

**Valentine v Weber**

2019 NY Slip Op 34225(U)

June 17, 2019

Supreme Court, Westchester County

Docket Number: 62013/16

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 167

To commence the statutory time period for appeal of  
of right (CPL § 5117(d)) you are advised to serve a copy of  
this order, with notice of entry, upon all parties.  
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Disp\_x\_\_ Dec\_\_ Seq. Nos. 3-5\_\_ Type\_SJ\_\_

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**  
-----X  
ROBIN A. VALENTINE,

Plaintiff,

-against-

Index No. 62013/16

DECISION AND ORDER

PHILIP WEBER, M.D., WHITE PLAINS  
HOSPITAL PHYSICIANS ASSOCIATES, NEW  
YORK ENDOSCOPY CENTER, LLC, WAHEEDA  
MITHANI, M.D. and WHITE PLAINS HOSPITAL,

Defendants.

-----X

The following papers numbered 1 to 7 were read on these  
motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmations and Exhibits	2
Notice of Motion, Affirmation and Exhibits	3
Affirmation in Opposition	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation	6
Reply Affirmation and Exhibits	7

All of the remaining defendants have filed motions for  
summary judgment in this action for medical malpractice. The  
first motion was filed by defendants White Plains Hospital and  
White Plains Hospital Physicians Associates ("White Plains").

The second motion was filed by defendant Mithani. The third motion was filed by defendant Weber.

The Court begins by granting the motion filed by Dr. Mithani. Plaintiff submitted to the Court an affirmation stating that she did not oppose the motion. It is thus granted, and Dr. Mithani is dismissed from the action.

The Court need not recount the facts in this action, aside from the following. Plaintiff had three surgeries performed by Dr. Weber, for two of which he was assisted by Dr. Mithani. The date of the final surgery was February 7, 2014. Plaintiff returned for a followup visit with Dr. Weber on February 18, 2014. This is the date of the last alleged malpractice, according to plaintiff's Supplemental Verified Bill of Particulars. The complaint was filed more than two and a half years from this date. CPLR § 214-a. However, plaintiff returned to Dr. Weber for a followup appointment on March 12, 2014. Plaintiff claims that because of the continuing treatment doctrine, this "counts" as the last date of the alleged malpractice for statute of limitations purposes.

The Court first addresses the motion filed by White Plains. The last date on which plaintiff was treated at White Plains was February 11, 2014, more than two and a half years prior to the commencement of the action. Plaintiff does not even oppose this aspect of White Plains' motion. It is thus granted, and any

direct claims for malpractice against White Plains are dismissed. However, both plaintiff and White Plains agree that if Dr. Weber did commit any malpractice (which White Plains denies), White Plains would be vicariously liable for it, as he was an employee.

As for the motion filed by Dr. Weber, he establishes a prima facie case that he did not commit medical malpractice. The affirmation of his expert, Dan Reiner, a New York surgeon who is Board-Certified in Surgery and Surgical Critical Care, states that Dr. Weber did not depart from the standard of care by treating plaintiff's hiatal hernia; by having to repeat the procedure a second time; and that there is "no indication in the reports of any injury to the vagus nerve, either posterior or anterior." Dr. Reiner also states that if the vagus nerve had been affected, "injury to the vagus nerve is a known complication of this surgery, not evidence of a departure from the standard of care, and can occur even in the face of good surgical practice." Dr. Reiner further states that the surgeries did not cause plaintiff's complaints, which predated the surgeries. All of these showings suffice to establish Dr. Weber's prima facie burden that he did not commit medical malpractice in any way. *Zamboli v. Dils-Rogu*, 157 A.D.3d 594, 594, 67 N.Y.S.3d 631 (1st Dept. 2018) ("Defendant established prima facie, through an affirmation by an expert surgeon, that he did not deviate from the accepted standard of medical practice.").

"Where a defendant makes a prima facie case of entitlement to summary judgment dismissing a medical malpractice action by submitting an affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact." *Bartolacci-Meir v. Sassoon*, 149 A.D.3d 567, 570, 50 N.Y.S.3d 395, 399 (1st Dept. 2017). In response to these prima facie showings, plaintiff had to rebut this showing. Plaintiff failed to do so.

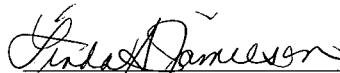
Plaintiff submits to the Court an affirmation of a doctor licensed only in Maryland, not in New York. Such a doctor cannot submit an affirmation, but **must** submit an affidavit. CPLR § 2106. The failure to submit an affidavit is fatal, according to the Second Department, which stated that an "affirmation did not constitute competent evidence because the attesting physician was not authorized by law to practice in this State." *Kelly v. Fenton*, 116 A.D.3d 923, 924, 984 N.Y.S.2d 131, 132 (2d Dept. 2014). See also *Richards v. Tyson*, 64 A.D.3d 760, 761, 883 N.Y.S.2d 575, 577 (2d Dept. 2009) ("affirmed medical reports prepared by Dr. Roger Brick were not admissible to oppose the defendant's motion, as he was no longer licensed to practice medicine in the State at the time the reports were written."); *Doumanis v. Conzo*, 265 A.D.2d 296, 296, 696 N.Y.S.2d 201, 203 (2d Dept. 1999) ("in this case, the purported affirmations of the

plaintiffs' chiropractor, which were not subscribed before a notary or other authorized official, were not entitled to judicial cognizance."). A review of this affirmation, moreover, does not establish that plaintiff's expert is familiar with the New York standards of practice, nor that the expert has any proof that Dr. Weber actually did sever the vagus nerve. All that the expert states, in conclusory fashion, is that because Dr. Weber performed a pyloroplasty, it must have been done as a result of an injury to the vagus nerve. The expert also concludes that plaintiff's symptoms are consistent with an injury to the vagus nerve - notwithstanding the fact that plaintiff complained of those same symptoms at the outset of the treatments. In any event, the Court rejects plaintiff's expert's report in its entirety. As a result, plaintiff has failed to rebut Dr. Weber's prima facie showing. Dr. Weber's motion is thus granted, and he is dismissed from the action. The vicarious claims against White Plains for employing Dr. Weber must also be dismissed.

The action is dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
June 17, 2019

  
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HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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