

Richardson v Garely

2023 NY Slip Op 33555(U)

October 7, 2023

Supreme Court, New York County

Docket Number: Index No. 805308/2017

Judge: Erika M. Edwards

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

-----X

REMY RICHARDSON,

Plaintiff,

- v -

ALAN GARELY, M.D., SOUTH NASSAU COMMUNITIES
HOSPITAL, ALEX KY, M.D. and THE MOUNT SINAI
HOSPITAL,

Defendants.

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INDEX NO. 805308/2017

MOTION DATE 06/29/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

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

Upon the foregoing documents, the court grants Defendants Alex Ky, M.D.’s (“Dr. Ky”) and The Mount Sinai Hospital’s (“Mt. Sinai”) (collectively “Movants”) motion for summary judgment filed under motion sequence 003 and the court dismisses Plaintiff Remy Richardson’s (“Plaintiff”) complaint as against the Movants.

Plaintiff brought this medical malpractice/negligence action against Defendants Alan Garely, M.D. (“Dr. Garely”), South Nassau Communities Hospital (“South Nassau”), Dr. Ky and Mt. Sinai (collectively, “Defendants”) in her Amended Complaint. Plaintiff alleges in substance that Defendants departed from accepted medical practice in their care and treatment of Plaintiff during certain periods between January 2015 and August 2016. Plaintiff’s claims against the Movants allege in substance that Defendants Dr. Ky and Mt. Sinai were negligent in Dr. Ky’s performance of a low anterior resection on January 22, 2015. Plaintiff also maintains causes of

action of lack of informed consent against all Defendants and negligent hiring, retention and supervision against Defendant Mt. Sinai.

In Plaintiff's Bill of Particulars, she alleges in substance that the Movants departed from appropriate standards of medical care and treatment by improperly performing the low anterior resection, improperly combining it with a uteropexy, improperly using and placing a mesh and failing to obtain Plaintiff's informed consent prior to the procedure. Plaintiff also alleges that Mt. Sinai is vicariously liable for Dr. Ky's and Dr. Garely's negligent deviations. Plaintiff also asserts direct negligence claims against Mt. Sinai and alleges in substance that it failed to provide adequate medical personnel and supervision; failed to provide proper equipment and supplies; failed to promulgate and/or enforce proper rules and regulations; failed to maintain proper, complete, and compliant medical records; and failed to properly hire/grant privileges to Defendants.

Plaintiff further alleges in substance that the alleged negligence against the Movants resulted in her sustaining injuries, including adhesions; defecatory dysfunction; inflammation; need for additional surgeries; uterine prolapse; paresthesia of the buttocks and upper thighs; digestive problems; intermittent bloat; perineal pain and pressure; lower back pain; painful bowel movements; painful intercourse; vaginal heaviness; need for painkillers; emotional pain and suffering; fear of intercourse and having children; and inability to conceive.

Defendants Dr. Ky and Mt. Sinai now move for summary judgment under motion sequence 003. They rely on the expert affirmation of Dr. Walter Longo and argue in substance that they did not depart from accepted standards of medical care, there is no causation between the alleged negligent care and Plaintiff's alleged injuries and there are no valid claims for lack of informed consent against both Movants or negligent hiring, retention and supervision against Mt.

Sinai. Defendants argue in substance that Dr. Ky's performance of Plaintiff's low anterior resection during Dr. Garely's abdominal sacral uteropexy was indicated and properly performed, that it was appropriate to combine both procedures, that Dr. Ky's procedure did not involve the placement of mesh, that appropriate informed consent was obtained, and that Mt. Sinai was not negligent. The Movants further argue in substance that Mr. Sinai is not vicariously liable for Dr. Garely because he was Plaintiff's private physician and was not employed by Mt. Sinai. Additionally, they argue that they did not cause or contribute to Plaintiff's alleged injuries.

According to the Movant's expert, a redundant colon is an abnormally long colon that can have additional loops or twists. A low resection is performed to address a redundant colon by mobilizing the rectum and resecting the redundant excess colon so that it no longer pushes down onto the pelvic floor. Such procedure can help relieve constipation and the feeling of abdominal/pelvic pressure. A rectocele is a type of prolapse where the supportive tissue wall between the rectum and vaginal wall weakens and causes the front of the rectum to sag and bulge into the vagina. He explained that internal rectal prolapse is when the intestine telescopes into itself and then falls down into the pelvis. Internal rectal prolapse, which is different than a rectocele, can be caused by a redundant colon. Defendants argue that although the low anterior resection procedure does not involve operating on the rectocele, it can have the effect of treating the symptoms of a rectocele, which are the same symptoms of internal prolapse, including constipation and the feeling of being unable to fully evacuate.

Defendants further argue in substance that Dr. Ky's role was limited to Dr. Garely asking him to evaluate Plaintiff for a redundant colon and his performance of a routine low anterior resection to remove 25 cm of redundant colon and a rectopexy, which involved suturing the rectum to the posterior sacrum to prevent further internal prolapse. The Movants argue that Dr.

Ky performed proper pre-operative and post-operative evaluations, that such procedure was indicated based on Plaintiff's history of complaints and that there were no departures by Dr. Ky in the performance of this procedure. Defendants also argue that there was no deviation in combining the low anterior resection with Dr. Garely's sacrohysteropexy procedure and that there were no complications based on the records.

The Movants further argue in substance that Plaintiff's alleged injuries were caused by her redundant colon causing internal prolapse where the colon internally collapsed onto itself and fell down into her pelvis. They further argue in substance that Plaintiff was only treated by Mt. Sinai during her admission from January 22, 2015 through January 27, 2015, she was only seen by Dr. Ky for office visits on January 7, 2015 and February 12, 2015, and the surgery at Mt. Sinai was on January 22, 2015. Therefore, her claims against the Movants should be limited to the dates of treatment as they did not treat Plaintiff after February 12, 2015.

Plaintiff opposes the motion and relies on her expert affirmation to argue in substance that Defendants Dr. Ky and Mt. Sinai were negligent and departed from accepted standards of care in their treatment of Plaintiff. Plaintiff further argues that such departures substantially contributed to causing Plaintiff's injuries, including severe pelvic pain, adhesions, and the need for subsequent procedures. Plaintiff further argues that the Movants failed to establish a prima facie entitlement to summary judgment as a matter of law because they failed to address material facts and excluded material facts and evidence which undermine their arguments.

Plaintiff alleges in substance that she was 20 years old when she began treatment with Defendants in January 2015 for complaints of constipation and difficulty evacuating caused by a combination of pelvic prolapses, including cystocele (prolapse of bladder into vagina), enterocele (prolapse of small bowel onto top of vagina) and rectocele (prolapse of front of

rectum to bulge into vagina). Plaintiff alleges that Defendants failed to address all of her prolapses, and in particular, they did not operate on the rectocele. Instead, Defendant Dr. Ky recommended and performed a low anterior resection for a redundant colon that was not warranted because there was no clear indication that her colon contributed to her symptoms and the procedure did not address the actual prolapse. Plaintiff's expert opines in substance that Dr. Ky departed from the standard of care by failing to perform either a transvaginal posterior repair or transanal repair instead of the low anterior resection which does not repair the rectocele.

Plaintiff further alleges in substance that two weeks after the procedure, Plaintiff's symptoms returned and she continued to have rectocele that had to be corrected in a subsequent procedure. The low anterior resection also contributed to Plaintiff's development of extensive abdominal adhesion, which also required another surgery to correct. Additionally, Plaintiff argues that although Dr. Ky did not place the mesh, Dr. Ky's decision to perform the low anterior resection adjacent to a synthetic mesh was contraindicated. Plaintiff further argues in substance that the placement of a synthetic material immediately adjacent to a contaminated wound creates clinical inflammation that causes substantial scarring and adhesions.

Plaintiff further argues in substance that Dr. Ky and Mt. Sinai deviated from the standard of care by failing to obtain proper informed consent prior to the procedure and that such failure contributed to Plaintiff's alleged injuries, including the need for additional surgery, abdominal adhesions and sequela. Plaintiff argues that the surgery had an increased risk of abdominal adhesions because Dr. Ky was performing a bowel resection immediately adjacent to the placement of synthetic mesh, but Dr. Ky failed to explain to Plaintiff the risk of abdominal adhesions and the need for additional surgery.

Plaintiff further argues in substance that Mt. Sinai is vicariously liable for Dr. Garely's negligence based on the doctrine of ostensible agency because Plaintiff relied on Dr. Garely's relationship with Mt. Sinai when she agreed to undergo the procedure with both doctors. Plaintiff further argues in substance that Mt. Sinai is vicariously liable for Dr. Ky's negligence as she was employed by Mt. Sinai at the time of the procedure.

Therefore, Plaintiff argues that issues of fact remain to be tried.

In reply, the Movants argue in substance that Plaintiff's expert opinions are insufficient as they are based on facts that are speculative, conclusory, and contradicted by the competent evidence, they fail to demonstrate causation, they incorrectly apply the law regarding vicarious liability and lack of informed consent and they fail to address negligent hiring and retention. The Movants further argue in substance that Plaintiff's expert's entire premise was based on the incorrect assumption that Dr. Ky's sole purpose was to repair Plaintiff's rectocele, instead of being a consultant to evaluate Plaintiff's internal rectal prolapse and to possibly perform a low anterior resection if the internal rectal prolapse was being caused by a redundant colon. The Movants further argue that the internal rectal prolapse is a condition that is completely separate and distinct from Plaintiff's rectocele. A sacral uteropexy is recommended as a first treatment option in younger patients like Plaintiff who may want to have children since it does not involve cutting through the vaginal wall. Therefore, Plaintiff's arguments to the contrary are misplaced and refuted by the evidence.

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]).

In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician who is retained by the patient himself (*see e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

Here, the court finds that Defendants Dr. Ky and Mt. Sinai demonstrated their entitlement to summary judgment as a matter of law and that Plaintiff failed to demonstrate sufficient disputed factual issues based on competent evidence sufficient to defeat this motion. The Movants demonstrated that Dr. Ky and Mt. Sinai did not deviate from accepted standards of care, nor did any of their acts or omissions cause or contribute to Plaintiff’s alleged injuries.

Defendants demonstrated that Dr. Ky’s procedure did not involve the placement of the mesh, nor was Dr. Ky involved in the decision to place the mesh in Plaintiff. The decision to perform both procedures at the same time was made by Dr. Garely, who was Plaintiff’s private physician and who determined the treatment plan prior to Dr. Ky’s involvement with Plaintiff’s treatment. Dr. Garely was responsible for the sacral hysteropexy procedure, including the decision to place the mesh and to perform the remainder of the procedure.

Dr. Garely brought Dr. Ky in for the limited purposes of consulting on Plaintiff’s redundant colon and to perform the routine low anterior resection if necessary. Thus, as argued by the Movants, Dr. Ky’s role was limited to treatment of Plaintiff’s internal rectal prolapse if it

was determined intraoperatively that it was due to a redundant colon. Dr. Ky had no role in repairing the rectocele. As the Movants argue, since Dr. Ky is a colorectal surgeon, he does not perform posterior repairs, like the rectocele, which is accessed through the vagina. Therefore, Plaintiff's expert's opinions regarding deviations related to Dr. Ky's failure to repair the rectocele or to perform one type of procedure instead of another are misplaced. Additionally, Plaintiff's expert's opinions regarding Dr. Ky's negligence causing or contributing to Plaintiff's symptoms and alleged injuries are equally misplaced.

The Movants demonstrated that Plaintiff had an internal prolapse and that the low anterior resection surgery was indicated and performed in a manner consistent with good and accepted medical practice. Additionally, the evidence supports the Movants' arguments that there were no complications with Dr. Ky's procedure.

The Movants also demonstrated that Dr. Ky obtained Plaintiff's informed consent prior to performing the procedure as Dr. Ky advised Plaintiff of the reasonably foreseeable risks, benefits and alternatives of the procedure, including what his role would be during the procedure, and Plaintiff indicated that she understood. Additionally, Plaintiff's parents were present during some of the discussions.

The court finds that Plaintiff's purported disputed material factual issues were based on her expert's opinions which were primarily based on the erroneous premise that Dr. Ky had a more expansive role in Plaintiff's treatment plan and that he was responsible for treating or repairing Plaintiff's rectocele. The evidence demonstrated that Dr. Ky had no role in treating or repairing Plaintiff's rectocele. Additionally, the court finds that many of Plaintiff's expert's opinions regarding the purported issues of fact regarding liability and causation were conclusory, speculative and unsupported, or even contradicted, by the record. At times, the expert appears to

have disregarded significant distinctions in various procedures or terms in an effort to create purported issues of fact.

Additionally, the court grants dismissal of Plaintiff's claims for negligent hiring, retention and supervision as against Defendant Mt. Sinai and finds that Plaintiff failed to raise any disputed issues of material facts.

The court also dismisses Plaintiff's claims that Defendant Mt. Sinai is vicariously liable for Dr. Garely's alleged negligence as he is a private urogynecologist, he treated Plaintiff outside of Mt. Sinai prior to the date of her procedure, and he was employed by South Nassau and not Mr. Sinai. Additionally, Plaintiff was admitted to Mt. Sinai as Dr. Garely's private patient for the purpose of permitting him to perform the procedure.

Since the court dismisses Plaintiff's claims against Dr. Ky, there is no vicarious liability on the part of Mt. Sinai for any acts or omission committed by Dr. Ky in his care and treatment of Plaintiff.

Therefore, the court finds that all of Plaintiff's claims against Defendants Dr. Ky and Mt. Sinai fail and the court dismisses Plaintiff's complaint as against Dr. Ky and Mt. Sinai. The court is not persuaded by Plaintiff's arguments to the contrary.

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

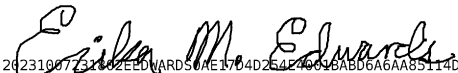
As such, it is hereby

ORDERED that the court grants Defendants Alex Ky, M.D.'s and The Mount Sinai Hospital's motion for summary judgment, filed under motion sequence 003, and the court dismisses Plaintiff Remy Richardson's complaint as against Defendants Alex Ky, M.D. and The

Mount Sinai Hospital, and directs the Clerk of the Court to enter judgment in favor of Defendants Alex Ky, M.D. and The Mount Sinai Hospital as against Plaintiff Remy Richardson; and it is further

ORDERED that the court severs these claims and the balance of the action against the remaining defendants shall continue.

This constitutes the decision and order of the court.


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<u>10/7/2023</u> DATE		<u>ERIKA M. EDWARDS, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE