

Falkowski v Keckeisen

2012 NY Slip Op 32512(U)

September 27, 2012

Sup Ct, Suffolk County

Docket Number: 09-14969

Judge: Daniel Martin

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

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 7-6-12
ADJ. DATE 7-10-12
Mot. Seq. # 001 - MG

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ELIZABETH FALKOWSKI,

Plaintiff,

- against -

GEORGE KECKEISEN, M.D., PECONIC
SURGICAL GROUP, P.C., and
SOUTHAMPTON HOSPITAL,

Defendants.

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 15; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Southampton Hospital for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is granted.

In this medical malpractice action, plaintiff Elizabeth Fakowski's claims are premised upon the alleged negligent departures from the standard of care by the defendants, and their failure to provide the plaintiff with informed consent. The plaintiff was seen and treated in the emergency room at Southampton Hospital on or about October 30, 2008, and was subsequently admitted to the hospital whereupon an appendectomy with exploratory surgery was performed by defendant George Keckeisen, M.D. on October 31, 2008. She was subsequently discharged from the hospital on November 1, 2008, only to be re-admitted on November 4, 2008 through November 12, 2008, during which time a

diagnostic laparoscopy with lysis of adhesions and irrigation of the abdominal cavity was performed on November 6, 2008 by Dr. Keckeisen. Upon discharge, the plaintiff was seen at defendant Peconic Surgical Group for complaints of heart burn. She then presented to Southampton Hospital on November 25, 2008, and was diagnosed with epigastric pain, probable gastritis. She was discharged home, only to return to Southampton Hospital emergency room and to be readmitted from November 26, through November 27, 2008. She was discharged from Southampton Hospital upon her request to to be seen at a tertiary care facility. She was not treated at Southampton Hospital thereafter. It is alleged that the defendants negligently failed to timely diagnose and treat the plaintiff for appendicitis/perforated appendix, causing her to develop appendicitis, rupture of the appendix, severe pain and suffering, to undergo an otherwise unnecessary exploratory surgery, and to develop a small bowel obstruction/ileus which required surgical intervention, insertion of a nasogastric tube and Foley catheter, and caused damage to her fallopian tubes, uncertain fertility status, scar tissue formation, and severe and unsightly scarring to her abdomen.

Defendant Southampton Hospital seeks summary judgment dismissing the complaint as asserted against it on the bases that its medical and nursing staff and employees did not depart from good and accepted practice in the care and treatment of the plaintiff, that there is nothing that they did or did not do which proximately caused the plaintiff's injuries, and that it is not vicariously liable for the acts or omissions of a physician who is not an employee of the hospital, but who is instead an employee of a group of independent contractors.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 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 [2d Dept 1981]).

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[2d Dept 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, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 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 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Although a hospital or other medical facility is liable for the negligence or malpractice of its employees, that rule does not apply when the treatment is provided by an independent physician, as when the physician is retained by the patient himself, unless the hospital knows that the patient is unaware of the dangers and novelty of the medical procedure proposed to be performed (*Birdell Hill v St. Clare's Hospital*, 67 NY2d 72, 499 NYS2d 904 [1986]).

In support of motion (001), Southampton Hospital has submitted, inter alia, an attorney's affidavit; the expert affidavit of Thomas H. Gouge, M.D.; copies of the summons and complaint, defendants' answers, and the plaintiff's verified bill of particulars; the signed transcripts of the examinations before trial of Elizabeth Falkowski dated January 26, 2010, George D. Keckeisen, M.D. dated April 15, 2010, non-party Kathleen Anderson dated August 5, 2010¹, and non-party Suzanne Moore dated June 23, 2011 which evidentiary testimony fails to comport with 22 NYCRR 202.5; a copy of the certified Southampton Hospital records; and the uncertified office records of Peconic Surgical Group which are not in admissible form pursuant to CPLR 3212.

Elizabeth Falkowski testified to the extent that she went to the emergency room at Southampton Hospital on October 30, 2008, and was subsequently admitted. Her pain continued to worsen during her admission while she waited for surgery. Dr. Keckeisen performed surgery on her the following afternoon. After surgery, he advised her that her appendix had ruptured and that he removed part of her cecum. She was discharged on November 1, 2008. She described her continuing complaints relating to abdominal pain and inability to have a bowel movement, her visit to Dr. Keckeisen, her later admissions to Southampton Hospital, and subsequent treatment by Keckeisen and other physicians. She stated that on her last admission, she was advised by Dr. Keckeisen that she had a possible intestinal blockage. She further added that in 2009, she saw Dr. Varhola, a gynecologist who performed laparoscopic surgery for a large cyst on her right ovary. She stated that Dr. Varhola advised her that she had thick scar tissue, so the left ovary could not be seen. She was also advised that she had endometriosis and that she could have a problem becoming pregnant due to the scar tissue around her ovaries.

By his examination before trial, George Keckeisen, M.D. established that he was an attending physician at Southampton Hospital on October 31, 2008, and was board certified in surgery. He received a telephone call at about 3:00 a.m. from the Southampton Hospital emergency department to see the plaintiff, Elizabeth Falkowski, and was advised that she was a twenty eight year old woman who had presented with abdominal pain with a clinical suspicion of appendicitis. He stated that he was the attending physician, responsible for the diagnosis and treatment of the plaintiff for twelve hours prior to performing surgery on her. He ordered a CT scan of her abdomen, and admitted her to the hospital. He did not perform surgery immediately upon her admission on October 31, 2008, as he stated the timing of

¹ Only a partial transcript has been provided to this court.

surgery is based on the patient's clinical condition and other variables, and although he felt that she needed surgery, he did not believe it had to be done that minute. He performed laparoscopic surgery later that day, after 2:50 p.m. He testified that good medical practice requires removing the appendix before it ruptures to avoid a general peritonitis, but continued that her appendix did not rupture prior to his performing surgery on her. He found an exudate during surgery, which he described as an inflammatory reactive fluid. He testified that he did not tell the plaintiff that he removed part of her cecum (which is attached to the appendix) because the appendix had ruptured.

Post-operatively, Dr. Keckeisen wrote that the plaintiff had acute suppurative appendicitis, but later crossed out the words "acute" and "suppurative." During surgery, he found purulent (pus) drainage in the plaintiff's right lower quadrant of the abdomen in the area of the appendix, but stated that while this drainage could represent acute appendicitis, it was not consistent with a ruptured appendix. He testified that she had appendicitis, an acutely inflamed appendix, without perforation. He additionally testified that he did not write his post-operative note for four months following the surgery, although good medical practice requires that the note be written sometime within a day or two following surgery. His partner, Leslaw Gredysa, M.D., discharged the plaintiff on November 1, 2008. Dr. Keckeisen described her care and treatment thereafter, including her subsequent visit at his office, upon her re-admission to Southampton Hospital on November 4, 2008, and upon her subsequent diagnostic laparoscopic surgery on November 6, 2008. In his operative report of November 6, 2008, he made reference to her having had a gangrenous appendicitis at the time of her prior surgery on October 31, 2008. He stated that a gangrenous appendix is sometimes consistent with perforation, then testified that he erroneously wrote that it was gangrenous. He continued that scar tissue developed in the interval between the two surgeries. He further testified that there was a lot of inflammatory reaction, but no evidence of a leak or intra-abdominal abscess, no injury to the intestine, and no accumulation of blood. Dr. Keckeisen testified that he saw the plaintiff in his office on November 24, 2008 relative to complaints of indigestion and heart burn. The next day, she went to the emergency department, and he admitted her to Southampton Hospital, and ordered a CT scan of her abdomen. After she was discharged on November 27, 2008, he did not see her again.

Kathleen Andersen testified that she is a registered nurse and is the nurse manager of the operating room at Southampton Hospital, in charge of the staff, schedule, daily operations, budget, finance, and overseeing materials and management. She was working on the date the plaintiff was admitted to the operating room for surgery on October 31, 2008, at 3:30 p.m., as an emergency add on. She stated that she did not participate in the plaintiff's surgery, did not make entries into the record, and did not participate in the dictation of the operative report. She continued that Suzanne Moore was the registered nurse who assisted Dr. Keckeisen with the surgery as first assistant. She stated that nurse Moore is self-employed, and was not an employee of Southampton Hospital. She continued that Dr. Lefisky, an anesthesiologist, and Robert Mineo, a certified registered nurse anesthetist were both employed by East End Anesthesia and were present during the surgery. Melissa Rozokis, an employee of the hospital, was the registered nurse circulating during the procedure. Diane Serton, an employee of Southampton Hospital, was the OR scrub technician. Nurse Anderson testified that she knew Elizabeth Falkowski and her mother. She continued that she was not involved with the plaintiff's subsequent surgery, although she was present in the operating room on November 6, 2008.

The expert physician for Southampton Hospital, Thomas H. Gouge, M.D. a physician licensed to practice medicine in New York, and certified in general surgery, set forth his education, training and experience, and the records, transcripts, and materials he reviewed. He opined within a reasonable degree of medical certainty that the care and treatment rendered by the nursing staff, doctors, and employees of Southampton Hospital did not deviate from the accepted standard of care, and were not the proximate cause of the plaintiff's alleged injuries, including a perforated appendix, and the other injuries claimed.

Dr. Gouge set forth the care and treatment, findings relative to the studies and testing performed on the plaintiff during her admissions to Southampton Hospital, and stated that Dr. Keckeisen was her attending physician and was responsible for her diagnosis and treatment from admission until her discharge. He summarized testimony and the care and treatment rendered during the plaintiff's admission, and opined that there is no evidence in the record to support the various departures from the standards of care as set forth in the plaintiff's complaint and bill of particulars. All blood tests were timely and appropriately obtained; antibiotics and other medications were timely and appropriately administered; all test results were promptly conveyed to Dr. Keckeisen and the other treating physicians; and all diagnostic testing was appropriately ordered and obtained, with the results timely and properly reported. Dr. Gouge continued that less than fifty minutes after the plaintiff's arrival in the emergency room, the staff timely considered the potential for appendicitis and the need for surgical intervention, and timely notified Dr. Keckeisen during that fifty minutes. She was thereafter timely admitted to the hospital. Proper care and treatment was rendered in the emergency department by the doctors, nurses and staff, and in the hospital during her admissions. She was properly monitored, and the staff followed the orders of the attending physician. Any decision concerning the plaintiff's discharge from the hospital was made by the attending physicians, and not by the hospital staff. Vital signs were monitored and recorded, and signs and symptoms were appropriately recorded, reported, and appreciated.

Dr. Gouge continued that it was the responsibility of the attending physicians to order consults deemed necessary and appropriate, and not the role of Southampton Hospital, and that there is no evidence that additional consultations were required. Decisions concerning the type of surgery and procedures to be performed, and when they should be performed, were made by, and were the responsibility, of the attending physician. The hospital staff did not delay in scheduling surgery as Dr. Keckeisen scheduled the surgery convenient to his operating room schedule that day. He continued that explanation of the risks, benefits, and alternatives to the procedures performed were the responsibility of the private attending. He continued that without the surgery, the plaintiff would have died, even if advised of additional risks, benefits, or alternatives. Except for the anesthesiologist, no person other than Dr. Keckeisen was responsible to advise the plaintiff of the risks, benefits, and alternatives, and thus, there is no basis for the claim that the hospital, by its staff and employees, failed to provide informed consent to the plaintiff. He concluded that the care and treatment provided by, and on behalf of defendant hospital, was at all times in accordance with the standards of care, and was not a proximate cause of the alleged injuries and damages.

Based upon consideration of the evidentiary submissions and the adduced testimonies submitted, it is determined that Southampton Hospital has established prima facie entitlement to summary judgment dismissing the complaint as asserted against it on the bases that its medical and nursing staff and employees did not depart from good and accepted medical and nursing practice in the care and treatment of the plaintiff, that there is nothing that they did or did not do which proximately caused the accident,


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that it is not vicariously liable for the acts or omissions of a physician who is not an employee of the hospital, and that it was not responsible for providing informed consent.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the 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 defendant's 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 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "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" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Here, the plaintiff has not opposed the motion, and thus failed to raise a factual issue to preclude summary judgment from being granted to the defendant Southampton Hospital.

Accordingly, motion (001) is granted and the complaint as asserted against Southampton Hospital is dismissed.

Dated: SEPTEMBER 27, 2012.



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION