

**Simone v Alam**

2020 NY Slip Op 35005(U)

December 1, 2020

Supreme Court, Nassau County

Docket Number: Index No. 603755/2017

Judge: John Michael Galasso

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU  
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....  
DEBORAH SIMONE and ROBERT SIMONE,

Plaintiff,

- against -

MAQSOOD ALAM, M.D., PAUL J. KUBIAK, M.D.,  
ISLAND MUSCULOSKELETAL CARE, MD, P.C., and  
MERCY MEDICAL CENTER,

Defendant.

Index No. 603755/2017  
Sequence # 002, 003, 004  
Motion Date: 10/21/2020

Part 13

.....	
Notice of Motion (Seq. 002).....	1
Affirmation in Opposition.....	2
Affirmation in Reply.....	3
Notice of Motion (Seq. 003).....	4
Affirmation in Opposition.....	5
Affirmation in Reply.....	6
Notice of Motion (Seq. 004).....	7
Affirmation in Opposition.....	8
Affirmation in Reply.....	9
.....	

Upon the foregoing papers, the motions of the defendants, Mercy Medical Center (Seq. #002), Dr. Paul J. Kubiak and Island Musculoskeletal M.D., P.C. (Seq. #003), and Maqsood Alam, M.D. (Seq. #004) each separately seeking summary judgment dismissing the complaint of plaintiffs, pursuant to CPLR § 3212 are determined as set forth below.

This is an action, sounding in medical malpractice, wherein the plaintiffs are seeking damages for personal injuries and lack of informed consent related to care and treatment rendered to the plaintiff, Deborah Simone, on or about January 23, 2015 and thereafter, and on May 12, 2015 and May 29, 2015 and thereafter, related to an alleged failure to properly diagnose and treat a MRSA infection in her right knee, resulting in amputation. Plaintiff, Robert Simone asserts a claim of loss of consortium.

Mercy Medical Center (hereinafter "MMC") contends that there were no departures from the applicable standards of care which proximately caused plaintiff's claimed injuries and that it is not vicariously liable for the treatment decisions of co-defendants, Dr. Alam and Dr. Kubiak. MMC asserts that the direct claims of malpractice asserted against MMC are limited to the treatment rendered to plaintiff during her May 29, 2015 – June 12, 2015 hospital admission only.

Plaintiff was admitted to MMC from January 23, 2015 to February 3, 2015, and from February 21, 2015 to May 1, 2015, for acute pancreatitis and abdominal abscesses with sepsis, and again from May 29, 2015 to June 12, 2015 for right knee pain with swelling and warmth associated therewith. Plaintiff seeks damages suffered due to the failure of defendants Dr. Alam and Dr. Kubiak, acting on behalf of MMC, to properly treat plaintiff for chronic MRSA infection located in her right knee, where she had a knee implant and other hardware. Plaintiff asserts that Dr. Alam, acting as the infectious disease physician, failed to advise or advocate for a removal of plaintiff's infected implant and that Dr. Kubiak, acting as plaintiff's orthopedic surgeon, failed to remove the implant, so that antibiotic could effectively treat the infection. Plaintiff contends that absent removal of the hardware a resurgence of the infection is expected despite continuing antibiotic treatment and the factor that required amputation of plaintiff's right leg above the knee.

In support of its motion, defendant, MMC, submits, *inter alia*, copies of the pleadings, plaintiff's bill of particulars, the deposition transcripts of plaintiffs, Deborah Simone and Robert Simone, defendant Dr. Maqsood Alam, M.D. (hereinafter "Dr. Alam"), defendant, Dr. Paul J. Kubiak, M.D. (hereinafter "Dr. Kubiak"), non-party witnesses, hospitalist, Dr. Alain Berthold (hereinafter "Dr. Berthold"), non-party witness nursing administrator, Bernadette Roche (hereinafter "Roche"), MMC records for plaintiff's January 2015 and February 2015 admissions and May-June 2015 admission, along with the expert affirmation of Dr. Alan M. Sanders, M.D. (hereinafter "Dr. Sanders").

Defendants, Dr. Kubiak and Island Musculoskeletal M.D., P.C. (Seq. #003) and Dr. Alam (Seq. #004) adopt and incorporate the factual history and exhibits and arguments set forth in co-defendant, MMC's motion for summary judgment.

The defendants contend that there were no departures from the standard of care of plaintiff which proximately caused plaintiff's injuries, and that plaintiff's claim for lack of informed consent and the derivative action of plaintiff's husband should be dismissed.

Dr. Sanders, , submits his affirmation on behalf of the defendants upon a review of the plaintiff's bills of particulars, medical records pertaining to the treatment rendered to plaintiff, including but not limited to the hospital records of MMC and Long Island Jewish Medical Center, the non-party records of Dr. Robert Michaels, and the deposition testimony of plaintiffs, co-defendants, Dr. Alam and Dr. Kubiak and non-party witnesses, Dr. Berthold and nurse administrator Roche, R. N..

Dr. Sanders is a physician Board Certified in Internal Medicine and infectious diseases who opines that plaintiff was an immunocompromised patient with underlying debilitating medical conditions, including her history of prolonged hospitalizations with pancreatitis, pneumonia and poor nutritional status, that are likely reasons for the development of infection in the knee. Dr. Sanders states in his affirmation that the MMC chart for plaintiff is replete with detailed progress notes demonstrating that the staff and doctors collectively elicited complete and accurate histories of plaintiff's significant prior treatment and conditions through proper physician examinations in accordance with good and accepted standards of medical practice. Dr. Sanders opines that Drs. Kubiak and Alam were both fully aware that plaintiff's right knee was infected from the outset from plaintiff's admission on May 29<sup>th</sup>, and took immediate action in

response thereto by implementing an appropriate treatment plan which called for surgical intervention plus an IV antibiotic regimen, with the standard of care applied to plaintiff's condition based upon subjective complaints, and proper monitoring of no significant changes or deterioration in the plaintiff's condition that warranted urgent attention at the time. In Dr. Sander's opinion, a number of IV antibiotics can be effective treatment for MRSA infections, including Vancomycin and Daptomycin and were appropriately received by plaintiff. In Dr. Sander's opinion the plaintiff would have required surgery regardless of the origin of the infection and the initial decision to perform a wash-out of the prosthetic joint without immediately removing the prosthesis. Dr. Sanders states in his affirmation that plaintiff was fully apprised of the risks, benefits and alternatives to the procedure as well as the potential problems that might occur during recuperation, with a signed document form confirming her understanding of same and expressing her desire to proceed with the surgery despite her knowledge of the risks and alternatives such that no reasonably prudent patient in plaintiff's position would have withheld consent for the surgery. Dr. Sanders concludes his affirmation stating that the plaintiff's amputation was the result of the non-healing surgical wound which was caused by devascularization of the skin due to her underlying conditions and complicated medical history which rendered her a poor healer and susceptible to infection, with no choice to avoid surgery and the risks associated therewith.

In opposition, plaintiffs submit, the physician affirmations of plaintiffs' experts, a physician Board Certified in Orthopedic Surgery and a physician Board Certified by the American Board of Internal Medicine (ABIM) in adult infectious disease. These experts base their opinions after reviewing the medical records of MMC and Long Island Jewish Medical Center and the deposition testimony of Dr. Kubiak and Dr. Alam.

The orthopedic expert opines that Drs. Kubiak and Alam failed to address progressive signs of wound deterioration and signs of infection in the wound and failed to order proper consultations with other physicians more qualified to handle plaintiff's condition of a septic right total knee arthrosis. In this expert's opinion the standard of care in 2015 for a chronic MRSA infection located at an implant or other internal hardware, was and is to remove the implant or hardware in totality so as to remove the source of infection and allow for proper healing with the administration of appropriate antibiotics. The orthopedic expert opines that it was the doctor's poor management of the underlying infection of the plaintiff's hardware that was not removed rather than the plaintiff's poor vascularity leading to poor wound healing and ultimately amputation. This expert concludes that it was a departure for Dr. Kubiak not to have evaluated the vasculature of the plaintiff's knee.

The infectious disease expert opines that plaintiff was not immunocompromised and that there is nothing in her medical history to suggest she had any nutritional deficiencies and more likely plaintiff developed the prosthetic joint infection due to her prior MRSA infection. This expert states in his affirmation that regardless of the cause of the failure of the wound to heal, the amputation was necessary because of the improperly treated infection, which should have been a 1 or 2 stage removal of the hardware and treatment with antibiotics in order to cure the MRSA infection. The infectious disease expert concludes that this wrong surgical decision was compounded by the failure to properly manage the surgical wound, contributing to the complexity of the medical/surgical problems faced by the plaintiff and leading to amputation of her leg.

It is well settled that summary judgment is designed to expedite the resolution of civil actions by eliminating from a court's trial calendar those claims that can be resolved as a matter of law. In most instances negligence cases (including medical malpractice claims) do not lend themselves to resolution by motion for summary judgment; however, where it can be established that there are no material issues of fact to be resolved, summary judgment may be appropriate. *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]; *Matusovkaya v. Valcourt*, 6 A.D.3d 507, 774 N.Y.S.2d 424 [2nd Dept. 2004].

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, 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 a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 593 [1980]).

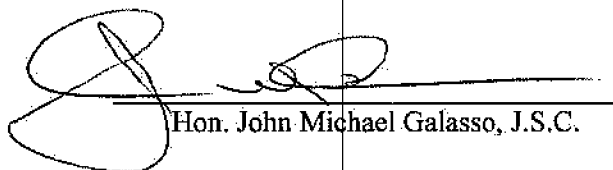
In the present case the parties have submitted conflicting medical expert opinions and "where the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution." (*Trueba v. Diflo*, 116 A.D.3rd 948, 949, 83 N.Y.S.2d 827 [2nd Dept. 2014]).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury." (*Wexlbaum v. Jean*, 80 A.D.3d 756, 758, 915 N.Y.S.2d 161 [2nd Dept. 2011]) See also, *Bjorke v. Rubenstein*, 53 A.D.3d 519, 861 N.Y.S.2d 757 [2nd Dept. 2008].

Accordingly, the motions of the defendants, Mercy Medical Center, (Seq. #002), Paul J. Kubiak and Island Musculoskeletal M.D., P.C. (Seq. #003), and Maqsood Alam, M.D. (Seq. #004), are denied.

This constitutes the decision and order of this Court. Any request for relief not expressly granted herein is denied.

Dated: December 1, 2020



Hon. John Michael Galasso, J.S.C.

**ENTERED**

Dec 16 2020

NASSAU COUNTY  
COUNTY CLERK'S OFFICE