

Scott v Martin

2022 NY Slip Op 32263(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 805259/2019

Judge: Erika M. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS PART 10M

Justice

-----X

ALLISON SCOTT,

Plaintiff,

- v -

HUNTER MARTIN, DDS, MD, ROBERT STUART
GLICKMAN DMD, NYU LANGONE HEALTH SYSTEM and
NYU LANGONE HOSPITAL,

Defendants.

-----X

INDEX NO. 805259/2019

MOTION DATE 12/09/2021,
12/06/2021

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 141, 144, 146

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 145, 147

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

Upon the foregoing documents, the court grants Defendants NYU Langone Health System’s (“NYUL Health System”) and NYU Langone Hospital’s (“NYUL Hospital”) (collectively “NYUL Defendants”) motion for summary judgment dismissal of Plaintiff Allison Scott’s (“Plaintiff”) complaint and all claims against them and NYUL Health System’s motion to dismiss the complaint for failure to state a cause of action under motion sequence 001 and grants Defendant Robert Stuart Glickman DMD’s (“Dr. Glickman”) summary judgment motion under motion sequence 002.

Plaintiff brought this dental malpractice, negligence and lack of informed consent action against Hunter Martin, DDS, who was discontinued from this case, Dr. Glickman and the NYUL Defendants. Plaintiff alleges in substance that she suffered damages caused by Defendants’

departures from good and accepted dental practice in their care and treatment of Plaintiff's bilateral mandible fractures, including an open reduction and internal fixation ("ORIF") of the right parasymphysis and closed reduction of the left subcondylar fractures, by Dr. Glickman, who was assisted by Dr. Martin, who was an oral surgery resident. The surgery was conducted at NYUL Hospital on March 30, 2017 and it involved the placement of an arch bar and implantation of a plate in Plaintiff's chin, requiring Plaintiff's jaw to be wired shut. Plaintiff was injured when she had a bicycle accident on March 26, 2017, causing her to fall off of her bicycle, strike her chin.

Plaintiff also alleges in substance that Defendants failed to timely, properly and appropriately evaluate, assess, diagnose and treat her dental condition, improperly placed the arch bars during the surgery, failed to prescribe proper medication, monitor her condition, failed to advise her of the risks, benefits and alternatives to the procedure and that the NYUL Defendants negligently hired Dr. Martin and Dr. Glickman.

Plaintiff alleged that Defendants' caused her injuries, which included numbness to the left side of her lip and chin (paresthesia), her upper teeth did not fit well with her lower teeth (malocclusion), pain, scars and additional injuries, requiring a subsequent surgery.

The NYUL Defendants now move under motion sequence 001 to dismiss for failure to state a cause of action upon which relief may be granted, pursuant to CPLR 3211, and for summary judgment dismissal of Plaintiff's complaint and all claims, pursuant to CPLR 3212. The NYUL Defendants rely on the expert affirmation of Dr. Allan J. Kucine who opines that the NYUL Defendants did not deviate from good and accepted dental practice in their care and treatment of Plaintiff and that their actions were not a proximate cause of Plaintiff's alleged injuries. Dr. Kucine further opined in substance that Plaintiff's allegations regarding the NYUL

Defendants' deviations in her evaluation, testing, diagnosis and assessment, during her surgery and in her post-operative care and treatment are without merit and that the treatment plan, placement of the arch bars and manner in which the surgery was conducted were appropriate and necessary to treat Plaintiff's fractures. Additionally, the NYUL Defendants argue in substance that none of the actions by the NYUL Defendants were a proximate cause of Plaintiff's injuries. They also argue that Plaintiff was adequately advised of the risks and benefits of the procedure.

The NYUL Defendants further argue in substance that all claims against NYUL Health System must be dismissed because NYUL Health System is not a hospital or medical care provider, it did not treat or care for Plaintiff and there was no hospital/patient relationship. Therefore, the NYUL Defendants argue that NYUL Health System owed no duty to Plaintiff. They also argue in substance that they cannot be liable for the acts of Dr. Glickman under vicarious, ostensible or apparent authority because Dr. Glickman was not their employee, that he was an independent physician retained by Plaintiff and that he was a Voluntary Attending Dentist with surgical privileges at NYUL Hospital.

Dr. Glickman now moves under motion sequence 002 for summary judgment in his favor and argues in substance that he met the standard of care with respect to Plaintiff's treatment, he did not cause any of her alleged injuries and he obtained Plaintiff's informed consent prior to the procedure. Dr. Glickman relies on the expert affirmation of Dr. Jay Neugarten who opines in substance that Plaintiff's surgery was necessary to stabilize and repair her fractures, that Dr. Glickman and Dr. Martin performed the surgery without issue and well within the standard of care and that Dr. Glickman's post-operative treatment plan was appropriate. Dr. Neugarten further stated in substance that there is no evidence that Plaintiff's alleged paresthesia was caused by the surgery. He stated that the paresthesia did not correlate with the area of the

surgery, there was no objective testing, no nerve injury from the surgery and that it was more likely than not caused by the trauma from the fall.

Dr. Glickman also argues in substance that he and Dr. Martin obtained Plaintiff's informed consent prior to the procedure verbally and in writing, as they adequately advised her of the risks and benefits associated with the surgery and she signed an informed consent form.

Plaintiff opposes the motions and relies on the expert affirmation of Michael B. Lee, D.D.S. Plaintiff argues in substance that there is an issue of material fact as to whether Dr. Glickman and Dr. Martin fully explained all of the alternatives and reasonably foreseeable risks of the surgery, including the option not to have the surgery. Plaintiff further alleges that when she expressed doubt about having the surgery, Dr. Glickman advised her that the surgery was necessary. Plaintiff argues that Dr. Glickman did not advise her of the risks or alternatives of the surgery prior to conducting the procedure and that Dr. Martin discussed the benefits and importance of the procedure, without discussing the risks or the option of not having the procedure. Plaintiff further argues that there is no evidence that either discussed the risks or alternatives with Plaintiff. Plaintiff further alleges that the lack of informed consent resulted in her injuries, including paresthesia, difficulty and pain while smiling and talking, prominence of the anterior chin and numbness in her chin.

Plaintiff further argues in substance that she testified during her deposition that had she known that she wouldn't feel her face, she would have never agreed to have the surgery. Additionally, in her affidavit submitted in opposition to the motions, Plaintiff claimed that had she known the risks and alternatives, she would have never consented to the surgery.

In rebuttal, the Defendants argue in substance that Plaintiff's expert failed to rebut any of Defendants' experts' claims that Defendants did not deviate from accepted practice, that they

were negligent in any manner, that their actions or inactions were a proximate cause of Plaintiff's alleged injuries. Additionally, Defendants argue that Plaintiff's claim of lack of informed consent fails because Plaintiff's expert failed to state that a reasonably prudent person would not have undergone the procedure and failed to rebut Defendant's claims that the surgery was necessary to treat Plaintiff's injuries. Additionally, they argue that Plaintiff failed to sufficiently allege that her lack of informed consent was a proximate cause of her alleged injuries.

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]).

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 who is retained by the patient himself (*see e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

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 all Defendants established their prima facie entitlement to summary judgment in their favor, however, Plaintiff failed to demonstrate any triable issues of fact to rebut Defendants' arguments based on admissible evidence.

As an initial matter, the court accepts Plaintiff's expert's affirmation and considers the merits of Dr. Lee's opinions. However, the court finds that he failed to rebut Defendants' experts' opinions that Defendants were not negligent, that there was no deviation from accepted practice in their care and treatment of Plaintiff, that they failed to obtain Plaintiff's informed consent, or that their actions or inactions were a proximate cause of Plaintiff's alleged injuries. Plaintiff failed to specify any alleged deviation or negligence on the part of any of the defendants regarding Plaintiff's pre-operative care and treatment, any deviations in the manner in which the surgery was conducted, or in her post-operative care and treatment. Therefore, the court dismisses Plaintiff's dental malpractice/negligence claim against all defendants.

Plaintiff's opposition focused on her lack of informed consent claim as it relates to Dr. Glickman's and Dr. Martin's failure to advise Plaintiff of the risk of paresthesia and of the alternative of not having surgical intervention. Dr. Lee stated in substance that it is possible to manage the mandible fracture without surgery and he discussed the risks of not having surgery. He opined that Plaintiff's alleged injuries were the causal result of the surgery and that her second surgery was necessary to relieve symptoms of complications from the surgery performed by Dr. Glickman and Dr. Martin. However, Dr. Lee failed to explain the basis for his opinions,

he failed to cite to anything in the evidence to support his opinions and he failed to rebut Defendants' experts' opinions regarding lack of informed consent, nor any of their other opinions regarding Defendants' lack of causation, negligence or deviation from accepted practice. Therefore, the court finds that Dr. Lee's opinions are conclusory and unsupported by the admissible evidence so Plaintiff failed to adequately rebut Defendants' arguments.

Furthermore, Defendants demonstrated that Dr. Glickman and Dr. Martin adequately advised Plaintiff of the known and accepted risks and benefits of the procedure and they advised Plaintiff that the surgery was necessary. Plaintiff's expert failed to allege that an alternative treatment should have been performed or that the surgery was not necessary. Plaintiff's expert also failed to opine that a reasonably prudent patient in Plaintiff's position would not have undergone the surgery if he or she had been fully informed of the alternative of not having the surgery.

Additionally, although Plaintiff alleged that she would not have consented to the surgery had she been advised that her face would be numb, Plaintiff previously testified in substance that she was advised of the risks and benefits of the surgery and that she was aware that the alternative to the surgery was not to have it at all. Therefore, Plaintiff's affidavit to the contrary, contradicts her earlier testimony. Additionally, Plaintiff failed to raise a triable issue regarding whether the alleged lack of informed consent was a proximate cause of her injuries. Therefore, the court dismisses Plaintiff's lack of informed consent claim against all defendants.

Additionally, although the court dismisses Plaintiff's complaint against Dr. Glickman, the court finds that Defendant NYUL Hospital cannot be held liable for the alleged negligence of Dr. Glickman or for negligently hiring Dr. Glickman because Dr. Glickman is a private, independent physician with surgical privileges at the hospital, who was retained by Plaintiff. Additionally,

Plaintiff discontinued the action against Dr. Martin and Plaintiff did not allege any negligence on the part of any other employee of either NYUL Defendant.

The court agrees with the NYUL Defendants that NYUL Health System is entitled to dismissal of all claims because NYUL Health System did not treat Plaintiff and there was no hospital/patient relationship with Plaintiff, so it owed no duty to Plaintiff. NYUL Health System demonstrated that it provides various services to NYU campuses and those services do not include any healthcare services.

As such, the court dismisses Plaintiff's complaint and all claims against all Defendants.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein.

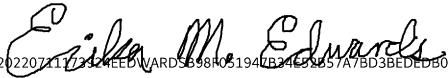
As such, it is hereby

ORDERED that the court grants Defendants NYU Langone Health System's and NYU Langone Hospital's motion for summary judgment dismissal of Plaintiff Allison Scott's complaint and all claims against them and the court grants Defendant NYU Langone Health System's motion to dismiss the complaint for failure to state a cause of action under motion sequence 001; and it is further

ORDERED that the court grants Defendant Robert Stuart Glickman DMD's summary judgment motion under motion sequence 002; and it is further

ORDERED that the court dismisses Plaintiff Allison Scott's complaint and all claims against Defendants NYU Langone Health System, NYU Langone Hospital and Robert Stuart Glickman DMD and directs the Clerk of the Court to enter judgment in favor of Defendants NYU Langone Health System, NYU Langone Hospital and Robert Stuart Glickman DMD as against Plaintiff Allison Scott, without costs to any party.

This constitutes the decision and order of the court.


2022071117342 ERIKA EDWARDS 6984061947B74E8857A7BD3BEDED500

7/11/2022
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: