Rodriguez v Gleckel
2023 NY Slip Op 35103(U)
September 28, 2023
Supreme Court, Queens County
Docket Number: Index No. 709380/2020
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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DANIEL RODRIGUEZ,

Plaintiff,

-against-

LOUIS W. GLECKEL, M.D., PROHEALTH CARE ASSOCIATES, L.L.P., ANDREW M. GRUNWALD, M.D. AND NYU LANGONE HEALTH,

Defendants.

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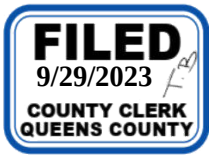
Index No. 709380/2020

Part 6
Motion Date: July 12, 2023
Calendar No. 8
Sequence No. 1



The following papers numbered EF-46 through EF-93 read on this motion by defendants LOUIS W. GLECKEL, M.D. and PROHEALTH CARE ASSOCIATES, L.L.P. for summary judgment and dismissal of plaintiff's Complaint and cross-claims pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……..	EF46-EF69
Affirmation in Opposition, Exhibits……..….....	…EF85-EF90
Reply Affirmation…….	EF93

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Louis W. Gleckel, M.D. and ProHealth Care Associates, L.L.P.'s motion for summary judgment and dismissal of plaintiff's Complaint and cross-claims pursuant to CPLR §3212 is granted as to plaintiff's claims for lack of informed consent and negligent hiring and training, but denied as to medical malpractice. (*See Galluccio v. Grossman*, 161 A.D.3d 1049 [2d Dept. 2018].) Plaintiff commenced this action for medical malpractice, lack of informed consent and negligent hiring while receiving medical care and treatment from defendants from July 12, 2016 through January 30, 2017. Plaintiff filed the Summons and Complaint on July 6, 2020, and issue was joined on August 5, 2020. It is noted that co-defendants Andrew M. Grunwald, M.D. and NYU Langone Health were granted summary judgment and dismissal without opposition by court Order dated September 26, 2023, and therefore there are no cross-claims in this action.

Defendants argue that summary judgment is warranted, as they provided good medical care and treatment to plaintiff within the standard of care, and no acts or omissions were the proximate cause of plaintiff's alleged injuries. They present the pleadings, medical records, the parties' deposition testimony, non-party witness Priscilla Villier's deposition testimony and the affirmation of Malcolm Phillips, M.D. in support of their motion. Defendants contend that they did not perform any medical procedures that required informed consent. They further argue that they treated plaintiff appropriately and within the accepted medical standards, and plaintiff's claim for negligent hiring and retention is meritless.

Defendants present the affirmation of Dr. Phillips in support of their motion. He affirmed he is a physician licensed to practice in New York and is board certified in Internal Medicine and sub-certified in Cardiovascular Disease and Adult Echocardiography. Dr. Phillips reviewed plaintiff's Bill of Particulars, medical records and deposition testimony in rendering the opinions in the affirmation. Dr. Phillips opined within a reasonable degree of medical certainty that defendants conformed to the standard of care of medical practices and did not cause plaintiff's claimed injuries. He reviewed the medical records and noted that plaintiff came to see defendant Dr. Gleckel on July 12, 2016, approximately one year after plaintiff's last visit, and presented with complaints of severe shortness of breath and chest pain. Dr. Phillips noted that plaintiff returned on July 28, 2016 and had a reduced shortness of breath and improved symptoms, so Dr. Gleckel referred plaintiff for an opinion with regard to aortic valve regurgitation and aortic valve replacement surgery. Plaintiff was also seen by Dr. Gleckel on September 15, 2016 where an EKG was performed with abnormal findings. Plaintiff was then seen by Dr. Gleckel on December 1, 2016, where plaintiff denied fever, fatigue/weakness, but complained of moderate palpitations so a blood count was done and Dr. Gleckel referred plaintiff for a gastroenterologist consultation. Plaintiff later complained of bumps on his head and Dr. Gleckel referred him for a vascular surgeon consultation. Dr. Phillips noted that blood cultures were not taken at LIJMC hospital on either January 28, 2017 or January 31, 2017, which he argues would have been done if there was a suspicion of endocarditis.

Dr. Phillips opined to a reasonable degree of medical certainty that Dr. Gleckel properly evaluated plaintiff during his visits at ProHealth, based upon plaintiff's signs, symptoms and complaints. He further opined to a reasonable degree of medical certainty that plaintiff received appropriate care from defendants, including appropriate and complete physical examinations, pertinent medical history, and appropriate cardiac testing was timely ordered and properly interpreted. Dr. Phillips further opined with a reasonable degree of medical certainty that defendant had no reason to suspect endocarditis because plaintiff denied and did not have fevers while being treated by Dr. Gleckel. Dr. Phillips opined with a reasonable degree of medical certainty that Dr. Gleckel timely and appropriately recommended a cardiac consultation for plaintiff, and that aortic valve replacement surgery was not indicated. He further opined to a reasonable degree of medical certainty that plaintiff did not need to be seen by a cardiothoracic

surgeon for consultation, as Dr. Gleckel had already referred plaintiff to a cardiologist. Dr. Phillips opined with a reasonable degree of medical certainty that Dr. Gleckel correctly sent plaintiff to a vascular surgeon, and it was reasonable for Dr. Gleckel not to have ordered a TEE study for plaintiff.

Dr. Phillips opined with a reasonable degree of medical certainty that blood cultures were not warranted to be taken on plaintiff, as the minimally elevated white blood count was episodic and not continuous, as would be indicative of endocarditis. He opined to a reasonable degree of medical certainty that Dr. Gleckel appreciated plaintiff's weight loss and advised him over multiple visits to exercise and hydrate. Dr. Phillips also opined to a reasonable degree of medical certainty that Dr. Gleckel timely and properly referred plaintiff to a gastroenterologist when plaintiff developed anemia, and that based upon plaintiff's white blood count and lack of fever, Dr. Gleckel had no reason to think plaintiff had an infection. Dr. Phillips also opined within a reasonable degree of medical certainty that none of defendants' medical treatment warranted an informed consent, and that none of defendant' acts or omissions were the proximate cause of any of plaintiff's injuries. He found that plaintiff's presentation was highly atypical for endocarditis and it is speculative to opine as to what point plaintiff developed endocarditis.

Plaintiff opposed the motion, arguing defendants failed to present a prima facie case as to his infective endocarditis, and there are issues of fact in dispute. He presents the affirmations of a board certified cardiologist and board certified infectious disease expert in support of his opposition. Plaintiff argues that defendants failed to timely recognize and treat his symptoms of endocarditis, specifically by failing to order blood cultures and a transesophageal echocardiogram. These failures delayed plaintiff's diagnosis of endocarditis and prevented him from being treated through antibiotics instead of the more aggressive treatment required, including aortic valve replacement. He argues that defendants failed to present a prima facie case of entitlement to summary judgment, as defendants' expert made conclusory opinions as to the standard of care and Dr. Gleckel's failure to recognize and treat endocarditis. Plaintiff argues that Dr. Gleckel's deposition testimony shows that plaintiff presented with many of the symptoms of endocarditis, and he admitted plaintiff may have had an infection during the July medical visits. Plaintiff also argues that there are issues of fact as to whether defendants' failure to diagnose and treat plaintiff's endocarditis caused him to undergo mitral valve repair, permanent pacemaker and premature aortic valve replacement.

Plaintiff presents the cardiologist expert affirmation in support of his opposition. The expert affirmed to be a licensed physician in New York who is board certified in cardiology. The expert reviewed the pleadings, medical records, deposition testimony and Dr. Phillips' affirmation in rendering the opinions. The expert opined with a reasonable degree of medical certainty that defendants departed from good and accepted medical practices and proximately caused plaintiff's injuries. The expert opined that defendants departed by failing to recognize signs and symptoms

of infective endocarditis and should have evaluated plaintiff for endocarditis. The expert opined that defendants departed by failing to order blood cultures and a transesophageal echocardiogram, and failing to recognize the relevance of plaintiff's symptoms with regard to a diagnosis of endocarditis. The expert further opined that these failures resulted in plaintiff's worsened vascular condition, two mycotic aneurysms, embolic brain lesions, a permanent pacemaker, mitral valve repair, aortic valve replacement, PTSD, anxiety and loss of enjoyment of life.

The expert opined that defendants deviated from good and accepted medical and cardiological standard of care by failing to appreciate plaintiff's symptoms over a period of months warranted a workup for endocarditis. The expert reviewed plaintiff's medical records and determined that his pre-existing cardiac issues put plaintiff at an increased risk of infective endocarditis. He also reviewed non-party Villier's testimony, who stated plaintiff, her fiancé, had high fevers out of nowhere, and other symptoms of infection. The expert also found that the medical records showed plaintiff had an elevated blood count and abnormal monocyte count, all consistent with infection. The expert opined that Dr. Gleckel departed from the standard of care by not ordering an echocardiogram, blood cultures or a transesophageal echocardiogram on July 28, 2016, merely because he did not believe plaintiff had an infection but failing to recognize plaintiff's symptoms were indicative of an infection. The expert argues that as of the September 2016 visit to Dr. Grunfeld, plaintiff did not need aortic valve replacement, and therefore had a chance of preventing his infection from spreading to the heart and other organs.

The expert further opined that defendants departed from the standard of good and accepted medical and cardiological practices by failing to order blood cultures and a transesophageal echocardiogram on December 1, 2016 and December 22, 2016, which allowed plaintiff's infection to spread. The expert opined that defendants' failure to diagnose and treat plaintiff's endocarditis delayed his diagnosis until February 2017, and opined an earlier diagnosis and treatment would have made a difference in plaintiff's medical condition and prevent the need for aortic valve repair and replacement and a permanent pacemaker. Instead, the expert opined that defendants' departures from good and accepted medical care allowed plaintiff's infection to progress to his heart and other organs causing more aggressive treatment beyond antibiotics.

Plaintiff also presented an infectious disease expert in support of his opposition. The expert affirmed to be a licensed physician in Pennsylvania and is board certified in Internal Medicine and Infectious Disease. The expert reviewed the pleadings, plaintiff's medical records, deposition testimony and Dr. Phillips' affirmation in rendering the opinions in the affirmation. The infectious disease expert opined within a reasonable degree of medical certainty that defendants departed from good and accepted medical practices and proximately caused plaintiff's injuries. The expert opined that defendants departed by failing to recognize signs and symptoms of infective endocarditis and should have evaluated plaintiff for endocarditis. The expert opined that defendants departed by failing to order blood cultures and a transesophageal echocardiogram, and

failing to recognize the relevance of plaintiff's symptoms with regard to a diagnosis of endocarditis. The expert further opined that these failures resulted in plaintiff's worsened vascular condition, two mycotic aneurysms, embolic brain lesions, a permanent pacemaker, mitral valve repair, aortic valve replacement, PTSD, anxiety and loss of enjoyment of life. The expert argued that treatment of patients with suspected infective endocarditis should be provided by a multidisciplinary team with expertise in cardiology, cardiac surgery and infectious disease. The expert disagreed with Dr. Phillips that plaintiff did not present with symptoms consistent with endocarditis and that defendants provided accepted medical care. The expert argued that early detection of endocarditis would allow plaintiff to be treated by weeks of antibiotics, rather than aortic valve replacement and a permanent pacemaker, and defendants' departures from the standard of care proximately caused plaintiff's injuries. The expert further argued that the standard of care is expeditious diagnosis and treatment of suspected endocarditis, and if untreated, can spread to a patient's brain and destroy the heart valves. Therefore, the expert opined within a reasonable degree of medical certainty that defendants' failure to timely detect and diagnosis endocarditis was a departure that resulted in plaintiff's injuries.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

To establish a cause of action to recover damages for lack of informed consent, a plaintiff must prove that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, that a reasonably prudent patient in the same position would not have undergone the treatment had the patient been fully informed, and that the lack of informed consent is a proximate cause of the injury." (*Rich v. Donnenfeld*, 191 A.D.3d 909, 910 [2d Dept. 2021].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety. (*D'Elia v. Menorah Home & Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 850 [2d Dept. 2008].)

Defendants established a prima facie case of entitlement to summary judgment. (*See Ajifowobaje v. Astramed Physicians, P.C.*, 71 A.D.3d 608 [2d Dept. 2010].) Defendants established through the medical records and expert affirmation that they performed good medical care for plaintiff within the accepted medical standards. They established that Dr. Gleckel provided accepted medical care to plaintiff, and there was no evidence that plaintiff had endocarditis at the time he treated plaintiff. (*See Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 A.D.3d 1093 [2d Dept. 2017].) Defendants demonstrated based upon the medical records and Dr. Gleckel's deposition testimony that he provided medical care to plaintiff within acceptable standards, and did not have to rule out all sources of infection based upon the record. (*See Lyakhovich v. Vernov*, 185 A.D.3d 566 [2d Dept. 2020].) They further established that defendants properly referred plaintiff for a cardiac and gastroenterology consultation and performed appropriate medical care based upon plaintiff's symptoms. Defendants further established that they did not provide any medical treatment that warranted plaintiff's informed consent. They also established that there was no evidence to support a claim for negligent hiring and training.

Plaintiff failed to oppose defendants' arguments with regard to the causes of action for lack of informed consent and negligent hiring and training, and therefore there are no issues of fact in dispute as to these claims.

However, plaintiff raised a triable issue of fact in dispute with regard to defendants' failure to timely detect and diagnose endocarditis in the several month period of treatment and based upon plaintiff's symptoms was a departure from accepted medical standards, and whether it caused plaintiff's injuries. (*See Masucci v. Feder*, 196 A.D.2d 416 [1st Dept. 1993].) Plaintiff's deposition testimony, as well as non-party Villier's testimony, raised issues of fact as to whether he presented

to Dr. Gleckel with fevers as well as other symptoms consistent with infection. Plaintiff's medical records also raise an issue of fact as to whether plaintiff's medical condition, including but not limited to the elevated blood count and pre-existing cardiac issues, warranted further examination, including blood cultures and a transesophageal echocardiogram, and whether defendants' failure to order blood cultures and a transesophageal echocardiogram was a departure that proximately caused plaintiff's injuries.

Accordingly, defendants Louis W. Gleckel, M.D. and ProHealth Care Associates, L.L.P.'s motion for summary judgment and dismissal of plaintiff's Complaint and cross-claims pursuant to CPLR §3212 is granted in part and denied in part and it is

ORDERED that summary judgment is granted as to plaintiff's cause of action for lack of informed consent, and this cause of action is dismissed, and it is further

ORDERED that summary judgment is granted as to plaintiff's cause of action for negligent hiring and training, and this cause of action is dismissed, and it is further

ORDERED that summary judgment is denied as to plaintiff's cause of action for medical malpractice and it is further

ORDERED that the parties shall appear virtually through Microsoft Teams for a pretrial conference on November 1, 2023 at 9:30am.

This constitutes the decision and Order of the Court.

Dated: September 28, 2023

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.