

Raymond v NYU Winthrop Hosp.

2021 NY Slip Op 33481(U)

April 12, 2021

Supreme Court, Nassau County

Docket Number: Index No. 603841/2018

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU: IAS Part 11
 Present: Hon. Sharon M.J. Gianelli

 SHARON RAYMOND,

Plaintiff,

-against-

NYU WINTHROP HOSPITAL and
 STEPHEN SLAVIN, M.D.,

Defendants.

X

Index No. 603841/2018

Mot. Seq. Nos. 001 and 002

Decision and Order

 X

Papers submitted:

Defendant Slavin's Notice of Motion _____	X
Defendant Slavin's Affirmation in Support With Exhibits _____	X
Defendant Slavin's Memorandum of Law In Support _____	X
Defendant Slavin's Expert Affirmation _____	X
Plaintiff's Affirmation in Opposition To Defendant Slavin _____	X
Plaintiff's Expert Affirmation _____	X
Defendant Slavin's Reply Affirmation _____	X
Defendant NYU's Notice of Motion _____	X
Defendant's NYU's Affirmation in Support With Exhibits _____	X
Defendant NYU's Memorandum of Law In Support _____	X
Defendant NYU's Expert Affirmation _____	X
Defendant Slavin's Affirmation in Partial Opposition to Defendant NYU _____	X
Defendant NYU's Further Reply Affirmation _____	X

This is Defendant NYU Winthrop Hospital's (hereinafter "NYU") motion for summary judgment pursuant to CPLR 3212 and dismissing Plaintiff's Complaint and all Cross-Claims as against Defendant NYU, and striking Defendant NYU from the caption. In his Affirmation in Opposition to Defendant Slavin's summary judgment motion, Plaintiff states, "Plaintiff does not oppose the motion on behalf of NYU Winthrop Hospital."

This is also Defendant Stephen Slavin M.D.'s (hereinafter "Slavin") motion for summary judgment pursuant to CPLR 3212 dismissing Plaintiff's complaint as against him, as well as all cross-claims, with prejudice.

This is a medical malpractice action which was commenced with the filing of a Summons and Complaint on or about March 23, 2018. An Answer for Winthrop was interposed on or about April 5, 2018.

The underlying action arises from Plaintiff Sharon Raymond's (hereinafter "Plaintiff") allegations that Defendant Slavin negligently performed an endotracheal intubation on Plaintiff in connection with surgery Plaintiff underwent on June 25, 2017 at Defendant NYU hospital. The claims here revolve around the intubation of Plaintiff, which was performed in furtherance of an elective procedure by Plaintiff's private attending physician, Dr. Maseih Moghaddassi (not a named defendant herein). The record and deposition testimony show that the pre-anesthesia evaluation, intubation and extubation of Plaintiff was not handled by the staff of Winthrop. Moreover, the staff of Winthrop did not assist in any aspects of the intubation or extubation of Plaintiff.

Plaintiff, a 60-plus year-old female underwent sinus surgery at Defendant NYU hospital on June 15, 2017. The surgery was performed by non-party Dr. Maseih Moghaddassi and Defendant Slavin was the surgical anesthesiologist. Dr. Moghaddassi examined Plaintiff during an office visit on November 16, 2016, and observed normal vocal cord mobility and no dysphonia, which is an abnormal

voice. On June 6, 2017, Dr. Moghaddassi performed another exam of Plaintiff's hypopharynx and larynx that again revealed normal vocal cord mobility. Dr. Modhaddassi then saw Plaintiff on June 15, 2017, the day of surgery. He noted that "there was some difficulty with intubation and they had to use a small endotracheal tube" (Moghaddassi, p.32, lines 6-15). Following pre-operative clearance and prior to Plaintiff's surgery, Defendant Slavin conducted a physical examination of Plaintiff including her neck and mouth (airway) and reviewed her surgical and anesthesia history.

In accordance with that assessment, Defendant Slavin categorized Plaintiff as Mallampati class 2 which indicates that Defendant Slavin was able to see the uvula in Plaintiff's mouth/throat but unable to completely see the soft palate. On June 15, 2017, Dr. Moghaddassi did not attempt to intubate Plaintiff. His surgical procedure was completed without intubation. Pursuant to Defendant Slavin's custom and practice, following the start of anesthesia, he attempted to intubate Plaintiff with a 7.0 millimeter diameter endotracheal tube with a Miller 2 blade, but was unable to do so. Defendant Slavin then attempted to intubate Plaintiff using a Glidescope 3 and then a 4 blade. When he was still unable to intubate her, Defendant Slavin completed the intubation with a Mac 3 blade using a 5.5 mm tube. Following the procedure, Defendant Slavin advised Plaintiff that the intubation was difficult and Dr. Moghaddassi allegedly advised Plaintiff that there was a resulting vocal cord injury and placed her on voice rest.

On July 10, 2017, in a post-operative office visit, Dr. Moghaddassi noted that Plaintiff was there for dysphonia as she had sinus surgery and had a difficult intubation where the airway was almost lost with the induction of anesthesia, and that Plaintiff has had dysphonia ever since. Dr. Moghaddassi attributed the cause of Plaintiff's severe dysphonia to a complication caused by Defendant Slavin, the anesthesiologist.

Plaintiff asserts that Defendant Slavin was negligent in his treatment of Plaintiff and does not oppose Defendant NYU's motion for summary judgment.

It is well-settled that, in a medical malpractice action, "[o]n 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" (*Rebozo v. Wilen*, 41 A.D.3d 457 [2nd Dept. 2007]; *Johnson v. Queens Long Island Med. Group*, 23 A.D.3d 525 [2nd Dept. 2005]; *Geller v. Walbaum*, 33 A.D.3d 855 [2nd Dept. 2006]).

In support of Defendant Slavin's assertion that he was not negligent in his treatment of Plaintiff, Defendant Slavin submitted an Expert Affirmation from David Berger, M.D., which states that following a review of all of the relevant records and documents herein, his expert opinion supports Defendant Slavin's claim that Defendant Slavin did not depart from good and accepted medical

practice in his treatment of Plaintiff and therefore Defendant Slavin was not negligent.

Plaintiff also submitted an Expert Affirmation which sets forth the reasoning as to why, following a review of all relevant records and documents, the expert believes Defendant Slavin departed from good and accepted medical practice and that Plaintiff was injured by that departure. Plaintiff's expert's opinion as to Defendant Slavin's negligence is supported by the record and is sufficient to raise triable issues of fact.

"Evidence of a difference of opinion among experts does not provide an adequate basis for a *prima facie* case of malpractice (citations omitted)" (*Mohan v. Westchester County Medical Center*, 145 A.D.2d 474 at 475 [2nd Dept. 1988]). Further, the partial opposition presented by Defendant Slavin to the grant of summary judgment to Defendant NYU to the extent Defendant NYU seeks dismissal of claims against Defendant NYU based on Plaintiff's theory of vicarious liability for Defendant Slavin is insufficient to establish and warrant denial of summary judgment to Defendant NYU.

Upon review and consideration of all papers submitted, Defendant Slavin has failed to make a showing of entitlement to summary judgment.

Accordingly,

It is

ORDERED, that Defendant NYU Winthrop Hospital’s motion for summary judgment pursuant to CPLR 3212 and a dismissal of Plaintiff’s Complaint and all Cross-Claims as against Defendant NYU and striking Defendant NYU from the caption, is Granted in its entirety; and

It is

ORDERED, that Defendant Stephen Slavin, M.D.’s motion for summary judgment pursuant to CPLR 3212 dismissing Plaintiff’s Complaint as against him, as well as all Cross-Claims, with prejudice, is Denied in its entirety; and

It is

ORDERED that the caption of this action shall be as follows and the Clerk of the Court is directed to amend the caption to reflect this change:

SHARON RAYMOND, X

Plaintiff,

Index No. 603841/2018

-against-

STEPHEN SLAVIN, M.D.,

Defendant.

_____ X

All applications not specifically addressed herein are denied.

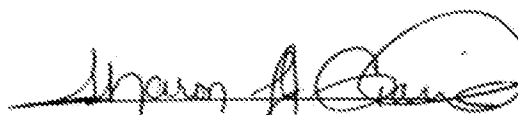
This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
April 12, 2021

ENTERED

Apr 16 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE



HON. SHARON M. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.