

Fortich v Ky-Miyasaka
2011 NY Slip Op 34033(U)
October 25, 2011
Sup Ct, Bronx County
Docket Number: 300963/08
Judge: Stanley B. Green
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NEW YORK SUPREME COURT - COUNTY OF BRONX

IA-6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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DESIREE FORTICH and EDISON FORTICH,

INDEX No. 300963/08

Plaintiff(s),

- against-

ALEX JENNY KY-MIYASAKA, ALBERT G. THOMAS,
THOMAS P. STERRY, JAMAL RAHAMAN, DAVID
BRONHEIM and MT. SINAI HOSPITAL,

Defendant(s)

Present:
HON. STANLEY GREEN
J.S.C.

----- X
The following papers numbered 1 to 3 read on this motion
No. on the Calendar of July 28, 2011

PAPERS

	<u>NUMBERED</u>
Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	2
Replying Affidavit and Exhibits.....	3
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: October 25, 2011



STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

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Defendant(s)

DECISION

-----X

HON. STANLEY GREEN:

The motion by defendant Dr. Thomas Sterry for an order pursuant to CPLR §3212 granting summary judgment is granted.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of defendant's negligence in the planning and performance of three different surgical procedures in a single operation on July 18, 2006 at Mt. Sinai Hospital. The surgical procedures included a total abdominal hysterectomy and salpingo-oophorectomy (TAH-BSO) performed by Dr. Thomas (gynecologist), the repair of a ventral hernia performed by Dr. Ky, (general surgeon) and an abdominoplasty or "tummy tuck" by Dr. Sterry (plastic surgeon).

Dr. Sterry performed the initial incision for the operation, then stepped out while Dr. Thomas and Dr. Ky performed the intra-abdominal work. Due to her medical history of multiple surgeries, plaintiff had extensive adhesions in her abdomen. Dr. Ky assisted Dr. Thomas by opening the planes of tissue to get into the abdomen, clearing any adhesions that were stuck to the abdominal wall. As Dr. Thomas then began taking out adhesions from the organs he was

planning to work on, he saw that a cystotomy (hole) in the bladder occurred. Dr. Thomas asked Dr. Ky to repair the hole and he called in Dr. Rahaman to assist in lysing the adhesions from the pelvic structures. After Dr. Thomas completed his surgery, Dr. Ky asked Dr. Sterry, who had scrubbed back in, to close the fascia over the abdomen in order to facilitate the hernia repair. Dr. Sterry closed the fascia and Dr. Ky completed the hernia repair. Dr. Sterry then performed the abdominoplasty, placed plaintiff in a surgical binder and transferred her to the SICU.

Post-operatively, plaintiff began to develop pain, then a fever and respiratory distress. On July 21, 2006, Dr. Ky performed an exploratory laparotomy which revealed two enterotomies (perforations) in the small intestine, which he repaired. Dr. Sterry assisted Dr. Ky in opening and closing plaintiff in order to protect the plastic surgery result. Plaintiff subsequently developed sepsis and underwent additional surgical procedures. She was discharged from the hospital in October 2006.

Plaintiff alleges that Dr. Sterry was negligent in: (1) planning three major surgeries simultaneously; (2) failing to inform her of the risks of combining multiple surgical procedures in light of her medical history; (3) failing to advise Dr. Ky that the binder could be removed in order to examine plaintiff's abdomen; and (4) in causing or contributing to the enterotomies and failing to timely diagnose and treat them.

Dr. Sterry seeks dismissal of the claims against him on the ground that he informed plaintiff of the risks, benefits and alternatives to the procedure, including the option of doing the three procedures separately, and the surgery he performed was nowhere near the place where the enterotomies were located and did not cause or contribute to plaintiff's injuries.

In support of the motion, Dr. Sterry submits his own affidavit, along with transcripts of

his deposition testimony and the testimony of Dr. Ky and Dr. Thomas, a copy of the consent form signed by plaintiff on July 11, 2006 and copies of the operative reports.

Dr. Sterry's testimony shows that plaintiff first consulted him on November 21, 2005 about an abdominal scar. At that time, he noted that her medical history was significant for an ongoing thyroid work-up, treatment for anemia, possibly secondary to fibroids, deep vein thrombosis treated with anticoagulation and a past surgical history of multiple abdominal surgeries. Dr. Sterry examined plaintiff and discussed with her the options for reconstructing her abdominal wall and the risks and benefits of the operations. He also advised her to undergo a CT scan to confirm his impression that she had a ventral hernia and discussed the possibility of having the hernia repaired at the same time. He discussed the risks and benefits of multiple possible surgical interventions with plaintiff, but plaintiff was not ready to schedule the surgery at that time. On November 28, 2005, plaintiff underwent a CT scan, which revealed a mid-line abdominal hernia containing non-obstructive small bowel.

Dr. Sterry next saw plaintiff on July 10, 2006 when she came to his office to go over the informed consent for an abdominoplasty the following week. The Informed Consent form signed by plaintiff, dated July 11, 2006, indicates that she consented to having Dr. Sterry perform an abdominoplasty and abdominal scar revision, that she was informed of the alternative treatments and of the various risks and complications that might occur. Dr. Sterry testified that he also informed plaintiff that she had the option of doing the three procedures separately and that he advised her that doing the procedures separately would put her at increased risk by nature of the multiple anesthesia sessions.

Dr. Sterry next saw plaintiff on July 17, when she presented for pre-operative markings

and to discuss the way the abdominoplasty was performed. He testified that he reviewed the risks and benefits with her again. The following day, the surgery was performed.

Dr. Sterry's testimony shows that his involvement in plaintiff's surgery on July 18th was superficial to the abdominal muscles and in a completely different surgical plane from the area of the operations being performed by Dr. Ky and Dr. Thomas. Dr. Sterry's testimony also shows that the binder given to plaintiff was made of latex elastic and could be opened and easily closed if needed for a physical examination of the patient's abdomen.

Dr. Sterry testified that plaintiff was doing well on July 18th. On July 19th, Dr. Sterry noted that plaintiff complained of back pain. Her blood pressure was 111/65 and her surgical wounds were clean, dry and intact. On July 20, plaintiff was complaining of discomfort and left flank pain, but the wound was clean, dry and intact without any evidence of infection. The plan was to take a CT scan of the abdomen and consider transfer to the ICU. According to Dr. Sterry, at that time, the attending physician in charge of plaintiff's post surgical management was Dr. Thomas. On July 21, after CT scans were performed and a bowel perforation could not be excluded, plaintiff was taken to the operating room by Dr. Ky. Dr. Sterry assisted Dr. Ky by opening and closing the tummy tuck.

Dr. Ky's testimony shows that it is her opinion that the most likely cause of the enterotomies was desecrosalization of the bowel, which could be from dissection, thermal injury from operative equipment, sutures, infection, poor blood supply, etc. Dr. Ky also testified that the tummy tuck "is something outside her belly" that "probably didn't have a whole lot to do with her hostile abdomen, because it's all surface for the most part."

Dr. Thomas' testimony shows that he discussed the risk of injury to the bowel, bladder,

etc. with plaintiff prior to the surgery and that in his opinion, there was no risk from doing all three procedures together and that to perform the procedures separately would increase the risks associated with anesthesia and the risk of infection.

Plaintiff contends that Dr. Sterry's motion must be denied because triable issues of fact exist concerning the surgical planning, the informed consent and the cause of the perforations.

In opposition to the motion, plaintiff submits her own affidavit, in which she states that a week before the surgery, Dr. Sterry discussed the planned surgery, but "did not mention the increased danger of doing three procedures at once" and did not suggest the possibility of delaying the cosmetic surgeries until after she healed from the gynecological procedure. Plaintiff states that if she had been aware of the increased risks, she would have delayed or canceled the cosmetic surgeries.

Plaintiff also submits the affirmation of an expert whose name is redacted. The affirmation indicates that the expert is licensed to practice medicine in New York, that he was Board Certified in Obstetrics and Gynecology and that he has performed hundreds of hysterectomies and salpingo-oophorectomies and has assisted in procedures for hernia repair and "other procedures similar to that involved here." He states that he reviewed plaintiff's medical records and the depositions and affidavit of Dr. Sterry and it is his opinion that Dr. Sterry departed from good medical practice in: (1) planning three major surgeries simultaneously when it was contraindicated by the patient's medical history; (2) failing to obtain informed consent concerning the risks of multiple surgeries; (3) failing to communicate properly with Dr. Ky and the surgical staff concerning the uses and function of the binder; (4) physically causing and/or contributing to the perforations; and (5) failing to notice and take steps to effect a timely repair of

the perforations.

Plaintiff's expert opines that because of plaintiff's extensive medical history, she was likely to have massive adhesions and that the longer the procedure lasted, the more manipulation of the organs that would be required and the more likely an injury would occur. He notes that plaintiff claims that Dr. Sterry did not inform her of the risks of combining the three surgeries together and opines that it was a departure for Dr. Sterry not to advise plaintiff of the special risks that her particular situation presented.

Plaintiff's expert also opines, based upon the contents of the July 21st operative report, that Dr. Sterry "likely" caused one of the perforations. This opinion is based upon a statement in the report indicating that the second enterotomy was located in a loop of small bowel slightly directly below the fascial closure, "which may have been plicated during the tummy tuck aspect of the surgery."

With respect to the alleged failure to timely diagnosis and treat the enterotomies, plaintiff's expert opines that Dr. Ky's progress note indicating that she was unable to perform a physical examination of plaintiff's abdomen because of the presence of the binder shows that "Either Dr. Sterry did not give clear instructions to the surgical team, or Dr. Ky did not understand him correctly" and that "Either one or both departed from good medical practice in this failure of communication," resulting in an inadequate physical exam by Dr. Ky and a delay in diagnosis of the acute abdomen.

In a medical malpractice action, a defendant physician establishes prima facie entitlement to summary judgment when he establishes 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. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to present competent evidence sufficient to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332). In order to sustain this burden, the plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care (Berger v. Becker, 272 AD2d 565). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice do not suffice to defeat defendant physician's motion (Alvarez v. Prospect Hospital, 68 NY2d 320). The expert's opinion must be based on facts in the record or personal knowledge (Cassano v. Hagstrom (5 NY2d 643).

While a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (Behar v. Coren, 21 AD3d 1045). Where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (Geffner v. North Shore Univ. Hosp., 57 AD3d 519).

To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law §2805-d, that: (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedures which a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation and (2) a reasonably prudent person in the patient's position

would not have undergone the procedure if he or she had been fully informed (Rodriguez v. New York City Health and Hospitals Corp., 50 AD3d 464).

Here, the evidence presented is sufficient to establish, prima facie, that Dr. Sterry did not depart from accepted standards of medical care in the treatment he provided and that he obtained plaintiff's informed consent for the surgery. Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a material issue of fact to defeat Dr. Sterry's motion.

While plaintiff submits the affirmation of an expert who opines that Dr. Sterry was negligent and departed from accepted medical standards by planning a triple surgery and failing to properly inform plaintiff of the increased risks of the combined surgery, this affirmation is insufficient to raise a material issue of fact to defeat Dr. Sterry's motion because plaintiff's expert fails to show that he has any experience with plastic surgery or with abdominoplasty procedures, fails to establish that it was Dr. Sterry's decision to combine the three surgeries and fails to establish a causal relationship between the length of the operation or Dr. Sterry's surgery and the alleged injuries. In addition, plaintiff's expert fails to address Dr. Sterry's claim that his surgery was on a completely different tissue plane, nowhere near the location of the enterotomies. Thus, his opinion that Dr. Sterry "likely" caused one of the enterotomies is not supported by factual evidence and is based upon a speculative statement that is contained in the July 21, 2006 operative report, which was dictated by a resident assistant to Dr. Ky who suggests that the second enterotomy "may have been plicated during the tummy tuck aspect of the surgery."

With respect to plaintiff's claim that faulty communication caused a delay in the diagnosis and treatment of the enterotomies, plaintiff's expert's statement that "either Dr. Sterry

did not give clear instructions to the surgical team, or Dr. Ky did not understand him” is speculative and not supported by the evidence submitted. In addition, plaintiff’s expert fails to describe the signs and symptoms that should have alerted Dr. Sterry to the perforations prior to July 21, 2011. Plaintiff having failed to submit competent evidence sufficient to raise a triable issue of fact as to Dr. Sterry’s negligence, this motion for summary judgment is granted.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint and all cross-claims.

This constitutes the decision and order of the court.

Dated: October 25, 2011



STANLEY GREEN, J.S.C.