Muy v Onwu
2019 NY Slip Op 34864(U)
August 23, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 15-609774
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 15-609774
CAL. No. 18-02369MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

Amended Decision and Order to reflect correction in captions.

MOTION DATE 5-7-19 (001)
MOTION DATE 5-14-19 (002)
MOTION DATE 6-18-19 (003)
ADJ. DATE 5-28-19 (002)
ADJ. DATE 6-18-19 (001, 003)
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - MG

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SILVIA MUY and OCTAVIO MAURICIO TORAL,

Plaintiffs,

- against -

CHUKS J. ONWU, CHUKS J. ONWU SURGICAL SERVICES, PLLC, RAVINDRA KOTA, BRIAN KWITKIN, BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER, INC,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment, to preclude : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant, Ravindra Kota, on April 10, 2019; filed by defendant Brian Kwitkin, on April 16, 2019; filed by plaintiff, on June 11, 2019 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Ravindra Kota, the motion (#002) by defendant Brian Kwitkin, and the motion by plaintiff (#003) are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Ravindra Kota for summary judgment dismissing all claims against him is granted; and it is further

ORDERED that the motion by defendant Brian Kwitkin for summary judgment dismissing all claims against him is granted; and it is further

ORDERED that the motion by plaintiffs for an order precluding the application of CPLR Article 16 is granted to the extent herein.

Plaintiff Silvia Muy commenced this medical malpractice action against defendants to recover damages for injuries she allegedly sustained as a result of defendants' negligent medical care and treatment and lack of informed consent. Plaintiff Octavio Mauricio Toral, her husband, brought a derivative claim for loss of services and companionship. It is alleged that between September 23, 2014 and October 4, 2014, Muy was treated by defendants Chuks J. Onwu, M.D., Brian Kwitkin, M.D., and Ravindra Kota, M.D., for acute cholecystitis. On September 24, 2014, Muy underwent a cholecystectomy. The complaint, as amplified by the bill of particulars and as relevant to the instant motions, alleges that Drs. Kwitkin and Kota were negligent in, *inter alia*, electing to convert her surgery from a laparoscopic procedure to an open procedure, in the post-operative care rendered, and in failing to obtain her informed consent.

Issue has been joined, discovery completed, and the note of issue filed. Dr. Kota now moves for summary judgment, arguing that as the first assistant surgeon during the procedure, he did not depart or deviate from good and accepted practice in his treatment of plaintiff, or, if there was a deviation or departure, that it was not the proximate cause of plaintiff's injuries. In support, Dr. Kota submits, *inter alia*, deposition testimony of the defendant physicians, an affirmation of David Pertsemlidis, M.D., a general surgeon, and plaintiff's medical records. No papers were submitted in opposition to the motion.

Dr. Kwitkin also moves for summary judgment, arguing that as the second assistant surgeon during the procedure, he did not depart or deviate from good and accepted practice in his treatment of plaintiff, or, if there was such a deviation or departure, that it was not the proximate cause of plaintiff's injuries. In support, Dr. Kwitkin submits, *inter alia*, deposition testimony of the plaintiff and defendant physicians, an affirmation of Michael G. Persico, M.D., a general surgeon, and plaintiff's medical records. No papers were submitted in opposition to the motion.

Plaintiffs move for an order precluding any defendant from obtaining the limited liability benefits of CPLR Article 16 in relation to the acts or omissions of a defendant granted summary judgment dismissing plaintiffs' complaint against him, her, or it. Plaintiffs argue that by failing to oppose each other's motions for summary judgment, the defendants should be precluded from asserting an Article 16 defense at trial. No papers were submitted in opposition to the motion.

The facts of this case, as they relate to the instant motions, subject to some dispute, can be summarized as follows: Plaintiff presented to the emergency department of Brookhaven Memorial Hospital Medical Center on September, 23, 2014, complaining of worsening stomach pains and a history of gallstones. Defendant Chuks Onwu, M.D., was the general surgeon on call for the hospital that day and was called to consult. Plaintiff was admitted to the hospital and underwent an ultrasound and an MRI cholangiogram, resulting in a diagnosis of probable impacted gallstone in the neck of the gallbladder with gallbladder wall thickening and Mirizzi syndrome. Dr. Onwu met with the plaintiff and her family, recommended a laparoscopic cholecystectomy, and explained the risks of the procedure. Dr. Onwu then scheduled the surgery for the following day.

On September 24, plaintiff underwent a laparoscopic cholecystectomy. Dr. Onwu was the primary surgeon and Dr. Kota was the first assistant, and entered the operating room after plaintiff was placed under anesthesia. It is undisputed that Dr. Onwu performed the procedure and dissection, and that Dr. Kota assisted with retraction and exposure, and that he did not exercise any independent judgment during the procedure. After encountering difficulty in fully visualizing plaintiff's internal anatomy, Dr. Onwu decided to convert to an open laparotomy procedure. After this decision was made, Dr. Onwu requested a second assistant surgeon to help with exposure and to help "move safely with surgery." Dr. Kota sent a text message to Dr. Kwitkin, requesting that he come to the operating room to assist with retraction and exposure. After approximately five hours, Dr. Onwu made the decision to end the surgery. Both Dr. Kota and Dr. Kwitkin left the operating room before plaintiff was transferred to post-anesthesia care. It is undisputed that neither Dr. Kota nor Dr. Kwitkin consulted with Dr. Onwu with respect to plaintiff's care after the conclusion of the surgery, and that neither doctor spoke with plaintiff or her family.

Plaintiff was discharged from Brookhaven Memorial Hospital Medical Center by Dr. Onwu on October 4, 2014. Plaintiff presented to Stony Brook University Medical Center on October 15, 2014, due to alleged post-operative complications, including transection of the common bile duct, right hepatic artery injury and drainage of bilious fluid. At Stony Brook University Medical Center, plaintiff underwent surgical reconstruction of the hepatobiliary tree.

In an affirmation, Dr. David S. Pertsemlidis swears that he is licensed to practice medicine in the State of New Jersey, that he is board certified by the American Board of Surgery, and that he is currently practicing as an attending surgeon. He opines that all of the treatment provided by Dr. Kota adhered to accepted standards of medical practice, and that such treatment was not a proximate cause of plaintiff's injuries. Additionally, Dr. Pertsemlidis notes that Dr. Kota was called in to the operating room to assist Dr. Onwu after the laparoscopic procedure had already begun, and that any decision regarding surgical procedure had already been made by the primary surgeon. Dr. Pertsemlidis avers that Dr. Kota's role was limited to providing retraction and assistance to Dr. Onwu during the surgical procedure itself, and that Dr. Kota was not involved in plaintiff's care before she entered, or after she left, the operating room.

In an affirmation, Dr. Michael G. Persico swears that he is licensed to practice medicine in the State of New York, that he is board certified in the field of general surgery, and that he is a Fellow of the American College of Surgeons. He opines that the treatment provided by Dr. Kwitkin, as second assistant surgeon, conformed to the standard of accepted medical and general surgical care, and that such treatment was not a proximate cause of plaintiff's injuries. Dr. Persico avers that surgical technique and approach are decisions made by a primary surgeon, who assumes responsibility for the operative procedure. Dr. Persico notes that Dr. Kwitkin did not enter the operating room until the surgery had been converted from laparoscopic to open, and that Dr. Kwitkin was not involved in plaintiff's care pre- or post-operatively.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]; ***Ahmed v Pannone***, 116 AD3d 802, 984 NYS2d 104 [2d Dept 2014], *lv dismissed* 25 NY3d 964, 8 NYS3d 261 [2015]; ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; ***DiMitri v Monsouri***, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). A plaintiff, therefore, must present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (*see*

Wild v Catholic Health Sys., 21 NY3d 951, 969 NYS2d 846 [2013]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Mackauer v Parikh***, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; ***Feuer v Ng***,136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). Furthermore, to satisfy the burden, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Mackauer v Parikh***, *supra*; ***Wall v Flushing Hosp. Med. Ctr***., 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting ***Deutsch v Claglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see* ***Brady v Westchester County Healthcare Corp.***, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (***Stukas v Streiter***, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Stucchio v Bikvan***, *supra*; ***Contreras v Adeyemi***, 102 AD3d 720, 958 NYS2d 430 [2d Dept 2013]).

Hospital staff, such as assistant surgeons, may be liable for carrying out a doctor's order "where the hospital staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders" (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265 n 3, 292 NYS2d 440 [1968], citing ***Fiorentino v Wenger*** 19 NY2d 407, 414-415, 280 NYS2d 373 [1967]; *see* ***Vaccaro v St. Vincent's Med. Ctr.***, 71 AD3d 1000, 898 NYS2d 163 [2d Dept 2010]). This general standard has been applied not only to nurses and hospital personnel, but also to medical residents and other doctors who are engaged in assisting a treating physician, and who do not themselves exercise any professional judgment with respect to the patient (***Abrams v Bute***, 138 AD3d 179, 191, 27 NYS3d 58 [2d Dept 2016]; *see* ***Soto v Andaz***, 8 AD3d 470, 471, 779 NYS2d 104 [2d Dept 2004]; ***Cook v Reisner***, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]). "When supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene" (***Bellafiore v Ricotta***, 83 AD3d 632, 633, 920 NYS2d 373 [2d Dept 2011]; *see* ***Abrams v Bute***, *supra* at 191; ***Zhuzhingo v Milligan***, 121 AD3d 1103, 1106, 995 NYS2d 588 [2d Dept 2014]; ***Soto v Andaz***, *supra*).

Upon review of the affirmations of Dr. Pertsemlidis and Dr. Persico, and the additional exhibits submitted in support of the motion, the Court finds Dr. Kota and Dr. Kwitkin have established, prima facie, that each performed the role of assistant surgeon and did not deviate or depart from acceptable standards of medical care during the surgical treatment of plaintiff (*see* ***Senatore v Epstein***, 128 AD3d 794, 9 NYS3d 362 [2d Dept 2015]; ***Stukas v Streiter***, *supra*; ***Adjetey v New York City Health & Hosps. Corp.***, 63 AD3d 865, 881 NYS2d 472 [2d Dept 2009]; ***Costello v Kirmani***, 54 AD3d 656, 863 NYS2d 262 [2d Dept 2008]; ***Dandrea v Hertz***, 23 AD3d 332, 804 NYS2d 106 [2d Dept 2005]). The experts both aver that Dr. Kota's

and Dr. Kwitkin's roles, as assistant surgeons, were to provide assistance, in the form of retraction and exposure, to the primary surgeon, Dr. Onwu. Dr. Pertsemlidis states that, based upon his review of the evidence, Dr. Kota did not participate in any dissection during the surgery, nor did he have any decision-making authority. Dr. Pertsemlidis states that Dr. Kota did not have any communication or contact with the plaintiff pre- or post-operatively and that the standard of care is for the primary surgeon to provide all post-operative follow-up care, and not Dr. Kota. Dr. Persico states that as an assistant surgeon, Dr. Kwitkin would have relied on Dr. Onwu's instructions and that he was called specifically to provide retraction after plaintiff's procedure was converted to an open surgery. Further, both experts opine, within a reasonable degree of medical certainty, that there is no evidence to suggest that either assistant should have intervened with the decisions made by Dr. Onwu, as Dr. Onwu's decisions did not deviate from normal practice (*see* ***Quille v New York City Health & Hosp. Corp.***, 152 AD3d 808, 59 NYS3d 131 [2d Dept 2017]; ***Nasima v Dolen***, 149 AD3d 759, 51 NYS3d 189 [2d Dept 2017]; ***Abrams v Bute***, *supra*; ***Soto v Andaz***, *supra*).

With respect to the cause of action alleging informed consent, the motion for summary judgment is granted. The requisite elements of such cause of action are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same 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" (***Spano v Bertocci***, 299 AD2d 335, 337-338, 749 NYS 2d 275 [2d Dept 2002]). For the claim to be actionable, the defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of the plaintiff's physical integrity (***Ellis v Eng***, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). In order to impose liability on a defendant physician, the physician must have prescribed or performed the procedure that gives rise to the claim (***Spinosa v Weinstein***, 168 AD2d 32, 571 NYS2d 747 [2d Dept 1991]).

Here, the evidence establishes, prima facie, that Dr. Onwu was plaintiff's treating physician, and that he recommended and performed the surgery. Dr. Kota's and Dr. Kwitkin's roles were that of assistant surgeons, limited to the operating room. "It is clearly not necessary that every physician or health care provider who becomes involved with a patient obtain informed consent to every medical procedure to which the patient submits."(***Spinosa v Weinstein***, *supra* at 39). Additionally, Dr. Pertsemlidis opines that Dr. Kota, as the assistant surgeon who was called in by the primary surgeon after surgery had already begun, had no responsibility or duty to provide informed consent to a patient who was already under anesthesia. Further, Dr. Persico opines that it was the responsibility of Dr. Onwu, as the primary surgeon, to obtain the patient's informed consent and not the responsibility or duty of Dr. Kwitkin (*see id.*).

Dr. Kota and Dr. Kwitkin, therefore, established a prima facie cases of entitlement to summary judgment. The burden now shifts to plaintiff to raise triable issues of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff submits no opposition to either motion and, as such, summary judgment is granted and the complaint is dismissed as against Dr. Kota and Dr. Kwitkin (*see* ***Stucchio v Bikvan***, *supra*; ***Mackauer v Parikh***, *supra*).

The caption shall be amended by deleting Dr. Kota and Dr. Kwitkin, and the instant action is severed and shall continue as against the remaining defendants. The caption of this action is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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SILVIA MUY and OCTAVIO MAURICIO TORAL,

Plaintiffs,

- against -

CHUKS J. ONWU, CHUKS J. ONWU SURGICAL SERVICES, PLLC, BROOKHAVEN MEMORIAL HOSPITAL MEDICAL CENTER, INC.,

Defendants.

---X

Dr. Kota and Dr. Kwitkin shall promptly serve a copy of this order with notice to its entering upon the parties and upon the clerk of the court, who shall mark the court's records to reflect the amended caption. Dr. Kota and Dr. Kwitkin also shall promptly serve upon the county clerk the notice required under CPLR 8019 (c) to amend the caption of this action as specified in this order.

Finally, with respect to plaintiff's motion to preclude the application of CPLR Article 16, CPLR 1601 "modifies the common-law rule of joint and several liability by making a joint tortfeasor whose share of fault is 50% or less liable for plaintiff's non-economic loss only to the extent of that tortfeasor's share of the total non-economic loss (***Chianese v Meier***, 98 NY2d 270, 275, 746 NYS2d 657 [2002]; *see* ***Rangolan v County of Nassau***, 96 NY2d 42, 725 NYS2d 611 [2001]; ***Hendrickson v Philbor Motors, Inc.***, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; ***Marsala v Weinraub***, 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]). Thus, "low-fault tortfeasors are liable only for their actual assessed share of responsibility, rather than the full amount of plaintiff's non-economic loss" (***Chianese v Meier***, *supra* at 275). CPLR 1600 provides that "'non-economic loss' includes[,] but is not limited to[,] pain and suffering, mental anguish, loss of consortium[,] or other damages for non-economic loss." Since a motion for summary judgment is the equivalent of a trial, the limited liability benefits for defendants under Article 16 are forfeited as to any codefendant who was awarded summary judgment in his or her favor (*see* ***Johnson v Peloro***, 62 AD3d 955, 880 NYS2d 129 [2d Dept 2009]; ***Drooker v South Nassau Community Hosp.***, 175 Misc2d 181, 669 NYS2d 169 [Sup Ct, Nassau County 1998]).

Here, none of the codefendants submitted any opposition to the motions by Dr. Kota or Dr. Kwitwin. Therefore, plaintiffs' request is granted to the extent that the remaining defendants have forfeited the opportunity to have their liability limited with respect to the acts or omissions of the defendants whose motions for summary judgment dismissing the complaints against them were granted. However, the remaining defendants are not foreclosed from asserting any CPLR Article 16 defense as against any potential defendants or non-parties to the action at trial.

Dated: 8/23/19

Martha L. Luft A.J.S.C.
HON. MARTHA L. LUFT

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**