

Shade v Khulpateea
2020 NY Slip Op 30760(U)
March 4, 2020
Supreme Court, Kings County
Docket Number: 507507/2016
Judge: Ellen M. Spodek
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
PRESENT:HON ELLEN SPODEK

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CHERYL SHADE,

Plaintiff,

Index No.: 507507/2016

-against-

Mot. Seq. No. 01

NEEKIANUND KHULPATEEA, M.D., NEEKIANUND
KHULPATEEA, M.D., P.C., "KHULPATEEA
PRACTICE GROUP," the name "Khulpateea Practice
Group" being fictitious pending its identification,
and MAIMONIDES MEDICAL CENTER,

DECISION AND ORDER

Defendants.

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Papers submitted on the motion:

Defendants' Notice of Motion _____ X
Plaintiff's Affirmation in Opposition _____ X
Defendants' Reply Affirmation _____ X

In this medical malpractice action, the Plaintiff Cheryl Shade (Shade) underwent a surgical procedure performed by Defendant Neekianund Khulpateea, M.D. (Khulpateea), at Maimonides Medical Center on December 11, 2015. Shade claims that Khulpateea failed to inspect her small bowel properly before closing the abdomen, thereby neglecting to detect a perforation of the small bowel. At oral argument on October 29, 2019, Plaintiff confirmed that no claim is being pursued for loss of informed consent, and therefore, that claim is withdrawn from the pleadings. Plaintiff also confirms at oral argument that there are no independent claims against Maimonides Medical Center (Maimonides), and that the liability against Maimonides is limited to vicarious liability through Khulpateea's acts and/or omissions during the hospitalization that included the surgery of December 11, 2015; and that the

claims against Khulpateea are limited to the same admission. Therefore, the case is narrowed in scope accordingly.

Defendants Neekianund Khulpateea, M.D., Neekianund Khulpateea, M.D., P.C., and Maimonides Medical Center moved for summary judgment, arguing that the procedure at issue, on December 11, 2015, was properly performed, that Khulpateea properly inspected the small bowel and found no perforation, and that in fact the bowel was not perforated until well after the admission at issue. Plaintiff opposes the motion, arguing that the small bowel was perforated during the procedure at issue, that Khulpateea negligently failed to detect the perforation, and that as a result, Shade was caused to develop a major infection, which required an extensive surgical procedure to correct and a lengthy hospitalization, and resulted in extensive lasting physical damage.

Summary judgment is a drastic remedy, which "should only be employed when there is no doubt as to the absence of triable issues." [Kolivas v. Kirchoff, 14 A.D.3d 493, 787 N.Y.S.2d 392 (2nd Dep't., 2005), citing Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974).] The motion must be denied if an issue of fact arguably exists. [Kaye v. Keret, 89 A.D.2d 885 (2nd Dep't., 1982), citing Falk v. Goodman, 7 N.Y.2d 87 (1959).] The Court's task is to determine whether issues exist, not to resolve existing factual issues. [Paulin v. Needham, 28 A.D.3d 531 (2nd Dep't., 2006).]

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . ." [Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852 (1985) (citations omitted).] However, once the movant has done that, the burden shifts to the opposing party to establish a deviation from accepted medical practice, and causation to an injury. [Raymundo v. Westchester County Medical Center, 292 A.D.2d 437 (2nd Dep't., 2002).]

In this case, Defendants submit a copy of the pleadings, the medical records, the EBT transcripts of the parties and other witnesses, and an Affirmation from an expert witness, Andrew Menzin, M.D. According to his Affirmation, Dr. Menzin is a board-certified obstetrician-gynecologist. Dr. Menzin opines that Khulpateea properly and carefully inspected the small bowel before completing the procedure, and found no perforations; and that "if there was a perforation, it would have been found during his careful inspection . . ." He opines that a CT scan taken on December 15, 2015, was read as being negative for any collections of free air, and that this definitively ruled out there being a perforation at that time, or earlier when the surgery was performed. He opines that the small bowel perforated after December 15, 2015, as a result of an inflammatory response following the surgery of December 11, 2015. Dr. Menzin also opines that "none of the injuries alleged . . . were a result of any alleged departure from the standard of care." The Court finds that Defendants made out their *prima facie* showing of entitlement to summary judgment, requiring the Plaintiff to establish a meritorious case in opposition.

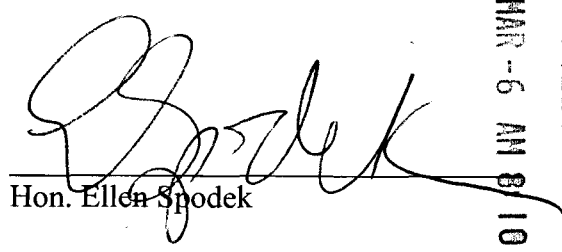
Relying on the same documents as Dr. Menzin had relied on, Plaintiff's expert Martin Gubernick, M.D. - also a board-certified obstetrician-gynecologist - executed an Affirmation, which Plaintiff submitted along with her papers opposing the Defendants' motion. Dr. Gubernick opines that the small bowel was perforated during the procedure of December 11, 2015, and that this is known to a reasonable degree of medical certainty because there is no other explanation for the severe pelvic pain with which Shade presented to the hospital on December 14, 2015, or for the small bowel being perforated later. He denies Dr. Menzin's proposed mechanism of causation, namely that inflammation caused the perforation; Dr. Gubernick opines that perforations cause inflammation, not the other way around. Dr. Gubernick agrees with Dr. Menzin that a careful inspection of the small bowel would reveal a perforation but concludes that the bowel inspection could not have been done carefully, because the

perforation was missed. Dr. Gubernick opines that the CT scan of December 15, 2015, does not rule out the presence of an extant small bowel perforation, because "There is a high false negative rate with CT scans for this condition." Dr. Gubernick opines to a reasonable degree of medical certainty that Khulpateea deviated from the applicable standard of care in neglecting to detect the small bowel perforation, which was present on December 11, 2015, and repair the same before closing the patient's abdomen; and that these deviations caused Shade to undergo additional surgeries, require a lengthy hospitalization, and suffer damage to her internal organs and structures, among other things. In so stating, Dr. Gubernick raises questions of fact such that summary judgment cannot be granted.

The medical opinions of the opposing experts are in stark conflict, on virtually every key point. The submissions before this Court present a classic battle of the experts, as there are questions of fact, which preclude the Court from granting summary judgment. Therefore, the motion is denied, with the exceptions noted at the beginning of this Order pertaining to the cause of action for informed consent, the limitation of the claims to the admission that included the December 11, 2015, surgery, and the limitation of the claims against Maimonides to those of vicarious liability.

Therefore, it is the Decision and Order of this Court that (1) all claims against the Defendant Maimonides Medical Center are vicarious only, through acts and/or omissions of Dr. KHULPATEEA during the admission which included the surgery of December 11, 2015, (2) the cause of action for lack of informed consent is withdrawn and eliminated from the case, and (3) Dr. KHULPATEEA's motion for summary judgment is denied, Plaintiff's claims being limited to the time period of hospitalization of December 11-12, 2015, inclusive.

DATED: ~~Manhasset~~ ^{Brooklyn}, New York
~~January 6~~, 2020
 March 4, 2020


 Hon. Ellen Spodek

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 KINGS COUNTY CLERK
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