Fairall v Kubiak
2020 NY Slip Op 30532(U)
February 19, 2020
Supreme Court, Suffolk County
Docket Number: 08-23202
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

ORIGINAL

INDEX No. 08-23202
CAL. No. 18-01772MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 3-7-19 (#023)
MOTION DATE 2-28-19 (#024)
ADJ. DATE 1-9-20
Mot. Seq. #023 - MG
#024 - WDN

DEBORAH FAIRALL, as Administratrix De Bonis non of the Estate of CAROL GIMPLIN, Deceased, ROBERT L. PRYOR, as Trustee of the Estate of MARVIN I. GIMPLIN, Individually,

Plaintiffs,

- against -

RICHARD KUBIAK, M.D., SCOTT PRESS, M.D., DHIREN MEHTA, M.D., MICHAEL IMPERATO, M.D., DAVID GROSS, M.D., MARTIN VAN DYNE, M.D., ELIZABETH DUBOVSKY, M.D., DAVID COHEN, M.D., PECONIC BAY MEDICAL CENTER, IMAGING ON CALL, LLC, IMAGING ON CALL, P.C., UROLOGICAL ASSOCIATES OF L.I., P.C., UROLOGICAL ASSOCIATES OF PECONIC BAY PRIMARY MEDICAL CARE, P.C., MEHTA & MEHTA PHYSICIANS, P.C., AND NORTH FORK RADIOLOGY, P.C.,

Defendants.

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PECONIC BAY MEDICAL CENTER,

Third-Party Plaintiff,

- against -

STONY BROOK EMERGENCY PHYSICIANS UFPC d/b/a STONY BROOK EMERGENCY PHYSICIANS, P.C.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 30; 35 - 85; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 31 - 32; Replying Affidavits and supporting papers 33 - 34; Other ___; it is,

ORDERED that the motion by Martin Van Dyne, M.D., and the motion by Dhiren Mehta, M.D., and Mehta Physicians, P.C., are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Martin Van Dyne, M.D. for summary judgment shall be marked withdrawn, pursuant to his correspondence to the Court dated January 23, 2020 requesting same; and it is further

ORDERED that the motion by defendants Dhiren Mehta, M.D., and Mehta & Mehta Physicians, P.C., for summary judgment dismissing the complaint against them is granted.

This is a medical malpractice action to recover damages for injuries allegedly sustained by plaintiff's decedent and mother, Carol Gimplin, then 62 years of age, by defendants Richard Kubiak,

M.D., Scott Press, M.D. Dhiren Mehta, M.D., Michael Imperato, M.D., David Gross, M.D., Martin Van Dyne, M.D., Elizabeth Dubovsky, M.D., David Cohen, M.D., Peconic Bay Medical Center, Imaging on Call, LLC, Imaging on Call, P.C., Urological Associates of L.I., P.C., Urological Associates of Peconic Bay Primary Medical Care, P.C., Mehta & Mehta Physicians, P.C., and North Fork Radiology, P.C. The medical malpractice claims arise from Dr. Mehta and Mehta & Mehta Physicians, P.C.'s ("the Mehta defendants") treatment of Ms. Gimplin from January 1, 2005 to July 20, 2006. Deborah Fairall, suing on behalf of Ms. Gimplin, alleges that Dr. Mehta was negligent in, among other things, failing to timely diagnose and treat a tortuous descending thoracic aorta. She also alleges a cause of action for lack of informed consent and negligent hiring. Robert Pryor, suing on behalf of Marvin Gimplin, Ms. Gimplin's husband, also sues derivatively for loss of services.

The Mehta defendants now move for summary judgment dismissing the complaint against them, arguing that they did not depart from good and accepted practices in the treatment they rendered to Ms. Gimplin. They submit, among other things, copies of the pleadings, the bills of particulars, various medical records, the affirmation of Sanford Goldberg, M.D., and the transcripts of the deposition testimony of Dr. Mehta, Dr. Gross, Dr. Kubiak, Dr. Imperato, and Dr. Cohen. Plaintiff does not substantively oppose the motion.

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 (***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 movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (***Dupree v Giugliano***, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice and that such departure proximately caused his or her injuries (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Macancela v Wyckoff Heights Med. Ctr.***, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a *prima facie* entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that such departure did not proximately cause the plaintiff's injuries (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Wodzenski v Eastern Long Is. Hosp.***, 170 AD3d 925, 96 NYS3d 80 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). The defendant must address and rebut specific

allegations of malpractice set forth in the plaintiff's bill of particulars (***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]). However, "bare conclusory assertions by defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (***DiLorenzo v Zaso***, 148 AD3d 1111, 1112, 50 NYS3d 503 [2d Dept 2017], quoting ***Winegrad v New York Univ. Med. Ctr.***, *supra* at 853; *see* ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]).

After making this *prima facie* showing, the burden shifts to the plaintiff to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). The plaintiff need only raise a triable issue as to the elements on which the defendant met the *prima facie* burden (***Bueno v Allam***, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; ***Hernandez v Hwaishienyi***, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (***Alvarez v Prospect Hosp.***, *supra* at 325; *see* ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, *supra*; ***Hernandez v Hwaishienyi***, *supra*). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

The Mehta defendants established a *prima facie* case of entitlement to summary judgment dismissing the medical malpractice claims against them by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment rendered to Ms. Gimplin (*see* ***Jagenburg v Chen-Stiebel***, *supra*; ***Galluccio v Grossman***, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; ***Bongiovanni v Cavagnuolo***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, *supra*; ***Faccio v Golub***, *supra*). By his affirmation, Dr. Goldberg stated that he reviewed the pleadings, the bills of particulars, Ms. Gimplin's medical records, and deposition testimony of Dr. Mehta, Dr. Gross, Dr. Kubiak, Dr. Imperato, and Dr. Cohen. He opined within a reasonable degree of medical certainty that the Mehta defendants did not depart from any good and accepted medical practice and that such medical care was not a proximate cause of Ms. Gimplin's alleged injuries.

Dr. Goldberg opined that Dr. Mehta did not fail to timely diagnose and treat Ms. Gimplin's tortuous descending thoracic aorta on July 19, 2006. He stated that it was reasonable for Dr. Mehta to suspect Ms. Gimplin was suffering from acute diverticulitis on that day given her complaints, physical examination findings, and his discussions with the radiologist concerning the computed tomography ("CT") scan performed the previous day. Dr. Goldberg further opined that Dr. Mehta properly and timely performed a physical examination during an emergency office visit and then sent Ms. Gimplin to the emergency room for treatment and further work-up.

The Mehta defendants also established their *prima facie* entitlement to summary judgment dismissing plaintiff's claims against Mehta & Mehta Physicians, P.C. Since Mehta & Mehta Physicians, P.C., is a professional corporation, it is vicariously liable under respondeat superior for wrongful acts committed by its employees (*see* ***Poplawski v Gross***, *supra*; ***Keitel v Kurtz***, *supra*; ***Monir v Khandakar***, *supra*). However, the Mehta defendants demonstrated that Dr. Mehta, its employee, was not negligent in Ms. Gimplin's medical treatment.

To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and the alternatives, and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see* Public Health Law § 2805-d [1]; ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Dyckes v Stabile***, 153 AD3d 783, 785, 61 NYS3d 110 [2d Dept 2017]; ***Schussheim v Barazani***, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (***Thompson v Orner***, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]; ***Trabal v Queens Surgi-Center***, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]; ***Mondo v Ellstein***, 302 AD2d 437, 754 NYS2d 579 [2d Dept 2003]).

The Mehta defendants established a *prima facie* case to dismiss the cause of action of informed consent (*see* ***Thomas v Farrago***, 154 AD3d 896, 62 NYS3d 478 [2d Dept 2017]). Plaintiff did not allege that Dr. Mehta performed non-emergency treatment or a diagnostic procedure that invaded Ms. Gimplin's bodily integrity when he allegedly failed to treat decedent (*see* Public Health Law § 2805-d [2]; ***Thomas v Farrago***, *supra*; ***Deutsch v Chaglassian***, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *cf.* ***Khosrova v Westermann***, 109 AD3d 965, 971 NYS2d 565 [2d Dept 2013]).

The Mehta defendants having met their initial burden on the motion, the burden shifted to the non-moving parties to submit admissible evidence raising a triable issue of fact (*see* ***Jagenburg v Chen-Stiebel***, *supra*; ***Williams v Bayley Seton Hosp.***, *supra*; ***Makinen v Torelli***, *supra*; ***Stukas v Streiter***, *supra*). Plaintiff does not substantively oppose the Mehta defendants' request for dismissal of the complaint against them and no other papers in opposition were submitted.

Accordingly, the motion by Dhiren Mehta, M.D., and Mehta & Mehta Physicians, P.C., dismissing the complaint against them, is granted.

Dated: February 19, 2020

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION