

Castro v Murphy

2020 NY Slip Op 34853(U)

February 19, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 17-621535

Judge: David T. Reilly

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SHORT FORM ORDER

INDEX No. 17-621535
CAL. No. 19-00038MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-29-19 (002 & 003)
ADJ. DATE 7-24-19
Mot. Seq. # 002 - MG
003 - MD

-----X
ROSA CASTRO,

Plaintiff,

- against -

CLEADOUS MURPHY, M.D., DEBORAH
DUPREY-MURPHY, M.D., CONTEMPORARY
MEDICAL SERVICES, P.C., ISLIP OB-GYN,
SOUTHSIDE HOSPITAL and NORTHWELL
HEALTH, INC,

Defendants.
-----X

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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants Southside Hospital and Northwell Health, Inc., dated April 26, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated July 3, 2010; Replying Affidavits and supporting papers ___; Notice of Motion/ Order to Show Cause and supporting papers by defendant Dr. Cleadous Murphy, dated April 30, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated July 3, 2010; Replying Affidavits and supporting papers by Dr. Murphy, dated July 23, 2019; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

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ORDERED that the motion of defendants Northwell Health, Inc. and Southside Hospital, and the motion of defendant Dr. Cleadous Murphy are consolidated for the purposes of this determination; and it is

ORDERED that the motion of defendants Northwell Health, Inc. and Southside Hospital for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion of defendant Dr. Cleadous Murphy for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for injuries that she allegedly sustained as a result of the medical malpractice of Dr. Cleadous Murphy and Dr. Deborah Duprey-Murphy when they performed her vaginal hysterectomy. The plaintiff alleges that Dr. Murphy and Dr. Duprey-Murphy were partners or employees of defendants Contemporary Medical Services, P.C., and Islip OB-GYN, and that the surgery was performed at defendant Southside Hospital, which was owned by defendant Northwell Health, Inc. The plaintiff further alleges that she was treated by the defendants from February 24, 2016 to June 2, 2016, and that the defendants failed to adhere to accepted standards in medical practice during her treatment, causing her to suffer urinary leakage, among other ailments. The Court notes that the action against Dr. Duprey-Murphy has been discontinued.

Defendants Southside Hospital and Northwell Health, Inc. (hereinafter “Northwell”) now move for summary judgment dismissing the claims against them, contending that they cannot be held liable for the acts or omissions of Dr. Murphy inasmuch as he was an “outside attending physician” who merely utilized the hospital to perform the surgery for his patient. The plaintiff does not oppose Northwell’s motion. Dr. Murphy also moves for summary judgment dismissing the complaint.

At her deposition, the plaintiff testified that she suffered from persistent cysts, a heavy and painful menstrual cycle, and uterine fibroids for approximately two years before visiting Dr. Murphy’s office in July 2015. She recalled that he examined her and recommended that she undergo a hysterectomy to resolve her condition. She visited Dr. Murphy’s practice at least two times prior to the procedure for a follow-up and additional examinations. The surgery was scheduled to be performed at Southside Hospital in February 2016, and the plaintiff recalled that she went to the hospital two days prior for pre-surgery testing. Because she could not read or speak English, an interpreter was provided to her during her visits with Dr. Murphy and prior to the surgery at the hospital. She testified that she gave Dr. Murphy consent to perform the surgery. The plaintiff remained at Southside Hospital for two days after the procedure was completed, and was cared for by the nursing staff at the hospital. Approximately four days after the hysterectomy, the plaintiff visited Dr. Murphy at his office for a follow-up. During that visit, the plaintiff informed Dr. Murphy that although she had a catheter in place, she suffered from incontinence and urinary leakage. Approximately one week later, she visited Dr. Murphy a second time and told him that the incontinence and leakage continued. In March 2016, Dr. Murphy performed a Latzko procedure at Southside Hospital to repair the plaintiff’s bladder, which, she testified, was “broken” as a result of the hysterectomy. After the Latzko procedure, the plaintiff continued to experience leakage and abdominal pain. Dr. Murphy referred the plaintiff to another

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doctor, Dr. Finamore, who examined her and recommended additional surgery. Dr. Finamore performed two separate procedures at Southside Hospital to repair her bladder.

Dr. Murphy testified that he had “attending privileges” at Southside Hospital, and that he owned Contemporary Medical Services, PC with Dr. Duprey-Murphy. He was employed by the practice as one of its physicians and he worked out of two office locations in Suffolk County. He typically worked at Southside Hospital when one of his patients was there, and it was the only hospital where he performed surgeries. Dr. Murphy recalled that when he met the plaintiff in July 2015 she complained of uterine fibroids, ovarian cysts, pelvic pain, an irregular bleeding. Upon examination and testing, he discovered that she had adenomyosis, a condition where the infrastructures of the uterus are found in the walls of the uterus, causing it to be round which in turn caused chronic pain. The plaintiff did not suffer from uterine fibroids, and did not have any urinary complaints. In September 2015, Dr. Murphy recommended that he perform a dilation and cartage (DNC) to look inside of the plaintiff’s uterus, and the procedure was performed at Southside Hospital in November 2015. Dr. Murphy met with the plaintiff in December 2015 and discussed a hysterectomy to address her pain. During that discussion, Dr. Murphy explained that there was an “extremely low” rate of injury to the bladder as a result of the procedure. He also testified that injury to the bladder could cause a fistula (a hole between the vagina and urethra). The plaintiff agreed to have the procedure and he performed surgery in February 2016 at Southside Hospital. Approximately one week after the procedure, Dr. Murphy met with the plaintiff for a follow-up. He observed that she was healing; however, she complained of urine leakage. Although he had some difficulty during the latter end of the surgery, he did not believe that the plaintiff’s bladder was damaged and he believed that the urinary issues she describe would resolve. After another visit, and upon examination of the plaintiff Dr. Murphy observed that the plaintiff had a fistula.

Dr. Murphy performed the Latzko procedure to address the fistula at Southside Hospital, and when the plaintiff returned to his office for a follow-up in March 2016, he observed that there was no leakage. In April 2016, the plaintiff returned to Dr. Murphy’s office and he removed the catheter that was placed after the hysterectomy. He testified that the catheter remained in place to promote healing. A few days later, the plaintiff contacted Dr. Murphy complaining that she continued to experience leakage. He conducted an examination and inserted a new catheter into her bladder. In May 2016, the plaintiff contacted Dr. Murphy’s office with complaints that the catheter broke and that the leakage continued. After two separate visits in May, Dr. Murphy referred the plaintiff to Dr. Finamore, the chief of urogynecology at Southside Hospital.

In an affidavit, Dr. Scott Smilen, board certified in obstetrics and gynecology and female pelvic medicine and recovery, opined that as per the standard of care, Northwell staff and assistant physicians are directed to act “at all times under the direction and control of the surgeon,” who, in this case was Dr. Murphy. The plaintiff’s various procedures were performed at Southside Hospital, and the staff and employees of the hospital did not deviate from good and accepted medical practice. Additionally, Dr. Smilen stated that the plaintiff made no direct claims of medical malpractice with respect to any Northwell employee or staff.

“Generally, a hospital cannot be held vicariously liable for the malpractice of a private attending physician who is not its employee” (*Schultz v Shreedhar*, 66 AD3d 666, 666, 866 NYS2d 484 [2d Dept

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2009)]. “[V]icarious liability for the medical malpractice of an independent, private attending physician may be imposed under a theory of apparent or ostensible agency by estoppel” (*Sampson v Contillo*, 55 AD3d 588, 589, 865 NYS2d 634 [2d Dept 2008]). In the context of a medical malpractice action, the patient must have reasonably believed that the physicians treating him or her were provided by the hospital or acted on the hospital’s behalf (*id.*). Furthermore, “[w]here hospital staff, such as resident physicians and nurses, have participated in the treatment of the patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees merely carried out the private attending physician’s orders” (*Cynamon v Mount Sinai Hosp.*, 163 AD3d 923, 924, 81 NYS3d 520 [2d Dept 2018]; *Gatting v Sisters of Charity Med. Ctr.*, 150 AD3d 701, 704, 53 NYS3d 665 [2d Dept 2017]).

Here, Northwell has established its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it. The record demonstrates that Dr. Murphy, a private attending physician not employed by Northwell, was entirely responsible for the plaintiff’s treatment and care before, during, and after the surgical procedures (*Sampson v Contillo*, 55 AD3d 588, 589, 865 NYS2d 634). The record further establishes that the employees of the hospital merely carried out the orders of Dr. Murphy concerning the plaintiff’s care. The plaintiff does not oppose Northwell’s position. Accordingly, the motion for summary judgment is granted.

Next, Dr. Murphy moves for summary judgment dismissing the complaint on the ground that he did not deviate from the standard of care in treating the plaintiff. To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries (*Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1067-1068, 56 NYS3d 108 [2d Dept 2017]). On a motion for summary judgment, a defendant has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.*, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; *Stucchio v Bikvan*, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; *Mackauer v Parikh*, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]). To satisfy this burden, a defendant must address and rebut the allegations of malpractice set forth in the plaintiff’s bill of particulars (*see Mackauer v Parikh*, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). Once this burden is satisfied, the burden shifts to the plaintiff to raise a triable issue of fact as to whether a departure from good and accepted practice occurred and whether this departure was a proximate cause of his or her injuries (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Dien v Seltzer*, 116 AD3d 910, 984 NYS2d 129 [2d Dept 2014]). “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” (*Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1067-1068, 56 NYS3d 108).

Dr. Murphy has made a prima facie showing of entitlement to a judgment as a matter of law. Dr. Murphy’s expert, Dr. Gary Mucciolo, who is a board certified doctor in obstetrics and gynecology opined that based upon his review of the plaintiff’s medical records and other documents, Dr. Murphy did

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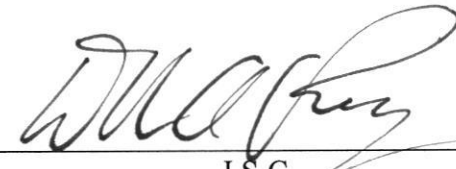
not depart from the standard of care in performing the hysterectomy, the Latzko procedure, or in his referral of the plaintiff to the urologist. According to Dr. Mucciolo, the development of a vesicovaginal fistula after a hysterectomy is a known complication of the procedure. He opined that the suture line placed by Dr. Murphy broke down and a fistula developed. Dr. Murphy monitored the plaintiff closely after the procedure and correctly pursued resolution by performing the Latzko procedure at least one to three months after the hysterectomy. Dr. Mucciolo further opined that it was within the acceptable standard of care to allow the fistula to resolve on its own prior to performing the Latzko, and that such procedure was a less invasive method to address the condition. Additionally, Dr. Mucciolo stated that Dr. Murphy referred the plaintiff to a urologist at the appropriate time inasmuch as Dr. Murphy was trained in and had previously performed the Latzko procedure.

In opposition, the plaintiff argues that Dr. Mucciolo failed to address all of the claims in her bill of particulars, particularly the claim that Dr. Murphy deviated from accepted standards of care in his failure to perform a cystoscopy to test the integrity of the bladder and to determine whether the plaintiff had a bladder injury. In an affidavit, the plaintiff's expert, board certified in obstetrics and gynecology, opined that a bladder injury could occur during a hysterectomy. The expert explained that when fistulas develop after a hysterectomy, it commonly manifests after 5 to 10 days post operation, and generally, surgical intervention is required to resolve the condition. A cystoscopy is used to visualize abnormalities in the lining of the bladder wall and the urethra and to diagnose intra-operative bladder injuries. According to the plaintiff's expert, Dr. Murphy's failure to perform a cystoscopy during the hysterectomy was a deviation from the accepted standard in medical care. The expert opined within a reasonable degree of medical certainty, that inasmuch as Dr. Murphy observed blood in the foley that was placed in the bladder before completing the hysterectomy, a cystoscopy was required to test for a bladder injury. Dr. Murphy's failure to perform the cystoscopy directly caused or contributed to the development of the fistula.

Here, plaintiff raised triable issues of fact by submitting the affidavit of her expert which contradicts Dr. Mucciolo's opinion. The plaintiff's expert opines that there was a deviation from accepted standard of care in Dr. Murphy's failure to perform a cystoscopy after the hysterectomy, which caused or contributed to the development of the fistula (see *Majid v Cheon-Lee*, 147 AD3d 66, 71, 45 NYS3d 592 [3d Dept 2016]). This presents an issue of credibility, which must be resolved by a fact-finder. Accordingly, the motion by Dr. Murphy for summary judgment dismissing the complaint is denied.

The unredacted affirmation of plaintiff's medical expert is being returned by mail to plaintiff's counsel simultaneously with the issuance of this Order.

Dated: Feb 29, 2020



J.S.C.
HON. DAVID T. REILLY

___ FINAL DISPOSITION X NON-FINAL DISPOSITION