supra*; *see also, Diaz v New York Downtown Hosp.*, 99 NY2d 542 (2002); *Romano v Stanley*, 90 NY2d 444 (1997); *Amatulli by Amatulli v Delhi Const. Corp.*, 77 NY2d 525 (1991). The Plaintiff’s expert must set forth the medically accepted standards or protocol and explain how it was departed from. *Geffner v North Shore University Hosp.*, 57 AD3d 839, 842 (2d Dept 2008), citing *Mustello v Berg*, 44 AD3d 1018, 1019 (2d Dept 2007), *lv den.*, 10 NY3d 711 (2008); *Behar v Coren*, 21 AD3d 1045, 1047 (2d Dept 2005), *lv den.*, 6 NY3d 705 (2006); *LaMarque v North Shore Univ. Hosp.*, 227 AD2d 594, 594-595 (2d Dept 1996). And, the Plaintiff’s expert must address all of the key facts relied on by the Defendant’s expert. *See, Kaplan v Hamilton Medical Associates, P.C.*, 262 AD2d 609 (2d Dept 1999); *see also, Geffner v North Shore University Hosp.*, *supra*; *Rebozo v Wilen*, 41 AD3d 457 (2d Dept 2007).

“To establish proximate cause, the Plaintiff must present ‘sufficient evidence from which a reasonable person might conclude that it was more probable than not that’ the Defendant’s deviation was a substantial factor in causing the injury.” *Alicea v Liguori*, 54 AD3d 784, 785 (2d Dept 2008), quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 (2d Dept 2005), citing *Sprain Brook Manor Nursing Home*, 253 AD2d 852 (2d Dept 1998), *lv den.*, 92 NY2d 818 (1999). The Plaintiff’s expert need not quantify “ ‘the extent to which the Defendant’s act or omission decreased the Plaintiff’s chance of better outcome or increased [the] injury, as long as evidence is presented from

which the jury may infer that the Defendant's conduct diminished the Plaintiff's chance of a better outcome or increased the injury.' ” *Alicea v Liguori, supra*, at p. 786, quoting *Flaherty v Fromberg*, 46 AD3d 743 (2d Dept 2007), citing *Barento v Winthrop University Hosp.*, 305 AD2d 623, 624 (2d Dept 2003); *Wong v Tang*, 2 AD3d 840, 841 (2d Dept 2003).

“Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient.” *Dockery v Sprecher*, 68 AD3d 1043 (2d Dept 2009), citing *Chulla v DiStefano*, 242 AD2d 657, 658 (2d Dept 1997), *lv diss.* 91 NY2d 921 (1998); *Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639 (3rd Dept 1990); *see also, Wasserman v Staten Island Radiological Associates*, 2 AD3d 713 (2d Dept 2003).

Furthermore, “[a] hospital may not be held liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits ‘independent acts of negligence or the attending physician’s orders are contradicted by normal practice.’ ” *Cham v St. Mary’s Hosp. of Brooklyn*, 72 AD3d 1003 (2d Dept 2010), quoting *Cerny v Williams*, 32 AD 3d 881, 883 (2d Dept 2006); citing *Hill v St. Clare’s Hosp.*, 67 NY2d 72, 79 (1986); *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 (1968); *Petty v Pilgrim*, 22 AD3d 478, 479 (2d Dept. 2005); *Pearce v Klein*, 293 AD2d 593 (2d Dept 2002).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting expert opinions Such credibility issues can only be resolved by a jury.” *Feinberg v Feit*, 23 AD3d 517, 519 (2d Dept 2005), citing *Barbuto v Winthrop University Hosp., supra*; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650 (2d Dept 2001); *see also, Roca v Perel*, 51 AD3d 757, 759 (2d Dept 2008); *Graham v Mitchell*, 37 AD3d 408 (2d Dept 2007).

In support of his motion, Dr. Mehlman has submitted the affirmation of Dr. Ian Storch, a Board Certified Internist and Gastroenterologist. Having reviewed the Plaintiffs' allegations, the Plaintiff's medical records and the transcripts of the examinations-before-trial, he opines to a reasonable degree of medical certainty that Dr. Mehlman was not negligent in his care of the Plaintiff. More specifically, he opines that the decision to schedule an upper endoscopy was appropriate under the circumstances. He explains that the Plaintiff's imaging studies did not explain her pain and that "unexplained abdominal pain or discomfort represents a significant complaint and can be indicative of significant pathology." He further opines that an upper endoscopy is more accurate in detecting ulcers or tumors and also permits biopsies (tissue samples) and cytology (cell samples) to be done to further explore the cause of patient's pain. He opines that the prior tests results did not contraindicate an upper endoscopy. Dr. Storch further opines that Dr. Mehlman properly discharged the Plaintiff as she made no complaints to him when he examined her after the procedure and there was nothing contraindicating her release. Dr. Storch similarly opines that Dr. Mehlman correctly instructed the Plaintiff to return to the hospital only when she reported significant complications and that she was appropriately cared for at Peninsula Hospital by Dr. Te.

As for the upper endoscopy itself, Dr. Mehlman opines that the procedure carries with it a risk of a perforation which can occur even when "performed by the most qualified experienced endoscopist . . . on a patient in ideal health at the finest medical facility, supported by the most qualified staff without any deviation from the standard of care." He also opines that "the alleged delay in diagnosing the [Plaintiff's] duodenal perforation had absolutely no impact on [her] surgical repair and recovery." As for the Plaintiff's claim of lack of informed consent, Dr. Storch notes that the Plaintiff acknowledged signing the standard form and that Dr. Mehlman's testimony at his examination-before-trial establishes

that he informed the Plaintiff of all the known risks and complications including perforation. He opines that under the circumstances of this case, “any reasonable patient . . . would have consented to the upper endoscopy procedure.”

Dr. Mehlman has established his entitlement to summary judgment thereby shifting the burden to the Plaintiff to establish the existence of a material issue of fact.

In support of its motion, the Defendant Peninsula Hospital has submitted the affirmation of Dr. Sanford Goldberg, a Board Certified Internist and Gastroenterologist. Having reviewed the Plaintiffs’ allegations, the Plaintiff’s medical records and the testimony given at the examinations-before-trial, he opines to a reasonable degree of medical certainty that the Plaintiff’s allegations of negligence against Peninsula Hospital are without merit. Like Dr. Storch, Dr. Goldberg opines that nothing contraindicated the upper endoscopy procedure and that there was no indication of increased risks. Like Dr. Storch, Dr. Goldberg opines that nothing explained the Plaintiff’s pain and that the upper endoscopy is a more accurate test for detecting inflammation and smaller abnormalities such as ulcers and tumors and was, therefore, an appropriate diagnostic test. As for the procedure, Dr. Goldberg notes that Nurse Butler properly assisted Dr. Mehlman in performing a biopsy bite in the Plaintiff’s stomach to test for H. pylori, which the Plaintiffs did not dispute. As for her discharge, Dr. Goldberg opines “to a reasonable degree of medical certainty, that it was appropriate to discharge [her] home following her upper endoscopy, as her post-endoscopy complaints were not abnormal and were not suggestive of any complication.” He explains that “the complaints expressed by the Plaintiff, including bloating and gas, are normal, given that air is introduced into the gastrointestinal system during an upper endoscopy.” Like Dr. Storch, Dr. Goldberg opines that the upper endoscopy procedure is not without risks, including a perforation which is a rare and unfortunate complication. He also opines that the Plaintiff’s informed

consent was properly procured.

The Defendant Peninsula Hospital has also established its entitlement to summary judgment shifting the burden to the Plaintiff to establish the existence of a material issue of fact.

In opposition, the Plaintiff has submitted the affirmation of a Board Certified Internist. Having reviewed, inter alia, the Bills of Particulars, the Plaintiff's medical records and the testimony at the examinations-before-trial, he opines that Dr. Mehlman departed from standard and accepted medical standards in his care and treatment of the Plaintiff which was a cause of her injuries, including the iatrogenic perforation of her duodenal diverticulum. More specifically, he opines that the upper endoscopy itself was both unnecessary and negligently performed. He opines that the Plaintiff's complaints of pain were attributable to other conditions and an upper endoscopy was not warranted.

The Plaintiff's expert notes that the Plaintiff was seen at the emergency room of Peninsula Hospital on February 3, 2007 complaining of right rib area discomfort radiating down into her lower abdomen. She reported having a liver cyst as well as a history of shingles precisely where she was experiencing the discomfort. The Plaintiff's expert opines that this was indicative of post-herpetic neuralgia, which could have been a cause of the Plaintiff's pain. In addition, a CT scan done that day revealed other possible causes of the Plaintiff's pain: a ruptured right ovarian follicle and/or cyst, post-herpetic neuralgia, duodenal diverticuli, and gall bladder disease. For these reasons, the emergency room doctor prescribed Neurontin, which is used for neuropathic pain, like post-herpetic neuralgia. The Plaintiff's expert notes that Dr. Steiner who saw the Plaintiff on February 9, 2007 with similar complaints of pain, in fact, diagnosed her with post-herpetic neuralgia and prescribed a medicine regime. To add to this, the Plaintiff's expert notes that a pelvic ultrasound performed on February 21, 2007 revealed bilateral ovarian cysts as well as fluid in the cul-de-sac, which is indicative of a ruptured

ovarian cyst or follicle, a further indication of another cause of the Plaintiff's pain.

The Plaintiff's expert notes that Dr. Mehlman prescribed Nexium when he saw the Plaintiff on March 5, 2007. He opines that not only did Mr. Mehlman err in diagnosing the Plaintiff with dyspepsia which is characterized by epigastric discomfort, bloating, anorexia, early satiety, belching or regurgitation, nausea and heartburn, he failed to obtain a detailed history which would have indicated alternate diagnoses. He opines that the Plaintiff's symptoms **coupled with the clinical findings** were consistent with post-herpetic neuralgia and a recently ruptured ovarian cyst, neither of which necessitated an upper endoscopy. Thus, he opines that Dr. Mehlman's missed diagnosis led to an unnecessary procedure and the rupture of the Plaintiff's duodenal diverticulum. The Plaintiff's expert further opines that even if the Plaintiff was suffering from dyspepsia, an upper endoscopy is not immediately called for. Rather, medicine therapy targeted at suppressing gastric acid is first employed and only if dyspepsia continues or is complicated by vomiting, bleeding, difficulty swallowing, pain swallowing, palpable abdominal mass developments or jaundice is an upper endoscopy appropriate. He in fact notes that "on March 15, 2007, on admission to the endoscopy suite prior to the upper endoscopy, a pre-procedure history and physical document[ed] that [the Plaintiff] had no complaints of abdominal pain, nor was she suffering from vomiting, bleeding, difficulty swallowing, pain on swallowing, jaundice or a palpable abdominal mass, further support [his] opinion that this upper endoscopy was not indicated."

The Plaintiff's expert also opines that the upper endoscopy was negligently performed. He notes that it only took a total of 10 minutes which he opines to a reasonable degree of medical certainty was too short an amount of time, indicating that it was done in a negligent and hurried manner. He further opines that coupled with the need for a biopsy of the Plaintiff's stomach and its aberrant

positioning, as well as the existence of duodenal diverticulum which the Plaintiff's expert opines heightened the risks, the risks of the hurried nature of the procedure becomes only more pronounced. He opines that rushing lead to the perforation of the Plaintiff's duodenal diverticulum.

The Plaintiff's expert also opines that duodenal diverticuli which the Plaintiff exhibited, places a patient at a greater risk of perforation from an upper endoscopy and that Dr. Mehlan was negligent in failing to appreciate and convey that fact.

The Plaintiff's expert additionally faults Dr. Mehlman for failing to diagnose the Plaintiff's duodenal diverticulum sooner. Indeed, he opines that Dr. Mehlman's awareness of that possibility should have been heightened by the presence of duodenal diverticulum and the positioning of the Plaintiff's stomach. The Plaintiff's expert opines that the delay in diagnosis caused bowel contents to contaminate the Plaintiff's peritoneal cavity for a prolonged time causing extensive, unnecessary inflammation.

Relying on the Plaintiff's testimony, the Plaintiff's expert faults Dr. Mehlman for not informing her of the risk of perforation of the duodenal wall prior to the procedure, which the Plaintiff claims to have only learned about after that happened to her, and for not discussing conservative treatment options with her. He opines to a reasonable degree of medical certainty that a reasonable person in the Plaintiff's situation would have opted against the procedure if fully informed.

The Plaintiffs have established the existence of a material issue of fact concerning Dr. Mehlman's care and treatment of the Plaintiff as well as whether he procured her informed consent. They have not done so with respect to Peninsula Hospital.

Dr. Mehlman's motion for summary judgment is **denied**.

Peninsula Hospital's motion for summary judgment is unopposed and therefore **granted**. The

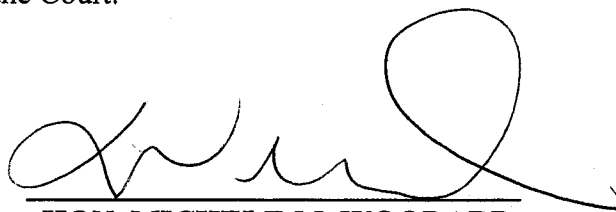
complaint against it is dismissed.

The parties are directed to appear in DCM on June 15, 2010 at 9:30 a.m. for trial.

This constitutes the Decision and Order of the Court.

DATED: June 7, 2010
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - SUMMARY JUDGMENT\Zucker-Rosenfeld v Mehlman, M.D. MLP.wpd

ENTERED
JUN 10 2010
NASSAU COUNTY
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