

Burns v Antell

2023 NY Slip Op 32017(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 450950/2019

Judge: John J. Kelley

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. JOHN J. KELLEY PART 56M

Justice

-----X

ANNE M. BURNS,

Plaintiff,

- v -

DARRICK E. ANTELL, M.D., MICHELLE KOZLOWSKY, R.N., LENNOX HILL AMBULATORY SURGERY, P.C. (A/K/A COLUMBIA EAST SIDE SURGERY A/K/A MANHATTAN RECONSTRUCTIVE SURGERY A/K/A DARRICK E. ANTELL, M.D., P.C.), Defendants.

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 253, 254, 255, 256, 257, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 294

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice and insufficient recordkeeping, and for lack of informed consent, fraud, gross negligence, and violation of the Education Law, the defendant Michelle Kozlowsky, R.N. moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against her. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Kozlowsky.

The facts of this dispute are set forth in detail in this court's June 13, 2023 order disposing of Motion Sequence 005. The crux of the plaintiff's claims is that the defendant Darrick E. Antell, M.D., a plastic surgeon, departed from good and accepted medical practice when, in the course of performing an August 10, 2016 breast reduction procedure upon her, he sutured the entirety of a thick clump of eschar, specifically, dead skin from the nipple-areola complex region, to surrounding healthy skin, and permitted the eschar to remain sutured to the healthy skin for two weeks following the surgery, thus allowing an infection to spread that

resulted in necrosis and a gross deformity in the nipple-areola complex, and requiring the whole complex to be removed. As relevant to the instant motion, the plaintiff alleged that Kozlowsky, as Antell's primary nurse, failed to recognize and diagnose the developing infection in a timely fashion, and failed promptly to report any concerns to Antell during the immediate post-operative period beginning on August 11, 2016. The plaintiff contended that this delay caused or contributed to Antell's failure seasonably to treat the infection and concomitant necrosis. She also faulted Kozlowsky for incomplete and misleading record keeping.

In the June 13, 2023 order, this court described, in detail, the allegations set forth in the plaintiff's complaint, her initial and amended bills of particulars as to Kozlowsky. In support of her motion, Kozlowsky submitted the pleadings, the bills of particulars, the parties' deposition transcripts, the transcript of the depositions of nonparty witnesses, relevant medical records, an attorney's affirmation, and her own affidavit, in which she presented factual assertions as well as expert opinions in the field of nursing.

In her affidavit, Kozlowsky asserted that she is a duly licensed registered nurse in the State of New York, and began working for Antell in or about June 2015. In response to the plaintiff's allegations, Kozlowsky contended that she was not a medical doctor, it was not her responsibility to diagnose conditions or illnesses, and she had no responsibility for deciding whether breast reduction surgery was advisable in the first instance, let alone the form and format of that surgery. She further alleged that, as a nurse, she had no responsibility for deciding where or how to free up, and then reposition, a patient's nipple-areola complex in conjunction with a breast reduction procedure. Kozlowsky averred that she did not even participate in the plaintiff's August 10, 2016 breast reduction procedure, and did not wrap or bandage the plaintiff at the conclusion of that surgery, as Antell undertook that task. She further stated that she did not make the determination to discharge the plaintiff after recovery, but, instead, consistent with office practice and protocol, called the plaintiff during the evening of August 10, 2016 to review all of the topics with the plaintiff that Antell required. Kozlowsky

averred that she charted those patient discussions so that they were available for Antell to review on August 11, 2016 in connection with the plaintiff's first post-operative visit with Antell.

Kozlowsky noted that, on both August 11, 2016 and August 12, 2016, Antell also saw, spoke with, and examined the plaintiff at his office, with her breast wound dressings removed, and discharged her to home on the latter date. As Kozlowsky described it,

“[w]hile I did speak with the patient by phone on 8/17/16 and did receive her 8/17/16 email with photos of her breasts, I did with them as I was trained in Dr. Antell's office. I copied them and placed them in his office for his review and decision making.

“I did speak with the patient by phone on 8/18/16 at which time she told me her left breast was improving; I charted the fact of that phone call the next day along with her stitch removal follow-up appointment.”

Kozlowsky also stated that, on August 25, 2016, while the plaintiff was at the general nursing triage before a scheduled examination for stitch removal, she charted what the plaintiff said to her that day regarding color changes to the left nipple. Kozlowsky explained that Antell saw the patient that same day, made all diagnostic decisions, formulated the treatment plan, and scheduled a follow-up visit for September 1, 2016, noting that it was Antell who personally telephoned the plaintiff to return to see him. She asserted that, accordingly, the nature of the patient care and treatment, including decision making as to any medical care plan, wound culturing, or other laboratory studies, were medical decisions, rather than nursing decisions, that they were made by Antell, and that they were carried out beginning with the August 31, 2016 revision surgery through the plaintiff's last visit with Antell on September 20, 2016, with little support activity on Kozlowsky's part, which was limited to changing the wound dressing and managing the plaintiff in the recovery room.

Kozlowsky thus expressly rejected the plaintiff's allegations that she could be held liable, as a nurse, for negligently failing properly to identify and treat the infection that developed in the plaintiff's left breast almost immediately after the surgery and for failing to ascertain that a surgical error occurred during the initial surgery, as these obligations were the sole province of

Antell, as the treating surgeon. She referred to the deposition testimony of the plaintiff's nurse "chaperone," Patty Kendrick, who averred that there was drainage coming from the plaintiff's arms, but not her breasts, and gave no indication to suggest the presence of fever, foul odor, or drainage leaking or emanating through the dressing. Thus, according to Kozlowsky, there was nothing in the medical chart or in Kendrick's testimony to suggest the presence of an infection at any time between August 10, 2016 and August 12, 2016. She thus opined that she did not deviate from required standards of nursing care, and that nothing that she did or failed to do proximately caused an infection or delayed its diagnosis.

Kozlowsky further opined that she could not be deemed negligent in failing to order appropriate blood tests or cultures that may have been required to identify any infection, as ordering blood tests and/or cultures are medical decisions that are outside the scope and authority of the work of a registered nurse. She noted that, in any event, Antell ordered multiple left breast swabs to culture for bacteria on separate occasions, that he ordered the plaintiff to use an antibiotic cream on her surgical sites, that he ordered oral antibiotics in consultation with an infectious disease specialist, and that, when examining the plaintiff, he checked for fever and foul odor, but observed none

With respect to the alleged deficiencies in her own record keeping, Kozlowsky explained that the first and second written notes in her own hand were dated August 16, 2016 and August 19, 2016, respectively, and were supplemented by the transcribed telephone calls that she had with the plaintiff on August 17, 2016 and August 18, 2016. She conceded that she mistakenly dated a chart entry in connection with the August 17, 2016 conversation as having been conducted on August 16, 2016. Kozlowsky asserted that, contrary to the plaintiff's characterizations,

"[t]here is nothing ominous or self-serving about these entries. They were my recall of the pertinent details from the completed telephone contacts and a review of those transcriptions confirms the same. Ms. Burns spoke only of bleeding from the left breast at the 8/17/16 call. She spoke of improvement at the 8/18/16 call. I was the one who asked for photos."

In any event, Kozlowsky concluded that those chart entries had no causal relationship to the injuries that the plaintiff alleged, inasmuch as Antell already knew of left nipple discoloration as early as August 11 and 12, 2016, and by August 17, 2016, Kozlowsky already had forwarded him the email and photographs that the plaintiff had sent to her earlier that date, and she had included them in the plaintiff's chart. She further asserted that she next made a chart entry on August 25, 2016, when the plaintiff arrived at Antell's office for a scheduled stitch removal, at which time Kozlowsky memorialized that the plaintiff had run out of the antibiotic ointment Silvadene and that her left nipple had turned completely black on the previous day. Kozlowsky explained that there was no mention in the transcribed August 17 and 18, 2016 telephone calls that the plaintiff had complained that her nipple had turned black. Kozlowsky opined that her charting in this regard was not negligent or self-serving and that, in light of the facts that Antell saw the plaintiff on August 25, 2016 and planned treatment for her on that date as well, the chart notations, however the plaintiff characterized them, did not proximately cause injury or damage to the plaintiff.

In Kozlowsky's August 31, 2016 note, referable to the revision surgery that Antell performed that day to remove the plaintiff's left nipple-areola complex, she wrote that "PT told nurse that she has not really showered after the surgery." Kozlowsky explained at her deposition that the phrase "not really showered" did not mean that the plaintiff had not showered at all, and rejected the plaintiff's contention that the note was entered wrongfully to suggest that it was the plaintiff's own grooming habits that caused her to become infected or permitted the infection to spread. She opined that the entry did not constitute negligence in memorializing her conversation with the plaintiff and that, in any event, it not alter or affect the medical care planning that Antell undertook that. She further explained that, regardless of the interpretation of the note, Antell continued to see, examine, diagnose, and treat the plaintiff for several weeks, including the next day, and continued the plaintiff on a course of oral antibiotics. With respect to

Kozlowsky's September 10, 2016, September 12, 2016, September 13, 2016, and September 19, 2016 chart entries, Kozlowsky opined that she was "not aware that any of these notations are being claimed to be negligently self-serving."

Kozlowsky explicitly denied the plaintiff's allegation that she failed properly to report and record critical medical information, events, and incidents to the plaintiff's chart, or that she received an email from the plaintiff on August 17, 2016 depicting problems with the plaintiff's breasts and did not immediately forward them to Antell. She opined that she did not deviate from required standards of nursing care in her handling of the August 17, 2016 email and attached photographs, and that her handling of the email did not proximately cause injury to the plaintiff, in that she timely forwarded it to Antell and placed at least one of the photographs in the plaintiff's chart, in accordance with Antell's practice and protocol. In any event, Kozlowsky averred that the plaintiff's reported concern at that time was the presence of red blood that was "weeping" from the left breast surgical wound, and not the blackened color of the breast, and that she properly followed up with the plaintiff by calling her again on the next day.

With respect to the plaintiff's allegations in the bills of particulars that Kozlowsky subjected the plaintiff to unnecessary stress by "screaming" at another nurse, improperly provided the plaintiff and Kendrick "with a small bag in which there were about a half a dozen 6x6 gauze pads" at the time of the plaintiff's discharge on August 10, 2016, acted "overtly dismissive" to the plaintiff by "treating her with disdain [and fail[ing] to listen and accurately report" the plaintiff's complaints, and "[i]ntentionally designed to assist Dr. Antell create a fabricate timeline . . . as to give the appearance of intentional sabotage of the medical records," Kozlowsky responded that

"[i]t pains me to even read these claims but they have nothing to do with standards of care; they have no causal relationship to the injuries [or] damages being claimed (post-op breast infection generating multiple operative interventions, loss of left breast tissue and loss of left nipple areola complex)."

As Kozlowsky described it, the plaintiff, while still under sedation, claimed that, on August 10, 2016, Kozlowsky was screaming in the operatory or recovery room, with Antell and the anesthesiologist present, but not reacting. Kozlowsky asserted that it was possible that she might have been verbally demanding of another nurse in connection with the preparation of the procedure for the next-schedule patient, but that she was not screaming and that, in any event, there was no causal relationship to any such screaming and a surgically generated post-operative infection. Although Kozlowsky denied being dismissive, disdainful, or inattentive, she opined that, even if she had exhibited that behavior, it did not cause or contribute to any of the plaintiff's injuries. Moreover, Kozlowsky categorically denied that she colluded with Antell to create a fabricated timeline or to sabotage the plaintiff's medical records. As with the plaintiff's other allegations of misconduct, Kozlowsky opined that any misconduct or negligence in connection with record keeping did not prevent or obstruct the plaintiff from pursuing proper follow-up care and treatment and, hence, did not proximately cause any of her alleged injuries.

In opposition to the motion, the plaintiff relied on the same submissions as Kozlowsky, and also submitted an attorney's affirmation, her own affidavit, and the identical expert affirmation of general/plastic and reconstructive surgeon Patrick J. Greaney, M.D., that she had submitted in opposition to the Antell defendants' motion for summary judgment. The contents of Greaney's affirmation were described in detail in this court's June 13, 2023 order. She also submitted photographs, transcripts of her telephone calls with Kozlowsky, a memorandum of law, and a counter statement of material facts.

In reply, Kozlowsky submitted an attorney's affirmation.

The court, in its June 13, 2023 order, provided a detailed analysis of the legal and evidentiary standards applicable to summary judgment motions in medical malpractice actions. In connection with the requirement that a defendant support his or her motion with an expert affirmation or affidavit, the court notes that a defendant health-care provider need not support a summary judgment motion with an affidavit or affirmation of another health-care provider.

Rather, the provider's own affidavit "may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the [health-care provider] acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assocs. P.C.*, 280 AD2d 754, 755 [3d Dept 2001] [citations omitted]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Groff v Kaleida Health* 161 AD3d 1518, 1520 [4th Dept 2018]; *Stancavage v Mirman*, 309 AD2d 918, 919 [2d Dept 2003]; *Baez v Lockridge*, 259 AD2d 573, 573 [2d Dept 1999]). Kozlowsky's affidavit in the instant matter is sufficiently detailed and descriptive to establish, prima facie, that she did not depart from good and accepted nursing practice, and that any insufficiencies in her record keeping protocol did not cause or contribute the plaintiff's injuries, or prevent the plaintiff from obtaining timely and necessary follow-up treatment and care.

As the Appellate Division, Second Department has explained,

"a nurse whose work is supervised by a physician and who does not exercise independent medical judgment cannot be liable for medical malpractice unless the directions from the physician so greatly deviate from normal medical practice that the nurse should be held liable for failing to intervene, or the nurse commits an independent act that constitutes a departure from accepted medical practice"

(*Yakubov v Jamil*, 121 AD3d 884, 885 [2d Dept 2014]; see *Gattling v Sisters of Charity Med. Ctr.*, 150 AD3d 701, 704 [2d Dept 2017]; *Bellafiore v Ricotta*, 83 AD3d 632, 632 [2d Dept 2011]). Kozlowsky demonstrated that, at all times, she was working under Antell's supervision, and that she did not exercise independent medical judgment. She also established, prima facie, that Antell's directions did not so greatly deviate from normal medical practice that she should have intervened. The plaintiff's opposition papers failed to raise a triable issue of fact as to whether Kozlowsky exercised medical judgment independent of Antell's, or that his conduct so greatly deviated from normal medical practice that Kozlowsky became obligated to intervene in some fashion.

With respect to whether Kozlowsky committed an independent act that constituted a departure from accepted medical or nursing practice, Kozlowsky established, prima facie, that

she did not depart from the applicable standard of care in the manner in which she provided post-operative nursing care, the manner in which she communicated with both the plaintiff and Antell, or the manner in which she generated and maintained the plaintiff's chart. Moreover, she established, prima facie, that even if the plaintiff's accusations against her were true, none of that alleged conduct caused or contributed to the plaintiff's injuries or ability to obtain proper follow-up treatment, including, but not limited to, the sufficiency of her record keeping (see generally *Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 740-741 [2d Dept 2017]). Moreover, while there is some authority for the proposition that a physician is qualified to render an opinion as to whether a nurse departed from good and accepted nursing practice in the context of the assistance that the nurse rendered to that physician's type of practice (see *Severin v Southside Hosp.*, 60 Misc 3d 1215[A], 2018 NY Slip Op 51138[U], *4, 2018 NY Misc LEXIS 3095, *15-16 [Sup Ct, Suffolk County, Jul. 20, 2018]), Dr. Greaney's affirmation is devoid of any discussion as to whether Kozlowsky departed from good nursing practice in the manner in which she cared for the plaintiff, communicated with either the plaintiff or Antell, or maintained her records. Nor did he address whether any of Kozlowsky's conduct caused or contributed to the onset and development of the plaintiff's infection, her necrosis, or the need for the removal of the left nipple-areola complex. Thus, in opposition to Kozlowsky's prima facie showing, the plaintiff failed to raise a triable issue of fact.

Additionally, the plaintiff has cited, and research has revealed, no authority for the proposition that bad bedside manner, standing alone, constitutes a species of malpractice.

The plaintiff's remaining claims and contentions are without merit.

Kozlowsky thus is entitled to summary judgment dismissing the complaint insofar as asserted against her.

Accordingly, it is

ORDERED that the motion of the defendant Michelle Kozlowsky, R.N., is granted, she is awarded summary judgment dismissing the complaint insofar as asserted against her, and the complaint is dismissed insofar as asserted against her; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Michelle Kozlowsky, R.N.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Michelle Kozlowsky, R.N.

This constitutes the Decision and Order of the court.



JOHN J. KELLEY, J.S.C.

6/14/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	