

Khosrova v Westermann

2011 NY Slip Op 32628(U)

October 4, 2011

Sup Ct, Suffolk County

Docket Number: 13953/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**-----X
SHARON KHOSROVA and BRUCE HALE,

Plaintiffs,

-against-

DR. CHRISTIAN WESTERMANN,

Defendant.
-----X

INDEX NO.: 13953/2005

CALENDAR NO.: 200901906MM

MOTION DATE: 10/7/2010

MOTION NO.: 002 MG

PLAINTIFFS' ATTORNEY:

JEFFREY SAMEL & PARTNERS

150 Broadway, 20th Floor

New York, New York 10038

DEFENDANT'S ATTORNEY:

FUMUSO, KELLY DeVERNA,

SNYDER, SWART & FARRELL LLP

110 Marcus Blvd., Suite 500

Hauppauge, New York 11788

Upon the following papers numbered 1 to 44 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-35; ~~Notice of Cross Motion and supporting papers~~ _____; Answering Affidavits and supporting papers 36-40; Replying Affidavits and supporting papers 41-44; Other Mem/Law 31-32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of defendant Christian Westermann, M.D., for an order pursuant to CPLR R. 3212 granting defendant summary judgment dismissing plaintiffs' complaint is granted.

The submissions reflect that on April 24, 2003, plaintiff Sharon Khosrova underwent a total abdominal hysterectomy for uterine fibroid tumors at Stony Brook University Hospital. The surgery was performed by the defendant, Christian Westermann, M.D. On June 8, 2005, plaintiff and her husband Bruce Hale, who has asserted a derivative claim, commenced this action against defendant asserting claims of medical malpractice and lack of informed consent. Plaintiff, who also had a preexisting diagnosis of hepatitis C (a result of a needlestick in the course of her prior employment as a nurse) alleges in her verified bill of particulars dated November 2, 2005 and supplemental verified bill of particulars dated July 23, 2009 that, *inter alia*, Dr. Westermann departed from good and accepted standards of medical care and treatment by using a surgical stapler rather than needles/sutures because of his fear of contracting hepatitis C; failing to inform plaintiff of his concerns about needlesticks; using the surgical stapler improperly; using stainless steel rather than titanium staples; failing to diagnose and correct complications from the surgery; failing to address plaintiff's post-operative pain; abandoning the plaintiff on July 10, 2003; and failing to respond to plaintiff's complaints.

Plaintiff alleges that as a result of these and other alleged departures, she sustained the following injuries: pelvic pain; dyspareunia; involuntary loss of urine; shortness of breath; difficulty breathing; nausea; vertigo; difficulty with balance; pain, soreness and/or discomfort; headaches; mood swings; depression; anxiety; abnormal bowel function; and constant, painful pulling/tugging sensation in the abdomen. Plaintiff further alleges that defendant violated the

standard of care by failing to advise plaintiff of the risks of the procedure. Additionally, plaintiff alleges that defendant violated the standard of care by altering and falsifying plaintiff's medical records.

After the completion of discovery and the filing of a note of issue on September 18, 2009, defendant interposed the instant motion for summary judgment on or about January 12, 2010. The motion was thereafter adjourned several times at the request of plaintiff's counsel pending plaintiff's undergoing exploratory surgery to determine the basis of her complaints of pelvic pain. The surgery was postponed for several months after plaintiff was injured in an unrelated fall and ultimately took place on May 26, 2010. Plaintiff's opposition to defendant's motion was served on August 17, 2010 and defendant served a reply on October 7, 2010.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the defendant has submitted, *inter alia*, an attorney's affirmation; copies of the complaint, answer, bill of particulars, supplemental bill of particulars, defendants' various discovery demands; affirmation of defendant's medical expert, Henry Prince, M.D. dated January 11, 2010; uncertified copies of the plaintiff's various medical records and reports; and copies of the transcripts of the depositions of plaintiff Sharon Khosrova dated June 30, 2006, September 8, 2006 and November 19, 2009, Dr. Westermann dated October 26, 2006, and Anthony Comerford dated December 9, 2008.

The affirmation of defendant's expert, Henry Prince, M.D., reflects that he is a New York State licensed physician who is board certified in obstetrics and gynecology. Dr. Prince reviewed plaintiff's then-available medical records and the parties' deposition testimony and concluded, within a reasonable degree of medical certainty, that Dr. Westermann acted appropriately and did not depart from accepted standards of medical practice in his care and treatment of Sharon

Khosrova. Moreover, Dr. Prince concluded, within a reasonable degree of medical certainty, that Dr. Westermann's treatment was not the proximate cause of any of the alleged injuries listed in plaintiff's bills of particulars.

As reported in Dr. Prince's affirmation, plaintiff's medical records reflect that on January 7, 2003, plaintiff presented to her gynecologist, Geri Schmitt, M.D., complaining of pelvic pain and dyspareunia (painful intercourse). A pelvic sonogram on January 22, 2003 revealed a fibroid uterus, IUD in situ and a nabothian cyst. Dr. Schmitt's recommendations for possible treatment modalities were the administration of Lupron, myomectomy, and hysterectomy.

Plaintiff subsequently treated with Dr. Westermann on February 20, 2003, whose notes of the visit reflect plaintiff's complaints of fibroids, pain, pressure and discomfort all the time. Upon examining plaintiff, Dr. Westermann noted tenderness throughout the abdomen, uterus enlarged with fibroids, severe tenderness, and that plaintiff was unable to tolerate the exam. Dr. Westermann's notes indicated plaintiff needed a possible total abdominal hysterectomy ("TAH"); that plaintiff wanted to preserve her ovaries if possible; and that she needed cardiac and medical clearance due to her prior cardiac history. Dr. Prince's affirmation reflects Dr. Westermann's notes stating that he discussed the risks, benefits and side effects of hormone replacement therapy (HRT), "discussed all options" regarding fibroids and advised plaintiff that she could still have pain and discomfort after surgery. On April 15, 2003, plaintiff signed a surgical consent form for a total abdominal hysterectomy and "indicated procedures." Dr. Westermann's office note, which Dr. Prince states was "inadvertently" dated April 15, 2005, indicates that consents were obtained and all options were discussed and questions answered.

Dr. Prince states that on April 24, 2003, Ms. Khosrova was admitted to Stony Brook University Hospital where she underwent an exploratory laparotomy, supracervical hysterectomy with ovarian preservation, and partial right salpingectomy (partial removal of fallopian tube). Dr. Prince sets forth that Dr. Westermann wrote in his operative note that due to concerns about the patient's past history of hepatitis C and concerns about needle sticks, he proceeded with the first part of the procedure (ligation of the utero-ovarian blood vessels) with the use of a staple gun. Blood loss was described as moderate (300 cc) at the end of the procedure. External staple removal was performed on May 1, 2003 at the defendant's office. A note of May 9, 2003 reflects that plaintiff called to come in, but was told to go to the office of her cardiologist (Dr. Hershman) due to her complaints of chest pain, shortness of breath and cough with chills. Although the plaintiff complained she was abandoned by Dr. Westermann when he referred her to Dr. Hershman, Dr. Prince concluded that plaintiff was appropriately referred to her cardiologist due to her history of multiple cardiac problems. Dr. Prince notes that Dr. Hershman had plaintiff admitted to St. Francis Hospital to rule out pulmonary embolus, that she was treated there for anxiety and that a diagnosis of pulmonary embolus was ruled out.

Dr. Prince opines that Dr. Westermann performed the surgical procedure within accepted standards of care, that surgical staples are commonly used in gynecological surgery, that the staples are superior to sutures as they are inert and do not cause inflammation and are far superior to cat gut sutures, that staples are FDA-approved and much faster to use than conventional sutures, thus decreasing blood loss and operative time, and that there is less tissue necrosis and

adhesions with staples. He further opines that Dr. Westermann properly used the staples due to the patient's history of hepatitis C, and that conventional sutures provide more of an opportunity for the physicians and nursing staff in the OR to acquire a needle-stick injury. Dr. Westermann, he further opines, properly used the staples without using the sheath which is normally used during a laparoscopic procedure, and that sutures were appropriately used when closing the fascia and cervical stump. Moreover, Dr. Prince concluded that appropriate post-operative care was provided and proper post-operative medications were given.

Dr. Prince further opines that Ms. Khosrova sustained no complications as a result of the surgery performed by Dr. Westermann, and that no additional surgery is required. He states that her complaints of pelvic pain and tugging are not due to the use of staples, that complications could develop if they were removed, and that her symptoms are actually due to abdominal wall laxity, myofascial pain syndrome, interstitial cystitis or adhesions, and are not related to the surgery or the surgical approach. Dr. Prince further opines that plaintiff's complaints of pain may be due to endometriosis as reflected in the surgical pathology report of April 24, 2003, which reveals adenomyosis, a type of endometriosis that can cause scarring and adhesions. Dr. Prince further opines that Dr. Westermann's treatment of the plaintiff was not the proximate cause of any of the alleged injuries listed in the plaintiff's bills of particulars.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a *prima facie* case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

In the instant action, the defendant has established by way of the affirmation of Dr. Prince that he did not depart from accepted standards of care and treatment, gave proper informed consent, and did not proximately cause the plaintiff's claimed injuries, and has thus established *prima facie* entitlement to summary judgment dismissing the complaint.

The plaintiffs have opposed this motion for summary judgment. To rebut a *prima facie* showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

The plaintiffs have submitted the affirmation of their expert, Kenneth Levey, M.D., a physician licensed to practice medicine in the State of New York and board certified in obstetrics and gynecology. It is the plaintiffs' expert's opinion within a reasonable degree of medical certainty that the defendant Dr. Westermann departed from accepted standards of medical care and treatment in treating plaintiff and that these departures were a substantial factor in "exacerbating plaintiff's complaint of pain" (Levey Aff, ¶4).

Dr. Levey opines that when Dr. Westermann advised the plaintiff of the need for a TAH to manage plaintiff's fibroids, he did not consider the plaintiff's "overall pain picture" as "it was likely that...there was additional disease" which could account for the pain that was not caused by the fibroids" (Levey Aff, ¶6). He opines that removal of plaintiff's fallopian tubes and ovaries would have been both standard and appropriate. He further opines that additional testing should have been done to further define and appropriately treat plaintiff's complaints of chronic pelvic pain. Dr. Levey further opines that the defendant's records do not indicate that Dr. Westermann considered informing the plaintiff of options such as uterine fibroid embolization, gonadotropic releasing hormone agonists, or simple observation and monitoring. Dr. Prince notes that "all the options and risks" allegedly discussed were not specified in the defendant's records, and concludes that the plaintiff was not fully informed as to all options before providing consent. Plaintiff's expert further notes that failure to maintain accurate medical records is a departure from good and accepted medical practice, and that Dr. Prince is not in a position to come to the conclusion that Dr. Westermann's dating the consent medical record "2005" as opposed to "2003" was "inadvertent." Dr. Levey further states that Dr. Westermann failed to inform the plaintiff that her pain could be worse after surgery, and opines that promising a patient that surgery will alleviate pain is a departure from good and accepted medical practice. The plaintiff's expert further opines that Dr. Westermann failed to properly address the plaintiff's pelvic pain by performing a supracervical hysterectomy as he failed to consider maximum denervation by not removing the cervix. Had the cervix been removed, Dr. Levey states, "there would have been a disruption of the nerves in the cardinal ligament that would have served to achieve maximum denervation and would have better addressed the plaintiff's pain" (Levey Aff, ¶6).

Dr. Levey further states that when the plaintiff complained of chest pain, shortness of breath, a cough and chills on May 9, 2003, less than two weeks after surgery, Dr. Westermann should have examined the plaintiff instead of referring her to her cardiologist and should have called an ambulance, and that his failure to do so was a departure from good and accepted medical practice.

With regard to the use of staples, the plaintiff's expert opines that "[w]hile there is a small body of evidence generally supporting the use of surgical staples in gynecological surgery, in a surgical case like the one at issue, the use of staples for her abdominal hysterectomy was the wrong choice, in light of the patient [sic] underlying pain condition" (Levey Aff ¶8). "[B]y adding multiple staple lines to the peritoneal and nerve tissue, one does not decrease but likely increases the pain generators" (*id.*). Plaintiff's expert also opines that the use of staples could have caused or increased the plaintiff's complaints of dyspareunia. Also, he states that the use of staples is not common with gynecological surgery and is not the "standard of care." Further, he opines, the use of blunt tip needles would have avoided the risk of needle sticks while not

exposing the patient to permanent pain generators caused by staples. Dr. Levey further opines that Dr. Westermann had an obligation to advise the plaintiff he was going to use staples, as they are not the community standard of care, despite his concerns with hepatitis C, and the plaintiff should have also been advised she could choose another physician who would use sutures instead of staples. Plaintiff's expert opines that the stapler was not properly used, that stainless steel staples are not intended for use with the subject stapler, and that Dr. Westermann should have apprised the patient of the same.

Dr. Levey also disagrees with Dr. Prince that the plaintiff's complaints of pain are due to endometriosis. He finds that there is no conclusive evidence that endometriosis was the cause of the pain either pre or post-operatively, and the postoperative report indicated adenomyosis, not endometriosis, which are two different diseases. Adenomyosis is limited to the uterus. Once the uterus is removed, the adenomyosis is cured, but Dr. Westermann failed to remove the entire uterus by leaving plaintiff's cervix in place. Dr. Levey concludes that "Dr. Westermann's use of staples for this patient, his failure to properly treat plaintiff's complaints of pain, and his failure to follow up with the patient, were departures from accepted standards of care that were substantial causes of the exacerbation of plaintiff's chronic pain syndrome and complaints" (Levey Aff, ¶13).

Also submitted in opposition to defendant's motion is the affidavit of the plaintiffs' forensic expert, Dennis Ryan, who states that he is certified by the American Board of Forensic Document Examiners as a forensic document examiner. On March 26, 2008, he examined and compared medical records submitted by plaintiff's counsel with "original" medical records provided by defense counsel, which he inspected using handwriting examination, high-resolution photography, microscopic examination, and UV/IR light examination of ink and paper. He concludes that with respect to certain of the documents, certain handwritten entries appeared to have been made with "different ink formulations," indicating that more than one pen may have been used to prepare the entry. With respect to a page of notes reflecting plaintiff's office visits on 5/27/03 and 7/10/03, Mr. Ryan concludes that the handwritten entry of the word "pain" was added to a photocopy of the original handwritten entry. He also notes that the handwritten dates in the document entitled "Progress Notes" are not in chronological order, as the entry dated 4-15-05 appears before the entries dated 5-1-03 and 5-1-09. He concludes that the latter two entries may have been added subsequent to the 4-19-05 handwritten progress notes. With respect to a "pelvic ultrasonography report" dated September 16, 2003, he concludes that the handwritten entries dated 9-16-05 may have been added subsequent to the preparation of the original handwritten entries. Upon examination of item number 5, consisting of three different samples of the "Pre-Surgical Orders," two of which were contained in the SUNY Stony Brook medical record and one of which was contained in Dr. Westermann's file, Mr. Ryan concludes that all three samples are photocopies.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (*see, Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624, 760 NYS2d 199 [2d Dept 2003]), as such credibility issues can only be resolved by a jury (*see, Shields v Baktidy, supra; Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). However, where the opinions of the plaintiff's expert are based on allegations of

medical malpractice that are merely conclusory in nature and unsupported by competent evidence, such expert affirmations are insufficient to defeat defendant physician's entitlement to summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Toledo v Ordway*, 208 AD2d 518 [2d Dept 1994]).

Here, the affirmation and affidavit of plaintiff's experts fail to raise genuine factual issues based on facts set forth in plaintiff's medical and hospital records.

Plaintiff's medical expert concluded, assertedly on the basis of his review of plaintiff's medical records, that defendant's alleged departures "were a substantial factor in exacerbating plaintiff's complaint of pain" (Levey Aff, ¶4) and "were substantial causes of the exacerbation of plaintiff's chronic pain syndrome and complaints" (Levey Aff, ¶12). However, there is no evidence in plaintiff's medical records or the records of this case that at the time plaintiff initially consulted with Dr. Westermann, plaintiff had any such preexisting chronic pain syndrome or that plaintiff is asserting a claim for exacerbation of any such syndrome. Plaintiffs' bill of particulars does not identify "exacerbation" as one of the injuries allegedly caused by Dr. Westermann, and states that the condition that Dr. Westermann undertook to treat was "fibroids," not any alleged chronic pain syndrome.

Dr. Levey's conclusory assertion that it was "likely that there was additional disease" causing pain not accounted for by the fibroids, and that Dr. Westermann should have also removed plaintiff's ovaries and fallopian tubes, is factually unsupported by the operative report and the subsequent pathology report, and grossly contrary to plaintiff's expressed wishes to preserve her ovaries "at all costs." Similarly unsupported is Dr. Levey's assertion that removal of plaintiff's cervix would have relieved plaintiff's pain. Dr. Levey's assertion that "it is probable that the use of staples caused or exacerbated [plaintiff's] dyspareunia" (Levey Aff, ¶8) fails to establish a causal connection between defendant's use of surgical staples and plaintiff's complaint of dyspareunia.

Although plaintiff's expert identifies numerous other alleged departures, *i.e.*, use of the stapler in a manner that is contraindicated, failing to call an ambulance for plaintiff when she reported experiencing shortness of breath, use of stainless steel as opposed to titanium staples, he does not state with a reasonable degree of medical certainty that any of them caused any of the alleged injuries to plaintiff. Accordingly, no triable issues of fact are raised with respect to any such alleged departures.

Most notable is the absence of any reference in Dr. Levey's report to plaintiff's medical records pertaining to the plaintiff's subsequent surgery, which occurred after defendant interposed the instant motion for summary judgment but before plaintiff's opposition was submitted. The reply affirmation of defendant's counsel reflects that on May 26, 2010 plaintiff underwent additional surgery to identify the source of her abdominal pain and discomfort. The surgery was performed by George DeNoto, M.D., whose operative report, dated May 26, 2010, reflects that a diagnostic laparoscopy was performed, in the course of which numerous abdominal adhesions were identified and lysed. Bilateral hydrosalpinx were also noted to be present. No other abnormalities were noted, and there is no mention of surgical staples. Moreover, Dr. DeNoto's

report dated June 1, 2010 indicates that plaintiff was noted to have a significant adhesion tugging on the peritoneum that could explain her discomfort, and that after the surgery, plaintiff reported that her abdominal discomfort was “significantly improved” and “almost completely gone.”

The reply affirmation of defendant’s medical expert¹ reflects the expert’s conclusion that because adhesions were found, and plaintiff’s symptoms resolved after the adhesions were lysed, plaintiff’s symptoms of pain were not caused by any alleged act or omission of Dr. Westermann. The Court is constrained to agree that plaintiff’s subsequent medical records establish that plaintiff’s alleged injuries were not caused by any act or omission of defendant Dr. Westermann. Moreover, the affidavit of plaintiff’s forensic document expert does not reflect that he formulated any opinion on the basis of his findings and observations; accordingly his affidavit fails to raise any questions of fact.

In light of all of the foregoing, defendant’s motion for summary judgment dismissing plaintiff’s complaint is granted.

Dated: October 4, 2011

PAUL J. BAISLEY, JR.

J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION

¹ Because defendant’s expert did not have an opportunity previously to opine on plaintiff’s recent medical records (which, the Court notes, were available to plaintiff but never referred to in plaintiff’s opposition or the expert’s affirmation), the Court considers the supplemental affirmation of the defendant’s expert submitted with defendant’s reply papers.