

Pugliese v Kavalier

2021 NY Slip Op 31245(U)

April 12, 2021

Supreme Court, New York County

Docket Number: 805163/2015

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30
Justice
INDEX NO. 805163/2015
DEBORAH PUGLIESE, MOTION DATE 04/07/2021, 04/07/2021
Plaintiff, MOTION SEQ. NO. 002 003
- v -

ELIZABETH KAVALER, LEONARD GLICKMAN, NEW YORK UROLOGICAL ASSOCIATES P.C., NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., LENOX HILL HOSPITAL, PATRICIA YEH, LENOX HILL MEDICAL ANESTHESIOLOGY, PLLC.

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 112, 114, 115, 119, 121, 130, 131 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 116, 117, 120, 122, 123, 124, 125, 126, 127, 128, 129 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents,

Defendants North Shore Long Island Jewish Health System, Inc., Leonard Glickman, M.D., and Lenox Hill Hospital's motion (sequence #002) for an order: (1) pursuant to CPLR § 3211, dismissing Plaintiff's complaint against North Shore Long Island Jewish Health System, Inc. given that a Stipulation of Discontinuance was executed by all remaining parties; (2) pursuant to CPLR § 3212, granting summary judgment, dismissing Plaintiff's Complaint against Leonard Glickman, M.D. and Lenox Hill Hospital is withdrawn as moot as detailed herein.

Defendants Elizabeth Kavalier, M.D. and New York Urological Associates, P.C.'s motion (sequence #003) seeking an order granting Elizabeth Kavalier, M.D. and New York Urological Associates, P.C. summary judgment, dismissing Plaintiff's Complaint in its entirety with prejudice pursuant to CPLR § 3212 is granted as detailed herein.

This medical malpractice action involves two causes of action, the first sounding in medical

malpractice and the second in informed consent, relating to a sling surgery performed by Defendant Dr. Kavalier on May 23, 2014, at Lenox Hill Hospital, resulting in a nerve injury to Plaintiff.

Defendants now move for summary judgment to dismiss Plaintiff's case as against them.

At oral argument on the motions, conducted via Microsoft Teams, the Court was informed that Plaintiff had discontinued as against Defendants North Shore Long Island Jewish Health System, Inc., Leonard Glickman, M.D., and Lenox Hill Hospital.

The motion of Defendants Elizabeth Kavalier, M.D. and New York Urological Associates, P.C. remains before the Court.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the affirmations of Dr. Harvey A. Winkler and Dr. Joseph S. Jeret. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants' motion, Dr. Winkler opined that, "all of the care and treatment rendered by Dr. Kavalier and New York Urological Associates, P.C. at all times comported with good and accepted medical treatment, and that there was nothing that Dr. Kavalier or New York Urological Associates, P.C., could have or should have done differently to prevent the patient's alleged injuries."

Dr. Winkler also opined, "that the plaintiff's sling surgery and prolapse surgery were indicated... the patient was appropriately provided with the risks, benefits and alternatives of the procedure."

Finally, Dr. Winkler concluded, "that even with every precaution taken a patient can still experience a non-negligent complication, which is unfortunately what happened here. The neurological positioning injury the patient developed was a non-negligent risk of the procedure that occurs very infrequently and does not necessitate disclosure by a physician during an informed consent conversation. There is nothing Dr. Kavalier and her team should have done differently to position the patient."

In support of Defendants' motion, Dr. Jeret opined that, "Although an unfortunate risk of the procedure, a sciatic nerve injury is a rare but nonetheless recognized risk of any procedure in the dorsal lithotomy position. It can happen when a patient is in the dorsal lithotomy position for any period of time. It is my opinion to a reasonable degree of medical certainty that the relatively short duration of the patient's surgery (one hour and twenty minutes) did not put her at any additional risk. It is my opinion within a reasonable degree of medical certainty that Dr. Kavalier appropriately informed the patient of the risks of the surgery as is documented in her chart, her operative report and the literature she gives her patients. Since the injury the patient unfortunately developed is so infrequent, occurring less than one percent of the time, I do not believe Dr. Kavalier needed to explicitly address the risk of this injury."

Dr. Jeret concluded, "that the patient received the appropriate follow up care and saw a neurologist at the appropriate time. Notably, the first EMG study that was performed even commented that it could be premature. As such, any claim that plaintiff's counsel makes with regard to the timing of consults and referrals is without merit. With regard to a neurological injury it can take time before an injury such as this is present on a study. As a result, it is my opinion within a reasonable degree of medical certainty that the patient received timely and appropriate follow up treatment and any earlier treatment would not have changed the outcome. Furthermore, no surgical or other interventional treatment was ever deemed necessary during the patient's neurological care—nor would earlier referral have made any intervention an option for her."

"Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, *supra*. In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion." *Id*.

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff opposed Defendants’ motion. Included in Plaintiff’s opposition was an Affirmation from an OB/GYN and an Affirmation from a Neurologist.

In opposition to Defendants’ motion, Plaintiff’s OB/GYN opined, “that the care rendered to Ms. Pugliese by the defendants did not comport with accepted standards of medical care and practice. It is further my opinion that the defendants’ departures from good and accepted standards of medical care and practice were a substantial factor in causing the plaintiff’s injuries.”

On the issue of informed consent, Plaintiff’s OB/GYN opined, “that Dr. Kavalier failed to adequately inform the patient about the procedures she performed on Ms. Pugliese. Ms. Pugliese should have been made aware if a sacrospinous ligament suspension and transvaginal mesh placement would be performed in addition to the listed procedures which were ‘pubovaginal sling, possible cystocele repair and cystoscopy’. She should have been given a choice between vaginal native tissue repair versus surgery with transvaginal mesh. These procedures should have been listed among the procedures to be performed on the consent form.”

In support of their opinion on informed consent, Plaintiff’s OB/GYN stated, “Federal Drug Administration (FDA) have been reviewing transvaginal mesh use for SUI and prolapse with great scrutiny since 2008. Based on extensive evaluation of risks and benefits, FDA have decided to maintain mesh-based sling procedures in Class II medical device category which means “lower risk”. However, transvaginal mesh use for surgical treatment of prolapse was moved to Class III (higher risk) category first in 2016, and then was taken off the market later in 2019 because transvaginal mesh application for prolapse repair was found to pose more significant risks. Until transvaginal mesh products for prolapse repair were removed from the market in 2019, experienced pelvic floor surgeons continued to use transvaginal mesh when appropriate but only after a very detailed informed consent process.”

The Court notes that the procedure at issue herein took place in 2014, two years prior to the FDA changing the “lower risk category” for mesh-based sling procedures.

Plaintiff's OB/GYN concluded, "that Ms. Pugliese should have been told that she would be having an apical suspension such as sacrospinous ligament suspension procedure which have distinct risks and that she was not advised of these risks. It was a departure from good and accepted standards of medical care and practice to not review the alternative methods of prolapse repair...It is my opinion with a reasonable degree of medical certainty that Ms. Pugliese should have been told that she would have transvaginal mesh placement for prolapse repair which have distinct risks and that she was not advised of these risks."

Plaintiff's OB/GYN contradicts Plaintiff's allegations regarding Defendants performance of the May 23, 2014 procedure. Plaintiff's OB/GYN stated that, "Overall the patient positioning appeared proper. The actual procedure appears to have been performed following the current standards based on the operative report...There is documentation and testimony that her positioning was appropriate, and the procedure did not take a long time. Therefore, it is unlikely that that the positioning was the causative factor in this case. Based on my expertise, it my opinion that it is more likely that not that Ms. Pugliese's nerve injury was due to nerve entrapment at the right sacrospinous ligament attachment."

However, Plaintiff's OB/GYN does find departures related to Plaintiff's treatment following the May 23, 2014 procedure. Plaintiff's OB/GYN opined, "that a branch of sciatic nerve was entrapped during the sacrospinous ligament attachment of the mesh on the right side and not correcting this complication in a timely manner after the surgery was a departure from good and accepted standards of medical care and practice which require that nerves be identified and protected against entrapment."

Plaintiff's OB/GYN elaborated, "that Ms. Pugliese's foot drop could have been reversed and long-term sequela could have been avoided if an intervention to remove the mesh from the right sacrospinous ligament had been attempted in a timely fashion. The failure to timely remove the mesh was a departure from good and accepted standards of medical care and practice which resulted in the nerve injury claimed herein."

This Court notes that according to the evidence before this Court, Plaintiff never had the mesh that Plaintiff's OB/GYN opines about removed or treated surgically and no evidence of a recommendation for either such treatment having been made to Plaintiff was submitted to the Court. According to the evidence submitted before this Court, Plaintiff's treatment subsequent to the May 23, 2014 procedure consisted of medication and physical therapy.

In opposition to Defendants' motion, Plaintiff's Neurologist opined, "that Ms. Pugliese suffered an intraoperative peripheral nerve injury during the procedure of May 23, 2014 by defendant Dr. Kavalier and that this nerve injury was the result of departures from good and accepted standards of medical care and practice as detailed by plaintiff's expert gynecologist."

"On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury." *Yankus v. Kelly*, 72 A.D.3d 1068, 900 N.Y.S.2d 120 (N.Y.A.D. 2nd Dept. 2010).

"General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion...the plaintiff's expert must specifically address the defense expert's allegations." *DiLorenzo v. Zaso*, 148 A.D.3d 1111, 50 N.Y.S.3d 503 (N.Y.A.D. 2nd Dept. 2017).

Plaintiff's Experts failed to contradict Defendants' Experts' opinions related to the performance of the May 23, 2014 procedure.

Plaintiff's Experts failed to contradict Defendant's Experts' opinions as to whether it was a departure to have not specifically informed Plaintiff of the mesh to be used during the May 23, 2014 procedure and the potential risks associated therewith and whether it was a departure to have not removed said mesh surgically in response to Plaintiff's complaints following the surgery. In support of Defendants' motion, Dr. Jeret stated that the risk suffered herein has less than a 1% chance of occurring. By Plaintiff's OB/GYN's own admission, at the time of the surgery in question, the FDA considered this a low risk. Nor does Plaintiff's OB/GYN explain how/why Defendants should be held to disclosure of a risk that did not become a recognized risk warranting concern until at least two years after the surgery.

Finally, Plaintiff's Experts failed to contradict Defendants' Experts opinions related to Plaintiff's post-operative care. There is no evidence in the record to support Plaintiff's OB/GYN's statement that surgery was the necessary treatment. According to the evidence before this Court, Plaintiff never had surgery to treat her foot drop, nor was any evidence submitted demonstrating that any of the physicians who have examined and treated Plaintiff since May 23, 2014, recommended surgery.

Plaintiff's OB/GYN's opinions related to informed consent and post-operative care are speculative and conclusory without support in the record. See *Mariani v. Hodjati*, 148 A.D.3d 495, 49 N.Y.S.3d 128 (N.Y.A.D. 1st Dept. 2017); see also *Cruz v. New York City Health & Hosps. Corp.*, 188 A.D.3d 592, 137 N.Y.S.3d 2 (N.Y.A.D. 1st Dept. 2020).

Defendants' argument, made in Reply to Plaintiff's Opposition and at oral argument, that, "Plaintiff has tried to engage in a last minute switch of theories" is moot in light of the foregoing.

Accordingly, it is

ORDERED that Defendants North Shore Long Island Jewish Health System, Inc., Leonard Glickman, M.D., and Lenox Hill Hospital's motion (sequence #002) is withdrawn as moot; and it is further


ORDERED that Defendants Elizabeth Kavalier, M.D. and New York Urological Associates, P.C.'s motion (sequence #003) seeking an order granting Elizabeth Kavalier, M.D. and New York Urological Associates, P.C. summary judgment, dismissing Plaintiff's Complaint in its entirety with prejudice pursuant to CPLR § 3212 is granted; and it is further

ORDERED that Plaintiff's allegations against Defendants Elizabeth Kavalier, M.D. and New York Urological Associates, P.C. are dismissed; and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly; and it is further

THIS IS THE DECISION AND ORDER OF THE COURT.

<u>4/12/2021</u> DATE			 JUDITH REEVES MCMAHON, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE