

Engel v Levine

2022 NY Slip Op 31185(U)

April 6, 2022

Supreme Court, New York County

Docket Number: Index No. 805171/2018

Judge: Erika M. 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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ILEESA ENGEL and ROBERT ENGEL,

Plaintiffs,

- v -

JOSHUA LEVINE, M.D., JOSHUA L. LEVINE, M.D., P.C.,
and ROBERT ALLEN, M.D.,

Defendants.

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INDEX NO. 805171/2018MOTION DATE 11/09/2021MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235

were read on this motion to/for

DISMISS

Upon the foregoing documents, the court grants in part Defendants Joshua Levine, M.D.'s ("Dr. Levine"), Joshua L. Levine, M.D., P.C.'s ("Levine P.C.") and Robert Allen, M.D.'s ("Dr. Allen") (collectively, "Defendants") motion for summary judgment dismissal of Plaintiffs Ileesa Engel's ("Ms. Engel") and Robert Engel's (collectively, "Plaintiffs") complaint, to the extent that the court dismisses the complaint against Defendant Dr. Allen, only, dismisses Plaintiffs' lack of informed consent claim against all Defendants and denies the remainder of the motion. As such, the remainder of the action continues against Dr. Levine and Levine P.C.

Plaintiffs brought 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 Ms. Engel on May 10, 2016 and continuing during breast reconstruction surgery subsequent to her double mastectomy and removal of two implants and post-surgical care. Plaintiffs further allege that Dr. Levine, who was assisted by Dr.

Allen, performed a bilateral explantation, bilateral capsulectomy, left internal mammary lymph node biopsy and bilateral breast reconstruction with deep inferior epigastric artery perforator flaps procedure (“DIEP”) at New York Eye and Ear Infirmary. Plaintiffs further allege that both doctors failed to properly perform the DIEP procedure, they inappropriately applied a compressive abdominal binder after the surgery and failed to timely treat Ms. Engel’s abdominal wound. As a result, they caused her to suffer an infection, necrosis, scarring and additional complications and damages. Ms. Engle was transferred to another facility and there was an unnecessary delay of almost eight hours before Dr. Levine conducted several debridement and hyperbaric treatment procedures to treat Ms. Engle’s abdominal wound and relieve the tension from the sutures which was compromising her blood flow to the area. Plaintiffs also allege lack of informed consent.

Defendants now move for summary judgment in their favor and argue in substance that Defendants did not depart from good and medical practice and that Ms. Engle was fully informed of the benefits and risks of the procedure. Defendants offer the expert opinion of Dr. Alan H. Gold. Defendants argue in substance that neither doctor departed from standards of care, Dr. Allen never worked on Ms. Engel’s abdominal area, but assisted Dr. Levine with the breast portion of the surgery, that the DIEP procedure and follow-up treatment were proper, there was no infection and that Ms. Engel’s alleged injuries were all known potential risks and complications for which she was fully advised prior to the procedure.

Plaintiffs oppose Defendants’ motion and they submitted their own expert’s opinion. Plaintiffs argue in substance that Defendants failed to demonstrate their prima facie entitlement to summary judgment in their favor and that there are questions of fact to be tried regarding what Dr. Levine knew, when he knew it and what he was required to do based on the information.

Plaintiffs' expert opines in substance that Defendants departed from accepted standards of care because the wound breakdown required immediate surgery to relieve the ischemic tension in the skin and abdomen and that Defendants unnecessarily delayed the surgery for almost eight hours which led to more serious and preventable complications.

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 or dental 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 and dental 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.*).

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 their entitlement to summary judgment in their favor. Therefore, the burden shifts to Plaintiffs to demonstrate disputed material issues of fact.

As to Plaintiff's informed consent claim, the court finds that Plaintiffs failed to raise a material issue of fact based upon admissible evidence. Defendants' expert opined in substance that DIEP post-mastectomy reconstruction is a complex procedure and that the potential risks and complications include partial or complete flap loss, flap and skin necrosis, delayed wound healing, and compromised circulation which may require revisionary surgeries. Defendants demonstrated that all of these potential risks were fully explained to Ms. Engel prior to her surgery and that she knowingly and intelligently consented to such surgery. The court finds that the medical records, deposition testimony and informed consent forms support a finding that Ms. Engel was informed of the potential risks, benefits and alternatives related to the procedure and that such risks included her alleged injuries.

Therefore, the court grants dismissal of Plaintiffs' lack of informed consent claim against all Defendants.

The court finds that Plaintiffs failed to raise any disputed issues of fact to overcome Defendants' motion as to Dr. Allen. Based upon the admissible evidence, Plaintiffs failed to demonstrate that Dr. Allen departed from the applicable standard of care and that his actions proximately caused her alleged injuries. Dr. Allen assisted Dr. Levine with Ms. Engel's breast reconstruction by preparing her chest for the flaps and attaching the flaps. He did not perform any work on her abdominal area, which was the cause of her alleged injuries. Additionally, he had no interaction with Ms. Engel prior to or after the surgery and he was not responsible for informing her of the risks and benefits of the procedure since she was Dr. Levine's patient.

Therefore, the court grants dismissal of Plaintiffs' complaint as against Dr. Allen.

However, the court denies the remainder of Defendants' motion and finds that Plaintiffs raised material issues of fact in dispute to be determined by the trier of fact as to whether Dr. Levine and Levine, PC. departed from good and accepted standards of care. Such questions of fact include, but are not necessarily limited to, whether Dr. Levine departed from accepted standards in his performance of the DIEP procedure by causing Ms. Engel's wound breakdown, by allowing the abdominal binder to remain in place too long, and in his post-operative care by unnecessarily delaying the procedures to treat the condition and relieve the tension in the skin and abdomen for almost eight hours after the completion of the surgery. Additionally, questions remain as to whether such delay and Dr. Levine's conduct proximately caused or exacerbated Ms. Engel's alleged injuries and complications.

Therefore, the court denies the remainder of Defendants' motion and the remaining claims continue as against Dr. Levine and Levine P.C.

The court has considered all additional arguments raised by the parties, but not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendants Joshua Levine, M.D.'s, Joshua L. Levine, M.D., P.C.'s and Robert Allen, M.D.'s motion for summary judgment in part to the extent that the court dismisses Plaintiffs Ileesa Engel's and Robert Engel's complaint as against Defendant Robert Allen, M.D. and dismisses Plaintiffs' lack of informed consent claim against all defendants, but the court denies the remainder of Defendants' motion; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendant Robert Allen, M.D. as against Plaintiffs without costs to any party; and it is further

ORDERED that the court amends the caption as follows:

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 ILEESA ENGEL and ROBERT ENGEL,

Plaintiffs,

-V-

JOSHUA LEVINE, M.D. and JOSHUA L.
 LEVINE, M.D., P.C.,

Defendants.

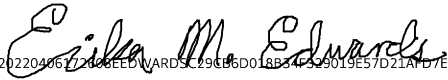
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 and it is further

ORDERED that counsel for the movant shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten (10) days of the date of this order, who is directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that the remainder of Plaintiffs' claims against Defendants Joshua Levine, M.D. and Joshua L. Levine, M.D., P.C. are severed and continued.

This constitutes the decision and order of the court.


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4/6/2022
DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: