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SHORT FORM ORDER

INDEX No. 07-20128
CAL. No. 11-01726MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-5-11
ADJ. DATE 2-6-12
Mot. Seq. # 013 - MG; CASEDISP

RITA WINKLER and CURTIS WINKLER, Plaintiffs, - against - SUFFOLK OB/GYN GROUP, P.C., MARK GREENSTEIN, M.D., LAWRENCE HORN, M.D., CORY SCHNEIDER, M.D., and HUNTINGTON HOSPITAL, Defendants.	SCHLEMMER & MANIATIS LLP Attorney for Plaintiffs 111 Broadway, Suite 701 New York, New York 10006 KELLY, RODE & KELLY, LLP Attorney for Defendants Suffolk OB/GYN Group, Mark Greenstein & Lawrence Horn 330 Old Country Road, Suite 305 Mineola, New York 11501

Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 19 ; Replying Affidavits and supporting papers 20 - 22 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Suffolk OB/GYN Group, P.C., Marc S. Greenstein, M.D. s/h/a Mark Greenstein, M.D. and Lawrence Horn, M.D. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is granted.

This is an action to recover damages, personally and derivatively, for the alleged negligent care and treatment of plaintiff Rita Winkler by defendants Marc S. Greenstein, M.D. s/h/a Mark Greenstein, M.D. (Dr. Greenstein) and Lawrence Horn, M.D. (Dr. Horn), as members of defendant Suffolk OB/GYN Group, P.C. (Suffolk OB/GYN), in 2005.[1] Plaintiffs allege that defendants failed to properly perform a surgical procedure on February 16, 2005 at Huntington Hospital to completely remove the then 43-year-old plaintiff's ovaries, which was necessary to ensure the effectiveness of her chemotherapy treatment following a

[1] The action was dismissed as against defendants Cory Schneider, M.D. and Huntington Hospital pursuant to orders dated June 23, 2010 of this Court.

mastectomy, and failed to timely diagnose her resulting symptoms. Plaintiffs further allege that a remnant of the ovary continued to function and produce hormones initially rendering ineffective, then delaying, plaintiff's chemotherapy treatment, increasing her risk of recurrence of breast cancer, causing her to have cramping, hemorrhaging, and mood swings, and requiring her to undergo a second surgery for removal of the ovary remnant.

Defendants Suffolk OB/GYN, Dr. Greenstein, and Dr. Horn now move for summary judgment dismissing the complaint as against them on the grounds that they were not negligent in their treatment of plaintiff and that, in any event, any alleged negligence on their part did not cause plaintiff's injuries. They assert that Dr. Greenstein performed the surgery according to the applicable standard of care with no indication during or after surgery, from pathology results, that there was an ovarian remnant. According to defendants, plaintiff's symptoms and complaints shortly after surgery were not indicative of anything unusual and it was not until plaintiff began to experience bleeding late in July 2005 that the possibility of an ovarian remnant arose for consideration. Defendants maintain that it was at that juncture that plaintiff presented to Dr. Horn, who then promptly ordered the appropriate tests and gave proper recommendations for additional procedures. Defendants argue that any delay in removal of the remnant was due to plaintiff's failure to return to defendants for treatment after her consultation with Dr. Horn and not due to a belated diagnosis by Dr. Horn. They also assert that inasmuch as the claims against the professional corporation are purely vicarious, a dismissal of the claims against the defendant physicians requires a dismissal of the claims against the corporation.

Defendants' submissions in support of the motion include, the summons and complaint, the answers of defendant Suffolk OB/GYN, Dr. Greenstein, and Dr. Horn, plaintiff's bill of particulars, the deposition transcripts of plaintiffs and of Dr. Greenstein, the affidavit of Dr. Horn, plaintiff's Huntington Hospital records from February 2005, a pelvic ultrasound report based on an examination on August 15, 2005 indicating possible "minimal residual ovarian tissue" of plaintiff's left ovary, the lab results from a blood test of plaintiff on August 21, 2005, the affidavit dated October 28, 2011 of defendants' expert, an endometrial biopsy report dated September 12, 2005, and a hysterectomy biopsy report dated February 25, 2006.

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage (*see* ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; *see also* ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]). A defendant physician moving for summary judgment in a medical malpractice action has the initial burden of establishing, prima facie, either the absence of any departure from good and accepted medical practice or that any departure was not the proximate cause of the alleged injuries (*see* ***Shichman v Yasmer***, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]; ***Larsen v Loychusuk***, 55 AD3d 560, 866 NYS2d 217 [2d Dept 2008]; ***Sandmann v Shapiro***, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *see also* ***Lau v Wan***, *supra*). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party (*see* ***Stukas v Streiter***,

83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *see also* ***Caggiano v Cooling***, 92 AD3d 634, 938 NYS2d 329 [2d Dept 2012]).

Where a defendant physician makes a prima facie showing that there was no departure from good and accepted medical practice, as well as an independent showing that any departure that may have occurred was not a proximate cause of plaintiff's injuries, the burden then shifts to plaintiff to rebut the physician's showing by raising a triable issue of fact as to both the departure element and the causation element (*see* ***Stukas v Streiter***, *supra*; ***Swezey v Montague Rehab & Pain Mgt.***, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009]; ***Myers v Ferrara***, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]). General allegations which are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Rebozo v Wilen***, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]).

Plaintiff's deposition testimony of February 3, 2010 reveals that she had been treating with the physicians of defendant Suffolk OB/GYN for many years, and that just prior to the subject surgical procedure to remove her ovaries, she had undergone a mastectomy and was receiving chemotherapy. According to plaintiff, she was not tolerating the chemotherapy drug Tamoxifen and was told by her oncologist that in order to take the alternate chemotherapy drug, Arimidex, she would have to be menopausal which would require the surgical removal of her ovaries, an oophorectomy. Plaintiff then spoke to Dr. Horn and scheduled an oophorectomy to be performed by Dr. Greenstein. Plaintiff stated that she spoke to Dr, Greenstein prior to the procedure but did not recall whether it was in person or by phone. She recalled telling him about the oncologist's recommendation of an oophorectomy, that she discussed all options with him, what he believed was necessary, and that Dr. Greenstein believed that an oophorectomy was adequate and did not recommend a hysterectomy. In addition, plaintiff recalled receiving surgical information, specifically, about the duration of the procedure, and that the procedure would be performed by laparoscopy. However, plaintiff testified that prior to the surgery, Dr. Greenstein did not discuss the risks associated with the surgery but that she did sign consent forms. Plaintiff underwent an oophorectomy at Huntington Hospital in February 2005 and within a month thereafter felt cramping, had headaches and joint pain, which occurred monthly, and then in late July 2005, on a weekend, she had hemorrhaging. Plaintiff remembered that she started taking Arimidex approximately two months after the surgery. In addition, plaintiff testified that she repeatedly complained to Dr. Greenstein, calling once a month after the surgery when the symptoms occurred, and that he recommended that she have a sonogram. Plaintiff further stated that after the sonogram was performed, the radiologist reviewed the film with her and showed her that one ovary had not been completely removed and said that it appeared to be active. Plaintiff also testified that she did not speak to, or visit the office of, Dr. Greenstein or Dr. Horn after receiving their advice to have a sonogram. Approximately two weeks after the sonogram, plaintiff went to another gynecological practice and started seeing Dr. Fatehi, who after one or two visits left the practice, and then plaintiff started seeing Dr. Contreras who performed a total hysterectomy in February 2006.

Dr. Greenstein testified at his deposition on November 18, 2010 that he is a general "ob/gyn," that plaintiff was first referred to him in 1999 for evaluation of her infertility, and that he saw plaintiff on February 2, 2005 in consultation to discuss management options concerning removal of her ovaries. He

stated that plaintiff had been diagnosed with breast cancer and her oncologist had suggested a course of chemotherapy, the medication Arimidex, which required the removal of her ovaries. Dr. Greenstein read his notes for February 2, 2005 indicating that plaintiff wished to undergo as minimal a procedure as possible, that options were discussed including laparoscopic oophorectomy versus subtotal abdominal hysterectomy with bilateral salpingo-oophorectomy, and that recovery, risks, benefits and alternatives were discussed and questions were answered. He did not specifically recall having performed bilateral removal of ovaries for any other cancer patients. Dr. Greenstein explained that a subtotal abdominal hysterectomy with bilateral salpingo-oophorectomy was a removal of the uterine fundus, which is the uterus above the cervix, both fallopian tubes and both ovaries. According to Dr. Greenstein, there are more risks to performing a hysterectomy with removal of ovaries as compared to only removing the ovaries. He listed those risks as bleeding, infection, and damage to nearby organs. In addition, Dr. Greenstein testified that since plaintiff wished to undergo as minimal a procedure as possible, such a procedure would be a laparoscopic oophorectomy, and that was the procedure that was scheduled. He also testified that his operative report indicated that first the left ovary then the right ovary was removed. Dr. Greenstein stated that his chart indicated that he next saw plaintiff on March 7, 2005 and that she was healing well, she was complaining of malodorous vaginal discharge, which he believed was a bacterial vaginosis, and he prescribed a vaginal cream. Telephone records showed that plaintiff had called on February 18, 2005 complaining of heavy menstrual discharge and cramps and the message was addressed by another physician in the practice and a nurse. Dr. Greenstein explained that irregular bleeding was not unusual during the first four to six weeks following surgery on the ovaries. The next contact with plaintiff was by telephone on August 9, 2005 based on a note by Dr. Horn, and then on August 19, 2005 concerning a pelvic sonogram with the message indicating that plaintiff was worried and needed to speak to a doctor. Dr. Greenstein further testified that he had a conversation with Dr. Horn about a question of residual ovarian tissue based on plaintiff's symptoms of vaginal bleeding or the results of the sonogram. Dr. Greenstein recalled that once this question arose, plaintiff interacted solely with Dr. Horn.

The submitted medical records indicate that Dr. Greenstein performed the laparoscopic bilateral oophorectomy with the assistance of Dr. Horn at Huntington Hospital on February 16, 2005. The pelvic sonogram report of August 2005 indicates "there is a left adnexal cyst with a small piece of tissue adjacent to it questionably representing residual left ovary. The residual tissue measures 1 cm x 4mm and there is an adjacent 1.1 x 0.9 cm cyst/follicle." The impression of said report includes "11 mm left adnexal cyst/follicle with 1 cm curvilinear solid tissue bordering it questionably representing minimal residual ovarian tissue."

By his affidavit dated October 28, 2011, Dr. Horn states that he has been Board Certified in Obstetrics and Gynecology since 1978, that he was a member of Suffolk OB/GYN in 2005, that he treated plaintiff for many years prior to the events of 2005, and that Dr. Greenstein was employed at the practice. In addition, Dr. Horn states that on January 31, 2005 he discussed with plaintiff the issues concerning the removal of her ovaries in order to allow her to take the oncologist's recommended medication and that he advised subtotal hysterectomy, bilateral salpingo-oophorectomy, and then referred her to Dr. Greenstein for consultation regarding surgery. He explains that his next contact with plaintiff was the day of the surgery and that he assisted Dr. Greenstein by holding instruments in place and did not make any incisions or cut

any structures. According to Dr. Horn, the procedure was performed uneventfully. He notes that the resulting pathology report reveals no evidence of a possible retained remnant or anything indicative of incomplete removal during the procedure. Dr. Horn also explains that the only way to determine the presence of residual ovarian tissue is by the presence of continued menstruation. He indicates that plaintiff's bleeding two days after the oophorectomy was not unusual and did not indicate continued menses or the need to order hormonal testing but that her staining during her visit on August 9, 2005 led him to order a transvaginal sonogram that was performed on August 15, 2005 and the resulting report showed the endometrial lining to be thickened at 12mm. Dr. Horn maintains that this finding was significant because it was consistent with estrogen production. He adds that he then ordered FSH testing and the results that he received on August 21, 2005 were consistent with estrogen production. According to Dr. Horn, he called plaintiff the next day and advised her of the lab results and recommended that she undergo endometrial biopsy, hysteroscopy for vaginal staining, pelvic imaging and additional surgery/laparoscopy to check for possible retained ovarian tissue. Plaintiff never returned.

In conclusion, Dr. Horn opines that plaintiff's treatment was appropriate and conformed to standards of care in the community. He states that an oophorectomy was the appropriate procedure to induce menopause in anticipation of the administration of Arimidex, that the standard of care did not require the removal of the fallopian tubes as well as the ovaries, and notes that plaintiff subsequently underwent the procedure that he recommended, an endometrial biopsy, and then a hysterectomy. Dr. Horn observes that the pathology report of the hysterectomy indicates no ovaries or ovarian remnant under gross description, only ovarian tissue under microscopic description, which he finds significant as an indication that the remnant could not be visualized at the time of the surgery performed by Dr. Greenstein. He maintains that a retained remnant is a risk, although a rare one, of an oophorectomy and is known to occur in the absence of negligence. Dr. Horn emphasizes that when plaintiff first came to see him following the surgery, he immediately ordered a sonogram, then FSH testing, and appropriately advised plaintiff that she needed further investigation, specifically, a biopsy among other tests and procedures which was exactly the course of treatment provided by her subsequent treating gynecologist.

The affirmation dated October 28, 2011 of defendants' expert, Joel Cooper, M.D. (Dr. Cooper) reveals that he is Board Certified in Obstetrics and Gynecology since 1973, that he has performed multiple laparoscopic oophorectomies, and that his opinion within a reasonable degree of medical certainty is that there were no deviations or departures from acceptable medical standards in the care and treatment provided by defendants Dr. Greenstein and Dr. Horn to plaintiff and that all of their treatment conformed to acceptable medical standards. He notes that the operative report of Dr. Greenstein and the pathology report show that the procedure was performed appropriately without event or complication and with no evidence of a remnant. With respect to plaintiff's message two days after surgery that she was bleeding, Dr. Cooper opines that a menstrual cycle and/or bleeding two days after surgery is normal either as menses due to continued estrogen production resulting from manipulation of the ovaries, bleeding from instrumentation used during the procedure, or the sudden fall of estrogen due to removal of both ovaries. He indicates that during plaintiff's two visits, on February 23, 2005 and March 7, 2005, she was reported to be doing well and continued bleeding or menses was not noted. Dr. Cooper adds that Dr. Horn's recommendations on August 22, 2005 were entirely appropriate and in conformity with the standard of care and that he acted immediately

so that there was no delay in the tests he ordered or the advice he gave plaintiff. According to Dr. Cooper, there was no reason to order hormone level testing prior to August 9, 2005 because there was no indication of any abnormality. He recounts that plaintiff ultimately underwent a hysterectomy in February 2006 and emphasizes that the pathology report makes no mention of an ovary or ovarian remnant under gross description and only identifies ovarian tissue under microscopic description. Dr. Cooper states that inasmuch as the ovarian remnant was identified microscopically and not visually, Dr. Greenstein did not miss an obvious piece of ovarian tissue so that there can be no claim that the tissue should have been visualized or that missing it constituted negligence.

Dr. Cooper concludes by opining to a reasonable degree of medical certainty that the treatment of defendants Dr. Greenstein and Dr. Horn conformed to the standard of care in the community, that Dr. Greenstein appropriately performed the oophorectomy, checked for hemostasis, and ascertained that the ovaries were entirely removed. He states that retained tissue is a risk of laparoscopic removal of the ovaries and occurs without negligence, as it did in plaintiff's case. Dr. Cooper also opines within a reasonable degree of medical certainty that there were no deviations or departures from acceptable medical standards by defendants Dr. Greenstein and Dr. Horn.

Here, defendants Dr. Greenstein and Dr. Horn established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, plaintiff's medical records, the deposition testimony of Dr. Greenstein, the affidavit of Dr. Horn, and their expert's affirmation indicating that their treatment of plaintiff did not depart from good and accepted medical practice (*see* ***Joyner-Pack v Sykes***, 54 AD3d 727, 729, 864 NYS2d 447 [2d Dept 2008]). The affirmation of defendants' medical expert established that the procedure was performed in accordance with good and accepted medical practices and that retained ovarian tissue is a known risk of the procedure that occurs in the absence of malpractice (*see* ***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Defendant Suffolk OB/GYN, which is alleged to be vicariously liable for the malpractice of defendants Dr. Greenstein and Dr. Horn, also established its prima facie entitlement to judgment as a matter of law (*see* ***Upshur v Staten Is. Med. Group***, 88 AD3d 785, 930 NYS2d 649 [2d Dept 2011], *lv denied* 18 NY3d 804, 938 NYS2d 862 [2012]).

In opposition to the motion for summary judgment, plaintiffs submit the affirmation of plaintiffs' counsel and a copy of the unsworn operative report of plaintiff's subsequent treating gynecologist concerning plaintiff's total abdominal hysterectomy and bilateral salpingo-oophorectomy on February 9, 2006. The report indicates "[w]ithin the patient's right side, a small mound was visualized as the area of residual ovarian tissue ... [t]he vessels were then clamped, cut and ligated, and the fallopian tube with the residual of the ovarian tissue was mobilized ... [t]he specimen was then removed and sent for final pathology." Plaintiffs contend that the contents of this report contradict defendants' characterization of the remnant as microscopic and not visually apparent thereby raising an issue of fact as to whether defendant Dr. Greenstein committed medical malpractice in failing to remove clearly visible ovarian tissue during the oophorectomy procedure. They contend that defendants failed to meet their initial burden inasmuch as the pelvic sonogram results they submitted indicated a visibly-sized possible ovarian remnant rather than a microscopic remnant and that the factual issue raised concerning the size and visibility of the remnant does not require submission of an expert opinion.

Here, plaintiffs are required to submit with their opposition papers an affidavit or affirmation of a medical expert to support their claims of malpractice and to refute defendants' submissions inasmuch as defendants' showing in support of their motion was not based solely on the alleged microscopic size of the ovarian remnant. Specifically, plaintiffs failed to rebut the opinions of defendants' expert and Dr. Horn that retained ovarian tissue, without qualification as to its size, is a known risk of an oophorectomy procedure that occurs in the absence of malpractice, and that there were no indications during or after the performance of the oophorectomy or relevant symptoms exhibited by plaintiff after the oophorectomy to raise the suspicion of an ovarian remnant until plaintiff's heavy bleeding occurred in August 2005. Thus, plaintiffs failed to raise a triable issue of fact (*see* ***Savage v Quinn***, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; ***Thomas v Richie***, 8 AD3d 363, 777 NYS2d 758 [2d Dept 2004]). Based on the foregoing, summary judgment is granted to defendants Dr. Greenstein and Dr. Horn dismissing the complaint insofar as asserted against them and consequently, summary judgment is also granted to defendant Suffolk OB/GYN dismissing the vicarious liability claims asserted against it pertaining to defendants Dr. Greenstein and Dr. Horn (*see* ***Simmons v Brooklyn Hosp. Ctr.***, 74 AD3d 1174, 903 NYS2d 521 [2d Dept 2010], *lv denied* 16 NY3d 707, 920 NYS2d 781 [2011]).

Inasmuch as the first cause of action which seeks damages on behalf of plaintiff Rita Winkler must be dismissed, the second derivative cause of action must also be dismissed (*see* ***Cabri v Park***, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]; *see also* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 567, 884 NYS2d 131 [2d Dept 2009]).

Accordingly, the motion is granted and the complaint is dismissed in its entirety.

Dated: 4/26/12

THOMAS F. WHELAN, J.S.C.