

<b>Estate of Henderson v Roslin</b>
2020 NY Slip Op 33051(U)
September 8, 2020
Supreme Court, Kings County
Docket Number: 522421/2016
Judge: Genine D. Edwards
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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 8th day of September, 2020.

P R E S E N T :

Hon. Genine D. Edwards,  
Justice

Estate of Dawn Z. Henderson by her  
Co-Administrators, Marlene Reid and  
Mitchell Gerald Powell,

Index No. 522421/2016

Motion Sequence: 1, 2

Plaintiff,

-against-

Mitchell S. Roslin, M.D., Andrew Brownlee, M.D.,  
Manhattan Minimally Invasive and Bariatric  
Surgery, P.C., and Lenox Hill Hospital,

Defendants.

The following papers numbered 1 to 6 read on this motion

Papers Numbered

Notice of Motion and Affidavits (Affirmations) Annexed	_____	1, 2
Answering Affidavit (Affirmation)	_____	3, 4
Reply Affidavit (Affirmation)	_____	5, 6

In this medical malpractice and wrongful death action, defendants Mitchell S. Roslin, M.D. ("Dr. Roslin") and Manhattan Minimally Invasive and Bariatric Surgery, P.C.<sup>1</sup> moved for summary judgment dismissing the complaint and to amend the caption to delete their names therefrom. Separately, defendant Lenox Hill Hospital also moved for summary judgment dismissing the complaint. Plaintiff

<sup>1</sup> Manhattan Minimally Invasive and Bariatric Surgery, P.C. is Dr. Roslin's practice.

opposed both motions. All parties signed a stipulation of discontinuance as to defendant Andrew Brownlee, M.D.

In April 2011, decedent, Dawn Z. Henderson, had a laparoscopic duodenal switch surgery with sleeve gastrectomy and cholecystectomy. On January 13, 2015, she reported to Lenox Hill Hospital to undergo a diagnostic laparoscopy with Dr. Roslin to rule out an internal hernia as well as to potentially lengthen her stomach to help with chronic vitamin deficiencies. Dr. Roslin inserted a bladeless 12mm trocar into the decedent's upper abdominal left quadrant at the start of the procedure. Immediately, a "small rush of blood" was observed and, upon further examination, it was determined that decedent's infrarenal aorta was laterally transected 50% of its circumference and injury occurred to her inferior vena cava. Despite resuscitation efforts, decedent died in the operating room.

*Mitchell S. Roslin, M.D. and Manhattan Minimally Invasive and Bariatric Surgery, P.C.*

"A physician [who moves] for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiff's injuries." *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018) quoting *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017). To sustain the burden, the physician "must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars." *Mackauer*, 148 A.D.3d 873.

"In opposition, a plaintiff must submit the affidavit of a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries." *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Simpson v. Edghill*, 169 A.D.3d 737, 93 N.Y.S.3d 399 (2d Dept. 2019); *M.C. v. Huntington Hospital*, 175 A.D.3d 578, 106 N.Y.S.3d 382 (2d Dept. 2019).

After oral argument and upon review of the foregoing cited papers, Dr. Roslin and his practice established their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged medical malpractice against them. In opposition, the affidavit of plaintiff's expert was sufficient to raise triable issues of fact. Plaintiff's expert concluded with a reasonable degree of medical certainty, that Dr. Roslin failed to recognize the layers of decedent's abdominal wall and utilized excessive force during the insertion of the trocar. Plaintiff did not address the remaining claims in its verified bill of particulars. Thus, those claims are dismissed without opposition.

*Lenox Hill Hospital*

"[U]nder the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its [physician-employee] acting within the scope of employment . . ." *Fuessel v. Chin*, 179 A.D.3d 899, 116 N.Y.S.3d 395 (2d Dept. 2020). Considering that plaintiff raised triable issues of fact as to Dr. Roslin's alleged malpractice, a question of fact was also raised as to Lenox Hill Hospital's vicarious liability for Dr. Roslin's alleged acts and omissions. Plaintiff did not address the other claims in the verified bill of particulars. Thus, those claims are dismissed without opposition.

Based on the foregoing, it is

ORDERED that Mitchell S. Roslin, M.D. and Manhattan Minimally Invasive and Bariatric's motion for summary judgment dismissing the complaint as against them is granted to the extent of dismissing all claims except plaintiff's claims regarding Dr. Roslin's departure from good and accepted practice in failing to use caution inserting a trochar to create a surgical opening and in using too much force to create a surgical opening with the trochar, and it is further

ORDERED that Lenox Hill Hospital's motion for summary judgment dismissing the complaint is granted to the extent of dismissing all claims except plaintiff's claim concerning Lenox Hill Hospital's alleged vicarious liability for Dr. Roslin's alleged acts and omissions, and it is further

ORDERED that Andrew Brownlee, M.D. is discontinued from the action pursuant to a stipulation of discontinuance signed by all parties, and it is further

ORDERED that the caption is amended as follows:

\_\_\_\_\_  
Estate of Dawn Z. Henderson by her  
Co-Administrators, Marlene Reid and  
Mitchell Gerald Powell,

Plaintiff,

-against-

Mitchell S. Roslin, M.D., Manhattan Minimally  
Invasive and Bariatric Surgery, P.C., and Lenox  
Hill Hospital,

Defendants.  
\_\_\_\_\_

This constitutes the Decision and Order of the Court.

For Clerks use only  
MG\_\_\_\_  
MD\_\_\_\_  
Motion Seq.#

  
ENTER  
\_\_\_\_\_  
J.S.C.

**HON. GENINE D. EDWARDS**