

Miller v Bostrom

2023 NY Slip Op 34342(U)

December 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805160/2019

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

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MARCIA D. MILLER,

Plaintiffs,

- v -

MATHIAS P. BOSTROM, M.D., GAYLE RUDOFISKY
SALAMA, M.D., ROBERT SCHNEIDER, M.D. and
HOSPITAL FOR SPECIAL SURGERY,

Defendants.

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INDEX NO. 805160/2019MOTION DATE 05/05/2023MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and oral argument held before the court on September 28, 2023, the court grants Defendant Gayle Rudofsky Salama, M.D.'s ("Dr. Salama") motion for summary judgment dismissal of Plaintiff Marcia D. Miller's ("Plaintiff") complaint and the court dismisses the complaint as against Dr. Salama and amends the caption to reflect the dismissal.

Plaintiff and her spouse, Michael Miller, brought this action sounding in medical malpractice, negligence and lack of informed consent against Defendants Mathias P. Bostrom, M.D. ("Dr. Bostrom"), Richard J. Herzog, M.D. ("Dr. Herzog"), Dr. Salama, Robert Schneider, M.D. ("Dr. Schneider") and Hospital for Special Surgery ("HSS") (collectively, "Defendants"). Mr. Miller subsequently discontinued the action against all defendants. In a decision and order, dated July 13, 2022, the court dismissed the complaint against Dr. Herzog and amended the caption to remove his name from the caption.

Plaintiff alleges in substance that on November 21, 2016, Defendants negligently performed a fluoroscopic-guided aspiration of her left hip at HSS causing her alleged injuries,

including a significant infection to her left hip, left hip prosthesis and multiple complications. The procedure was needed so that Dr. Bostrom could perform hip revision surgery on Plaintiff to remove the metal components of her left hip implant, which caused metal buildup and debris to lodge into Plaintiff's soft tissues, and to replace the metal components with ceramic components. Plaintiff further alleges in substance that Defendant Dr. Salama deviated from accepted standards of medical practice by making multiple attempts to perform the aspiration using the same contaminated needle without changing gloves and sterilizing herself when she left the operative table, failing to maintain a sterile field during the procedure and failing to contact a superior to request assistance during the procedure.

Defendant Dr. Salama now moves under motion sequence 003 for summary judgment dismissal of Plaintiff's complaint. Dr. Salama relies on the expert opinions of Dr. Devon A. Klein, a board certified radiologist. She argues in substance that at the time of the procedure, Dr. Salama was a fourth year resident who was supervised and acting under the direction of the attending physician, Defendant Dr. Schneider, at all times. She argues that there were no departures, that the hip aspiration was performed in accordance with good and accepted practice and that she did not exercise any independent medical judgment in her performance of the hip aspiration. Additionally, Dr. Salama argues that there was nothing about Dr. Schneider's treatment decisions that was so clearly contraindicated that would have required her to question or refuse to follow his orders. She also argues in substance that an infection is a known and accepted risk of hip aspirations and that Plaintiff was appropriately advised of such risk prior to undergoing the procedure.

Plaintiff opposes the motion and relies on the expert opinion of Dr. Wayne J. Olan, who is board certified in radiology and neuroradiology. Plaintiff argues in substance that the court

should deny Dr. Salama's motion because improper sterile techniques were used and Dr. Salama has an independent obligation to employ standard and accepted techniques of sterility, regardless of what Dr. Schneider told her to do as the attending radiologist. Plaintiff argues that the required sterile techniques include scrubbing in, as if scrubbing in for a surgical procedure, wearing a sterile surgical gown, gloves and mask, and changing gloves and needles during the course of the procedure if there is even a hint of contamination.

Plaintiff further alleges that Dr. Salama's failure to employ sterile techniques caused Plaintiff's infection. Plaintiff further argues that significant triable issues of fact exist regarding Dr. Salama's negligence which preclude the granting of summary judgment.

In reply, Defendant Dr. Salama argues that Plaintiff failed to provide any legal support for her claim that Dr. Salama, as a fourth year resident, had an individual obligation that was separate from her attending's responsibility. Dr. Salama also argues in substance that Plaintiff abandoned her claim for lack of informed consent against Dr. Salama and failed to create a triable question of fact sufficient to defeat the 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]).

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]).

A hospital or its employee, including a resident, cannot be held liable for following the directions of the supervising attending physician, unless the attending physician's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders (*Walter v Betancourt*, 283 AD2d 223, 224 [1st Dept 2001] [internal quotations and citations omitted]).

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 Dr. Salama demonstrated her entitlement to summary judgment in her favor as a matter of law and Plaintiff failed to raise a triable issue of fact sufficient to defeat this motion. Plaintiff failed to raise a question of fact in support of her argument that Dr. Salama had any independent liability in this matter as the testimony demonstrated that she was under the direction and supervision of Dr. Schneider, the attending physician, at all relevant times. There is no legal support for Plaintiff's argument that Dr. Salama had an independent

obligation to maintain a sterile environment. To the contrary, as cited by Dr. Salama, the prevailing case law establishes that a resident cannot be held liable in this situation where there is no evidence that Dr. Schneider's orders were "so clearly contraindicated by normal practice" that Dr. Salama should have disregarded them, or even questioned them.

The court is not persuaded by any other arguments raised by Plaintiff in opposition to this motion. Therefore, Plaintiff failed to raise any material issue of fact sufficient to defeat this motion. The court dismisses Plaintiff's complaint as against Dr. Salama and amends the caption accordingly.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein, and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant Gayle Rudofsky Salama, M.D.'s motion for summary judgment dismissal of Plaintiff Marcia D. Miller's complaint, filed under motion sequence 003; and it is further

ORDERED that the court dismisses Plaintiff Marcia Miller's complaint as against Defendant Gayle Rudofsky Salama, M.D., only, and directs the Clerk of the Court to enter judgment in favor of Defendant Gayle Rudofsky Salama, M.D. as against Plaintiff Marcia Miller; and it is further

ORDERED that the court amends the caption to remove Defendant Gayle Rudofsky Salama, M.D.'s name as a Defendant in this action as per the following:

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MARCIA D. MILLER,

Plaintiff,

-against-

MATHIAS P. BOSTROM, M.D., ROBERT SCHNEIDER,
M.D. and HOSPITAL FOR SPECIAL SURGERY,

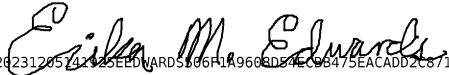
Defendants.
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and it is further;

ORDERED that counsel for Defendant Gayle Rudofsky Salama, M.D. shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within twenty (20) days of the date of this decision and order, who is directed to mark the court’s records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)].

This constitutes the decision and order of the court.


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12/5/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: