Elliston v Grosser
2014 NY Slip Op 30414(U)
February 20, 2014
Supreme Court, New York County
Docket Number: 105533/10
Judge: Joan B. Lobis

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 105533/2010
ELLISTON, HELEN
vs.
GROSSER, MAYER, M.D.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/17/13

MOTION SEQ. NO. _____

The following papers, numbered 1 to 1 **, were read on this motion to/for** summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2-3

Replying Affidavits _____ **No(s).** 4

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

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

Dated: 2/20/14

_____, J.S.C.

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
NEW YORK COUNTY: IAS PART 6

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HELEN ELLISTON,

Plaintiff,

Index No. 105533/10

-against-

Decision and Order

MAYER GROSSER, M.D., MATTHEW B. LUBIN, M.D., MARY C. NOECKER, M.D., PARK LENOX EMERGENCY MEDICINE, P.C., L.H. EMERGENCY MEDICAL SERVICES, P.C., and LENOX HILL HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

This medical malpractice case arises out of the care and treatment of Helen Elliston's gallbladder infection and removal. Ms. Elliston sues Mayer Grosser, M.D., Matthew B. Lubin, M.D., Mary C. Noecker, M.D., Park Lenox Emergency Medicine, P.C., L.H. Emergency Medical Services, P.C., and Lenox Hill Hospital, alleging medical negligence and lack of informed consent. All of the Defendants except for Lenox Hill Hospital move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. For the following reasons, the motion is denied.

On Sunday, January 6, 2008, Helen Elliston, then age 72, took herself to the emergency room of Lenox Hill Hospital. Upon her arrival at approximately 1:30 pm, she complained that she had been having pain since earlier that morning. The triage notes described her as having sharp, epigastric and chest pain on a scale of 10 out of 10. She was nauseous and perspiring. Her medical and social history included diabetes, high cholesterol, high blood pressure, and prior surgeries, including gastric bypass, knee replacement, appendectomy, and hysterectomy. Her medications included Lipitor, Percocet and insulin. One year prior Ms. Elliston had similar but

less intense pain and had been diagnosed with gallstones. She had not had her gallbladder removed.

Dr. Mayer Grosser was an attending physician in the emergency room at the time that Ms. Elliston arrived. At approximately 3:00 pm, Dr. Grosser ordered Dilaudid, a narcotic medication, for Ms. Elliston's pain. He also ordered x-rays and an abdominal ultrasound.

Ms. Elliston's abdominal x-ray was performed approximately 20 minutes later. It showed stool in the colon. From these results, Dr. Grosser considered a diagnosis of an obstruction less likely than other explanations for her pain, which continued to be severe. At approximately 3:40 pm, Dr. Grosser ordered her another dose of Dilaudid.

One hour later, Ms. Elliston went for an abdominal ultrasound. The preliminary report by the resident, Dr. Jan Samah, indicated a distension of the gallbladder with gallstones and sludge. There was no wall thickening or pericholecystic fluid detected, however, to suggest acute cholecystitis.

Dr. Grosser reviewed the abdominal ultrasound results shortly after Ms. Elliston returned to the emergency department. He then ordered a CT scan with contrast of Ms. Elliston's abdomen and pelvis. Ms. Elliston was given the contrast, which she finished by approximately 7:30 pm. Although Ms. Elliston was still in pain, Dr. Grosser's order for an additional dose of Dilaudid was not provided, due to the patient's vomiting. Instead, she was given morphine at approximately 6:00 pm. Approximately one half hour after Ms. Elliston was administered morphine, her other tests

showed that her creatine reading was 1.9.

By the time Ms. Elliston had finished her contrast for the CT scan, she was reporting some relief from her pain. Approximately one hour after she finished the contrast, she was transported to radiology. The CT scan itself, however, was not done until approximately forty-five minutes later, at 9:32 pm. The preliminary radiology report indicated distension of the gallbladder with pericholecystic fluid, suspicious for acute cholecystitis.

In the meantime, Ms. Elliston's pain returned. Dr. Grosser was leaving for the evening, and Dr. Mary Noecker took over as Ms. Elliston's attending emergency room physician. At the change in shifts at approximately 10:30 pm, Dr. Noecker ordered a two miligram dose of Dilaudid for Ms. Elliston, twice the amount of the earlier doses. At the same time, Ms. Elliston's blood pressure had dropped from 168/78 upon her arrival to the emergency room to 100/58. By 11:00 pm, Ms. Ellison was hypotensive, with a blood pressure of 80/40. She also had decreased oxygen saturation.

By 11:55 pm, Ms. Elliston had developed a fever of 101.6 degrees and her blood pressure was 77/40. Approximately one half hour later, Dr. Noecker ordered Ms. Elliston be given one gram of Tylenol. At 12:44 am, Dr. Noecker ordered the antibiotic, Flagyl. Dr. Noecker testified at her deposition that she believed based on Ms. Elliston's temperature and CT scan results that she had sepsis. Ms. Elliston continued to be administered the fever reducer and antibiotic medications.

In the meantime, Dr. Noecker finished her shift, and Dr. Matthew Lubin assumed Ms. Elliston's care. At 3:00 am, following notification by the attending nurse of Ms. Elliston's low blood pressure, Dr. Lubin found Ms. Elliston to have reduced responsiveness, pinpoint pupils, and sonorous respirations. Dr. Lubin ordered a chest x-ray based on Ms. Elliston's shortness of breath. He reviewed the CT scan results and ordered that Ms. Elliston be given intravenously .8 milligrams of the medication, Narcan, which is designed to counteract narcotic effects. He opined at his deposition that given Ms. Elliston's positive response to the Narcan - her blood pressure rose to 109/66 - the previously-administered narcotics at least partially caused her reduction in blood pressure.

Within an hour, however, Ms. Elliston's blood pressure fell again, to 90/37. The chest x-ray showed a new infiltrate at the right base of the lung. By 7:00 am, when Ms. Elliston was transferred out of the emergency department, she was hypotensive, septic, experiencing multi-organ failure, and deemed too unstable to undergo surgery. Later that day, she was intubated and underwent a percutaneous drainage of the gallbladder. The next morning, on January 8, 2008, Ms. Elliston's gallbladder, which was necrotic, was removed in a procedure that lasted six hours.

Ms. Elliston continued to suffer complications. She had blood transfusions and developed an intra-abdominal abscess that required drainage under anesthesia. She was not discharged until January 29, 2008, three weeks after arriving at the emergency room. She did not return home upon discharge, however, but rather was transferred to a nursing facility for rehabilitation, where she remained for another six weeks. She required months of additional nursing assistance on an outpatient basis. A little over a year later, in the fall of 2009, Ms. Elliston vomited

her stool, and required additional surgery for an intestinal blockage along with weeks of inpatient rehabilitation that she contends is a consequence of the medical malpractice alleged in this case.

Ms. Elliston filed her summons and complaint on April 28, 2010, alleging medical malpractice and lack of informed consent. The Defendants joined issue in June 2010. Plaintiff served bills of particulars in August 2011, and the parties' depositions were conducted between March 2012 and September 2012. The note of issue was filed in August 2013, and the Defendants, other than Lenox Hill Hospital, now move for summary judgment, claiming that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law.

In support of their motion, the movants provide an expert opinion by Gregory Mazarin, M.D. Dr. Mazarin is a New York-licensed physician, who is board-certified in emergency medicine. He is an assistant professor in the Department of Emergency Medicine at Albert Einstein College of Medicine. He opines that Ms. Elliston had a life-threatening gallbladder infection upon her presentation to Lenox Hill Hospital and nothing Defendants did caused or contributed to her alleged injuries. He claims that the Defendants' care and treatment was appropriate, the infectious process caused her injuries, and the source of infection, a necrotic gallbladder, was identified "[a]t the time of surgery." He opines that although the administration of narcotic pain medication was a "small short-term contributing factor" to Ms. Elliston's hypotension, the Defendants conducted a "complete and thorough evaluation," and Ms. Elliston was admitted "to the surgical service in a timely manner." Dr. Mazarin does not address Plaintiff's claim of lack of informed consent.

Plaintiff Elliston opposes the Defendants' motion. She claims that they failed to

establish a prima facie case of entitlement to summary judgment, and there are disputed issues of material fact. In support, Ms. Elliston offers an expert opinion, whose identity has been redacted pursuant to Section 3101(d)(1)(i) of the Civil Practice Law and Rules. Plaintiff's expert is a New-York licensed physician and an assistant professor of surgery at New York University's School of Medicine. The expert is board-certified in general surgery and has extensive experience treating and diagnosing gastrointestinal conditions, including acute cholecystitis.

Plaintiff's expert opines that the Defendants departed in their care and treatment of Ms. Elliston by negligently delaying diagnosis, which caused Ms. Elliston's surgery to be delayed and contributed to her hypotension, shock, sepsis, and multi-organ failure. Plaintiff's expert takes issue with the delay in conducting Ms. Elliston's CT scan, which did not occur until eight hours after Ms. Elliston's arrival in the emergency room. The expert further criticizes the delay in acting upon those results, noting antibiotics were not ordered and administered until approximately twelve hours after Ms. Elliston's arrival. Along with the Defendants' expert, Dr. Mazarin, Plaintiff's expert agrees that the administration of narcotic pain medications in this case contributed to Ms. Elliston's hypotensive state, which was already exacerbated by Defendants' delayed administration of antibiotics. Plaintiff's expert opines that the narcotics' contribution to Ms. Elliston's low blood pressure could have been avoided had Defendants properly monitored her vital signs. Had Ms. Elliston's condition been timely and appropriately diagnosed before she became unstable, the expert contends, she could have undergone a less invasive surgical procedure "with little or no complications or sequellae." Instead, Defendants' conduct contributed to complications, including an abscess that required drainage under anesthesia, increased post-operative scarring and longer recovery.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that the physician did not depart from accepted standards of practice or that, even if the physician did, the departure did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate

the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing by submitting an affidavit from a doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment. As a threshold matter, the motion fails to address Plaintiff's second cause of action, lack of informed consent. Therefore, this Court will construe the motion as one for partial summary judgment on the only other cause of action alleged, medical malpractice, which is set forth in the complaint's first cause of action.

Turning to the medical malpractice cause of action, this Court further finds that the movants have failed to show a prima facie case for summary judgment. Dr. Mazarin, in contending that there have been no departures, fails to show how Defendants' conduct was proper. See Ocasio-Gary, 69 A.D.3d at 404. His conclusion that Ms. Elliston had a life-threatening gallbladder infection when she arrived at Lenox Hill is unexplained. Nor does he explain why almost 48 hours would be an appropriate interval between her arrival at 1:30 pm on January 6 with such an infection, and her surgery for removal of the necrotic gallbladder on the morning of January 8. Dr. Mazarin's claim

of no proximate cause is also conclusory. He concedes that the administration of the narcotic pain medication in this case contributed to Ms. Elliston's hypotension, but fails to show how that did not contribute to Ms. Elliston's complications.

This Court finds, in contrast, that Plaintiff has presented genuine issues of material fact. Her expert disputes Dr. Mazarin's findings and highlights the material issues of facts that remain for the jury, including the propriety of the delays in diagnosis in conducting a CT scan and administering antibiotics upon the findings. The experts also agree in varying degrees that the administration of narcotics medication in this case contributed to Ms. Elliston's hypotension, which is alleged to have delayed her surgery. Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the parties appear for a pretrial conference on March 25, 2014, at 9:30 am.

Dated: Feb. 20, 2014

ENTER:

JOAN B. LOBIS, J.S.C.