Campisi v Lutheran Med. Ctr.
2021 NY Slip Op 30768(U)
February 25, 2021
Supreme Court, Kings County
Docket Number: 518449/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MARIE CAMPISI,

Plaintiffs,

-against-

LUTHERAN MEDICAL CENTER, JOSEPH FREEDMAN, M.D., TAUQEER AHMAD, M.D., STEVEN ATHANAIL, M.D., JOSE ARJONA, M.D. and FRANK LACQUA, M.D.,

Defendants.

Index No.: 518449/2016

AMENDED DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed......................	1-2, 3-4, 5-6, 7-8, 9-10
Order to Show cause and Affidavits Annexed............	
Answering Affidavits...	11
Replying Affidavits..	12, 13
Exhibits...	
Other: .... (memo)...	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Frank Lacqua, M.D. ("Dr. Lacqua"), (seq. 7); Steven Athanail, M.D. ("Dr. Athanail"), (seq. 8); Joseph Freedman, M.D. ("Dr. Freedman"), (seq. 9); Tauqeer Ahmad, M.D. ("Dr. Ahmad"), (seq.10); Lutheran Medical Center ("Lutheran") (seq. 11); and Jose Arjona, M.D. ("Dr. Arjona") (seq. 12) have each moved pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of plaintiff's complaint upon the grounds that they were neither negligent nor departed from accepted medical or hospital malpractice with respect to the care and treatment that was rendered to the

plaintiff Marie Campisi, and there are no issues of fact which would warrant a trial in this matter.

Counsel for the plaintiff, has opposed the motion for summary judgment of defendants Dr. Athanail and Lutheran upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiffs, as against these defendants, for negligence, medical and hospital malpractice, and whether the departure from good and accepted practice through their acts and omissions was a proximate cause of the plaintiff's injuries. Plaintiff's counsel has not opposed the Motion to Dismiss by defendants Dr. Lacqua, Dr. Freedman, Dr. Ahmad and Dr. Arjona.

Background:

The within action sounding in medical malpractice was commenced by the filing of a summons and complaint with the Clerk of this Court, on or about October 19, 2016. Thereafter, an Amended Summons and Complaint was filed on January 25, 2017 and a second Summons and Complaint was filed on May 10, 2018. Issue was joined by the service of the verified answer of the defendants.

The plaintiff alleges that defendants Dr. Athanail and Lutheran failed to institute appropriate and timely medical treatment; failed to timely and properly diagnose and treat the plaintiff's perforated colon; failed to timely and appropriately perform a diagnostic surgical intervention at Lutheran while a patient from May 1 through May 4, 2016, as well as failed to provide an appropriate and timely follow up following her discharge from Lutheran. These alleged failures resulted in the plaintiff having to undergo emergency surgery at Maimonides Medical Center ("Maimonides") on May 20, 2016.

A deposition was conducted of the plaintiff Ms. Campisi, as well as that of defendants Dr. Athanail, Dr. Lacqua, Dr. Freedman, Dr. Ahmad and Dr. Arjona.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about October 2, 2019.

Facts:

On November 16, 2015, the plaintiff then 68 years old presented to her primary care physician, Dr. John Lazzara with complaints of having lower abdominal and groin pain, as well as nausea and constipation.[1] Dr. Lazzara advised the plaintiff to follow up with her gastroenterologist as her last colonoscopy was eight years prior and offered a recommendation to take both an enema and Miralax to address her symptoms. The plaintiff returned to Dr. Lazzara's office approximately two weeks later (December 1, 2015) having had increased pain over the prior five days, as well as was experiencing cramping and belching. Following another exam of the patient's abdomen, in which the doctor noted tenderness upon palpation of the left lower quadrant, it was his impression that the plaintiff had diverticulitis of the large intestine. Dr. Lazzara prescribed antibiotics and made another referral to the patient's gastroenterologist, Dr. Anthony Palagiano.

The plaintiff presented to Dr. Lacqua, a colorectal surgeon on or about January 14, 2016. At that visit, Dr. Lacqua scheduled plaintiff for a colonoscopy which was performed on February 16, 2016. The results revealed diverticulosis of the sigmoid colon and a recommendation was made for plaintiff to undergo a CT scan of the abdomen in order to further evaluate the plaintiff's lower abdominal pain.

Ten days later (February 27, 2016) the plaintiff presented to the Emergency Department of Lutheran with complaints of chest and lower abdominal pain as well as constipation. Defendant Dr. Freedman was the attending ER physician during this admission. Upon exam of her abdomen, tenderness was noted in the left lower quadrant. A CT scan of her abdomen which was interpreted by Dr. Arjona (radiologist) revealed mucosal thickening of the distal descending and sigmoid colon which was deemed to be consistent with a finding of colitis, as well as mild pericolonic stranding and scattered diverticuli. A review of the CT scan showed no evidence of a perforation or abscess and the lab results revealed a normal white blood cell count. The plaintiff was discharged from the hospital, at which time she was prescribed Amoxicillin, instructed to drink 8 to 12 glasses of water daily, and to follow-up with her primary care physician.

[1] The plaintiff's medical history included hypertension, elevated cholesterol, cholelithiasis, jaundice, diverticulosis, as well as non-insulin diabetes.

On March 10, 2016, the plaintiff had a follow-up appointment with Dr. Lacqua. Following a review of the plaintiff's lab work and a CT scan that was taken at Lutheran, Dr. Lacqua surmised that the patient had mild diverticulitis. Based upon that diagnosis, the doctor prescribed several medications (antibiotics and an anti-inflammatory bowel medicine) and placed the plaintiff on a liquid diet. Dr. Lacqua allegedly followed up with the patient four days later by phone and was advised that she was feeling better.

On April 10, 2016, the plaintiff returned to Lutheran's Emergency Department, with complaints of nausea, vomiting, abdominal pain as well as not having had a bowel movement for four days prior thereto. Defendant Dr. Ahmad was the attending on-call physician in the Family Practice unit during this admission. Another CT scan of the abdomen and pelvis was taken which revealed left-sided colitis, diverticulosis, but no evidence of a perforation or abscess. A gastroenterologist, Dr. Yitzchak Moshenyat, performed a GI consult and was of the belief that the plaintiff had colitis with a possibility of diverticulitis and recommended that the plaintiff undergo another colonoscopy. After a three day hospitalization, the plaintiff was discharged with instructions to continue with antibiotics.

The plaintiff was once again seen by Dr. Lacqua on April 28, 2016 as she was having complaints of lower abdominal pain. Dr. Lacqua recommended the plaintiff undergo a barium enema and depending on those results, a diagnostic laparoscopy and/or laparotomy to further analyze the colon may have been necessary.

On May 1, 2016, the plaintiff returned to Lutheran's Emergency Department, where she had complaints of suprapubic colicky pain and abdominal pain associated with vomiting and nausea. Upon exam, the plaintiff's abdomen was found to be soft, non-distended with positive bowel sounds and tenderness to palpation in the left lower quadrant. An abdominal x-ray revealed no acute findings. A CT scan of the abdomen and pelvis revealed persistent colonic wall thickening and inflammation in the sigmoid colon, but no evidence of a colonic perforation or intestinal obstruction on the CT scan. The plaintiff was then admitted to the hospital and Dr. Athanail was the on-call attending physician at Lutheran. The infectious disease team evaluated the plaintiff and their

analysis of her condition was that her clinical picture was consistent with one having recurrent c.difficile colitis and that diverticulitis was unlikely. The plaintiff's symptoms did begin to improve and the plan of treatment was to continue the patient on IV Flagyl with vancomycin. During the course of the admission the plaintiff allegedly did not exhibit any signs or symptoms of an intestinal obstruction or perforation. The plaintiff was discharged from the hospital on May 4th, when the patient was able to tolerate a regular diet, was pain free and had no diarrhea.

Eight days later on May 12th, the plaintiff sought treatment with Dr. Robin Baradarian, a gastroenterologist where she had complaints of heartburn, vomiting, bloating and acid reflux. The exam of plaintiff's abdomen found it to be soft, non-tender and non-distended with good bowel sounds. Pursuant to the recommendation of Dr. Baradarian, the plaintiff underwent both an upper endoscopy and an abdominal sonogram. The results of the abdominal sonogram revealed mild fatty infiltration of the liver with gallstones. The findings from the upper endoscopy were erythema of the esophagus, antrum and stomach as well as mild to moderate gastric inflammation. As a result, Dr. Baradarian recommended that the plaintiff undergo a CT scan of the chest, abdomen and pelvis as well as a barium esophagram.

On May 20th, the plaintiff presented to Maimonides with complaints of a sudden onset of abdominal pain. A CT scan of the abdomen showed a bowel obstruction at the distal sigmoid colon with perforation, colonic wall thickening and evidence of spillage. An emergency laparotomy was performed which revealed a perforated cecum with mass versus stricture in the sigmoid colon. The plaintiff then underwent a right hemicolectomy, end ileostomy and creation of a transverse colon mucous fistula. The plaintiff remained a patient at Maimonides until June 7th when she was transferred to Hamilton Park Nursing Home, for post-surgical rehabilitation.

On August 9, 2016, the plaintiff was readmitted to Maimonides where she underwent an open resection of the sigmoid colon and reversal of the ileostomy and lysis of peritoneal adhesions. The plaintiff was discharged one month later on September 8th.

Parties' Contentions:

As plaintiff's counsel has not opposed the Motion to Dismiss by defendants Dr. Lacqua, Dr. Freedman, Dr. Ahmad and Dr. Arjona, the only motions the Court will address are the Motions to Dismiss by Dr. Athanail and Lutheran.

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Dr. Athanail and Lutheran, and if they deviated from the standard of medical and hospital care in the treatment of the plaintiff while at Lutheran.

In support of the motion for summary judgment by defendant Dr. Athanail, counsel offers the affirmation of George C. Fisher, M.D. ("Dr. Fisher"), who opines that the care and treatment provided by Dr. Athanail was at all times in accordance with good and accepted medical practice, and none of his alleged acts or omissions caused or contributed to plaintiff's alleged injuries.

In support of the motion for summary judgment by defendant Lutheran, counsel offers the affirmation of Daniel Feingold, M.D. ("Dr. Feingold"), who opines that the care and treatment rendered to the plaintiff at Lutheran was at all times in accordance with good and accepted medical practice, the plaintiff did not have a perforated colon during any of her admissions to Lutheran, and that no act or omission on behalf of Lutheran caused or contributed to the plaintiff's alleged injuries.

Plaintiff, by her attorneys, opposes the defendants' motions for summary judgment, arguing that the defendants committed specific acts of malpractice in the treatment of the plaintiff, such as failing to timely and properly diagnose the plaintiff's perforated colon, which plaintiff claims caused and/or contributed to a difficult operative course, serious post-operative complications, such as sepsis and organ dysfunction, and the development of permanent bowel problems, pain, and difficulty tolerating food.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from

accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that the defendants have presented evidence sufficient to meet this burden, including expert affirmations. Defendant Dr. Athanail's expert, Dr. Fisher, states that Dr. Athanail performed an appropriate evaluation of the plaintiff over the course of her admission to Lutheran from May 1 to May 4, 2016. Dr. Fisher asserts that it was appropriate for Dr. Athanail to conduct a CT scan of the plaintiff's abdomen and pelvis based on the symptoms she was exhibiting upon presentation to the Lutheran Emergency Department. Dr. Fisher states that the results of the CT scan revealed persistent colonic wall thickening and inflammation involving the distal descending and proximal sigmoid colon, and that there was no evidence of a colonic perforation or obstruction. Dr. Fisher also states that plaintiff did not have any signs or symptoms[2] of a perforation while under the care of Dr. Athanail from May 1 to May 4, 2016. Dr. Fisher claims the plan of care, which included antibiotics to treat the inflammatory process within her bowel, as well as the administration of intravenous hydration, was appropriate and in accordance with the standard of care. In addition, Dr. Fisher opines that it was appropriate for Dr. Athanail to order an infectious disease consultation in light of the differential diagnosis of diverticulitis and/or c.difficile colitis. Dr. Fisher asserts that the plaintiff's condition improved over the course of the three days, and infectious disease deemed the plaintiff clinically stable for discharge on May 4, 2016. Dr. Fisher argues that the plaintiff's discharge was appropriate and Dr. Athanail had no duty or obligation to continue treating the plaintiff following her discharge, as she was not Dr. Athanail's private patient. Dr. Fisher maintains that Dr. Athanail did not fail to diagnose a perforation of the colon, and did not fail to perform surgery, because the CT scan revealed no such evidence of a perforation or an obstruction that would warrant surgical

[2] Dr. Fisher explains that patients with a colonic perforation commonly present with severe abdominal pain and tenderness, vomiting, fever and other signs of sepsis along with radiologic findings on a CT scan including signs of pneumoperitoneum and laboratory findings such as an elevated white blood cell count.

intervention. In addition, Dr. Fisher asserts there is no causal connection between Dr. Athanail's treatment and the plaintiff's alleged injuries.

With respect to Lutheran, Dr. Feingold asserts that the plaintiff did not have a perforated colon during any of her admissions to Lutheran. Dr. Feingold opines that plaintiff's colon perforated acutely on May 20, 2016, which was over two weeks after her last discharge from Lutheran, when she developed a stricture in her sigmoid colon.[3] Dr. Feingold references the medical records from Maimonides Medical Center, in which multiple providers indicated that plaintiff's abdominal pain and distention developed acutely on the morning of May 20, 2016. Dr. Feingold states that there are several indicators of a colon perforation, including a CT of the abdomen that shows free air in the peritoneal cavity, as well as an elevated white blood cell count (above the normal range of 4-11), neither of which were exhibited by plaintiff. Dr. Feingold claims that the CT scan performed on February 27, 2016 did demonstrate colitis (inflammation of the colon), which plaintiff was treated for, and that all subsequent CT scans demonstrated colitis, diverticulosis, and diverticulitis. Dr. Feingold claims the plaintiff was timely and appropriately treated for c. difficile colitis with antibiotics while at Lutheran. Dr. Feingold asserts that the Lutheran staff performed the appropriate diagnostic tests in a timely manner, and that the results of these tests in addition to plaintiff's complaints, indicated that surgical intervention was not necessary. Dr. Feingold also states that plaintiff's condition improved over the course of her admission, which would not have occurred if she had a perforation of the colon.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential

[3] Dr. Feingold explains that this can lead to a perforation in the cecum, which is the pouch that forms the first part of the colon. According to Dr. Feingold, a colon perforation is a hole in the wall of the colon that allows air, and sometimes intestinal materials, to leak into the abdominal cavity.

elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

In opposing the defendants' motions, plaintiff's expert has pointed to several possible departures by Dr. Athanail and Lutheran. Plaintiff's expert asserts that the defendants' experts' opinions are conclusory and deficient in that they don't address the failure to provide the plaintiff with timely and appropriate diagnostic exploratory surgery during her admission at Lutheran from May 1 to May 4, 2016. Plaintiff's expert opines that the purpose of exploratory surgery is to determine the cause of a problem, and that diagnostic surgical intervention was indicated for the plaintiff even without confirmation of a blockage or confirmation of an obstruction in her colon due to the duration and severity of the plaintiff's symptoms. Plaintiff's expert claims Dr. Athanail should have ordered diagnostic exploratory surgery and his failure to do so was a departure from the standard of care. Plaintiff's expert asserts that this departure caused and/or contributed to the progression of a perforation/infection in plaintiff's colon and significantly diminished her chance for a better outcome.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). As such, the defendants' motions for summary judgment dismissing plaintiff's medical malpractice claim are denied. In

reaching that determination, the Court considered the argument of defendants' counsel by their experts that there was no indication over the course of plaintiff's multiple admissions to Lutheran of a perforation of her colon and that additional testing and procedure was not necessary. This argument was refuted by plaintiff through her expert that it was a departure from the standard of care for Dr. Athanail and Lutheran to fail to perform diagnostic exploratory surgery during plaintiff's admission from May 1 to May 4, 2016.

As to the informed consent claim, a plaintiff must prove (1) the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury. See Zapata v Buitriago, 107 AD3d 977, 979, 969 NYS2d 79 [2d Dept 2013]; Spano v Bertocci, 299 AD2d 335, 749 NYS2d 275 [2d Dept 2002].

Defendants Lutheran and Dr. Athanail assert that the plaintiff never underwent any surgical treatment or invasive procedures while at Lutheran, and as such the lack of informed consent claim should be dismissed. As plaintiff has not offered an argument in opposition as to the merits of this cause of action, plaintiff's claim for lack of informed consent is dismissed.

Conclusion:

While the defendants have met their burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met her burden to offer admissible evidence raising a question of fact as to whether the defendants departed from good and accepted medical practice in the diagnosis and treatment of the plaintiff. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motion by the defendants for summary judgment and a dismissal of

plaintiffs' complaint, pursuant to CPLR §3212, is granted only with respect to the informed consent claim, and said motion is otherwise denied.

In addition, the motions to dismiss by defendants Dr. Lacqua, Dr. Freedman, Dr. Ahmad and Dr. Arjona, are granted. As such, the complaint against these four defendants is dismissed. Additionally, the caption is amended as follows:

MARIE CAMPISI,

Plaintiffs,

-against-

LUTHERAN MEDICAL CENTER, and
STEVEN ATHANAIL, M.D.,

Defendants.

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This shall constitute the decision and order of this Court.

Dated: February 25, 2021
Brooklyn, NY

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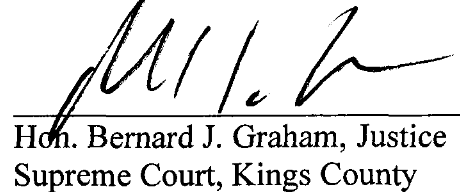

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

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