Gonzalez v New York City Health & Hosps.
2023 NY Slip Op 35115(U)
December 19, 2023
Supreme Court, Queens County
Docket Number: Index No. 706748/21
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part 10
Justice

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Andrea D. Fermin Gonzalez and Edgar A. Hernandez Sierra,

Plaintiff,

Index Number: 706748/21

Motion Date: 12/11/23

- against -

New York City Health and Hospitals, Elmhurst Hospital Center,

Defendants.

Motion Seq. No.: 2

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The following papers numbered E45-E66 read on this motion by Defendants for summary judgment or in the alternative, for partial summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E45-62
Affirmation in Opposition-Exhibit-Memorandum of Law..	E63-65
Reply.....	E66

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants for summary judgment or in the alternative, for partial summary judgment for Plaintiff's claims of a reduced ability to conceive and deliver a baby is granted.

This is a medical malpractice action alleging departures from good and accepted medical practice in failure to diagnose Plaintiff's appendicitis. The Notice of Claim alleges that the claim arose on July 26, 2020 up through and including September 22, 2020.

The relevant facts are as follows. Plaintiff presented at Elmhurst Hospital on July 26, 2020 at approximately 4:00PM complaining of nausea, vomiting, diarrhea, and abdominal pain. Plaintiff was seen by Dr. Joseph Rabinovich, the emergency

department attending physician. The Bill of Particulars provides that Plaintiff presented with a low grade fever. Plaintiff advised that she began experiencing pain approximately four hours after consuming fried rice and vomited ten times that day. She indicated that the pain was diffuse, but worse in the epigastric area. The differential diagnosis included gastroenteritis/gastritis. Blood was drawn and demonstrated a significant elevated white blood cell count of 18.88. Subsequently, Plaintiff was evaluated by Dr. Suresh Kumar Pavuluri, who administered Reglan. Later, Dr. Pavuluri re-evaluated Plaintiff and noted that her pain had improved. Dr. Pavuluri performed a McBurney's Point examination, which was negative during both of his examinations. Plaintiff was discharged at approximately 10:00PM with a diagnosis of "non-intractable vomiting with nausea." She was directed to follow up with her primary care physician and to return to the hospital upon worsening pain, vomiting, and/or fever.

Plaintiff returned to Elmhurst Hospital on July 28, 2020 with new complaints of pain in the right lower quadrant. Appendicitis was considered likely. An abdominal/pelvic CT was performed and confirmed a rupture with peri appendiceal abscess formation. Plaintiff was admitted and placed on IV antibiotics. Possible drainage was considered, but no abscess was found. A repeat CT scan was performed on August 2, 2022 and revealed an 8 centimeter collection in the lower right quadrant, for which a drain was placed. Plaintiff was discharged on August 5, 2020. Plaintiff followed up at Elmhurst Hospital on August 11, 2020 with the drain still in place. Plaintiff followed up again on August 21, 2020. A CT scan showed abscess collection was almost resolved, but also identified multiply fecaliths, or hard stony masses of feces in the appendix. The forgoing warranted an appendectomy, which was performed on September 22, 2020. Pathology findings included fragments of adipose tissue and thick smooth muscle tissue. A clinical correlation was recommenced to determine the origin of the disrupted appendix, mesocolon tissue, or fallopian tube tissue.

Plaintiff was seen by Dr. Christine Marissa Roy-McMahon in the Elmhurst Gynecology Clinic on October 20, 2020. Dr. Roy-McMahon advised that the pathology report revealed focal endometriosis. No action was taken given the Plaintiff's indication that she did not desire pregnancy and had been taking oral contraceptives for the past twelve years. Plaintiff subsequently followed up with a gynecologist at another facility to refill her birth control.

Plaintiff alleges injuries including peritonitis, sepsis, abdominal and intestinal adhesions, tissue contractures to her gastrointestinal tract and reproductive organs, urgency of bowel movements, abdominal pain, injury to the fallopian tubes and

uterus, severe internal scarring of the abdominal organs, and a significantly reduced ability to conceive and deliver a baby.

In support, movants proffer the expert affirmations of Dr. Saul Melman, Dr. Steven Drexler, and Dr. Alyssa Dweck.

Dr. Saul Melman

Dr. Saul Melman is a physician Board Certified in Emergency Medicine. Dr. Melman opined that Plaintiff was appropriately evaluated at Elmhurst Hospital, in that the appropriate examinations, lab work, and differential diagnoses were rendered. Acute gastroenteritis was consistent with the abdominal pain Plaintiff was experiencing. Moreover, nausea, vomiting, and diarrhea after consuming fried rice would be consistent with gastroenteritis, not appendicitis. Gastrointestinal issues, such that those Plaintiff was experiencing are linked to Bacillus Cereus, a common bacteria found in fried rice.

With regard to the physical examination, at no point did Plaintiff complain of right lower quadrant pain, which would be indicative of appendicitis. Moreover, the McBurney's Point examination was negative. With regard to lab work, even though Plaintiff's white blood count was elevated, this would be considered "non-specific" and does not unequivocally point to appendicitis. For example, an elevated white blood count could be caused by inflammation or stress. Dr. Melman also indicates that Plaintiff never suffered a fever, which is a temperature over 100.4, and considered a common sign of infection. Plaintiff's temperature never rose over 99.3 during her July 26, 2020 hospital visit. Plaintiff was appropriately administered anti-emetic medication, given her symptoms. This would not have masked appendicitis, since anti-emetic medications are not pain medications.

Dr. Melman notes that appendicitis was considered as a part of the differential diagnoses of all relevant medical providers. However, given all of the data collected, gastroenteritis appeared more likely. Finally, because of her history and the fact that her symptoms appeared to be approving, Dr. Melman opined that imaging was not warranted.

Dr. Steven Drexler

Dr. Steven Drexler is a physician Board Certified in Anatomic Pathology and Neuropathy. Here, the pathology report indicated the presence of certain tissue. A clinic correlation was recommended to determine the origin of the specimens, such as disrupted appendix

or mesocolon tissue or fallopian tube tissue. Dr. Drexler opined that there is no fallopian tube tissue present on the pathology slides. Dr. Drexler indicates that there are two layers of muscle with a layer in between made of myenteric plexus. The forgoing does not exist in the fallopian tubes. Thus, Dr. Drexler was able to rule out evidence of fallopian tube involvement in the materials removed during the appendectomy.

Dr. Alyssa Dweck

Dr. Alyssa Dweck is a physician Board Certified in Obstetrics and Gynecology. The pathology report here revealed that Plaintiff has asymptomatic endometriosis. Dr. Dweck opined that this finding is unrelated to Plaintiff's ruptured appendix. Endometriosis occurs when tissue similar to the uterine lining grows outside of the uterus. The growth of this tissue is spontaneous. Based on Plaintiff's normal gynecological exam and the absence of fallopian tube tissue in the pathology report, Dr. Dweck opined that there was no injury sustained to the fallopian tubes or any part of Plaintiff's reproductive system which would impact her ability to conceive.

Physician Board Certified in Emergency Medicine

In opposition, Plaintiff submits the affidavit of an unnamed physician Board Certified in Emergency Medicine. The physician opined that the Defendants failed to diagnose and treat Plaintiff's appendicitis and prematurely discharged her, representing a departure of good and accepted medical practice. The forgoing resulted in a perforated appendix and development of peritonitis and infection abscess, prolonged hospitalization, abdominal cavity scar tissue, and extensive adhesions.

With regard to imaging, the physician opined that a CT scan should have been performed on July 26, 2020 because it is the most accurate imaging studying for the evaluation of appendicitis. The standard of care requires a CT scan be performed to rule out appendicitis if a patient presents with signs of abdominal pain, low grade fever, tenderness, and any evidence of infection, such as an elevated white blood count.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (see Hutchinson v. New York City Health & Hosps. Corp., 172 A.D.3d 1037 [2d Dept. 2019]). Here, moving Defendants have submitted the expert affirmations of Drs. Melman, Drexler, and Dweck that establish, prima facie, that there was no departure from good and

accepted medical standards in the treatment of Plaintiff, and that no alleged departure was the proximate cause of Plaintiff's injuries. In opposition, Plaintiff failed to raise a triable issue of fact.

At the outset, the Court notes that Plaintiff failed to oppose the portion of the motion for summary judgment with regard to Plaintiff's claims of a reduced ability to conceive and deliver a baby. Accordingly, the motion is granted with respect to those causes of action contained within the complaint.

With respect to the remainder of the motion, the Court finds that the affidavit submitted by the Plaintiff is insufficient to raise a triable issue of fact. The physician essentially solely opined that the Defendants should have ordered a CT scan to rule out appendicitis. However, the affidavit fails to refute any of the specific opinions set forth in the Defendants' expert affirmations (see Marsh v. City of New York, 191 A.D.3d 973 [2d Dept. 2021]; Attia v. Klebanov, 192 A.D.3d 650 [2d Dept. 2021]; Tsitrin v. New York Community Hosp., 154 A.D.3d 994 [2d Dept. 2017]; Abalola v. Flower Hosp., 44 A.D.3d 522 [2d Dept. 2007]). Instead, the physician offers generalized and conclusory opinions without accurately addressing the Plaintiff's specific case or by incorrectly stating the relevant facts (see id.; see also Masseroux v. Maimonides Med. Ctr., 181 A.D.3d 583 [2d Dept. 2020]). For example, the physician opined that a patient with appendicitis who undergoes a physical examination will experience worsening pain. Here, however, the Plaintiff's symptoms improved after the physical examination and prior to her initial discharge. The physician did not address the opinions set forth by Dr. Melman regarding elevated white blood count, in that an elevated count is indicative of an infection but not necessarily appendicitis. Nor does the physician refute the opinion of Dr. Melman concerning Plaintiff's lack of a fever. Moreover, the physician does not mention the diagnosis of gastroenteritis or refute that the differential diagnosis was proper.

In regard to causation the physician opined that the failure to order the CT scan caused a delay in diagnosis and was the proximate cause of the Plaintiff's injuries, including the perforation of her appendix. However, the physician failed to indicate that performance of a CT scan during the initial work up would have revealed appendicitis, thereby preventing a rupture, and Plaintiff's subsequent injuries. The conclusory opinion proffered in regard to causation is insufficient to defeat the Defendants' prima facie case (see Marsh, 191 A.D.3d at 974; Hernandex v. Nwaishienyi, 148 A.D.3d 684 [2d Dept. 2017]). Based on all of the forgoing, the Court finds that the Plaintiff's physician affidavit

is insufficient to raise a triable issue of fact to defeat Defendants' motion for summary judgment.

Accordingly, the motion is granted and the complaint is dismissed. Defendants may enter judgment accordingly.

Serve a copy of this order with notice of entry without undue delay.

Dated: December 19, 2023

KEVIN J. KERRIGAN, J.S.C.