

Sheiffer v Fox

2023 NY Slip Op 30937(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 162180/2015

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

<p style="text-align: center;">-----X</p> <p>JAIME SHEIFFER,</p> <p style="text-align: center;">Plaintiff,</p>	<p>INDEX NO. <u>162180/2015</u></p> <p>MOTION DATE <u>11/16/2022</u></p> <p>MOTION SEQ. NO. <u>005</u></p>
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- v -

NATHAN FOX, M.D., ADRIENNE BARASCH, M.D., SUSAN PESCI, M.D., SAMUEL BENDER, M.D., MICHAEL SILVERSTEIN, M.D., STEPHANIE MELKA, M.D., NEIL GRAFSTEIN, M.D., CIARA MARLEY, M.D., PAUL CHOI M.D., JERRY BLAIVAS, M.D., MATERNAL FETAL MEDICINE ASSOCIATES, PLLC, THE MOUNT SINAI HOSPITAL, NEW YORK UROLOGICAL ASSOCIATES, P.C., EAST RIVER MEDICAL IMAGING, P.C., and UROCENTER OF NEW YORK,

Defendants.

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 164, 165, 166, 167, 168, 169, 170, 171, 172, 220, 223

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

In this action, inter alia, to recover damages for medical malpractice based on alleged departures from good and accepted practice and lack of informed consent, the defendant urologist Neil Grafstein, M.D., moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiff does not oppose the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Grafstein.

The facts of this dispute, as well as an analysis of the law applicable to summary judgment motions in medical malpractice actions, are set forth in great detail in this court's March 27, 2023 order deciding motion sequence 004. In short, the plaintiff alleged that the defendant obstetrician/gynecologist Nathan Fox, M.D., negligently transected her urinary bladder during a cesarean section procedure, necessitating intraoperative repair surgery. She further alleged that, as a consequence of the bladder repair surgery, she later developed a

vesicovaginal fistula that also required surgical repair, but that all of the OB/GYNs and urologists named as defendants in this action failed to appreciate the presence of the fistula in a timely fashion, causing her to suffer from pain and discomfort until the fistula was repaired. As explained in that order, after Fox recognized that there was a bladder defect, he called in Grafstein to perform the bladder repair, Grafstein thereupon repaired the bladder laceration, and he thereafter followed up with the plaintiff by, among other things, performing a cystogram and prescribing antibiotics to treat an apparent urinary tract infection.

Grafstein established his prima facie entitlement to judgment as a matter of law by submitting the pleadings, the plaintiff's bill of particulars as to him, the parties' deposition transcripts, relevant medical records, and the expert affirmation of Matthew P. Rutman, M.D., a board-certified urologist and professor of urology. Dr. Rutman opined that Grafstein did not depart from good and accepted practice either in the manner in which he performed the bladder repair or in the quality of his post-operative testing, treatment, and care of the plaintiff. Dr. Rutman stated that

“[t]he surgical repair by Dr. Grafstein on March 20, 2014, was properly performed and well-within the standard of care Bladder lacerations are a known complication of c-sections. In this case, the 6 to 7 cm laceration was promptly recognized, and Dr. Grafstein was called in to perform the repair. The repair technique used by Dr. Grafstein was wholly appropriate, as was the methylene blue testing for extravasation. Further, the decision to continue the Foley catheter for 2 weeks post-operatively was well within the standard recommendation for a patient healing from a bladder repair.”

He further concluded that

“during the April 1, 2014, and April 17, 2014, office visits, Dr. Grafstein appropriately and timely responded to the plaintiff's reported signs and symptoms, ordered appropriate diagnostic testing, and properly conducted a physical examination all within the standard of care. Moreover, contrary to the plaintiff's allegation that he failed to order or perform a cystogram, Dr. Grafstein performed a cystogram on her on April 1, 2014, . . . [and] there was no leakage, no fistula, and [Grafstein] thereafter ma[d]e the proper medical judgment call to remove the Foley catheter. . . [T]he cystogram was properly interpreted by Dr. Grafstein, and his instruction to the plaintiff to return to the office for follow-up in two weeks was completely within the standard of care as well.”

Dr. Rutman opined that, when Grafstein assessed the plaintiff on April 17, 2014, he did so in an “appropriate, thorough, and timely” manner. He averred that, based on the plaintiff’s complaints of a slight burning sensation during urination that had improved since the catheter was removed, along with “mild” blood in the urine and a urine dip result that was positive for leukocytes, but negative for nitrites, Grafstein’s decision to treat the plaintiff with Bactrim for a urinary tract infection, and by performing a urine culture, “was a proper exercise of medical and clinical judgment.” Dr. Rutman further concluded and that there was no clinical evidence that the plaintiff was suffering from a vesicovaginal fistula at the time of that visit. He further noted that, by the time that the plaintiff next presented to Grafstein’s office on May 7, 2014, her urinalysis, culture, and urine dipstick tests were all negative or normal.

Dr. Rutman further asserted that there was no basis for the plaintiff’s claim that Grafstein did not obtain her fully informed consent to the bladder repair procedure, as it was an emergency intraoperative procedure, or to the cystogram, with respect to which the plaintiff did not assert any injury. In any event, he noted that all other claims against Grafstein involved a failure to diagnose the fistula, which cannot support a cause of action alleging lack of informed consent.

In opposition to Grafstein’s showing, the plaintiff did not oppose the motion and, hence, did not raise a triable issue of fact. In any event, John Garofalo, M.D., in the affirmation that he submitted on the plaintiff’s behalf in connection with motion sequence 004, conceded that the bladder repair was properly performed. Hence, Grafstein is entitled to summary judgment dismissing the complaint insofar as asserted against him.

In light of the foregoing, it is

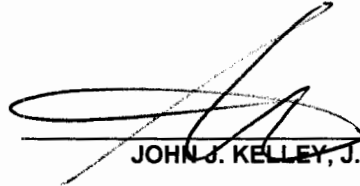
ORDERED that the motion is granted, without opposition, summary judgment is awarded to the defendant Neil Grafstein, M.D., dismissing the complaint insofar as asserted against him, and the complaint is dismissed insofar as asserted against the defendant Neil Grafstein, M.D.; and it is further,

ORDERED that the action is severed insofar as asserted against the defendant Neil Grafstein, M.D.; and it is further

ORDERED that the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against the defendant Neil Grafstein, M.D.

This constitutes the Decision and Order of the court.

3/27/2023
DATE



JOHN J. KELLEY, 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: