

Vega v Feinberg

2020 NY Slip Op 35132(U)

August 18, 2020

Supreme Court, Nassau County

Docket Number: Index No. 603697/18

Judge: James P. McCormack

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.

SUPREME COURT - STATE OF NEW YORK

PRESENT: *Honorable James P. McCormack*

Justice

_____X

ROSALIE VEGA,

**TRIAL/IAS, PART 18
NASSAU COUNTY**

Plaintiff(s),

-against-

Index No.: 603697/18

**JOSEPH FEINBERG, M.D., DOMINIC A.
FILARDI, M.D., NORTH SHORE
UNIVERSITY HOSPITAL, NORTHWELL
HEALTH,**

**Motion Submitted: 7/14/2020
Motion Seq.: 005**

Defendant(s).

_____X

The following papers read on these motions:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, Joseph Feinberg, M.D. (Dr. Feinberg), moves this court for an order, pursuant to CPLR 3212, granting him summary judgment and dismissing the complaint

against him. Plaintiff, Rosalie Vegas (Vega) opposes the motion.¹

Vega commenced this medical malpractice action by summons and complaint dated March 20, 2018. Issue was joined by service of an answer from North Shore University Hospital (NSUH) dated April 16, 2018. Dominic A. Filardi, M.D. (Dr. Filardi) interposed an answer dated April 25, 2018. Dr. Feinberg served an answer dated April 25, 2018. The case certified ready for trial on July 2, 2019 and a note of issue was filed on September 26, 2019.

On March 16, 2016, Vega was admitted to NSUH where Dr. Feinberg was to perform bilateral breast reconstruction. In 1998, after a diagnosis of cancer in Vega's left breast, Dr. Feinberg performed breast reconstruction after a mastectomy. In 2016, Vega was diagnosed with cancer in her right breast. It was determined that Vega would have a mastectomy, have the right breast removed, and Dr. Feinberg would replace implant in the left breast. On March 16, 2016, Dr. Filardi performed the mastectomy on the right breast, and Dr. Feinberg performed the breast reconstruction and replacement of the implant on the left breast. It is undisputed that, at all times, Vega was a heavy cigarette smoker. It is further undisputed by all parties that cigarette smoking impedes post-surgical healing.

¹Contemporaneously with the signing of this order, the court will sign an order on Motion Seqs 004 and 006. Motion 004 is a discovery motion brought by Vega against the Co-Defendants, Dominic A. Filardi, M.D., North Shore University Hospital, and Northwell Health. The court is mostly granting the relief sought in Motion Seq. 004, and recognizes that Vega's inability to access that information could have hampered her ability to oppose the within motion for summary judgment. However, the court finds that the within motion should be mostly denied, rendering the lack of discovery, as related to this motion, moot.

At 11:37 p.m., more than six hours after the procedure, a note in Vega's chart indicates that a doctor and a physician's assistant went to Vega's "bedside to assess ecchymosis." At 3:33 a.m. on March 17, a resident assessed the ecchymosis and circled the spot. Eight hours later, a note indicates "right breast ecchymotic with hematoma and Dr. Filardi aware and saw patient." While ecchymosis is discoloring or bruising of the skin, a hematoma indicates pooling of blood and potential bleeding.

Vega was discharged from the hospital on March 17, with a directive to contact Dr. Feinberg or Dr. Filardi if the ecchymosis or hematoma enlarged. It is undisputed that she did not contact either doctor prior to her scheduled follow-up on March 24 with Dr. Filardi. Further, Vega testified she resumed smoking. During the follow-up, it was noted that the spot had resolved significantly. During a March 29 follow up with Dr. Feinberg, he indicated the "hematoma" had resolved. He noted a small, dark area on the inferior flap. When Vega returned to see Dr. Feinberg on April 5, Dr. Feinberg noted eschar on the right breast. The eschar resulted in partial breast flap necrosis. Dr. Feinberg cleaned up the eschar, but had Vega admitted to Glen Cove Hospital the following day to debride the necrotic tissue. He also wanted to see if the implant had been exposed and to evaluate what was in the pocket. During the procedure on April 6, Dr. Feinberg noted some minor fluid in the pocket with no blood or blood products. After he cleaned the pocket, he inserted a new implant.

Vega returned to see Dr. Feinberg on April 19, on which date the wound was healing appropriately. However, during the April 26 follow-up visit, Dr. Feinberg noted further necrosis with imminent exposure of the implant. Dr. Feinberg then removed the implant and created a local flap for closure. He would not insert another implant since the chances of success were decreased after the first two failed attempts. Vega returned to see Dr. Feinberg on May 10 and Dr. Feinberg noted a 1.5 cm opening in the incision site. He told Vega to return in a week for vac therapy, but Vegas did not return to see Dr. Feinberg after that. Dr. Feinberg now moves for summary judgment, alleging that there were no deviations from the standard of care, and that there was informed consent.

It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

A defendant seeking summary judgment bears the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit

of its defense, rather than merely by pointing out gaps in the plaintiff's case (*Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]). Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, *supra*, at p. 852). The motion court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulettes Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, "[t]he courts function on a motion for summary judgment is 'to determine whether material factual issues exist, not to resolve such issues (citations omitted)'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

" 'In order 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' " (*DiGeronimo v Fuchs*, 101 AD3d 933, 935 [2d Dept 2012], quoting *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; *see also, Klein v Argoff*, 101 AD3d 1090 [2d Dept 2012]). Therefore, "[i]n an action sounding in medical malpractice, a defendant physician moving for summary judgment must establish, *prima facie*, either that there

was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries (emphasis added)" (*LeMaire v Kunchman*, 102 AD3d 659 [2d Dept 2013], citing *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]; *Stukas v Streiter*, *supra* at p. 24; *see also*, *Klein v Argoff*, *supra*; *DiGeronimo v Fuchs*, *supra*). " 'In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's [complaint and] bill of particulars (citations omitted)' " (*Bendel v Rajpal*, 101 AD3d 662, 663 [2d Dept 2012], quoting *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]).

"Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by the plaintiff in his or her complaint and bill of particulars are insufficient to make a *prima facie* showing that a defendant physician is entitled to judgment as a matter of law (citations omitted)" (*Bendel v Rajpal*, *supra*, at p. 663).

Once a defendant physician has made the requisite showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact with respect to the issues on which the defendant met the *prima facie* burden (*LeMaire v Kunchman*, *supra*, at p. 659 [citation omitted]). " '[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (citations omitted)' "

” (*Bendel v Rajpal, supra*, at p. 189, quoting *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2d Dept 2012]).

Furthermore, “ ‘[i]n a [medical] malpractice action, where causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not’ that the defendant’s deviation was a substantial factor in causing the injury (citations omitted)” (*Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010], quoting *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881 [2d Dept 2005]; see also, *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], *lv denied*, 92 NY2d 818 [1999]). “A plaintiff’s evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased the injury, ‘as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury (citations omitted)’ ” (*Goldberg v Horowitz, supra*, at p. 694, quoting *Alicea v Ligouri*, 54 AD3d 784 [2nd Dept 2008] [internal quotation marks omitted]),

In support of his motion, Dr. Feinberg submits, *inter alia*, the expert affirmation of Dennis Barek, M.D. (Dr. Barek). Dr. Barek is a physician Board Certified in Plastic Surgery.

Having reviewed the pleadings, the bills of particulars and the relevant medical records, Dr. Berek is of the opinion that Dr. Feinberg's care was all within the standard of care, and that he did not depart from good and accepted medical care. According to Dr. Berek, the post-operative issues Vega encountered were either the normal result of the surgery, or were caused by her smoking.

Dr. Berek's opinion becomes troublesome immediately, when he states that Vega did not suffer a hematoma, but instead "had post-surgical ecchymosis, which is not unexpected and which resolved within a week of the surgical procedures performed by the defendants." The problem is, both the hospital records and Dr. Feinberg's own records refer to the spot as a hematoma. Further, the records from Glen Cove Hospital indicate it was a "post-op hematoma". Because Dr. Berek distinguishes between the two, it is unlikely that Dr. Feinberg would use the terms ecchymosis and hematoma interchangeably. Yet Dr. Berek does not explain or address the hospital records labeling the issue a hematoma, nor Dr. Feinberg himself calling it hematoma. Based upon Dr. Berek's reasoning, if it was hematoma, then it was not a normal result of the surgery.

Next, Dr. Berek points out that during pre-surgical testing, Vega's hemoglobin and hematocrit were high, which he linked to tobacco use. The high levels lead to polythemia, which is increased production of red blood cells. The body increases red blood cell production to deliver oxygen to the tissues. This scenario "has serious

issue again, nor does he state whether any precautions needed to be taken as a result.

Dr. Barek repeatedly returns to the opinion that Vega's smoking was the cause of her many post-operation problems. But this then raises the question of why Dr. Feinberg (and Dr. Filardi), while knowing Vega's healing would be compromised by the smoking, did not recognize the hematoma as a potentially more serious problem, or why they did not seek to discover the source of it. Further, Dr. Barek does not explain why Vega's smoking wreaked havoc on the healing process on the right side, but caused no issue on the left side. It is possible there is a logical, medical explanation for the difference, but Dr. Barek does not address it.

For these reasons alone, the court finds that Dr. Feinberg has failed to establish entitlement to summary judgment as matter of law. The affirmation of the expert raises issues that go unaddressed, and actually contradicts Dr. Feinberg's findings that the original spot on the right breast was a hematoma.

However, even if the court found that Dr. Feinberg had met his burden, and the burden then shifted to Vega, the motion would still be denied. Vega offers the expert affirmation of Dr. Adam Schaffner, a physician Board Certified in Plastic Surgery, with a specialty in aesthetic plastic surgery. It was Dr. Schaffner that Vega went to see, and who finished her breast reconstruction after she stopped seeing Dr. Feinberg.

According to Dr. Schaffner, the hospital records from Vega's treatment are incomplete because there are no nurses notes and no doctors' progress notes. While this is addressed in a related order in this matter, the court agrees that an incomplete chart is a deviation from the standard of care. Dr. Schaffner also opines that discharging Vega

without discovering the source of the hematoma was a deviation from the standard of care. Because he agrees with Dr. Feinberg and Dr. Berek that smoking impedes healing, Dr. Schaffner opines that the presence of the hematoma required a more immediate and urgent response than the "wait and see" approach Dr. Filardi and Dr. Feinberg took. Instead, due to the smoking, Vega's age, and cancer history, Dr. Filardi and Dr. Feinberg should have diagnosed the source of the bleeding, stopped the bleeding and evacuated the collection of blood. Their failure to do so undermined Vega's ability to heal. As further proof, Dr. Schaffner points to wound on the left breast healing without issue. According to Dr. Schaffner, the interruption in healing caused by smoking is systemic, and should not have only announced itself on the right side. At the very least, this case is a "battle of the experts" matter and should be presented to a jury. (*Mehtvin v. Ravi*, 180 AD3d 661 [2d Dept 2020]).

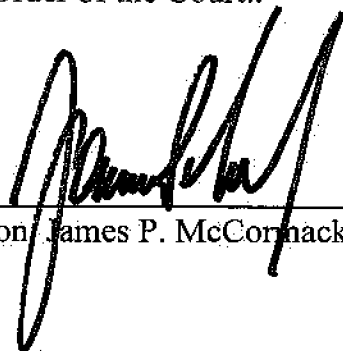
Finally, the court finds Dr. Feinberg has failed to establish entitlement to summary judgment on the issue of informed consent. Dr. Berek, in his affirmation, merely notes that informed consent forms were signed, but does not opine as to whether they effectively informed Vega of the risks associated with the procedures. (*Schussheim v. Barazani*, 136 AD3d 787 [2d Dept 2016]). As such, the motion to dismiss the cause of action for lack of informed consent will be denied regardless of the sufficiency of the opposition papers.

Accordingly, it is hereby

ORDERED, that Dr. Feinberg's motion for summary judgment is DENIED in its entirety.

The foregoing constitutes the Decision and Order of the Court..

Dated: August 18, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Aug 20 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE