Feeney v Santos
2023 NY Slip Op 35212(U)
April 27, 2023
Supreme Court, Erie County
Docket Number: Index No. 816756/2017
Judge: Henry J. Nowak

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BRIAN FEENEY, Individually and as Administrator of the Estate of ELLEN FEENEY,

Plaintiff,

vs.

CARLOS SANTOS, M.D., OB/GYN ASSOCIATES OF WNY, MERCY HOSPITAL OF BUFFALO, and CATHOLIC HEALTH SYSTEM, INC.

Defendants.

DECISION

INDEX NO. 816756/2017

HON. HENRY J. NOWAK, J.S.C.
Justice Presiding

In this wrongful death action sounding in medical malpractice and lack of informed consent, defendants Carlos Santos, M.D. and OB/GYN Associates of WNY move for summary judgment and dismissal of the complaint. Plaintiff opposes their motion. Defendants Mercy Hospital of Buffalo and the Catholic Health System, Inc. did not move for summary judgment and do not oppose Dr. Santos and OB/GYN Associates' motion. The court has considered the documents filed in the New York State Courts Electronic Filing (NYSCEF) system as Doc. Nos. 31-57 and 59-60.

I. Factual Background

In August 2016, plaintiff's decedent, Ellen Feeney (age 63), underwent surgery with Dr. Armstrong (a non-party) to repair a hernia. As part of that surgery, Dr. Armstrong inserted permanent abdominal wall mesh throughout Ms. Feeney's abdomen. In the months that

followed, ovarian cysts were identified in Ms. Feeney's left adnexal area. She met with Dr. Santos and according to his November 21, 2016 note, he suggested surgery to Ms. Feeney, describing it as "an open laparoscopy and possible ovarian cystectomy and possible oophorectomy" (NYSCE Doc. No. 53, p. 3). Ms. Feeney agreed and surgery was performed at Mercy Hospital of Buffalo on December 14, 2016.

Ms. Feeney was discharged from Mercy Hospital of Buffalo the same day, and was instructed to follow-up with Dr. Santos and his office if she experienced any number of symptoms, including persistent nausea and vomiting. Over the next 24 hours, Ms. Feeney began to experience nausea and vomiting. She contacted Dr. Santos' office at approximately 4:30 p.m. on December 15, 2016. The OB/GYN Associates receptionist documented that Ms. Feeney called and reported feeling nauseous and vomiting. A nurse from OB/GYN Associates spoke with Ms. Feeney at approximately 5:30 p.m. and instructed her to proceed to the hospital.

Ms. Feeney arrived at the hospital at approximately 7:30 p.m. Plaintiff's daughter testified that her mother was not seen for at least a half an hour. Once seen, she was diagnosed with septic shock. A pelvic CT scan performed at 9:26 p.m. showed a gas collection in the anterior abdominal wall, consistent with a perforation. The radiologist spoke with the ER physician, who noted in Ms. Feeney's chart at 9:49 p.m. that the radiologist "believes that the bowel might had been nicked" during the December 14, 2016 procedure (NYSCEF Doc. No. 55 p. 364). Dr. Santos was not contacted until after 10:00 p.m. Ms. Feeney was taken in for exploratory surgery at approximately 2:00 a.m. on December 16, 2016, nearly seven hours after she arrived at the hospital. A bowel perforation was identified intraoperatively. Ms. Feeney was extubated and sent to the ICU postoperatively, but her condition deteriorated and she passed

away on December 17, 2016 at 10:49 p.m. Her cause of death was listed as peritonitis and septic shock due to inadvertent perforation of bowel during surgical treatment for ovarian cyst.

II. Application of Law

A. Medical Malpractice

On a motion for summary judgment in a medical malpractice action, the moving defendant must establish that there was no deviation or departure from the applicable standard of care and that any alleged departure did not proximately cause the plaintiff's injuries (*see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). If the movant makes this prima facie showing by addressing and rejecting each and every allegation in plaintiffs' verified bill of particulars, and establishing that there was no proximate causal connection between any alleged deviation and the injuries claimed, the burden shifts to the opposing party to adduce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*see Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1166 [4th Dept 2020]; *Bubar*, 177 AD3d at 1360; *Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, Dr. Santos' affidavit addresses and rejects each allegation in plaintiff's bill of particulars (NYSCEF Doc. No. 44). Thus, the burden shifts to the plaintiff to raise an issue of fact.

In opposition to this motion, plaintiff submits the affidavit of Suketu Mansuria, M.D., a board-certified OB/GYN (NYSCEF Doc. No. 57). Dr. Mansuria opines that Dr. Santos and his practice deviated from accepted standards of care before, during, and after the December 14, 2016 surgery (*id.*). Dr. Mansuria reviewed all the pertinent records and deposition testimony, and opines that Dr. Santos should have conservatively monitored the cyst prior to surgery, should have advised the plaintiff of the increased surgical risk based on the previous placement of mesh,

should have altered his surgical approach given the prior placement of mesh, failed to identify that the bowel had adhered to the abdominal wall despite having complete visualization of the surgical field, injured the bowel as a result, and failed to identify the injury intraoperatively (NYSCEF Doc. No. 57 at ¶¶ 39-62). Plaintiff further contends that the defendants failed to have appropriate policies and procedures in place to ensure that Ms. Feeney received a call back from his office or to otherwise alert Dr. Santos to potential postoperative complications. Plaintiff's expert contends that this delay ultimately led to Ms. Feeney's deterioration and death and deprived her of the chance of a better outcome (NYSCEF Doc. No. 57 at ¶¶ 62-75).

Where, as here, the plaintiff's expert proof "squarely opposes the affirmation of the moving parties' expert, the result is a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Defendants' motion regarding plaintiff's medical malpractice claims is thus denied.

To the extent that these defendants argue that many of plaintiff's contentions are "deemed abandoned" pursuant to *Bubar* (177 AD3d at 1360) and its progeny (*see e.g. Pasek v Catholic Health System, Inc.* 186 AD3d 1035 [4th Dept 2020]; *Noga v Brothers of Mercy Nursing & Rehabilitation Center*, 198 AD3d 1277 [4th Dept 2021]), the court instructs the parties to submit motions in limine on or before August 15, 2023 regarding allegations that defendants contend have been abandoned.

B. Lack of Informed Consent

Finally, with respect to plaintiff's claim sounding in lack of informed consent, it is well settled that, in order "[t]o succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that: (1) the practitioner failed to disclose the

risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; Public Health Law § 2805–d [1], [3]).

Here, plaintiff's expert opines that the consent was qualitatively insufficient, insofar as Dr. Santos did not discuss the risk of sepsis and death, and did not discuss any increased risks of surgery based upon the presence of the hernia mesh or otherwise offer conservative treatment, and that the failure to do so was a deviation from accepted practice and the standard of care (NYSCEF Doc. No. 57 at ¶¶ 8-9, 39-49). Thus, there is a question of fact as to the qualitative sufficiency of the consent (*Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017]; *Gray v Williams*, 108 AD3d 1085, 1087 [4th Dept 2013]). Defendants' motion regarding plaintiff's lack of informed consent claims is thus denied as well.

Submit order on notice.

DATED: April 27, 2023

HON. HENRY J. NOWAK, J.S.C.