

Semper v Karamitsos
2020 NY Slip Op 32897(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 805182/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

TULIP SEMPER AND ERIC HOLLOMAN,

INDEX NO. 805182/2015

Plaintiffs,

MOTION DATE

- against-

MOTION SEQ. NO. 5

MOTION CAL. NO.

HARRY KARAMITSOS, M.D., KAMEELAH PHILLIPS, M.D., SERGUEI V. DOLGOPOLOV, M.D., LENO)(HILL HOSPITAL OF THE NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., RONALD BLATT, M.D., JEFFREY A. MAZLIN, M.D., EAST SIDE GYNECOLOGY SERVICES, P.C. and RONALD BLATT, M.D., P.C.,

Defendants.

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 No

Under Motion Sequence 5, Defendant East Side Gynecology Services, P.C. (“East Side Gynecological”) moves for summary judgment. Plaintiffs Tulip Semper (“Ms. Semper”) and Eric Holloman (collectively, “Plaintiffs”) oppose the motion.

Factual Background

On December 19, 2012, Ms. Semper, then 41 years old, presented to New York Downtown Hospital with complaints of vaginal bleeding. Plaintiff was given a transvaginal ultrasound, which showed a closed cervix and a uterus that appeared to be “10 weeks” in size. Ms. Semper was diagnosed with a complete spontaneous abortion/miscarriage and was discharged home on December 20, 2012, with instructions to obtain follow up care. Prior to this visit, Ms. Semper had not been aware that she was pregnant.

On December 21, 2012, Ms. Semper presented to Manhattan Physicians Group and was seen by Bertha Bogdan, NP. Ms. Semper was given a transvaginal ultrasound which noted a large intermural myoma. Ms. Semper was sent for an ultrasound and it was performed on the same day by Dr. Jay Lee, M.D. The ultrasound report showed a dominant central myoma measuring 6.3 x 5.8 x 5.4 cm. and a uterus that is anteverted measuring 12.3 x 6.5 x 10.0 cm. There was no

sonographic evidence of intrauterine gestation. There is an addendum, which notes a discrepancy in the size of the uterus from a prior study of October 25, 2012.

On December 28, 2012, Ms. Semper presented to the Emergency Department at LHH. Ms. Semper reported right lower abdominal pain. Ms. Semper underwent a transvaginal ultrasound which revealed a single intrauterine pregnancy with an estimated gestational age of 9 weeks. On December 28, 2012, Ms. Semper was discharged from LHH with a plan to follow up with Dr. Karamitsos.

On December 31, 2012, Ms. Semper returned to LHH with complaints of vaginal bleeding and abdominal pain. Drs. Christine Haines and Karamitsos evaluated Ms. Semper. A repeat ultrasound was performed on Ms. Semper. The ultrasound revealed a single intrauterine pregnancy with an estimated gestational age of 9 weeks, 5 days. The uterus was noted to be anteverted and enlarged measuring 26.2 x 13.8 x 17.4 cm. A large intramural fibroid or focal adenomyosis was noted in the posterior uterine body measuring 15.4 x 8.6 x 14.1 cm. Labs revealed blood in the urine. Ms. Semper elected to terminate the pregnancy. On December 31, 2012, Ms. Semper was discharged from LHH with a referral to be seen by Dr. Phillips for the termination of pregnancy.

On January 3, 2013, Ms. Semper presented to East Side Gynecology Services, PC ("East Side Gynecology") for the termination of pregnancy. Ms. Semper's medical history included epilepsy, high blood pressure and anemia. Ms. Semper's weight was recorded as 300 lbs. and her height was 5'4". Abnormal findings were noted as a "Fibroid, Tumor, Ovarian cyst." Under "General Examination," the following findings were noted: "General Appearance: NAD, Pleasant, Heart: NSR, No murmurs, Lungs: Clear to auscultation; Abdomen: Soft, NT/ND, No masses felt, Vagina: Grossly normal. Cervix: Normal appearing; No lesions; Negative cmt. Adnexa: Normal, No masses. Uterus: 9 weeks."

The East Side Gynecology records indicate that a real time obstetrical transvaginal ultrasound was performed on Ms. Semper prior to the procedure. A note by Michele Ries at 8:19 a.m. states that the ultrasound revealed a twin gestation. Gestation A had a positive fetal heart rate and Gestation B had a negative fetal heart rate.

Dr. Mazlin attempted the procedure to terminate the pregnancy. When asked what instruments he uses for a first trimester abortion of pregnancy, Dr. Mazlin testified, "The instruments that are used are a speculum to open up the vagina; Betadine swabs put in the vagina; something called a tenaculum which is placed on the cervix to

hold it steady; dilators which are used to enter the cervix and uterus; suction catheter placed in the uterus to remove tissue; curettes which are used to remove placental fragments; and a sonogram which is used to watch the whole thing.” (Dr. Mazlin’s deposition at page 19:23-20:11). Dr. Mazlin testified, “All of this is done under sonographic guidance, so I am constantly looking at the sonogram to see how I’m doing, looking back and forth. But it is right next to the patient, so I can see both with the same visualization.” (Dr. Mazlin’s deposition at page 20:19-20:24).

Dr. Jeffrey Davis administered the anesthesia. Dr. Mazlin explained that he used dilators to open the cervix and to measure the cavity of the uterus. The records show that “Plaintiff has an enlarged fibroid uterus. The cavity is 20 cms from os (sic) making it impossible to reach. The pt cannot have the procedure done at this center and should go to the hospital for the termination of pregnancy.” Dr. Mazlin stopped the procedure. Ms. Semper was advised that the abortion was not performed and that she had to follow-up with her primary gynecologist to perform the procedure in the hospital settings.

On January 3, 2013, at 10:05 am, Dr. Mazlin called Dr. Phillips and arranged for Dr. Phillips to see Ms. Semper immediately after she left East Side Gynecology. Ms. Semper was instructed not to take anything by mouth, ensuring that she remained appropriate for the administration of anesthesia. Ms. Semper left East Side Gynecology with a prescription for Doxycycline.

On January 3, 2013, Ms. Semper presented to Dr. Phillips at Manhattan’s Physician Group.

Ms. Semper reported continued bleeding. Dr. Phillips performed a vaginal examination and documented the following: “internal Gyn: Examination of the vagina found no active bleeding, old blood. Cervix is 1 cm dilated. The uterus is Fundal Ht: 24 cm, Ovaries palpable, normal in size; no masses. Bladder is normal. Last PAP: 10/25/2012. No CVA tenderness.”

The “Assessment/Plan” was as follows:

Unplanned pregnancy (V22.2) Patient desparately (sic) desires termination due to fear that she will miscarry due to fiboirds (sic). Has history of 16w SAB that she is in counseling (for over one year). Patient also with fear of T21 given her age and SAB of twin. Discussed likelihood of normal pregnancy however unable to perform screen

until at least 11 weeks. Discussed high risk nature of procedure including risk of infection, transfusion, exlap with possible hysterectomy. Patient verbalized understanding. I advised her to discuss with husband if risks outweigh benefits prior to proceeding with termination. Will order bloodwork and schedule pending decision to proceed with D&C. Needs blood work and medical clearance prior to OR.

TVUS noted fundal pregnancy with + FH. Large intermural myoma unclear if obstructing endometrium

Plan to pretreat with cytotec to decrease dilation requirements.

Fibroid uterus (218.9)

Morbid obesity (278.01)

Ms. Semper recalled a conversation with Dr. Phillips on January 3, 2013 that there were “two choices, the hospital or orally, a pill” to terminate the pregnancy. Ms. Semper testified that Dr. Phillips “told me the risk, the pill comes down gradually, you just bleed a lot, and when you are in the hospital, she can do a D&C in the hospital.” (Ms. Semper’s deposition at 142:11-16).

There was a telephone conversation between January 3, 2013 and January 7, 2013 that Ms. Semper recalls with Dr. Phillips. Ms. Semper testified that after the January 3, 2013, Dr. Phillips called her “to discuss the 24 abortion pill, the pill.” As for the substance of the telephone conversation, Ms. Semper testified, “I don’t know exactly what the conversation was, but she wanted me to take the abortion pill.” Ms. Semper testified that Dr. Phillips advised her that the pill “was her first choice” because “[i]t was easier.” Ms. Semper testified that she responded, “okay” to Dr. Phillips. Ms. Semper testified that she did not recall “why” she did not get the pill. Ms. Semper testified, “I’m not sure if the insurance covered it or not. Ms. Semper further testified that she believes she had another conversation with Dr. Phillips before January 7, 2013. Ms. Semper testified that Dr. Phillips “had to call me back about the pill.” Ms. Semper did not recall the substance of that follow-up call. (Ms. Semper’s deposition; page 148-150).

Ms. Semper's termination of pregnancy was scheduled for January 7, 2013 with Dr. Phillips at LHH.

On January 4, 2013, Ms. Semper presented to Manhattan Physicians Group to obtain medical clearance for the procedure. Ms. Semper's vital signs and physical examination were within normal limits. Ms. Semper's EKG was normal.

On January 7, 2013, Ms. Semper presented to LHH to undergo a D&C procedure. Dr. Phillips performed a D&C procedure under ultrasound guidance and under general anesthesia. The post-operative findings were consistent with a 15 cm posterior fibroid, a 24-week size fibroid uterus and products of conception. The repeat ultrasound of the uterus performed during the procedure showed a thin endometrial lining and no retained products of conception. No active bleeding was noted. Ms. Semper was discharged home with no complaints. Ms. Semper was prescribed Tylenol and Motrin for pain, Doxycycline, and told to place nothing in her vagina for two weeks.

On January 8, 2013, as noted in pharmacy records, Ms. Semper filled a prescription for Doxycycline. On January 10, 2013, Ms. Semper returned to the Emergency Department at LHH with complaints of severe lower abdominal pain associated with nausea and vomiting, fever, chills, and generalized weakness. The symptoms started that day. Ms. Semper denied experiencing urinary symptoms or diarrhea and constipation. The record also notes "Pt admits that she did not [take] antibiotics as she was recommended." Plaintiff was evaluated by Dr. Karamitsos and admitted for further treatment.

On January 11, 2013 and into January 12, 2020, Ms. Semper underwent an exploratory laparotomy, a cystoscopy, bilateral ureteral stent placement, supracervical abdominal hysterectomy and a right salpingo-oophorectomy. According to the operative report, the surgeons were Drs. Karamitsos, Phillips, and Dolgoplov. The abdomen was packed and left open pending prognosis. The preoperative diagnosis was sepsis, acute renal failure, fibroid uterus and endometritis. The post-operative diagnosis was sepsis, acute renal failure, fibroid uterus and endometritis. She returned to the operating room two days later to close the abdomen.

On January 13, 2013, a cervical culture came back positive for MRSA. Ms. Semper developed acute respiratory distress syndrome (ARDS), acute renal failure (ARF), deep venous thrombosis (DVT), and disseminating intravascular coagulopathy (DIC). Ms. Semper was discharged on January 27, 2013.

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 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.” *Id.* at 324. “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.

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].

Discussion

East Side Gynecology submits the affirmation of Jonathan Lanzkowsky, M.D. ("Dr. Lanzkowsky"). Dr. Lanzkowsky is physician duly licensed to practice medicine in the State of New York and is Board Certified in the field of obstetrics and gynecology. East Side Gynecology also submits the affirmation of Richard Fried, M.D. ("Dr. Fried"). Dr. Fried is licensed to practice medicine in the State of New York and is Board Certified in Internal Medicine with a Subspecialty Board in Infectious Disease.

Dr. Lanzkowsky and Dr. Fried opine that East Side Gynecology, including Dr. Mazlin, Dr. Blatt and other employees, did not depart from good and accepted practices in the care it provided to Ms. Semper and did not proximately cause or contribute to Ms. Semper's injuries.

East Side Gynecology argues that Ms. Semper "received the appropriate care and treatment at East Side Gynecology, P.C. There was no act or omission on behalf of East Side Gynecology, P.C., or its staff that proximately caused or contributed to the injuries alleged by Plaintiff." East Side Gynecology asserts that "[t]he procedure in question was attempted by Dr. Jeffrey Mazlin" and that Ms. Semper "was never seen or treated by Dr. Ronald Blatt or Ronald Blatt, M.D., P.C."

In opposition, Plaintiffs contend that the negligent acts and/or omissions of Dr. Mazlin occurred while he was employed with East Side Gynecology. Plaintiffs assert that the medical records from East Side Gynecology show that the facility may also be known as Ronald Blatt, M.D., P.C. Plaintiffs assert that "[t]here are two (2) pages of post-op nursing records contained within the East Side Gynecology records which states at the top of the page- Ronald Blatt, M.D., P.C. 144 East 44th Street, Suite 225, New York, NY 10017-6690. (see Exhibit '6' page 32-33). The phone number listed under Ronald Blatt, M.D., P.C. is 212-308-4988, which is the phone number for East Side Gynecology, (see Exhibit '10' page 32-33)."

Additionally, Plaintiffs contend that Dr. Mazlin testified at his deposition that he was an employee of East Side Gynecology at the time of the malpractice and that

East Side Gynecology was owned by Dr. Blatt. Plaintiffs contend that Dr. Mazlin further testified that:

Q: I believe you previously testified, you said you worked at Eastside Gynecology. When you were working there, where did your paychecks come from?

A: They came from Eastside Gynecology or Manhattan Center for Gynecology, one of them, I don't recall. They were both owned by Dr. Blatt. I think Eastside was the abortion part and Manhattan Center for Gynecology was the gyn part, but they were next to each other. (See Dr. Mazlin's Deposition Testimony, Exhibit "8", page 74 lines 7—19).

“As a general rule, employers are held vicariously liable for their employee's torts only to the extent that the underlying acts were within the scope of the employment.” *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 119 [1996]. The rule extends to medical facilities, who can be vicariously liable for the negligence or malpractice of their employees including their physicians. *Hill v. St. Clare's Hosp.*, 67 NY2d 72 [1986].

Dr. Mazlin, (Motion Sequence 7) and Dr. Blatt and Blatt PC (Motion Sequence 8) remain in the case and their motions for summary judgment were denied. Plaintiffs have shown there exists “material issues of fact which require a trial of the action.” *Alvarez*, 68 N.Y.2d at 324. There is sufficient evidence to require submission to a jury whether East Side Gynecology is vicariously liable for the acts of negligence and/or omissions of its doctors and/or support staff who were involved in the care of Ms. Semper. Therefore, East Side Gynecology's motion for summary judgment is denied.

Wherefore it is hereby

ORDERED that Defendant East Side Gynecology Services, P.C.'s motion for summary judgment is denied; and it is further

ORDERED that the remaining parties are to appear for a pretrial conference on October 30, 2020 at 10:00am.

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

requested is denied.

Dated: September 1, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION