

Watson v Lau

2023 NY Slip Op 32494(U)

July 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 516964/2020

Judge: Consuelo Mallafre Melendez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ALISON WATSON,

Plaintiff,

SHORT FORM ORDER

-against-

Index No.: 516964/2020

Mo. Seq.: 002

NANCY LAU, M.D. and JKAN
GASTROENTEROLOGY, PLLC,

Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion: NYSCEF #: 44-57; 60-72.

Defendants Nancy Lau, M.D. and JKan Gastroenterology PLLC move this court for an Order pursuant to CPLR § 3212, granting summary judgment to defendants and dismissing Plaintiffs' Complaint. Plaintiff submitted opposition to this motion.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.’”

Hutchinson, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. “When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v.*

North Shore University Hospital at Syosset, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendants’ expert Michael Simon Frank, M.D., a physician board certified in Internal Medicine and Gastroenterology, established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Plaintiff’s expert, Roberto Bergamaschi, M.D., a physician duly licensed to practice medicine within the State of New York, currently the Professor of Surgery at New York Medical College, Valhalla, New York, and Chief of Section of Colon & Rectal Surgery at Westchester Medical Center and MidHudson Regional Hospital, established that they are qualified to opine as to the care the plaintiff received in this case.

The court finds Defendant’s expert’s speculation that this massive perforation occurred, not as a result of technical negligence and incompetence on the part of Dr. Lau but as a result of a justifiable small perforation having exponentially enlarged after the procedure was completed when Ms. Watson went to use the toilet in an attempt to relieve her abdominal pain to be without any basis in science. On the other hand, Plaintiff’s expert opines that a perforation this deep and this wide does not happen during a diagnostic colonoscopy in the absence of excessive and misplaced force of the endoscope. Th expert states a person simply does not have the ability to create the type of force through a Valsalva maneuver (a bowel movement) that would permit a

small perforation to grow exponentially in circumference and deepen through all the layers of the colon wall to become a full thickness bowel perforation encompassing 60-75% of the rectum.

As to the experts' opinions, case law is clear that "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment." *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d dept. 2010]. Here, the opinion of the Defendant's expert is speculative and conclusory and insufficient to meet its prima facie burden for summary judgment.

To the extent that a portion of defendant's expert's opinion is not speculative or conclusory, the court finds that plaintiff raises issues of fact which preclude summary judgment. "Summary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts (see *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623 [2d Dept 2003]; *Fotinas v Westchester County Med. Ctr.*, 300 AD2d 437 [2d Dept 2002]). When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution (see *Barbuto v Winthrop Univ. Hosp.*, *supra*; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650 [2d Dept 2001])." *Shields v Baktidy*, 11 AD3d 671, 672 [2d Dept 2004]; *Russell v. Garafalo*, 189 A.D.3d 1100 [2d Dept 2020].

Contrary to the opinion of defendant's expert, plaintiff's expert opines that a perforation was not justifiable in the setting of endometriosis on the surface of the colon as endometriosis would strengthen the bowel wall, making it more difficult to perforate. Plaintiff's expert also

opined the Defendant deviated from the standard of care as emergency treatment was negligently delayed several hours while Dr. Lau observed her patient, Ms. Watson, at her office, despite immediate complaints of abdominal pain and a clinical finding of a distended abdomen, as well as rectal bleeding.

Plaintiff's expert further opines that the performance of diagnostic colonoscopies on 7/5/19 and 8/6/19 were not indicated, as IBD had already been ruled out in the performance of three prior colonoscopies that were all normal, one in 2014 and two in 2016. Dr. Lau had already properly diagnosed Ms. Watson's chronic gastrointestinal condition as a result of IBS, as well as side effects from the many medications she was taking. The NYU CT scan of 6/13/19 was normal and given the plaintiff's known medical history and negative previous colonoscopy findings, she did not require further diagnostic colonoscopies at that time.

As to the claim of informed consent, Plaintiff's expert raises an issue of fact regarding whether Dr. Lau provided Ms. Watson with an appropriate informed consent analysis prior to the colonoscopy on 8/9/16. Plaintiff's expert opined that, appropriate informed consent would require informing Ms. Watson of the greater likelihood of perforation given plaintiff's tortuous colon and providing Ms. Watson with the option of performing a colonoscopy in a hospital setting. Therefor, summary judgment is also denied as to the claim of lack of informed consent.

Accordingly, Defendant's motion for summary judgment is DENIED in its entirety.

This constitutes the decision and order of the Court.

Dated: July 20, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.