Akel v Girardi
2020 NY Slip Op 32551(U)
August 3, 2020
Supreme Court, New York County
Docket Number: 805364/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 6

Justice

ALEXANDER AKEL,

Plaintiff,

- against-

LEONARD GIRARDI, M.D., NEW YORK AND PRESBYTERIAN HOSPITAL, and WEILL CORNELL MEDICAL CENTER,

Defendants.

INDEX NO. 805364/2015
MOTION DATE
MOTION SEQ. NO. 3
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Defendants Leonard Girardi, M.D. s/h/a Leonard Gerardi, M.D. ("Dr. Girardi"), and The New York and Presbyterian Hospital s/h/a New York and Presbyterian Hospital and Weill Cornell Medical Center ("NYPH") (collectively, "Defendants") move pursuant to CPLR § 3212 for summary judgment and for the dismissal of Plaintiff's Complaint against them. Plaintiff Alexander Akel ("Plaintiff" or "Akel") opposes Defendants' motion for summary judgment.

Factual Background

On April 22, 2014, Plaintiff, then 46-years-old, presented to cardiologist, Dr. Robert Mueller ("Dr. Mueller"), with chest pain, severe abdominal pain, shortness of breath, dyspnea on exertion and palpitations. Plaintiff underwent an echocardiogram, which revealed moderate to severe mitral valve regurgitation and mitral valve prolapse. Plaintiff testified that Dr. Mueller informed him that mitral valve regurgitation could explain the symptoms he was experiencing and that he would need open heart surgery to repair the valve. Dr. Mueller referred Plaintiff to

Dr. Girardi for a cardiothoracic surgery consultation. (Akel Tr., Def. Ex. E, at pp. 73-75; 80).

Plaintiff went home after his appointment with Dr. Mueller and began to experience increased shortness of breath, chest pain, and abdominal pain. Plaintiff called Dr. Mueller who told him to go directly to the Emergency Department ("ED") of NYPH. (Akel Tr., Def. Ex. E, at pp. 91-2).

Plaintiff presented to the ED of NYPH a few hours later and was admitted to Dr. Girardi's service. Upon admission to NYPH, NYPH documented Plaintiff's history of worsening chest pain and his other symptoms such as dizziness, palpitations, and confusion. (NYPH medical records, Ex. I, at p. 18-21).

On April 23, 2014, Plaintiff had a right and left heart catheterization performed by Luke K. Kim, M.D. with Ryan Kaple, M.D. The results of the catheterization indicated mild coronary artery disease, left ventricular function (ejection fraction 55%); mild to moderate mitral regurgitation (2+) and normal right-sided pressure. (NYPH records, Ex. I, at p. 152).

Plaintiff had another echocardiogram on April 23, 2014. The results indicated: normal left ventricular size and function; normal right ventricular size and function; left atrial dilatation; mitral valve prolapse; dilated aortic root; moderate mitral regurgitation; mild tricuspid regurgitation; and normal left ventricular diastolic relaxation. (NYPH records, Ex. I, at p. 154-155).

Plaintiff testified that he met Dr. Girardi the morning after he arrived at NYPH. (Akel Tr., Def. Ex. E, at p. 106). Plaintiff was told that the mitral insufficiency had been confirmed by the echocardiogram and that he had a dilation of the ascending aorta. (Akel Tr., Def. Ex. E, at pp. 106-107). Dr. Girardi explained that Plaintiff had mitral valve regurgitation that required repair. Plaintiff testified that Dr. Girardi explained that "there seemed to be a good amount of tissue still there, despite leaflets being stretched; that it would require a surgery and the repair he told [Plaintiff] he would perform was an annuloplasty of a half ring at minimum and a full ring, if necessary, with a resection." (Akel Tr., Def. Ex. E, at p. 108).

Plaintiff testified that Dr. Girardi explained "[t]hat a plastic ring would be placed in the valve to help the valve to seal properly, so when the left ventricle contracted, blood would leave the heart, the valve would close, and not come back in." (Akel Tr., Def. Ex. E, at p. 109). Plaintiff testified that Dr. Girardi told him the

aneurism "wasn't in a critical state, that while he was there, it would be in [his] best interest to have him repair that and that he would most likely do a valve-sparing, where the aortic valve would be spared, would come back and would be sewn back in, and that they would do a Dacron graft to repair much the length of the ascending aorta." (Akel Tr., Def. Ex. E, at pp. 109-110). Plaintiff testified that Dr. Girardi told him that after the surgery, the mitral valve prolapse "should go back to its normal function following the surgery and medication." (Akel Tr., Def. Ex. E, at p. 110).

On April 24, 2014, Plaintiff had a transesophageal Echocardiogram ("TEE") that noted the following findings: "Mitral valve prolapse. Moderate to moderately severe mitral regurgitation (see above). Left atrial dilatation. Eccentric left ventricular hypertrophy. Normal global left ventricular function. Normal right ventricular size and function. Patent foramen ovate. Dilated aortic root." (NYPH medical records, Ex. I, at p. 161).

On April 25, 2014, Plaintiff was discharged with the plan to return on May 13, 2014 for mitral valve replacement and "possible aneurysm repair." The procedure was to be performed Dr. Girardi. (NYPH medical records, Ex. I, at p. 53, 266).

On May 13, 2014, Plaintiff was re-admitted to NYPH to undergo mitral valve replacement. (NYPH medical records, Ex. I, at p. 270).

Dr. Girardi's May 13, 2014 Operative Report documented that he performed "(1) Valve-sparing repair of ascending aortic aneurysm with reimplantation of the aortic valve using a 28 mm woven Dacron graft. 2. mitral valve repair with edge-to-edge technique. 3. atrial septal defect repair." (NYPH medical records, Ex. I, at p. 676-677). Dr. Girardi testified that he recalled the TEE post-op results obtained for Plaintiff and that the results showed a 1 to 2+ mitral regurgitation. (Girardi Tr., Def. Ex. F, at pp.43-45).

Dr. Usman Ahmad's Operative Note on May 13, 2014 documented that Dr. Girardi had performed an "Ascending Aneurysm Repair with valve-sparing, Mitral Valve Repair and ASD closure." Dr. Ahmad documented that cardiac bypass time was 122 minutes. (NYPH medical records, Ex. I, at p. 281-283).

Plaintiff testified that he asked Dr. Girardi "what did you end up doing, was that the half ring or the full ring with the annuloplasty" and Dr. Girardi responded,

"we fixed it." (Akel Tr., Def. Ex. E., p. 146). When Plaintiff asked Dr. Girardi "what is the level of regurgitation," Dr. Girardi responded, "it is less than one." (Akel Tr., Def. Ex. E., p. 146-147).

The NYPH records document that on May 16, 2014 and May 17, 2014, Plaintiff complained of shortness of breath, pain, and being tired. (NYPH records, Ex. I, at p. 316-319). On May 17, 2014, Plaintiff is noted to have 92% SPO2 during ambulation with stair training and decreased pulmonary function and endurance. (NYPH records, Ex. I, at p. 319).

Plaintiff testified that his shortness of breath, palpitations and pain continued and increased following his discharge from NYPH. Plaintiff had an echocardiogram in Dr. Mueller's office that revealed the regurgitation had increased to 3-4. (Akel Tr., Def. Ex. E, at p. 190-191). Dr. Mueller told him he likely needed further surgery. (NYPH records, Ex. I, at p. 195).

Dr. Adams performed a mitral valve re-repair on June 27, 2014.

Summary Judgment Standard

CPLR §3212 provides in relevant part, that a motion for summary judgment,

> shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party… [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

"[A] doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care." *Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]

A defendant moving for summary judgment in a medical malpractice case has the burden of making a prima facie showing of entitlement to judgment as a matter of law by showing that "there was no departure from good and accepted

medical practice or that any departure was not the proximate cause of the injuries alleged" by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 AD3d 204, 206 [1st Dept. 2010].

Once the defendant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]. Specifically, a plaintiff "must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact." *Alvarez*, 68 NY2d at 324.

A plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 AD3d at 207. "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." *Id.* at 325. An affidavit from an expert which sets "forth general conclusions, misstatements of evidence and unsupported assertions, is insufficient to demonstrate a defendant's failure to comport with accepted medical practice, or that any such failure was the proximate cause of plaintiff's injuries." *Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008].

Pursuant to Public Health Law § 2805-d[2], "[t]he right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body."

"To prevail on such claim, a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries." *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]. A defendant moving for summary judgment on a lack of informed consent claim must show *inter alia* that there is no factual dispute as to whether the plaintiff was informed "of any foreseeable risks, benefits or alternatives" of the treatment rendered. *Balzola*, 107 AD3d at 588.

A hospital or other medical facility is liable for the negligence or malpractice of its employees including its physicians. Generally, a hospital is not liable for the actions or omissions of independent, private attending physicians that the patient retained for him or herself. Moreover, a physician's affiliation with a hospital is insufficient to hold the hospital liable for the doctor's alleged malpractice. *Hill v. St. Clare's Hospital*, 67 NY2d 72, 79 [1986].

"[A] hospital is not liable for the negligence of attending physician … and cannot be held concurrently liable with such a physician unless its employees commit independent acts of negligence or the attending physician's orders are contraindicated by normal practice." *Cerny v. Williams*, 32 AD3d 881, 883 (2d Dept. 2006). *See Cunningham v. St. Barnabas Hosp.*, 36 AD3d 567 (1st Dept. 2007) (resident who "merely assisted and took orders from [the surgeon] during unsuccessful operation" is not liable for malpractice).

Summary Judgment Motion

Plaintiff's Bill of Particulars and Supplemental Bill of Particulars allege, *inter alia*, that Dr. Girardi deviated from accepted standards of medical practice, and committed medical malpractice in: failing to consider and attempt conservative treatment of Plaintiff's ascending aortic aneurysm; failing to order serial monitoring of Plaintiff's ascending aortic aneurysm prior to surgical intervention; negligently performing a valve-sparing repair of Plaintiff's ascending aortic aneurysm with re-implantation of the aortic valve and that was less than 5.0 cm at its greatest dimension and asymptomatic; negligently failing to perform an intraoperative revision of the mitral valve repair after intra-operative testing showed continued mitral regurgitation; failing to recommend Plaintiff undergo mitral valve re-exploration; failing to use required judgment and expertise in the treatment of Plaintiff; negligently utilizing an inadequate surgical technique to treat Plaintiff's mitral valve regurgitation; and failing and neglecting to properly respond to the histories taken or recorded.

Plaintiff's Bill of Particulars and Supplemental Bill of Particulars also allege that Dr. Girardi failed to obtain informed consent from Plaintiff.

Plaintiff's Bill of Particulars with respect to NYPH is based on the same allegations asserted against Dr. Girardi.

Expert Affirmations

Defendants submit the expert affirmation of Alfred T. Culliford M.D. ("Dr. Culliford"). Dr. Culliford is a physician licensed to practice medicine in the State of New York and is board certified in surgery and thoracic surgery. Dr. Culliford states that he has reviewed the pleadings, Plaintiff's Bills of Particulars, deposition testimony, and the medical records. Dr. Culliford's opinions are all given "within a reasonable degree of medical certainty."

Dr. Culliford opines "that Dr. Girardi and NYPH in no way departed from the standard of care" or "caused and/or contributed to the plaintiff's claimed injuries."

Dr. Culliford opines "that Dr. Girardi considered all of the plaintiff's treatment options and exercised proper medical judgment in deciding to surgically repair the plaintiff's ascending aortic aneurysm." Dr. Culliford states that the surgery was a priority in Plaintiff's case because of the risk of aortic rupture and death. Dr. Culliford explains that although Plaintiff's aortic aneurysm was only dilated to 4.6cm, Plaintiff was "symptomatic with complaints of worsening chest pain, shortness of breath and dyspnea on exertion and had many of the suggested characteristics of Marfan syndrome and connective tissue weakness, which placed him at a high risk for dissection or rupture of the aortic aneurysm."

Dr. Culliford opines "that Dr. Girardi properly performed a valve-sparing repair of the ascending aortic aneurysm." Dr. Culliford states that the postoperative TEE "showed no aortic insufficiency" and Plaintiff's echocardiograms on May 31, 2014 and June 3, 2014 showed "normal aortic and aortic annulus dimension with minimal aortic regurgitation." Dr. Culliford states that the June 27, 2014 Operative Report documented that Plaintiff had done well from an aortic standpoint.

Dr. Culliford opines that the mitral valve repair performed by Dr. Girardi on May 13, 2014 was performed properly. Dr. Culliford explains that both "an edge-to-edge leaflet repair, also known as an Alfieri stitch repair, [which] involves bringing together the anterior and posterior leaflets of the mitral valve centrally to decrease mitral regurgitation," and "[a] repair with an annuloplasty ring [which] involves the implantation of a prosthetic ring surrounding the mitral valve, which pulls the leaflets together to facilitate coaptation and valve function" are acceptable methods of repairing a mitral valve.

Dr. Culliford opines "that Dr. Girardi exercised proper medical judgment and appropriately chose to begin his operation on plaintiff's life-threatening aortic aneurysm, and then repair the plaintiff's mitral valve using an edge-to-edge technique through the aortic root." Dr. Culliford states that based on the Operative Report, Dr. Girardi "initially repaired the plaintiff's aortic aneurysm by performing a valve-sparing repair of ascending aorta," and then "timely turned his attention to the plaintiff's mitral valve, which was properly and completely visualized through the aortic root." Dr. Culliford states, "Dr. Girardi documented that the leaflets appeared myxomatous but not actually prolapsing" and "documented that he considered alternative repair techniques, but made a surgical judgment that the Alfieri stitch was the best option for the plaintiff." Dr. Culliford states that, "In performing the edge-to-edge repair through the aortic root, Dr. Girardi was able to visualize the leading edge of the anterior and posterior leaflets of the mitral valve and place sutures to bring the leaflet line together to reduce mitral regurgitation."

Dr. Culliford opines "that Dr. Girardi properly chose to perform the plaintiff's mitral valve repair via an edge-to-edge technique, given the significant amount of time the plaintiff would have been on cardiopulmonary bypass, and the heightened risk of severe complications, had an annuloplasty repair been performed." Dr. Culliford explains that "performing a mitral valve repair with an annuloplasty ring would have required Dr. Girardi to also perform an atriotomy over the mitral valve; this would have taken a great amount of time to complete and would have increased the plaintiff's crossclamp time and exposure to cardiopulmonary bypass." Dr. Culliford explains that "[p]rolonged crossclamp and cardiopulmonary bypass time are associated with mortality and the development of severe complications, including, but not limited to, prolonged heart ischemia and loss of heart muscle viability." Dr. Culliford opines "that had Dr. Girardi chose to perform the plaintiff's mitral valve repair using an annuloplasty ring, he would have exposed the plaintiff to serious and significant health risks due to the length of time it takes to complete such a repair."

Dr. Culliford explains that "Dr. Girardi's proper exercise of medical judgment in this case is clearly demonstrated by comparing the crossclamp and cardiopulmonary bypass times documented in Dr. Girardi's Operative Report and Dr. Adam's Operative Report." Dr. Culliford explains:

> Dr. Adams performed a mitral valve re-repair on June 27, 2014. However, in performing the mitral valve re-repair using an annuloplasty ring, Dr. Adams took more time than Dr. Girardi to complete the procedure. Per Dr.

> Girardi's Operative Report, the crossclamp time was 107 minutes and the cardiopulmonary bypass time was 122 minutes. Dr. Girardi not only addressed the plaintiff's aortic aneurysm, but also repaired his mitral valve and an atrial septal defect. In comparison, the cardiopulmonary bypass time for Dr. Adams' surgery was 234 minutes, nearly two hours longer than Dr. Girardi's surgery. It is my opinion, within a reasonable degree of medical certainty, that the crossclamp time of Dr. Adams' surgery constituted approximately 90% of the bypass time.

Dr. Culliford opines "that the plaintiff's postoperative echocardiograms demonstrate that Dr. Girardi properly performed the plaintiff's mitral valve repair using an edge-to-edge (Alfieri stitch) technique" based on a post-operative TTE which revealed 1-2+ mitral insufficiency, no evidence of a mitral valve flail and anterior leaflet prolapse, and 70% ejection fraction. Dr. Culliford opines "that there was no reason to perform an intraoperative mitral valve re-repair, and such a repair would have been injurious to continue the plaintiff on cardiopulmonary bypass." Dr. Culliford states that "Dr. Girardi exercised proper medical judgment in closing the plaintiff and ending the procedure."

Dr. Culliford opines "that Dr. Girardi performed a complete and proper mitral valve repair, significantly improving the plaintiff's mitral regurgitation and eliminating the grave risk of aortic root dissection." Dr. Culliford states that "[t]o the extent that the plaintiff continued to experience mitral valve regurgitation, he was treated medically following the procedure and voluntarily elected to undergo the mitral valve re-repair with Dr. Adams on June 27, 2014" and "[r]epair failure is a known risk of mitral valve and aortic aneurysm repairs."

Dr. Culliford opines "that Dr. Girardi's repair of the ascending aortic aneurysm, mitral valve, and atrial septal, was appropriate in all respects and not the proximate cause of any of the plaintiff's claimed injuries and damages." Dr. Culliford explains that since Plaintiff's June 27, 2014 surgery, Plaintiff has denied experiencing chest pain, shortness of breath, paroxysmal nocturnal dyspnea, and palpitations. Dr. Culliford further explains that "there has been no evidence on physical examination, or laboratory and radiographic studies, to suggest a cardiac etiology for the plaintiff's alleged damages and injuries."

Dr. Culliford opines "that Dr. Girardi appropriately and fully advised plaintiff of the risks, benefits and alternatives to the surgery." Dr. Culliford explains:

> Dr. Girardi advised the plaintiff that the risks for both an ascending aortic aneurysm repair and mitral valve repair/replacement included repair failure, need for replacement, infection, heart attack, stroke, bleeding, and death. In addition, Dr. Girardi advised the plaintiff that he could choose not to undergo surgery, but he was at risk of aortic aneurysm dissection or rupture and worsening mitral regurgitation symptoms and heart muscle function. The plaintiff signed a consent form for the mitral valve repair and aortic aneurysm repair on April 25th and, again, on May 13th. He also testified that his signature on the form was a good indication that he read and understood its contents, including the risks, benefits, and alternatives of the operation. A reasonably prudent person in the plaintiff's position, having been so informed, would have elected to undergo the care and treatment recommended by Dr. Girardi.

Dr. Culliford opines "that the care and treatment rendered by NYPH to the plaintiff was at all times appropriate and comported with the standard of care." Dr. Culliford explains that "[t]here is nothing in the records, nor is there any testimony, that suggests that NYPH, including, but not limited to, its physicians, nurses, and other staff, caused and/or contributed to the plaintiff's injuries." Further, Dr. Culliford states, "As the attending physician, Dr. Girardi was responsible for the plaintiff's treatment and none of his directives were clearly contraindicated."

Plaintiff submits the affirmation of a physician ("Plaintiff's expert") licensed to practice in New York, New Jersey and Massachusetts, and licensed to practice medicine/surgery with the General Medical Council of the United Kingdom. Plaintiff's expert is Board Certified by the American Board of Surgery and Board Certified by the American Board of Thoracic Surgery.

Plaintiff's expert states that he reviewed records, including Plaintiff and Dr. Girardi's deposition transcripts, NYPH's records, Mount Sinai's records, and Dr.

Culliford's affirmation. Plaintiff's expert's opinions are given "to a reasonable degree of medical certainty."

Plaintiff's expert opines "that there are several aspects of Dr. Girardi's care of this patient that represent departures from good and accepted standards of Cardiothoracic Surgical practice."

Plaintiff's expert "disagree[s] with Dr. Culliford's opinion that both surgical techniques, i.e., the Alfieri stitch versus the ring annuloplasty, 'are acceptable and recognized methods for repairing a mitral valve.'" Plaintiff's expert explains, "In 2014, the Alfieri stitch, though a described procedure, was not appropriate for this young patient with excellent LV function and mitral prolapse and mitral regurgitation being the cause of his major symptoms." Plaintiff's expert opines "that Dr. Girardi's decision, intraoperatively, to perform the Alfieri edge-to-edge suture repair of the mitral valve, a non-curative procedure rather than the ring annuloplasty discussed with his patient prior to surgery, was a departure from good and accepted standards of Cardio-thoracic surgery."

Plaintiff's expert states that "[m]itral valve insufficiency and a moderate-to-severe level of mitral valve regurgitation was the primary and most troubling problem presented by Mr. Akel upon his admissions to NYH-Presbyterian in April and May 2014" based on his presented symptoms. Plaintiff's expert states "that [t]he aortic dilation was discovered incidentally as part of the workup prior to mitral valve repair surgery" and was not significant enough to explain Plaintiff's chest pain and shortness of breath, which Dr. Girardi had recognized.

Plaintiff's expert states, "Notwithstanding this position prior to the surgery, it is clear that in the course of the procedures, Dr. Girardi instead made the aortic repair the primary procedure, devoting the most time to it and making a determination to perform a far less effective, minimalist and noncurative procedure for the mitral repair only thereafter, by his own testimony, because he felt that he had essentially run out of time to effectively complete the surgery he initially discussed with his patient."

Plaintiff's expert states "[t]he bypass and cross clamp time for this procedure was not unusually long and in fact, when he finally had the curative procedure in a second open-heart surgery, Mr. Akel tolerated a much longer clamp time well despite this being a re- operative procedure." Plaintiff's expert opines, "The annuloplasty to repair the mitral valve, had it been performed during Dr. Girardi's surgery, should have taken no more than forty minutes and in a young, otherwise

healthy individual like Mr. Akel, this additional time on bypass did not have present a problem."

Plaintiff's expert states, "Most importantly, a ring annuloplasty with or without resection of the leaflets would have been a definitive repair of the mitral valve and as such, a cure for the mitral regurgitation that continued to present a significant problem to Mr. Akel post-surgery." Plaintiff's expert explains, "On post op days two and three, physicians' and nurses' notes indicated that he was having difficulty maintaining his oxygen saturation (SPO2) even with nasal cannulas providing supplemental oxygen."

Plaintiff's expert opines "to a reasonable degree of medical and cardiothoracic surgical certainty that Dr. Girardi failed to provide (and obtain) an effective Informed Consent from Mr. Akel for the manner in which he addressed the mitral regurgitation in the May 13, 2014 surgery, and that this failure constituted another departure from good and accepted standards of medical care." Plaintiff's expert explains, "Dr. Girardi had an obligation to make sure his patient understood his plan for the surgeries he performed on May 13, 2014 and that the patient had given informed consent to those procedures." Plaintiff' expert states "given Mr. Akel's testimony, and supported by Dr. Girardi's testimony on this point, this patient did not comprehend that his surgeon did not intend to perform the annuloplasty they had discussed, and this fact is further borne out by the patient's growing hostility as he realized post-surgery that his surgeon had not done the procedure they discussed." Plaintiff's expert states, "It is unclear from the immediate post-surgery period whether Mr. Akel had yet realized that his mitral regurgitation had not been properly or effectively addressed."

Plaintiff's expert opines that "Dr. Girardi's choice to perform a minimalist procedure to address the mitral regurgitation was also a departure in the context set forth in these records and based on his own testimony about Mr. Akel's surgery." Plaintiff's expert explains:

> Prior to surgery, Mr. Akel was documented as having moderate to severe mitral regurgitation at 1-2+. The pre-surgery TEE documented Mr. Akel's mitral regurgitation as mild to moderate mitral regurgitation (2+) with normal right-sided pressure. (152). Thus, the post-repair level of 1+ to 2+ had not improved at all from the presurgical level.

Plaintiff's expert finds "troubling" Dr. Girardi's explanation - "that he found post-repair regurgitation at 1+ to 2+ acceptable and that he did not feel it was necessary to go back to perform the annuloplasty or other curative procedure before closing Mr. Akel's chest" because of the length of the operation at that point.

Plaintiff's expert opines "the Alfieri suture repair procedure Dr. Girardi utilized for Mr. Akel's mitral regurgitation was a proper procedure to be used for an elderly or otherwise debilitated patient with many co-morbidities, when the primary concern is to minimize the patient's time on cardio-pulmonary bypass." Plaintiff's expert states, "While I have no problem with the performance of Dr. Girardis' aortic repair, i.e., the procedure was properly performed and not contraindicated for this patient, I do find a departure in using that repair and its complexity as the reason to forgo a curative procedure that would have precluded the need for a second major open heart procedure only weeks thereafter." Plaintiff's expert opines:

> To a reasonable degree of medical/surgical surgery, this decision was not necessary according to the records available and there was no emergent need to get the patient off of bypass; he was stable, he could have endured the additional time necessary to complete a curative procedure such as the annuloplasty that was planned, and the failure to do the curative more definitive procedure resulted in the patient continuing to suffer from debilitating regurgitation symptoms and to require a second open heart surgery shortly thereafter to perform the procedure that should have been done on May 13, 2014 by Dr. Girardi.

Plaintiff's expert opines that "Dr. Girardi's failure to honestly advise his patient what procedure he had utilized, and to fully and completely explain why he made the choices he made, was another departure from good and accepted standards of medical/surgical practice." Plaintiff's expert opines, "To a reasonable degree of medical/surgical certainty, in my opinion it is a departure from good and accepted standards of care for a surgeon to refuse to see or speak to his patient post-surgery." Plaintiff's expert states that "Dr. Girardi's failure to honestly apprise his patient that the valvular insufficiency had actually not been fixed delayed his obtaining a definitive treatment and was the proximate cause of his needing a further major cardiothoracic surgery and of his suffering from continuing and

increasingly severe post op symptoms of mitral regurgitation longer than was necessary."

Discussion

A. Dr. Girardi

Dr. Girardi makes a prima facie showing of entitlement to summary judgment on Plaintiff's medical malpractice and informed consent claims.

Dr. Culliford opines that Dr. Girardi met the standard of care in the treatment that he provided to Plaintiff. Specifically, Dr. Culliford opines that Dr. Girardi's decision to repair Plaintiff's ascending aneurysm and to then perform the mitral valve repair using the edge to edge technique or Alfieri stitch as opposed to an annuloplasty ring met the standard of care.

Dr. Culliford also opines that Plaintiff was fully informed of the procedures, and their risks, benefits, and alternatives and that any reasonable person in Plaintiff's position would have consented to the aortic aneurysm repair and mitral valve repair in light of the risk of worsening mitral valve regurgitation and aortic dissection or rupture.

The burden now shifts to Plaintiff to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action.

Plaintiff's expert opines, *inter alia*, that Dr. Girardi's decision to utilize the minimalist Alfieri stitch procedure instead of a curative, definite procedure such as a ring annuloplasty was a departure in the standard of care. Plaintiff's expert opines that Dr. Girardi's failure to do a curative, definitive repair of the mitral valve caused injury to Plaintiff in that he not only had no relief from his symptoms, but his regurgitation worsened after the surgery from a 1-2+ to a 3-4, as indicated by the echocardiogram taken in Dr. Mueller's office, and Plaintiff had to endure a second heart surgery.

Plaintiff's expert opines there was no reason for concern for additional time on bypass because Plaintiff was young and otherwise healthy, and tolerated a longer time on bypass during his second operation at Mr. Sinai. Plaintiff's expert opines that Dr. Girardi failed to provide sufficient information to Plaintiff about the

possibility that a procedure other than annuloplasty might be considered and as a result Dr. Girardi did not obtain a fully informed consent for the procedure that he did perform.

Plaintiff's opposing expert affirmation establishes sufficient factual disputes regarding Plaintiff's medical malpractice and informed consent claims as against Dr. Girardi to defeat summary judgment. "The weight to be accorded to the conflicting testimony of experts is "a matter 'peculiarly within the province of the jury.'" *Torricelli v Pisacano*, 9 AD3d 291, 293 [1st Dept 2004].

B. NYPH

NYPH makes a prima facie showing of entitlement to summary judgment on Plaintiff's medical malpractice and informed consent claims.

"[A] hospital is not liable for the negligence of attending physician.. .and cannot be held concurrently liable with such a physician unless its employees commit independent acts of negligence or the attending physician's orders are contraindicated by normal practice." *Cerny*, 32 AD3d at 883.

Dr. Culliford opines that the "treatment rendered by NYPH to the plaintiff was at all times appropriate and comported with the standard of care." Dr. Culliford states that that there is nothing in the records that suggests that NYPH or its staff caused and/or contributed to Plaintiff's injuries. Dr. Culliford states, "As the attending physician, Dr. Girardi was responsible for the plaintiff's treatment and none of his directives were clearly contraindicated. NYPH provided qualified, experienced, and trained personnel to render care and treatment to the plaintiff." Dr. Culliford opines that "NYPH did not proximately cause and/or contribute to the plaintiff's injuries in this case."

Defendants established that the staff at NYPH did not depart from the standard of care, did not proximately cause any of Plaintiff's injuries, were properly supervised, and followed all directives without exercising any independent medical judgment.

Plaintiff failed to rebut NYPH's showing that NYPH did not depart from the standard of care and did not proximately cause Plaintiff's injuries. Plaintiff's expert does not claim that NYPH or its staff departed from the standard of care.

Nor is there any claim or support that NYPH is vicariously liable for Dr. Girardi's actions.

Accordingly, NYPH's motion for summary judgment is granted.

Wherefore it is hereby

ORDERED that Defendants' motion for summary judgment is granted ONLY to the extent that all claims asserted against The New York and Presbyterian Hospital s/h/a New York and Presbyterian Hospital and Weill Cornell Medical Center are dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant Leonard Girardi, M.D. s/h/a Leonard Gerardi, M.D.'s motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for pretrial conference in Part 6 on September 29, 2020 at 10:30 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: AUGUST 3, 2020

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION