

**Thomas v Kolev**

2024 NY Slip Op 32721(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 805044/2019

Judge: Kathy J. King

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHY J. KING PART 06**

*Justice*

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JASMINE THOMAS,

Plaintiff,

- v -

TAMARA N KOLEV MD, ERIK T GOLUBOFF MD, ICHAN SCHOOL OF MEDICINE AT MOUNT SINAI, MOUNT SINAI DOCTORS FACULTY PRACTICE, MOUNT SINAI BETH ISRAEL MEDICAL CENTER, MOUNT SINAI HEALTH SYSTEM<sup>1</sup>, ERIK T. GOLUBOFF

Defendant.

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**INDEX NO.** 805044/2019  
**MOTION DATE** 02/17/2023  
**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, defendants TAMARA N. KOLEV, M.D. (“Dr. Kolev”), THE ICHAN SCHOOL OF MEDICINE AT MOUNT SINAI, also s/h/a “MOUNT SINAI DOCTORS FACULTY PRATICE” (“Ichan School”), BETH ISRAEL MEDICAL CENTER s/h/a “MOUNT SINAI BETH ISRAEL MEDICAL CENTER” (“BIMC”)<sup>2</sup>, and ERIK T. GOLUBOFF, M.D. (“Dr. Goluboff”), move for summary judgment, pursuant to CPLR §3212, dismissing Plaintiff’s claims against the Defendants in their entirety.

**STATEMENT OF FACTS**

On June 23, 2016, Plaintiff was referred to the Beth Israel Medical Center (“BIMC”) for a surgical evaluation for a fibroid uterus and ovarian mass, based on her long history of fibroid

<sup>1</sup> The action was discontinued as to Mount Sinai Health System on 3/19/2022 (NYSCEF Doc 22)

<sup>2</sup> Plaintiff’s Bills of Particulars as to the THE ICHAN SCHOOL OF MEDICINE AT MOUNT SINAI, also s/h/a “MOUNT SINAI DOCTORS FACULTY PRACTICE”, and BETH ISRAEL MEDICAL CENTER s/h/a “MOUNT SINAI BETH ISRAEL MEDICAL CENTER (collectively referred to as “Institutional Defendants”), alleges that Dr. Kolev and Dr. Goluboff acted as agents and/or or employees of the Institutional Defendants during the treatment at issue.

uterus, heavy vaginal bleeding, and anemia. On July 6, 2016, Plaintiff met with Defendant, Dr. Kolev, and after discussing the risks and benefits of a hysterectomy, Plaintiff agreed to a surgical plan which included a total laparoscopic hysterectomy, as well as a cystoscopy. Plaintiff signed an informed consent form the same day, which indicated, among other things, that “risks include bleeding, infection, [and] damage to surrounding tissue/organs...”

On August, 23, 2016, Plaintiff underwent a “total laparoscopic abdominal hysterectomy, bilateral salpingo-oophorectomy (removal of the ovaries and fallopian tubes), right ovarian cystectomy and lysis of adhesions, and cystoscopy,” which was performed by Dr. Kolev. Post-operatively, Plaintiff was reported to be stable, pelvic examinations were found to be normal with no reports of pain, and she was discharged the same day. At her deposition, Dr. Kolev testified that post-operatively there was no suspicion of ureter injury or any issue with the cystectomy that was performed.

On August 26, 2016, Plaintiff presented to the Emergency Department at BIMC, complaining of nausea and vomiting for three days, and abdominal discomfort and pain starting the day prior. An abdominal CT was performed, and thereafter the leading differential diagnosis reached at that time was injury causing a hematoma within the ureter, and obstruction. On August 27, 2016, Plaintiff was seen by the OB/GYN team, which included Dr. Kolev and Defendant Dr. Goluboff, and was diagnosed with a right ureteral injury. On August 29, 2016, a hospital Interventional Radiologist, Dr. Markowitz, inserted a nephrostomy tube to divert the urine into a bag, to relieve the pressure in the area before a re-implantation surgery was to be performed. The nephrostomy tube remained in place until Dr. Goluboff performed the re-implantation surgery in October 2016.

On September 15, 2016, Plaintiff consulted with Dr. Kolev, who performed an exam of the nephrostomy tube site, and noted a small amount of pus surrounding the area, with mild

erythema. She prescribed a 7-day course of Keflex, an antibiotic which is used to treat a wide variety of bacterial infections. Plaintiff also consulted with Dr. Goluboff the same day and the risks and benefits of a ureteral re-implantation procedure were discussed, including an ileal ureter, nephrectomy, urine leakage, infection, and bleeding. According to the record, there were no signs or symptoms that Plaintiff's nephrostomy tube was infected at this juncture.

Plaintiff continued to follow up with Dr. Kolev at the Gynecology clinic and Dr. Goluboff at the Urology clinic. Over the course of the following two months, Plaintiff experienced infections at the nephrostomy tube site that required admissions to BIMC, and treatment with antibiotics. On October 27, 2016, Plaintiff underwent a successful right ureteral re-implantation surgery performed by Dr. Goluboff, and subsequent stent removal on November 17, 2016. Plaintiff has not required additional surgery to date.

Plaintiff commenced the instant action sounding in medical malpractice with the filing of a Summons and Complaint, asserting six causes of action for medical malpractice, one for each named Defendant. Plaintiff's complaint alleges that the Defendants' malpractice caused an injury to her right ureter, resulting in abdominal pain, urine infiltration, incontinence, endocarditis, infection, additional surgery and anxiety.

Specifically, Plaintiff alleges that Defendants were negligent in failing to promptly and properly render medical care in accordance with the standard of care; causing, permitting and allowing preventable injury; failing to promptly and properly perform gynecological surgery; failing to protect the patient's urinary tract; failing to promptly and properly assess the patient for ureteral injury; failing to promptly and properly diagnose and treat ureteral injury; failing to promptly and properly diagnose and treat urinary tract infection; failing to promptly and properly hospitalize the patient; failing to promptly and properly bring the patient back for surgery to address ureteral injury; failing to properly and promptly treat infection; performing urological

surgery with an active urinary tract infection; and failing to promptly and properly make referrals to medical and urological consultant.

As to the Institutional Defendants, Plaintiff's complaint and bills of particulars also assert claims of vicarious liability.

### DISCUSSION

It is well settled that the movant on a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see CPLR §3212*). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). The moving party's “[f]ailure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Id.*)

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (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, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521 [1st Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez*, 68 NY2d 320; *Frye*, 70 AD3d 15) or by establishing that the plaintiff was not injured by such treatment

(see *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a Defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (see *Roques*, 73 AD3d 204; *Joyner-Pack v Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Sammi Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]).

Once the moving party has met this prima facie burden the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Alvarez*, 68 NY2d 320; *Roques*, 73 AD3d 204; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

Here, Defendants submit the affirmations of Dr. Mark Levie, a board-certified Obstetrician and Gynecologist, and Dr. Toby Chai, a board-certified Urologist, in support of the motion, both of whom opine within a reasonable degree of medical certainty based upon a review of Plaintiff's various medical records, bill of particulars, deposition testimony, and other pertinent documents in this matter. Dr. Levie opines that the gynecological care provided by Dr. Kolev was at all times proper and consistent with the standard of care. He notes that the hysterectomy performed by Dr. Kolev was indicated because Plaintiff had a fibroid uterus, abnormal bleeding and anemia, and an ovarian mass increasing in size. He also notes that alternative options were discussed.

He further opines that no aspect of the postoperative urological care provided by Dr. Kolev proximately caused injury to the Plaintiff. He opines that the common risks of the surgery

performed by Dr. Kolev include bleeding, infection, and damage to surrounding tissues and organs. All these risks were clearly communicated to Plaintiff by Dr. Kolev in July 2016, and again in August 2016.

Dr. Levie notes that following the hysterectomy and upon completion of the surgery, Dr. Kolev performed a cystoscopy to ensure that Plaintiff's ureters were functioning properly, and opines that it is routine and standard medical practice to perform a cystoscopy at the conclusion of a total laparoscopic hysterectomy. According to Dr. Levie, a cystoscopy is performed by inserting a thin camera or a cystoscope into the urethra and passing the scope into the bladder to allow the surgeon to visualize whether there is damage to the ureter or bladder, and ensure that urine is passing freely. Dr. Levie notes that upon performance of the cystoscopy, Dr. Kolev did not have any difficulty visualizing bilateral ureteral jets, which confirmed that both ureters were patent and functioning, and that urine was flowing from the left and right kidney through the left and right ureter into the bladder. He opines that it is standard medical practice for a surgeon to check for injury by performing a cystoscopy to confirm that there are bilateral ureteral jets. He further opines that Dr. Kolev appropriately checked for injury by performing a cystoscopy and had no further suspicion of an intraoperative complication. Dr. Levie further opines that it was within the standard of care for Dr. Kolev to discharge plaintiff the day of the surgery, since Plaintiff was stable, had no pain or fever, no symptomatology of an infection, and all pelvic examinations were normal.

Notwithstanding Plaintiff's contention, Dr. Levie notes that due to the location of the ureter deep down near the pelvis, a suture may inadvertently kink next to, or in the vicinity of the ureter during the vaginal cuff portion of the procedure, which may later cause an issue. Dr. Levie opines that in this type of procedure, sutures are used to close blood vessels, reapproximate tissue and close incisions and are a necessary part of performing surgery

consistent with the standard of care. According to Dr. Levie, in this case, the suture was not placed through the ureter; rather, it was appropriately located next to the ureter, however the suture subsequently kinked, causing continued inflammation and delayed buildup of urine, leading to ureteric injury. Dr. Levie opines that this is a known risk of the surgery, and that Plaintiff was properly informed of this risk, and consented to the procedure.

Dr. Levie further opines that postoperatively, there was nothing Dr. Kolev did or failed to do that caused Plaintiff's endocarditis. Dr. Kolev prescribed antibiotics to Plaintiff on September 15, 2016, for what appeared to be a superficial skin infection at the nephrostomy tube site. In October 2016, Plaintiff was seen by Infectious Disease consults, and received continuing treatment with antibiotics. Various testing for endocarditis was done, however the condition was never diagnosed.

Dr. Levie also notes that contrary to Plaintiff's contentions in her bill of particulars, the alleged future injuries were not caused by any act or omission of Dr. Kolev. Dr. Levie concludes that Plaintiff has not required any additional surgery, and has continued to live a normal life, and opines that Dr. Kolev did not depart from the standard of care in rendering medical care and treatment to the Plaintiff, and did not proximately cause any of Plaintiff's alleged injuries.

Defendants also submit the expert affirmation of Dr. Toby Chai, a board-certified Urologist, who opines that Dr. Goluboff was within the standard of care in scheduling the re-implantation surgery on October 27, 2016. According to Dr. Chai, six to eight weeks is the appropriate amount of time for a nephrostomy tube to remain in place, as it allows adequate time for any ureteral tissue inflammation to subside, and to proceed with the re-implantation surgery. Dr. Chai further opines that there were no indications that Plaintiff had an ongoing infection, and contrary to Plaintiff's contentions, there was no reason for the surgery to be postponed. Dr. Chai notes that postoperatively Dr. Goluboff appropriately treated Plaintiff's infection with continuing

antibiotics, in consultation with and guidance from Infectious Disease consults. Dr. Chai opines that Plaintiff's allegations of ongoing injury, consisting of frequent yeast infections or urinary tract infections, have no relation to the re-implantation surgery performed by Dr. Goluboff. He notes that some patients are simply more susceptible to yeast infections, urinary tract infections, and bacterial build up, and opines that Plaintiff's extensive medical history indicates that she is more susceptible to such infections.

Based on the foregoing expert affirmations, Drs. Kolev and Goluboff have demonstrated their prima facie entitlement to summary judgment as a matter of law by establishing that the standard of care related to the hysterectomy, the cystoscopy and post-operative care of Plaintiff was complied with, and that all of Plaintiff's injuries were known risks of the surgical procedure. (*see Steinberg v Lenox Hill Hosp.*, 148 AD3d 612 [1st Dept 2017]; *Camacho v Pintauro*, 210 AD3d 578 [1st Dept 2022]). Specifically, Dr. Kolev has established that a cystoscopy was appropriately performed during the hysterectomy, in accordance with the standard of care, and that the cystoscopy correctly identified bilateral urinary jets in the bladder. Dr. Goluboff has established that the postoperative urological care and ureteral repair was timely and appropriate, and that as a result neither Dr. Kolev nor Dr. Goluboff caused any of the alleged injuries sustained by the Plaintiff.

In opposition to Defendants' motion, Plaintiff submits the expert affirmation of Dr. Jonathan A. Cosin, a board-certified physician in Obstetrics and Gynecology, who opines to a reasonable degree of medical certainty, solely as to Dr. Kolev.

Dr. Cosin disputes the opinion of Dr. Levie that the ureter transection may have been caused by a kink of a suture that occurred after the surgery. Dr. Cosin opines that the finding of a complete transection of the ureter is well supported by the clinical findings, and eliminates the possibility that the ureter was kinked by a suture. Dr. Cosin further opines that "it is

physiologically impossible for a transected ureter to produce a normal of flow of urine into the bladder on cystoscopy as it was no longer flowing past the area of the transection and Dr. Kolev either failed to perform the test appropriately or failed to properly interpret the results.” Dr. Cosin opines that the lack of urinary flow should have alerted Dr. Kolev to the ureter transection.

Based on the expert affirmation of Dr. Cosin, the Court finds that Plaintiff has rebutted the prima facie showing of Dr. Kolev by raising triable issues of fact as to whether it was a departure from the standard of care for Dr. Kolev to perform a cystoscopy during a laparoscopic hysterectomy; whether Dr. Kolev failed to diagnose the transected ureter; whether the ureteral injury was caused by kinking of the ureter from a suture placed during the operation; and whether these departures were the proximate cause of Plaintiff’s alleged injuries and the need for additional surgery for ureter re-implantation. (*Alvarez*, 68 NY2d 320; *Mignoli v Oyugi*, 82 AD3d 443 [1st Dept 2011]; *Polanco v Reed*, 105 AD3d 438 [1st Dept 2013]).

The Court finds that the expert affirmations submitted on behalf of Defendant Kolev and Plaintiff are of equal strength, supported by the facts in the record, address the essential allegations in the bill of particulars, and set forth their opinions with a reasonable degree of medical certainty (*Roques*, 73 AD3d 204). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” because “[s]uch credibility issues can only be resolved by a jury” (*Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]; *Feinberg v Feit*, 23 AD3d 517 [2d Dept 2005]; *Griffin v Cerabona*, 103 AD3d 420 [1st Dept 2013]).

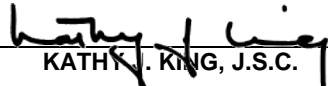
Based on the conflicting opinions of the respective experts, Defendants’ motion is denied as to Dr. Kolev. Further, given the Court’s finding that triable issues of fact exist as to the nature of the care and treatment rendered to Plaintiff by Defendant Dr. Kolev, and whether such treatment proximately caused Plaintiff’s alleged injuries, dismissal is not warranted against Dr.

Kolev’s employer, BIMC, under the doctrine of respondeat superior. In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment (see *Sessa v Peconic Bay Med. Ctr.*, 200 AD3d 1085 [2d Dept 2021]).

The Court notes that Plaintiff submits no opposition to Defendants’ motion seeking summary judgment on behalf of Dr. Goluboff and the Ichan School of Medicine at Mount Sinai s/h/a Mount Sinai Doctors Faculty Practice, therefore, that branch of Defendants’ motion is granted.

Based on the foregoing, it is hereby

**ORDERED** that Defendants’ motion for summary judgment is granted to the extent of dismissing the claims against Dr. Goluboff and the Ichan School of Medicine at Mount Sinai s/h/a Mount Sinai Doctors Faculty Practice, and in all other respects, the motion is denied.

<u>7/12/2024</u> DATE		 KATHY J. KING, 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 checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE