

Saglimbeni v Chalas

2018 NY Slip Op 34423(U)

October 9, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-610187

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 15-610187
CAL. No. 17-02287MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice Supreme Court

MOTION DATE 4-12-18 (001 & 002)
ADJ. DATE 8-16-18
Mot. Seq. # 001 - MotD
002 - MotD

JULIANNE SAGLIMBENI,

Plaintiff,

- against -

EVA CHALAS, M.D., ALAN MCNAMARA,
M.D., WINTHROP LONG ISLAND
GYNECOLOGIC ONCOLOGY ASSOCIATES
and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by Eva Chalas, M.D. and Winthrop Long Island Gynecologic Oncology Associates, dated March 23, 2018, by Winthrop University Hospital, dated March 27, 2018; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated June 27, 2018; Replying Affidavits and supporting papers by Eva Chalas, M.D. and Winthrop Long Island Gynecologic Oncology Associates, dated August 13, 2018; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that the motion (seq. 001) by defendants Eva Chalas, M.D., and Winthrop Long Island Gynecologic Oncology Associates, and the motion (seq. 002) by defendant Winthrop University Hospital are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Eva Chalas, M.D., and Winthrop Long Island Gynecologic Oncology Associates for summary judgment dismissing the complaint and all cross claims asserted against them is granted to the extent indicated, and is otherwise denied; and it is further

ORDERED that the motion by defendant Winthrop University Hospital for summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent indicated, and is otherwise denied.

Plaintiff Julianne Saglimbeni commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice, *inter alia*, in failing to properly perform a supra-cervical hysterectomy, leading to a thermal injury of the bowel; in leaving mesh in place when repairing the thermal injury; in failing to treat an infection; in failing to obtain informed consent; and, as to defendant Winthrop University Hospital, in failing to investigate the qualifications of its employees. Issue has been joined, discovery is complete, and a note of issue has been filed.

Eva Chalas, M.D. and Winthrop Long Island Gynecologic Oncology Associates (hereinafter collectively referred to as "Dr. Chalas") now move for summary judgment dismissing the complaint and all cross claims asserted against them. In support of the motion, Dr. Chalas submits, among other things, copies of the pleadings; her own deposition transcript and the deposition transcripts of plaintiff, and Virginia Corbett; plaintiff's medical records; and the expert affirmations of John Lovecchio, M.D., and Thomas Gouge, M.D. Winthrop University Hospital also moves for summary judgment in its favor. In support of the motion, Winthrop University Hospital submits the deposition transcripts of plaintiff, Dr. Chalas, and Virginia Corbett, and plaintiff's medical records. In opposition to the motions, plaintiff submits an affirmation from an expert physician, board certified in surgery.

Plaintiff testified that she first saw Dr. Chalas on April 1, 2010. Plaintiff's chief complaint was constant abdominal pain. Dr. Chalas' examination revealed a uterine mass, and she recommended a laparotomy to remove the mass and a possible hysterectomy. Plaintiff initially consented to the surgery scheduled for April 12, 2010. However, plaintiff canceled the surgery with Dr. Chalas and instead underwent surgery on April 23, 2010 at Memorial Sloan Kettering Cancer Center. Dr. Ginger Gardner performed multiple myometomies and removed fibroid tumors during an exploratory laparotomy. Medical records indicate that on July 3, 2012, a CT scan revealed persistent nodular myomas (benign tumors composed partly of muscle tissue) in plaintiff's uterus and a large umbilical hernia containing non-obstructed loops of bowel. On August 4, 2012, plaintiff underwent a laparoscopic repair of an incarcerated incisional hernia with non-absorbable mesh and tact placement by Dr. Arif Ahmad at John T. Mather Memorial Hospital.

On January 24, 2013, plaintiff saw Dr. Chalas for the second time. Medical records indicate that plaintiff complained of severe abdominal pain. Dr. Chalas testified that her examination revealed an anterior

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myoma that was tender. Dr. Chalas testified her impression was that plaintiff suffered from a degenerating myoma and she recommended a repeat ultrasound, followed by a supra-cervical hysterectomy. Dr. Chalas testified that after a 50 minute conversation plaintiff agreed to go forward with the hysterectomy.

Medical records indicate that on February 27, 2013, plaintiff was admitted to Winthrop University Hospital for performance of the supra-cervical hysterectomy. Plaintiff was taking the antibiotic Zithromax for a sinus infection. Plaintiff signed a written consent authorizing Dr. Chalas to perform a supra-cervical hysterectomy and indicated procedures. Prior to the surgery Flagyl, and Gentamicin, prophylactic antibiotics, were administered to plaintiff. Dr. Chalas' operative report acknowledges that while she was lysing (breaking down of the membrane of a cell) adhesions from prior surgical procedures she caused a thermal injury to plaintiff's rectosigmoid colon. Dr. Chalas testified that she performed a repair and checked the integrity of the bowel by submerging it in fluid and distending it with gas, and that no air leak was seen. The area of injury was removed and sent to pathology. Dr. Chalas also testified that she removed a portion of the mesh that had been previously placed by a prior surgeon, as it failed to integrate into the abdominal wall. A pathology report revealed myomas, leiomyomas, and a benign cyst.

On February 28, 2013, Dr. Chalas saw plaintiff and plaintiff was cleared for a bland diet. Dr. Chalas noted that plaintiff was afebrile and her white blood count was 13.6 (normal). Medical records indicate that on March 1, 2013, plaintiff experienced wound separation and Dr. Chalas closed the incision bedside. On March 2, 2013, plaintiff was seen by Dr. Chalas' resident and later that morning by Dr. Chalas. Notes indicate that plaintiff had not yet passed flatus. On March 3, 2013, plaintiff was seen by a gynecology oncology resident, and at 10:30 a.m. that day plaintiff had a bowel movement with positive flatus. On March 4, 2013, plaintiff was discharged from Winthrop University Hospital. On March 11, 2013, plaintiff followed up at the office of Dr. Chalas. PA Christine Prazak examined plaintiff and noted slight incisional pain, but no erythema or drainage. On March 28, 2013, plaintiff complained of extreme abdominal pain and Dr. Chalas recommended a CT scan, which revealed residual fluid in the anterior pelvic wall at the operative site. On March 29, 2013, Dr. Chalas examined plaintiff and observed erythema and fluctuance (movable and compressible) below the umbilicus. Dr. Chalas drained the fluid, which ultimately grew cultures of MRSA bacteria.

On March 29, 2013, the plaintiff was admitted to Winthrop University Hospital. On March 30, 2013, Dr. Chalas recommended a wound care consultation. A wound vacuum was recommended and performed. The plaintiff was discharged on April 1, 2013.

By April 26, 2013, the plaintiff's wound had still not healed, and medical records indicate a debridement was performed. On August 30, 2013, the wound reopened. On September 10, 2013, plaintiff treated with Dr. Gorenstein and cultures were positive for MRSA. A CT scan revealed a deep seated infection and on December 2, 2013, the infected mesh was removed and extensive debridement of infected soft tissue in the abdominal wall was removed. On December 23, 2013, plaintiff was diagnosed with a saddle pulmonary embolism and surgery was performed to filter the clot.

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

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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 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. Chalas has established her prima facie entitlement to summary judgment. Dr. Chalas's experts, Dr. John Lovecchio, board certified in gynecologic oncology, and Dr. Thomas Gouge, board certified in general surgery, both opine that the care rendered by Dr. Chalas was appropriate, was within the accepted standards of medical and surgical practice, and was not the proximate cause of, or a significant factor to, any injury alleged by plaintiff. Dr. Lovecchio specifically opines that Dr. Chalas obtained an appropriate history from plaintiff, obtained a proper informed consent for the supra-cervical hysterectomy, appropriately performed the hysterectomy, "that a thermal injury to the sigmoid colon is not, in and of itself, evidence of malpractice," that there was no obligation to do a bowel preparation prior to performing the hysterectomy, that the thermal injury was timely identified and appropriately repaired, that it was appropriate not to remove the mesh, that a surgery consultation was not necessary, and that plaintiff was appropriately treated post-operatively. Likewise, Dr. Gouge opines that Dr. Chalas was trained and qualified to recommend and perform a supra-cervical hysterectomy without obtaining a presurgical consult, that Dr. Chalas timely recognized the injury to the sigmoid colon, that the repair procedure was appropriate, that it

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was appropriate not to remove incorporated mesh, and that the infection did not develop from the bowel repair, but rather from cellulitis at the incision site.

Winthrop University Hospital has also established a prima facie entitlement to summary judgment. Dr. Chalas testified that she is employed by Winthrop University Hospital. A hospital is not vicariously liable for acts of a private attending physician and is sheltered from liability in those instances where its employees follow directions of attending physician, unless that doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into correctness of orders (*Walter v Betancourt*, 283 AD2d 223, 724 NYS2d 728 [1st Dept 2001]). Here, Winthrop University Hospital relies on Dr. Chalas's experts to establish that the hospital was free of any medical malpractice as the care and treatment rendered by Dr. Chalas was within the appropriate standard of care. As to plaintiff's third cause of action, the record is devoid of any evidence that Dr. Chalas or any employee of the hospital did not possess the requisite knowledge, skill, training, and experience to treat plaintiff. Dr. Chalas testified that her license to practice medicine has never been suspended, revoked or subject to discipline. Winthrop University Hospital has also made a prima facie showing that prior to all procedures and treatment plaintiff was appropriately advised of the risks and benefits of the procedures and consented to them.

In opposition, plaintiff has raised triable issues of fact with regard to Dr. Chalas and Winthrop University Hospital's vicarious liability. Plaintiff's expert opines that Dr. Chalas violated the standard of care by failing to remove the mesh, causing thermal injury to plaintiff's colon, and subjecting her to MRSA infection caused by the injury to the colon. Given the conflict in expert opinion, summary judgment as to the first cause of action is denied (*Alvarez v Prospect Hosp.*, *supra*). As to plaintiff's third cause of action, there is no evidence that Dr. Chalas or any employee of the hospital did not possess the requisite knowledge, skill, training, and experience to treat plaintiff. Accordingly, plaintiff's third cause of action alleging negligent hiring and granting of privileges is dismissed.

As to plaintiff's second cause of action, which alleges lack of informed consent, 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]; *Footo 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 [2d Dept 2004]; *Mondo v Ellstein*,

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302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]). As plaintiff has not raised any issue of fact, the second cause of action is dismissed as to all defendants.

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: OCT 09 2018



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION