

**Kerwin v Hoitis**

2023 NY Slip Op 32106(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805173/2019

Judge: Judith N. McMahon

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

PRESENT: HON. JUDITH n. MCMAHON PART 30M

*Justice*

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JACQUELYNN KERWIN,

Plaintiff,

- v -

KAREN HOITIS, NYU LANGONE MEDICAL CENTER  
BREAST & SURGICAL ONCOLOGY, AND NYU LANGONE  
HOSPITALS

Defendant.

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INDEX NO. 805173/2019

MOTION DATE 06/14/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

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

Upon the foregoing documents, the motion for summary judgment of the defendants Karen Hiotis, M.D., s/h/a Karen Hoitis, M.D., NYU Langone Medical Center Breast & Surgical Oncology, and NYU Langone Hospitals (hereinafter, collectively, “the defendants”) pursuant to CPLR 3212 is granted to the extent that the complaint is severed and dismissed as against NYU Langone Medical Center Breast & Surgical Oncology, and against defendant, NYU Langone Hospitals, as unopposed<sup>1</sup>. Plaintiff’s “Second” and “Third” causes of action for lack of informed consent and negligent hiring are severed and dismissed. The balance of the motion is denied.

This medical malpractice matter arises out of a duct excision procedure performed by defendant-surgeon, Dr. Hiotis, on January 13, 2017, at NYU Langone Hospitals. The 62-year-old plaintiff claims that Dr. Hiotis’ departures from the standard of care including, *inter alia*, her use

<sup>1</sup> The Court notes that Dr. Hiotis was plaintiff’s attending physician and was not employed by either defendant but rather by NYU School of Medicine (*see* EBT of Dr. Hiotis; NYSCEF Doc. No. 36, p. 9).

of an electrocautery (“Bovie”)<sup>2</sup> device set at an excessive 40 watts, plaintiff was left with a significant concave area in the left breast, and unrelenting infections from a non-healing wound. Defendants maintain that the left breast duct excision was properly performed, that all surgical equipment including use of the Bovie was within the standard of care and properly used, and that plaintiff’s injuries and infections were the result of cystic duct ectasia (*i.e.*, blocked milk ducts), rather than any allegedly negligent care and treatment by Dr. Hiotis.

It is undisputed that plaintiff first presented to Dr. Hiotis’ office on November 14, 2016, with complaints of yellowish discharge from her left nipple. A sonogram and galactogram performed on December 12, 2016, did not reveal evidence of malignancy, and Dr. Hiotis recommended a duct excision, which she performed on January 13, 2017, at NYU Langone Hospitals (*see* NYSCEF Doc. No. 27, para 5). The surgery was performed on an out-patient basis. Plaintiff has continued to follow with physicians for a non-healing wound and suffers from recurrent infections to date. The nipple area is purportedly still swollen with occasional discharge, and plaintiff’s left breast remains concave at the surgical site.

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1<sup>st</sup> Dept. 2012]).

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<sup>2</sup> The doctor described the Bovie device as an “electrical scalpel” (*see* EBT of Dr. Hiotis; NYSCEF Doc. No.36, p. 55).

In support of the motion, defendant submits the expert affirmations of Paul Tartter, M.D. (*see* NYSCEF Doc. No. 28) who opines to a reasonable degree of medical certainty that the treatment rendered to plaintiff from January 13, 2017, through April 24, 2017 was within the standard of care and did not proximately cause her injuries. Specifically, Dr. Tartter opines that: (1) the left duct excision was properly performed and all equipment properly used including the Bovie electrocautery device; (2) the Bovie setting of 40 watts was within the standard of care and is the commonly used setting; (3) the use of a peak plasma blade was not required; (4) the subareolar flap was properly created to permit access to the duct being removed; (5) plaintiff did not suffer a burn from the Bovie device; (6) there was no delay in diagnosing and/or treating an alleged burn; (7) there is no evidence that defendant's treatment led to a breast infection, as plaintiff's first complaint of pain was not until February 3, 2017, a month after the procedure; (8) Cipro treatment for infection was appropriate; (9) plaintiff's recurrent complaints are due to a condition of duct ectasia, and not a result of a burn or untoward event occurring during the procedure; (10) plaintiff's complaints were well managed by defendants within the standard of care, and there was no reason for referrals to an infectious disease provider or wound care specialist; (11) plaintiff's skin integrity was protected during the surgery; (12) blood supply to the breast was properly protected during surgery, and (13) defendants did not negligently cause necrosis or scarring to plaintiff's left breast. Dr. Tartter is emphatic that "all of the plaintiff's subsequent complaints and related sequela were attributed to cystic duct ectasia and delayed wound healing and were not proximately caused by negligence" (*id.* para 52).

"The affirmation of defendants' expert was sufficient to meet defendants' *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff's alleged injuries" (*Einach v.*

*Lenox Hill Hosp.*, 160 AD3d 443 [1<sup>st</sup> Dept. 2018]). “An expert’s opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert’s opinion is without probative force” (*Pascocello v. Jibone*, 161 AD3d 516 at 516 [1<sup>st</sup> Dept. 2018]); [*internal citations omitted*]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1<sup>st</sup> Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1<sup>st</sup> Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1<sup>st</sup> Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion, plaintiff submits the affirmation of a surgeon (*see* NYSCEF Doc. No. 47) who opines to a reasonable degree of medical certainty that Dr. Hiotis departed from good and accepted medical practice and that these departures were a substantial factor in causing injury to plaintiff by way of compromising blood flow to the nipple areola area resulting in, *inter alia*, a concave area in the left breast. Specifically, the expert opines that: (1) plaintiff’s recurrent infections are related to the subject surgery; (2) blood flow to the nipple was compromised during surgery because of the thin flap and excessive cautery used during the surgery, and (3) a thin flap was inappropriate in this case, “as this will not sufficiently protect the vasculature,” and that “extensive use of cautery” as reflected in the pathology report caused tissue damage “making it easier for bacteria to grow” (*id.*, paras 48-50).

The foregoing expert affirmation raises clear questions of fact sufficient to defeat summary judgment. "The medical experts' conflicting opinions...raise issues of fact that must be resolved at trial" (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1<sup>st</sup> Dept. 2018]). As such, the motion for summary judgment by the defendants to dismiss plaintiff's complaint is denied.

Accordingly, it is

ORDERED that the motion for summary judgment the defendant NYU Langone Medical Center Breast & Surgical Oncology and the defendant NYU Langone Hospitals, to dismiss plaintiff's complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that plaintiff's causes of action for lack of informed consent and negligent hiring by NYU Langone Hospitals is severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the defendants NYU Langone Medical Center Breast & Surgical Oncology, and NYU Langone Hospitals dismissing plaintiff's complaint with prejudice; and it is further

ORDERED the parties shall appear for a virtual pre-trial conference via Microsoft Teams on **September 21, 2023, at 12:15 p.m.**

6/21/2023  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  GRANTED IN PART  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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