

McGrath v Arato
2013 NY Slip Op 33153(U)
December 5, 2013
Sup Ct, Suffolk County
Docket Number: 11-34314
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-19-13
ADJ. DATE 9-20-13
Mot. Seq. # 002 - MD

-----X		CASTRO & TRODDEN, LLC
KAREN McGRATH and DANIEL McGRATH,	:	Attorney for Plaintiffs
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Plaintiffs,	:	Smithtown, New York 11787
	:	
	:	KELLY, RODE & KELLY LLC
	:	Attorney for Defendants Arato & Arato &
	:	Blaszczyk Obstetrics & Gynecology
- against -	:	330 Old Country Road, Suite 305
	:	Mineola, New York 11501
	:	
	:	TROMELLO, McDONNELL & KEHOE
	:	Attorney for Defendant Merlo
MICHEL ARATO, M.D., CATHERINE MERLO,	:	P.O. Box 9038
RN, ARATO AND BLASZCZYK OBSTETRICS	:	Melville, New York 11747-9038
& GYNECOLOGY, P.C. and ST. CHARLES	:	
HOSPITAL,	:	MONTFORT, HEALY, McGUIRE & SALLEY
	:	Attorney for Defendant St. Charles Ho
Defendants.	:	840 Franklin Avenue, P.O. Box 7677
-----X		Garden City, New York 11530-7677

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-20; Replying Affidavits and supporting papers 21-23; Other 24; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (002) by defendant, Catherine Merlo, R.N., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against her is denied.

In this medical malpractice action, the plaintiff, Karen McGrath, has asserted causes of action sounding in negligence, lack of informed consent, and a derivative claim on behalf of her spouse, Daniel McGrath. It is alleged that the plaintiff sustained multiple small bowel lacerations during her surgery for adhesions on January 25, 2011, due to the alleged negligent departures from the standard of care and treatment during surgery and during the postoperative period. It is alleged that the moving defendant,



nurse Catherine Merlo, departed from good and accepted standards of nursing care and treatment in falsely reassuring the plaintiff two days after surgery by telephone that her complaints were due to the air or gas used during surgery, then recommending that she take Tums or Mylanta; her failure to report the plaintiff's complaints to the plaintiff's treating physicians; and her failure to follow up with the plaintiff to ascertain her condition after the telephone calls.

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.*). 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]).

In support of this motion, defendant Merlo has submitted an attorney's affirmation; the affidavit of Catherine Merlo, R.N. which is not supported by a certified copy of the office records to which she refers in her affidavit pursuant to CPLR 3212 and 4518; copies of the summons and complaint, defendant Merlo's answer with demands, and plaintiff's verified bill of particulars with regard to defendant Merlo. Movant has failed to provide the answers served by the remaining defendants. Movant also submits an uncertified and incomplete portion of the St. Charles Hospital record for procedure dated January 25, 2011 which is not in admissible form (*see 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]); and an incomplete, unsigned and uncertified portion of the transcript of the examination before trial of Karen McGrath which is not in admissible form (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), and is not accompanied by an affidavit or proof of service pursuant to CPLR 3116. The defendant has not submitted the answers served by her co-defendants as required by CPLR 3212.

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[2nd 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

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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 defendant's exhibits are not in admissible form, it is noted that the plaintiff has submitted a certified copy of plaintiff's hospital record, a copy of defendant Arato's office record, and a certified copy of plaintiff's deposition transcript. Accordingly, in searching the record, this court will consider the same. Moreover, upon careful review and consideration of the evidentiary submissions, it is determined that even if defendant Merlo's moving papers were in admissible form, Catherine Merlo, R.N. has failed to demonstrate *prima facie* entitlement to summary judgment dismissing the complaint as asserted against her.

"The affidavit of a defendant physician may be sufficient to establish a *prima facie* entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]). Here, defendant Catherine Merlo, R.N. has submitted an affidavit in support of her application for summary judgment and she opines as her own expert, stating, that based upon the record, it is her opinion that she conformed to the standards of good and accepted nursing standards, and that her conversations with the plaintiff by phone had nothing to do with the injury plaintiff claims to have sustained.

Defendant Merlo averred that on January 25, 2011, due to chronic pelvic pain, the plaintiff underwent laparoscopic surgery by Dr. Michael Arato, M.D. Merlo continued that on January 27, 2011, at 2:30 p.m., her entry into the office record of Arato and Blaszczyk Obstetrics & Gynecology, P.C. indicates that the plaintiff called and stated she needed to speak with Dr. Arato who had called her the previous day. She stated that it felt like her insides moved when she changed position. Merlo averred that she reviewed with the patient that she still may have a bit of air from the surgery, and that she offered an appointment with Dr. Blaszczyk, but the plaintiff refused. Merlo then indicated that she would see if Dr. Arato was on call. Merlo's next entry on January 27, 2013, without a time, indicated that the plaintiff was called and told that Dr. Arato was unavailable, and she further offered an appointment for the plaintiff to see Dr. Blaszczyk, but the plaintiff refused. She stated that she instructed the plaintiff to call if there were any changes.

Merlo continued that she did not diagnose the plaintiff's condition during those two telephone calls and did offer her an appointment. She stated that she did, however, tell the plaintiff that her post-op complaints of feeling movement on her insides was not unusual in the early post-op period, and the pains may be from gas which had been used to inflate the abdomen to perform the procedure, which she stated was not a departure from the standard of care. This information was accompanied by her advice to the plaintiff that she be seen by the doctor. Merlo continued that she appreciated the plaintiff's symptoms and did not minimize them. Although she did not diagnose an "emergent" situation, and direct the plaintiff to an emergency room, she did advise the plaintiff that she could be seen by Dr. Blaszczyk. Merlo continued that she did not cause an open abdominal wound, the multiple lacerations to plaintiff's internal organs or cause the need for further and additional multiple surgeries, including an exploratory laparotomy and bowel resection, small bowel obstruction, and need for an end ileostomy.

Merlo testified at her examination before trial that she had no independent recollection of her telephone calls with the plaintiff. She did not have the plaintiff's chart, but learned from the plaintiff that she had surgery during their conversation. She could not recall if she asked the plaintiff if she had a fever, vomiting, pain, diarrhea, difficulty voiding, or other problems. She had no discussions with Dr. Arato about the plaintiff as he was on vacation. She did not follow up with the plaintiff after the second telephone conversation to see how she was. She did not explain the risks of not coming to the office to the plaintiff.

It is determined that defendant Merlo's affidavit does not establish prima facie entitlement to summary judgment dismissing the complaint as there are factual issues which preclude the same. In addition to her failure to set forth the standard of care required of her as a registered nurse, she does not indicate whether or not she spoke with Dr. Blaszczyk or Dr. Arato, and what the standard of care required. She merely opined that she complied with the standard of care. Defendant Merlo also submitted the deposition transcript of the plaintiff, wherein the plaintiff testified that she was told by defendant Merlo that she probably had gas from the surgery and to take Mylanta or Tums to ease the gas pains. Thus, there are factual issues concerning whether defendant Merlo diagnosed the plaintiff's condition and prescribed medication for treatment of the plaintiff's complaints, and whether the delay in medical care caused or contributed to the plaintiff's condition. Additionally, plaintiff's expert has submitted an affidavit which raises factual issues and conflicting opinions, precluding summary judgment.

To rebut a summary judgment motion, 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 may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts. Where, as here, medical experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (*Feinberg v Feti*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Dandrea v Hertz*, 23 AD2d 332, 804 NYS2d 106 [2d Dept 2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]).

Plaintiff's expert is a physician licensed to practice medicine in New York State and is board certified in general surgery. He set forth his education and training and work experience and the records and materials reviewed. He opined with a reasonable degree of medical certainty that defendant Catherine Merlo, R.N. departed from good and accepted standards of medical practice by reassuring the plaintiff that her post-operative complaints were normal and likely the result of air or gas from surgery; in suggesting that the plaintiff take Mylanta or Tums to treat her complaints; in causing a delay in the diagnosis of small bowel lacerations; failing to discuss plaintiff's complaints with Dr. Blaszczyk before giving medical advice; and failing to follow up with the plaintiff to check on her condition. He further opined that these departures were a substantial contributing cause of the plaintiff's injuries.

Plaintiff's expert stated that the plaintiff had laparoscopic lysis of adhesions on January 25, 2011, by Dr. Michael Arato, M.D. at St. Charles Hospital, and was discharged home. On January 27, 2011, the plaintiff spoke to someone at St. Charles Hospital with complaints of stomach pain, vomiting, problems

with voiding, and feeling bloated. She was instructed to call Dr. Arato's office. In so doing, the plaintiff spoke with defendant nurse Merlo who assured her that what she was feeling was to be expected since she was pumped with air or gas during the surgery, and suggested that she take Mylanta or Tums to ease her pain. She further offered an appointment with Dr. Blaszczyk, but the plaintiff declined, thinking she was just recovering. Nurse Merlo did not discuss the plaintiff's phone call and complaints with Dr. Blaszczyk, nor did she follow up with the plaintiff. Thereafter, the plaintiff's condition deteriorated significantly and she was rushed to Stony Brook University Hospital on an emergency basis, with delusions and a history of abdominal pain, nausea and vomiting.

At Stony Brook Hospital, various testing was conducted, and the plaintiff was diagnosed by Dr. Shapiro with peritonitis with septic shock for which an emergency exploratory laparotomy with repair of multiple bowel perforations were performed. Per Dr. Shapiro, the plaintiff's condition was "grim." During surgery, three circumferential lacerations of the small bowel were found, as well as other injuries. Multiple surgeries followed, including the need for an ileostomy with subsequent reversal. The plaintiff also suffered multiple small bowel obstructions, deep vein thrombosis, stroke, short bowel syndrome, memory loss, speech impairment, and significant scarring. The plaintiff's expert opined that because the plaintiff's bowels were leaking into her abdomen post-operatively, that the longer the condition persisted, the worse the outcome.

Plaintiff's expert opined that instead of talking to the plaintiff and reassuring her when she called the office, defendant Merlo should have told the plaintiff to come to the office or go to the emergency room without first reassuring her. He continued that nurse Merlo's failure to discuss the plaintiff's complaints with the physician before giving medical advice and failing to follow up with the plaintiff constituted departures from the standards of care. Plaintiff's expert opined that nurse Merlo falsely reassured the plaintiff that her complaints were normal. He further opined that telling the plaintiff to take Mylanta or Tums is tantamount to medical treatment which was a departure from the standard of care. The plaintiff's expert stated that he reviewed the affidavit of defendant Merlo who opined that she is not absolved from responsibility because she offered an appointment to the plaintiff with Dr. Blaszczyk, because she first reassured the plaintiff by suggesting her condition was normal, and then suggested over-the-counter medications.

The plaintiff's expert continued that a small bowel laceration is a medical emergency and that timely diagnosis is imperative. The delay caused by nurse Merlo by reassuring her and prescribing over-the-counter medication caused, contributed, and/or exacerbated the plaintiff's injuries, including septic shock, peritonitis, delusions, loss of consciousness, memory loss, and the natural sequelae of those conditions as evidenced by the plaintiff's condition deteriorating significantly after her telephone discussion with nurse Merlo, who falsely reassured the plaintiff. Had nurse Merlo exercised due care, the plaintiff's injuries could have been avoidable or minimized.

Based upon the foregoing, it is determined that irrespective of the sufficiency of the moving papers, the plaintiff's expert has raised multiple factual issues which preclude summary judgment from being granted to defendant Merlo. Defendant's attempt to introduce the unsigned and uncertified partial transcript of defendant Arato in the reply is precluded as improperly submitted with the reply. The transcript is not in admissible form and does not resolve the factual issues. The function of a reply paper is to address arguments made in opposition to the position taken by the movant and not to permit the

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movant to introduce new arguments in support of, or new grounds for the motion (*In the Matter of the Application of Veronica Montgomery-Costa v The City of New York*, 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Sup Ct, New York County 2009]). Nor does it avail defendant to shift to the plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when the plaintiff has neither the obligation nor opportunity to respond absent express leave of court (*Winegrad v City of New York*, *supra*; *Azzopardi v American Blower Corporation*, 192 AD2d 453, 596 NYS2d 404 [1st Dept 1992]).

Accordingly, motion (002) by defendant Merlo for summary judgment dismissing the complaint as asserted against her is denied.

Dated: Dec. 5, 2013

W. Gerald Ashe
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION