

Ahmed v Rosenberg
2022 NY Slip Op 30381(U)
January 13, 2022
Supreme Court, New York County
Docket Number: Index No. 805205/2018
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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SAEED AHMED,

Plaintiff,

- v -

JOSHUA ROSENBERG, SAMEEP KADAKIA, NEW YORK
EYE & EAR INFIRMARY

Defendant.

-----X

INDEX NO. 805205/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents,

Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants, Joshua Rosenberg, M.D., Sameep Kadakia, M.D., and New York Eye & Ear Infirmary, is granted in part and denied in part as detailed herein.

This is a medical malpractice action wherein Plaintiff alleges damages related to the care and treatment of his left Zygomaticomaxillary Complex (ZMC) and orbital floor fractures. Plaintiff suffered a traumatic injury on December 3, 2015, as a result of an assault from a co-worker, and following that injury, he came under Defendants' care for treatment. Plaintiff alleges that such treatment was rendered negligently.

Defendants Joshua Rosenberg, M.D., Sameep Kadakia, M.D., and New York Eye & Ear Infirmary now move for summary judgment to dismiss Plaintiff's case as against them.

“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 Affirmation of Dr. Richard Lisman. *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); *See also Bamberg-Taylor v. Strauch*, 192 A.D.3d 401, 142 N.Y.S.3d 537 (N.Y.A.D. 1st Dept. 2021).

In support of Defendants’ motion, Dr. Lisman opined that “Plaintiff’s injuries come from an assault by a co-worker who punched plaintiff on the left side of the face repeatedly on December 3, 2015. It is my opinion that plaintiff’s diplopia was initially caused by the zygomaticomaxillary complex fracture ("ZMC") and orbital floor fracture from the trauma of being punched in the face which caused the left orbital rectus muscles to become entrapped and the contents of the globe to be displaced. More importantly, plaintiff chose to wait over a month to have surgical repair of these fractures even at the insistence of doctors at Staten Island University Hospital and Dr. Joshua Rosenberg that surgery needed to be immediate. Plaintiff admittedly was told that waiting could cause the bones to heal improperly and make repair difficult.”

Dr. Lisman further opined that “A time for surgery was reserved for plaintiff, who then cancelled the procedure and chose to wait. It is my opinion that this wait was the proximate cause of plaintiff’s diplopia. Moreover, it is my opinion that Dr. Rosenberg properly informed

plaintiff of the risks of delaying the repair surgery, including the possibility of permanent diplopia and facial asymmetry but also risks of the surgery itself such as infection, damage to cranial nerves, poor aesthetic and functional outcome.”

As to Plaintiff’s allegations regarding the surgery that was performed, Dr. Lisman stated that “First and foremost, the Medpor implant used by Dr. Rosenberg was porous polyethylene, the information and sticker are in the medical records and placed there by techs/nurse in preparation for the procedure. This type of implant does not show up radiographically so it would not be apparent on CT or MRI which is why you observe the surrounding areas. Further, Dr. Shinder's letter to Dr. Bykov states the exact opposite of the CT scan report as if he was looking at something completely different than the radiologist. Upon the attached exhibit of the actual films it is objectively obvious that there is a perfect straight line on the orbital floor and the soft tissue contents of the orbit are not displaced into the maxillary sinus. Again, a straight line does not exist in nature this way. There are opinions and then there are facts. The films clearly show the results of Dr. Rosenberg's surgery in repairing the orbital floor fracture.”

Lastly, Dr. Lisman concluded, “It is my opinion, Dr. Rosenberg examined plaintiff properly upon the initial visit one week after the injury and had a proper surgical plan in place. Dr. Rosenberg fully informed, in fact, stressed to plaintiff that he has to have this surgery immediately or that the bones would permanently heal and the diplopia could be permanent. Dr. Rosenberg fully informed plaintiff of the risks to surgery and told him prior to surgery that the delay in consenting could make repair very difficult if not impossible. When plaintiff finally agreed to surgery which was six (6) weeks after the initial visit with Dr. Rosenberg but seven (7) weeks after the injury, as suspected the bones had healed with no mobility to repair the ZMC fracture but Dr. Rosenberg repositioned the orbital contents and placed a Medpor implant on the

floor properly to attempt to help reduce diplopia and aesthetics of plaintiff's facial structure. The proximate cause of plaintiff's residual diplopia was from the initial injury damaging the inferior rectus muscle and not from any alleged negligence of Dr. Rosenberg. Dr. Rosenberg properly repaired plaintiff's left eye and did not cause him to have diplopia after the surgery."

As to Plaintiff's allegations against Defendant New York Eye & Ear Infirmary, Defendants state that neither Dr. Rosenberg, nor Dr. Kadakia are employees of the Infirmary. The Infirmary is a facility where Dr. Rosenberg has privileges as a private doctor, and that is where the January 22, 2016 surgery took place. "It is well settled that a hospital is not vicariously liable for the acts of a private attending physician at its facility who is retained by a patient and is immune from liability where its employees follow the direction of the attending physician, unless that physician's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders." *Garson v. Beth Israel Med. Ctr.*, 41 A.D.3d 159, 838 N.Y.S.2d 35 (N.Y.A.D. 1st Dept. 2007). "[M]ere affiliation with a hospital is insufficient to impute a doctor's negligence to a hospital." *Shafran v. St. Vincent's Hosp. & Med. Ctr.*, 264 A.D.2d 553, 694 N.Y.S.2d 642 (N.Y.A.D. 1st Dept. 1999).

"Once this showing has been made [by Defendant], 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.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). 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 submitted an Affirmation from an Otolaryngologist in Opposition to Defendants’ motion.

Plaintiff’s Otolaryngologist opined “I disagree with Dr. Lisman’s statement that the plaintiff’s claim that ‘there was no Medpor Implant placed by Dr. Rosenberg’ is ‘untrue’. Much to the contrary, a review of Mr. Ahmed’s medical records provides at least two instances where the issue of whether Dr. Rosenberg placed an implant, or properly placed an implant is in question. First, Dr. Shinder did not find or document the presence of any previously placed implant during the revision surgery he performed on February 28, 2020... Second, Dr. Shinder noted the following regarding the only CT scan that exists of Mr. Ahmed following the surgery performed by Dr. Rosenberg: ‘although [Dr. Rosenberg] states that he placed an orbital implant, I do not see evidence of that in the current imaging’.”

Plaintiff's Otolaryngologist elaborated that, "The defendants cannot establish that the implant was placed by Dr. Rosenberg. At the very least, and even assuming the implant was placed, that neither CT imaging nor Dr. Shinder could visualize it, despite having a complete 360-degree view of the field. Either way, if Dr. Rosenberg failed to place the Medpor implant in accordance with his surgical [plan], or if he improperly placed the Medpor implant rendering it ineffective, this constitutes a departure from the standard of care, and there is evidence to support both contentions."

Plaintiff's Otolaryngologist concluded that, "In sum, it is my opinion, to a reasonable degree of medical certainty, that the defendants departed from the standard of care by failing to properly treat Mr. Ahmed in accordance with the standard of care. This failure is highlighted by contradictory notations in the medical records. There is ample support for Dr. Shinder's assertions that no implant was placed by Dr. Rosenberg at NYEEI on January 22, 2016. These departures directly caused Mr. Ahmed additional injuries and required him to undergo further surgical intervention that would have been otherwise unnecessary. Further, it cost Mr. Ahmed his best chance to cure or improve his vision."

Plaintiff's Otolaryngologist did not offer any opinion as to Plaintiff's allegations related to a lack of informed consent. Since Plaintiff's Expert did not refute Defendants' Expert's opinions regarding allegations related to a lack of informed consent, those claims must be dismissed.

Additionally, regarding Plaintiff's allegations against Defendant Dr. Kadakia, "A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to

intervene.” *Quille v. New York City Health & Hosp. Corp.*, 152 A.D.3d 808, 59 N.Y.S.3d 131 (N.Y.A.D. 2nd Dept. 2017); *See also Irizarry v. St. Barnabas Hosp.*, 145 A.D.3d 529, 43 N.Y.S.3d 45 (N.Y.A.D. 1st Dept. 2016); *Murphy v. Drosinos*, 179 A.D.3d 461, 117 N.Y.S.3d 34 (N.Y.A.D. 1st Dept. 2020). Plaintiff’s Otolaryngologist did not mention Dr. Kadakia at all in their Affirmation. Plaintiff’s claims against Defendant Dr. Kadakia must also be dismissed.

Nor did Plaintiff’s Otolaryngologist delineate any departures by Defendant New York Eye & Ear Infirmary or its employees, so Plaintiff’s claims against Defendant New York Eye & Ear Infirmary must be dismissed as well.

As to the remainder of Plaintiff’s allegations against Dr. Rosenberg, “In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017); *See also Hernandez v. Eachempati*, 190 A.D.3d 552, 140 N.Y.S.3d 225 (N.Y.A.D. 1st Dept. 2021).

It should be noted that Defendants efiled an additional Affirmation from Dr. Lisman in Reply to Plaintiff’s Opposition. It is improper to submit new evidence in reply, and this Court’s Part Rules expressly prohibit sur expert affirmations without prior consent of the Court, which was not given here. Consequently, this Court did not consider Defendants’ Expert’s Affirmation submitted in Reply in deciding this motion.

At oral argument on the motion, Counsel for Defendants argued that the motion to dismiss should be granted because of a lack of proximate cause based on Dr. Lisman’s opinion that, “it does not make any difference what Dr. Shinder did or did not do, or saw, because it is undisputed that plaintiff had a blowout orbital floor fracture, it was unrepaired by plaintiff

delaying treatment for over 4 weeks, and the inferior rectus muscle was damaged this caused permanent diplopia on upward and left gaze. The differences in opinion with regard to Dr. Shinder and his review of the films is irrelevant because in 2018 plaintiff had diplopia from atrophied tissue from delay of repair, the Hertel measurement of 18 prior to Dr. Shinder's surgery and after shows that nothing Dr. Shinder did made any difference because again the repair needed to be made within at least 14 days of the injury. The standard by physicians who repair these types of orbital floor fractures is surgical repair should be no later than 14 days because after that there is no guarantee of successfully giving a patient symmetry or correcting diplopia.”

“The overarching principle governing determinations of proximate cause is that a defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury.” *Raldiris v. Enlarged City Sch. Dist. of Middletown*, 179 A.D.3d 1111, 118 N.Y.S.3d 696 (N.Y.A.D. 2nd Dept. 2020). “Proximate cause is established where the defendant's conduct was a “substantial factor” in bringing about the injury.” *King v. St. Barnabas Hosp.*, 87 A.D.3d 238, 927 N.Y.S.2d 34 (N.Y.A.D. 1st Dept. 2011).

However, the Court notes that Dr. Lisman’s opinions regarding a lack of proximate cause is contradicted by Plaintiff’s Otolaryngologist’s conclusion, noted above, that, “These departures directly caused Mr. Ahmed additional injuries and required him to undergo further surgical intervention that would have been otherwise unnecessary. Further, it cost Mr. Ahmed his best chance to cure or improve his vision.”

“Although the issue may be decided as a matter of law where only one conclusion may be drawn from the established facts, the question of proximate cause is generally to be decided by the finder of fact.” *Designer Limousine, Inc. v. Auth. Transportation, Inc.*, 176 A.D.3d 670, 110 N.Y.S.3d 133 (N.Y.A.D. 2nd Dept. 2019); *See also Richardson v. Cablevision Sys. Corp.*, 173

A.D.3d 1083, 104 N.Y.S.3d 655 (N.Y.A.D. 2nd Dept. 2019); *Kante v. Tong Fei Chen*, 176 A.D.3d 928, 111 N.Y.S.3d 612 (N.Y.A.D. 2nd Dept. 2019); *M.M.T. v. Relyea*, 177 A.D.3d 1013, 114 N.Y.S.3d 385 (N.Y.A.D. 2nd Dept. 2019).

“Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020). *See also Melendez v. Parkchester Med. Servs., P.C.*, 76 A.D.3d 927, 908 N.Y.S.2d 33 (N.Y.A.D. 1st Dept. 2010).

ORDERED that those portions of Defendants’ motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Sameep Kadakia, M.D. is granted; and it is further

ORDERED that Plaintiff’s allegations against Defendant Sameep Kadakia, M.D. are severed and dismissed; and it is further

ORDERED that those portions of Defendants’ motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant New York Eye & Ear Infirmary is granted; and it is further

ORDERED that Plaintiff’s allegations against Defendant New York Eye & Ear Infirmary are severed and dismissed; and it is further

ORDERED that the remainder of Defendants’ motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against the remaining Defendant Joshua Rosenberg, M.D. is granted only as to Plaintiff’s allegations related to a lack of informed consent; and it is further

ORDERED that Plaintiff's allegations related to a lack of informed consent are severed and dismissed; and it is further

ORDERED that the remainder of Defendants' motion, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendant Joshua Rosenberg, M.D. is denied; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on March 24, 2022 at 3:30 pm; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

1/13/2022
DATE

Hon. Judith N. McMahon
J.S.C.
JUDITH MCMAHON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	