

Beckford v Sabir

2023 NY Slip Op 34914(U)

January 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 500948/2018

Judge: Pamela L. Fisher

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At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 24 day of January 2023.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
TILLEY BECKFORD

Plaintiff,

- against -

DECISION/ORDER

Index No: 500948/2018

SHASHA SABIR, M.D., ROBBY SHORT, M.D.,
KINGS COUNTY HOSPITAL and
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1-3,</u>
Opposing Affidavits (Affirmations) _____	<u>4-5,</u>
Reply Affidavits (Affirmations) _____	<u>6</u>

Upon the foregoing papers in this medical malpractice action, defendants, Shasha Sabir, M.D., Robby Short, M.D., Kings County Hospital and New York City Health and Hospitals Corporation moves in motion sequence 2, pursuant to CPLR § 3212, for summary judgment, dismissing the complaint against defendants, and directing the entry of judgment in its favor. The Court notes that plaintiff is not opposing the part of defendant’s motion seeking to dismiss the complaint against defendant Shasha Sabir, M.D. Therefore, defendant’s motion to dismiss the complaint as to defendant Shasha Sabir, M.D., is granted without opposition.

Plaintiff commenced this action by filing a summons and complaint on January 15, 2018 (Defendant’s Affirmation in Support ¶ 4, to defendant’s motion papers, motion sequence 2).

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Issue was joined by defendants in or about February 2018 (*Id.* at ¶ 4). Plaintiff served the bill of particulars upon each defendant (*Id.* at ¶ 4). In her complaint and bill of particulars, plaintiff alleges that the staff at Kings County Hospital departed from good and acceptable medical practice on June 20, 2017, in negligently performing the plaintiff's vaginal hysterectomy (Complaint and Bill of Particulars, Exhibit C and E to defendant's motion sequence 2). As a result of the alleged malpractice, plaintiff claims that the infant plaintiff sustained the following injuries: bladder and ureter perforation, bowel obstruction, pulmonary embolism, vesico-vaginal fistula, and the need for various surgeries and treatments (Bill of Particulars, Exhibit E ¶ 19 to defendant's motion sequence 2).

The following facts are not in dispute. On January 12, 2017, plaintiff presented to the gynecology clinic at Kings County Hospital Center and was seen and treated by Dr. Robby Short, the attending gynecologist (Statement of Undisputed Facts ¶ 2, motion sequence 2). The chart indicates that plaintiff was a 62-year-old woman, with a history of four vaginal births, diabetes, hyperlipidemia, tubal ligation and obesity (Kings County Hospital records, Exhibit L to defendant's motion sequence 2). After examination and testing, the chart indicates a cystocele, rectocele, uterine prolapse, spontaneous urine leakage and stress urinary incontinence were noted. Plaintiff was to attempt conservative management and was prescribed Ditropan (*Id.* at pp 1-4). On April 27, 2017, plaintiff returned to the clinic for follow-up and reported no relief from medication. Plaintiff thereafter requested surgical management and a possible hysterectomy with an anterior-posterior repair, sacrospinous ligament fixation, and transobturator tape placement were discussed with the plaintiff. The plaintiff scheduled surgery for June 20, 2017, with Dr. Short (*Id.* at pp 29-31). On June 20, 2017, the plaintiff presented to Kings County Hospital Center for the scheduled procedures, where her vital signs were noted as strong and normal.

Plaintiff was alert, orientated, admitted into the hospital and again discussed risks of surgery after which she signed a consent form (Kings County Hospital records for June 2017, Exhibit M to defendant's motion sequence 2). On June 20, 2017, at 8:40AM, Dr. Short performed the scheduled operation. In the operative report, Dr. Short notes that an incision was made into the junction between the bladder and cervix, he clamped the ligaments and blood vessels and then removed the uterus through the vagina (Kings County Hospital records for June 2017, Exhibit M to defendant's motion sequence 2). The report notes that Dr. Short then repaired the plaintiff's cystocele by making an incision into the anterior vaginal wall, removing all the redundant vaginal wall tissue, and closing the anterior compartment of the vagina (*Id.* at pp 26-32). Dr. Short then opened the posterior compartment and excused the redundant vaginal wall tissue, repaired the posterior compartment, identified the sacrospinous ligament, and suspended the apex of the vagina to that ligament (*Id.* at pp 26-31). The report further reports that the procedure was performed with plaintiff's bladder full of urine and no urine leakage was noted during the operation. The surgery was completed at 10:30AM on June 20, 2017 (*Id.* at pp 26-31). After transfer to the recovery room, plaintiff was noted to be in stable condition, her vital signs were strong and normal, and she was approved for discharge from the PACU to a regular floor at 9:00PM on June 20, 2017 (*Id.* at pp 32).

On June 21, 2017, at around 6:23AM, plaintiff asserted no complaints, her abdomen was noted as soft and non-tender and her vaginal packing and catheter were removed (*Id.* at pp 37). The chart indicates that plaintiff was noted as meeting all milestones, inclusive of ambulating, voiding urine and tolerating her diet. Chart further notes, plaintiff was not experiencing urinary incontinence or leakage and was urinating on her own. Plaintiff was discharged home in the afternoon of June 21, 2017 (*Id.* at pp 39). On June 30, 2017, at 7:10PM, plaintiff presented to the

ED at Kings County Hospital Center with complaints of pain and swelling in her abdomen, shortness of breath, nausea, vomiting and vaginal bleeding (Kings County Hospital records for June 30-July 1, 2017, Exhibit N to defendant's motion sequence 2). Plaintiff underwent a physical examination and testing which showed leukocytosis and a left shift, suggesting acute inflammation or infection and acute kidney failure was suspected (*Id.*). On June 30, 2017, at 7:35PM, plaintiff was transported to the operating room for possible bladder repair. Dr. McNeil performed a cystoscopy and an exploratory laparotomy where a 1-2cm right posterior bladder wall defect was noted and the doctor suspected leakage of urine from the right ureter near the bladder (*Id.*). The chart shows that Dr. McNeil performed an open laparotomy and after a gynecology consult, the right fallopian tube and ovary were removed (*Id.*). Dr. McNeil then identified, isolated, and inspected the bladder perforation and repaired the perforation with a suture.

On July 2, 2017, plaintiff was transferred back to a regular floor and with moderate treatment the symptoms of possible bowel obstruction were resolved on their own. On July 14, 2017, the plaintiff was discharged home by Dr. Short with instructions to follow up at the clinic a week later (*Id.*). Thereafter, plaintiff continued to periodically treat at the Kings County Hospital Center urology and gynecology clinics based on continued complaints of shortness of breath, swelling in legs and difficult ambulating from July 20, 2017, through and including September 7, 2017, for which she received examinations, diagnostic testing and conservative treatment including medication (Kings County Hospital records for July 20, 2017, Exhibit O to defendant's motion sequence 2). On June 16, 2021, plaintiff presented for a robotic vesico-vaginal fistula repair at Bellevue Medical Center (Bellevue Medical Center Hospital records, Exhibit P to defendant's motion sequence 2).

In support of its motion for summary judgment, defendants submit expert affirmations from Gary L. Mucciolo, M.D., a physician board certified in Obstetrics and Gynecology, and Benjamin M. Brucker, M.D., a physician board certified in Urology, contending that the staff at Kings County Hospital did not depart from acceptable medical practice during their treatment of the plaintiff (Mucciolo Expert Affirmation ¶¶ 1, 4, annexed as Exhibit A to defendant's motion papers, motion sequence 2 and Brucker Expert Affirmation ¶¶ 1-5, annexed as Exhibit B to defendant's motion papers, motion sequence 2). Their opinions are based on review of the pleadings, bills of particulars, medical records, and the parties' deposition transcripts, as well as their own education, training, and experience (*Id.* at ¶ 3). The experts each opine that the hysterectomy, anterior-posterior repair, sacrospinous ligament fixation, and transobturator tape placement procedures performed by Dr. Short on June 20, 2017, were indicated and the plaintiff was properly evaluated and prepared prior to surgery (*Id.* at ¶ 29). Dr. Mucciolo states that the performed procedures were proper and appropriate treatment for plaintiff's presenting conditions and complaints of urine leak, incontinence, urinary urgency, cystocele, rectocele and uterine prolapse (*Id.* at ¶ 29). He further states that Dr. Short appropriately attempted conservative medical management prior to the surgery and since the medical management failed to resolve the plaintiff's symptoms, it was proper for Dr. Short to recommend and perform the hysterectomy, anterior-posterior repair, sacrospinous ligament fixation, and transobturator tape placement procedures in treatment of the plaintiff's complaints and conditions (*Id.* at ¶ 30). Dr. Mucciolo further opines that it is clear from the records and the deposition testimony that the plaintiff wanted surgical intervention for her conditions and that Dr. Short advised the plaintiff of the risks and complications of the operations (*Id.* at ¶ 30). He states that the procedures were performed properly, and all aspects of the surgery were within the standard of care as described

in the Operative Report and transcripts. Dr. Mucciolo states that a bladder perforation and ureter injury are known risks of these procedures and there is no evidence of malpractice (*Id.* at ¶ 32). He opines that the result of the “constellation of conditions,” was that the plaintiff’s organs were displaced from their usual anatomic location and that there is no departures from the standard of care under the circumstances. Dr. Mucciolo notes that there was no reason to suspect any such injury upon the completion of the surgery as evidenced by plaintiff’s ability to urinate normally after the hysterectomy (*Id.* at ¶ 33). It is Dr. Mucciolo’s opinion to a reasonable degree of medical certainty that the plaintiff’s bladder was not injured by Dr. Short during the procedures on June 20, 2017 (*Id.* at ¶ 34). He states that had Dr. Short perforated the bladder during the surgery, urine would have leaked out into the surgical field during the surgery and non was noted during the operation (*Id.* at ¶ 34). It is his opinion that the perforation occurred after the hysterectomy and, in fact, after she was discharged from the hospital as an inflammatory response to the surgery (*Id.* at ¶ 35). Dr. Brucker opines that when the plaintiff presented to the Kings County Hospital Center ED on June 30, 2017, the plaintiff was timely seen and a urology consult was timely requested and provided after which the plaintiff was taken to the OR to repair the bladder perforation (Brucker Expert Affirmation ¶¶ 32, annexed as Exhibit B to defendant’s motion papers, motion sequence 2). Dr. Brucker further opines that there is zero evidence in the record of any issues with the bladder perforation repair (*Id.* ¶¶ 32-33).

In opposition, plaintiff submits an expert affidavit from a William Bisordi, M.D., F.A.C.P., a physician certified in Internal Medicine and Gastroenterology who opines that the staff at Kings County Hospital deviated from the standard of care during their treatment of the plaintiff, and that they proximately caused her injuries (Plaintiff’s Expert Affidavit ¶¶ 1-5, annexed as Exhibit A to plaintiff’s opposition papers, motion sequence 2). His opinion is based

on review of the medical records, expert affidavits, motion papers, and the parties' deposition transcripts (*Id.* at ¶ 6). Plaintiff's expert opines that to a reasonable degree of medical certainty, defendants departed for good and accepted standards during the plaintiff's hysterectomy procedure as a bladder perforation is not a common or acceptable complication resulting from a routine hysterectomy (*Id.* at ¶ 12). Dr. Bisordi states that the perforation was not found until ten days after the vaginal hysterectomy was performed and as a result of the surgery to repair the injury to the bladder, defendants caused further injury to her right ureter (*Id.* at ¶ 13). Dr. Bisordi opines that Dr. Short deviated from good and accepted medical practice in negligently performing the vaginal hysterectomy on June 20, 2017, leading to the bladder wall perforation, which was not identified during the procedure (*Id.* at ¶ 14). He further opines that defendants' negligence in properly and timely treating plaintiff's perforation proximately caused plaintiff's further unnecessary and avoidable pain and suffering leading to an additional repair of the posterior bladder wall on July 1, 2017 (*Id.* at ¶ 15-16). Dr. Bisordi opines that had the perforation not occurred or had it been identified during the initial hysterectomy on June 20, 2017, the bladder perforation could have been repair intraoperatively and the plaintiff would not have required the second emergency repair surgery (*Id.* at ¶ 17).

In reply, defendant reiterates that the staff at Kings County Hospital did not deviate from the standard of care during their treatment of the plaintiff and that none of the plaintiff's injuries were proximately caused by any negligent acts or omissions by the defendants (Reply Affirmation ¶ 3). Defendants argue that they have shown prima facie entitlement to judgment as a matter of law and that plaintiff's expert opinion is insufficient to defeat defendant's motion for summary judgment, as it is "conclusory" and unsupported by the record (*Id.* at ¶¶ 16). Defendant argues that plaintiff's expert, who is certified in Internal Medicine and Gastroenterology, fails to

indicate a familiarity with the standards of practice area in question, specifically Gynecology and Urology. Defendant states that since plaintiff's expert is proffering an opinion outside of his own specialty, a foundation must be laid by the expert (*Id.* at ¶¶ 10). Defendant argues that the only purported dispute plaintiff's expert attempts to raise to demonstrate an issue of fact is to whether a bladder perforation is known complication of a vaginal hysterectomy and there is no evidence or argument made that defendants deviated from the good and acceptable standard of care at subsequent treatment appointments or procedures (*Id.* at ¶ 19). Defendant further argues that the expert's opinions are without any citation to evidence or facts to support his conclusion.

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a motion for summary judgment, defendant must "make prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Lulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, the burden then shifts to the plaintiff to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas*, 83 AD3d at 24). If the defendant "makes only prima facie showing that he or she did not deviate or depart from accepted medical practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause" (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion"

(*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; “[s]uch credibility issues can only be resolved by a jury” (*Id.*).

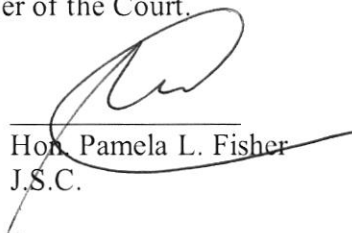
Here, defendants met their prima facie burden for summary judgment. Defendant’s experts, Dr. Mucciolo and Dr. Brucker affirmed that the staff at Kings County Hospital did not deviate from acceptable standards of medical practice, and that they did not proximately cause the plaintiff’s injuries. Both experts contend that the plaintiff did not sustain a bladder perforation as a result of any negligence or malpractice of the defendants. They opine that the bladder perforation and ureter injury were sustained post procedure as a result of plaintiff’s known history and circumstances as there is zero evidence of a perforation as documented in the Operative Report. Plaintiff’s experts further opine that a bladder perforation and ureter injury are known risks of a hysterectomy for which the plaintiff was advised and opted to continue with surgical intervention. The experts further opine that there is no evidence of any negligence or malpractice during the treatment of plaintiff post-surgery on June 20, 2017. The experts opinions constitute competent evidence, in that they are based on the pleadings, bills of particulars, medical records, and the parties’ deposition transcripts.

In opposition, plaintiff produced an affidavit of merit from a duly licensed physician certified in Internal Medicine and Gastroenterology, who opines that Dr. Short and the staff at Kings County Hospital deviated from the standard of care during the hysterectomy of the plaintiff, and that the departure proximately caused her injuries. As plaintiff’s expert did not establish a foundation that he possessed sufficient training, experience or familiarity with surgery, particularly gynecological surgery, the Court is not convinced that he is qualified to render an opinion that Dr. Short departed from accepted standards of medical care in performing

the plaintiff's hysterectomy, nor he is qualified to opine as to whether a bladder perforation is an uncommon risk of a hysterectomy (*Newell v. City of New York et al*, 204 A.D.3d 574, [1st Dept. 2022]). In any event, Dr. Bisordi fails to address defendants' experts' opinion that there could not have been a bladder perforation because had the bladder been perforated, urine would have leaked out into the surgical field and the plaintiff was urinating on her own post-surgery, prior to hospital discharge. Plaintiff did not seek medical attention until ten (10) days after discharge and stated swelling occurred the day she returned to the ED and not earlier. Additionally, plaintiff's expert does not opine on defendants' experts' opinion that a bladder perforation is a common complication of a hysterectomy and that plaintiff's hysterectomy was not a routine procedure given her prior surgeries, prior pregnancies and other significant factors placing her at a higher risk for the complications she experienced. As such, plaintiff's expert opinion fails to raise a triable issue of fact as to the causes of action for medical malpractice, as it is conclusory, speculative, and does not "address specific assertions" of defendants' expert (See *Tsitrin v. New York Community Hosp.*, 154 AD3d 994, 996 [2d. Dept. 2017]; *Foster-Sturup v. Long*, 95 AD3d 726, 728-29 [1st Dept. 2012]; *Abalola v. Flower Hosp.*, 44 AD3d 522, 522 [1st Dept. 2007]). Defendants established there were no departures from the standard or care in treating the plaintiff and plaintiff failed to rebut that showing with a qualified expert whose opinions are based upon facts in the record. All claims relating to the defendant Dr. Shasha Sabir are hereby dismissed as unopposed. As plaintiff has failed to raise a trial issue of fact the balance of defendants' motion for summary judgment is granted in its entirety.

This constitutes the decision and order of the Court.

ENTER:


Hon. Pamela L. Fisher
J.S.C.

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Hon. Pamela L. Fisher, J.S.C.