Fuentes-Yanez v Mercy Med. Ctr.
2021 NY Slip Op 30817(U)
March 15, 2021
Supreme Court, Kings County
Docket Number: 503964/14
Judge: Ellen M. Spodek
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At an IAS Term, Part MMESP 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of March , 2021.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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BLANCA FUENTES-YANEZ, a/k/a BLANCA FUENTES,

Plaintiff,

Index No. 503964/14

-against-

MERCY MEDICAL CENTER, JAVIER ANDRADE, M.D., AARON WINNICK, M.D., JAQUELINE DELMONT, M.D., SYDNEY HUGHES, M.D., LONG ISLAND EMERGENCY MEDICAL CARE, P.C., and MAIMONIDES MEDICAL CENTER,

Defendants.

- X

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	55-57, 75-77, 92-95, 107-109
Answer/Opposing Affidavits (Affirmations)	123-125
Reply Affidavits (Affirmations)	135, 136, 137, 138

Upon the foregoing papers, defendants Javier Andrade, M.D., [motion sequence number 3], defendant Sidney Hughes, M.D., [motion sequence number 4], defendants Aaron Winnick, M.D., and Maimonides Medical Center (Maimonides), [motion sequence

number 5] and defendant Mercy Medical Center (Mercy) [motion sequence number 6] move for orders, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint.

In this matter involving causes of action for medical malpractice and lack of informed consent, plaintiff alleges that she suffered injuries as the result of malpractice by Dr. Andrade during a laparoscopic cholecystectomy[1] performed on February 11, 2013 at Mercy as well as malpractice by Dr. Andrade and the other defendants in their follow-up care through the end of May 2013. The laparoscopic cholecystectomy was recommended because plaintiff's history and testing showed that she was suffering from gallstones. It is undisputed that during the February 11, 2013 cholecystectomy Dr. Andrade was supposed to clip the cystic duct and cystic artery. However, Dr. Andrade also clipped plaintiff's common bile duct and hepatic duct by mistake. Dr. Andrade did not recognize the injury during the operation, and plaintiff, who otherwise tolerated the procedure well, was discharged from Mercy the next morning without the injury to the common bile duct or hepatic duct being discovered.

Plaintiff presented to Mercy's emergency room on February 15, 2013 with right upper quadrant abdominal pain. She was seen by Dr. Hughes who ordered a CT scan and liver function test (LFT) bloodwork. The CT Scan was negative for a bile leak or obstruction, but the LFTs were elevated. Dr. Hughes contacted Dr. Andrade by telephone regarding plaintiff's condition, and, according to Dr. Andrade's deposition testimony, Dr.

[1] A Cholecystectomy is a gallbladder removal surgery.

Hughes informed him that the lab levels were normal. Dr. Andrade instructed Dr. Hughes to discharge plaintiff with directions to follow-up at his office if the CT Scans were negative. Dr. Hughes, on the other hand, testified at his deposition that he believes he informed Dr. Andrade regarding the lab values, including the elevated LFTs. In any event, plaintiff was discharged from Mercy and was told to follow-up with Dr. Andrade.

On February 20, 2013, plaintiff presented to Dr. Andrade's office with right upper quadrant pain and appeared jaundiced. Dr. Andrade referred plaintiff to Mercy, where she was admitted for evaluation and various tests were conducted. As is relevant here, an endoscopic retrograde cholangiopancreatography (ERCP) performed on February 21, 2013, showed that the common bile duct was occluded (clipped) or transected.

On February 23, 2011, plaintiff was transferred to Maimonides under the care of Dr. Winnick, a hepatobiliary surgeon who would ultimately perform the repair surgery relating to the clipping of the common bile duct and the hepatic duct. Plaintiff received treatment and care at Maimonides, including a successfully performed percutaneous drainage, and was discharged on February 28, 2013. The drainage tube, however, apparently came loose, and she was readmitted to Maimonides on March 1, 2013.

While at Maimonides during this second admission, interventional radiologists at Maimonides performed a hepatic angiogram on March 12, 2013 in order to stop bleeding in the area of plaintiff’s liver. During this procedure, plaintiff’s left and right hepatic arteries were unintentionally dissected. The radiologists performing the procedure recognized the injury during the procedure, and took steps, including the use of stent

repairs, to reopen the blood flow from the arteries into the liver. They were also able to stop the bleed within the right lobe of the liver.

Concern for plaintiff's liver function led to her being transferred to New York University Hospitals Center (NYU) on March 13, 2013, in order for her to be considered for a liver transplant. Plaintiff's liver function ultimately improved such that a liver transplant was not needed, and she was discharged from NYU on April 5, 2013. Although plaintiff, by May 28, 2013, had issues with a drain that led to her readmission to Maimonides that day, her overall condition had stabilized such that Dr. Winnick was able to perform the repair surgery on May 29, 2013. Plaintiff was discharged from Maimonides on June 4, 2013, and, other than the removal of a drain on July 29, 2013, and follow-up visits with Dr. Winnick that continued through January 15, 2014, plaintiff has had no further care, treatment or ongoing medical issues relating to the treatment and procedures at issue in this action.

Discussion

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider 'departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries'" (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]; *see Hutchinson v New York City Health & Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept 2019]). A defendant moving for summary judgment dismissing a medical

malpractice action 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 patient's injuries (*see Hutchinson*, 172 AD3d at 1039; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2d Dept 2013]). "Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden" (*Schmitt*, 121 AD3d at 1088; *see Hutchinson*, 172 AD3d at 1039; *Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

In moving for summary judgment, Dr. Andrade submitted an affirmation from Danne Lorieo, M.D., who is board certified in general surgery, and who has performed many cholecystectomies via open laparotomies or laparoscopically. Dr. Lorieo opines that the inadvertent injury to the common bile duct during the February 13, 2013 surgery is a well-known complication of a laparoscopic cholecystectomy that occurs in 0.5 to 1.5 percent of such surgeries. According to Dr. Lorieo, such inadvertent injury may occur even when an experienced surgeon adheres to the standard of care because there is a great deal of anatomical variation in the biliary system, because the bile ducts can obscure each other, and because the bile ducts are very small and may only be separated by millimeters. Dr. Lorieo further notes that plaintiff was later found to have small radicles,[2] which suggests that plaintiff had narrowed bile ducts, making the complication more explainable.

[2] According to Dr. Lorieo, "radicles" refers to the intrahepatic ducts within the liver.

With respect to plaintiff's February 15, 2013 emergency room visit to Mercy, Dr. Lorieo concedes that plaintiff should have been admitted on that date because she had abnormal LFTs (including an elevated bilirubin level). Dr. Lorieo, however, asserts that the five-day delay in diagnosing that plaintiff had suffered an injury to her common bile duct caused by the failure to admit her on the date of the emergency room visit had no adverse effect on her subsequent course of treatment. In this regard, Dr. Lorieo asserts that the delay had no effect on the nature of the interventional procedures that were performed and that it is routine to perform the reparative surgery after a period of healing. At his deposition, Dr. Winnick testified to similar effect, stating that he did not think anything would have changed or been done differently if plaintiff had presented earlier.

Based on the affirmation from Dr. Lorieo, the deposition testimony in the record and the medical records, Dr. Andrade has demonstrated his prima facie entitlement to summary judgment dismissing the medical malpractice cause of action based on the absence of any departures from accepted medical practice (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova v Westerman*, 109 AD3d 965, 966 [2d Dept 2013]; *Mitchell v Lograno*, 108 AD3d 689, 692-693 [2d Dept 2013]). This prima facie showing shifts the burden to plaintiff to demonstrate the existence of a factual issue with respect to her care by Dr. Andrade.

In opposition, plaintiff submitted an affirmation from a surgeon who opines that Dr. Andrade failed to properly identify the "hepatocytic triangle" and obtain a "critical view" of the relevant anatomy during the February 12, 2013 cholecystectomy. Given that no

intraoperative cholangiogram was performed,[3] and given that the operative report contains no mention that plaintiff had had distorted anatomy, plaintiff's surgeon asserts that there is no reason to believe that plaintiff had distorted anatomy. Absent an anatomic anomaly, the expert asserts that the failure to properly identify the common bile duct and its clipping constitutes a departure from accepted medical practice.

With respect to the February 15, 2013 visit to Mercy's emergency room, plaintiff's surgeon asserts that, in view of the elevated LFTs, Dr. Andrade departed from accepted medical practice in failing to have plaintiff admitted, and asserts that this failure to admit plaintiff "resulted in the failure to timely diagnose the iatrogenic bile duct injury and was a substantial contributing factor to her complicated course. Worsening liver injury is evident in the LFT values which were more elevated on February 20th."

Plaintiff's surgeon explains his or her opinions and points to facts in the medical record that support his or her assertions with respect to the care rendered by Dr. Andrade during the February 11, 2013 cholecystectomy. As such, the affirmation of plaintiff's surgeon in this respect cannot, contrary to Dr. Andrade's assertions, be rejected as wholly conclusory (*see Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 424-425 [1st Dept 2015]; *Seiden v Sonstein*, 127 AD3d 1158, 1162 [2d Dept 2015]; *Frank v Smith*, 127 AD3d 1301, 1303 [3d Dept 2015]). Accordingly, this court finds that the affirmation of plaintiff's surgeon is sufficient to demonstrate the existence of factual issues as to whether

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[3] Plaintiff's surgeon notes that intraoperative cholangiograms are generally performed when a patient presents with distorted anatomy in order to permit the proper identification of the ducts.

Dr. Andrade departed from the standard of care in performing the February 11, 2013 cholecystectomy (*see Lefkowitz v Kelly*, 170 AD3d 1148, 1150 [2d Dept 2019]; *Padilla v Montefiore Med. Ctr.*, 119 AD3d 493, 494 [1st Dept 2014]; *Grant-White v Hornbarger*, 12 AD3d 1066, 1068 [4th Dept 2004]; *Coluzzi v Korn*, 209 AD2d 951, 952 [4th Dept 1994]; *see also Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 544-546 [2d Dept 2017]; *Leto v Feld*, 131 AD3d 590, 592 [2d Dept 2015]; *Polanco v Reed*, 105 AD3d 438, 441-442 [1st Dept 2013]; *Bell v Ellis Hosp.*, 50 AD3d 1240, 1242 [3d Dept 2008]; *cf. Pancila v Ramanzi*, 140 AD3d 516, 516 [1st Dept 2016]; *Matos v Schwartz*, 104 AD3d 650, 651-652 [2d Dept 2013]). The conflicting opinions of the experts with respect to this care present issues of credibility that must be determined by a jury (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017]; *Leto*, 131 AD3d at 592).

While there are undoubtedly factual issues regarding Dr. Andrade's role in Mercy's declining to admit plaintiff when she presented to Mercy's emergency room on February 15, 2013, the conclusory assertions of plaintiff's surgeon fail to demonstrate an issue of fact as to whether plaintiff suffered any injury that was proximately caused by the delay in diagnosing plaintiff's injury that arose from the failure to admit her. Although plaintiff's surgeon notes a worsening of plaintiff's LFTs from February 15, 2013 to February 20, 2013, he makes no suggestion that the delay changed her treatment course, increased her pain and suffering, or even resulted in a longer hospital stay (*see Longhi v Lewit*, 187 AD3d 873, 879-880 [2d Dept 2020]; *Goldsmith v Taverni*, 90 AD3d 704, 705 [2d Dept 2011]; *cf.*

Neyman, 153 AD3d at 544-546; *Bystak v Windsong Radiology Group, P.C.*, 31 Misc 3d 1224 [A], 2011 NY Slip Op 50816, *2 [U] [Sup Court, Erie County 2011]).

Turning to Dr. Hughes, he submitted an affirmation of Boris Khodorkovsky, M.D., who specializes in emergency medicine and who asserts that Dr. Hughes did not depart from the standard of care for an emergency room doctor in discharging plaintiff from the emergency room based on his deposition testimony regarding his conversations with Dr. Andrade. In addition, Dr. Khodorkovsky opines, for essentially the same reasons identified by Dr. Lorieo, that plaintiff did not suffer an injury proximately related to the decision to discharge plaintiff. Based on the affirmation from Dr. Khodorkovsky, the deposition testimony in the record and the medical records, Dr. Hughes has demonstrated his prima facie entitlement to summary judgment dismissing the medical malpractice cause of action based on the absence of any departures from accepted medical practice and the absence of causation (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693).

As noted with respect to Dr. Andrade, the conflicting deposition testimony of Dr. Hughes and Dr. Andrade present factual issues relating to what information Dr. Hughes relayed to Dr. Andrade and relating to the propriety of their decision to discharge plaintiff on February 15, 2013. Nevertheless, just as with the claim against Dr. Andrade, the conclusory assertions of plaintiff's surgeon fail to demonstrate the existence of factual issues with respect to causation (*see Longhi*, 187 AD3d at 879-880; *Goldsmith*, 90 AD3d at 705; *cf. Neyman*, 153 AD3d at 544-546; *Bystak*, 2011 NY Slip Op 50816, *2). Dr.

Hughes is thus entitled to summary judgment dismissing the medical malpractice cause of action as against him.

In its motion for summary judgment, Mercy has demonstrated its prima facie entitlement to summary judgment dismissing the medical malpractice cause of action by showing that it cannot be held vicariously liable for the acts of Dr. Andrade because he was a private attending physician selected by plaintiff (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Mitchell v Goncalves*, 179 AD3d 787, 788-789 [2d Dept 2020]), and by showing, through the affidavit of its expert, Gregory Mazarin, M.D., that Mercy's staff did not commit any independent acts of negligence in treating plaintiff and that Dr. Andrade's orders were not clearly contraindicated by normal practice (*see Gattling v Sisters of Charity Med. Ctr.*, 150 AD3d 701, 703-704 [2d Dept 2017]; *Bedard v Klein*, 88 AD3d 754, 755 [2d Dept 2011]). Since plaintiff, in opposition, only challenges Mercy's motion based on the assertion that Mercy is vicariously liable for Dr. Hughes' care, and since this court has found that Dr. Hughes is entitled to summary judgment on his medical malpractice action, plaintiff has failed to demonstrate the existence of a factual issue warranting denial of Mercy's motion in this respect (*see Longhi*, 187 AD3d at 878; *Shenoy v Kaleida Health*, 162 AD3d 1701, 1702 [4th Dept 2018]; *Smith v Watkins*, 145 AD3d 596, 597 [1st Dept 2016]).

Turning to the motion by Dr. Winnick and Maimonides, they have demonstrated their prima facie entitlement to summary judgment dismissing the medical malpractice cause of action through the affirmation of Sander Florman, M.D., a surgeon who asserts

that the care rendered by Dr. Winnick did not depart from accepted medical practice, and an affirmation from David Sperling, M.D., an interventional radiologist who asserts that, among other things, the interventional radiologists at Maimonides did not depart from accepted medical practice in performing the March 12, 2013 angiogram, and that the injury to plaintiff's left and right hepatic arteries during the March 12, 2013 angiogram was a known complication of the procedure (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693). Dr. Sperling also asserts that the interventional radiologists promptly recognized the dissection of the arteries, took steps to correct it, and that there was no direct or proximal connection between plaintiff's alleged injuries and the performance of the angiogram.

Plaintiff has not opposed the portion of the motion by Dr. Winnick, and indeed, has signed a stipulation consenting to dismissal of the action as against Dr. Winnick with prejudice. Dr. Winnick is thus entitled to summary judgment dismissing the action as against him.

Regarding Maimonides' care, plaintiff submits an affidavit from an interventional radiologist who maintains that Maimonides' interventional radiologists departed from accepted medical practice in using a 7 French arterial sheath for entry into the hepatic arteries as those arteries are too small for the use of such a large vascular sheath. Rather, plaintiff's interventional radiologist asserts that good and accepted medical practice required that the procedure should have been performed with "superselective catheters with embolization of the pseudoaneurysms" (interventional radiologist affidavit at ¶¶ 46-47).

Plaintiff's interventional radiologist asserts that the dissection of the hepatic arteries caused a rapid deterioration of liver function, which necessitated the transfer to NYU for a possible liver transplant.

Contrary to Maimonides' contention, the court finds that the affidavit of plaintiff's interventional radiologist is sufficient to demonstrate the existence of a factual issue as to whether the use of the 7 French sheath constitutes a departure from accepted medical practice (*see Leto*, 131 AD3d at 592; *see Santiago v Filstein*, 35 AD3d 184, 186-187 [2d Dept 2006]). Moreover, the assertion of plaintiff's interventional radiologist that the injury to the arteries caused a deterioration of liver function that led to the transfer to NYU sufficiently identifies an injury distinct from the injuries arising from clipping of the common bile duct by Dr. Andrade on February 11, 2013 and thus demonstrates the existence of a factual issue with respect to causation (*see Neyman*, 153 AD3d at 544-546; *Omane*, 150 AD3d at 1129; *Leto*, 131 AD3d at 592; *Polanco*, 105 AD3d at 441-442; *Bell*, 50 AD3d at 1242; *Bystak*, 2011 NY Slip Op 50816, *2). Indeed, regardless of the impact of the dissection of the arteries on plaintiff's liver function, the need for the stent placement to correct the injury is, in and of itself, sufficient to make out an injury and warrants denial of the motion with respect to Maimonides (*see Stewart v Goldstein*, 175 AD3d 1214, 1215 [1st Dept 2019]).

With respect to plaintiff's cause of action premised on the lack of informed consent, plaintiff failed to address it in her opposition papers. Therefore, the lack of informed consent claims are dismissed as against the defendants.

Dr. Andrade's motion (motion sequence number 3) is granted only to the extent that the lack of informed consent claim is dismissed and the medical malpractice cause of action is limited to injuries caused by the alleged departures relating to the clipping of the common bile duct during the February 11, 2013 laparoscopic surgery conducted by Dr. Andrade at Mercy. The remainder of the motion is denied.

Dr. Hughes' motion (motion sequence number 4) is granted and the complaint is dismissed as against him.

Dr. Winnick and Maimonides' motion (motion sequence number 5) is granted to the extent that the complaint is dismissed as against Dr. Winnick and granted to the extent that the cause of action for lack of informed consent is dismissed as against Maimonides and to the extent that the medical malpractice cause of action as against Maimonides is limited to injuries allegedly caused by the use of the 7 French arterial sheath during the March 12, 2013 procedure performed by the interventional radiologists at Maimonides. The motion is otherwise denied with respect to Maimonides.

Mercy's motion (motion sequence number 6) is granted, and the complaint is dismissed as against it.

The clerk is directed to enter judgment accordingly, the action is severed accordingly, and the caption is amended to read as follows: [4]

[4] The court notes that, by way of a so-ordered stipulation dated March 5, 2019, the action was discontinued as against defendant Jacqueline Delmont, M.D. In its own review of the filings on NYSCEF, the court does not see any appearance in this action by Emergency Medical Care, P.C., nor does the court see any motion for a default judgment as against it.

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BLANCA FUENTES-YANEZ, a/k/a BLANCA FUENTES,

Plaintiff,

Index No. 503964/14

-against-

JAVIER ANDRADE, M.D., LONG ISLAND EMERGENCY MEDICAL CARE, P.C., and MAIMONIDES MEDICAL CENTER,

Defendants.

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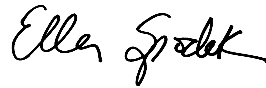
This constitutes the decision and order of the court

E N T E R,



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