

Iyalla v St. Luke's Roosevelt Hosp.

2011 NY Slip Op 32150(U)

August 4, 2011

Supreme Court, New York County

Docket Number: 118070/05

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

IYALLA, TINA

INDEX NO. 118070/05

MOTION DATE 3/29/11

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER

The following papers, numbered 1 to 12 were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

1-17j15

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order

FILED

AUG 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/4/11

JSH
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
COUNTY OF NEW YORK

-----X

TINA A. IYALLA,

Plaintiff,

-against-

ST. LUKE'S ROOSEVELT HOSPITAL,

Defendant.

-----X

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

Index No. 118070/05

Decision and Order

FILED

AUG 05 2011

NEW YORK
COUNTY CLERKS OFFICE

Motion Sequence Numbers 002 and 003 are hereby consolidated for disposition.

Motion Sequence Number 002, defendant St. Luke's Roosevelt Hospital (the "Hospital") moves, by order to show cause, pursuant to C.P.L.R. Rule 3212, for an order granting it summary judgment dismissing this matter in its entirety. In Motion Sequence Number 003, plaintiff, proceeding *pro se*, moves, by order to show cause, for an order vacating her default on Motion Sequence Number 002; allowing her to oppose the summary judgment motion; and compelling Jeffrey Singerman, an administrator from the Hospital, to appear for a deposition.

This action sounding in medical malpractice concerns care rendered to plaintiff in the Hospital's emergency room on September 15, 2005. Plaintiff presented to the emergency room that night at approximately 10:52 p.m. complaining of vaginal bleeding that persisted for three weeks and cramping that began three days prior. According to the medical records, plaintiff also set forth that "something [was] coming out from her vagina" and that her pain level was 10/10. Plaintiff reported a history of fibroids and anemia. Her temperature was 97.1° Fahrenheit; her blood pressure was 115/72; and her pulse rate was 102 beats per minute ("bpm"). Jonathan McCauley, M.D., an

emergency room physician, performed a gynecological exam on plaintiff at approximately 11:15 p.m. According to the medical records, the exam revealed mild to moderate blood in the vault, which is at the internal end of the vaginal canal, and a closed external orifice of the cervix. Dr. McCauley diagnosed her with anemia with chronic blood loss secondary to vaginal bleeding.

At approximately 11:30 p.m., plaintiff underwent a complete blood count ("CBC"), which revealed a white blood cell count of 7.4; a red blood cell count of 3.76; a hemoglobin count of 9.4; and a hemocrit level of 30.7. At 12:45 a.m. on September 16, Dr. McCauley performed a second pelvic examination. According to the medical records, he found a large amount of blood and plaintiff complained of a 8/10 pain level. At approximately 1:20 a.m., the Hospital intravenously administered 1,000 milliliters of normal saline and 4 milligrams of morphine. Dr. McCauley prepared plaintiff for discharge at approximately 1:44 a.m. Her discharge diagnosis remained anemia with chronic blood loss and vaginal bleeding. According to the medical records, Dr. McCauley instructed plaintiff to follow-up with her "regular doctor" for treatment of her anemia and fibroids, but to report back to the emergency room with any further problems. He also told her that she would likely need to have a hysterectomy to treat the fibroids. At approximately 2:42 a.m., plaintiff left the Hospital. She was ambulatory and "tolerating pain."

Plaintiff reported to gynecologist Chien-Jen Huang, M.D., F.A.C.O.G., on September 21, 2005. After an examination, he prescribed her with AnaproxDS and Metrogel, a gel used to treat vaginal infections. According to Dr. Huang's records (portions of which are illegible), he suggested that plaintiff undergo a radical hysterectomy. Plaintiff next visited with Dr. Huang on September 23,

2005. According to the medical records, Dr. Huang observed a "huge mass through [an] effaced [cervix]." He continued plaintiff on the Metrogel and again suggested that she undergo a radical hysterectomy.

On September 24, 2005 at approximately 8:20 a.m., plaintiff presented to the emergency room at New York-Presbyterian Hospital ("NYPH"), complaining that "tissue" had prolapsed from her vagina and that she had abdominal pain. Upon intake, plaintiff had a pulse of 140 bpm and a temperature of 97.5° F. By 6:15 p.m. that day, her heart rate had dropped to 125 bpm, but her temperature had risen to 99.8° F. NYPH initially scheduled plaintiff to be discharged that day but the discharge was canceled, and plaintiff was sent for an obstetric and gynecological consultation. The consultation took place at approximately 7:30 p.m. According to the medical records, upon vaginal examination, gynecologist Jennifer Tam, M.D., noted a prolapsing "membrane like material" and a "well circumscribed round structure." Dr. Tam believed that her findings most likely suggested a "calcified/degenerating fibroid." Dr. Tam ordered a pelvic and abdominal MRI and repeat blood cultures. She suggested that plaintiff stay at NYPH overnight. Results from the MRI were reported on September 26, 2005 and included findings of fluid collection; multiple fibroids; and evidence of a calcified fibroid. Plaintiff was scheduled for a hysterectomy. Plaintiff was continuously monitored at NYPH over the next few weeks and developed a bacterial infection. On October 7, 2005, plaintiff underwent a total abdominal hysterectomy, a bilateral salpingo-oophorectomy, and an appendectomy. According to the records, plaintiff's recovery was slow and marked by recurrent fevers and leukocytosis. She was ultimately discharged on October 18, 2005.

On or about December 30, 2005, plaintiff commenced this action with the filing of a summons and complaint. In her bill of particulars, plaintiff alleges that the Hospital and its staff failed to, inter alia, diagnose an infection and obtain a proper consultation from a "specialist." Plaintiff filed her note of issue on or about September 30, 2010. By order to show cause dated March 4, 2011, the Hospital moved for summary judgment. The motion was marked returnable on March 29, 2011 at 11:00 a.m. Plaintiff failed to oppose the motion and defaulted on the appearance. By order to show cause dated April 7, 2011, plaintiff moved for an order vacating her default and permitting her to depose an administrator from the Hospital.

Turning first to the summary judgment motion, 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 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.

In support of its motion, the Hospital offers an affirmation from Natalie Roche, M.D., who is board certified in obstetrics and gynecology. Upon her review of the medical records, Dr. Roche opines that plaintiff did not present to the Hospital with an infection, because her white blood cell count was normal; she was afebrile; and her other vital signs were "essentially normal." Dr.

Roche further sets forth that based on plaintiff's medical history, her anemia was seemingly a chronic condition that did not require emergency treatment other than the intravenous hydration. Dr. Roche maintains that fibroids can degenerate very quickly and that it is likely that one of plaintiff's fibroids degenerated and became infected in between her discharge from the Hospital and her admission to NYPH. Dr. Roche further asserts that plaintiff's hysterectomy was inevitable as it was the only way to treat her uterine fibroids.

Dr. Roche's non-conclusory affirmation setting forth that plaintiff was exhibiting no clinical signs of infection is sufficient to satisfy the Hospital's prima facie burden for summary judgment. Since the motion was submitted on default, the court must now determine whether plaintiff can vacate her default and sufficiently rebut the prima facie burden. Under C.P.L.R. Rule 5015(a), "[a] party seeking to vacate a default is required to demonstrate both a reasonable excuse for the default and a meritorious cause of action[.]" Easton v. Associates Leasing, Inc., 24 A.D.3d 141, 143 (1st Dep't 2005) (citation omitted). In medical malpractice cases, an affirmation from a medical expert is required to demonstrate merit. See, e.g., Rose v. Our Lady of Mercy Med. Ctr., 268 A.D.2d 225, 226 (1st Dep't 2000); Fiore v. Galang, 64 N.Y.2d 999, 1000-01 (1985). To oppose a summary judgment motion, the affirmation must set forth "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 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 support of her motion to vacate her default, plaintiff sets forth that she was sick on the return date of the summary judgment motion. Plaintiff also offers affirmations from Karen O'Leary Barber, a registered nurse, and Sha-Barbara E. McDaniel, M.D., a board certified OB/GYN. As a preliminary matter, as the Hospital correctly argues, the court cannot consider the affirmation of Nurse Barber, since, under C.P.L.R. Rule 2106, registered nurses cannot offer expert evidence in the form of an affirmation. Dr. McDaniel opines that, based on her review of the medical records, the Hospital deviated from the standard of care by performing an incomplete evaluation and rendering "a faulty diagnosis." Dr. McDaniel sets forth that plaintiff presented to the Hospital with an aborting myoma coupled with an "infection process such as pelvic inflammatory disease or tubo-ovarian abscess."¹ Dr. McDaniel sets forth that Ms. Iyalla's complaints of intense pain (10 on a 1-10 pain scale) is not consistent with anemia and vaginal bleeding. Instead, it is evidence of infection. Dr. McDaniel asserts that a gynecologic consultation was needed and, upon the consultation, a gynecologist should have performed a pelvic-abdominal evaluation. The Hospital's failure to take such action was a deviation from the standard of care. Dr. McDaniel asserts that the Hospital's failure to diagnose plaintiff's condition resulted in a delayed diagnosis that caused increased pain and suffering and "irreparable damage to her reproductive organs." Dr. McDaniel asserts that the hysterectomy could have been avoided.

¹ Ms. Iyalla's "affirmation" (submitted separately from the order to show cause and its supporting affidavit that sets forth illness caused her default) mentions that she complained of "a foul smelling foreign tissue protruding from her swollen cervix." While her unsworn affirmation cannot be considered, the records from the Hospital reflect that she complained that "something was coming out of her vagina."

In opposition, the Hospital argues that plaintiff fails to substantiate her claim of illness. The Hospital further argues that plaintiff did not establish that she has a meritorious cause of action.

Plaintiff's excuse of illness is reasonable. See Blakely v. Pitts, 80 A.D.3d 451 (1st Dep't 2011). Furthermore, plaintiff's prompt motion to vacate the default and her prior, zealous participation in this case suggest that the default was "was inadvertent, unintentional and an isolated incident devoid of any pattern of dilatory behavior." Spyropoulos v. Hirsh, 21 A.D.3d 818 (1st Dep't 2005) (citations omitted). Dr. McDaniel's opinion that the Hospital failed to recognize an infection and order an immediate gynecological consultation causing a delay in diagnose and increased pain and suffering is sufficient to establish the merits of plaintiff's case and rebut the Hospital's prima facie showing for summary judgment. It is well-established that "[c]onflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment." Bradley v. Soundview Healthcenter, 4 A.D.3d 194 (1st Dep't 2004).

Turning to plaintiff's request for a deposition, the Hospital was previously ordered to "provide the name of the gynecologist on call or resident handling gynecology on September 15, 2005 or an affidavit attesting that no such doctor was on call or that the information was unavailable." See so-ordered stipulation filed on November 29, 2010. By affidavit dated February 24, 2011, Jeffrey Singerman, the administrator of the Hospital's Department of Obstetrics and Gynecology since September 25, 2008, set forth that he obtained a list of gynecology residents on staff in 2005 and 2006 and that such list was provided to plaintiff. Mr. Singerman further asserted

that he could not identify the gynecology resident on duty at the time of plaintiff's emergency room visit because the scheduling records were destroyed in the "normal course of business." He also went through the records of the gynecology department and the residency program, but could not identify any gynecology residents that worked on September 15, 2005. Now, plaintiff seeks Mr. Singerman's deposition.

Following the filing of the note of issue, only the subsequent development of "unusual or unanticipated circumstances" will warrant further discovery. 22 N.Y.C.R.R. § 202.21(d); see also Sklarz v. Crabtree, 35 A.D.3d 260, 261 (1st Dep't 2006). The moving party has the burden of showing that these grounds have been met. See Med Part v. Kingsbridge Heights Care Ctr. Inc., 22 A.D.3d 260, 261 (1st Dep't 2005). Plaintiff sets forth that she wants to depose Mr. Singerman. She later argues that since Mr. Singerman did not begin to work for the Hospital until 2008, his affidavit is irrelevant. Plaintiff fails to identify any "unusual or unanticipated circumstances" that justify her need for a deposition of Mr. Singerman. Furthermore, the court notes that the Hospital has complied with the so-ordered stipulation by "attesting that . . . the information [on the gynecology resident] was unavailable." See so-ordered stipulation filed on November 29, 2010. That branch of plaintiff's motion seeking a deposition of Mr. Singerman is denied. Accordingly, it is hereby

ORDERED that that branch of plaintiff's motion (Motion Sequence Number 003) that seeks an order vacating her default on the Hospital's summary judgment motion (Motion Sequence 002) is granted; and it is further

ORDERED that upon vacating the default, the Hospital's summary judgment motion (Motion Sequence 002) is denied in its entirety; and it is further

ORDERED that that branch of plaintiff's motion (Motion Sequence Number 003) for an order compelling a deposition of Jeffery Singerman is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on August 30, 2011 at 11:00 a.m. prepared to pick trial dates.

Date: August 4, 2011



JOAN B. LOBIS, J.S.C.

FILED

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