Vaccaro v Kavaler
2023 NY Slip Op 35213(U)
October 10, 2023
Supreme Court, Richmond County
Docket Number: Index No. 151239/2022
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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KAREN VACCARO and NEIL VACCARO,

Plaintiffs,

-against-

ELIZABETH KAVALER M.D., and TOTAL UROLOGY CARE OF NEW YORK, PLLC,

Defendants.

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IAS Part 6

Present:

HON. JUDITH N. MCMAHON

Index No. 151239/2022

Mot. Seq. No.: 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45-65 were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, the motion of defendants Elizabeth Kavaler, M.D., and Total Urology Care of New York, PLLC, for summary judgment pursuant to CPLR §3212 is denied.

This medical malpractice action arises out of a September 9, 2020, surgical procedure (pelvic floor reconstruction and vaginal hysterectomy) performed by urogynecologist, Dr. Kavaler, on the 75-year-old plaintiff, Karen Vaccaro. Plaintiff claims that due to an extended period in the high lithotomy position[1], she suffered a neurologic injury in the peroneal nerve distribution of her left lower extremity, leaving her with pain, numbness, and a left foot drop. It is

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[1] With use of stirrups, plaintiff's hips are flexed until the angle between the posterior surface of the thighs and the operating room bed surface is 110 to 120 degrees, with lower legs flexed.

undisputed that the surgery lasted two hours and fifteen minutes[2], during which plaintiff's legs were not intermittently repositioned.

Defendants move for judgment as a matter of law on the grounds that the care and treatment rendered to plaintiff was within good and accepted standards of medical care and did not proximately cause the alleged injuries. Plaintiffs oppose the motion, maintaining that Dr. Kavaler and vicariously, her employer, Total Urology Care of New York PLLC, departed from accepted standards of care by, *inter alia,* failing to assess plaintiff's positioning throughout the entire surgical case to insure a safe neurological position, and failing to minimize the time plaintiff spent in the high lithotomy position to avoid the known surgical complication of damage to the common peroneal nerve.

" 'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries'" (*DiGeronimo v. Fuchs,* 101 AD3d 933, 936 [2d Dept. 2012], *quoting Stukas v Streiter,* 83 AD3d 18, 23 [2d Dept. 2011]). Accordingly, "[a] physician moving for summary judgment dismissing a complaint alleging medical malpractice must establish, *prima face,* either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries" (*Gillespie v. New York Hosp. Queens,* 96 AD3d 901, 902 [2d Dept. 2012]).

Here, defendants have met their burden on the motion through the affirmation of George Lazarou, M.D. (*see* NYSCEF Doc. No. 49), an OB/GYN board certified in female pelvic medicine and reconstructive surgery. Dr. Lazarou opines within a reasonable degree of medical certainty that Dr. Kavaler's care and treatment of plaintiff was "well within the standard of care, and that

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[2] Plaintiff claims that she understood the surgery would take between 50 and 90 minutes.

no acts or alleged omissions by Dr. Kavaler were the proximate cause of, or substantial, contributing or exacerbating factor in causing any injury to the plaintiff" (*id.*, para. 5).

According to Dr. Lazarou, "the development of a nerve injury and drop foot from surgical positioning is a remote and not reasonably foreseeable risk" (*id.*, para. 21). The expert finds that Dr. Kavaler: (1) properly performed a complete and thorough pelvic examination on August 26, 2020 that was well within the standard of care; (2) appropriately assessed plaintiff with a complete pelvic floor prolapse; (3) appropriately deemed that the plaintiff's prolapse required surgical repair (rather than use of a pessary); (4) appropriately provided written material, reviewed the risks of surgery, explained the common complications of mesh exposure, and explained that positioning on the table with legs in padded stirrups can put pressure on the back and hips, possibly resulting in post-operative back, leg or hip pain that is usually transient; (5) appropriately encouraged plaintiff to explore a second opinion regarding surgical options, including abdominal hysterectomy or robotically assisted surgery, which Dr. Kavaler does not perform; (6) properly planned the surgery by completing an extensive examination, obtaining plaintiff's history, imaging studies, urodynamic testing and preoperative clearance, and confirming the absence of any back or lower extremity conditions or neurological deficits; (7) appropriately advised that the surgery is performed with legs up in padded stirrups and that positioning on the table can put pressure on the back and hips; (8) appropriately placed plaintiff in the high lithotomy position as that is the only way to access the deep pelvic ligaments and enter the vaginal canal in a way that the planned surgery can be performed, and (9) ensured that plaintiff's legs were placed in the stirrups in a way that they would be lying without any pressure. Dr. Lazarou is emphatic that the standard of care did not require Dr. Kavaler to intermittently reposition plaintiff, maneuver the stirrups, or monitor

her limbs for signs of compression during the surgery[3], and that "once the legs are properly positioned...they are not touched." (*id.*, para. 32). In fact, Dr. Lazarou opines that it is within the standard of care not to reposition the legs during surgery, since the surgeon would be unable to see what she was doing due to the drape covering the legs.

Where the defendant has met the burden for summary judgment, the plaintiff, in opposition, must submit a physician's affidavit attesting to a departure or deviation from acceptable medical practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see Williams v. Bayley Seton Hosp.*, 112 AD3d 917 [2d Dept. 2013]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Fink v. DeAngelis,* 117 AD3d 894 [2d Dept. 2014]; *Feinberg v. Feit*, 23 AD3d 517 [2d Dept. 2005], and "such conflicting medical opinions will raise credibility issues which can only be resolved by a jury" (*DiGeronimo v. Fuchs,* 101 AD3d 933, 936 [2d Dept. 2012]).

Here, plaintiff has raised a triable issue of fact sufficient to defeat summary judgment through the expert affidavit of William D. Winkelman, M.D. (*see* NYSCEF Doc. No. 62).

In Dr. Winkelman's opinion, the defendants departed from accepted standards of medical care by failing to (1) minimize the time that plaintiff spent in high lithotomy; (2) continually assess plaintiff throughout the surgical case to insure a safe neurological position, since the high lithotomy position "carries greater risk of nerve injury relative to other lithotomy positions" (*id.*, para. 15); (3) perform a pelvic organ prolapse quantification ("POP-Q") during plaintiff's initial presentation, to fully understand the dimensions of the prolapse; (4) discuss the risk of nerve damage during surgery, since "never injury in the high lithotomy position is a well-known

[3] In Dr. Lazarou's opinion, the surgery did not take longer than usual.

complication of this type of surgery" (*id.*, para. 19); (5) adequately discuss the alternatives to the proposed surgery, and (6) inform plaintiff that performing a synthetic mid-urethral sling may not have been necessary or indicated.

Dr. Winkelman's affidavit raises clear questions of fact with respect to all causes of action, inclusive of informed consent[4], that must be resolved at trial (*see Hendricks v. Transcare New York, Inc.*, 158 AD3d 477 [1st Dept. 2018]). As such, defendants' motion for summary judgment must be denied in its entirety.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendants is denied; and it is further

ORDERED that any and all additional requests for relief are hereby denied; and it is further

ORDERED that all parties shall appear for a pre-trial conference via Microsoft Teams on **December 4, 2023 at 12:15 p.m.**

ENTER,

Dated: October 10, 2023

J.S.C.

Hon. Judith N. McMahon
J.S.C.

[4] A question exists as to whether plaintiff would have consented to the vaginal hysterectomy, had she been informed that damage to the peroneal nerve was a known complication of accessing the ligaments via the high lithotomy position.