

Colbert v Lustberg
2017 NY Slip Op 31656(U)
August 1, 2017
Supreme Court, Suffolk County
Docket Number: 11-24914
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 11-24914CAL. No. 16-01908MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH FARNETI
Acting Justice Supreme CourtMOTION DATE 3-16-17
ADJ. DATE 6-8-17
Mot. Seq. # 004 - MD
005 - MD
006 - MG-----X
JENNIFER COLBERT and LEE COLBERT,

Plaintiffs,

- against -

STUART LUSTBERG, M.D., LAWRENCE
LIPPERT, M.D., HUNTINGTON BAY
OBSTETRICS & GYNECOLOGY, P.C., and
HUNTINGTON HOSPITAL,Defendants.
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Upon the following papers numbered 1 to 55 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 17 - 38; 43 - 55; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14 - 16; Replying Affidavits and supporting papers 39 - 40; 41 - 42; Other ; it is,

ORDERED that the motion (seq. 004) by defendant Lawrence J. Lippert, M.D., the motion (seq. 005) by defendants Stuart Lustberg, M.D. and Huntington Bay Obstetrics & Gynecology, P.C., and the motion (seq. 006) by defendant Huntington Hospital are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Lawrence J. Lippert, M.D., and the motion by defendants Stuart Lustberg, M.D. and Huntington Bay Obstetrics & Gynecology, P.C., for summary judgment in their favor dismissing the complaint and all cross claims asserted against them are denied; and it is further

ORDERED that the motion by defendant Huntington Hospital for summary judgment in its favor dismissing the complaint and all cross claims asserted against it is granted.

Plaintiff Jennifer Colbert commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice, *inter alia*, in improperly performing a C-section and in failing to obtain informed consent before performing the procedure. Plaintiff Lee Colbert alleges loss of companionship and consortium of his spouse. Issue has been joined, discovery is complete, and a note of issue has been filed.

Lawrence J. Lippert, M.D., now moves for summary judgment in his favor dismissing the complaint and all cross claims asserted against him. In support of the motion, Dr. Lippert submits, among other things, copies of the pleadings; his own deposition transcript and the deposition transcripts of Stuart Lustberg, M.D., Jennifer Colbert and Lee Colbert; plaintiff's medical records; and the expert affirmation of Leonard Benedict, M.D.

Stuart Lustberg, M.D. and Huntington Bay Obstetrics & Gynecology, P.C. (hereinafter collectively referred to as "Dr. Lustberg"), move for summary judgment in their favor dismissing the complaint and all cross claims against them. In support of the motion, Dr. Lustberg submits an affirmation of expert witness J. Gerald Quirk, M.D.; copies of the pleadings; his own deposition transcript and the deposition transcripts of Dr. Lippert, Jennifer Colbert and Lee Colbert; and plaintiff's medical records.

Huntington Hospital moves for summary judgment in its favor dismissing the complaint and all cross claims against it. In support of the motion, Huntington Hospital submits copies of the pleadings; the deposition transcripts of Dr. Lippert and Dr. Lustberg; plaintiff's medical records; an affidavit of Kristina Jeffrey and an affirmation of expert witness Michael Arato, M.D. In opposition, plaintiffs submit an affirmation of counsel and an expert physician's affirmation.

Jennifer Colbert testified that she became pregnant in May 2009 and her estimated date of delivery was January 11, 2010. She testified that she treated prenatally with her obstetrician, Dr. Elisa Felsen-Singer, and her prenatal care was uncomplicated until November 2009 when she was found to have elevated blood pressure. Medical records indicate that on November 24, 2009, plaintiff was admitted to Huntington Hospital to rule out pregnancy induced hypertension, preeclampsia. Plaintiff

was prescribed Labetolol, an anti-hypertensive medication, and released from Huntington Hospital on November 26, 2009. In December of 2009, plaintiff was 36 years old, and weighed 208 lbs. Her medical records indicated she was an active smoker, and suffered from chronic hypertension and asthma.

Plaintiff testified that on January 5, 2010, during a scheduled office visit with Dr. Elisa Felsen-Singer, her blood pressure was elevated. Plaintiff admitted that she had not taken her blood pressure medication and wanted to go home to take it. Later that afternoon, plaintiff's blood pressure remained elevated and Dr. Felsen-Singer directed plaintiff to go to Huntington Hospital. Plaintiff testified she was to be monitored at Huntington Hospital and a C-section was scheduled for January 6, 2010.

Medical records indicate that on January 5, 2010, Dr. Stuart Lustberg, an on-call covering obstetrician, performed a C-section at approximately 8:10 p.m. Dr. Lustberg testified that because of plaintiff's chronic hypertension and superimposed preeclampsia and the risk to both plaintiff and the fetus he decided to perform a C-section after his physical examination of plaintiff revealed a blood pressure of 170 over 100. Records indicate that at 6:10 p.m. plaintiff signed an informed consent form after discussing the risks with Dr. Lustberg. Dr. Lustberg testified he was assisted by Dr. Lippert. Dr. Lustberg testified he used a Pfannenstiell incision. Dr. Lippert testified that his role as an assistant surgeon was to hold retractors, help control minor bleeding, press on the uterus to assist delivery and to suture the right half of the facial incision at the direction of the lead surgeon. Dr. Lippert testified that he did not suture any portion of plaintiff's peritoneum, rectus muscles, subcutaneous tissue or close her skin. He testified that the Cesarean section was concluded at 9:45 p.m. and he was not otherwise involved in plaintiff's care and treatment. Medical records indicate that there were no complications or difficulties noted during the Cesarean section.

Following delivery plaintiff complained of abdominal pain, nausea, and vomiting. Dr. Lustberg was not involved in plaintiff's post-Cesarean section care. Medical records indicate that on January 9, 2010, plaintiff was diagnosed with an incisional hernia and Dr. Vera Freeman performed an exploratory laparotomy. Dr. Freeman reported that "a knuckle of small bowel was noted herniated through the lower midline fascia layer, but it was herniated through a layer of peritoneum and muscle that had been sutured together."

To make a *prima facie* showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff's injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment.

(see *Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (see *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a *prima facie* case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a *prima facie* showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (see *Alvarez v Prospect Hosp.*, *supra*; *Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 766, 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's *prima facie* showing (see *Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, Dr. Lippert and Dr. Lustberg have failed to established a *prima facie* case of entitlement to judgment as a matter of law that they did not depart from good and accepted medical practice (see *Muniz v Mount Sinai Hosp. of Queens*, 91 AD3d 612, 937 NYS2d 244 [2d Dept 2012]; *Belak-Redl v Bollengier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; *Tuorto v Jadali*, 62 AD3d 784, 878 NYS2d 457 [2d Dept 2009]). While both defendants present expert affirmations from Dr. Benedict and Dr. Quirk, respectively, that they did not depart from accepted standards of care, did not contribute to plaintiff's alleged injuries, and that incisional hernias "are remarkably common and occur in approximately 12 to 15% of abdominal operations," the experts opinions are directly contradicted by Dr. Lustberg's own deposition testimony. When asked at his deposition, based upon a reasonable degree of medical certainty, as to whether a patient who has been closed in the manner he described, that is, peritoneum, followed by rectus muscle, followed by fascia, followed by the subcutaneous tissue, followed by the skin closure, the bowel can make its way into the suture line after the closure, Dr. Lustberg opined "that it cannot." He explained, "[i]f the suture line is placed properly, its tight and there is no space for that." While Dr. Quirk references plaintiff's advanced maternal age, obesity, smoking, hypertension, and asthma as risk factors following a C-section, Dr. Lustberg has raised triable issues of fact by contradicting his own medical expert (*Wallenquest v Brookhaven Mem. Hosp. Med. Ctr.*, 28 AD3d 538, 813 NYS2d 484 [2d Dept 2006]).

Moreover, Dr. Lustberg testified that he has no independent recollection of the surgery he performed on plaintiff and his operative report, relied upon by his expert, is not in admissible form (see CPLR 4518). An expert opinion that is unsupported by an evidentiary foundation has no probative value (*Diaz v NY Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]). Accordingly, those branches of Dr. Lippert's and Dr. Lustberg's motion to dismiss the first cause of action are denied.

As to plaintiffs second cause of action alleging lack of informed consent, defendants have established a *prima facie* case of entitlement to judgment as a matter of law. To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and the alternatives, and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see* Public Health Law § 2805-d [1]; *Schussheim v Barazani*, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]; *Lavi v NYU Hosps. Ctr.*, 133 AD3d 830, 21 NYS3d 143 [2d Dept 2015]; *Zapata v Buitriago*, 107 AD3d 977, 969 NYS2d 79 [2d Dept 2013]). However, where a private physician attends his or her patient at the facilities of a hospital, it is the duty of the physician, not the hospital, to obtain the patient's informed consent, and a hospital employee's undertaking the ministerial task of recording that consent does not transfer that duty to the hospital (*see Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]; *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Salandy v Bryk*, 55 AD3d 147, 152, 864 NYS2d 46 [2d Dept 2008]). Here, Dr. Lustberg testified and medical records indicate that he explained the risks of delivery by C-section to plaintiff and her spouse and all questions were encouraged and answered. An informed consent form was signed by plaintiff on January 5, 2009, at 6:10 p.m. In opposition, plaintiffs have not raised any issue of fact. Accordingly, the cause of action is dismissed as to all defendants.

Turning to the motion by Huntington Hospital, a hospital generally may not be held liable for malpractice committed by a private attending physician not in its employment (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Smolian v Port Auth. of N.Y. & N.J.*, 128 AD3d 796, 801, 9 NYS3d 329, 334 [2d Dept 2015]; *Zhuzhingo v Milligan*, 121 AD3d 1103, 995 NYS2d 588 [2d Dept 2014]), an exception exists when a patient presents at an emergency department seeking treatment from the hospital and not from a particular physician of the patient's own choosing (*see Smolian v Port Auth. of N.Y. & N.J.*, *supra*; *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 988 NYS2d 628 [2d Dept 2014]; *Giambona v Hines*, 104 AD3d 807, 961 NYS2d 519 [2d Dept 2013]). Under this exception, liability is predicated on the hospital's apparent or ostensible agency over the independent physician (*see Hill v St. Clare's Hosp.*, *supra*, at 80; *Muslim v Horizon Med. Group, P.C.*, *supra*; *Loaiza v Lam*, 107 AD3d 951, 968 NYS2d 548 [2d Dept 2013]). Moreover, a hospital may be held concurrently liable with a private physician if its employees commit independent acts of negligence or fail to inquire about the correctness of a private physician's orders that are contrary to normal practice (*see Doria v Benisch*, *supra*; *Aronov v Soukkary*, 104 AD3d 623, 960 NYS2d 462 [2d Dept 2013]; *Corletta v Fischer*, 101 AD3d 929, 956 NYS2d 163 [2d Dept 2012]).

Here, Huntington Hospital has established a *prima facie* case of entitlement to judgment as a matter of law dismissing the complaint asserted against it. Kristina Jeffrey, an executive assistant in the hospital's human resource department, avers that she searched the hospital's employment records and that such search showed Dr. Lustberg was not an employee of the hospital in 2010. Likewise, Dr. Lippert testified that in 2010 he was self-employed. Additionally, the hospital's expert, Dr. Michael Arato, opines that the care and treatment rendered to plaintiff by the staff of Huntington Hospital was in

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accordance with good and accepted medical practice and not the proximate cause of any of plaintiff's claimed injuries. Plaintiffs do not oppose the hospital's motion and have failed to raised an issue of fact regarding the defendant Huntington Hospital. Accordingly, Huntington Hospital's motion to dismiss the complaint asserted against it is granted.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: August 1, 2017


Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION