Carpenter v Brucker
2021 NY Slip Op 31249(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 805359/2016
Judge: Judith N. McMahon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH REEVES MCMAHON** **PART** **IAS MOTION 30**

Justice

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KIMBERLY CARPENTER

Plaintiff,

- v -

BENJAMIN BRUCKER,

Defendant.

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INDEX NO. 805359/2016

MOTION DATE 03/24/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121

were read on this motion to/for DISMISS.

Defendant Benjamin M. Brucker, M.D. ("Dr. Brucker") moves this Court for an Order granting him summary judgment and dismissing Plaintiff's Complaint pursuant to CPLR §3212. The Court hereby grants the Motion in part and denies it in part, as detailed below.

Plaintiff Kimberly Carpenter ("Plaintiff") commenced this Action against Defendant for medical malpractice, lack of informed consent and violation of express and implied warranty. On February 14, 2014, Plaintiff first saw Defendant, a urologist and female pelvic medicine and reconstructive surgeon, regarding complaints of stress urinary incontinence ("SUI") that she had for two years. According to Plaintiff's chart, Plaintiff was to provide Defendant with recent urodynamic studies showing her existing SUI. While discussing different SUI treatment options, Defendant recommended Plaintiff try pelvic floor exercises, such as Kegels, or "urethral bulking agents", which is an in-office injection of a filler substance. After Plaintiff stated she wanted to

undergo the "Burch" surgical procedure, Defendant discussed the procedure's higher morbidity rate and increased risks.

Defendant also reviewed the risks of using an autologous sling as opposed to a TVT-Exact retropubic synthetic mesh sling ("TVT-Exact Sling"), which purportedly had a lower risk of voiding dysfunction. According to Plaintiff's chart, Defendant explained some details about the same-day operation, including its 90% success rate and 2% risk of voiding dysfunction that could require loosening of the procedure. Plaintiff expressed her fears regarding the mesh product, which developed from conversations with her sister-in-law who was a nurse and television commercials warning against the use of mesh. The parties discussed such fears and Defendant explained that such television commercials condemned the mesh used in other procedures, such as bladder prolapse, and not the sling used to address SUI. Defendant noted in his assessment that Plaintiff was a candidate for the TVT-Exact Sling procedure and that he provided her with literature on the procedure. Plaintiff indicated she would discuss the procedure with her family before making a decision.

On March 14, 2014, Plaintiff underwent pre-surgical testing at Tisch Hospital and signed pre and post-operative instructions for the TVT-Exact Sling procedure. Plaintiff testified that she was alarmed by the pre-operative instructions she received regarding the "same-day" procedure since she knew the "Burch" procedure required a three-day hospitalization. Defendant called Plaintiff that day and reviewed the three alternative procedures: the "Burch", an autologous sling or a mesh sling. Plaintiff testified that Defendant answered all of her questions and concerns during this conversation, but did not inform her that prolonged catherization was a possible risk of the procedure. Plaintiff decided to undergo the TVT-Exact Sling installation, which Defendant performed on March 17, 2014 at NYU Langone Medical Center without any reported

complications. Prior to the procedure, Plaintiff signed a two-page consent form for a "Cystocopy Insertion of Mid-Urethral Sling", which Defendant represents he reviewed with her. Plaintiff argues that Defendant did not obtain her proper informed consent and failed to disclose the risks and possible alternatives to her. After the catheter was removed and Plaintiff voided three times, Plaintiff was discharged with instructions regarding urinary retention.

During her first post-operative visit with Defendant on April 10, 2014, Plaintiff represented that she believed her SUI was resolved, but noticed that she had increased difficulty urinating for three days. While Defendant believed that such difficult urinating was caused by a decongestant Plaintiff was taking for the flu, he recommended she begin self-catherization ("CIC") twice a day. Plaintiff continued performing CIC twice a day and presented to Defendant on April 18, 2014 with continued urine retention. Defendant explained to Plaintiff that he believed the sling was "likely still on the tight side" and recommended she continue CIC for a few more weeks to determine if she continued to require catherization. According to his notes, Defendant had a "long discussion" with Plaintiff about the risks and benefits of the three available options in the event she continued requiring catherization: cutting the sling, continuing catherization or performing a urethral lysis. Defendant wrote in his notes that Plaintiff believed cutting the sling would be the next appropriate step.

On April 30, 2014, Defendant recommended cutting the sling since Plaintiff still required CIC. Plaintiff requested they postpone the procedure due to a change in her health insurance and Defendant noted that Plaintiff stated she ultimately wanted a sling put back since she was satisfied with the continence she was experiencing. On August 21, 2014, Defendant called Plaintiff to check in with her and offered to perform the procedure despite Plaintiff's lack of

insurance coverage.[1] However, Plaintiff chose to wait until she regained insurance coverage and contacted Defendant's office on November 19, 2014 to set up an appointment for the procedure.

Plaintiff did not return to Defendant's office until March 18, 2015, at which time Defendant reviewed the different options with Plaintiff and she opted to undergo the incision procedure. After receiving pre-operative instructions during her pre-surgical testing in March 2015, Plaintiff presented to NYU Langone Medical Center on April 9, 2015 and signed consent forms for the revision procedure ("Revision"). During the Revision, Defendant cut a segment of the mid-urethral portion of the sling, without complication, and avoided excessive dissection of the sling to minimize the propensity for recurring SUI.

During her first post-Revision appointment on April 21, 2015, Plaintiff told Defendant she resumed SUI two days after the Revision but was no longer performing CIC. During her last visit with Defendant on June 19, 2015, Plaintiff complained of SUI, specifically leaking when coughing, and Defendant discussed treatment, including Kegel exercises, pelvic floor exercises and bulking agents. Defendant testified that he also reviewed the possibility of removing the mesh sling and installing another of the same model.

On September 2, 2015, Plaintiff first sought treatment with urogynecologist Dr. Michael Brodman, who found no mesh erosion. Dr. Brodman discussed the options of replacing Plaintiff's existing sling with another TVT-Exact retropubic sling and performing a Burch procedure, while noting that a further revision might be necessary if the effect of the sling was too tight. After considering her options, Plaintiff agreed that Dr. Brodman would try to replace the existing TVT-Exact sling with a TVT-Exact sling. However, if the area was too scarred, Dr.

[1] Defendant indicated he could create a payment plan, work with another hospital or consider performing a revision at no cost.

Brodman would convert to a Burch procedure without waking Plaintiff up from anesthesia. On February 23, 2016, Dr. Brodman removed the existing sling and installed a new TVT-Exact sling. During March and May 2016, Plaintiff returned with complaints of new vaginal sharpness and Dr. Brodman diagnosed new mesh erosion. Dr. Brodman performed three revision procedures on Plaintiff during 2016 and 2017, during which he cut exposed portions of the mesh. Plaintiff testified that she believes all of Dr. Brodman's surgeries were successful, as she is now continent, and her condition has tremendously improved since her first appointment with Defendant. In her bill of particulars, Plaintiff alleges that Defendant's alleged departures caused injuries, including SUI, uncontrolled urine leakage, multiple surgical procedures, mesh erosion, and an aneurysm.

Defendant's Motion for Summary Judgment

In support of his motion for summary judgment, Defendant submits the affirmation of Alan Garely, M.D. ("Dr. Garely"), who is board certified in obstetrics, gynecology and urogynecology. Dr. Garely opines that Defendant appropriately assessed Plaintiff's complaints, took her history and physical examination into account and counseled her on conservative and surgical alternatives to the TVT-Exact Sling procedure. Dr. Garely further states that the Defendant properly obtained informed consent and carried out the procedure on March 17, 2014 "in every respect, including appropriately tensioning the sling." Dr. Garely explains that Defendant appropriately followed up with Plaintiff in the post-operative period, ruled out the reasons for her urinary retention and correctly and timely recommended a revision procedure. Dr. Garely opines that Defendant properly performed the Revision procedure on April 9, 2015,

With respect to Plaintiff's allegation of informed consent, Dr. Garely opines that most of the warnings Plaintiff claims Defendant should have provided "would have been inappropriate

and improper, as they concern issues related to the mesh used for other surgeries, such as bladder prolapse surgeries or hernia repairs." According to Dr. Garely, the TVT-Exact retropubic sling recommended by Defendant was not only widely accepted and used at the time, but is still considered the "gold standard" used to treat SUI. Dr. Garely explains that Defendant met the standard of care in all aspects of his treatment of Plaintiff and "nothing he did or did not do proximately caused plaintiff's alleged injuries."

In opposition to Defendant's Motion, Plaintiff submits the affirmation of urologist Matthew E. Karlovsky, M.D., FACS ("Dr. Karlovsky"). Dr. Karlovsky opines that Defendant departed from the standard of care by not evaluating Plaintiff for pre-existing voiding dysfunction or Valsalva voiding, which he represents is a risk factor for post-sling urinary retention. Dr. Karlovsky notes that on March 4, 2014, Plaintiff sent Defendant the results of her urodynamics study taken on January 19, 2014, which had data points that, when taken together, are consistent with Valsalva voiding/straining to void. Despite Defendant's testimony to the contrary, Dr. Karlovsky explains that nothing in the chart indicates Defendant received, read or considered the results prior to performing this TVT-Exact Sling installation. Dr. Karlovsky opines that if Defendant reviewed the urodynamics studies and either missed the incomplete emptying and week bladder contraction or disregarded it knowing that Plaintiff strained to void, Defendant "unnecessarily put her at an elevated risk of urinary retention with his proposed surgery." Dr. Karlovsky states that Defendant failed to inform Plaintiff of this increased risk of urinary retention and dyspareunia.

Dr. Karlovsky opines that by failing to perform a complete pre-operative assessment and diagnosing Plaintiff with pre-operative voiding dysfunction, Defendant exposed her to a "higher than baseline" risk of urinary retention by implanting a retropubic mid-urethral sling. According

to Dr. Karlovsky, Defendant also failed to inform Plaintiff of such risk. Defendant further missed a critical post-operative window, during which he could have loosened the sling without cutting it, and failed to disclose the risk of dyspareunia from mesh surgery. Due to Plaintiff's recurrent SUI, Plaintiff underwent repeat sling surgery that increased her risk for repeated mesh extrusion which occurred three times and led to ongoing dyspareunia. Dr. Karlovsky opines that "but for the urinary retention from Dr. Brucker's sling", Plaintiff would not have suffered her alleged injuries and damages.

DISCUSSION

Summary Judgment Standard

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing Judgment in favor of any party." CPLR §3212(b). A party seeking summary judgment must show that there are not material issues of fact that are in dispute and that it is entitled to judgment as a matter of law. (*See Dallas-Stephenson v. Waisman,* 39 AD3d 303, 306 [1st Dept., 2007]). Once a movant makes such a showing, "the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial. *Id.*

Plaintiff's Medical Malpractice Cause of Action

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (*See Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). "Once a

defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to 'rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.'" *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants." *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]. "To defeat summary judgment, the expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted).

Here, the Court finds that based upon the affirmation of Dr. Garely, Defendant has made a prima facie showing that he did not depart from the standard of care and that any alleged departure proximately caused Plaintiff's alleged injuries. Dr. Garely details how Plaintiff was an appropriate candidate to undergo the TVT-Exact Sling installation procedure and how Dr. Brucker's recommendation in this case "was in full accord with the accepted standards of urological care." In his affirmation, Dr. Garely explains how the TVT-Exact Sling is the "gold standard" in treating SUI and opines that Defendant "carried out a textbook installation surgery with no departures." Based upon Dr. Garely's affirmation, this Court finds that Defendant met his prima facie burden.

The Court also finds that Plaintiff has rebutted Defendant's prima facie showing as to whether Defendant departed from the standard of care in (1) recommending the TVT-Exact Sling installation procedure in light of Plaintiff's urodynamic studies and (2) his performance of the TVT-Exact Sling Installation on March 17, 2014. Clearly, an issue of fact exists as to whether

Defendant reviewed the urodynamic studies prior to the installation procedure. Furthermore, Dr. Karlovsky opines that even if Defendant reviewed such studies, he failed to properly assess Plaintiff's increased risk for urinary retention based upon the data points that indicated Valsalva voiding. The Court finds that Plaintiff's expert has also sufficiently rebutted Dr. Garely's opinion that Defendant performed the TVT-Exact Installation Procedure on March 17, 2017 in accordance with accepted medical standards. Therefore, such allegations in Plaintiff's Complaint are not subject to dismissal.

However, the Court notes that Plaintiff failed to demonstrate that any other issues of fact exist regarding her allegations of medical malpractice, including those regarding Defendant's post-operative care of Plaintiff and his performance of the Revision Procedure on April 9, 2015. With respect to the Revision, Dr. Karlovsky maintains that Defendant missed a post-operative window of time to loosen the sling without having to cut it. As Defendant currently argues, this new theory of liability is not present in Plaintiff's Complaint or Bill of Particulars. Since Dr. Karlovsky does not opine that Defendant departed from the standard of care in his performance of the Revision procedure, any allegations based upon Defendant's post-operative care are dismissed.

Plaintiff's Allegations of Lack of Informed Consent

In order to prevail on a claim for lack of informed consent, "a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of her injuries." *Balzola v. Giese*, 107 AD3d 587, 588-89 [1st Dept 2013]. Once a defendant has made a prima facie showing that consent was properly obtained, a

plaintiff must raise a triable issue of fact by offering medical evidence showing the alleged increased risk was material and that lack of informed consent proximately caused the injury. *See id*. The Appellate Division, First Department has held that

> Where a plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively insufficient, the cause of action for medical malpractice based on lack of informed consent must be dismissed (CPLR 4401–a; *Gardner v. Wider,* 32 A.D.3d 728, 730, 821 N.Y.S.2d 74 [2006]), particularly where she has failed to prove that a reasonably prudent person in her position would not have undergone the procedure had she been fully informed of the risks of the procedure,(*Evans v. Holleran,* 198 A.D.2d 472, 474, 604 N.Y.S.2d 958 [1993]). *Rodriguez v New York City Health and Hosps. Corp.,* 50 AD3d 464, 465 [1st Dept 2008].

The Court finds that based upon the affirmation of Dr. Garely, Defendant has made a prima facie showing that he properly obtained informed consent. Dr. Garely details how Defendant explained the risks of the TVT-Exact Sling installation, including the percentages of each risk, and addressed Plaintiff's concerns on more than one occasion prior to the procedure. The record shows that Defendant went through the various options with Plaintiff during their initial consultation on and clarified her questions during their phone conversation on March 14, 2014. Based upon the record and affirmation of Dr. Garely, the Court finds that Defendant made a prima facie showing with respect to informed consent.

The Court further finds that based upon Dr. Karlovsky's affirmation, Plaintiff raised an issue of triable fact regarding informed consent only as to whether Defendant informed Plaintiff of her elevated risk of urinary retention in light of Plaintiff's urodynamics studies prior to the TVT-Exact Installation on March 17, 2014. However, Dr. Karlovsky otherwise failed to sufficiently rebut Dr. Garely's opinion that Defendant obtained proper informed consent and demonstrate that the information Defendant provided to Plaintiff regarding the inherent risks about the TVT-Exact Sling Installation or Revision procedures was qualitatively insufficient.

(*See Gardner v. Wider,* 32 A.D.3d 728, 730, 821 N.Y.S.2d 74 [1st Dept., 2006]). Therefore, Plaintiff's allegations of lack of informed consent are dismissed, except her allegation that Defendant failed to inform her of her elevated risk of urinary retention based upon the urodynamics studies prior to the TVT-Exact Installation on March 17, 2014.

Accordingly, it is hereby

ORDERED that Plaintiff's allegations that Defendant departed from the standard of care in (1) recommending the TVT-Exact Sling installation procedure in light of Plaintiff's urodynamic studies and (2) his performance of the TVT-Exact Sling Installation on March 17, 2014 are not dismissed; it is further

ORDERED that the remainder of Plaintiff's allegations of medical malpractice against Defendant are hereby dismissed; it is further

ORDERED that Plaintiff's allegation that Defendant failed to inform Plaintiff of her elevated risk of urinary retention in light of Plaintiff's urodynamics studies prior to the TVT-Exact Installation on March 17, 2014 is not dismissed; it is further

ORDERED that the remainder of Plaintiff's allegations of lack of informed consent are hereby dismissed; and it is

ORDERED that the remainder of Defendant's Motion is hereby denied.

This is the Decision and Order of the Court.

3/29/2021
DATE

JUDITH REEVES MCMAHON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE