Semper v Karamitsos
2020 NY Slip Op 32898(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 805182/2015
Judge: Eileen A. Rakower

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. 6**
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 X No	

Defendant Lenox Hill Hospital of the North Shore-Long Island Jewish Health System, Inc. ("LHH") moves for summary judgment. Plaintiffs do not oppose LHH's motion.

Plaintiffs cross move for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of LHH in the event that LHH is awarded summary judgment. Defendant Dr. Jeffrey A. Mazlin, M.D. ("Dr. Mazlin") opposes Plaintiffs' cross motion. Dr. Mazlin contends that if his motion for summary judgment is denied and he is a defendant in the case at trial, his Article 16 rights as to LHH should not be precluded.

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 Dolgopolov. 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 repertory 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].

"As a general rule, employers are held vicariously liable for their employee' 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].

"A physician who owns a medical clinic held out to the public as offering medical services may be liable vicariously for treating doctor's malpractice, notwithstanding that physician/owner neither participates in nor controls diagnosis or treatment." *Hill*, 67 NY2d at 74.

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. *Id.* at 588.

LHH's Motion for Summary Judgment

LHH submits the Affirmation of Jeffrey P. Gumprecht, M.D. ("Dr. Grumprecht"), a physician licensed to practice medicine in the State of New York and Board Certified in internal medicine and a diplomate in infectious diseases. Dr. Grumprecht states that he reviewed the medical records maintained by LHH; co-Defendants' records; all relevant prior and subsequent treating records; the deposition transcripts; the pleadings; and the Bills of Particulars. Dr. Grumprecht's opinions are rendered with a reasonable degree of medical certainty.

LHH makes a *prima facie* showing of entitlement to summary judgment. LHH, through Dr. Grumprecht's Affirmation, demonstrates that the medical treatment that LHH staff provided to Ms. Semper was within the standard of care. Dr. Grumprecht opines that LHH staff properly monitored and treated Ms. Semper throughout her admission, appropriately followed the directives and orders of the supervising physicians, and did not exercise independent medical judgment in connection with the D&C and associated assessments including any decision to administer prophylactic antibiotics. Dr. Grumprecht further opines that there is no evidence that Ms. Semper contracted MRSA during the January 7, 2013 D&C procedure at LHH or that the procedure was performed negligently or with unsterile equipment. Dr. Grumprecht further opines that "the operating surgeon is responsible for obtaining informed consent, and in this case that would be co-Defendant Dr. Karamitsos or Dr. Phillips."

Plaintiffs have failed to meet their burden to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. Plaintiffs do not oppose LHH's motion for summary judgment. Plaintiffs do not submit an affidavit from a physician attesting to any departures on LHH's behalf or a failure on LHH's part to obtain informed consent. Rather, both of Plaintiffs' experts make clear that the alleged malpractice happened on January 3, 2013, which was before Ms. Semper was ever admitted to LHH for the D&C procedure or otherwise. Therefore, LHH's motion for summary judgment is granted without opposition.

Plaintiffs' Cross-Motion

Plaintiffs cross move for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Dr. Karamitsos (Motion Sequence 4) and LHH (Motion Sequence 6) in the event that Dr. Karamitsos and LHH are awarded summary judgment. Under Motion Sequence 10, Plaintiffs move for the same relief with respect to any acts or omissions of Dr. Dolgopolov in the event that he is awarded summary judgment.

Dr. Mazlin opposes Plaintiffs' cross-motion to preclude defendants from asserting an Article 16 defense against LHH should LHH's summary judgment motion be granted. Dr. Mazlin contends, "Any application or objection to Dr. Mazlin asserting Article 16 rights should be made at the time of trial after all the evidence has been entered." Dr. Mazlin contends, "Should testimony elicited at trial reveal evidence that discontinued defendants, may share in the responsibility for the claimed malpractice, then Dr. Mazlin has the right to seek Article 16, and Gen. Oblig. Law § 15-108 protection." Dr. Mazlin "seeks to preserve the protection under Article 16 which might arise based upon the testimony elicited at trial and not based upon the deposition testimony obtained up to this point in time."

"Article 16 does not require a defendant to disclose, prior to the time of trial, any individual or entity whose liability will be invoked by that defendant." *Anderson v. Beaton*, 2009 WL 9435543 at *3 [N.Y. Sup Ct, New York County 2009] (citing *Marsala v. Weintraub,* 208 AD2d 680 [2d Dept. 1994]; *Rodi v. Landau,* 170 Misc.2d 180 [Supreme Court, Rockland County, J. Howard Miller, Oct. 29, 1996]). The court explained:

> As recently pointed out in *Carmona v. Mathisson*, 2009 WL 792565 [Supreme Court, Bronx County, J. Dominic R. Massaro, Jr., March 23, 2009], where a Court dismisses an action on summary judgment, it does not substantively decide the issues of a parties negligence, it simply finds that the opponent to such motion has failed to meet its burden of proof, in opposing the motion. Therefore, that Court held that a defendant should not be foreclosed from seeking apportionment of fault against a party in connection with Article 16 of the CPLR, even if the tortfeasor that the defendant seeks to assign fault to was an original party to the action who successfully had the action against them dismissed, having summary judgment granted in its favor. This Court agrees with the decision in *Carmona, supra,* and believes that "equity and the interests of justice"

> require that Dr. Beaton be permitted to introduce evidence at trial of any negligence on the part of Mount Sinai in connection with the care and treatment rendered to plaintiff herein, and have the jury apportion fault between them, if they are both found to be negligent.

Anderson, 2009 WL 9435543 at *4.

In *Greco v. Offor*, 2019 WL 4861956, *3-4 [N.Y. Sup Ct, New York County 2019], the court noted that, "While the Appellate Division, First Department has not ruled on the issue as to whether a defendant waives his or her right to Article 16 apportionment where he or she fails to oppose a co-defendant's motion for summary judgment, the trial courts are divided on this issue." The court then proceeded to state that it "is inclined to follow the holding as set forth by the New York County Supreme Court in *Andersen v. Beaton* (No. 1039882007, 2009 WL-9435543, at *4, *supra)*." The *Greco* court, in following *Andersen*, denied the plaintiff's application to preclude co-defendants from asserting their rights under Article 16 at trial where the plaintiff did not oppose the defendants' motion for summary judgment.

Any decision with respect to the Article 16 rights of the remaining defendants is referred to the Trial Court to be decided at the close of the evidence.

Therefore, Plaintiffs' cross motion for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of LHH is denied.

Wherefore it is hereby

ORDERED that Defendant Lenox Hill Hospital of the North Shore-Long Island Jewish Health System, Inc.'s motion for summary judgment is granted in its entirety without opposition and the action is severed and dismissed as against Lenox Hill Hospital of the North Shore-Long Island Jewish Health System, Inc., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiffs' cross motion for an Order precluding the defendants in this matter from asserting the benefits of CPLR Article 16, with respect to any acts or omissions of Lenox Hill Hospital of the North Shore-Long Island Jewish Health System, Inc. is denied; and it is further

ORDERED that all remaining parties are to appear on October 30, 2020 at 10:00am for a pre-trial conference.

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 X NON-FINAL DISPOSITION