

Yapo v Torrioni

2024 NY Slip Op 32149(U)

June 21, 2024

Supreme Court, New York County

Docket Number: Index No. 805293/2018

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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MARIE CLAUDINE YAPO,
Plaintiff,

- v -

ANDREA TORRONI, DENIS KNOBEL, ROBERTO L. FLORES, PIERRE B. SAADEH, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

INDEX NO. 805293/2018
MOTION DATE 10/10/2023
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, defendants' motion, pursuant to CPLR 3212, for summary judgment is granted in part and denied in part.

Background

On May 17, 2017, plaintiff, Marie Claudine Yapo ("Yapo"), a 61-year-old, right-hand-dominant, woman, was referred by her dentist to an oral surgeon for a biopsy of a mass in her mouth. NYSCEF Doc. No. 109.

On June 1, 2017, plaintiff was seen by the Oral and Maxillofacial Surgery ("OMFS") team at defendant Bellevue Hospital Center ("Bellevue"). The OMFS team performed a biopsy that indicated a right palate squamous cell carcinoma, a form of oral cancer. NYSCEF Doc. No. 109.

On June 16, 2017, in consultation with defendant Dr. Andrea Torroni, M.D. ("Dr. Torroni"), a member of the OMFS team, plaintiff elected to undergo surgery to remove the cancerous growth and replace the excised oral features with material from her shoulder. Plaintiff signed consent forms after being told that potential side effects of the surgery included "nerve injury, change in sensation, and loss of sensation." NYSCEF Doc. No. 93.

On June 22, 2017, Dr. Torroni performed a "right hemimaxillectomy, selective neck dissections levels 1 through 3 of the right neck and extraction of tooth #7." After the growth was removed, defendant Dr. Dennis Knobel, M.D. ("Dr. Knobel"), a second-year fellow, performed the plastic surgery, a reconstruction with scapula microvascular free flaps, to replace the excised oral material under the supervision of non-party Dr. Jamie Levine, M.D. ("Dr. Levine") and defendant Dr. Roberto L. Flores, M.D. ("Dr. Flores"). NYSCEF Doc. No. 109. In layperson's

terms, Dr. Torroni removed a portion of plaintiff's jaw and Dr. Knobel replaced it with a material from plaintiff's right shoulder. NYSCEF Doc. No. 109. Although supervising, Drs. Levine and Flores never "scrubbed in" for the surgery. NYSCEF Doc. Nos. 115, 116.

On July 3, 2017, plaintiff was discharged from Bellevue. NYSCEF Doc. No. 109.

On December 29, 2017, at a check-up to track her recovery, non-party Dr. Neil Vranis, M.D. recorded that plaintiff's right shoulder had a limited range of motion, only ninety degrees. He also reported a "winging" of the scapula, as the plaintiff's right shoulder blade stuck out instead of lying flat against the back of the ribcage. NYSCEF Doc. No. 109.

On January 11, 2018, at a visit to the Bellevue rehabilitation clinic, non-party Dr. Shailaja Kalva, M.D. diagnosed plaintiff with "Brachial Plexus Disorder," a nerve injury with symptoms including pain, weakness, or muscle loss in the shoulder or arm. NYSCEF Doc. No. 109.

On April 2, 2018, after months of noticing pain and weakness in her right shoulder and arm, plaintiff underwent an electromyography, a test used to help detect neuromuscular abnormalities, which found that she had contracted a chronic neurogenic disease predominantly affecting the upper trunk and spinal accessory nerve. NYSCEF Doc. No. 109.

Through February 2020, plaintiff reported being unable to lift heavy items with her right side, experiencing pain, continuing to take medication, and being unable to return to work. NYSCEF Doc. No. 112.

Procedural History

On August 29, 2018, plaintiff sued Dr. Torroni, Dr. Pierre B. Saadeh, M.D. ("Dr. Saadeh"), and New York City Health and Hospitals Corporation ("NYCHHC") d/b/a Bellevue, asserting three causes of action: medical malpractice, lack of informed consent, and negligent hiring, retention, and/or supervision. NYSCEF Doc. No. 1.

On September 18, 2018, plaintiff amended her complaint to include Drs. Knobel and Flores. NYSCEF Doc. No. 3.

Dr. Flores asserts that he was never served with the summons and complaint. NYSCEF Doc. No. 79. However, plaintiff has submitted a notarized affidavit of service, stating that plaintiff's agent served Dr. Flores on September 26, 2018 by leaving: the summons and complaint with Vanessa Soto, who allegedly is an authorized agent who could accept service on behalf of Dr. Flores, at Dr. Flores's place of business, and, within 20 days of the personal service to Dr. Flores's place of business sending the summons and complaint to Dr. Flores's place of business in a first class mail envelope marked "Personal and Confidential." NYSCEF Doc. No. 17. Dr. Flores has not disputed the process server's affidavit.

Between October 2018 and January 2019, Drs. Torroni, Saadeh, Knobel and NYCHHC answered with general denials and eight affirmative defenses. NYSCEF Doc. Nos. 19, 26, 31, 43.

Defendants now move, pursuant to CPLR 3212, for summary judgment, seeking to dismiss plaintiff's complaint in its entirety. NYSCEF Doc. No. 78.

Defendants argue, inter alia, that: both surgeries were performed in response to the presence of a stage four carcinoma that would have resulted in plaintiff's death if not treated; the surgeries were properly done and could not have caused the injury; Dr. Knobel, an experienced second-year fellow was permitted to perform the plastic surgery and was supervised by both Dr. Flores and Dr. Levine; and that informed consent was provided and that, even if not, a reasonable person would not have declined the surgery. NYSCEF Doc. No. 79. Defendants provide affidavits from plastic surgery expert Evan Garfein, M.D., F.A.C.S. ("Dr. Garfein") and oral and maxillofacial surgery expert Al Haitham Al Shetawi, M.D., D.M.D., F.A.C.S. ("Dr. Al Shetawi"). NYSCEF Doc. Nos. 81, 82.

In opposition, plaintiff argues that: defendants failed to make a prima facie showing that they did not deviate from the accepted standards of medical practice; defendants deviated from the standard of care in a way that proximately caused, exacerbated, and contributed to plaintiff's injuries; at a minimum, triable issues of fact exist as to defendants' deviation from the standard of care; and that plaintiff's case meets the prima facie conditions for the doctrine of res ipsa loquitur, creating an inference of negligence by defendants, as defendants are not able to explain the source of plaintiff's post-surgery injury. NYSCEF Doc. No. 103. Plaintiff provides an affidavit from an otolaryngology and head and neck surgery expert. NYSCEF Doc. No. 104. Plaintiff's papers do not address her lack of informed consent cause of action.

In reply, defendants argue, inter alia, that plaintiff's affirmation in opposition is procedurally defective and should not be considered because it was submitted one hour and thirty-seven minutes after the court's deadline, defendants met their prima facie entitlement to summary judgment, plaintiff abandoned her claim of lack of informed consent by failing to address it in her opposition, and that plaintiff failed to create an issue of fact on multiple contested issues. NYSCEF Doc. No. 121.

To address defendant's contention that plaintiff's affirmation in opposition is procedurally defective, plaintiff sent the court a letter explaining the slight delay, requesting that her affirmation be considered timely and that the summary judgment motion be decided on the merits. NYSCEF Doc. No. 122. This Court finds that the one hour and thirty-seven minute delay was de minimis, did not prejudice defendants' rights, will consider the affirmation on its merits. CPLR 2001.

Discussion

Service on Dr. Flores

According to CPLR 308(2), personal service can be effectuated by "delivering the summons within the state to a person of suitable age and discretion at the actual place of business... of the person to be served and by... mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such

delivery and mailing to be effected within twenty days of each other.” Plaintiff’s agent served Dr. Flores this way, and therefore the service upon Dr. Flores is valid. NYSCEF Doc. No. 17.

Summary Judgment

To obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.” Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Medical Malpractice

Plaintiff sets out two arguments for the denial of summary judgment dismissing her medical malpractice cause of action: (1) defendants deviated from the standard of care in a way that was the proximate cause of plaintiff’s injury, and (2) negligence can be implied based on the doctrine of res ipsa loquitur. NYSCEF Doc. No. 103.

Plaintiff’s first argument aligns with the traditional formulation of medical malpractice actions, the requirement to prove “(1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff’s injury.” Frye v Montefiore Med. Ctr., 70 AD3d 15 (1st Dept 2009). In a summary judgment posture, a conflict between each party’s medical experts is sufficient to create an issue of fact. Santiago v Brandeis, 309 AD2d 621 (1st Dept 2003).

Here, plaintiff’s expert asserts that defendants

deviated from accepted standards of care by failing to properly perform the harvesting of the scapula free flap, failing to properly identify the surgical landmarks, dissecting outside of the critical surgical landmarks, failing to properly position the patient and her right arm, failing to properly document in the medical chart, failing to adequately supervise physicians in training, which proximately caused and contributed to [plaintiff’s injuries].

NYSCEF Doc. No. 104. Defendants’ experts offer conflicting testimony, asserting that defendants adhered to all the accepted standards of care. NYSCEF Doc. Nos. 81, 82. A finder of fact must weigh each expert’s credibility and accuracy on each of the alleged deviations, and therefore summary judgment must be denied on plaintiff’s medical malpractice cause of action.

Plaintiff’s second argument relies on an untraditional application of the doctrine of res ipsa loquitur. Gushlaw v Roll, 290 AD2d 667 (3d Dept 2002) (“While the doctrine of res ipsa loquitur has been applied to medical malpractice cases, it has been done so sparingly...”). The three elements of res ipsa loquitur are (1) the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3), it must not have been due

to any voluntary action or contribution on the part of the plaintiff. Kambat v St. Francis Hosp., 89 NY2d 489 (1997). Although the standard *res ipsa loquitor* case does not rely on expert testimony, a plaintiff may use expert testimony to inform the finder of fact's decision on the first element. States v Lourdes Hosp., 100 NY2d 208, 210 (2003). In a summary judgment posture, a conflict between each party's experts concerning whether the kind of injury a plaintiff suffered does not ordinarily occur in the absence of negligence is sufficient to create an issue of fact. Sklarova v Coopersmith, 180 AD3d 510, 511 (1st Dept 2020) citing Lourdes.

Plaintiff's expert opines that developing Brachial Plexus Disorder is an "exceedingly rare event" absent misconduct by defendants. NYSCEF Doc. No. 104. Defendants' expert, Dr. Al Shetawi, disputes the nature and severity of plaintiff's injury and asserts that lingering effects similar to what plaintiff is experiencing are accepted risks of the surgery, even when properly conducted. NYSCEF Doc. No. 82. This conflict of expert opinions concerning the first element of *res ipsa loquitor* is sufficient to create an issue of material fact.

Informed Consent

Failure to address a cause of action in opposition papers that a movant raises in their motion for summary judgment is sufficient grounds to grant the motion. Kershaw v Hosp. for Special Surgery, 114 AD3d 75 (1st Dept 2013) ("the motion court correctly dismissed the second cause of action alleging lack of informed consent as plaintiff's papers did not address this claim"). Here, defendants argued for summary judgment dismissing plaintiff's informed consent cause of action and plaintiff did not address the matter in her opposition papers.

Additionally, "[t]o succeed in a lack of informed consent cause of action, 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 (2010).

Here, Drs. Garfein and Al Shetawi affirm that the underlying surgery was life-saving, and plaintiff's expert witness does not dispute this claim. NYSCEF Doc. Nos. 81, 82, 104. A reasonable person in plaintiff's position, fully informed, would have elected to receive life-saving surgery, even at the risk of Brachial Plexus Disorder.

Finally, even plaintiff's expert witness acknowledges that Brachial Plexus Disorder is a nerve injury. NYSCEF Doc. No. 104. Because "nerve injury" was listed as a possible side effect in the consent form that plaintiff signed, defendants had notified plaintiff that her injury might occur. NYSCEF Doc. No. 93. Therefore, this Court will grant summary judgment dismissing plaintiff's second cause of action.

Negligent Hiring, Retention, and Supervision

Plaintiff's third cause of action arises out of defendants' supervision of Dr. Knobel as he operated on plaintiff. Plaintiff's expert asserts that the standard of care required that either Dr. Levine or Dr. Flores, as the attending physicians supervising a second-year fellow, should have been "scrubbed-in" for the surgery. NYSCEF Doc. No. 104. However, "it is settled law that a necessary element of a negligent supervision claim requires a showing that the defendant knew

of the employee's propensity to commit the tortious act or should have known of such propensity had the defendant conducted an adequate hiring procedure.” N. X. v Cabrini Med. Ctr., 280 AD2d 34, 42 (1st Dept 2001), affd as mod, 97 NY2d 247 (2002). Nowhere in plaintiff’s papers does she introduce any factual allegation that Dr. Knobel had a propensity to commit tortious actions of which defendants should have been aware. Therefore, this Court will grant summary judgment dismissing defendant’s third cause of action.

This court has considered the parties’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, defendants’ motion for summary judgment dismissing the instant complaint is hereby granted as to the second and third causes of action, for informed consent and negligent hiring, retention, and supervision, and is hereby denied as to the first cause of action, for medical malpractice; and the Clerk is hereby directed to enter judgment accordingly.

Finally, if all the parties feel that this dispute might be well-served by a settlement conference, a call to the Court at 646-386-3222 will get the ball rolling.

HON. ARTHUR F. ENGORON
(Handwritten signature)

6/21/2024
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>