

Rivera v Smith

2014 NY Slip Op 31648(U)

May 9, 2014

Supreme Court, Bronx County

Docket Number: 303030/10

Judge: Stanley B. Green

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

-----X
YAZMIN RIVERA,

INDEX No. 303030/10

Plaintiff(s),

- against-

ALOYSIUS G. SMITH, VICTOR FONTANA,
MIKHAIL JOUTOVSKY and SAINT BARNABAS
HOSPITAL,

Defendant(s)

DECISION

-----X
HON. STANLEY GREEN:

The motion by Victor Fontana, Mikhail Joutovsky and Saint Barnabas Hospital (SBH) for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is granted only to the extent that the claims against Victor Fontana and Mikhail Joutovsky are dismissed. The cross-motion by Aloysius G. Smith for an order pursuant to CPLR §3025(b) granting permission to amend his answer to add a response denying the allegations in paragraph "86" of the complaint and adding the affirmative defense of set-off pursuant to GOL §15-108 is granted on default. Dr. Smith shall serve an amended answer in the form annexed as Exhibit "C" within 30 days from the date of this order.

Plaintiff commenced this action to recover damages for medical malpractice in connection with the performance of breast reconstruction surgery on December 18, 2008 and during her post-operative care through February 5, 2009. She claims that Dr. Smith, an attending plastic surgeon in the Hand and Plastic Surgery Department at SBH, was negligent and departed from good and accepted practices by recommending and performing an immediate pedicle transverse rectus abdominus myocutaneous (TRAM) flap reconstruction (wherein a portion of

the patient's abdomen is excised and repositioned into a reconstructed breast) on her left breast and by failing to inform of her the risks and alternatives to the procedure. She claims that SBH is liable not only for the alleged negligence of Dr. Fontana (a plastic surgery fellow) and Dr. Joutovsky (a medical resident), who assisted Dr. Smith in the surgery and care of plaintiff, but also that it is liable for the negligence of Dr. Smith, who was an attending physician.

On September 9, 2008, plaintiff sought treatment at SBH emergency room complaining of a lump in her left breast. She was examined and referred for initial evaluation at the SBH Breast Clinic on September 12, 2008. At the Breast Clinic, plaintiff was examined by Dr. Klein, an attending physician and surgeon and an ultrasound was performed. Plaintiff was then referred to SBH Radiology Department for tests, including a breast biopsy which revealed Grade 2 invasive carcinoma. On September 26, 2008, plaintiff returned to the Breast Clinic and was seen by Dr. Farhad and Dr. Klein. She was referred back to the SBH Radiology Department for further tests to determine the extent of her disease. On October 10, 2008, she returned to the Breast Clinic and a treatment plan was formed which included a mastectomy and adjuvant chemotherapy. The Breast Clinic then referred plaintiff to the Medicine Clinic to obtain medical clearance for the surgery and to the SBH Plastic Surgery Clinic for evaluation of her reconstruction options. On October 15, 2008, plaintiff presented to the Medicine Clinic. She reported a medical history of Hepatitis C, a 29 year smoking habit of one pack per day and that she was currently smoking one pack about every six days. She was advised that smoking could adversely affect her cancer, surgical risk, wound healing and overall health. After an EKG, she was cleared for "whatever breast surgery deemed necessary by Breast Surgery."

According to plaintiff, on December 15, 2008, Dr. Klein went with her to the fourth floor

and introduced her to Dr. Smith, an attending plastic surgeon in the Hand and Plastic Surgery Department at SBH. According to Dr. Smith, under his supervision, a medical student advised plaintiff of the risks of possible failure of reconstruction due to her history of smoking and he discussed with plaintiff the various options for post-mastectomy reconstruction. Dr. Smith concluded that a pedicle TRAM flap was an appropriate reconstruction procedure. Dr. Smith claims that he advised plaintiff of the risks of flap failure due to her smoking and that despite the risks, plaintiff agreed to go forward with the mastectomy and the TRAM flap procedure and signed the necessary consent forms. According to plaintiff, she signed forms consenting to the surgery, but she denies that Dr. Smith or any other doctors discussed with her any potential risks of the surgery (Rivera, EBT, p. 23).

On December 18, 2008, plaintiff underwent a modified radical mastectomy and an immediate TRAM flap breast reconstruction at SBH. Dr. Fontana, Dr. Joutovsky, and Dr. Facey, a resident, assisted Dr. Smith during the reconstruction procedure. The operative report indicates that Dr. Smith performed the TRAM flap reconstruction without complication. However, after the surgery and while plaintiff was still in the recovery room, it was observed that approximately 1/3 of the flap was pale in color. Warm packs were applied to the flap, but within 24-48 hours of the procedure, the transplanted flap began to show evidence of decreased blood supply, the tissue became ecchymotic, decreased in temperature and began blistering. Three days after the surgery, plaintiff began having ecchymosis at the area of the abdominal incision. On January 13, 2009, Dr. Smith debrided the left breast and abdominal wound, removed the flap and left the wounds open for closure at later date. On January 20, 2008, Dr. Smith further debrided the wounds and closed the left breast wound, but left the abdominal wound open and a wound

wound vacuum was placed on it to promote healing. Plaintiff remained at SBH until February 5, 2009, when she was discharged to Coler Goldwater Hospital for further wound care. While at Coler Goldwater, plaintiff continued to return to SBH for breast cancer care and for follow up visits at the SBH Plastic Surgery Clinic. On February 11, 2009, she had a port placed at the SBH Department of Radiology for the administration of chemotherapy agents and on March 3, 2009, she began chemotherapy treatment at SBH Cancer Center. Plaintiff continued to return for follow up care and regular testing at the SBH Radiology Department for more than a year.

Dr. Fontana, Dr. Joutovsky and SBH seek dismissal of all claims and causes of action against them on the grounds that they did not deviate from the standard of care in their treatment of plaintiff, properly followed the directives of Dr. Smith, plaintiff's private attending physician, and were never required to countermand any physician orders. They also contend that plaintiff was properly informed of the risks of and consented to the TRAM flap procedure by signing the necessary consent forms. Drs. Fontana and Joutovsky and SBH also seek dismissal of all claims against them related to medical care managed and supervised by any other attending physicians to the extent that plaintiff has failed to sue such attending physicians.

In support of the motion, Drs. Fontana and Joutovsky and SBH submit the affidavit of Marc Wolf, Director of Human Resources at SBH, which shows that Dr. Smith has been an attending surgeon in the Plastic/Hand Surgery Department of SBH since December 1998, that his treatment of patients at SBH was not done as an employee of SBH, and that his duties as Chief of Plastic/Hand Surgery were administrative in nature. They also submit the affirmation of Dr. Robert T. Grant, who opines that Drs. Fontana and Joutovsky and SBH provided plaintiff with appropriate care and treatment in all respects, did not deviate from the accepted standards of care

in the fields of plastic and reconstructive surgery and that no act or omission by them proximately caused or was a substantial factor in causing plaintiff's claimed injuries. Dr. Grant states that it is the standard of care for the attending surgeon performing the operation to determine whether a pedicle TRAM flap reconstruction is indicated for the patient. He explains that the TRAM flap relies on the superior epigastric vessels, and therefore, patients with limited blood supply, such as diabetics or heavy smokers, may not be ideal candidates for the procedure. Dr. Grant states that Dr. Smith was not only solely responsible not only for determining the best surgical option for plaintiff, but also for her care and treatment before, during and following the procedure. He opines that Dr. Smith's decision to go forward with the pedicle TRAM flap procedure was not contraindicated and that, after receiving Ms. Rivera's consent to perform a pedicle TRAM flap, Drs. Fontana and Joutovsky merely assisted Dr. Smith in performing the procedure under his supervision. Dr. Grant opines that the records show that Drs. Fontana and Joutovsky and SBH residents, students, nurses and staff provided plaintiff with appropriate care and treatment in all respects and appropriately followed the directives of attending physicians, and specifically, Dr. Smith, and were never required to countermand any physician orders. He opines that no action or inaction on the part of Drs. Fontana and Joutovsky and/or SBH proximately caused or was a substantial factor in, plaintiff's claimed injuries.

Plaintiff contends that the evidence presented is insufficient to meet defendants' prima facie burden because movants have premised their motion on facts not in the light most favorable to the plaintiff and have failed to address contradictory deposition testimony. Plaintiff also contends that material issues of fact exist as to: (1) whether Dr. Smith was an employee-in-fact of SBH; (2) whether there was a reasonable basis for plaintiff to believe that Dr. Smith was

provided by SBH and was, in his care of her, acting as its agent; and (3) as to whether Dr. Smith's conduct deviated for the accepted standards of medical practice and was a proximate cause of plaintiff's injuries, which preclude a grant of summary judgment.

Plaintiff notes that Dr. Grant's opinion that plaintiff was informed of the risks and alternatives to the TRAM flap procedure and that SBH medical residents, students, nurses and staff were not required to intervene in plaintiff's care and treatment, is based upon testimony and facts that are "cherry-picked" and favorable to movants, but fails to address plaintiff's testimony that she was not informed of the risks of the procedure or alternatives by Dr. Smith or by any doctors. Plaintiff also notes that defense counsel states that "attending Dr. Klein introduced Ms. Rivera directly to Dr. Aloysius Smith, M.D.," then uses this "fact" as one of the primary underpinnings for his argument the plaintiff "selected" Dr. Smith as her private physician. However, Dr. Smith's testimony contradicts this version of events, as he testified that Dr. Klein did not come with the patient when she first came to see him.

Plaintiff also contends that material issues of fact exist as to whether Dr. Smith was an employee-in-fact of SBH and as to whether plaintiff reasonably believed that he was provided by the hospital and was, in his care of her, acting as its agent. Plaintiff notes that Dr. Smith testified that pursuant to an agreement with SBH, he: (1) was responsible for providing plastic surgery and hand surgery services in the emergency room, the Plastic Surgery Clinic and to inpatient patients; (2) provided services in the Plastic Surgery Clinic one day a week and spent one day a week in the operating room operating on SBH patients; (3) maintained a regular schedule at the hospital, providing clinical services on Wednesdays, surgical services on Tuesdays and making rounds on inpatients as needed; and (4) was paid directly by SBH for the services he provided to its

patients, not on a fee for service model, but on a contractually agreed amount for the services he provided. Dr. Smith also testified that, in addition to his position at SBH, he has maintained a separate private practice for the last twenty years, located at 955 Yonkers Avenue and uses the facilities of St. Joseph's Hospital to perform surgeries on his private patients.

Plaintiff also submits the affirmation of an expert who opines Dr. Smith deviated from the accepted standard of medical practice in recommending the pedicle TRAM flap procedure to plaintiff, despite her current smoking and obesity, and by failing to inform her of the risks of the procedure or any alternative procedures. The expert opines that as a result of these departures, plaintiff developed necrosis of the breast and abdomen which led to her current complaints of pain, scarring and weakness and that the departures were a substantial factor and contributing cause of her injuries

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

While Drs. Fontana and Joutovsky and SBH have presented testimony, records and the affirmation of an expert which show that the care and treatment they rendered to plaintiff was at all times proper, that Drs. Fontana and Joutovsky and the residents, students, nurses and staff of SBH properly followed the directives of Dr. Smith at all relevant times and that plaintiff consented to the surgery, this evidence is insufficient to establish SBH's prima facie entitlement to summary judgment because defendants' expert's opinion is based, in part, upon a version of the "facts" that is contradicted by plaintiff's testimony, that she was not informed of the risks of the procedure and by Dr. Smith's testimony that Dr. Klein did not bring plaintiff down to meet him. In addition, Dr. Smith's testimony regarding his contractual relationship with SBH, the fact that plaintiff initially sought treatment at SBH emergency room and was referred to the SBH Breast Clinic and subsequently to other SBH facilities, including the SBH Plastic Surgery clinic for treatment, that she did not request a particular physician and her records of treatment were maintained by SBH, along with the disputed circumstances surrounding her introduction to Dr. Smith, demonstrate that triable issues of fact exist as to whether Dr. Smith was an employee-in-fact of or otherwise acting on behalf of SBH and as to whether plaintiff reasonably believed that Dr. Smith was acting at the hospital's behest, so as to render it vicariously liable for his malpractice (Malcolm v. The Mount Vernon Hospital, 309 AD2d 704; Finan v. St. Barnabas Hospital, 306 AD2d 189).

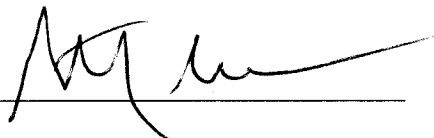
As to the alleged malpractice, the affirmation of plaintiff's expert raises triable issues of fact as to whether Dr. Smith departed from good and accepted standards of practice in his treatment of plaintiff and caused the claimed injuries, which preclude a grant of summary judgment (Cregan v. Sachs, 65 AD3d 101; Bradley v. Soundview Health Center, 4 AD3d 194).

Accordingly, the motion for summary judgment by SBH is denied.

However, in light of the fact that it was Dr. Smith's duty as the attending surgeon, to inform plaintiff of the risks of the procedure and alternative treatment options, and that there is no dispute that Drs. Fontana and Joutovsky were following the directives of the attending physicians at all relevant times and none of the orders were clearly contraindicated, there is no basis to hold them individually liable. Accordingly, the claims against Drs. Fontana and Joutovsky are dismissed.

This constitutes the decision and order of the court.

Dated: May 9, 2014



STANLEY GREEN, J.S.C.