

Chapman v Tovar

2018 NY Slip Op 34575(U)

January 30, 2018

Supreme Court, Bronx County

Docket Number: Index No. 21457/2013E

Judge: Mary Ann Brigantti

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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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METTIE ALICIA CHAPMAN,

Plaintiff,

-against-

DECISION / ORDER

Index No. 21457/2013E

WINIFRED S. TOVAR, M.D., ST. BARNABAS HOSPITAL,
and ST. BARNABAS OB/GYN P.C.,

Defendants.

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The following papers numbered 1 to 5 read on the below motion noticed on April 27, 2017 and duly submitted on the Part IA15 Motion calendar of **August 4, 2017**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs' MSJ, Exhibits	1,2
Pls.' Aff. in Opp.	3,4
Defs' Reply Aff.	5

Upon the foregoing papers, defendants Winifred S. Tovar, M.D. ("Tovar") and St. Barnabas OB/GYN, P.C. (collectively, "Defendants") move for summary judgment, dismissing the complaint of the plaintiff Mettie Alicia Chapman ("Plaintiff") and all cross-claims pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This action arises out of a laparoscopic hysterectomy surgery performed by co-defendant Tovar on May 6, 2011. Plaintiff alleges that as a result of medical malpractice that occurred during the surgery, she sustained, *inter alia*, an injury to her rectum. Plaintiff thereafter commenced this action against St. Barnabas Hospital ("SBH"), Tovar, and his employer St. Barnabas OB/GYN, P.C., asserting causes of action predicated upon medical malpractice and lack of informed consent. Defendants now move for summary judgment on the grounds that Tovar did not deviate from the applicable standard of care in rendering treatment to Plaintiff, and Tovar's actions were not a proximate cause of Plaintiff's alleged injuries. Defendants' motion is supported by an affirmation from Lewis S. Rosenberg, M.D., a physician board-certified in

obstetrics & gynecology. Dr. Rosenberg reviewed Plaintiff's treatment and opines that (1) there was no deviation or departure from accepted medical care, as a known complication occurred during this procedure that was treated appropriately, and there is no evidence that anything Tovar did or did not do caused the injuries, and (2) Plaintiff was appropriately counseled as to the risks of the procedure which included, *inter alia*, possible injury to the rectum, and she signed a consent form acknowledging that Tovar explained to her the nature and purpose of the operation, possible alternatives, and possible complication that could arise from the surgery.

In opposition to the motion, Plaintiff argues that Defendants' expert opinion is conclusory and fails to carry their initial burden of proof. Plaintiff further submits a redacted affidavit from her own expert who alleges, *inter alia*, that Tovar deviated from the accepted standard of care by failing to appreciate the correct tissue plane during the portion of the operation in which the posterior cul-de-sac was incised, which was a competent producing cause of Plaintiff's injuries. Plaintiff submits her own testimony wherein she denied that Tovar ever discussed with her the risks of the procedure (Pl. EBT at 65, 66). In addition, Plaintiff's medical expert opined that the signed consent form is boilerplate as it "failed to convey any specific risks, alternatives, or benefits of the procedure in writing, nor did it convey the risk of puncturing the rectum by Tovar, or the risk of the need for a culpotomy procedure and resulting need for a colostomy bag and internet mesh that will require lifelong monitoring, treatment, and the likely need for revision and repair procedures in the future" (Expert Aff. At Par 17).

In reply, Defendants argues that Plaintiff's moving papers are untimely because they were served four days late and must be rejected. Defendants also argue that Plaintiff's expert affidavit fails to raise an issue of fact because it is conclusory, speculative, without factual basis in the record, and without probative value because the expert is not authorized to practice in New York State. As for the issue of informed consent, Defendants assert that the affidavit of Plaintiff's expert applies an improper standard of care with respect to the information that should have been disclosed before surgery. Additionally, Plaintiff's self-serving statement that she was not advised of the risks associated with surgery is directly contradicted by the evidence - detailed notes and a consent form signed by Plaintiff.

II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

A. Medical Malpractice

The Court accepts Plaintiff’s allegedly untimely opposition papers over Defendants’ objection, because Defendants suffered no prejudice as they were able to fully respond to Plaintiff’s contentions by reply affirmation (*see Prato v. Arzt*, 79 A.D.3d 622, 622-23 [1st Dept. 2010]). A medical malpractice defendant moving for summary judgment meets his initial burden by establishing that either (1) he did not deviate from accepted medical practice, or (2) his alleged deviation was not a proximate cause of the plaintiff’s injury or damages (*see Bacani v. Rosenberg*, 74 A.D.3d 500, 501 [1st Dept. 2010], citing *Mattis v. Keen*, 54 A.D.3d 610, 611 [1st Dept. 2008]).

In this case, Defendants failed to establish their prima facie entitlement to summary judgment with respect to Plaintiff's medical malpractice claim. Plaintiff alleges in her verified bill of particulars that Tovar negligently inflicted a rectal injury during her laparoscopic assisted vaginal hysterectomy. The post-surgery operative report annexed to the moving papers states, in part, "[t]he posterior cul-de-sac was then incised using the curved Metzenbaum scissors gaining entry into the intraperitoneal cavity. Inspection of the incision confirmed proper entry into the posterior cul-de-sac. However, upon further examination, a defect in the rectal mucosa was found. At this point, the vaginal hysterectomy was aborted." Defendants' expert Dr. Rosenberg notes that during the procedure, "a defect was recognized in the rectum" which he characterized as a "known complication" or "known risk" to surgery. The expert, however, fails to state with detail or specificity that Tovar's surgical methods or techniques complied with the applicable standard of care. Indeed, the expert does not even specify the applicable standard of care to be adhered to during this procedure (*see generally Ross-Germain v. Millenium Medical Services, P.C.*, 144 A.D.3d 658, 660 [2nd Dept. 2016]).

Tovar acknowledged at his examination before trial that there was a "complication" during Plaintiff's surgery "where [I] cut her proximal portion of her rectum" (Tovar EBT at 15:14-20, annexed to co-defendant SBH's motion for summary judgment). A surgical note (also annexed to SBH's motion papers) states that "patient sustained an inadvertent laceration through the posterior vaginal wall into the rectum during transvaginal hysterectomy." Dr. Rosenberg noted that the rectal injury was a "known risk" to surgery but offered no substantive comment as to whether or not it was avoidable, or would have occurred even in the absence of negligence. The expert states only in conclusory fashion that "there was "no deviation or departure from accepted practice" and "no evidence that anything Tovar did or did not do was the proximate cause" of Plaintiff's injuries. "Bare conclusory denials of negligence without any factual relationship to the alleged injuries, and the submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint, are insufficient to establish that defendant is entitled to summary judgment" (*see Wasserman v. Carella*, 307 A.D.2d 225, 226 [1st Dept. 2003]). Dr. Rosenberg noted that another surgical team took over and repaired the rectal injury, however he does not allege that this occurrence severed the causal

connection between Tovar's performance during surgery and Plaintiff's subsequent injury and the complications that arose therefrom. Since Defendants' failed to carry their initial burden with respect to the medical malpractice claim, this branch of their motion for summary judgment must be denied regardless of the sufficiency of the opposing papers (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851).

B. *Informed Consent*

In order to prevail on a cause of action alleging a failure to procure informed consent, "a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries" (*see Balzoo v. Giese*, 107 A.D.3d 587, 588 [1st Dept. 2013]; CPLR 4401-a; Public Health Law 2805-d[1] and [3]).

Defendants carried their initial summary judgment burden with respect to Plaintiff's claim predicated upon a lack of informed consent (*see Johnson v. Staten Island Medical Group*, 82 A.D.3d 708 [2nd Dept. 2011]). Tovar testified that, prior to surgery, he spoke with Plaintiff about the risks associated with the surgery - specifically, "the risk of injury to...the rectum, possible risks of bleeding, possible risk of infection, possible injury to the ureter - connecting the kidney to the bladder; and possible conversion of the laparoscopic assisted vaginal hysterectomy to total abdominal hysterectomy" (Tovar EBT at 20-21). Tovar said that he orally reviewed the risks with Plaintiff again on the day of surgery (*id* at 21). Defendants submit a medical record indicating that on April 27, 2011, Plaintiff was counseled as to the risks of surgery. Defendants also submit a consent form signed by Plaintiff stating, in part, the "risks involved and the possibility of complications, have been fully explained to me in plain language by Dr. Tover. I acknowledge no guarantee or assurance has been made as to the results that my [sic] be obtained. Every effort has been made to provide me with complete information."

In opposition to the motion, Plaintiff submits her own testimony wherein she flatly denies that Tovar ever discussed with her the risks of the procedure (Pl. EBT at 65, 66). In addition, Plaintiff's medical expert opined that the signed consent form is boilerplate as it "failed to

convey any specific risks, alternatives, or benefits of the procedure in writing, nor did it convey the risk of puncturing the rectum by Tovar, or the risk of the need for a culpotomy procedure and resulting need for a colostomy bag and internet mesh that will require lifelong monitoring, treatment, and the likely need for revision and repair procedures in the future” (Expert Aff. At Par 17). However, even accepting this evidence as credible, neither Plaintiff nor her expert allege, or offer any evidence, that a reasonable person, having been appropriately advised of the risks associated with the procedure, would not have elected to go through with it (*see, e.g., Orphan v. Pilnik*, 66 A.D.3d 543, 544 [1st Dept. 2009], *aff’d*, 15 N.Y.3d 907 [2010]). Since Plaintiff failed to raise an issue of fact regarding a necessary element of her cause of action predicated upon a lack of informed consent, that cause of action must be dismissed (*id; see also Fortich v. Ky-Miyasaka*, 102 A.D.3d 610, 611 [1st Dept. 2017]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branch of Defendants’ motion for summary judgment seeking dismissal of Plaintiff’s medical malpractice claim predicated upon Defendants’ alleged negligent treatment of Plaintiff is denied, and it is further,

ORDERED, that the branch of Defendants’ motion for summary judgment seeking dismissal of Plaintiff’s medical malpractice claim predicated upon Defendants’ failure to procure informed consent is granted, and that claim only is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 1/30, 2018



Hon. Mary Ann Brigantti, J.S.C.