

Mormino v Cappellino
2021 NY Slip Op 33532(U)
August 30, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 610502/2018
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 610502/2018
CAL. No. 202001201MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 4/7/21
ADJ. DATE 7/27/21
Mot. Seq. # 001 MG; CASEDISP

-----X
CAROLYN MORMINO,

Plaintiff,

- against -

ANTHONY CAPPELLINO, M.D., ST.
CHARLES ORTHOPEDICS, and GOOD
SAMARITAN HOSPITAL,

Defendants.
-----X

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendants Anthony Cappellino, M.D., St. Charles Orthopedics, and Good Samaritan Hospital, on April 7, 2021 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; it is

ORDERED that the unopposed motion by defendants Anthony Cappellino, M.D., St. Charles Orthopedics, and Good Samaritan Hospital for summary judgment in their favor dismissing the complaint is granted.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Carolyn Mormino by defendants Anthony Cappellino, M.D., St. Charles Orthopedics, and Good Samaritan Hospital. Plaintiff alleges, inter alia, that on February 24, 2017, Dr. Cappellino negligently performed a right shoulder replacement and biceps tenodesis, causing injury to her thoracic axillary artery. Plaintiff alleges that St. Charles Orthopedics is vicariously liable for the negligence of Dr. Cappellino, and that Good Samaritan Hospital is vicariously liable for the negligence of its employees, including Dr. Cappellino.

Mormino v Cappellino
Index No. 610502/2018
Page 2

Defendants now move for summary judgment dismissing the complaint as asserted against them, arguing, inter alia, that the care and treatment provided to plaintiff was at all times consistent with good and accepted standards of medical care, and that none of the acts or omissions of Dr. Cappellino, or the staff of Good Samaritan Hospital, were a proximate cause of plaintiff's alleged injuries. In support of their motion, defendants submit, among other things, the affirmations of Tyler Lucas, M.D., and Howard Sander, M.D., copies of the transcripts of the depositions of plaintiff and Dr. Cappellino, and plaintiff's medical records. Plaintiff does not oppose the motion.

As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment, and a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice, and that such departure proximately caused his or her injuries (*see Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]).

To establish his or her entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see Bongiovanni v Cavagnuolo*, *supra*; *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 33 NYS3d 369 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]). If such a showing is made, the burden then shifts to the plaintiff to submit evidentiary facts or materials in rebuttal, but only as to those elements on which the defendant met his or her prima facie burden (*see Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]; *Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter*, *supra*). Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact in a medical malpractice action (*see Wagner v Parker*, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2d Dept 2017]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2d Dept 2017]).

It is fundamental that the "primary duty of a hospital's nursing staff is to follow the physician's orders, and a hospital is normally protected from tort liability if its staff follows the orders" (*Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see Bell v WSNCHS N., Inc.*, 153 AD3d 498, 59 NYS3d 475 [2d Dept 2017]). "A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry

Mormino v Cappellino
Index No. 610502/2018
Page 3

into the correctness of the same” (*Toth v Bloshinsky*, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; see *Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Cerny v Williams*, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]).

Defendants have established, prima facie, entitlement to summary judgment dismissing the complaint. Defendants submit the affirmation of Tyler Lucas, M.D., who avers that he is licensed to practice medicine in New York, and that he is board certified in orthopedic surgery. Dr. Lucas opines, within a reasonable degree of medical certainty, that Dr. Cappellino, St. Charles Orthopedics, and Good Samaritan Hospital acted within the standards of good and accepted medical practice with respect to their care and treatment of plaintiff, and that no act or omission by defendants was a proximate cause of plaintiff’s alleged injuries. Dr. Lucas opines that based on plaintiff’s complaints of pain, it was appropriate to initially treat her with conservative measures, such as cortisone injections, and further opines that, following an MRI which revealed a rotator cuff tear, it was appropriate for Dr. Cappellino to perform an arthroscopic surgery. Dr. Lucas opines that the June 20, 2016 surgery was performed appropriately, and that Dr. Cappellino successfully removed all loose bone fragments, and that the surgery was performed without complications. He opines that it was appropriate for Dr. Cappellino to refer plaintiff to post-operative physical therapy, but notes that plaintiff was not successful in physical therapy as she did not attend as often as instructed. With respect to plaintiff’s February 24, 2017 right shoulder replacement with biceps tenodesis, Dr. Lucas opines that Dr. Cappellino appropriately recommended the procedure, after attempting conservative therapies. During the February 24 procedure, Dr. Cappellino indicated in his operative report that there was a possible arterial injury and noted a bleed from the lateral thoracic branch of the axillary artery. He testified that he found the source of the bleed in the branch of the axillary artery, clamped it off, tied the vessel, and placed a stitch to reinforce the clamp. He testified that he immediately called for an intraoperative vascular consult with nonparty Dr. Garri Pasklinsky. Dr. Lucas opines that it was within the standard of care for Dr. Cappellino to consult a vascular surgeon after encountering an injury to a blood vessel such as this. Dr. Pasklinsky’s operative note reflects that he was able to obtain homeostasis with ligation of the bleeding artery, and that he evaluated the distal circulation and axillary artery, and noted the artery to be intact proximally and distally with palpable pulses in the brachial, radial, and ulnar arteries. X-rays were taken, which demonstrated no evidence of major vascular injury. On May 24, 2017, during a post-operative visit, plaintiff complained of numbness in her right fingers, and Dr. Cappellino referred her to a neurologist. She saw neurologist, nonparty Dr. Anthony Adamo, who found no atrophy and that her sensation was intact. Dr. Adamo noted a clinical impression of brachial plexopathy and cervical radiculopathy.

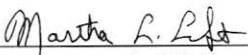
Dr. Lucas opines that the arterial injury to plaintiff which occurred during the February 24 procedure had no connection to her alleged long term injuries. He states that plaintiff was not diagnosed with any ischemia related to her right upper arm, and that her arm was consistently well perfused, with good color and temperature. Further, Dr. Lucas notes that plaintiff has never been diagnosed with any arterial occlusion or other ischemic injury to her right upper arm. Dr. Lucas opines that plaintiff’s alleged injuries are the result of significant and severe cervical stenosis in her neck, evident on post-operative MRI films, which revealed moderate central canal stenosis at C5-6 and C6-7, foraminal stenosis from C4-7 due to degenerative changes and posterior osteophyte and disc bulges, and a herniated disc at C3-4.

Mormino v Cappellino
 Index No. 610502/2018
 Page 4

Defendants also submit the affirmation of Howard Sander, M.D., who avers that he is licensed to practice medicine in New York, and that he is board certified in neurology. He opines, within a reasonable degree of medical certainty, that the care and treatment provided by Dr. Cappellino, St. Charles Orthopedics, and Good Samaritan Hospital was at all times in accord with good and accepted medical practice, and that no act or omission of the defendants was a proximate cause of plaintiff's alleged injuries. Dr. Sander opines that plaintiff's neurological symptoms of numbness and tingling were not the result of the intraoperative arterial bleeding which occurred on February 24, 2017, or from plaintiff's June 20, 2016 procedure. Dr. Sander states that plaintiff's neurological complaints of numbness and tingling began several weeks after the February 24 procedure, and that the first complaint she made to Dr. Cappellino was on May 24, 2017. Dr. Sander opines that if the injury to plaintiff's axillary artery, which occurred on February 24, was the cause of her alleged injuries, the expectation is that her symptoms would have presented immediately after surgery, but no later than two weeks post-operatively. As plaintiff did not experience neurological symptoms for several months, Dr. Sander opines that plaintiff's symptoms are not attributable to Dr. Cappellino's February 24 procedure. Dr. Sander further notes that Dr. Adamo's neurological evaluation of plaintiff does not support plaintiff's allegations against defendants.

Defendants having met their prima facie burden on the motion for summary judgment dismissing the complaint as asserted against them, the burden now shifts to plaintiffs to raise a triable issue of fact necessitating a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stiso v Berlin*, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; *Stukas v Streiter*, *supra*). Plaintiff fails to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 114 NYS3d 100 [2d Dept 2019]). Therefore, the motion by defendants for summary judgment dismissing the complaint as asserted against them is granted.

Dated: August 30, 2021



 A.J.S.C.

HON. MARTHA L. LUFT

X FINAL DISPOSITION

NON-FINAL DISPOSITION