

Palazzolo v Schmitt
2020 NY Slip Op 35293(U)
October 7, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 600412/2015
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 600412/2015
CAL. No. 19-00102MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 6/19/19 (001)
MOTION DATE 9/23/19 (002)
ADJ. DATE 8/27/20
Mot. Seq. # 001 MG
002 XMD

TAMMY L. PALAZZOLO,

Plaintiff,

- against -

GERI A. SCHMITT, M.D., EAST END
WOMEN'S HEALTHCARE, P.C., MEDHAT
E. ALLAM, M.D., MEDHAT E. ALLAM,
M.D., P.C., EASTERN LONG ISLAND
SURGERY, P.C., SOUTHAMPTON
HOSPITAL and THE SOUTHAMPTON
HOSPITAL ASSOCIATION,

Defendants.

SILBERSTEIN, AWAD & MILKOS, P.C.
Attorney for Plaintiff
600 Old Country Road
Garden City, New York 11530

KERLEY, WALSH, MATERA & CINQUEMANI
Attorney for Defendant Schmitt and East End
Women's Healthcare, PC
2174 Jackson Avenue
Seaford, New York 11783

AARONSON RAPPAPORT FEINSTEIN &
DEUTSCH, LLP
Attorney for Defendants Allam and
Eastern Long Island Surgery
600 Third Avenue, 5th Floor
New York New York 10016

BARTLETT LLP
Attorney for Defendants
320 Carleton Avenue, Suite 7500
Central Islip, New York 11722

Upon the following papers read on these e-filed motions for summary judgment, to preclude : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant Medhat E. Allam, M.D., and Eastern Long Island Surgery, P.C., on May 16, 2019 ; Notice of Cross Motion and supporting papers filed by plaintiff, on September 6, 2019 ; Answering Affidavits and supporting papers filed by defendant Southampton Hospital and The Southampton Hospital Association, on June 13, 2019; filed

Palazzolo v Schmitt
Index No. 600412/2015
Page 2

by plaintiff, on September 6, 2019; filed by defendants Geri A. Schmitt, M.D., and East End Women's Healthcare, P.C., on September 16, 2019; Replying Affidavits and supporting papers filed by plaintiff, on September 27, 2019; filed by defendants Medhat E. Allam, M.D., and Eastern Long Island Surgery, P.C. on October 7, 2019; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#001) by defendants Medhat E. Allam, M.D., and Eastern Long Island Surgery, P.C., and the motion (#002) by plaintiff Tammy L. Palazzolo are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Medhat E. Allam, M.D., and Eastern Long Island Surgery, P.C., for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that the motion by plaintiff Tammy L. Palazzolo for an order precluding the application of CPLR Article 16 is denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Tammy L. Palazzolo by defendants Geri A. Schmitt, M.D., East End Women's Healthcare, P.C., Medhat E. Allam, M.D., Medhat E. Allam M.D., P.C., Eastern Long Island Surgery P.C. ("ELIS"), Southampton Hospital and The Southampton Hospital Association. With respect to the instant motions, plaintiff alleges, *inter alia*, that Dr. Allam and ELIS (collectively "Dr. Allam") negligently performed a hernia repair on her, causing injury to her bladder. Plaintiff asserts causes of action sounding in medical malpractice and lack of informed consent.

The facts, as they relate to the instant motions, can be summarized as follows: on May 14, 2012, after experiencing abdominal pain, plaintiff was diagnosed with an ovarian cyst by Dr. Scarbrough of East End Women's care. Dr. Scarbrough then referred plaintiff to non-party colorectal surgeon, Dr. Ruffo. Dr. Ruffo ordered a CT scan of plaintiff's abdomen and pelvis, which revealed a small to moderate sized hiatal hernia. On or about May 22, 2012, plaintiff returned to Dr. Scarborough, and, after consultation, plaintiff opted to undergo a laparoscopic, bilateral salpingo-oophorectomy with another OBGYN, Dr. Schmitt, as Dr. Scarbrough did not perform the procedure. On June 4, plaintiff was evaluated pre-operatively by Dr. Schmitt. Dr. Schmitt testified that she discussed the risks of the procedure, including the potential for bladder injury and the possibility of conversion to an open laparotomy if plaintiff's abdominal adhesions were extensive. Dr. Schmitt testified that plaintiff acknowledged the risks and chose to proceed.

On June 16, Dr. Schmitt performed the laparoscopic, bilateral salpingo-oophorectomy at Southampton Hospital. During the procedure, Dr. Schmitt testified that plaintiff's previously diagnosed hiatal hernia was incarcerated, which could lead to strangulation or obstruction. Dr. Schmitt testified that this finding was a surgical emergency, and that she called for a surgical consult with Dr. Allam. Dr. Allam responded to the operating room after plaintiff had already been put under general anesthesia, and after the surgery had begun. Dr. Allam performed lysis of plaintiff's abdominal adhesions and repaired the incarcerated incisional hernia. Dr. Allam utilized surgical mesh and tacks to secure the mesh to

Palazzolo v Schmitt
Index No. 600412/2015
Page 3

plaintiff's abdominal wall. Dr. Allam noted that there were no complications and that her blood loss was minimal.

After plaintiff's surgery was completed, she complained post-operatively of abdominal pain, increased flatulence, and her blood in her urine. Dr. Schmitt suspected bladder perforation and ordered a CT cystogram, which confirmed a bladder perforation. On July 17, Dr. Allam, who was assisted by non-party urologist Dr. Mukelwitz, performed a laparoscopic bladder perforation repair. Dr. Allam repaired the perforation with sutures and confirmed the repair using Methylene blue saline fluid to test for leaks, and found none. On July 20, plaintiff was discharged from Southampton Hospital.

Dr. Allam and ELIS now move for summary judgment dismissing the complaint as asserted against them, arguing that Dr. Allam did not deviate or depart from the applicable standard of care in his surgical and post-operative care of plaintiff, or, that if there was a deviation or departure, that it was not the proximate cause of plaintiff's alleged injuries. Dr. Allam further argues that, as a physician who was called to consult plaintiff's attending gynecologist intraoperatively, he did not have a duty to obtain her informed consent, as she was unconscious and because the procedure was emergent. In support of his motion, Dr. Allam submits, *inter alia*, the affirmation of George Denoto, M.D., portions of the transcripts of the depositions of plaintiff, Dr. Schmitt, Dr. Allam, and Dr. Scarbrough, and portions of plaintiff's uncertified medical records from East End Women's Care, ELIS, and Southampton Hospital. Plaintiff opposes the motion, arguing that questions of fact exist with respect to whether Dr. Allam deviated or departed from the applicable standard of care in his treatment of her, and with respect to the proximate cause of her injuries. Plaintiff does not oppose Dr. Allam's motion for summary judgment on the cause of action for lack of informed consent. Plaintiff submits, *inter alia*, the affirmation of a physician, the transcripts of the deposition testimony of plaintiff, Dr. Allam, and Dr. Schmitt, and plaintiff's medical records.

Initially, the Court notes that while Dr. Allam has submitted uncertified copies of plaintiff's medical records, plaintiff does not challenge their admissibility and references their contents in opposition. Since there is no prejudice to any substantial right of the plaintiffs by the lack of certification, the records will be considered admissible (*Matter of Robert E. Havell Revocable Trust v Zoning Bd. of Appeals of Vil. of Monroe*, 127 AD3d 1095, 8 NYS3d 353 [2d Dept 2015]; see CPLR 2001). Additionally, in civil cases, "inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess" (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54, 984 NYS2d 401 [2d Dept 2014]; see *Alfaro v Lavacca*, __ AD3d __, 2020 NY Slip Op 05173 [2d Dept 2020]).

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment, and a breach of this duty constitutes medical malpractice (see *Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice, and that such departure proximately caused his or her injuries (see *Gross v Friedman*, 73 NY2d 721, 535

Palazzolo v Schmitt
Index No. 600412/2015
Page 4

NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]).

To establish his or her entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (see *Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 33 NYS3d 369 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]). If such a showing is made, the burden then shifts to the plaintiff to submit evidentiary facts or materials in rebuttal, but only as to those elements on which the defendant met his or her *prima facie* burden (see *Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]; *Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter*, *supra*). Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact in a medical malpractice action (see *Wagner v Parker*, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2d Dept 2017]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2d Dept 2017]).

Dr. Allam has established, *prima facie*, entitlement to summary judgment dismissing the complaint as asserted against him. Dr. Allam submits the affirmation of George Denoto, M.D., who avers that he is licensed to practice medicine in New York State and that he is board certified in surgery. Dr. Denoto states that he is fully familiar with the standards of care as they existed in 2012 with respect to general surgery and the performance of hiatal hernia repair and salpingo-oophorectomies. Dr. Denoto opines, within a reasonable degree of medical certainty, that Dr. Allam and ELIS comported with the applicable standard of care at all times with respect to the treatment provided to plaintiff. Further, Dr. Denoto opines, within a reasonable degree of medical certainty, that no action or inaction on the part of Dr. Allam or ELIS caused plaintiffs alleged injuries. Dr. Denoto opines that Dr. Allam properly performed plaintiff's July 16, 2012 hernia repair and adhesion takedown surgery properly. Dr. Denoto opines that it was proper for Dr. Allam to utilize mesh and Absorba Tacks, and that such use was within the standard of care in 2012. Dr. Denoto opines that bladder perforation was a "well-known" risk of the hernia repair procedure, and that Dr. Schmitt properly informed plaintiff of this risk. Dr. Denoto states that a bladder perforation, in and of itself, does not constitute a departure from the standard of care. Dr. Denoto opines that there was no indication of bladder injury during the procedure itself, and states that the standard of care did not require a surgeon to test for bladder injury intraoperatively, if there was no indication of injury.

With respect to the July 17, 2012 bladder repair, Dr. Denoto opines, within a reasonable degree of medical certainty, that Dr. Allam's repair of plaintiff's bladder perforation comported with the standard of care. Dr. Denoto states that Dr. Allam properly sutured the perforation, checked the repair

Palazzolo v Schmitt
Index No. 600412/2015
Page 5

with Methylene blue saline, and ensured there was no leak. Further, Dr. Denoto opines, within a reasonable degree of medical certainty, that the post-operative care provided to plaintiff by Dr. Allam was proper. Dr. Denoto states that plaintiff did not experience any complications post-operatively, and that plaintiff was also followed by a urologist, Dr. Munkelwitz. Dr. Denoto opines that it was proper for Dr. Allam to rely on the expertise of a urologist. Dr. Denoto also notes that plaintiff denied any new complaints to either Dr. Allam or Dr. Munkelwitz post-operatively.

Dr. Denoto opines, within a reasonable degree of medical certainty, that the care and treatment provided by Dr. Allam did not proximately cause plaintiff's alleged injuries. Dr. Denoto states that bladder perforation is a known risk of hernia repair surgery. Dr. Denoto further explains that surgical mesh erosion is a known risk, and erosion does not reflect a departure from the standard of care. Dr. Denoto also notes that plaintiff denied dysuria, urinary frequency, and significant hematuria when she was seen by Dr. Munkelwitz on September 17, 2012.

With respect to plaintiff's cause of action for lack of informed consent, lack of informed consent "is a distinct cause of action which requires proof of facts not contemplated by an action based merely on allegations of negligence" (*Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 694, 48 NYS3d 455 [2d Dept 2017]; see Public Health Law § 2805-d). To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must establish: (1) that the physician failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the procedure that a physician in a similar circumstance would have disclosed; (2) that a reasonably prudent person in the plaintiff's position would not have undergone the procedure if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the procedure; and (3) that the lack of informed consent is a proximate cause of the injury sustained (see Public Health Law § 2805-d [1]; *Orphan v Pilnik*, 15 NY3d 907, 914 NYS2d 729 [2010]; *Lynn G. v Hugo James v Greenberg*, 96 NY2d 306, 728 NYS2d 121 [2001]; *Gilmore v Mihail*, 174 AD3d 686, 105 NYS3d 504 [2d Dept 2019]; *Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]). It is the obligation of a patient's private physician to obtain informed consent (see Public Health Law § 2805-d [1]; *Cynamon v Mount Sinai Hosp.*, 163 AD3d 923, 81 NYS3d 520 [2d Dept 2018]; *Sela v Katz, supra*; *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 48 [2d Dept 2008]; *Cirella v Central Gen. Hosp.*, 217 AD2d 680, 630 NYS2d 93 [2d Dept 1995]). Here, Dr. Allam submits the affirmation of Dr. Denoto. Dr. Denoto opines that Dr. Schmitt, as plaintiff's physician, had the duty to obtain her informed consent prior to the July 16 surgery. Dr. Denoto notes that Dr. Allam was not consulted by Dr. Schmitt, and did not arrive to the operating room, until after the surgery had commenced and plaintiff was under anesthesia. Further, Dr. Denoto states that plaintiff's incarcerated hernia, discovered intraoperatively, was a surgical emergency requiring immediate treatment. Dr. Denoto opines that, as plaintiff had previously been informed of, and consented to, additional procedures if complications arose, and because the hernia repair was emergent, the informed consent was proper.

Dr. Allam having met his *prima facie* burden on the motion for summary judgment dismissing the cause of action for medical malpractice, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stiso v Berlin*, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; *Stukas v Streiter, supra*). Plaintiff submits the

Palazzolo v Schmitt
Index No. 600412/2015
Page 6

affirmation of a physician, who avers that he or she is licensed to practice medicine in New York and New Jersey. However, as plaintiff's expert fails to lay any foundation for his or her opinion that Dr. Allam departed or deviated from good and accepted practice in her treatment of the plaintiff, such as his specialty, training, or experience, his opinion as to any deviation or departure is not reliable (*see Matott v Ward*, 48 NY2d 455, 459, 423 NYS2d 645 [1979]; *Galluccio v Grossman*, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; *cf. Schmitt v Medford Kidney Center*, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). Further, plaintiff's expert fails to identify or define the applicable standard of care under the circumstances, rendering his opinion speculative and conclusory (*see Schmitt v Medford Kidney Ctr., supra; DeLaurentis v Orange Regional Med. Center-Horton Campus*, 117 AD3d 774, 985 NYS2d 709 [2d Dept 2014]). As plaintiff's expert's affirmation lacks any probative value, it is insufficient to raise any triable issues of fact (*see Wagner v Parker, supra; Bowe v Brooklyn United Methodist Church Home, supra; Kerrins v South Nassau Communities Hosp., supra*). Moreover, the affirmation of an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the plaintiff's submissions fail to present admissible evidence of any departures or deviations from good and accepted practice, she fails to rebut Dr. Allam's *prima facie* showing of entitlement to summary judgment (*see Matott v Ward, supra; Wagner v Parker, supra; DeLaurentis v Orange Regional Med. Center-Horton Campus, supra*). Therefore, Dr. Allam and ELIS's motion for summary judgment dismissing the complaint as asserted against them is granted.

Plaintiff cross-moves for an Order precluding any defendant from obtaining the limited liability benefits of Article 16 in relation to the acts or omissions of a defendant granted summary judgment dismissing plaintiff's complaint against him, her, or it. Plaintiff argues that by failing to oppose Dr. Allam and ELIS's motion for summary judgment, the remaining defendants should be precluded from asserting an Article 16 defense at trial. Dr. Schmitt and East End Women's Healthcare oppose the motion, arguing that the cross motion is premature and that it is prejudicial for plaintiff to seek to preclude rights of the defendants in this action as expert disclosure has not been completed.

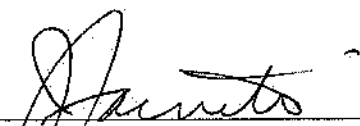
CPLR 1601 "modifies the common-law rule of joint and several liability by making a joint tortfeasor whose share of fault is 50% or less liable for plaintiff's non-economic loss only to the extent of that tortfeasor's share of the total non-economic loss (*Chianese v Meier*, 98 NY2d 270, 275, 746 NYS2d 657 [2002]; *see Rangolan v County of Nassau*, 96 NY2d 42, 725 NYS2d 611 [2001]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 955 NYS2d 384 [2d Dept 2012]; *Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]). Thus, "low-fault tortfeasors are liable only for their actual assessed share of responsibility, rather than the full amount of plaintiff's non-economic loss" (*Chianese v Meier, supra* at 275). However, when a codefendant is dismissed from an action as the result of a summary judgment motion, a remaining defendant has no basis for seeking Article 16 apportionment of liability with respect to the dismissed codefendant. Nevertheless, the motion is denied. The statutory right of apportionment must be proved by the party asserting such defense at the time of trial. The assertion of an Article 16 defense does not shift to a defendant claiming such a defense the burden of establishing the negligence of a codefendant seeking summary judgment (*see CPLR 1603; Marsala v Weinraub*, 208 AD2d 689, 617 NYS2d 809 [2d Dept 1994]). Further, "equity requires that the defendants have the benefit of their rights under CPLR Article 16, such that if their culpability is

Palazzolo v Schmitt
Index No. 600412/2015
Page 7

50% or less, their exposure for economic damages should be limited proportionately to their share of fault (*Moy v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 92 AD3d 651, 652, 938 NYS2d 328 [2d Dept 2012]; see CPLR 1601 [1]).

Accordingly, the motion by Dr. Allam and ELIS for summary judgment in their favor dismissing the complaint is granted, and the cross motion of plaintiff to preclude any remaining defendant from asserting an Article 16 defense at trial is denied.

Dated: October 7, 2020



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION