

Nardelli v Chamas

2023 NY Slip Op 32228(U)

June 30, 2023

Supreme Court, New York County

Docket Number: Index No. 805077/2019

Judge: Erika M. Edwards

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

PRESENT: HON. ERIKA M. EDWARDS
Justice

PART 10M

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JENNIFER NARDELLI,

Plaintiff,

INDEX NO. 805077/2019
MOTION DATE 04/19/2022
MOTION SEQ. NO. Cross-Mtn 002

- v -

FIRAS M. CHAMAS, M.D., NEW YORK ORTHOPEDICS,
P.C., MARINA ALLEN, M.D., GREGORY LOLLO, M.D.,
CHRISTOPHER RIEGLER, M.D. and SURGICARE OF
MANHATTAN, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Cross-Motion 002) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 232, 233, 234, 236, 237, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 281, 282, 283, 284

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

Upon the foregoing documents, the court denies Defendants Marina Allen, M.D.’s (“Dr. Allen”) and Surgicare of Manhattan, LLC’s (“Surgicare”) cross-motion for summary judgment dismissal of Plaintiff Jennifer Nardelli’s (“Plaintiff”) Verified Complaint.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendants. Plaintiff subsequently voluntarily discontinued the action against Defendants Gregory Lollo, M.D. (“Dr. Lollo”) and Christopher Riegler, M.D. (Dr. Riegler”) and resolved the matter with Dr. Firas M. Chamas, M.D. (“Dr. Chamas”).

Plaintiff’s claims against Defendants Dr. Allen and Surgicare involve allegations that Dr. Allen committed malpractice by oversedating Plaintiff during Dr. Chamas’ performance of a cervical epidural steroid injection on March 15, 2017, at Surgicare’s facility. Plaintiff alleges in substance that because Plaintiff was oversedated, she could not feel the pain and discomfort of

the needle approaching her spinal cord when Dr. Chamas advanced the needle into Plaintiff's neck to administer the epidural steroid injection. Plaintiff further alleged in substance that she suddenly and violently extended her neck and lifted her chest and torso up off of the table while the needle was still in her neck. Plaintiff also alleges in substance that Dr. Allen's malpractice caused Plaintiff to develop a syrinx requiring her to undergo complex surgery resulting in significant, permanent chronic nerve pain in her right arm and hand with resultant weakness and atrophy and continued physical therapy. Plaintiff further alleges that Surgicare is vicariously liable for Dr. Allen's malpractice.

It appears that Dr. Allen was the anesthesiologist who initially provided Plaintiff with 2 mg of Versed, also known as Midazolam, to initially sedate Plaintiff. However, it is disputed as to which doctor administered Fentanyl and Propofol, although Plaintiff received all three.

Prior to the dismissal, Dr. Lollo moved for summary judgment and submitted the expert affidavits of Dr. James Eisenkraft, an anesthesiologist, and Dr. Lawrence Epstein, a pain management physician. Dr. Lollo's two experts opined that Dr. Lollo did not depart from good and accepted medical practice in Plaintiff's care and treatment and that he did not cause Plaintiff's alleged injuries. They also opined in substance that the Versed, Fentanyl and Propofol were administered to Plaintiff in the appropriate dosage, manner and timing, such that Plaintiff was not oversedated and incommunicative. The action was discontinued prior to the court's decision on Dr. Lollo's motion.

Defendants Dr. Allen and Surgicare now cross-move for summary judgment dismissal of Plaintiff's Complaint and rather than submit their own expert opinions, they rely on Dr. Lollo's experts' opinions. The Movants argue in substance that since Plaintiff's claims against Dr. Allen are identical to Plaintiff's claims against Dr. Lollo, Dr. Lollo's experts' opinions are attributable

to Dr. Allen and support the Movants' arguments that Dr. Allen did not depart from good and accepted standard of medical practice in her care and treatment of Plaintiff, nor did she cause or contribute to Plaintiff's alleged injuries. The Movants further argue in substance that Dr. Allen does not recall this case, but that she believed that she gave Plaintiff 2 mg of Versed to initially sedate her. She further testified that although she customarily gives Fentanyl after administering Versed, she did not do so in this case because she did not document that she did it. Also, the anesthesia record regarding the administration of Fentanyl and Propofol was in Dr. Lollo's handwriting. Additionally, Dr. Allen did not recall seeing Plaintiff's reaction to Dr. Chamas' advancement of the needle so she believed that she was not in the room at the time. However, another witness said that she was in the room.

The Movants argue in substance that such factual disputes are irrelevant because both experts opined that the amount of Versed, Fentanyl and Propofol was the appropriate amount, manner and timing of sedation for Plaintiff and that they did not oversedate her to the point where she was insensate and unable to tell Dr. Chamas that she was experiencing pain when he placed the needle into her neck. The experts opined that Plaintiff was still able to communicate and that she was responsive. The Movants also argue in substance that the expert opinions support their arguments that Dr. Allen and Surgicare did nothing to cause Plaintiff's alleged injuries. Additionally, since the claims against Dr. Lollo were withdrawn and since there are no viable claims against any other Surgicare employees, Defendants argue in substance that if the court dismisses the Complaint against Dr. Allen, then it must also dismiss the Complaint against Surgicare.

Plaintiff opposes the cross-motion and argues in substance that the Movants failed to demonstrate their prima facie entitlement to judgment in their favor as a matter of law. Plaintiff

argues that since the action was discontinued against Dr. Lollo and Dr. Lollo's summary judgment motion was withdrawn, the expert affidavits were also withdrawn and should not be considered by the court. Plaintiff also argues in substance that the experts' opinions were not supported by, and were often contradicted by, the medical records and other evidence in this case. Plaintiff also disputes some of the Movants' recitation of the material facts. Additionally, Plaintiff argues in substance that the experts focused on Dr. Lollo and did not necessarily address the allegations, medical records and arguments specific to Dr. Allen's and Surgicare's alleged malpractice and causation.

In the alternative, although the burden should not shift to Plaintiff, Plaintiff argues that her expert opinion contradicts Dr. Lollo's experts' opinions and raises questions of fact regarding liability and causation which are sufficient to defeat the cross-motion. Plaintiff alleges that the testimony of Dr. Allen and Dr. Lollo contradict each other as to who administered the Fentanyl and Propofol to Plaintiff, which is a material question of fact. Plaintiff further argues in substance that Surgicare's anesthesia record and Dr. Lollo's testimony demonstrate that Dr. Allen, and not Dr. Lollo, administered the Fentanyl and Propofol and that Dr. Allen believes that she was not the one who administered them since she did not document it in her records. Plaintiff argues in substance that Dr. Allen's failure to document Plaintiff's reaction to the sedation was also a departure which was not addressed by Dr. Lollo's experts. Therefore, Plaintiff argues that the court must deny the cross-motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d

824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York*

Univ. Med. Center, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendants Dr. Allen and Surgicare failed to meet their initial burden of demonstrating their entitlement to judgment in their favor as a matter of law. The court agrees with Plaintiff and finds that the expert affidavits submitted in support of Dr. Lollo’s motion are insufficient to demonstrate a prima facie case that Dr. Allen and Surgicare, through vicarious liability, did not depart from accepted standard of practice as to their care and treatment of Plaintiff, or that they did not cause Plaintiff’s alleged injuries. As noted by Plaintiff, the experts failed to opine that Dr. Allen or Surgicare did not depart from the accepted standard of practice and they failed to address some of the material facts set forth in the medical records and testimony pertaining to Dr. Allen and Plaintiff’s specific allegations against Dr. Allen. As such, the court finds that the burden never shifted to Plaintiff and the court denies the motion.

In the alternative, the court finds that if the Movants had met their burden of demonstrating their entitlement to judgment in their favor as a matter of law, then Plaintiff’s expert opinion raised triable issues of facts regarding Dr. Allen’s and Surgicare’s alleged departures from accepted standard of practice, including, but not necessarily limited to, whether Dr. Allen’s actions caused Plaintiff to be oversedated, and whether they caused or contributed to Plaintiff’s alleged injuries. The court finds that Plaintiff’s expert opinion contradicted some of Dr. Lollo’s experts’ opinions and that Plaintiff’s expert opinions were not speculative, conclusory, nor unsupported by the record.

Therefore, the court determines that questions of material fact remain to be tried and the court denies the cross-motion.

The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies all requests for relief which were not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Defendants Marina Allen, M.D.'s and Surgicare of Manhattan, LLC's cross-motion for summary judgment dismissal of Plaintiff Jennifer Nardelli's Verified Complaint, filed under motion sequence 002, without costs to any party.

This constitutes the decision and order of the court.

6/30/2023

DATE


ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE