

**Nodine v Foster**

2020 NY Slip Op 35019(U)

January 27, 2020

Supreme Court, Tompkins County

Docket Number: Index No. EF2018-0534

Judge: Gerald A. Keene

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At a Submitted Term of the Supreme Court of the State of New York, held in and for the County of Tompkins at the Tompkins County Courthouse in the City of Ithaca, New York on the 20<sup>th</sup> day of December, 2019.

**PRESENT: HON. GERALD A. KEENE  
ACTING SUPREME COURT JUSTICE**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF TOMPKINS

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BRUCE NODINE,

Plaintiff,

v.

CORA LEE FOSTER, M.D., SURGICAL  
ASSOCIATES OF ITHACA, P.C., CAYUGA  
MEDICAL CENTER AT ITHACA, INC.,

Defendants.

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GERALD A. KEENE, A.J.S.C.

**DECISION AND ORDER**

Index No. EF2018-0534

RJI No. 2019-0358-M

FINDINGS OF FACT

This medical malpractice action arises from surgical care received by the plaintiff from the defendants in October of 2016. The plaintiff appeared at the Cayuga Medical Center Emergency Department on October 4, 2016 complaining of pain in his right lower abdomen. The on-call surgeon, Dr. Foster, suspected appendicitis based on the examination of the plaintiff and arranged surgery for that day. During the surgery, the appendix was found to be normal, but it was determined that the plaintiff had a bowel perforation. A colostomy was performed to create a stoma. The stoma lost blood supply and a second surgery was performed on October 7, 2016 to perform an ileostomy.

The plaintiff was discharged from the hospital on October 12, 2016. On October 14, 2016, he returned to the emergency room at Cayuga Medical Center to address an infection and wound dehiscence that had developed. He was treated over the next two months and eventually had successful ostomy reversal surgery at a Syracuse hospital. The plaintiff has had normal bowel function after the surgery, but alleges that he had other complications following his treatment by the Syracuse surgeon; he relates these problems to negligence on the part of the defendants.

The defendants have moved for summary judgment to dismiss the Complaint. The defendants provided an affirmation from their expert, Dr. Richard T. MacDowell, a surgeon and Associate Professor of Surgery at Albany Medical Center. Based upon his review of the Complaint, Amended Bill of Particulars, transcripts of depositions of the plaintiff and Dr. Cora Lee Foster and the medical records of the plaintiff's treatment, he opines that there has been no departure from the standard of care and no medical malpractice on the part of the defendants.

The defendants also submitted an affirmation from Dr. Elizabeth Plocharczyk indicating that the metallic device found in the intestinal fragments was not something improperly left in the patient from his surgery. Rather, it was part of an anvil used during surgery to make an anastomosis.

In response, the plaintiff has offered an expert affirmation in opposition from a New York State licensed physician who is board certified in surgery. The surgeon's name has been redacted but provided in camera. See Marano v. Mercy Hosp., 241 A.D.2d 48 (2<sup>nd</sup> Dept., 1998); CPLR Section 3101(d)(1)(i). Plaintiff's expert opines that the defendants departed from generally accepted medical standards and that the departure was a substantial factor in causing injury to the plaintiff. Specifically, the plaintiff's expert alleges that the deviations on the part of the defendants were diagnosing appendicitis without ordering an imaging study, performing an unnecessary colostomy on the plaintiff, failing to consult with an infectious disease specialist, failing to obtain

sufficient bloodwork post-surgery, discharging the plaintiff without any antibiotics, discharging the plaintiff when he had an infection, and failing to consult with an infectious disease specialist during the plaintiff's second admission from October 15 to October 18, 2016.

Counsel for the defendants has submitted a reply affirmation arguing that the plaintiff's expert has not addressed some of the claims alleged by the plaintiff and that at least as to those claims, the motion for summary judgment should be granted.

#### CONCLUSIONS OF LAW

As explained by the Court in Derusha v. Sellig, 92 A.D.3d 1193 (3<sup>rd</sup> Dept., 2012), "the proponent of a motion for summary judgment in a medical malpractice action '[bears] the initial burden of establishing that there was no departure from accepted standards of practice or that plaintiff was not injured thereby.'" (Quoting Menard v. Feinberg, 60 A.D.3d 1135, 1136 (3<sup>rd</sup> Dept., 2009); Amodio v. Wolpert, 52 A.D.3d 1078, 1079 (3<sup>rd</sup> Dept., 2008)); see also Hayden v. Gordon, 91 A.D.3d 819 (2<sup>nd</sup> Dept., 2012). "The evidence produced by the movant must be viewed in the light most favorable to the nonmovant, affording the nonmovant every favorable inference...." Horth v Mansur, 243 A.D.2d 1041, 1042 (3<sup>rd</sup> Dept., 1997), citing Rizk v. Cohen, 73 N.Y.2d 98, 103 (1989). If this burden is met here by defendants, it will be incumbent on plaintiff to demonstrate the existence of a triable issue of fact. See Rosen v. John J. Foley Skilled Nursing Facility, 45 A.D.3d 558 (2<sup>nd</sup> Dept., 2007). Explained another way, "to defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing." Stukas v. Streiter, 83 A.D.3d 18, 24 (2<sup>nd</sup> Dept., 2011); see Sampson v. Contillo, 55 A.D.3d 588 (2<sup>nd</sup> Dept., 2008), citing Nichols v. Stamer, 49 A.D.3d 832 (2<sup>nd</sup> Dept., 2008); Berger v. Becker, 272 A.D.2d 565 (2<sup>nd</sup> Dept., 2000) ("To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment

occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury [citations omitted].”).

Through the affirmations of Dr. MacDowell and Dr. Plocharczyk, defendants have met their initial burden in demonstrating that there were no departures from established and/or accepted medical standards in the treatment of the plaintiff.

As alleged in paragraphs “6”, “7” and “8” of Dr. MacDowell’s affirmation, the examination of the plaintiff, symptoms he displayed and tests performed upon him indicated that he had acute appendicitis. The plaintiff agreed to have the doctor perform surgery. Upon proceeding with the laparoscopic appendectomy, it was discovered that the appendix was normal but that there was a perforation in the colon. An ostomy was performed by Dr. Foster. According to Dr. MacDowell, there was no medical malpractice on the part of the defendants.

With the burden now shifting to plaintiff, the record establishes he has shown “through competent expert medical opinion evidence, both a deviation from the accepted standard of care and that the departure was a proximate cause of [the injury]” (Daugharty v. Marshall, 60 A.D.3d 1219, 1221 (3<sup>rd</sup> Dept., 2009), quoting Bell v. Ellis Hosp., 50 A.D.3d 1240 (3<sup>rd</sup> Dept. 2008)) to preclude summary judgment. In reviewing plaintiff’s expert opinion affirmation, it is important to note that “summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” Feinberg v. Feit, 23 A.D.3d 517, 519 (2<sup>nd</sup> Dept., 2005), citing Shields v. Baktidy, 11 A.D.3d 671, 672 (2<sup>nd</sup> Dept., 2004); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623, 624 (2<sup>nd</sup> Dept., 2003); see also Adjetey v. New York City Health and Hosps. Corp., 63 A.D.3d 865 (2<sup>nd</sup> Dept., 2009) (“summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts [citations omitted].”). “Such credibility issues can only be resolved by a jury [citations omitted].” Feinberg v. Feit, *supra* at 519. Plaintiff’s expert raises issues of fact to defeat summary judgment,

in that he raises questions as to the reasonableness of the actions of Dr. Foster in not seeking a CT scan, performing the ostomy on the plaintiff, discharging him and not prescribing antibiotics upon plaintiff's discharge. Also, questions have been raised regarding whether Dr. Foster should have consulted with an infectious disease specialist. The record as a whole raises issues of fact as to whether Dr. Foster failed to take steps that would have avoided the plaintiff's surgery and the complications thereof.

The Court agrees with the defendants that the plaintiff's expert has not addressed the claims that there was a metallic object left in the plaintiff's abdomen, that the bowel was "allowed to perforate," that there was a public health law violation and that the surgery was performed below standards. As to those claims, the motion for a partial summary judgment is granted and the plaintiff shall be precluded from arguing these claims at trial.

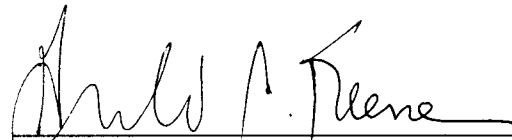
It is therefore,

ORDERED, that defendants' motion for summary judgment and dismissing the plaintiff's Complaint is denied; and it is further

ORDERED, that defendants' motion for partial summary judgment as to the plaintiff's claims of a foreign object being left in the plaintiff's abdomen, allowing the bowel to perforate, a public health law violation and the surgery being performed "below standards" is granted.

This shall constitute the Decision and Order of The Court.

Dated: January 27, 2020  
at Ithaca, New York

  
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HON. GERALD A. KEENE  
Acting Supreme Court Justice

ENTER: 01/27/2020