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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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JOANMARIE GLOVER,

Plaintiff,

-against-

STEPHEN KRIGSMAN, M.D., HENRY PARTRIDGE, M.D., KENNETH BECKER, M.D. and SOUTH NASSAU COMMUNITIES HOSPITAL,

Defendants.

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TRIAL/IAS PART 21

INDEX # 012428/09

Motion Seq. 1
Motion Date 2.28.11
Submit Date 4.22.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Defendant Kenneth Becker, M.D., moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him.

The plaintiff in this action seeks to recover damages for medical malpractice and lack of informed consent. She alleges, *inter alia*, that the defendants were negligent in failing to timely diagnose and treat her anastomosis leak. The defendant Dr. Becker seeks summary judgment dismissing the complaint against him.

"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 (2nd Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2nd Dept. 1990).

" 'The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (citations omitted).' " Wexelbaum v Jean, 80 AD3d 756 (2nd Dept. 2011), quoting DiMitri v Monsouri, 302 AD2d 420, 421 (2nd Dept. 2003). "In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries." Stukas v Streiter, 83 AD3d 18 (2nd Dept. 2011). "Thus on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted

medical practice or that the plaintiff was not injured thereby (citations omitted)." Wexelbaum v Jean, supra; see also, Stukas v Streiter, supra.

If the moving defendant only establishes that he did not commit medical malpractice, in opposing the motion, the plaintiff must establish the existence of a material issue of fact with respect to only that issue. Stukas v Streiter, supra. Similarly, if the moving defendant establishes a lack of proximate cause, the plaintiff need establish only the existence of a material issue of fact with respect to that issue. Stukas v Streiter, supra. However, if the moving defendant establishes both a lack of negligence and proximate cause, in opposing the motion, the plaintiff must establish an issue of fact as to both of those issues. Stukas v Streiter, 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 (citations omitted). Shectman v Wilson, 68 AD3d 848 (2nd Dept. 2009); 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 of care and explain how they were departed from. Geffner v North Shore University Hosp., 57 AD3d 839, 842 (2nd Dept. 2008) (citations omitted). 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 (2nd Dept. 1999); see also, Geffner v North Shore University Hosp., supra; Rebozo v Wilen, 41 AD3d 457 (2nd Dept. 2007).

An expert's affidavit which lacks evidentiary support in the record or is contradicted thereby is not sufficient to establish the existence of a triable issue of fact. Micciola v Sacchi, 36 AD3d 869, 871 (2nd Dept. 2007) (citations omitted). Furthermore, "[a]n expert may not reach a

conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (citations omitted)." Rosato v 2550 Corp., 70 AD3d 803 (2nd Dept. 2010); see also, Cassano v Hagstrom, 5 NY2d 646 (1959); Hambsch v New York City Tr. Auth., 63 NY2d 723, 725 (1984). "[H]indsight reasoning . . . is insufficient to defeat summary judgment (citations omitted)." Miccola v Sacchi, supra at p. 871.

"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 (citations omitted)." Alicea v Liguori, 54 AD3d 784, 785 (2nd Dept. 2008), quoting Johnson v Jamaica Hosp. Med. Ctr., 21 AD3d 881, 883 (2nd Dept. 2005). 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 (citations omitted).' " Alicea v Liguori, supra, at p. 786, quoting Flaherty v Fromberg, 46 AD3d 743, 745 (2nd Dept. 2007).

Pursuant to New York Public Health Law § 2805-d, a cause of action for lack of informed consent is limited to cases involving non-emergency treatment, procedure or surgery or a diagnostic procedure involving an invasion or disruption of the patient's body. Thus, the "plaintiff must allege that the wrong complained of arose out of some affirmative violation of plaintiff's physical integrity." Iazzetta v Vicenzi, 200 AD2d 209, 213 (3rd Dept. 1994), lv den., 85 NY2d 857 (1995); see also, Flanagan v Catskill Regional Medical Center, 65 AD3d 563, 566-567 (2nd Dept. 2009): Public Health Law § 2805-d(3) provides that "[f]or a cause of action it must . . . be

established that a reasonably prudent person in the patient's position *would not have undergone* the treatment or diagnosis if he had been fully informed (emphasis added) (citations omitted)." Ellis v Eng, 70 AD3d 887 (2nd Dept. 2010).

The facts pertinent to the determination of this motion are as follows:

While undergoing a colonoscopy by defendant Dr. Krigsman on January 31, 2008,. the plaintiff sustained a perforated colon.. The colonoscopy was terminated and the plaintiff was transferred to the defendant South Nassau Communities Hospital ("hospital"). At the hospital, the perforated colon was confirmed via x-ray and the defendant Dr. Partridge performed an exploratory laparotomy and sigmoid colectomy as an emergency procedure with the assistance of non-party Dr. Paley. The plaintiff's hospital chart indicates that she was seen by Dr. Partridge the next day and she was stable and afebrile.

Dr. Becker first saw the plaintiff on the morning of February 2, 2008 as he was the covering doctor for the weekend. At his examination before trial, Dr. Becker testified that on that day, the plaintiff was progressing well post-surgery. She did not have a fever nor was she nauseous. At his examination before trial, Dr. Becker testified that he directed that she not be permitted to eat until she passed flatus and that she be kept on IV fluids, get her lungs moving and breathing deeper, replace her potassium and correct her electrolytes if needed. Dr. Becker examined the plaintiff again the next day, February 3rd. Dr. Becker testified at his examination before trial that while plaintiff had experienced nausea and cramps that morning, she obtained relief via pain medication. Dr. Becker acknowledged at his deposition that while nausea and cramps could be a sign of a bowel perforation, he ruled that out because the plaintiff did not have a fever, there were no signs of sepsis, her pain responded to medication and her white blood cell

count was improving. Post-op ileus, a bowel obstruction, was suspected. His plan was to continue IV fluids and to continue dietary restrictions until the plaintiff's signs of bowel function resumed. Dr. Becker did not see or participate in the plaintiff's treatment again until February 7th, and once again, only as the covering doctor, per request.

It appears that the plaintiff remained stable in Dr. Becker's absence. On the 4th of February, she had a minimally distended abdomen and negative flatus but no fever. Her white blood cell count continued to improve, as it was decreasing. On February 5th, she had positive bowel movements with a soft abdomen and she was afebrile, which conditions continued on February 6th. The plaintiff's discharge was planned for the 7th.

Dr. Becker testified at his examination-before-trial that unfortunately, when he examined the plaintiff on February 7th, he learned that she had developed nausea, vomiting and abdominal distension. However, she did not have a fever, there were no signs of sepsis, and her vital signs were good, including her white blood count. Dr. Becker testified that while a colon perforation was a "vague consideration" in his differential diagnosis, and he had some concern that she could have been developing a postoperative bowel obstruction, since she "had no fevers [and] no signs of sepsis, which usually [go] part and parcel with perforation," his other diagnosis was much higher on his list of concerns. He accordingly planned to replace her nasogastric tube and obtain a stat abdominal x-ray. Dr. Becker testified at his deposition that when he examined the plaintiff on February 8th, he learned that she had loose bowel movements and cramps with mild tenderness and her abdomen continued to be distended. However, she remained without any signs of sepsis or fever and with stable vital signs, including a continued improving 7.7K white blood cell count. A follow-up note in the plaintiff's chart shows that when the radiology report revealed possible

free air under her right hemidiaphragm and her white blood count skyrocketed to 34.2K, Dr. Becker ordered a CT scan of her abdomen. The CT scan revealed free air throughout the plaintiff's upper abdomen leading Dr. Becker to suspect a leak or bowel perforation. That day, Dr. Becker performed an exploratory laparotomy, drained the plaintiff's abdominal abcess, performed a partial left colectomy with end left colostomy and a Hartmann's pouch closure.

The plaintiff had an uneventful recovery and was discharged from the hospital on March 3, 2008. A successful reverse colostomy was performed at North Shore University Hospital on May 6, 2008.

In support of his motion, Dr. Becker has submitted the affirmation of Dr. Sorrentino, a board certified general surgeon. Having reviewed the plaintiff's medical records and the testimony given at the examinations-before-trial in this case, he opines to a reasonable degree of medical certainty that Dr. Becker did not depart from good and accepted medical practice in his care and treatment of the plaintiff. He explains that the plaintiff had no signs or symptoms which warranted any diagnostic studies on February 2nd when Dr. Becker first saw her. Dr. Sorrentino notes that the fact that the plaintiff had no flatus and a slightly distended stomach two days post-surgery were not clinically significant because those things are normal for a patient who underwent a sigmoid colectomy to repair a perforated colon. Thus, Dr. Sorrentino opines that Dr. Becker's treatment plan on February 2nd was appropriate. Similarly, Dr. Sorrentino opines that Dr. Becker's February 3rd diagnosis of post-operative ileus was appropriate because again, it is common for a patient to exhibit nausea and cramps three days post-operative without fevers or sepsis and a white blood cell count of 11.3K.

Dr. Sorrentino opines that Dr. Becker properly addressed the plaintiff's changing conditions on February 7th by ordering a stt abdominal x-ray. Dr. Sorrentino opines that Dr. Becker's failure to seriously consider an anastomosis leak that day was appropriate because despite her nausea, bilious vomiting and a distended abdomen, the plaintiff did not have a fever or signs of sepsis and her blood count was normal. Thus, Dr. Sorrentino opines that Dr. Becker's differential diagnosis of ileus/obstruction was not a departure from accepted standards of medical practice as symptoms of that condition include nausea, bilious vomiting, abdominal distension, normal white blood cell count and a normal temperature. As for February 8th, Dr. Sorrentino further opines that Dr. Becker properly ordered a stat CT scan to confirm the presence of free air which had been revealed in the February 7th abdominal x-ray. Dr. Sorrentino opines that the result of the stat CT scan were consistent with the plaintiff's white blood cell count of 34K on February 8th warranting the emergent exploratory surgery undertaken by Dr. Becker that day.

In summary, Dr. Sorrentino opines that there was nothing unusual in plaintiff's progress until February 7th to which Dr. Becker properly responded. Furthermore, Dr. Sorrentino opines, "[g]iven the symptoms Ms. Glover had on February 7, 2008, the outcome would not have differed, in that Ms. Glover would have needed surgical intervention to repair the anastomosis leak. Dr. Becker acted within acceptable medical practice in assessing Ms. Glover's symptoms, and his judgment was within acceptable standards of medical practice."

Dr. Sorrentino also opines that Dr. Becker appropriately obtained the plaintiff's informed consent.

Dr. Becker has established his entitlement to summary judgment dismissing the compliant against him thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

The plaintiff had not opposed dismissal of the lack of informed consent claim as against Dr. Becker, and, therefore, it is dismissed.

In opposition, the plaintiff has submitted the affidavit of a Board Certified surgeon. Having reviewed the plaintiff's medical records and the testimony given at the examinations-before-trial in this case, s/he opines to a reasonable degree of medical certainty as follows: Given the plaintiff's abdominal pain and distension on February 3rd, "the possibility of an acute abdominal process and/or anastomatic leak should have been considered;" *i.e.*, an abdominal x-ray should have been ordered. Furthermore, based upon the plaintiff's continued abdominal distension, nausea and bilious vomiting on February 7th, a stat or emergency CT scan should have been ordered because "plaintiff's symptoms clearly suggested an acute abdominal process, including small bowel obstruction and/or anastomotic leak," which should not have been dismissed. He opines that "the failure . . . to order the CT scan on February 7, 2008 was a substantial factor in causing the plaintiff's anastomotic leak." He opines that the delay in ordering this test "made a substantial difference in the outcome to the extent that the delay allowed the anastomotic leak to progress to such an extent that it required a far more involved, invasive and riskier surgical repair than had it been discovered on February 7, 2008."

The plaintiff's expert notes that Dr. Becker admitted that nausea and cramps, which the plaintiff experienced on February 3rd could be signs of a bowel perforation and faults Dr. Sorrentino for mischaracterizing Dr. Becker's testimony.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" *Feinberg v. Feit*, 23 A.D.3d 517, 519 (see also, *Darwick v. Paternoster*, 56 A.D.3d 714, 715, 868 N.Y.S.2d 698; *Bjorke v. Rubenstein*, 53 A.D.3d 519, 520, 861 N.Y.S.2d 757; *Roca v. Perel,* 51 A.D.3d at 759, 859 N.Y.S.2d 203). In the instant case, plaintiff's expert has raised a material issue of fact whether defendant Becker deviated or departed from accepted medical practice in failing to order certain diagnostic tests, and, if so, whether such departure was a proximate cause of plaintiff's injury. Accordingly, the defendant Becker's motion for summary judgment is **DENIED**.

Dated: June 1, 2011

ENTER:

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