

McKay v Dubrow

2015 NY Slip Op 31260(U)

July 20, 2015

Supreme Court, Suffolk County

Docket Number: 11-815

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-19-14 (001)
MOTION DATE 10-10-14 (002)
MOTION DATE 11-20-14 (003)
ADJ. DATE 12-11-14
Mot. Seq. # 001 - MG
 # 002 - MG
 # 003 - XMD

-----X
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- against -

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ERIC N. DUBROW, M.D., ORTHOPEDIC
ASSOCIATES OF LONG ISLAND, L.L.P.,
ELAINE BARBARA HUGHES, N.P., EBH
NURSE PRACTITIONER ADULT HEALTH,
P.C., BRIAN PHILIP BATESON, M.D., LONG
ISLAND ANESTHESIA PHYSICIANS, LLP
and ST. CHARLES HOSPITAL and
REHABILITATION CENTER,

Defendants.
-----X

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment; cross motion for preclusion; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 45; Notice of Cross Motion and supporting papers 46 - 52; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 53 - 55; 56 - 58; 59 - 62; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Brian Bateson, M.D., the motion (#002) by defendant Long Island Anesthesia Physicians, LLP, and the cross motion (#003) by plaintiff are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Brian Bateson, M.D., for, inter alia, an order granting summary judgment in his favor is granted; and it is

ORDERED that the motion by defendant Long Island Anesthesia Physicians, LLP, for an order granting summary judgment in its favor is granted; and it is

ORDERED that the cross motion by plaintiff for an order precluding defendants from seeking apportionment is denied.

On March 2, 2009, plaintiff Catherine McKay, suffering from osteoarthritis in her right pelvis, presented at defendant St. Charles Hospital and Rehabilitation Center for elective total right hip replacement surgery. The procedure, also known as total hip arthroplasty, was performed that same day by defendant Eric Dubrow, M.D., plaintiff's treating orthopedic surgeon and a partner of defendant Orthopedic Associates of Long Island, LLP. Defendant Brian Bateson, M.D., an attending anesthesiologist at St. Charles Hospital and a partner of defendant Long Island Anesthesia Physicians, LLP, administered and managed the anesthesia used during plaintiff's surgery. Defendant Elaine Hughes, a surgical nurse practitioner who is employed by both Orthopedic Associates of Long Island and Long Island Anesthesia Physicians, assisted Dr. Dubrow during the procedure. After the surgery, an anti-embolism stocking was placed on plaintiff's right leg, and an abduction pillow was placed between her legs and fastened in place using velco straps.

Plaintiff was then transferred to the hospital's Post Anesthesia Care Unit (PACU), where her post-operative recovery from the anesthesia was assessed, her vital signs were monitored, and pain medication was administered. Approximately 45 minutes after plaintiff arrived in the PACU, a nurse allegedly noted on the medical chart that plaintiff's right leg, which was described as pink in appearance immediately after surgery, had become pale. Despite the alleged change in leg color, Dr. Bateson discharged plaintiff from PACU approximately 30 minutes later, and she was brought to a regular hospital room. The next morning, when Dr. Dubrow visited plaintiff in the hospital, he discovered that she was unable to dorsiflex her right ankle and right toes, and that she had decreased sensation in the bottom of her right foot. During that visit Dr. Dubrow allegedly loosened the right straps of the abduction pillow, though he has no recollection as to whether he was advised by plaintiff or a nurse that plaintiff had complained about her right leg. Nurse Hughes also visited with plaintiff on March 3 in her capacity as an employee of Long Island Anesthesia Physicians to conduct a pain evaluation and to assess her need for pain medication. Two days after surgery, Dr. Dubrow removed the abduction pillow, because plaintiff was complaining of pain. He noted in her chart that plaintiff continued to have decreased sensation in her right foot and was unable to dorsiflex her right ankle and toes, and that she reported experiencing burning pain behind her right knee the night following

surgery. Nurse Hughes, as an employee of Long Island Anesthesia Physicians, also evaluated plaintiff on March 4 to determine her pain level and provide pain management care. Plaintiff was discharged from St. Charles Hospital by Dr. Dubrow on March 5, 2009. She later was diagnosed as suffering from peroneal nerve palsy in her right foot and sciatic neuropathy.

Thereafter, plaintiff commenced this action to recover damages for medical malpractice and lack of informed consent. Plaintiff also asserted a cause of action against St. Charles Hospital for negligent hiring and supervision. By her bill of particulars, plaintiff alleges that defendants were negligent, among other things, in failing to take proper measures to prevent injury to the peroneal nerve and the sciatic nerve; in failing to properly monitor plaintiff's neurological and vascular condition during or after the surgery; in failing to evaluate the color and temperature of plaintiff's extremities intraoperatively or postoperatively; in failing to properly position the straps of the abduction pillow after the surgery; and in prematurely discharging plaintiff from the PACU. She further alleges that she suffered numerous injuries due to defendants' negligence, including damage to her peroneal and sciatic nerves, right peroneal palsy, peripheral neuropathy, weakness and loss of muscle in her right leg, and restricted joint function in her right knee.

Dr. Bateson now moves for an order (1) granting summary judgment in his favor on the complaint and the cross claims against him, and (2) amending the caption by removing his name as a defendant. He argues there is no legal basis to find him liable for plaintiff's alleged injuries, as he had no involvement in the manipulation of the surgical area or in the placement of the abduction pillow, and that plaintiff was in stable condition, with no symptoms of right foot drop, when she was discharged from the PACU. In support of his motion, he submits copies of the complaint and his answer; the bill of particulars served by plaintiff in response to his demand; transcripts of the deposition testimony of plaintiff, Dr. Dubrow, Elaine Hughes, and St. Charles Hospital; the transcript of his own deposition testimony; and a certified copy of the hospital records related to plaintiff's 2009 hip replacement surgery. In addition, Dr. Bateson submits an affidavit of his expert, Dr. Kevin Glassman. Long Island Anesthesia Physicians, LLP, also moves for summary judgment in its favor, arguing that the anesthesia care and the post-operative pain management care rendered to plaintiff by its employees conformed with accepted standards of medical practice. Its submissions in support of the motion include the transcripts of the parties' deposition testimony, a report prepared by plaintiff's treating neurologist, Dr. Cristina Drafta, and an affirmation of its expert, Dr. David Berger.

Plaintiff opposes the motions, arguing Dr. Glassman's affirmation and Dr. Berger's affidavit are insufficient to establish a prima facie case of entitlement to judgment, particularly as they fail to address the allegations that Dr. Bateson failed to assess the circulation in her right leg while she was in the PACU and discharged her to a nursing unit even though she experienced hypotension and the color in her right leg had changed from pink to pale. Alternatively, plaintiff alleges the affidavit of her medical expert raises a triable issues as to whether Dr. Bateson departed from accepted standards of anesthesia care in the PACU by failing to take action after her leg became pale and whether such alleged negligence was a contributing factor to her peroneal nerve injury. She further alleges that Long Island Anesthesia Physicians, LLP, is vicariously liable for Dr. Bateson's negligence, as he was a principal of such partnership at the time of plaintiff's surgery. Plaintiff also cross-moves for an order precluding any defendant not granted summary judgment, which did not oppose the motions by Dr. Bateson and Long Island Anesthesia Physicians, from seeking contribution and apportionment from any defendant granted summary judgment, arguing the non-moving defendants "may not sit on the sidelines and watch [the moving] defendants escape any responsibility and then come

forth with evidence at trial to foist responsibility on the ‘empty chairs’ left behind” by any defendant dismissed from the action. Long Island Anesthesia Physicians and defendant St. Charles Hospital oppose plaintiff’s cross motion.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted standards of medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff’s injury or damage (*see Duvidovich v George*, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; *Ahmed v Pannone*, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). On a motion for summary judgment dismissing a medical malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 5 NYS3d 162 [2d Dept 2015]; *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). If the defendant makes such a showing, the burden shifts to the plaintiff to submit evidentiary proof rebutting the defendant’s prima facie showing (*see Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176; *see Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, 95 AD3d 823, 944 NYS2d 197 [2d Dept 2012]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Guzzi v Gewirtz*, 82 AD3d 838, 918 NYS2d 552 [2d Dept 2011]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674). And while summary judgment is not appropriate where the parties present conflicting expert opinions, an affidavit of a plaintiff’s expert that is conclusory or speculative is insufficient to defeat a defendant’s prima facie showing (*see Senatore v Epstein*, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 947 NYS2d 148; *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265).

Further, Public Health Law § 2805-d (1) defines lack of informed consent as “the failure of the person providing the professional treatment * * * to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make knowledgeable evaluation.” To establish a medical malpractice claim based on lack of informed consent, a plaintiff must show (1) that the defendant failed to disclose alternatives to the proposed treatment and the foreseeable risks associated with such treatment, that a reasonable medical practitioner under similar circumstances would have disclosed, (2) that a reasonably prudent person in the patient’s position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*see* Public Health Law §2805-d [3]; *Manning v Brookhaven Mem. Hosp. Med. Ctr.*, 11 AD3d 518, 782 NYS2d 833 [2d Dept 2004]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; *Footte v Rajadhyax*, 268 AD2d 745, 702 NYS2d 153 [3d Dept 2000]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 779 NYS2d 504; *Mondo v Ellstein*, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]).

Here, Dr. Bateson's submissions, particularly the deposition testimony and the affidavit of Dr. Glassman, are sufficient to establish a prima facie case of entitlement to judgment in his favor as a matter of law (*see Kunic v Jivotovski*, 121 AD3d 1054, 995 NYS2d 587 [2d Dept 2014]; *Belak-Redl v Bollingier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]). In particular, the affidavit of Dr. Glassman states, in relevant part, that Dr. Bateson properly performed a preoperative anesthesia evaluation of plaintiff and obtained a signed consent for anesthesia services from plaintiff prior to the operation. It states that Dr. Bateson properly positioned plaintiff's head and upper body during the surgery, properly administered anesthesia and pain medication to plaintiff on the date of the surgery, and properly monitored plaintiff's recovery from the anesthesia in the PACU. Dr. Glassman's affidavit explains that at the time of her discharge from the PACU, plaintiff was awake, her airway was maintained, her vital signs were stable, and there was no uncontrolled blood loss. Moreover, it states that when she was discharged from the PACU plaintiff denied numbness, had full sensation to her toes, and could move her extremities. Dr. Glassman concludes that there is no evidence in the record that plaintiff suffered from any complications related to anesthesia, and that the anesthesia care and treatment provided by Dr. Bateson conformed with the accepted standards of care within the medical community.

Likewise, Long Island Anesthesia Physicians established prima facie its entitlement to judgment dismissing the complaint against it (*see Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 903 NYS2d 521 [2d Dept 2010]). The allegations against Long Island Anesthesia Physicians are predicated on vicarious liability for Dr. Bateson's and Nurse Hughes' anesthesia and pain management treatment of plaintiff. The affirmation of its expert, Dr. Berger, explains the positioning of patients during surgery, and the use of certain devices during and after surgery. It describes, from an anesthesia perspective, the responsibilities of an anesthesiologist monitoring a surgical patient recovering in the PACU and the clinical parameters used to determine whether a patient may be discharged from the unit. Dr. Berger opines that plaintiff's treatment by Dr. Bateson conformed with good and accepted standards of anesthetic care, and that the anesthetic care rendered was not a proximate cause of plaintiff's alleged injuries. He also avers that Dr. Bateson appropriately discussed with plaintiff the risks of anesthesia and obtained a signed consent form from her prior to the operation, and that Nurse Hughes and two other employees of Long Island Anesthesia Physicians, who are not named as defendants, provided appropriate post-operative pain management care to plaintiff.

The moving defendants, therefore, shifted the burden to plaintiff to present evidentiary proof in admissible form sufficient to raise triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176). Contrary to the assertions of her counsel, the affidavit of plaintiff's expert fails to raise a triable issue of fact. Significantly, while plaintiff's expert refers to a general statement contained in the Standards for Postanesthesia Care prepared by the American Society of Anesthesiologists that "general medical supervision and coordination of patient care in the PACU should be the responsibility of the anesthesiologist," such expert does not set forth the accepted community standards of practice for anesthesiologists monitoring patients in the PACU after general anesthesia or show how Dr. Bateson departed from such standards of care. Moreover, plaintiff's expert does not refer to any evidence in the record demonstrating that at the time of her discharge from the PACU plaintiff did not meet the criteria for discharge to a nursing floor, or that the alleged nerve injuries were causally related to the anesthesia treatment or the pain management care provided by Dr. Bateson. Further, while plaintiff's expert discusses the importance of monitoring the operative limb after total joint

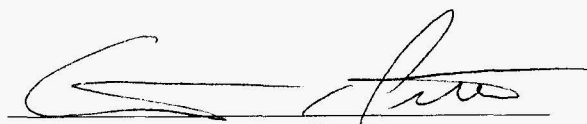
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replacement surgery, such expert does not distinguish between the duties owed to a surgical patient by the orthopedist who performed the surgery and by the anesthesiologist who provided the anesthesia and pain management care. Thus, plaintiff's expert's assertions that Dr. Bateson departed "from accepted standards of medicine and anesthesia practice" in the PACU and that such departures "were substantial contributing factors to [plaintiff's] permanent right leg peroneal nerve injury" lack probative value (*see Diaz v Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; *Furey v Kraft*, 27 AD3d 416, 812 NYS2d 590 [2d Dept], *lv denied* 7 NY3d 703, 819 NYS2d 869 [2006]; *Maldonado v Lee*, 278 AD2d 206, 717 NYS2d 258 [2d Dept 2000]). Finally, plaintiff does not offer any evidence disputing Dr. Berger's opinion that Nurse Hughes' pain management treatment of plaintiff did not depart from the accepted standard of care.

Accordingly, the branch of Dr. Bateson's motion seeking summary judgment in his favor on the medical malpractice and the lack of informed consent claims against him is granted. Absent any opposition, the branch of Dr. Bateson's motion for an order amending the caption by deleting his name as a defendant is granted. The motion by Long Island Anesthesia Physicians for summary judgment in its favor also is granted.

As to plaintiff's cross motion, CPLR 1601 (1) limits the liability that may be imposed upon a defendant jointly and severally liable for noneconomic losses to its proportionate share in instances where such defendant's liability is determined to be 50% or less of the total liability assigned to "all persons liable" (*Rangolan v County of Nassau*, 96 NY2d 42, 45, 725 NYS2d 611 [2001]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 254, 955 NYS2d 384 [2d Dept 2012]; *Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]). However, when a codefendant is dismissed from an action as the result of a summary judgment motion, a remaining defendant has no basis for seeking Article 16 apportionment of liability with respect to the dismissed codefendant. Nevertheless, the cross motion is denied. The statutory right of apportionment must be proved by the party asserting such defense at the time of trial. Contrary to the assertion by plaintiff's counsel, the assertion of an Article 16 defense does not shift to a defendant claiming such a defense the burden of establishing the negligence of a codefendant seeking summary judgment (*see* CPLR 1603; *Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809).

Dated: July 20, 2015



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION