SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA EDWARDS **PART** 10M

Justice

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MEGAN CONNOR,

Plaintiff,

- v -

DAVID A. GLUCK, M.D. and PARKMED NYC,

Defendants.

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INDEX NO. 805247/2018

MOTION DATE 11/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument held on March 10, 2022, the court grants Defendants David A. Gluck, M.D.'s ("Gluck") and Parkmed NYC's ("Parkmed") (collectively, "Defendants") motion for summary judgment and the court dismisses Plaintiff Megan Connor's ("Plaintiff") complaint against Defendants.

Plaintiff brings this medical malpractice and lack of informed consent action against Defendants and alleges that they departed from good and accepted medical standards in their gynecological and surgical care and treatment of Plaintiff from January 1, 2016 to February 3, 2016. Plaintiff further alleges that Defendant Gluck was negligent, careless and reckless in his termination of Plaintiff's pregnancy in her 25th week during her second trimester. On February 2, 2016, Defendant Gluck inserted a laminaria to dilate Plaintiff's cervix and he performed a dilation and evacuation ("D&E") on February 3, 2016. Plaintiff further alleges that after the procedure, she suffered excessive uterine bleeding and was taken to Bellevue Hospital. Plaintiff alleges that Defendants' malpractice caused her injuries, which included a damaged and punctured uterus, blood transfusions and inability to have children.

Defendants now move for summary judgment dismissal of Plaintiffs complaint. Defendants rely upon the expert opinion of Gary Mucciolo, M.D., who opines in substance that Defendants did not depart from good and accepted medical practice and their actions were not the proximate cause of Plaintiff's alleged injuries. Defendants further argue that Plaintiff's uterus was not punctured, but there was a small laceration on the posterior cervix. Additionally, Defendants argue that Plaintiff's bleeding occurred in the recovery room after the procedure had been completed and was caused by uterine atony and a consumptive coagulopathy (DIC). These conditions are well-known complications of a second trimester pregnancy termination. The cervical laceration did not occur during the procedure, but after it when Defendant Gluck was attempting to control the bleeding. Therefore, Defendants argue that the evidence does not support Plaintiff's claims that her uterus was punctured or damaged in any way or that she is unable to have children.

Plaintiff opposes the motion and relies on the expert opinion of Martin Gubernick, M.D., who opines that Defendants departed from good and accepted medical practice by failing to timely identify Plaintiff's cervical laceration and failing to suture it completely during the pregnancy termination procedure once they identified it. Plaintiff further alleges in substance that Defendants' actions caused Plaintiff to suffer excessive blood loss requiring Plaintiff to be transferred to Bellevue Hospital for treatment.

In reply, Defendants argue in substance that Plaintiff's expert's opinions were conclusory, included assumptions not based on the evidence and it did not dispute Defendants' expert's opinions. Additionally, Defendants argue that Plaintiff's expert opinion regarding Defendants' failure to properly and timely suture the cervical laceration raised new theories of malpractice and a new injury which were not included in Plaintiff's bill of particulars.

Defendants further argue that the cervical laceration occurred during efforts to control Plaintiff's bleeding when the uterus failed to contract, which is a known risk of the procedure.

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]).

Here, the court finds that Defendants, through their expert's affirmation, met their initial burden of demonstrating their entitlement to summary judgment in their favor as a matter of law and that Plaintiff, through her expert's affirmation, failed to rebut Defendants' expert's opinions, failed to raise a triable issue of fact by admissible evidence and impermissibly attempted to raise new theories of liability and damages which were not included in Plaintiff's bill of particulars. Additionally, the court finds Plaintiff's expert's opinions regarding the failure to timely and properly suture the cervical laceration to be conclusory and unsupported by the medical records and Bellevue Hospital diagnosis.

In her bill of particulars, Plaintiff alleged in substance that Defendants were negligent by improperly performing the abortion, damaging and injuring Plaintiff's uterus, puncturing the uterus, and after the procedure, failing to appreciate the signs, symptoms and complaints of

severe abdominal pain and blood loss, failing to refer Plaintiff to follow-up testing and failure to order radiographic examinations.

Plaintiff now abandons her claims that Defendants punctured, damaged and injured her uterus and claims that Defendants' alleged improper performance of Plaintiff's abortion caused Plaintiff's cervical laceration, that they failed to identify it, that there was a delay in suturing the laceration and that such suturing was done improperly. The court finds that Plaintiff's claim that Defendants caused a cervical laceration is a new injury claim and her claims regarding Defendants' failure to identify the cervical laceration in a timely manner and failure to properly and completely suture it are new claims of liability, none of which were included in Plaintiff's bill of particulars. Additionally, the court finds that these allegations are not merely an amplification or elaboration of the injuries set forth in Plaintiff's bill of particulars.

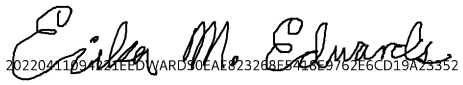
Furthermore, Plaintiff's expert failed to rebut Defendants' claims that Plaintiff's bleeding did not occur during the procedure, but in the recovery room when the uterus failed to contract, and he fails to specify the basis for Defendant Gluck's alleged departures during the procedure, which was the substance of Plaintiff's claims. Plaintiff's new allegations of departures related to the suturing of the cervical laceration occurred after the procedure was completed. Therefore, Plaintiff failed to raise a triable issue of fact regarding Defendants' expert's opinion that Defendants did not depart from good and acceptable medical practice in their performance of the procedure. Thus, Plaintiff's malpractice claims fail and her additional claims, including lack of informed consent, must also be dismissed.

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

As such, it is hereby

ORDERED that the court grants Defendants David A. Gluck, M.D.'s and Parkmed NYC's motion for summary judgment and the court dismisses Plaintiff Megan Connor's complaint against Defendants David A. Gluck, M.D. and Parkmed NYC; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendants David A. Gluck, M.D. and Parkmed NYC as against Plaintiff Megan Connor, without costs to any party.



4/11/2022
DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**