

Muller v Hospital for Special Surgery, Inc.
2022 NY Slip Op 30842(U)
March 11, 2022
Supreme Court, New York County
Docket Number: Index No. 805120/2017
Judge: Erika Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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INDEX NO. 805120/2017

HARRIET SCHONFELD MULLER and NORMAN MULLER

**MOTION DATE 11/26/2019,
11/26/2019**

Plaintiffs,

MOTION SEQ. NO. 004 005

- v -

HOSPITAL FOR SPECIAL SURGERY, INC. and ALLAN
INGLIS, M.D.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 152, 153, 154, 157, 159, 160, 161, 162, 167, 168, 172

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 155, 156, 158, 163, 164, 165, 166, 169, 170, 171, 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the court grants Defendant Hospital for Special Surgery, Inc.'s ("HSS") (motion seq. 005) and Allan Inglis, M.D.'s ("Inglis") (motion seq. 004) (collectively, "Defendants") motions for summary judgment dismissal of Plaintiffs Harriet Schonfeld Muller's ("Schonfeld Muller") and Norman Muller's (collectively "Plaintiffs") complaint.

Plaintiffs filed this medical malpractice and lack of informed consent action against Defendants and alleged in substance that Defendants departed from good and accepted medical practice in their care and treatment of Plaintiff Schonfeld Muller by negligently treating her infected knee from May 20, 2015 to May 27, 2015, after she had a total knee replacement on October 22, 2014. Plaintiffs allege in substance that Defendant Inglis, who was Plaintiff

Schonfeld Muller's orthopedic surgeon, and Dr. Andy Miller, who worked as an infectious diseases specialist for Defendant HSS, deviated by improperly diagnosing Plaintiff Schonfeld Muller's infection as an acute infection, instead of a chronic infection, and choosing to have Dr. Inglis perform a one-stage incision and drainage wash-out procedure ("I&D") one day prior to receiving the culture results, which could not have cured the infection, instead of conducting a two-stage procedure to treat the infection and implant a new prosthesis. The two-stage procedure, which was eventually conducted at another facility by another surgeon, required removal of the prosthesis with placement of an antibiotic infused spacer for six weeks, followed by a second procedure for placement of a new prosthesis.

Defendant HSS now moves for summary judgment dismissal of Plaintiffs' complaint under motion sequence 004 and offers the expert affidavit of Michael Bronson, M.D. HSS argues in substance that Plaintiffs failed to demonstrate that HSS or its employee, Dr. Andy Miller, departed from accepted standards of medical care and practice in their treatment of Plaintiff Schonfeld Muller or that there was proximate cause for her alleged injuries. HSS further argues that Defendant Inglis is a private physician with hospital privileges and not an employee of HSS, so the doctrine of respondeat superior does not apply. Additionally, HSS argues in substance that Plaintiffs failed to oppose the motion with competent evidence in admissible form to create a material issue of fact. HSS further argues that Plaintiff's expert was not qualified to render an opinion on Dr. Miller's care, since he was a retired orthopedic surgeon and not an expert in infectious diseases and he failed to lay the requisite foundation to support his opinions.

Defendant Inglis now moves for summary judgment dismissal of Plaintiffs' complaint under motion sequence 005 and offers the expert affidavit from Bruce Farber, M.D. Defendant Inglis argues in substance that he is entitled to summary judgment because his expert opined that

there was no departure and no causation of Plaintiff Schonfeld Muller's alleged injuries.

Defendant Inglis further argues in substance that the court should disregard Plaintiffs' expert's affidavit because his opinions were not supported by the record and he alleged new theories of liability which were not previously pled, including that Plaintiff Schonfeld Muller's infection was chronic, that it dated back to her original knee replacement surgery, that Defendant Inglis departed from accepted standards of care by performing the I&D procedure instead of the two-stage procedure and that he did so prior to receiving the culture results. Defendant Inglis also argues in substance that the court should disregard Plaintiff's expert's affidavit regarding proximate cause because he failed to mention which of Plaintiff Schonfeld Muller's injuries were caused by Defendant Inglis' alleged malpractice. Also, Defendant Inglis argues in substance that the court should preclude Plaintiffs' expert's testimony because he never included in his affidavit that he previously treated Plaintiff Schonfeld Muller and Plaintiffs failed to serve any medical records or reports of such treatment.

Plaintiffs oppose the motions and offer the expert affidavit of Benzion Benatar, M.D. Plaintiff's expert stated in substance that he has performed over 900 total knee replacement surgeries, he has taught the procedure and that he is fully familiar with the diagnosis and treatment for post-knee replacement patients who have developed complications, including infections. Dr. Benatar opined in substance that Dr. Inglis and Dr. Miller deviated from accepted standards of care in their treatment of Plaintiff Schonfeld Muller by performing the I&D procedure instead of the two stage exchange explantation of the total knee replacement, that such deviation was the proximate cause of her infection and other injuries and that they failed to disclose to her the material risks, success rates, benefits, and alternatives to treating her chronic infection with an I&D procedure rather than the two stage procedure. He also stated that the

record showed that neither doctor knew the duration of the infection and that they also deviated from the accepted standard of care by performing the I&D before receiving the culture results, which revealed that they should have removed all implanted components immediately.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence

without any factual relationship to the alleged injuries” and “fails to address the essential factual allegations set forth in the complaint” or bill of particulars, then it is insufficient to establish defendant’s entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; see *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant’s papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant’s prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff’s injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff’s expert’s opinion is based

upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). “Ordinarily, 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 Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, “[w]here the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment” (*id.*).

In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself (*see e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, “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 (plaintiff’s) injuries” (*see Public Health Law § 2805-d; Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

Here, the court finds that Defendants met their initial burden of demonstrating that there was no departure from good and accepted medical practice and that any departure was not the proximate cause of Plaintiff Schonfeld Muller's alleged injuries. Therefore, the burden shifted to Plaintiffs and Plaintiffs failed to establish by admissible evidence the existence of a factual issue requiring a trial of this action.

The court finds that Plaintiffs failed to demonstrate that Plaintiffs' expert's opinions were based on facts sufficiently supported in the record. Plaintiffs' expert opined in substance that Dr. Inglis and Dr. Miller deviated from accepted standards of care in their treatment of Plaintiff Schonfeld Muller, that such deviations were the proximate cause of her alleged injuries and that they failed to obtain her informed consent. However, these opinions were primarily premised upon the claim that the infection of her prosthetic knee was chronic and not acute at the time she presented to HSS on May 20, 2015 and that an immediate two-stage procedure was required to cure the infection. The court finds that these opinions are conclusory, speculative and unsupported by any evidentiary foundation. The expert failed to explain why he believed the infection was chronic and he failed to point to anything in the record to support his contention. Therefore, Plaintiffs failed to defeat Defendants' summary judgment motions by raising a material issue of fact in dispute.

Additionally, the court finds that Plaintiffs failed to identify any evidence in the medical records or deposition testimony to demonstrate that Defendants were aware or should have been aware that the symptoms of Plaintiff Schonfeld Muller's infection existed prior to May 19, 2015. The expert indicated in substance that Plaintiff Schonfeld Muller complained about an infection in October 2014 after her total knee replacement surgery and that she was prescribed indomethacin in December 2014, but he failed to explain which record supported these claims,

he did not include any details of Plaintiff's complaint, any details of why she was prescribed the anti-inflammatory medication two months later, or why this information should have resulted in the diagnosis that the infection was chronic and not acute when she presented to HSS.

Additionally, there is no explanation as to why the identity of the infection as methicillin-susceptible staphylococcus aureus (MSSA) should also have led to the diagnosis that the infection was chronic and that an immediate two-step procedure was required. There was also no explanation for why such alleged deviations caused Plaintiff Schonfeld Muller's injuries. As such, the expert's claims of liability and proximate cause were conclusory, speculative and lacked a sufficient evidentiary foundation.

In fact, the record contradicts this assertion and indicates that Plaintiff Schonfeld Muller stated that the symptoms of her infection, which included pain, redness and swelling to her knee, began on May 19, 2015 when she was exiting a cab, which was the day before she went to HSS. As Defendants argue, this was several months after her knee replacement surgery and indicative that the infection was acute and not chronic. Therefore, the record contradicts the main premise for which Plaintiff's expert based his opinions of liability and causation.

Additionally, Plaintiffs failed to sufficiently allege through admissible evidence that Dr. Inglis or Dr. Miller should have known that her symptoms of infection began months earlier and persisted over time.

Although there is no requirement that Plaintiff must submit an affidavit from an expert in infectious diseases to opine on Dr. Miller's treatment, Plaintiff's expert must lay a proper foundation to support his opinions regarding the alleged misdiagnosis of the nature of the infection and the basis for opining that Defendant Inglis should have performed the two-stage procedure. Defendant HSS argues that Plaintiff's expert failed to do so, but the court disagrees.

Plaintiff's expert indicated that he performed over 900 total knee replacements and that he was fully familiar with post-surgery complications, including infections, and the causes and proper treatment for infected knee prostheses. The court finds that any deficiencies in the details of his experience with infections and the two procedures discussed in his affidavit do not prevent his ability to opine on Dr. Miller's treatment in this case.

Furthermore, the court is troubled that it appears that Plaintiff Schonfeld Muller was treated by Plaintiffs' expert during the time when she allegedly complained of symptoms of an infection, but Plaintiff's expert failed to discuss such treatment and Plaintiffs failed to provide Defendants with any records of such treatment. This is particularly important because Plaintiffs failed to identify anything in the record to support such claims. However, the court does not preclude the expert or dismiss the complaint for Plaintiffs' failure to provide such records or a medical report from their expert.

Regarding Plaintiffs' lack of informed consent claim, the court finds that Defendants made a prima facie showing that Plaintiff Schonfeld Muller's informed consent was properly obtained prior to beginning the D&I procedure. Plaintiff failed to raise a triable issue of fact by offering expert medical evidence establishing that Plaintiff was not properly and adequately advised of the reasonably foreseeable risks, benefits or alternatives to performing the procedure. Although Plaintiff testified in substance that she was not sufficiently informed of the benefits and risks of both procedures, such claims are not supported by the record.

Furthermore, the opinions asserted in Plaintiff's expert's affidavit regarding the adequacy of the consent are conclusory and based upon the premise that Plaintiff Schonfeld Muller's infection was chronic and not acute, which is not supported by the record. Additionally, Plaintiffs failed to demonstrate that a reasonably prudent person in Plaintiff Schonfeld Muller's

position would not have undergone the I&D treatment if he or she had been fully informed and that the lack of informed consent was a proximate cause of her alleged injuries.

Finally, the court dismisses Plaintiffs' pain and suffering claim as duplicative and related to damages on Plaintiff's other claims and the loss of consortium claim.

Therefore, the court grants both Defendants motions for summary judgment and dismisses Plaintiffs' complaint as against both Defendants.

The court has considered all arguments raised by the parties which are not specifically discussed herein and the court denies any additional request for relief not expressly granted.

As such, it is hereby

ORDERED that the court grants Defendants Hospital for Special Surgery, Inc.'s and Allan Inglis, M.D.'s motions for summary judgment dismissal of Plaintiffs Harriet Schonfeld Muller's and Norman Muller's complaint filed under motion sequences 005 and 004, respectively; and it is further

ORDERED that the court dismisses Plaintiffs Harriet Schonfeld Muller's and Norman Muller's complaint as against both defendants and the Clerk of the Court is directed to enter judgment in favor of Defendants Hospital for Special Surgery, Inc. and Allan Inglis, M.D. as against Plaintiffs Harriet Schonfeld Muller and Norman Muller, without costs to any party.

This constitutes the decision and order of the court.

3/11/2022
DATE


ERIKA EDWARDS, J.S.C.

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