

Rosenfeld v Su

2022 NY Slip Op 32223(U)

July 8, 2022

Supreme Court, New York County

Docket Number: Index No. 805143/2017

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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ILENE ROSENFELD and GADI ROSENFELD,

Plaintiffs,

- v -

EDWIN SU, M.D., HOSPITAL FOR SPECIAL SURGERY,
and EDWIN P. SU, M.D., P.C.,

Defendants.

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INDEX NO. 805143/2017

MOTION DATE 11/24/2021

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 135

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

Upon the foregoing documents, the court grants in part Defendants Edwin Su, M.D.’s (“Dr. Su”), Hospital for Special Surgery’s (“HSS”) and Edwin P. Su, M.D., P.C.’s (Su, P.C.”) (collectively, “Defendants”) motion for summary judgment dismissal of Plaintiffs Irene Rosenfeld’s (Ms. Rosenfeld”) and Gadi Rosenfeld’s (Mr. Rosenfeld”) (collectively, “Plaintiffs”) complaint to the extent the court grants the portion of the motion seeking dismissal of Plaintiffs’ claims regarding lack of informed consent, a purported conflict of interest amongst Defendants regarding the manufacturers of the implants and Defendants’ failure to perform sufficient pre-operative testing to adequately recognize Ms. Rosenfeld’s knee conditions and deterioration.

Plaintiffs brought this medical malpractice and lack of informed consent action against Defendants for injuries Ms. Rosenfeld allegedly suffered because of Dr. Su’s negligent performance of knee surgeries on Ms. Rosenfeld’s right knee performed at HSS. Plaintiffs further allege that on November 7, 2014, as an attending and employee of HSS, Dr. Su performed partial knee replacements on both of Ms. Rosenfeld’s knees. Plaintiffs further allege

in substance that Dr. Su failed to perform sufficient pre-operative testing, failed to ascertain the deterioration of Ms. Rosenfeld's knee, used an inappropriate knee implant, improperly switched from a Smith & Nephew "affixed meniscus" prosthesis to a Biomet Oxford "floating meniscus" prosthesis for the partial knee replacement without notifying Ms. Rosenfeld and improperly performed the procedure. Plaintiffs also allege in substance that Dr. Su failed to obtain Ms. Rosenfeld's informed consent prior to the procedure by failing to advise Ms. Rosenfeld of the particular implant that he used, the risk of displacement of the implant and the alternative models that were available to avoid the risk of displacement.

Plaintiffs further alleged that because of Dr. Su's negligence, Ms. Rosenfeld had to undergo two additional right knee surgeries. Dr. Su performed revision surgery on Ms. Rosenfeld's partial right knee replacement on or about December 15, 2014. Ms. Rosenfeld had a displaced polyethylene bearing so Dr. Su had to remove it and increase the thickness for added stability. He used a Biomet Oxford Partial Knee system with the "floating meniscus" design. Plaintiff sustained another right knee dislocation, so Dr. Su performed a right revision total knee arthroplasty on February 12, 2015, using a Smith and Nephew implant.

Defendants now move by order to show cause under motion sequence 007 for summary judgment in their favor and dismissal of Plaintiffs' complaint. Defendants rely on the expert affidavit of Dr. Michael E. Berend and argue in substance that Defendants did not commit any departures from good and accepted medical practice in their care and treatment of Ms. Rosenfeld and that they did not cause or contribute to her alleged injuries. Defendants argue in substance that all necessary and appropriate imaging studies and tests were obtained prior to the surgeries and that it was not necessary to order an MRI. Defendants further argue in substance that it was appropriate for Dr. Su to perform both partial knee replacements on November 7, 2014 and the

revision surgery on December 15, 2014 with the Biomet Oxford Partial Knee system with the “floating meniscus” design since Ms. Rosenfeld’s ligaments were not compromised. Dr. Su used his discretion based on his medical judgment to choose which implant model to use on Ms. Rosenfeld and since he only used Biomet Oxford systems while performing partial knee replacements, it was his decision to make.

Defendants also argue in substance that the dislocations of Ms. Rosenfeld’s knee implants on December 12, 2014 and February 11, 2015 were not caused by Defendants’ alleged negligence. Defendants argue in substance that the need for the additional surgeries and the conversion from a partial knee replacement to a total knee replacement were known risks of the procedure. Defendants further argue that Dr. Su appropriately explained to Ms. Rosenfeld the risks and alternatives of the partial knee replacement, which is supported by the signed consent forms and the notations in the medical records.

Plaintiffs oppose the motion and rely on the expert affirmation of Arvind Von Keudell, M.D. to argue that Defendants departed from good and accepted medical practice and failed to obtain her informed consent prior to the procedures. Plaintiffs further argue in substance that Ms. Rosenfeld’s lax ligaments were unsuitable for Dr. Su’s performance of a partial knee replacement, particularly with the Biomet Oxford implant. Additionally, Plaintiffs allege that there was a conflict of interest between HSS and Dr. Su regarding the two manufacturers of the implants, Smith and Nephew and Biomet Oxford. During 2014 and 2015, Dr. Su received approximately \$100,000 from Smith and Nephew as a consultant, yet Biomet Oxford moved up to third place on the list of largest donors to HSS and Smith and Nephew moved from third to last place. Plaintiffs contend that there was a conflict of interest which impacted on Defendants’ decision to use the Biomet Oxford implant on Ms. Rosenfeld’s partial knee replacement.

Plaintiffs further argue that Dr. Su should have never used the Biomet Oxford partial knee implant on Ms. Rosenfeld and that he should have performed a total knee replacement instead of the partial knee replacement because on the deteriorated structural condition of her knee. Plaintiffs allege that Ms. Rosenfeld's dislocations were caused by the mobile "free floating" meniscus bearing which was unable to be contained by her lax and unstable ligaments in her right knee. Additionally, Plaintiffs argue in substance that if Dr. Su had used a particular type of Smith and Nephew implant on the partial knee replacement, then Ms. Rosenfeld's implants would have not dislocated and she would not have undergone the additional surgeries.

In reply, Defendants argue in substance that Plaintiffs' expert's affirmation is not an affirmation, but an affidavit that should have been accompanied by a certificate of conformity. Plaintiffs further argue that it is invalid because it failed to comply with CPLR 2309(c) since Dr. Von Keudell was not licensed to practice medicine in the State of New York, it was notarized remotely out-of-state and it did not include a certificate of conformity. Additionally, Plaintiffs' expert is not qualified to render such opinions since there was no indication that he specialized in knee replacements, let alone partial knee replacements. Defendants also claim that he failed to address Plaintiffs' claims regarding pre-operative testing and imaging, so Plaintiffs abandoned these claims. Defendants also argue in substance that Plaintiffs failed to rebut Defendants' facts in their material statement of facts. Defendants further argue in substance that Plaintiffs misconstrued "ligament laxity" with "ligament insufficiency" and that it was appropriate for Dr. Su to use the Biomet Oxford system on Ms. Rosenfeld. Defendants further allege that Dr. Su uses Smith and Nephew for total knee replacements and hip replacements, but he uses Biomet Oxford for partial knee replacements.

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 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 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]).

As an initial matter, the court accepts Plaintiffs’ expert affidavit and granted Plaintiffs’ motion by order to show cause, under motion sequence 008, for the court to accept Plaintiffs’ Certificate of Conformity of Oath Taken Out of State nunc pro tunc. Therefore, the court denies this portion of Defendants’ motion and considers the expert affidavit on its merits.

The court finds that although Defendants met their initial burden of establishing prima facie entitlement to summary judgment in their favor, Plaintiffs raised material issues of fact necessary to be tried regarding certain claims. Such factual issues in dispute, include, but are not

necessarily limited to, whether Defendants departed from good and accepted medical practice including whether Dr. Su negligently performed the procedure on Ms. Rosenfeld; the nature of the structural condition of Ms. Rosenfeld's right knee; whether Dr. Su used the proper type of implant and poly bearing based on the condition of her right knee; whether he should have performed a partial or total knee replacement on her right knee after the first dislocation; and whether Dr. Su's alleged negligence was a proximate cause of Ms. Rosenfeld's alleged injuries.

However, the court grants the portion of Defendants' motion seeking dismissal of Plaintiffs' lack of informed consent claim. The court finds that Dr. Su adequately advised Ms. Rosenfeld of the risks and alternatives related to all three surgeries and he obtained her informed consent prior to performing all three surgeries. Plaintiffs failed to raise an issue of fact to demonstrate that Dr. Su was required to advise Ms. Rosenfeld of alternative types of implants on the market for her partial knee replacement. Defendants demonstrated that Dr. Su was well within good and accepted medical practice to choose the type of implant based upon his training and experience and the needs of his patient.

Also, the court finds that Plaintiffs failed to raise triable issues of fact regarding their claims that Defendants' failure to perform sufficient pre-operative testing to adequately recognize Ms. Rosenfeld's knee conditions and deterioration, including the use of an MRI. Therefore, the court dismisses these claims as well.

Furthermore, the court dismisses Plaintiffs' claim that there was a conflict of interest amongst Defendants regarding the manufacturers of the implants and a potential impact on Dr. Su's and HSS' medical decisions involving the use of the Biomet Oxford implant on Ms. Rosenfeld's partial knee replacement. The court finds that Plaintiffs failed to demonstrate an issue of fact that the purported conflict of interest impacted Dr. Su's or HSS' decision on the

type of implant to use on Ms. Rosenfeld, whether such purported conflict was a departure and whether such purported conflict was a proximate cause of her alleged injuries.

Therefore, the court grants in part Defendants' summary judgment motion by dismissing Plaintiffs' claims regarding lack of informed consent, a purported conflict of interest amongst Defendants regarding the manufacturers of the implants, Smith and Nephew and Biomet Oxford, and Defendants' failure to perform sufficient pre-operative testing to adequately recognize Ms. Rosenfeld's knee conditions and deterioration, including the use of an MRI.

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

As such, it is hereby

ORDERED that the court grants in part Defendants Edwin Su, M.D.'s, Hospital for Special Surgery's and Edwin P. Su, M.D., P.C.'s motion for summary judgment under motion sequence 007, to the extent that the court grants the portion of the motion seeking dismissal of and the court dismisses Plaintiffs Irene Rosenfeld's and Gadi Rosenfeld's claims regarding lack of informed consent, a purported conflict of interest amongst Defendants regarding the manufacturers of the implants, Smith and Nephew and Biomet Oxford, as impacting Defendants' medical decisions regarding the use of the Biomet Oxford implant on Plaintiff Irene Rosenfeld's right partial knee replacement and Defendants' failure to perform sufficient pre-operative testing to adequately recognize Ms. Rosenfeld's knee conditions and deterioration, including the use of an MRI, and the court denies the remainder of the motion; and it is further

