

Schofield v Edward B. Borden, M.D., P.C.
2012 NY Slip Op 32365(U)
September 6, 2012
Supreme Court, Suffolk County
Docket Number: 08-16956
Judge: Daniel Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

COPY
SHORT FORM ORDER

INDEX No. 08-16956
CAL No. 11-01886MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 1-3-12
ADJ. DATE 4-10-12
Mot. Seq. # 003 - MD

-----X	
RECHANDLE SCHOFIELD and JOHN SCHOFIELD,	PAUL AJLOUNY & ASSOCIATES
	Attorney for Plaintiffs
	320 Old Country Road, Ste 205
	Garden City, New York 11530
Plaintiffs,	
- against -	KELLER, O'REILLY & WATSON, P.C.
	Attorney for Defendants
EDWARD B. BORDEN, M.D., P.C., EDWARD B. BORDEN, M.D., and NORTH SUFFOLK SURGICAL ASSOCIATES, P.C.,	242 Crossways Park West
	Woodbury, New York 11797
Defendants.	
-----X	

Upon the following papers numbered 1 to 32 read on this motion for partial summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21 - 26 ; Replying Affidavits and supporting papers 27 - 32 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants, Edward B. Borden, M.D. and North Suffolk Surgical Associates, P.C. s/h/a Edward B. Borden, M.D., P.C. and North Suffolk Surgical Associates, P.C., for an order pursuant to CPLR 3212 (e) granting partial summary judgment in their favor is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Rechandle Schofield while undergoing a bilateral total mastectomy on November 10, 2005 at Mather-St. Charles Hospital located at 200 Belle Terre Road, Port Jefferson, New York. Defendant Edward B. Borden, M.D. (Dr. Borden) performed the procedure. Plaintiff had been referred to Dr. Borden by her primary care physician based on plaintiff's desire to undergo a prophylactic bilateral total mastectomy given her strong family history of cancer, particularly breast cancer, and extreme discomfort that was affecting her quality of life. It was originally planned that Dr. Borden would perform the bilateral total mastectomy to be immediately followed by a reconstruction of plaintiff's breasts by a non-

party plastic surgeon. Prior to the planned surgery, the non-party surgeon marked plaintiff's breasts to indicate the incision areas, but when plaintiff's urinalysis results returned indicating a urinary tract infection, the non-party surgeon declined to perform the reconstruction with concerns of the risk of infection with the placement of the breast implants. Dr. Borden went ahead with the bilateral total mastectomy, first performing surgery on the left breast and then on the right breast. Following the surgery, plaintiff began complaining of an inability to lift her left arm. She was later diagnosed with adhesive capsulitis¹ of the left shoulder or frozen left shoulder.

Plaintiffs commenced this action against Dr. Borden and his practice, North Suffolk Surgical Associates, P.C., alleging that defendants were negligent in, among other things, failing to properly diagnose and/or treat plaintiff in accordance with good and accepted standards of medical care, failing to properly note plaintiff's medical history, performing unnecessary procedures upon plaintiff, employing contraindicated treatment techniques, failing to conform to the agreed course of treatment including the removal of plaintiff's nipples and areolae, and failing to keep accurate records of the course of plaintiff's illness and the treatment administered to her. By their bill of particulars, plaintiffs allege that plaintiff sustained the following injuries, disfigurement of the breasts and a frozen left shoulder. The complaint alleges a cause of action for medical malpractice based on negligence and a cause of action for loss of services. The Court's computerized records indicate that the note of issue in this action was filed on September 16, 2011.

Defendants now move for partial summary judgment in their favor dismissing plaintiff's claims that she sustained a frozen left shoulder as a result of the bilateral mastectomy procedure performed by Dr. Borden. Defendants assert that any act or omission in their care and treatment of plaintiff did not proximately cause the frozen left shoulder condition alleged by plaintiffs. In support of their motion, defendants submit, among other things, the summons and complaint, their answer, plaintiffs' bill of particulars, plaintiff's hospital and other medical records, and the affirmation of defendants' expert, Dominic Filardi, M.D.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

¹ Adhesive capsulitis is defined as a condition in which there is a limitation of motion in a joint due to inflammatory thickening of the capsule. It is synonymous with the term frozen shoulder (Stedman's Medical Dictionary 282 [27th ed 2000]).

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]). On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant must make a prima facie showing that there was no departure from good and accepted medical practice, or that any departure was not the proximate cause of the alleged injuries (*see Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]; *Ahmed v New York City Health & Hosps. Corp.*, 84 AD3d 709, 922 NYS2d 202 [2d Dept 2011]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). 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*, 83 AD3d 18, 918 NYS2d 176; *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 that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (*see Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856; *Ahmed v New York City Health & Hosps. Corp.*, 84 AD3d 709, 922 NYS2d 202).

By his affirmation, Dr. Filardi states that he is a board certified surgeon licensed to practice medicine in New York since 1985 and is fully familiar with the care of surgical patients, especially breast surgery patients. He indicates that he reviewed plaintiff's medical and hospital records as well as color photographs of plaintiff. Dr. Filardi notes that prior to seeing Dr. Borden in 2005, plaintiff had been a twenty year smoker with longstanding complaints and conditions including lupus, diagnosed conversion disorder, left arm trauma, migraines, absent seizures, and fibrocystic breast disease with related severe and worsening mastodynia.² He adds that plaintiff had a family history that included breast cancer and was referred to Dr. Borden based on her desire to undergo a prophylactic bilateral mastectomy. Dr. Filardi opines that during plaintiff's first visit on October 18, 2005, Dr. Borden appropriately reviewed the records and films, which included recent radiological studies plaintiff brought with her, and that no additional radiological studies were indicated or warranted prior to the procedure on November 10, 2005. In addition, he states that Dr. Borden properly obtained a full history from plaintiff by having her complete a patient questionnaire and speaking with her, performed a complete normal breast examination and properly noted his findings, which included findings of mild to moderate nodularity and marked tenderness of both breasts. According to Dr. Filardi, Dr. Borden considered appropriate indications for the prophylactic bilateral total mastectomy and the diagnosis and agreed upon treatment was appropriate and within the standard of care inasmuch as the operation would likely reduce or eliminate plaintiff's breast pain and reduce plaintiff's risk of eventually developing breast cancer.

² Mastodynia is defined as pain in the breast (Stedman's Medical Dictionary 1070 [27th ed 2000]).

Dr. Filardi opines within a reasonable degree of medical certainty that Dr. Borden discussed all risks, benefits and alternatives involved with the procedure and thoroughly and accurately documented the discussions as required by the applicable standard of care. He also opines that Dr. Borden appropriately advised plaintiff of the risks involved with the procedure, including the chance of desensitization and capsulitis. Dr. Filardi adds that Dr. Borden properly discussed available cosmetic procedures to follow the mastectomy and appropriately referred plaintiff to plastic surgeons and back to her primary care physician for required pre-operative medical clearance, which plaintiff obtained.

Dr. Filardi explains that the plastic surgeon pre-marked plaintiff's breasts to direct Dr. Borden as to where to make his incisions during the skin-sparing mastectomy so that the plastic surgeon could best complete her reconstructive portion of the operation. According to Dr. Filardi, it was appropriate and within the standard of care for Dr. Borden to defer to the plastic surgeon in this respect. He opines that it was not a departure from good and accepted medical practice for Dr. Borden to proceed with the bilateral mastectomy despite the cancellation of the reconstruction portion of the surgery, noting that Dr. Borden offered to cancel and reschedule but that plaintiff declined. Dr. Filardi opines that Dr. Borden appropriately made incisions pursuant to the plastic surgeon's pre-surgical markings and that the operative field was distant from the plaintiff's axilla, did not include the area of the axilla³ fascia, and that his procedure left plaintiff's axillary and lymph nodes intact. He states that no lymph tissue or nodes were removed, as evidenced by the intra-operative pathology report. Dr. Filardi avers that Dr. Borden performed the procedure in accordance with good and accepted medical practice and appropriately closed plaintiff's intra-operative wounds and successfully completed the prophylactic bilateral mastectomy procedure.

Dr. Filardi continues that when Dr. Borden saw plaintiff during her follow up visit, he appropriately spoke with plaintiff concerning her normal post-breast operation pain complaints, which included numbness, pain and soreness in her chest and arm areas, he examined her wounds, he appropriately measured the extent that plaintiff could move her arms, and he removed her drains. According to Dr. Filardi, Dr. Borden continued during the post-operative course to appropriately advise plaintiff on wound and bandage care, drain care, and exercise. He believes that based on plaintiff's continued complaints of pain and restricted shoulder movement in both arms, Dr. Borden appropriately gave her a referral for physical therapy and continued to advise her to follow up with him.

Dr. Filardi notes that frozen shoulder/adhesive capsulitis is a rare though known and accepted complication which can develop and occur for unknown reasons, and it can develop from mere limb disuse, often after trauma. He opines within a reasonable degree of medical certainty that most likely plaintiff experienced normal post-operative breast and chest pain and restrictions which led her to avoid doing the required post-operative exercises and therapies necessary to resume full functionality and daily life. According to Dr. Filardi, due to plaintiff's autoimmune inflammatory disorder (lupus) and the disuse of her left limb resulting from her avoidance of painful stretches and exercise, frozen shoulder/adhesive capsulitis naturally developed. He maintains that plaintiff's ongoing failure to

³ Axilla is defined as the space below the shoulder joint containing the axillary artery and vein, the infraclavicular part of the brachial plexus, axillary lymph nodes and vessels, and areolar tissue (Stedman's Medical Dictionary 175 [27th ed 2000]).

actively seek and steadily pursue treatment for the condition has caused it to worsen and continue to affect her functionality and daily life. He also notes that after eventually undergoing a procedure to receive breast implants plaintiff admittedly did not seek any medical treatment or advice concerning her breasts.

In response to plaintiff's allegations, Dr. Filardi notes that plaintiff underwent EMG and nerve conduction studies which were normal and opines that the results confirm that no intra-operative injury was caused to plaintiff's brachial plexus or interocostobrachial nerves during Dr. Borden's surgery. He further opines that the brachial plexus nerves could not have been injured intra-operatively as Dr. Borden did not go through the axilla artery or vein during the procedure and no sentinel node biopsy was performed. Dr. Filardi informs that it is naturally possible for the brachial plexus nerves to be disturbed during a breast procedure, which would result in a feeling of numbness that would decrease with time, and that feeling would ultimately return. According to Dr. Filardi, if this occurred with plaintiff, the resulting numbness could have contributed to her avoiding use of her left arm thereby contributing to her eventual development of frozen shoulder/adhesive capsulitis. He emphasizes that such an occurrence would not result from anything that Dr. Borden did or did not do as it is a known risk and complication of any breast procedure. He adds that the records indicate that plaintiff did not pursue physical therapy or home exercises as she had been instructed to do, despite having been told that the lack of use can make a restricted shoulder and adhesive capsulitis worse. According to Dr. Filardi, when frozen shoulder/adhesive capsulitis is identified, if exercise is advised and there is no improvement, physical therapy is generally recommended and, to be effective, physical therapy must be aggressively pursued at least three times a week, usually for at least six months, to gain any benefit or experience any improvement. In conclusion, Dr. Filardi opines within a reasonable degree of medical certainty that plaintiff's non-compliance with suggested and prescribed courses of medical treatment resulted in the development, continuance and presence of her current left frozen shoulder condition which was not caused by anything Dr. Borden did or did not do during his care and treatment of plaintiff.

Here, defendants demonstrated their prima facie entitlement to judgment as a matter of law by submitting evidence establishing that there was no departure from good and accepted practice by defendants and that, in any event, any departure was not a proximate cause of the alleged injuries (*see Bezerman v Bailine*, 95 AD3d 1153, 945 NYS2d 166 [2d Dept 2012]). Defendants' expert opined that the injury of frozen shoulder/adhesive capsulitis is a known, albeit rare, consequence and complication of plaintiff's surgery as well as plaintiff's failure to undergo the physical therapy that had been prescribed or perform the advised home exercises (*see Swanson v Raju*, 95 AD3d 1105, 945 NYS2d 101 [2d Dept 2012]).

In opposition to the motion, plaintiffs contend that Dr. Borden failed to inform plaintiff of the risk of a frozen shoulder prior to surgery, and that the stitches on her left side and her inability to lift her left arm are indicative that Dr. Borden cut deeper or further than was discussed with plaintiff or required in a prophylactic bilateral mastectomy, cutting into plaintiff's axilla, thereby causing plaintiff's left shoulder problems. Plaintiffs submit their own affidavits, Dr. Borden's report of operation, and a redacted expert affirmation.

In reply, defendants argue that plaintiff cannot advance a separate theory of liability based on lack of informed consent for the first time in opposition to a motion for summary judgment, and that defendants are entitled to partial summary judgment inasmuch as plaintiffs failed to raise a triable issue of fact regarding proximate causation.

Plaintiff states in her affidavit that after the bilateral total mastectomy was performed she had an incision under her right arm that had eight stitches in it and an incision under her left arm that had eleven stitches in it. According to plaintiff, Dr. Borden initially told her that the incisions under her right arm were the result of his having dropped the scalpel and that he later told her that the incisions resulted because he forgot what kind of operation he was performing and believing that she was a cancer patient he had performed an unnecessary lymphadenectomy.⁴ She avers that Dr. Borden never told her that frozen shoulder or adhesive capsulitis was a known complication of the surgery and asserts that had she known, she would not have undergone the elective procedure inasmuch as she did not have breast cancer. Plaintiff's husband, plaintiff John Schofield, attests to witnessing the new incisions with stitches under plaintiff's right arm and left arm following the bilateral total mastectomy procedure.

Plaintiffs note Dr. Borden's deposition testimony that during dissection with the electric surgery tool of the subcutaneous tissue on plaintiff's right side, he created a small defect, a nick, between half an inch and an inch and a half in the axillary skin, which is folded. He denied that it occurred in more than one surgical field, such as the left side, and denied that he made specific incisions to remove lymph tissue. Plaintiffs contend that Dr. Borden made the same error on plaintiff's left side, that he cut plaintiff's axilla, but failed to disclose it in his operative report or during his deposition.

The redacted expert affirmation submitted by plaintiffs indicates that plaintiffs' expert is a board certified surgeon who has been licensed to practice medicine in New York for over 20 years. The expert states that he has reviewed the operative report, deposition transcripts and other medical records of plaintiff and that his opinion is within a reasonable degree of medical certainty. The expert opines that making unnecessary incisions in a surgical patient is a departure from the accepted standard of medical care. The expert then states that "[i]t would be important to note in an operative report that the Patient had a recently stitched incision in the area of the operative field. This is pertinent information and I would expect it to have been included in the operative report if the incision in the left arm was present and had stitches prior to the surgery." The expert concludes by opining that failing to inform a patient of the known risks and complications of a surgical procedure to be performed on a patient is a departure from the accepted standard of medical care.

Plaintiffs' submissions raise triable issues of fact as to whether Dr. Borden made unnecessary incisions on plaintiff's left side during the mastectomy such that he departed from accepted standards of medical practice (*see Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Barnett v Fashakin*, 85 AD3d 832, 925 NYS2d 168 [2d Dept 2011]; *Guzzi v Gewirtz*, 82 AD3d 838, 918 NYS2d 552 [2d Dept 2011]) and whether such departures were a proximate cause of plaintiff's injuries (*see*

⁴ Lymphadenectomy is defined as the excision of the lymph nodes (Stedman's Medical Dictionary 1038 [27th ed 2000])

Schofield v Borden
 Index No. 08-16956
 Page No. 7

Adjetey v New York City Health and Hospitals Corp., 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; *Boutin v Bay Shore Family Health Ctr.*, 59 AD3d 368, 872 NYS2d 523 [2d Dept 2009]). “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 AD3d 517, 519, 806 NYS2d 661 [2d Dept 2005] [internal citations omitted]; see *Hayden v Gordon*, 91 AD3d 819, 821, 937 NYS2d 299; *Graham v Mitchell*, 37 AD3d 408, 409, 829 NYS2d 628 [2d Dept 2007]). Therefore, defendants are not entitled to partial summary judgment in their favor dismissing plaintiff’s claims that she sustained a frozen left shoulder as a result of the bilateral mastectomy procedure performed by Dr. Borden (see *Berger v Hale*, 81 AD3d 766, 916 NYS2d 831 [2d Dept 2011]; *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 903 NYS2d 502 [2d Dept 2010], *lv to appeal dismissed* 16 NY3d 884, 923 NYS2d 411 [2011]).

Accordingly, the motion is denied.

Dated: SEPTEMBER 6, 2012.


 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION