

**Maltese v Winthrop Univ. Hosp.**

2020 NY Slip Op 35252(U)

April 27, 2020

Supreme Court, Nassau County

Docket Number: Index No. 608334/16

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK**

**PRESENT: HON. JACK L. LIBERT,**  
**Justice.**

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**CATERINA MALTESE,**

**Plaintiff,**

**-against-**

**WINTHROP UNIVERSITY HOSPITAL, WILLIAM KOKOTOS, M.D., CARDIOVASCULAR MEDICAL ASSOCIATES, P.C., PHILIP STEIN, M.D., JOSEPH ROTOLO, M.D., WINTHROP CARDIOVASCULAR AND THORACIC SURGERY, P.C., and SCOTT SCHUBACH, M.D.,**

**Defendants.**

**TRIAL PART 20**  
**NASSAU COUNTY**

**MOTION # 02, 03**  
**INDEX # 608334/16**  
**MOTION SUBMITTED:**  
**FEBRUARY 14, 2020**

**The following papers having been read on this motion:**

- Notice of Motion/Order to Show Cause.....1, 2**
- Cross Motion/Answering Affidavits.....3**
- Reply Affidavits.....4, 5**

Defendants Stein, Rotolo, Cardiovascular Medical Associates, P.C. move for summary judgment dismissing the case as against each of them and for partial summary judgment dismissing all allegations of negligence with the exception of vicarious liability for defendants Schubach and Kokotos (Motion No. 2). Defendants Kokotos, Schubach and Winthrop Cardiovascular and Thoracic Surgery P.C. move for summary judgment dismissing the case as to each of them (Motion No. 3).

On May 28, 2014 plaintiff presented to Winthrop Hospital complaining of difficulty with breathing and chest pains. After cardiac catheterization showing significant arterial blockages, plaintiff underwent bypass surgery, which was performed by defendant Dr. Kokotos on May 30, 2014. Hospital records show no surgical complications. Plaintiff was discharged on June 6, 2014. Dr. Stein, a cardiologist at defendant Cardiovascular Medical Associates saw the plaintiff on June 16, 2014 for followup care. Kokotos evaluated

plaintiff on July 2, 2014 for further followup. At that time among conditions noted in Kokotos' report were "incisional discomfort, shortness of breath, fatigue and erythema associated with the superior pole of her incision." Plaintiff was next seen at Winthrop Cardiothoracic Surgery, P.C. by Dr. Schubach and a nurse practitioner. At this visit plaintiff continued to complain about her incision. Plaintiff saw Dr. Stein again on July 14, 2014 and Dr. Kokotos again on August 6, 2014. On August 8, 2014 plaintiff presented at Winthrop complaining of "chest redness." Dr. Kokotos evaluated plaintiff in the emergency department and testified at his deposition that her symptoms may have been caused by a misalignment of the manubrium and sternum which "happens all the time." On August 19, 2014, plaintiff was seen by Dr. Rotolo, who noted that plaintiff "apparently suffered some degree of postoperative infection" at the site of the incision. On August 27, 2014 plaintiff presented to the emergency room at St. Francis Hospital with continuing complaints of sternal pain. At St. Francis, Dr. Marino (not a party to this action) noted "erythema overlying the superior aspect of the sternum surrounding the mid-sternotomy scar, although the scar itself looked to be well healed." Dr. Marino requested an evaluation by a plastic surgeon. A CT scan was interpreted as indicating sternal osteomyelitis. The following week the plaintiff underwent surgery to remove the wires in her sternum (from the original bypass procedure), to debride the sternal infection and to surgically reconstruct her chest with a chest wall advancement flap. Plaintiff remained at St. Francis until September 12, 2014.

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2nd Dept. 1989]). 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 [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 [1980]).

"A defendant moving for summary judgment in a medical malpractice action must demonstrate the

absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries (see *Gachette v Leak*, 172 AD3d 1327, 1329 [2019]; *Stukas v Streiter*, 83 AD3d 18, 23 [2011]). Where a defendant physician makes a *prima facie* showing on both elements, "the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element" (*Stukas v Streiter*, 83 AD3d at 25; see also *Gachette v Leak*, 172 AD3d at 1329)." *Rosenthal v Alexander*, 180 A.D.3d 826, 118 N.Y.S.3d 658, 2020 N.Y. Slip Op. 01101 [Second Dept., 2020]).

Plaintiff alleged that defendants departed from accepted standards of medical care by failing to timely diagnose and treat her surgical site, failing to refer her to a specialist for evaluation of her postoperative wound, failing to order necessary tests and failing to prevent severe infection. Plaintiff claims that these alleged departures proximately caused the injuries that required her to undergo the debridement and reconstructive surgery.

Moving defendants in each of their respective motions assert that the care they rendered complied with reasonable standards of care and in any event did not proximately cause plaintiff's injury. The moving defendants in Motion No. 2 offer as evidence the expert affidavit of Dr. Malcolm Phillips, who is board certified in internal medicine and cardiology. Dr. Phillips opined with a reasonable degree of medical certainty "that the care rendered by the moving Defendants [in Motion No. 2] conformed to the standard of care... [and] the moving defendants did not proximately cause the plaintiff's claimed injuries.

Likewise, the moving defendants in Motion No. 3 submitted an expert opinion in support of their *prima facie* case for summary judgment. In his detailed report Dr. Robert Duntona, a cardiothoracic surgeon concluded "with a reasonable degree of medical certainty that care and treatment of William Kokotos, M.D., Winthrop Cardiovascular and Thoracic Surgery, P.C. and Scott Schubach, M.D. at all times conformed to the standard of care and did not proximately cause the plaintiff's claimed injuries."

Plaintiff submitted its own expert opinions, one from a board certified cardiothoracic surgeon, the second from a board certified cardiologist and the third from an internist also board certified in infectious diseases. Each of these experts opined “with a reasonable degree of medical certainty” that all of the defendants departed from accepted standards of medical care in connection with each of the departures alleged by plaintiff and the departures proximately caused plaintiff’s alleged injuries.

In *Rosenthal (supra)* the Second Department upheld the lower court’s decision denying summary judgment to defendants finding that the expert reports provided by plaintiff raised triable issues of fact concerning both departures and proximate cause. The same holds true in the case at bar. Issues of fact raised concerning whether defendants departed from medical standards include the continuation of oral antibiotics after failure of two prior courses; failure to diagnose or suspect that plaintiff had a deeper infection rather than the diagnoses of cellulitis; alleged misreading of the CT scan taken on August 8, 2014; failure of defendants Stein and Rotolo to participate in post-operative management of the sternal surgical wound; and failure to earlier diagnose and treat plaintiff’s sternal osteomyelitis. Inherent in each of these issues concerning departures is also the issue of causation.

The motions (Motion No. 2 and No. 3) for summary judgment are in all respects denied.

This constitutes the decision and order of the court.

**E N T E R**

DATED: April 27, 2020

**ENTERED**

/s/

Apr 29 2020

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**HON. JACK L. LIBERT**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

**J. S. C.**