

Miseses-Perez v Holden

2011 NY Slip Op 30523(U)

February 8, 2011

Supreme Court, New York County

Docket Number: 0100807/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

IVANNIA MIESES - PEREZ

- v -

JOSHUA HUDSON, M.D.

INDEX NO. 100807/09
MOTION DATE 11/23/10
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

1-17
18-19
20

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED

FEB 10 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/8/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

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

-----X
IVANNIA MIESES-PEREZ and ALEXANDER PEREZ,

Plaintiffs,

Index No. 100807/09

-against-

Decision and Order

JOSHUA HOLDEN, M.D., SHARMILEE BANSAL,
M.D., KIMBERLY MATHIS, M.D., JACK MAIDMAN,
M.D., NICOLE RODNEY, NEW YORK
PRESBYTERIAN THE UNIVERSITY HOSPITAL
OF COLUMBIA AND CORNELL,

Defendants.

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

FILED
FEB 10 2011
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition. In Motion Sequence Number 002, Sharmilee Bansal, M.D., and Jack Maidman, M.D., move for summary judgment dismissal of the claims against them. In Motion Sequence Number 003, plaintiffs move for summary judgment in their favor against Dr. Bansal, Joshua Holden, M.D., and the New York and Presbyterian Hospital s/h/a New York Presbyterian The University Hospital of Columbia and Cornell (the "Hospital").¹

This action, sounding in medical malpractice and lack of informed consent, arises out of a bilateral tubal ligation ("BTL") performed on Ms. Mieses-Perez on August 16, 2007. During her second pregnancy, Ms. Mieses-Perez received prenatal care from Dr. Maidman. She told Dr. Maidman that she did not want to have any more children after the birth of her second child. On or

¹ In Motion Sequence Number 003, plaintiffs also moved to disqualify defendants' counsel from representing both Dr. Holden and Dr. Bansal, but they withdrew this branch of the motion during oral argument before the undersigned on November 23, 2010.

about May 4, 2007, Dr. Maidman discussed tubal ligation with Ms. Mieses-Perez. He testified that he advised her that sterilization was permanent and irreversible; that there were other non-surgical alternatives to sterilization; that sterilization was her decision and she could change her mind at any point prior to the surgery; and that there were complications and risks associated with the procedure and with undergoing general anesthesia. Dr. Maidman informed Ms. Mieses-Perez that the procedure involved an incision in the belly button and that both fallopian tubes would be cut and tied. Ms. Mieses-Perez executed the New York State Sterilization Consent Form; her signature was witnessed by a member of Dr. Maidman's staff. After a normal pregnancy and labor, Ms. Mieses-Perez delivered her second child on July 18, 2007, and was discharged from the Hospital two days later. Ms. Mieses-Perez testified that she was under the impression that Dr. Maidman was going to perform the tubal ligation right after the delivery, but Dr. Maidman did not participate in the delivery and he testified that it was never his plan to perform the surgery himself. After the birth, Dr. Maidman's office provided Ms. Mieses-Perez with a list of gynecologic surgeons who could perform the tubal ligation; Dr. Holden was among the surgeons on the list.

On August 3, 2007, Ms. Mieses-Perez met with Dr. Holden, an attending surgeon at the Hospital and a member of the faculty in the obstetrics and gynecological department, to discuss the laparoscopic BTL. Dr. Holden conveyed the risks of and alternatives to the procedure, and the fact that tubal ligation is permanent and irreversible. Ms. Mieses-Perez decided to have the procedure done and signed a consent form for Dr. Holden to perform the procedure on August 16, 2007.

On August 16, 2007, Dr. Bansal, a resident at the Hospital who would be assisting Dr. Holden during the laparoscopic BTL, discussed the procedure with Ms. Mieses-Perez in the pre-operation room. Dr. Bansal testified that she discussed with Ms. Mieses-Perez the fact that all surgeries carry risks, such as bleeding, infection, and injury to nearby organs. Ms. Mieses-Perez executed the "reaffirmation" portion of the New York State Sterilization Consent Form, with her husband acting as the witness.

The proposed laparoscopic BTL procedure involved inflating the abdomen, inserting a trocar and a tiny camera, and performing the tubal ligation by visualizing the surgery with the camera. First, the anesthesia team sedated and intubated Ms. Mieses-Perez in the supine position. After the anesthesia was administered, Dr. Bansal made a small incision under the patient's belly button. Then, Drs. Bansal and Holden grabbed and elevated the skin around the abdomen and, using a needle to insert gas, Dr. Bansal inflated the abdomen.² Once the abdomen was inflated, Dr. Bansal twice attempted to place the trocar but encountered resistance and stopped before penetrating the fascia. Dr. Holden took over and placed the trocar through the skin under the belly button and into the abdominal cavity. A camera was inserted. Drs. Holden and Bansal saw blood accumulating in the retroperitoneal space, where it should not be. A vascular surgery consultation was ordered and it was determined that the laparoscopic procedure would be abandoned in favor of an open laparotomy to try to stop the bleeding. A vertical incision was made on Ms. Mieses-Perez's belly and her abdominal cavity was opened and entered. Ms. Mieses-Perez's aorta had been nicked.

² According to the surgeons' testimony, the abdomen is inflated to prevent the trocar from being inserted too far into the abdomen.

Compression was applied to the abdomen to curtail the bleeding. The vascular team arrived and repaired the aorta. The BTL was performed. Ms. Mieses-Perez required a transfusion of two units of blood and woke up in the intensive care unit. Drs. Holden and Bansal testified that the injury to the aorta could have been caused by either the needle or the trocar, but that it was more likely caused by Dr. Holden's placement of the trocar on the third attempt.

Plaintiffs' complaint raises claims of medical malpractice, lack of informed consent, negligent granting of hospital privileges, and loss of services and consortium on behalf of Mr. Perez. Ms. Mieses-Perez's injuries include her damaged aorta, the further surgery to repair the aorta, extensive scarring with keloid formation, and psychological injuries. As to Drs. Holden and Bansal, plaintiffs' bills of particulars allege that they both departed from good and accepted medical practice in, *inter alia*, failing to properly perform the BTL; causing Ms. Mieses-Perez's aorta to be damaged during the BTL; and failing to inform Ms. Mieses-Perez of the risks of BTL. Specifically, plaintiffs allege that Drs. Holden and Bansal both failed to properly inflate the space between the abdominal wall and the aorta; failed to make an adequate incision; failed to properly insert the trocar; and failed to properly position Ms. Mieses-Perez's body. As to all of the defendants, plaintiffs allege that they departed from good and accepted medical practice in failing to inform Ms. Mieses-Perez of the risks of laparoscopic BTL, including that her aorta could be damaged and/or that she might need open surgery that could lead to scarring and/or death. Plaintiffs claim that a reasonably prudent person would not have had the BTL procedure if properly informed of the risks of the procedure.

In the interests of efficiency, plaintiffs' motion for summary judgment shall be disposed of first. Although not clearly stated in the motion, plaintiffs ostensibly move for summary

judgment against Dr. Holden, Dr. Bansal, and the Hospital on the basis that there are no issues of fact with regard to their claims that these defendants departed from the standard of care, and that those departures proximately caused plaintiffs' alleged injuries. Plaintiffs fail to support their motion with an affirmation from an expert. As defendants correctly point out in their opposition to plaintiffs' motion, expert medical opinion testimony is required to demonstrate a prima facie entitlement to summary judgment regarding medical malpractice claims (see Mulligan v. N.Y. Cornell Med. Ctr., 304 A.D.2d 492 [1st Dep't 2003]) and claims of failure to obtain informed consent (see Orphan v. Pijnik, 15 N.Y.3d 907 [2010]). Without expert testimony, plaintiffs' motion for summary judgment must be denied.

In support of their motion for summary judgment, Dr. Bansal and Dr. Maidman submit an expert affirmation from Gary Mucciolo, M.D., a physician licensed to practice medicine in the State of New York and board certified in obstetrics and gynecology. He states that his opinions are based on his experience and his review of the pleadings, medical records, and deposition transcripts. As to Dr. Bansal, Dr. Mucciolo sets forth that as a second year resident, she simply assisted Dr. Holden and was not responsible for selecting the surgical procedure, obtaining the patient's informed consent, or making independent surgical judgments during the procedure. Rather, Dr. Holden, as the private attending physician, was the person entirely responsible for what went on during the surgery, including formulating the surgical plan, obtaining the informed consent of the patient, performing the procedure in conformity with the applicable standard of care, and supervising the residents assisting him with the surgery. Dr. Mucciolo opines that Dr. Bansal did not depart from good and accepted practice, in that she properly assisted Dr. Holden, used

appropriate technique, properly followed and implemented Dr. Holden's instructions and directions, and acted under Dr. Holden's direction and control at all times during the procedure. Dr. Mucciolo opines that the supine position was proper for the insertion of the needle and trocar, that the technique of the surgeons gripping and elevating the belly skin with their hands was proper, and that the needle was properly placed at a downward angle with appropriate pressure. Dr. Bansal appropriately checked the abdomen to ensure proper inflation prior to attempting to insert the trocar, used appropriate technique to place the trocar, and appropriately abandoned her efforts without passing the trocar through the fascia when she encountered resistance. Dr. Mucciolo opines that it was appropriate for Dr. Holden to take over the placement of the trocar after Dr. Bansal's two failed attempts. Further, when the complication was discovered, Dr. Bansal took appropriate steps, under Dr. Holden's supervision, to identify the cause of the bleeding and request assistance. Dr. Mucciolo opines that the injury to Ms. Mieses-Perez's aorta occurred during Dr. Holden's insertion of the trocar, not Dr. Bansal's attempts, and that nothing Dr. Bansal did or did not do proximately caused Ms. Mieses-Perez's claimed injuries.

While Dr. Bansal was not required to conduct an informed consent discussion with the patient, it is Dr. Mucciolo's opinion that to the extent that she did, she properly informed the patient of the reasonably foreseeable risks, benefits, and alternatives to laparoscopic BTL. She advised Ms. Mieses-Perez of the risks and alternatives to the sterilization procedure itself and to any surgery in general. Dr. Bansal also advised Ms. Mieses-Perez of the specific risks of laparoscopic BTL, including injury to the bowel, bladder, and major vascular and nerve structures, and the risk that the laparoscopic procedure may have to be converted to an open laparotomy with a traditional

skin incision. Dr. Bansal also obtained Ms. Mieses-Perez's reaffirmation of the informed consent on the New York State Sterilization Consent Form. So, even though she had no duty to do so, Dr. Mucciolo opines that Dr. Bansal conducted a proper informed consent discussion regarding laparoscopic BTL.

As to Dr. Maidman, Dr. Mucciolo asserts that the prenatal care provided was proper. He emphasizes that Dr. Maidman did not participate in the BTL procedure at all. Dr. Mucciolo sets forth that the evidence shows that on May 4, 2007, Dr. Maidman advised Ms. Mieses-Perez that the sterilization procedure was permanent and irreversible, that the decision up to her, and that she could change her mind at any time. Dr. Maidman also informed Ms. Mieses-Perez of the risks of surgery, in general. Ms. Mieses-Perez was given the opportunity to ask questions and review the New York State Sterilization Consent Form, which she properly executed more than thirty (30) and less than one hundred eighty (180) days prior to the BTL.³ Dr. Mucciolo opines that Dr. Maidman had no duty to conduct the surgical informed consent discussion with Ms. Mieses-Perez prior to the laparoscopic BTL, because Dr. Maidman was not the surgeon who performed the BTL, nor was it ever planned that Dr. Maidman would perform the BTL. Dr. Mucciolo reiterates that the responsibility for obtaining the patient's informed consent was Dr. Holden's, alone. Regardless, the information session that Dr. Maidman conducted on May 4, 2007, did meet the standard of care for

³ Federal regulations govern the performance of sterilization procedures. The individual must be at least twenty-one (21) years old at the time consent for the procedure is obtained; the individual must be mentally competent; the individual must voluntarily give his or her consent to the procedure; and at least 30 days but not more than 180 days must have passed between the date of informed consent and the date of the sterilization, except in the case of premature delivery or emergency abdominal surgery. 42 C.F.R. § 50.203.

the sterilization procedure. As it is Dr. Mucciolo's belief that it is the surgeon's responsibility to procure the informed consent of the patient, he opines that Dr. Maidman did nothing to proximately cause Ms. Mieses-Perez's alleged injuries.

Plaintiffs, in opposition to Drs. Maidman's and Bansal's motion for summary judgment, assert that issues of fact preclude summary judgment in either physician's favor. In support of their opposition, they provide an expert affirmation from a physician duly licensed to practice medicine in the State of New York (name redacted). Plaintiffs' expert affirms that the statements in the affirmation are based on a review of the medical records and "portions" of the deposition transcripts. The expert asserts that the patient should have been placed in the Trandelenberg position, where the patient's feet are positioned higher than the head, and not the supine position. The expert sets forth that if Ms. Mieses-Perez had been in the Trandelenberg position, the surgeons would not have needed to point the trocar towards her feet to avoid injuring her, but would have been able to safely introduce the instruments directly downward, and the trocar would have been easy to control and would not have injured her aorta. The expert claims that Dr. Bansal knew or should have known that the patient should have been in the Trandelenberg position and not simply lying flat. If Dr. Bansal had asserted ordinary prudence, she would have inquired into the correctness of Dr. Holden's opinion and would not have permitted the procedure to go forward. Plaintiffs' expert further claims that Dr. Bansal should not have used her hands to pull the patient's skin away from the abdomen; rather, she should have used an instrument called a tenaculum. If Dr. Holden refused to use the tenaculum, plaintiffs' expert claims that Dr. Bansal should have prevented the procedure from going forward, since such a clear mistake was being made that placed the patient

in significant danger. Plaintiffs' expert opines that if Ms. Mieses-Perez had been correctly positioned and properly inflated the abdomen or used instruments to hold up the skin, she would not have suffered the injury to her aorta. The expert then points out Dr. Bansal's testimony that an aorta injury can occur in two situations, if there is an anatomic variance, or if there is surgical error. The expert states that it is his understanding that no anatomical variant was reported; as such, the expert concludes, the injury to the aorta was caused by malpractice.

As to the claims of informed consent, plaintiffs' expert maintains that Dr. Bansal also failed to obtain Ms. Mieses-Perez's informed consent to the procedure. The expert states that Dr. Bansal should have explained the risks of keloid formation for an open procedure, and that if Dr. Bansal had told Ms. Mieses-Perez that she might end up with keloid scarring, a reasonable patient would have refused the procedure. The expert opines that reaffirming the New York State Sterilization Consent Form is insufficient and below the standard of care, as is relying upon what other physicians might have told the patient. The expert states that the doctor must convey the risks of the surgery in a manner tailored to the specific individual. If Dr. Bansal had provided the necessary information, a reasonable patient in Ms. Mieses-Perez's position would not have elected to have the procedure. The expert maintains that since Dr. Bansal procured Ms. Mieses-Perez's signature on the reaffirmation, she deviated from accepted standards of care in assuming that Ms. Mieses-Perez had been provided with the information needed to make an informed decision by Dr. Holden or Dr. Maidman.⁴ Rather, Dr. Bansal should have provided Ms. Mieses-Perez with all of the

⁴ The court notes that plaintiffs' expert states that, according to Dr. Holden's testimony, Dr. Holden relied on Dr. Bansal to provide the patient with the information necessary to provide informed consent; however, the expert fails to mention that later in Dr. Holden's deposition, he

necessary information, including that she was likely to form keloid scars if there were any problems during the laparoscopic procedure.

Plaintiffs' expert also maintains that Dr. Maidman deviated from accepted standards of care, and that such deviation proximately caused Ms. Mieses-Perez's injuries, by failing to provide adequate information to the patient prior to her agreeing to the procedure. The expert states that prior to allowing Ms. Mieses-Perez to sign the New York State Sterilization Consent Form, Dr. Maidman should have performed a physical examination, which would have led him to see that Ms. Mieses-Perez has a tendency to form keloid scars. If Dr. Maidman had told Ms. Mieses-Perez that if the laparoscopic procedure needed to be abandoned for an open procedure, she would likely form a keloid scar, a reasonable patient would have refused the procedure. The expert sets forth that patients generally choose laparoscopic procedures to avoid scarring. The expert points out that Ms. Mieses-Perez's testimony was that she was only informed of the risks of any procedure, *i.e.*, not waking up from anesthesia, infection, and blood transfusions. The expert opines that these warnings fell below the standard of care. The expert further opines that the Sterilization Consent Form was insufficient to disclose the specific risk of keloids as to this specific patient.

A defendant 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

testified that he had his own comprehensive conversation about the procedure with Ms. Mieses-Perez in his office. Plaintiffs' expert's conclusion that Dr. Holden relied on Dr. Bansal to obtain the patient's informed consent is a misstatement of fact, which may be due to plaintiffs' expert having reviewed only "portions" of the transcripts and not the entire transcripts.

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, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action 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, 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, 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, 73 A.D.3d at 207 (internal citations omitted). The 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 the defendant’s prima facie showing. Id.

In general, a hospital staff member who is following the orders of a private attending physician and is not acting independently is not liable for malpractice attributable to the private physician. See Toth v. Comm. Hosp. at Glen Cove, 22 N.Y.2d 255, 265 (1968). Accord Costello v. Kirmani, 54 A.D.3d 656, 657 (2d Dep’t 2008); Walter v. Betancourt, 283 A.D.2d 223, 224 (1st Dep’t 2001). An exception to the rule applies where “the hospital staff knows that the doctor’s

orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders.” Toth, 22 N.Y.2d at 265 n.3. Accord Soto v. Andaz, 8 A.D.3d 470, 471 (2d Dep’t 2004).

Dr. Bansal has demonstrated that she is entitled to summary judgment. Dr. Bansal has established—through her own statements, those of Dr. Holden’s, and Dr. Mucciolo’s affirmation—that Dr. Holden, Ms. Mieses-Perez’s private physician, was responsible for planning and implementing the BTL, and that she only acted under his direction and supervision. Plaintiffs’ expert opines that the supine position and the use of hands to pull up the patient’s abdominal skin are improper and so clearly contraindicated that Dr. Bansal departed from good and accepted practice by failing to stop the procedure that Dr. Holden was performing. Yet, the expert neither explains why the supine position and/or the use of hands to elevate the skin are improper techniques, nor does the expert explain why the Trandelenberg position and/or the use of a tenaculum to elevate the skin are superior techniques. Plaintiffs offer no rebuttal to Dr. Bansal’s prima facie demonstration of entitlement to summary judgment other than their expert’s conclusory statements that Dr. Holden’s technique was so improper and so clearly contraindicated that Dr. Bansal should have prevented the procedure from going forward. As conclusory statements are insufficient to raise an issue of fact to rebut a defendant’s prima facie showing, Dr. Bansal is entitled to summary judgment.

Turning to the claims for lack of informed consent, Public Health Law § 2805-d(1) sets forth that lack of informed consent is

the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable

medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation

(emphasis added). When a patient is treated by their private physician in a hospital setting, it is the private physician's duty to obtain the patient's informed consent to the procedure. See, e.g., Sita v. Long Is. Jewish-Hillside Med. Ctr., 22 A.D.3d 743 (2d Dep't 2005); Beard v. Brunswick Hosp. Ctr., 220 A.D.2d 550, 551 (2d Dep't 1995).

Dr. Bansal has established that she was not the "person providing the professional treatment or diagnosis" (Pub. Health Law § 2805-d[1]), that she was an employee of the Hospital, and that Dr. Holden was Ms. Mieses-Perez's private physician. As such, even though she may have undertaken the task to procure Ms. Mieses-Perez's signature on the reaffirmation of the Sterilization Consent Form or discuss the surgery with plaintiffs, the duty to provide the information to Ms. Mieses-Perez necessary to make an informed decision rested with Dr. Holden. See Cirella v. Central Gen. Hosp., 217 A.D.2d 680, 681 (2d Dep't 1995) (citations omitted); see also Pub. Health Law § 2805-d(1). Plaintiffs have failed to sufficiently rebut Dr. Bansal's prima facie demonstration of entitlement to summary judgment on the informed consent claim. They have offered no authority to support their position that an exception exists that required Dr. Bansal to obtain plaintiff's informed consent.

Similarly, Dr. Maidman has established that he is entitled to summary judgment by showing that he did not order or perform the procedure in question and that the information session that he did conduct on May 4, 2007, met the standard of care for providing Ms. Mieses-Perez with

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the remaining defendants; and it is further

ORDERED that plaintiffs' motion for summary judgment (Motion Sequence Number 003) is denied; and it is further

ORDERED that counsel are directed to appear for a previously scheduled pre-trial conference on March 15, 2011, at 10:00 a.m.

Dated: February 8, 2011



JOAN B. LOBIS, J.S.C.

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