

Lapitino v Sapienza
2022 NY Slip Op 33899(U)
November 15, 2022
Supreme Court, New York County
Docket Number: Index No. 805185/2020
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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LAURA LAPITINO,

Plaintiff,

- v -

ANTHONY SAPIENZA, NY ORTHOPEDICS

Defendant.

-----X

INDEX NO. 805185/2020

MOTION DATE 11/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 39, 40, 41, 42, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion of defendants Anthony Sapienza, M.D. and New York Orthopedics a/k/a Orthopedics Management Partners, LLC for summary judgment pursuant to CPLR §3212 is granted, and plaintiff's complaint is dismissed.

This matter arises out of the alleged medical malpractice surrounding surgery to plaintiff's left wrist¹ on February 24, 2020 and the defendants' subsequent care and treatment of plaintiff through March 6, 2020. Plaintiff claims that she now suffers from, inter alia, complex regional pain syndrome ("CRPS") and permanent loss of function of her left wrist, resulting from Dr. Sapienza's departures from accepted medical standards while performing both the surgery and a subsequent (bedside) irrigation, debridement, and evacuation of a hematoma one week after the surgery.

¹ The surgery performed on February 24, 2020 was a left wrist arthroscopy with synovectomy, scapholunate ligament tear repair with capsulodesis, excision of dorsal ganglion recurrent cyst, and a posterior interosseus nerve neurectomy.

Defendants move for judgment dismissing the complaint maintaining that plaintiff has not identified any departures on the part of Dr. Sapienza during his preoperative, intraoperative, or postoperative care of Ms. Lapitino. Plaintiff opposes the motion.

FACTUAL BACKGROUND

Plaintiff first came under the care of defendant NY Orthopedics in 2013, following a fall down subway stairs where she injured her left wrist. She was diagnosed with a ganglion cyst and underwent surgery with Steven J. Lee, M.D. of that practice, for left wrist mass excision to remove the cyst, on March 1, 2013.

Two years later, plaintiff returned to NY Orthopedics after injuring her left wrist during an exercise class. Plaintiff did not undergo an MRI that had been ordered.

In late November of 2018, plaintiff again presented to NY Orthopedics after suffering a fall from a ladder. She did not undergo an MRI that had been ordered.

On December 19, 2019 plaintiff returned to NY Orthopedics, this time complaining that her left wrist pain was so severe she could not lift anything with her left hand. She had an MRI on January 3, 2020 which reportedly showed degenerative signal and a small partial tear in the dorsal band of the interosseous scapholunate ligament, which generated a dorsal ganglion cyst that was growing in size. Dr. Sapienza diagnosed a scapholunate ligament tear and a ganglion cyst partial TFCC tear, and on January 21, 2020 plaintiff signed a consent form for surgery, which was performed by Dr. Sapienza on February 24, 2020.

On March 3, 2020, plaintiff saw Dr. Sapienza for her first postoperative visit at which time she reported feeling well with no significant pain at rest. Defendant noted a concern as to swelling and prescribed Keflex for any potential infection. No blood cultures were ordered as there were no signs of systemic infection.

On March 4, 2020, plaintiff began to experience increased pain in her wrist. NY Orthopedics instructed her to go to the emergency department, where Dr. Sapienza met her and performed a bedside² irrigation and drainage which resulted in the evacuation of a well-sized hematoma. Blood cultures ruled out infection. Plaintiff was discharged from the emergency room on March 5, 2020.

On March 6, 2020, plaintiff developed increased pain, swelling and discoloration to her left wrist. Dr. Lee, who was covering for Dr. Sapienza, performed a formal irrigation, debridement, and evacuation of hematoma and tenosynovectomy in the operating room. Her final visit with Dr. Lee was on May 20, 2020. Plaintiff never attended physical therapy and has not seen any physician regarding her left wrist since May 20, 2020.

EXPERT OPINIONS AND SUMMARY JUDGMENT

In support of their motion for summary judgment defendants attach, *inter alia*, the expert affirmation of Dr. Robert Strauch, an orthopedic surgeon with a certificate of added qualification in hand surgery (*see* NYSCEF Doc. No. 18) who unequivocally opines that (1) Dr. Sapienza did not depart from good and accepted medical practice in his care and treatment of plaintiff; (2) Dr. Sapienza used sound medical/surgical judgment in treating plaintiff, and (3) no negligent acts or omissions committed by Dr. Sapienza were a proximate cause of plaintiff's claimed injuries. Specifically, Dr. Strauch explains that the reason for plaintiff's alleged residual pain and loss of function of her left wrist stems from her long history of left wrist problems, precipitated by a series of traumas. Dr. Strauch uses the operative report authored by Dr. Sapienza (which he largely deconstructs sentence by sentence) to support his finding that Dr. Sapienza adhered to

² Based on plaintiff's reported discomfort, the availability of an operating suite, and the fact that plaintiff had consumed food and drink, Dr. Sapienza determined that an immediate bedside procedure was preferable to evacuate the hematoma.

good and accepted practices during the performance of the surgical procedure on February 24, 2020 and further, that Dr. Sapienza's decision not to take plaintiff to a formal operating suite on March 4, 2020 because of the perceived urgency of the problem, her pain level, and the fact that plaintiff had taken food and drink rendering her unable to undergo general anesthesia, was in all respects appropriate.

Dr. Strauch points out that no diagnosis of CRPS was ever made, nor was there ever evidence of any nerve injury in the medical records to support such a claim. He opines that defendants' care and treatment was not the proximate cause of plaintiff's alleged injuries, since she had a long history of left wrist pain precipitated by a series of traumas that predated the surgery at issue, and finally, that any residual pain or discomfort experienced by plaintiff is, to a reasonable degree of medical certainty, caused by the natural history of her disease and traumatic events.

In opposition to the motion plaintiff provides, *inter alia*, the redacted affirmation of a general surgeon (*see* NYSCEF Doc. No. 40). The Court notes that plaintiff's expert is not a hand surgeon or an orthopedic surgeon, and despite claiming to have "performed numerous hand surgeries in the wrist area" (*id.*, para 2), the expert never attests to having performed the specific surgery at issue in this case. The expert initially appears to limit his opinions to plaintiff's postoperative care and treatment "between March 3, 2020 and March 7, 2020" (*id.*, para 4), but later offers that Dr. Sapienza caused plaintiff to suffer a permanent neurologic injury when he "misidentified" and removed the wrong nerve on February 24, 2020. Again, plaintiff's expert never performed the operation that he/she opines on.

In fact, it is difficult for this Court to decipher when plaintiff claims that the alleged departures occurred. The Court gleans from the affidavit that plaintiff's expert is of the opinion

that removal of the hematoma at bedside rather than in the operating room was a cause of the alleged CRPS and permanent nerve damage. Here, however, it must be noted that plaintiff's allegation of CRPS stems from a single note contained in Dr. Lee's chart indicating that he was ruling out CRPS. In fact, at his deposition, Dr. Lee testified that he never diagnosed plaintiff as having either a nerve injury or CRPS (*see* NYSCEF Doc. No. 46, pp. 72-72).

Simply put, plaintiff's expert fails to set forth the standard of care violated by defendants and fails to **identify the departures** made by Dr. Sapienza. Plaintiff's expert does not explain the way in which supposed departure(s) constituted a proximate cause of alleged injuries.

APPLICABLE LAW

The standards for summary judgment are well settled. The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; [*internal citations omitted*]). The motion must be supported by evidence in admissible form (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]), and the facts must be viewed in the light most favorable to the nonmoving party (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on the issues of credibility" (*Garcia v. J.D. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept. 1992]).

Once the movant has met his or her burden on the motion, the nonmoving party must establish the existence of a material issue of fact (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A movant's failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64

NY2d 851 [1985]; [*internal citations omitted*]). It has been held that merely “pointing to gaps in an opponent’s evidence is insufficient to demonstrate a movant’s entitlement to summary judgment” (*Koulermos v. A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]).

“The drastic remedy of summary judgment, which deprives a party of his day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*DeParis v. Women’s Natl. Republican Club, Inc.*, 148 AD3d 401 [1st Dept. 2017]; [*internal citations omitted*]). “It is not the court’s function on a motion for summary judgment to assess credibility” (*Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]).

To sustain a cause of action for medical malpractice, the plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of the claimed injury. A medical provider moving for summary judgment, therefore, must make a *prima facie* showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept. 2009]; [*internal citations omitted*]), or by establishing that the plaintiff was not injured by such treatment (*see generally Stukas v. Streiter*, 83 AD3d 18 [2d Dept. 2011]).

To satisfy the burden on the motion, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). If the expert’s opinion is not based on facts in the record, the facts must be personally known to the expert and the opinion should specify “in what way” the plaintiff’s treatment was proper and “elucidate the standard of care” (*Ocasio-Gary v. Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept. 2010]). Once a defendant has made such a showing, the burden shifts to

the plaintiff to “submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]), but only as to those elements on which the defendant met the burden (*see Gillespie v. New York Hosp. Queens*, 96 AD3d 901 [2d Dept. 2012]). Accordingly, a plaintiff must produce expert testimony regarding the specific acts of malpractice, and not just testimony that alleges “[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence” (*Alvarez v. Prospect Hosp.*, 68 NY2d at 325). In most instances, the opinion of a qualified expert that the plaintiff’s injuries resulted from a deviation from relevant industry or medical standards is sufficient to defeat summary judgment (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24). Where the expert’s “ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment” (*Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The plaintiff’s expert must address the specific assertions of the defendant’s expert with respect to negligence and causation (*see Foster-Sturup v. Long*, 95 AD3d 726, 728-729 [1st Dept. 2012]).

The nonconclusory opinion of a qualified expert based on competent evidence that a defendant departed from accepted medical practice and that that departure was a proximate cause of plaintiff’s injury precludes a grant of summary judgment in favor of the defendants (*see Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542 [2002]; *Cregan v. Sachs*, 65 A.D.3d 101, 108, 879 N.Y.S.2d 440 [1st Dept.2009]). However, the affidavit must be by a qualified expert who “profess[es] personal knowledge of the standard of care in the field of [] medicine [at issue], whether acquired through his practice or studies or in some other way” (*Nguyen v. Dorce*, 125 A.D.3d 571 [1st Dept.2015] [pathologist not qualified to render opinion as to whether defendant deviated from the standard of care in the field of emergency medicine]; *see also Atkins v. Beth*

Abraham Health Servs., 133 A.D.3d 491 [1st Dept.2015] [osteopath not qualified to render opinion on treatment of a geriatric patient with diabetes and other conditions]; *Udoye v. Westchester–Bronx OB/GYN, P.C.*, 126 A.D.3d 653 [1st Dept.2015] [pathologist not qualified to render an opinion as to the standard of care in obstetrics or cardiology]).

An expert opinion that is contradicted by the record cannot defeat summary judgment.

FINDINGS

The Court finds that defendants have established entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmation of orthopedic surgeon and specialist in hand surgery, Dr. Strauch, who opined that Dr. Sapienza made all appropriate and timely decisions during the February 24, 2020 surgery and post-surgical care, and that his conduct was not a proximate cause of plaintiff's alleged injuries.

In opposition, plaintiff has failed to raise a triable issue of fact. The plaintiff's expert, who has not performed the surgical procedure at issue, has failed to set forth the standard of care allegedly violated, and has failed to present a nonspeculative basis for a finding that any act or omission of the medical defendants was the proximate cause of any injury (*see DeFilippo v. New York Downstate Hosp.*, 10 AD3d 521 [1st Dept. 2004]; [internal citations omitted]). Plaintiff's expert opinion was insufficient to contradict the opinion of Dr. Strauch that plaintiff was appropriately treated from February 24, 2020 through March 6, 2020.

While a medical expert need not be a specialist in a particular field in order to testify regarding accepted practice in that field (*Lopez v. Gramuglia*, 133 AD3d 424 [1st Dept. 2015]), the expert must provide a foundation that he or she possesses the "requisite personal knowledge" necessary to make a determination on the issues presented (*Limmer v. Rosenfeld*, 92 AD3d 609 [1st Dept. 2012]; *see Steinberg v. Lenox Hill Hosp.*, 148 AD3d 612 at 613 [1st Dept. 2017];

internal citations omitted; *see also Villani v. Kings Harbor Multicare Center*, 190 AD3d 534 [1st Dept. 2021]).

Further, no sur-reply affidavits were considered as this Court did not grant permission for submission of sur-replies, pursuant to Part rules.

Finally, based upon the record before it, the Court finds that plaintiff provided defendants with her informed consent, and all further allegations are deemed to be without merit.

Accordingly, it is

ORDERED that the motion of defendants Anthony Sapienza, M.D. and NY Orthopedics for summary judgment dismissing the complaint of plaintiff, Laura Lapitino, is granted in its entirety; and it is further

ORDERED that the Clerk enter judgment dismissing the plaintiff's complaint.

11/15/2022
DATE

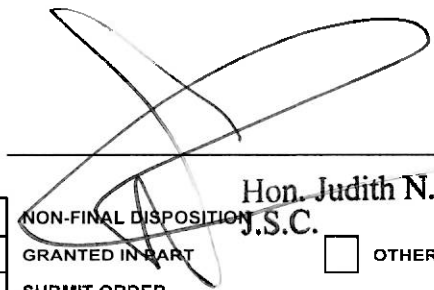
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APPLICATION:

CHECK IF APPROPRIATE:

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<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE



Hon. Judith N. McMahon
J.S.C.