

Furman v DeSimone
2019 NY Slip Op 31797(U)
June 18, 2019
Supreme Court, Tompkins County
Docket Number: 2013-1011
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 18th day of April, 2019.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding
STATE OF NEW YORK
SUPREME COURT: TOMPKINS COUNTY

CYNTHIA L. FURMAN and MATTHEW J. FURMAN,

Plaintiffs,

DECISION AND ORDER

Index No. 2013-1011
RJI No. 2015-0391-C

-vs-

JEFFREY DeSIMONE, M.D.,
KENNETH COOPER, M.D.,
CENTRAL NEW YORK SURGICAL
PHYSICIANS, P.C.,
CRNA "JANE DOE" (a fictitious person),
RAO KAMANI, M.D., and
CROUSE HOSPITAL,

Defendants.

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EUGENE D. FAUGHNAN, J.S.C.

Defendant Rao Kamani, M.D. (“Kamani”) filed the instant motion pursuant to CPLR §2221(d) for leave to reargue his motion for summary judgment seeking dismissal of all the claims against him in the Amended Complaint. By Decision and Order dated December 21, 2018, the Court dismissed claims against CRNA (certified registered nurse anesthetist) Jane Doe. For the reasons set forth herein, the Court grants Kamani’s motion to reargue, and upon reargument, adheres to its prior determination, and Kamani’s motion for summary judgment is denied.

The underlying facts are set forth in detail in the Court’s prior Decision and Order. To briefly summarize, Plaintiff Cynthia Furman (“Furman”) brought this action for medical malpractice arising out of a laproscopic sleeve gastrectomy performed on April 2, 2012, where Kamani was the supervising anesthesiologist. During the course of the surgery, a surgical bougie and an esophageal temperature probe were inadvertently stapled to Furman’s stomach, requiring further dissection and repair. In the prior Decision and Order, the Court concluded that Furman had “raised a triable issue of fact as to whether Kamani deviated from the accepted medical standard of care as the supervising anesthesiologist during the surgery, and whether that deviation was the proximate cause of Furman’s injuries.” (Decision and Order at p.13).

Although not agreeing with the Court's conclusion with respect to the accepted standard of medical care issue, Kamani's motion for reargument is on the question of proximate cause only. Kamani argues that he produced prima facie evidence to support summary judgment on the issue of proximate cause by producing evidence that any alleged deviation was irrelevant to, and not the proximate cause of Furman's injuries, and that Plaintiff failed to raise a triable issue of fact in opposition. Kamani asserts that the prior Decision and Order failed to "demonstrate a complete consideration of the proximate cause issue raised in his summary judgment motion." (Affidavit of Karen Felter, Esq. at ¶3).

In particular, Kamani contends that his own affidavit in support of the motion for summary judgment was sufficient to satisfy his burden. He opined that "the incidental trapping of the temperature probe, which was significantly smaller than the bougie, did not cause, materially alter or add to the complication of clipping the bougie." On this motion to reargue, he claims that Plaintiff's expert, Louis Flancbaum, M.D. ("Flancbaum") failed to even address the proximate cause issue, and therefore, no triable issue of fact was raised. On that basis, Kamani argues that reargument under CPLR §2221(d) is warranted.

"In a medical malpractice action, the plaintiff must show that the defendant 'deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury.'" *Mazella v. Beals*, 27 NY3d 694, 705 (2016), quoting *James v. Wormuth*, 21 NY3d 540, 545 (2013); *Gallagher v. Cayuga Med. Ctr.*, 151 AD3d 1349 (3rd Dept. 2017). "[O]n a motion for summary judgment, the defendant must establish 'either that there was no departure from accepted standards of practice in the plaintiff's treatment or that any such deviation did not injure the plaintiff.'" *Butler v. Cayuga Med. Ctr.*, 158 AD3d 868, 869 (3rd Dept. 2018), quoting *D'Orta v. Margaretville Mem. Hosp.*, 154 AD3d 1229, 1231 (3rd Dept. 2017).

Under CPLR 2221(d) "[a] motion for leave to reargue ... shall be based upon matters of fact of law allegedly overlooked or misapprehended by the court in determining the prior motion,

but shall not include any matters of fact not offered on the prior motion.” See *Greene Major Holdings, LLC v. Trailside At Hunter, LLC*, 148 AD3d 1317 (3rd Dept. 2017); *Matter of Town of Poestenkill v. New York State Dept. of Env'tl. Conservation.*, 229 AD2d 650 (3rd Dept. 1996). “A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision. ... The motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” *Mayer v. National Arts Club*, 192 AD2d 863, 865 (3rd Dept. 1993) (internal citation and end citation omitted); *Andrea v. E.I. Du Pont De Nemours & Co.*, 289 AD2d 1039 (4th Dept. 2001). Kamani claims that the prior Decision and Order did not address the proximate cause component of the medical malpractice claim. To the extent that the Court’s discussion or analysis of proximate was lacking or insufficiently detailed in the prior Decision and Order, the Court has determined to grant Kamani’s motion for reargument.

Kamani’s affidavit alleges that the surgical bougie was intended to be present in the stomach when the staples were placed “to create a standard sized sleeve and staple around it.” (Kamani affidavit at ¶¶26, 39, 49). He also stated that “failure to remove the temperature probe prior to the stapling of Mrs. Furman’s stomach was irrelevant to the outcome of the surgery since it is undisputed that both the surgical bougie and temperature probe were clipped by the stapler.” (Kamani affidavit at ¶¶49, 51). He went on to explain that the temperature probe was significantly smaller than the bougie and since the bougie was trapped by the stapler, it would have needed to be dissected and repaired in any event, such that the entrapment of the temperature probe did not add any additional damage. Thus, he concluded that “there is no causal relationship between the alleged failure to remove the esophageal temperature probe and Mrs. Furman’s alleged injuries in this case.” (Kamani affidavit ¶52). He then asserts that Furman has not submitted evidence that would raise a triable issue of fact.

In opposition to the summary judgment motion, Furman submitted an affidavit from Flancbaum, who is Board Certified in Surgery and has performed over 2,000 bariatric surgeries. Flancbaum's qualifications and training are set forth in the earlier Decision and Order. He provided opinions with respect to both the standard of care and proximate cause. The proximate cause opinions are relevant for this discussion.

Flancbaum stated that "to avoid the very complication that occurred here, the esophageal temperature probe should not have been used." (Flancbaum affidavit ¶10.) He also stated that stapling two tubes during a surgery is a breach of the standard of care and that "[i]t is or should be known to every surgeon and anesthesiologist that these tubes either must be withdrawn prior to firing any stapling device or- in the case of the bougie- moved away from the range of the stapler. Specific steps and maneuvers to ensure that they are not 'trapped' within the stapler are required to prevent this complication." (Flancbaum affidavit ¶14). He also opined that the surgeon and Kamani were both responsible to make sure the CRNA knew what was required in this surgery, and the failure to do so caused the injuries to Furman. He concluded that Furman sustained complications from the surgery due to the negligence of the surgeons, Kamani and the CRNA.

Kamani's affidavit focuses on the esophageal temperature probe. He seemingly contends the bougie was not intended to be removed prior to the firing of the staples, and that the surgeons were responsible for making sure the bougie did not get stapled. On that basis, then, he asserts he could only potentially be responsible for the entrapment of the temperature probe, and that the stapling of the temperature probe did not add any additional complication to what the surgeons had to do to repair the entrapment of the bougie.

On the other hand, Flancbaum's opinion can be viewed as saying that the anesthesiologist has a role in making sure that both the bougie and the temperature probe are not in the range or direction of the stapler. Thus, the entrapment of either one, or both, was the result of the alleged

breach of the accepted standard of medical care. Accordingly, the anesthesiologist could bear some liability even for the stapling of the bougie. Kamani's affidavit does not address the potential liability of an anesthesiologist for stapling of the bougie, apparently because of the fact that it was not intended to be removed during the surgery. Flancbaum's affidavit is sufficient to at least raise a triable issue of fact on whether the stapling of the bougie and resulting repair were attributable to any malpractice on the part of Kamani. The inquiry cannot be limited artificially to just consideration of the temperature probe as Kamani claims.

Kamani argues that Flancbaum's affidavit is purely conclusory and therefore does not raise a triable issue of fact on proximate cause. *See e.g. O'Shea v. Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1141 (4th Dept. 2009) ("although the affirmation of plaintiffs' expert raises a triable issue of fact concerning a departure from accepted practice, the affirmation is merely conclusory with respect to the issue of proximate cause and thus is insufficient to defeat the motion insofar as it seeks summary judgment dismissing the complaint against defendant."); *Olinsky-Paul v. Jaffe*, 105 AD3d 1181 (3rd Dept. 2013) (an expert opinion must be specific and factual, not just conclusory). The Court disagrees with Kamani's assessment of Flancbaum's affidavit. In the present case, Flancbaum described the surgical procedure involved, and alternatives to the use of an esophageal temperature probe, and that a "skin temperature monitor was a safer alternative and should have been used." (Flancbaum affidavit at ¶10). This opinion is specific, based upon the particular facts of this case, and provides an alternative method and reasons why the temperature probe should not have been used, and that it could be trapped if it was used. The Court finds it is not conclusory. In addition, Flancbaum's opinion specifically stated that the bougie should have been moved before the staples were fired, as discussed in the preceding paragraph. If the bougie had been properly moved out of the way of the staples, it would not have been trapped either.

Even if the Court considers only the question of proximate cause with respect to the stapling of the temperature probe, there is still a question of fact presented. In addition to the

Flancbaum affidavit, Furman points to the deposition testimony of the co-defendant doctors as supporting a question of fact concerning causation. Dr. Cooper testified that the stapler (which actually staples and cuts) came into contact with the bougie and temperature probe and just the tip of both were transected. Dr. DeSimone testified that the part of the bougie and temperature probe which were cut and then stapled to Furman's stomach were roughly the same size. Thus, even though the bougie initially is larger than the temperature probe, the portion of both that were cut were about equal. This undermines Kamani's statement that the bougie was much larger and had to be dissected anyway, and the stapling of the temperature probe added nothing to the damage.

Dr. Cooper also provided testimony that the bougie may have flipped back and that the placement of the temperature probe may have impacted the placement of the bougie. If that was the case, then the use of the temperature probe may have been a contributing factor to the bougie being stapled. Even if the temperature probe is smaller, if it was a factor in the larger bougie being stapled, then it is not irrelevant. Given those additional factors, not addressed in Kamani's affidavit, an issue of fact is raised concerning proximate cause. In particular, the evidence calls into question Kamani's claim that the temperature probe played no role in Furman's injuries resulting from the stapling of the bougie and temperature probe. There can be more than one proximate cause for a Plaintiff's injuries. *See, Humphrey v. State of New York*, 60 NY2d 742 (1983); *Loconti v. Creede*, 169 AD2d 900 (3rd Dept. 1991); "Proximate cause is ordinarily a factual issue for resolution by a jury and therefore it is 'only [when] one conclusion may be drawn from the established facts [that] the question of legal cause [may] be decided as a matter of law.'" *Grant v. Nembhard*, 94 AD3d 1397, 1398 (3rd Dept. 2012), quoting *Dupell v. Levesque*, 198 AD2d 712, 713 (3rd Dept. 1993). Even if the anesthesiologist could only bear responsibility for the stapling of the temperature probe, it would be up to the jury to determine the relative percentage of responsibility for the damages that were sustained.

On these bases, the Court finds that Plaintiff has raised a question of fact in opposition to Kamani's affidavit and claim of no proximate cause. Accordingly, upon reargument, Kamani's motion for summary judgment is denied.

This constitutes the **Decision and Order** of the Court.

Dated: June 18, 2019
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice