

Depasquale v Staten Is. Univ. Hosp.
2020 NY Slip Op 32861(U)
July 27, 2020
Supreme Court, Richmond County
Docket Number: 151010-2015
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

IAS PART 6

ESTELLE DEPASQUALE and NOELLE CARBONE as
Administrator of the Estate of JOSEPH DEPASQUALE,

ORDER

Plaintiffs,

- against -

Index Number: 151010-2015

STATEN ISLAND UNIVERSITY HOSPITAL,
NORTH SHORE LIJ NETWORK, INC., DANIEL MEGNA,
M.D., SOTTILE & MEGNA, M.D., P.C., CORNELIU VULPE,
M.D., SHAILRAJ PARIKH, M.D., JOHN/JANE DOE, M.D.
AND JOHN/JANE DOE, R.N.,

Hon. Justice
Judith N. McMahon

Defendants.

X

Defendant Corneliu Vulpe, M.D.'s ("VULPE") Motion for Summary Judgment seeking to dismiss the case is denied as detailed herein.

Plaintiff alleges that Estelle DePasquale's duodenum was perforated during either an endoscopic retrograde cholangiopancreatography (ERCP) performed by Defendant Gastroenterologist Daniel Megna on December 29, 2014, or during a cholecystectomy performed by Defendant General Surgeon Corneliu Vulpe on December 30, 2014. Plaintiff has not alleged malpractice related to the performance of the ERCP procedure, and consequently Plaintiff has discontinued against Defendant Dr. Megna and his professional practice. Plaintiff's alleged malpractice concerns the post-op care of Estelle DePasquale. Plaintiff alleges, among others, that VULPE failed to properly diagnose sepsis prior to discharging Ms. DePasquale on January 4, 2015.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage.” *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2nd Dept. 2010). “To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries.” *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2nd Dept. 2018).

VULPE submitted an Affirmation from Dr. Thomas Gouge which demonstrated their prima facie entitlement to judgment as a matter of law. *See Lefkowitz v. Kelly*, 170 A.D.3d 1148, 96 N.Y.S.3d 642 (N.Y.A.D. 2nd Dept. 2019).

In support of Defendant's motion, Dr. Gouge opined “that during the patient's post-operative admission to SIUH, Dr. Vulpe properly and timely assessed the patient's condition when providing care, and the appropriate therapies and treatments were provided.” Dr. Gouge stated that, “Dr. Vulpe's deposition testimony indicates Dr. Vulpe was sick in the days following patient's procedure. Further, Dr. Vulpe's deposition testimony shows Dr. Vulpe was not the doctor who approved the discharge of patient. Nor did Dr. Vulpe participate in the discharge in any way.”

“Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

In opposition to Defendants' motion, Plaintiff submitted an Affirmation from Dr. Robert A. Aldoroty. Dr. Aldoroty opined that, “SIUH, Dr. Parikh, and Dr. Vulpe, were negligent when they discharged Ms. DePasquale while she had exhibited signs and symptoms of a serious infection which

included, but were not limited to, an elevated [white blood count], fever, urinary retention, and swelling of her lower extremities.” Dr. Aldoroty further opined that, “SIUH, Dr. Parikh, and Dr. Vulpe, were negligent in discharging Plaintiff without investigating and finding the source of Ms. DePasquale's infection. This is particularly true as the patient had an ERCP during the same admission and a duodenal or bile duct perforation are known risks of the procedure. A perforation should have been on their short list of possible complications following Plaintiff's ERCP.”

Dr. Aldoroty concluded “that had Defendants, SIUH, Dr. Vulpe, and Dr. Parikh timely diagnosed and treated the source of Plaintiff's infection, a perforation, Ms. DePasquale's medical and surgical treatment of the peritonitis would have been abbreviated and less complex. Plaintiff would have needed fewer hospitalizations, fewer abdominal drains to drain peritoneal collections and abscesses that were [the] result [of] prolonged peritonitis.”

It should also be noted that although VULPE did testify that he was out of work sick at the time of Plaintiff's discharge, he was the one who ultimately signed Plaintiff's discharge. Also, VULPE was unable to state when he last treated Plaintiff before getting sick. Given the relatively short period of time that Plaintiff was admitted for treatment, December 27, 2014 – January 4, 2015, and the fact that VULPE's name is noted throughout Plaintiff's medical records as the treating physician, and the fact that VULPE is not sure when he last treated Plaintiff, there remain questions of fact. Additionally, Plaintiff's Expert, Dr. Aldoroty detailed significant signs and symptoms exhibited by Plaintiff and documented in the medical records while Dr. Vulpe was still actively involved in Plaintiff's treatment that Dr. Aldoroty used as the basis for delineating breaches.

At oral argument on this motion, there was some discussion regarding the use of the phrase “prior to discharge”. Defendant took a very narrow view of the term to mean only occurring on January 4, immediately prior to Plaintiff's discharge. Plaintiff objected to Defendant's construction of that phrase and proffered that “prior to discharge” refers to anything that happened during Plaintiff's admission. The import of this being that it is irrelevant that at some point during Plaintiff's admission, VULPE was out of

work sick. Instead allegations and expert opinions that use the term “prior to discharge” when discussing breaches would encompass VULPE’s treatment of Plaintiff throughout Plaintiff’s admission.

“In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

As such, Defendant’s Motion for Summary Judgment must be denied.

Accordingly, it is

ORDERED that Defendant’s Motion for Summary Judgment seeking dismissal is denied, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 27, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.