

<b>Huang v Yan-Rosenberg</b>
2023 NY Slip Op 30236(U)
January 13, 2023
Supreme Court, Kings County
Docket Number: Index No. 512280/2019
Judge: Genine D. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 13th day of January 2023

P R E S E N T :

HON. GENINE D. EDWARDS, Justice

-----X

MEILAN HUANG,

Index No. 512280/2019

Plaintiff,

-against-

LINLI YAN-ROSENBERG, M.D. and  
LINLI YAN-ROSEBERG,  
PHYSICIAN, P.C.,

Defendants.

-----X

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion, Affidavits (Affirmations) Annexed and Exhibits.....	34-45
Answering Affidavit (Affirmation) and Exhibits.....	48-49
Reply Affidavit (Affirmation) and Exhibits.....	50-51

In an action to recover damages for medical malpractice and lack of informed consent defendants Linli Yan-Rosenberg, M.D. (“Yan-Rosenberg”) and Linli Yan-Rosenberg, Physician, PC moved for an Order granting summary judgment dismissing the complaint. Plaintiff opposed the motion.

**Facts**

On April 4, 2013, plaintiff appeared in Dr. Yan-Rosenberg’s office, on referral from her primary care physician, for treatment of HPV and evaluation for IUD removal. Dr. Yan-Rosenberg noted that plaintiff had an IUD that was installed in China, in 1995, that she had been

in menopause since she was fifty years old and was diagnosed with HPV of the cervix. Dr. Yan-Rosenberg discussed IUD removal, but plaintiff declined.

In subsequent visits, defendant performed several colposcopies, a LEEP/cone procedure, as well as pap smears in six-month intervals. On December 29, 2017, plaintiff's pap smear revealed bacteria actinomyces, which Dr. Yan-Rosenberg indicated can be caused by IUDs. A nurse practitioner treated plaintiff and discussed IUD removal, but plaintiff wanted time to consider it. On January 13, 2018, Dr. Yan-Rosenberg documented that she again recommended IUD removal, but plaintiff refused. On May 2, 2018, plaintiff returned to defendants' office with a CT scan report of her abdomen and pelvis, ordered by her urologist, which showed plaintiff had fibroids. Plaintiff was concerned that the IUD was related to her fibroid issue and wanted the IUD removed. Defendant explained to plaintiff that the IUD did not cause her fibroids but moved forward with the removal procedure. Dr. Yan-Rosenberg gave plaintiff, a non-English speaker, a consent form written in English. Speaking in Cantonese, Dr. Yan-Rosenberg explained the procedure, common risks including the IUD string possibly breaking, and the contents of the waiver. However, plaintiff contends that she was forced into removing the IUD and was not adequately informed of the complications of removal.

Before the removal, during her vaginal examination, Dr. Yan-Rosenberg visualized the IUD string. She performed a sonogram, identified the T shape of the device and located it in the uterine cavity. The string broke on the first attempt to remove the IUD. At that point, Dr. Yan-Rosenberg told plaintiff about the string breaking. She showed plaintiff the small-tipped forceps she intended to insert to assist with removal, and asked plaintiff if she wanted to proceed. Plaintiff agreed, and Dr. Yan-Rosenberg made a second attempt to remove the IUD, but the forceps slipped. The doctor informed plaintiff of what happened and asked again if plaintiff

wanted to continue, to which plaintiff responded in the affirmative. Dr. Yan-Rosenberg removed the IUD on the third attempt. After the removal, plaintiff was bleeding and complained of pain and dizziness. Dr. Yan-Rosenberg gave plaintiff pain medicine and after resting in the office plaintiff returned home.

That night, plaintiff's pain increased. She was nauseous and vomited frequently. The next day, May 3, 2018, plaintiff sought treatment from Maimonides Hospital Emergency Room ("Maimonides") for severe pain and vomiting. Upon receiving a call from the hospital, Dr. Yan-Rosenberg notified the attending physician that plaintiff recently had an IUD removed and a gynecologist should be consulted. On May 4, 2018, plaintiff had surgery at Maimonides. Dr. Yan-Rosenberg was informed that bleeding was found in plaintiff's uterus as well as a bowel perforation. Twenty centimeters of plaintiff's bowel was removed during the surgery.

### Law

When moving for summary judgment in a medical malpractice action, defendants must "demonstrate the absence of any material issues of fact with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of plaintiff's injuries." *Russell v. Garafalo*, 189 A.D.3d 1100, 136 N.Y.S.3d 317 (2d Dept. 2020). If the movant makes a prima facie showing of both required elements, the burden shifts to plaintiff to "rebut defendant's showing by raising triable issues of fact as to both the departure element and the causation element." *Gilmore v. Mihail*, 174 A.D.3d 686, 105 N.Y.S.3d 504 (2d Dept. 2019).

In opposition to a summary judgment motion, a plaintiff must "submit an affidavit of an expert physician attesting to a departure from good and accepted practice and stating the

physician's opinion that the alleged departure was a component producing cause of plaintiff's injuries." *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). *See Burns v. Goyal*, 145 A.D.3d 952, 44 N.Y.S.3d 180 (2d Dept. 2016). However, "[g]eneral allegations that are conclusory and unsupported by competent evidence tending to establish essential elements of medical malpractice are insufficient to defeat the motion for summary judgment." *Keun Young Kim v. Lenox Hill Hosp.*, 156 A.D.3d 774, 67 N.Y.S.3d 53 (2d Dept. 2017).

Lack of informed consent is another form of medical malpractice. A plaintiff alleging lack of informed consent must prove: "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonable prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is the proximate cause of the injury." *Spano v. Bertocci*, 299 A.D.2d 335, 749 N.Y.S.2d 275 (2d Dept. 2002). On a summary judgment motion, the proponent must make a prima facie showing that there are no issues of material fact. "The mere fact that plaintiff signed a consent form does not establish defendants' prima facie entitlement to judgment as a matter of law." *Godel v. Goldstein*, 155 A.D.3d 939, 64 N.Y.S.3d 127 (2d Dept. 2017) quoting *Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016).

### Analysis

#### Medical Malpractice

Defendants established their prima facie entitlement to summary judgment by proffering plaintiff's medical records, deposition testimony and the expert opinion of their board-certified physician, Gary Mucciolo, M.D., who specializes in Obstetrics and Gynecology. Dr. Mucciolo

concluded that Dr. Yan-Rosenberg did not deviate from accepted standards of care in recommending the removal of the IUD nor in the method she used for removal. Specifically, Dr. Mucciolo agreed with Dr. Yan-Rosenberg's recommendation to remove the IUD because there was a risk of infection as the IUD is a foreign object in the body, and actinomyces bacteria, associated with IUDs, were detected in plaintiff's pap smear. Additionally, Dr. Mucciolo opined that by completing a sonogram prior to the IUD removal, Dr. Yan-Rosenberg adhered to the required standards of care by locating the IUD, identifying its shape, and the size of plaintiff's uterus prior to removal. He explained that since there was no indication from the sonogram that the IUD was in her uterus wall or outside of the wall, it was reasonable to perform an in-office removal with small tipped forceps, which allowed defendant to grip the IUD, rather than performing a hysteroscopy. On the issue of causation, Dr. Mucciolo indicated that perforation of the uterus and bowel are known complications of the procedure but maintained that Dr. Yan-Rosenberg's actions were not the cause of plaintiff's injuries. He also added that the risk of perforation would still exist if Dr. Yan-Rosenberg performed a hysteroscopy or used ultrasound guidance during the removal.

In opposition, plaintiff's expert agreed that it was reasonable for defendants to recommend IUD removal because the IUD was over twenty years old, plaintiff was post-menopausal and no longer needed it, and there was a perpetual risk of infection as the IUD is a foreign body. However, the expert raised triable issues of fact as to whether defendant failed to perceive a heightened risk for complications with an in-office removal based upon plaintiff's medical history as well as whether the use of small-tipped forceps caused injury to plaintiff's bowel. The expert opined with a reasonable degree of medical certainty that plaintiff was at a high risk for complications due to being post-menopausal and the long period of time that the

IUD was inserted. As a result, Dr. Yan-Rosenberg should have informed plaintiff of the option to remove the IUD in a hospital setting, with ultrasound guidance or through a hysteroscopy. Furthermore, Dr. Yan-Rosenberg should have stopped the procedure after the IUD string broke during the first attempt. The difficulty removing the IUD coupled with the results of the CT scan report, according to plaintiff's expert, were indicators that the IUD was potentially embedded, and a regular removal was not appropriate in this circumstance. On the issue of causation, plaintiff's expert opined that, based upon Dr. Yan-Rosenberg's deposition testimony, the bleeding in plaintiff's uterus and bowel perforation were caused by the small tipped forceps used during the IUD removal. As the experts' opinions are in conflict regarding the departure and causation elements of this claim, this matter must be submitted to a jury. *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022). *Loaiza v. Lam*, 107 A.D.3d 951, 968 N.Y.S.2d 548 (2d Dept. 2013).

#### Informed Consent

Defendants failed to establish their prima facie entitlement to judgment as a matter of law on the informed consent claim. Dr. Yan-Rosenberg testified at her deposition that she verbally informed plaintiff of the risks of the procedure and obtained plaintiff's consent with a signed consent form. However, she admitted that she did not offer alternatives such as an ultrasound-guided removal, a hysteroscopy, or removal in a hospital setting.

In addition, Dr. Yan-Rosenberg explained that she verbally told plaintiff of the most common side effects of IUD removal including pain, bleeding, perforation of the uterus, and potential damage to surrounding organs. Though the consent form was in English, a language plaintiff did not understand, defendants' expert opined that the discussion between the two in Cantonese, the plaintiff's native language, was sufficient.

But plaintiff's deposition indicated that she was not informed of the risks of the removal or how the device would be removed. She was simply told it had to be removed. Additionally, the consent form contained only generic language that did not explain any alternatives, risks or complications specific to IUD removal, and the witness and translator sections of the form were left blank further raising question as to whether the risks and alternatives were explained to plaintiff. *See Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016); *Walker v. Saint Vincent Catholic Med. Ctrs.*, 114 A.D.3d 669, 979 N.Y.S.2d 697 (2d Dept. 2014). Based on the generic nature of the consent form and conflicting deposition testimony, defendants failed to shoulder their burden regarding lack of informed consent. *See Friedberg v. Rodeo*, 193 A.D.3d 825, 142 N.Y.S.3d 405 (2d Dept. 2021); *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022); *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 21 N.Y.S.3d 143 (2d Dept. 2015).

Lastly, in their reply, defendants asserted that their motion should be granted because plaintiff did not file a counter statement of undisputed facts pursuant to NYCRR 202.8-g. NYCRR 202.8-g(e) states that in the event that the opponent of a summary judgment motion does not submit a counter-statement of facts, the Court may take any action deemed just and appropriate. This Court is not required to dismiss the complaint nor are defendants entitled to summary judgment.

**Conclusion**

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied in its entirety.

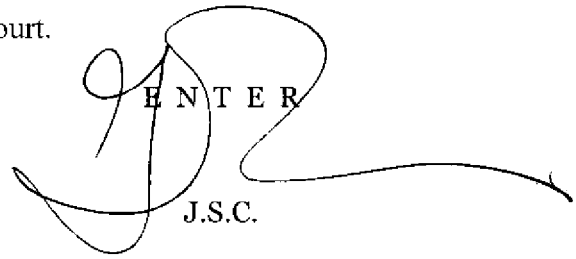
This constitutes the decision and Order of this Court.

For Clerks use only

MG \_\_\_\_\_

MD \_\_\_\_\_

Motion Seq.#: 34



ENTER  
J.S.C.

**HON. GENINE D. EDWARDS**