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| <b>Sosa v Stahl</b>                                                                                                                                                                                                            |
| 2023 NY Slip Op 35282(U)                                                                                                                                                                                                       |
| August 9, 2023                                                                                                                                                                                                                 |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: Index No. 24084/2015E                                                                                                                                                                                           |
| Judge: Alicia Gerez                                                                                                                                                                                                            |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX-----X  
DOMINGO SOSA,

Plaintiff,

DECISION and ORDER  
Index No. 24084/2015E

- against -

PETER J. STAHL, MD and NEW YORK  
PRESBYTERIAN HOSPITAL,Defendants.  
-----X**HON. ALICIA GEREZ**

Defendants PETER J. STAHL, M.D. and NEW YORK PRESBYTERIAN HOSPITAL, (hereinafter referred to as “defendants”) move for an Order pursuant to CPLR §3212 granting summary judgment and dismissing plaintiff’s complaint. After review of the papers, together with the opposition submitted thereto; review of the Court file; and due deliberation, the motion is decided as follows.

This medical malpractice action involves plaintiff’s claims that defendants allegedly failed to properly remove a penile prosthetic reservoir during surgical repair of a non-functioning penile prosthesis on January 24, 2013. Plaintiff claims that the remnant reservoir migrated, causing injury to plaintiff’s upper right abdominal quadrant, and necessitated additional surgeries to remove the reservoir and other injuries. Plaintiff had been diagnosed with prostate cancer in 2007 and had his prostate removed. Due to the prostate surgery, and the resulting erectile dysfunction, plaintiff opted to undergo a penile implant surgery in 2007 or 2008. In 2012, plaintiff experienced problems with the implant, specifically that it would no longer inflate to help his penis become erect.

During the procedure on January 24, 2013 for the removal and replacement of a multicomponent inflatable penile prosthesis, Peter J. Stahl, M.D. (“Dr. Stahl”) determined that the reservoir from the prior penile prosthesis was encased within significant scar tissue. Dr. Stahl noted

that the risks of entering the retroperitoneum to explant the existing reservoir outweighed the potential benefits of removal as there was no suspicion of device infection. Thus, the tubing was cut and the reservoir was abandoned and left in place. The remainder of the procedure, including the insertion of the new penile prosthesis, was performed without noted complications. Plaintiff testified that he recalled Dr. Stahl discussing the presence of scar tissue from his prior surgeries. Dr. Stahl noted that he advised plaintiff, through a Spanish interpreter, that the old reservoir was left in place and that it could become infected later in life.

On May 22, 2015, plaintiff returned to Dr. Stahl reporting that in late 2014, he developed right upper quadrant pain, and a CT scan revealed that the abandoned reservoir has migrated to the upper right quadrant of plaintiff's abdomen. The reservoir was surgically removed on August 12, 2015 by a non-party physician.

Moving for summary judgment, the defendants rely on the affirmation of Paul Gittens, M.D. ("Dr. Gittens"), board-certified in urology. The affirmation is submitted in support of their claims that the defendants did not deviate from the accepted standard of medical care in treating the plaintiff. Dr. Gittens states his opinion to a reasonable degree of medical certainty that the penile implant replacement surgery was appropriately indicated based on plaintiff's pre-existing and non-functioning penile implant, with complaints of pain and sexual dysfunction. Dr. Gittens further opines that based on his review of the operative report and medical chart for the subject surgery, the surgical technique was entirely appropriate and consistent with the standard of care. It is also his opinion that Dr. Stahl's intraoperative decision to leave the reservoir from the prior surgery in place was based on sound medical judgment and reasoning in light of the documented adhesions encountered during the procedure, which prevented the safe removal of the old reservoir. Dr. Gittens opines that proceeding with removal of the reservoir would have subjected plaintiff to a heightened risk of injury to adjacent structures including other organs, vasculature, and nerves with minimal benefit to doing so.

Additionally, Dr. Gittens opines to a reasonable degree of medical certainty that Dr. Stahl appropriately discussed the risks of the procedure with plaintiff pre-operatively and properly discussed the rationale for which the reservoir was left in place to plaintiff post-operatively.

In opposition, plaintiff submits an affirmation in opposition from his attorneys, but fails to submit an expert affirmation to rebut Dr. Gittens' opinions. Plaintiff argues that defendants have not met their burden in demonstrating entitlement to summary judgment. Other than this blanket statement, however, plaintiff offers no argument as to how defendants failed to meet their burden of proof on this motion. Plaintiff offers no commentary whatsoever on defendants' expert's affirmation or the opinions expressed therein.

"A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries" (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015][citation omitted]). If a defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment, by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "with medical evidence that defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Pullman v. Silverman*, 125 AD3d 562, 562 [1st Dept 2015], *aff'd* 28 NY3d 1060 [2016]; see *Scalisi v. Oberlander*, 96 AD3d 106, 120 [1st Dept 2012].)

Where a defendant has made a *prima facie* showing of entitlement to judgment as a matter of law by submitting medical records and the affirmation of an expert demonstrating that the defendants did not depart from accepted medical practice (See e.g. *Kristal R. v. Nichter*, 115 AD3d 409, 411[1st Dept. 2014]), the burden thus shifts to the plaintiff to demonstrate otherwise. A plaintiff's expert's

opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept. 2007]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept. 2009]).

Defendants met their *prima facie* burden of demonstrating entitlement to summary judgment (*Anyle B. v Bronx Lebanon Hosp.*, 128 AD3d 1 [1st Dept. 2015]). Here, Dr. Gittens opines to a reasonable degree of medical certainty that the treatment rendered by Dr. Stahl was at all times appropriate and within the standard of care, and that the intraoperative decision to leave the reservoir from the prior surgery was based on sound medical judgment and reasoning.

In opposition to this *prima facie* showing, plaintiff fails to refute the contentions of defendants' expert, Dr. Gittens. Expert testimony by way of an affirmation or affidavit is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause unless the matter is one which is within the experience and observation of the ordinary juror. See *Koehler v. Schwartz*, 48 NY2d 807 [1979]; see also *Lyons v. McCauley*, 252 AD2d 516 [2d Dept. 1998]. "In a medical malpractice action, expert medical opinion evidence is required to demonstrate merit" (*Fiore v. Galang*, 64 NY2d 999 [1985]). This is because medical malpractice actions concern matters which are not "within the ordinary experience of lay persons." *Id.*, at 1001. In a medical malpractice case, the "absence of a proper affidavit of merit is a death blow to plaintiff's case" (*Ramos v. Lapommeray*, 135 AD2d 439 [1st Dept. 1987]). "In order to defeat defendant's motion for summary judgment, some statement of expert medical opinion was required to demonstrate the viability of the ... theory of liability hypothesized by plaintiff's counsel" (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 327

[1986]). “An affirmation by counsel is without evidentiary value and thus unavailing” (*Zuckerman v. City of New York*, 49 NY2d 557, 563 [1980]).

In light of plaintiff’s failure to offer expert opinion in opposition to the affirmation of defendants’ expert establishing defendants’ *prima facie* entitlement to judgment as a matter of law, no triable issue was raised, and summary judgment dismissing the complaint is properly granted. *See DeCintio v. Lawrence Hospital*, 753 NYS2d 26 [1<sup>st</sup> Dept. 2002] Indeed, there is no substantive proof in the record that defendants committed malpractice or failed to procure informed consent.

The remaining arguments were considered and found to be without merit.

Accordingly, it is

ORDERED that the motion for summary judgment is GRANTED in its entirety.

This is the Decision and Order of the Court.

ENTER

Dated: 8/9/23

  
Hon. Alicia Gerez, A.J.S.C.