

**Gargano v Langman**

2019 NY Slip Op 34797(U)

June 6, 2019

Supreme Court, Rockland County

Docket Number: Index No. 030988/2017

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
PHYLLIS GARGANO,

*Plaintiff,*

*-against-*

**DECISION AND ORDER  
ON MOTION FOR  
SUMMARY JUDGMENT**

Index No.: 030988/2017

Motion #2

YARON LANGMAN, VIPUL SHAH, PETER KAYE, MICHAEL  
SCHWARTZ, KENNETH ZWEIG, MICHELLE SLIFKIN,  
JACOB OUSEPH, ANNA KOMOROWSKI, DIGESTIVE  
DISEASE ASSOCIATES OF ROCKLAND, P.C., RAMAPO  
VALLEY SURGICAL ASSOCIATIONS, P.C., ROCKLAND  
THORACIC AND VASCULAR ASSOCIATES, P.C., ROCKLAND  
INFECTIOUS DISEASE, LLP, HEMATOLOGY ONCOLOGY  
ASSOCIATES OF ROCKLAND and GOOD SAMARITAN  
HOSPITAL d/b/a BON SECOURS CHARITY HEALTH  
SYSTEMS, INC.

*Defendants.*

-----X  
*Sherri L. Eisenpress, J.*

The following papers, numbered 1 to 4, were reviewed in connection with Defendants Michael Schwartz, M.D. ("Dr. Schwartz"), and Rockland Thoracic and Vascular Associates, P.C.'s ("Rockland Thoracic") unopposed motion for an Order, pursuant to Civil Practice Law and Rules § 3212, dismissing the instant medical malpractice action as against said them:

**PAPERS**

**NUMBERED**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT IN SUPPORT  
OF MICHAEL SCHWARTZ/MEMORANDUM OF LAW/EXHIBITS "A-H"

1-4

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant negligence/medical malpractice action was commenced on March 2, 2017, and alleges that during the course of treatment from June through September 2014, and as a result of undergoing a colonoscopy and an enema, Plaintiff, a 64 year old woman with

multiple co-morbidities, developed a rectovaginal fistula which resulted in the need for a colostomy, and caused, aggravated, accelerated or enhanced renal injury/failure; rectal wound; rectal bleeding; sepsis; pneumothorax; urinary tract infection; tissue damage; intestinal damaged; altered mental sate and pain and suffering.

Specifically with respect to claims against Dr. Schwartz and Rockland Thoracic, Plaintiff essentially sets forth four theories of liability: (i) negligent diagnosis; (ii) negligent testing; (iii) negligent treatment and administration of medication; and (iv) negligent follow-up care, response and communication. Dr. Schwartz submits his own affidavit in support of the instant summary judgment motion made on his own behalf, and on behalf of Rockland Thoracic, at which he is a partner. Dr. Schwartz states that his first involvement with Plaintiff was when he was called by her nephrologist to consult for dialysis fistula placement on July 10, 2014. He was also called to perform a revision of the plaintiff's left arm arteriovenous fistula on November 24, 2014. Dr. Schwartz notes that this limited care solely involved the plaintiff's dialysis fistula treatment, which is wholly unrelated to any aspect of the plaintiff's underlying theories of liability. He further notes that neither he nor Rockland Thoracic performed any services that were related to the alleged existence of medical complications arising out of a recto-vaginal fistula.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag

Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from accepted practice; and 2) evidence that such departure was a proximate cause of injury or damage. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006). In a summary judgment motion on a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby. Belak-Redl v. Bollinger, 74 A.D.3d 1110, 1111, 903 N.Y.S.2d 508 (2d Dept. 2010). The defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc.. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993).

While a defendant physician moving for summary judgment may submit his own affidavit to meet his burden of establishing prima facie entitlement to summary judgment in a medical malpractice action, that affidavit must be detailed, specific, and factual in nature, and must address each of the specific factual claims of negligence raised in the plaintiff's Bill of Particulars. Macaluso v. Pilcher, 145 A.D.3d 1559, 1560, 43 N.Y.S.3d 658 (4<sup>th</sup> Dept. 2016). Once the defendant doctor has made such a prima facie showing, the burden then shifts to the plaintiff patient to lay bare his or her proof and demonstrate the existence of a material triable issue of fact regarding his or her claims against a defendant doctor. Georges, 194 A.D.2d at 518.

In the instant matter, Dr. Schwartz' affidavit, which is sufficiently detailed, specific and factual, establishes his and Rockland Thoracic's prima facie entitlement to summary

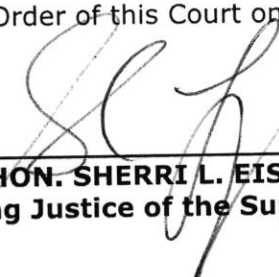
judgment and dismissal of the case against them. As Plaintiff has not submitted opposition to the instant motion, no triable issue of fact warranting a trial of this action has been demonstrated.

Accordingly, it is hereby

**ORDERED** that Dr. Michael Schwartz and Rockland Toracic and Vascular Associates P.C.'s Notice of Motion (#2) for summary judgment and dismissal of the Complaint as against them is hereby GRANTED.

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York  
June 6, 2019

  
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**HON. SHERRI L. EISENPRESS**  
**Acting Justice of the Supreme Court**

To: All parties via e-filing