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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

IA PART 16
PART _____

Index Number : 104880/2005
WALCOTT, MIZPEH
vs.
PRESBYTERIAN HOSPITAL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent of severing and dismissing the cause of action sounding in lack of informed consent, as well as all claims against defendant Barry Shaktman, M.D., and is denied in accordance with the accompanying memorandum decision.

FILED
MAY 29 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 28 2013

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MIZPEH WALCOTT,

Plaintiff,

Index No. 104880/05
Motion Seq. No.003

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL,
NEW YORK PRESBYTERIAN HOSPITAL,
EVA FISCHER, M.D., and BARRY SHAKTMAN, M.D.,

Defendants.

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SCHLESINGER, J.:

In this action that stems from surgeries which the plaintiff had on October 9, 2002, Mizpeh Walcott claims that she developed massive post-surgical infections that caused her a great deal of pain and suffering, not only in the immediate aftermath of the surgery, but intermittently in the ensuing years. The defendants The New York and Presbyterian Hospital, a general surgeon Dr. Eva Fischer, and an OB-GYN Dr. Barry Shaktman, are all moving for summary judgment.

The motion is supported by an affirmation from Dr. Daniel Herron, who is board certified in surgery; specifically, his speciality is minimally invasive surgery. However, it is clear that on October 9, 2002, Ms. Walcott had anything but minimally invasive surgery. Rather, she had a very lengthy combined surgery performed by both defendant doctors. Nobody claims the surgery was contraindicated. It involved both a hernia repair and a bilateral salpingo oophorectomy as part of a hysterectomy.

Ms. Walcott had seen both of these surgeons earlier. When she first went to see Dr. Fischer in February 2001, she complained of a painful umbilical mass. In the following year, specifically in July 2002, Ms. Walcott saw Dr. Shaktman based on a referral by Dr.

Fischer because of an ovarian mass that required surgery to rule out cancer. The following month, August 2002, due to worsening abdominal pain, Dr. Fischer ordered a sonogram, which showed adnexal masses. Therefore, the two physicians decided that they would do a combined surgical procedure, which was scheduled for October 9, 2002.

In the original complaint, counsel for the plaintiff asserted a claim for lack of informed consent. However, that claim was withdrawn via the expert affirmation supporting plaintiff's opposition papers. That doctor, a surgeon, acknowledges that plaintiff received informed consent.

The surgery itself proceeded in this fashion. First Dr. Fischer opened the abdomen. Then Dr. Shaktman did a bilateral complete hysterectomy, and then Dr. Fischer returned to repair the patient's hernia with surgical mesh. Ms. Walcott remained in the hospital until October 13. From the records, it appears that Dr. Fischer saw her on the 10th, the day after the surgery, but there is no indication that this doctor saw Ms. Walcott any day after that. There is no dispute here that it was Dr. Fischer who closed the patient at the conclusion of the procedure. Therefore, in my final disposition of this motion, I will be distinguishing between the surgeons here and intend to dismiss all claims against Dr. Shaktman.

The moving defendants' expert, Dr. Herron, states that he reviewed all of the medical records as well as legal papers in this action, including the examinations before trial. However, he does not specify precisely which examinations he reviewed. That omission is particularly significant because both the plaintiff's March 2, 2009 account of what happened on October 29, 2002, and the account by her daughter' Mizpeh Walcott-Francis who was deposed on May 7, 2009, describe a somewhat ghastly visit with Dr. Eva Fischer, which Dr. Herron does not comment on at all.

Dr. Herron's position is that neither the doctors nor the hospital did anything wrong here. Further, he insists that Ms. Walcott did not in fact suffer from an intra-abdominal infection; rather, she suffered from an abdominal wound infection and superficial dehiscence. In other words, he claims that there was no opening of the muscular layer of the abdomen, nor any protrusion of the intestines. He states further that this kind of wound infection is not uncommon, particularly when dealing with repairs of large hernias. Further, Dr. Herron says that Ms. Walcott had a number of comorbidities that increased her risk of complications. These included chronic obstructive pulmonary disease (COPD), diabetes, morbid obesity and a history of Hepatitis B.

Dr. Herron describes the way in which the surgery was performed and then indicates that the records show that vancomycin was given to Ms. Walcott prophylactically and that ciproflaxacin was given post-operatively. He says further, pursuant to the operative report, that a Jackson-Pratt drain was placed on top of the mesh to minimize the risk of fluid collection.

After the operation, although Ms. Walcott had some fever and an elevation in her white blood count, she did not appear to have an infection. On the day of discharge, October 13, 2002, she had no fever. According to the records, her dressing was clean and dry and there was minimal tenderness over the incision site. She was free of nausea, chills, fever or vomiting. Upon discharge, she was advised to follow up with Dr. Fischer in one week and with Dr. Shaktman in two weeks. Dr. Herron says that the discharge was appropriate pursuant to the manner in which the patient presented on that date.

Between October 13 and October 29, Ms. Walcott made no complaints to any of the defendants. Dr. Herron then simply relates that the plaintiff, instead of returning to see

Dr. Fischer in one week, waited over two weeks to see her on October 29, 2002. With regard to the October 29 visit, Dr. Herron completely ignores the sworn testimony of Ms. Walcott and her daughter. Instead, he opines that Dr. Fischer, on that date, administered appropriate wound care. He describes that the wound was opened and that seroma fluid was drained from it. Then the wound was packed. Dr. Herron then states that Dr. Fischer first became aware of any wound infection on that date.

On the subject of the wound, Dr. Herron refers to the claim made by the plaintiff that Kling gauze was used and left behind at the conclusion of the surgery. It was this gauze, which she saw removed from her abdomen on October 29, 2002, that presumably contributed to her infection. However, Dr. Herron insists that pursuant to the records of the hospital, Kling gauze was not used and that in fact no packing was used until the infected site was cleaned on October 29, 2002.

Dr. Herron then states that Dr. Fischer next saw Ms. Walcott on November 5, 2002, when again her wound was properly debrided. She was told on that date to come back in a week, but she did not return until December 3, 2002. However, Dr. Herron acknowledges that in the interim time, Ms. Walcott received very frequent and appropriate nursing care at her home.

As to Dr. Shaktman, Dr. Herron points out that it was not until July 1, 2003, that Ms. Walcott next saw him after her surgery. Therefore, he was never made aware of any complications as a result of the surgery.

Ms. Walcott's attorney has shared certain photographs of her healing process with defense counsel. Dr. Herron says these show healthy healing. He also opines that the combined surgeries did not increase any risk of Ms. Walcott developing any kind of

infection. Finally, he says there is no evidence in the record of any kind of subsequent surgeries to the patient's abdomen indicating persistent infection.

The opposition is not terribly impressive, but it does pay attention to Ms. Walcott's account of the October 29, 2002 visit and try to put it into some medical context. This physician is also a surgeon and licensed to practice in New York and, like Dr. Herron, is board certified in surgery. He/she states that he/she has also done numerous hernia repairs. This doctor opines (at ¶2), in a fairly conclusory manner, that "all of the defendants were negligent in this matter and that said negligence was blatant."

Plaintiff's expert describes the case as one involving foreign material that was obviously left behind during the nine hours of surgery. It is clear that he is basing his opinion on the events of October 29, 2002, as described by the plaintiff and her daughter in their sworn depositions. Those accounts begin when Ms. Walcott was at home and began to have terrible pain in her abdomen. Ms. Walcott states that she had not looked at the wound at any time before that day because she assumed that it was closed and meant to be closed until it was seen again by the doctor. Also, no nurse had been to her home or looked at the wound between her discharge on October 13 and October 29.

After Ms. Walcott complained of this pain, both she and her daughter detected an odor coming from her body that smelled like a rat. They decided to go to a neighborhood hospital and went to the Emergency Department at Long Island College Hospital. There the plaintiff was seen by two employees, whom she cannot identify. Nor can she state with certainty what positions they held there. They briefly looked at the wound and told her that she had to go back to her surgeon who would deal with the situation. According to the accounts, one of the employees got Dr. Fischer's name from her daughter and called her

on the phone. Ms. Walcott was not admitted there. The two women then drove to New York Hospital where they say that Dr. Fischer and an aide were waiting for them with a wheelchair on the first floor of the hospital near Dr. Fischer's office.[1] They were immediately taken to the office where Ms. Walcott was given a gown to put on.

The ensuing scene, according to Ms. Walcott and her daughter, involved a very upset surgeon, Dr. Fischer, who kept cursing and saying that she had "F—ed up". She also accused others of doing the same thing by removing the drain that she had placed. She then asked for a retractor, which made Ms. Walcott start to cry as she knew from working at the hospital as an aide what retractors were used for. After the patient started crying, Dr. Fischer reassured her that she would take care of her and then proceeded to open up her abdomen with the retractor. The daughter, who was told by Dr. Fischer not to faint, instead ran out of the room to a bathroom where she vomited profusely.

Meanwhile, back in the office, Ms. Walcott, who was awake, saw Dr. Fischer remove yards and yards of discolored stinky gauze directly out of her abdomen. She has characterized this as Kling gauze, a kind of gauze she states that she was familiar with. She further states that after clean new gauze was placed in the abdomen, the wound was closed. Meanwhile, Dr. Fischer's aide sprayed the office to remove the putrid smell. Dr. Fischer then ordered a nurse to visit Ms. Walcott that night and twice a day thereafter to make sure the wound was kept clean for a period of time. Also, Ms. Walcott says that on that day she was given medication for this infection and for her pain.

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[1]These accounts are found in Ms. Walcott's EBT from pp. 105-130 and in Ms. Francis' EBT on pp. 63-83.

The expert who supports plaintiff's complaint does precisely the opposite of what Dr. Herron does; i.e., he/she relies completely on the plaintiff's account of what occurred on October 29th. Interestingly, on October 22, 2009, when Dr . Fischer was deposed, she swore that she had no recollection of any of these events. Significantly, though, she does not deny that any of this happened. Rather, she indicates that she "can't remember". (See, e.g., pp 42 and 52). When asked specifically about her excited state where she was repeatedly cursing, she replied that she "doubted" that happened (p. 70).

The expert in opposition, pursuant to the plaintiff's account, opines that the discolored and stinky gauze that was removed from plaintiff's abdomen on October 29 was something that clearly should never have been there. Therefore, he refers to it as "foreign material". He goes on to say (at ¶5) that "retained" material such as this gauze is a "nidous for infection", which is a breeding place where bacteria and other agents of disease lodge and develop. According to this doctor, it is a focused infection or a place where germs fester, which is what he says occurred here. Finally, he comments on the fact that the operative report indicates that the skin was "primarily closed". He says that this phrase is noteworthy and consistent with a foreign body — the gauze — having been negligently left inside the patient. He adds in explanation that if it was meant to be placed in the abdomen and kept there, there would have been some indication that the wound had been left open and packed.

In reply, counsel for the defense makes much of the fact that there is no record from Long Island College Hospital showing that Ms. Walcott received treatment from them at any time during October 2002. Plaintiff responds by arguing that the hospital itself acknowledges that not all of her records could be found. However, I do not think that this point is particularly important because if one credits the account by Ms. Walcott and her

daughter, and a jury might, then one could conclude that since the patient was never admitted into the hospital or given actual treatment in the emergency room, then it is conceivable that a record was never kept. I want to make it clear that I am not condoning such a practice or the one described by the plaintiff and her daughter where personnel from the hospital referred her back to her original surgeon and, in essence, refused to treat her. I am only suggesting that if this all happened in this way, then it is understandable that there would be no record.

Defense counsel also makes much of the fact that Kling gauze was not used by the defendant hospital at the time of the surgery. She argues that Ms. Walcott was certain that it was Kling gauze that had been used as she was familiar with this kind of material. Therefore, since it appears from Dr. Fischer's testimony that Kling gauze was not used, then the plaintiff's expert cannot simply assume that it was some other material left inside. Further, because he has no right to make such an assumption, his opinions should not be given any weight. However, I do not think this conclusion is irresistible. Whether it was Kling gauze or some other material, that is really not the gravamen of this case. It is rather whether the events as described by the plaintiff and her daughter occurred in the manner in which they testified and whether those events on October 29, 2002 and their aftermath support the fact that a large amount of gauze material was left in the plaintiff's abdominal wound unintentionally and became infected.

Therefore, based on the above, I find that there are legitimate issues of fact. I am not prepared to simply ignore, as Dr. Herron chose to, the sworn testimony given by Ms. Walcott and her daughter and its implications. Nor am I prepared to simply reject the medical opinions expressed by their expert, who explains the meaning of these events as reported by these individuals.

In sum, I am dismissing the cause of action sounding in lack of informed consent, as well as any claims against Dr. Shaktman. As I understand the surgical procedure, after Dr. Shaktman performed the gynecological aspect, he left, and it was Dr. Fischer who then did the hernia repair and "closed" the patient. Therefore, if in fact gauze was improperly left behind in the wound, there is no plausible reasoning which could hold Dr. Shaktman responsible for this act. However, I am keeping the hospital in the action since there is testimony that for several days after the surgery, namely, on October 11, 12, and 13, 2002, Ms. Walcott was seen almost exclusively by the hospital's nurses and residents, as opposed to her actual surgeons. Therefore, during those days, the hospital staff was primarily responsible for making sure that the patient's wound was properly cared for and was not in a state where infection could result.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent of dismissing the cause of action sounding in lack of informed consent and the Clerk is directed to sever and dismiss that claim; and it is further

ORDERED that the motion is further granted to the extent of dismissing all claims against defendant Barry Shaktman, M.D., and the Clerk is directed to sever those claims and enter judgment in favor of Dr. Shaktman; and it is further

ORDERED that the balance of the defendants' motion is denied. Counsel are directed to appear for a pre-trial conference on June 5, 2013 at 9:30 a.m. prepared to discuss settlement and select a trial date.

Dated: May 28, 2013

MAY 28 2013

FILED
MAY 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

ALICE SCHLESINGER