

Labby v Cummings

2024 NY Slip Op 32728(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 805428/2017

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

-----X

REBECCA LABBY, SCOTT LABBY,
Plaintiff,

- v -

ALLEGRA CUMMINGS MD, MARIA TEAIWA-
RUTHERFORD MD, REGINE CHERAZARD MD, MT. SINAI
ROOSEVELT HOSPITAL, MALA VARMA MD, ALEX
SPYROPOULOS MD, NORTHWELL HEALTH PHYSICIANS
PARTNERS - LENOX HILL MEDICINE, EITAN KLEIN MD,
COLUMBUS CARDIOLOGY ASSOCIATES,

Defendants.

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INDEX NO. 805428/2017
MOTION DATE 09/28/2023, 09/28/2023
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 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, 148, 150, 152, 154, 156, 157, 159, 160, 162, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 248, 250, 252, 254, 256, 257, 259, 261, 267, 268, 269, 270, 271, 272

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 151, 153, 155, 158, 161, 163, 165, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 249, 251, 253, 255, 258, 260, 262, 263, 264, 265, 266

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents and for the reasons stated hereinbelow, defendants' motions, pursuant to CPLR 3212, for summary judgment are granted in part and denied in part, as set forth below.

Background

The Parties

This medical malpractice and negligence action arises after plaintiff Rebecca Labby ("plaintiff") suffered a heart attack, aortic blood clot, and stroke in December 2016 while under the care of defendants, Allegra Cummings, M.D. ("Cummings"), Maria Teaiwa-Rutherford, M.D., Regine Cherazard, M.D., Mount Sinai Roosevelt Hospital ("Mount Sinai"), Mala Varma, M.D. ("Varma"), Alex Spyropoulos, M.D. ("Spyropoulos"), Northwell Health Physician Partners,

Lenox Hill Medicine (“LHH”), Eitan Klein, M.D. (“Klein”), and Columbus Cardiology Associates.

According to plaintiff’s medical records, she has a MTHFR gene variation, a mutated prothrombin gene, antiphospholipid syndrome (“APS”), and a history of preeclampsia. NYSCEF Doc. Nos. 86, 87. A prothrombin gene mutation can increase blood clots; the MTHFR gene variation raises homocysteine levels in blood, which is related to blood clotting; APS is an autoimmune disorder which increases the risk of blood clots; and preeclampsia is a pregnancy complication that includes high blood pressure. NYSCEF Doc. Nos. 112, 113, 110. In January 2014, plaintiff suffered a miscarriage suspected to be related to a blood clot. NYSCEF Doc. No. 86.

Plaintiff’s 2014-2015 Pregnancy

On November 21, 2014, plaintiff visited defendant Cummings, an OB/GYN, to confirm that she was pregnant. NYSCEF Doc. No. 86. As pregnancy can make blood hypercoagulable, or prone to clotting, during her pregnancy, plaintiff was prescribed and took Lovenox, an anticoagulant (blood thinner) injection, to reduce the risk of clots. NYSCEF Doc. Nos. 110, 87.

On May 29, 2015, plaintiff experienced high blood pressure and thrombophilia as complications of her pregnancy and was admitted to Mount Sinai. NYSCEF Doc. No. 88. On June 1, 2015, defendant Rutherford delivered plaintiff’s child at 32 weeks. NYSCEF Doc. No. 88. On June 6, 2015, Mount Sinai discharged plaintiff, and on the same day, plaintiff stopped taking Lovenox. NYSCEF Doc. No. 90.

Plaintiff’s 2015-2016 Medical Visits

On June 17, 2015, plaintiff presented at Mount Sinai with chest pains, pains in her right calf, and difficulty breathing deeply. NYSCEF Doc. No. 90. Non-party Dr. Ian Ellis diagnosed her with a pulmonary embolism, or a blood clot that traveled from the legs to the lungs. Id.

On June 19, 2015, defendant Klein, a cardiologist, examined plaintiff. NYSCEF Doc. No. 90. Klein discharged plaintiff with instructions to resume injecting Lovenox, visit a hematologist, and schedule a follow up. Id. Klein testified that the follow-up visit was for the purpose of discussing Coumadin, an oral blood thinner, which plaintiff began taking after June 19. NYSCEF Doc. No. 113. On June 30, 2015, Klein referred plaintiff to defendant Varma, a hematologist, for further consultation on blood thinners. NYSCEF Doc. No. 90.

On July 17, 2015, plaintiff met with Varma, who performed various laboratory tests and concluded that plaintiff’s APS, if persistent, would heighten her risk of blood clotting. NYSCEF Doc. No. 93.

From July 17, 2015, to October 20, 2015, plaintiff periodically visited Klein for international normalized ratio (“INR”) blood testing to measure her clotting rates. NYSCEF Doc. Nos. 91, 92. Each visit, Klein adjusted plaintiff’s Coumadin dose based on her blood levels. Id. Klein stopped working at Mount Sinai at the end of October 2015. NYSCEF Doc. No. 113. After Klein left, plaintiff visited Varma for bloodwork. NYSCEF Doc. No. 93.

Varma testified that, on January 6, 2016, plaintiff called her and asked her to switch her blood thinner from Coumadin to Xarelto, an oral anticoagulant, as parenthood made coming to the office for periodic INR testing difficult. NYSCEF Doc. No. 111. Varma prescribed plaintiff Xarelto and plaintiff started taking the medication. Id.

On June 9, 2016, plaintiff visited defendant Spyropoulos at defendant LHH for evaluation of her anticoagulation therapy. NYSCEF Doc. No. 143. Spyropoulos reviewed plaintiff's medical history and ultimately concluded that plaintiff remained at a high risk of blood clotting and recommended taking blood thinners long-term. Id. Spyropoulos claims that he informed plaintiff that there were more available data on the efficacy of Coumadin than for Xarelto, but that plaintiff did not want to consider Coumadin. NYSCEF Doc. No. 133. Spyropoulos continued plaintiff on Xarelto. Id.

From July 14 to October 20, 2016, plaintiff visited Spyropoulos for intermittent follow-ups. NYSCEF Doc. No. 143. During this time, plaintiff continued to take Xarelto. Id.

Plaintiff's 2016 Hospitalization

On December 8, 2016, plaintiff presented at Mount Sinai with sudden chest pain, nausea, shortness of breath, chills, and dizziness. NYSCEF Doc. No. 138. After an abnormal EKG, a doctor at Mount Sinai diagnosed her with acute myocardial infarction, or, in layperson's terms, a heart attack. Id.

On December 9, 2016, a Mount Sinai doctor performed a heart ultrasound on plaintiff. NYSCEF Doc. No. 139. The ultrasound revealed that plaintiff suffered from aortic thrombosis, or, in layperson's terms, a blood clot in the aortic valve. Id. A surgeon at Mount Sinai performed an aortic valve thrombectomy on plaintiff, thus removing the clot. Id.

On December 10, 2016, a head CT scan revealed a left middle cerebral artery infarct, suggesting that plaintiff had suffered a stroke. NYSCEF Doc. No. 139. After a hemispherectomy (removal of a portion of the skull) on December 11, 2017, plaintiff remained hospitalized at Mount Sinai until January 11, 2017, when she was transferred to a rehabilitation facility. Id. Prior to discharge, plaintiff exhibited severe aphasia, or brain damage that limits the ability to communicate. Id.

The Instant Action

On November 29, 2017, plaintiffs, Rebecca Labby and Scott Labby, sued defendants, asserting four causes of action: (1) negligence, (2) lack of informed consent, and (3) loss of services, all against all defendants; (4) negligent supervision, against Mount Sinai. NYSCEF Doc. No. 1.

Motion Sequence 2

On September 27, 2023, defendants Varma and Klein moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against them. NYSCEF Doc. No. 73. They argue, inter alia, that: Klein properly treated plaintiff with Coumadin and Lovenox; Klein did not depart from the standard of care in treating plaintiff's aortic insufficiency; Klein's treatment was not the proximate cause of plaintiff's injuries; Varma did not depart from the standard of care in treating plaintiff's APS with Xarelto; and Varma's treatment was not the

proximate cause of plaintiff's injuries. NYSCEF Doc. No. 74. They submit affidavits from Dr. Jacob Rand ("Rand"), a hematologist, and Dr. Stanley Schneller ("Schneller"), a cardiologist, who state that neither defendant departed from good and accepted medical practice, and that their treatment was not the proximate cause of plaintiff's injuries. NYSCEF Doc. Nos. 76, 77.

In opposition, plaintiffs argue, inter alia, that: Varma departed from good and accepted medical practice by switching plaintiff's medication from Coumadin to Xarelto; plaintiff's use of Xarelto caused her injuries; and defendants' statements about causation are conclusory. NYSCEF Doc. No. 166. Plaintiffs submit an affidavit from an expert hematologist, who says that Varma's prescription of Xarelto departed from good medical practice and caused plaintiff's injuries. NYSCEF Doc. No. 167.

In reply, Varma and Klein adopt and incorporate by reference the proximate cause arguments set forth by their co-defendants' expert in Motion Sequence 3 and argue, inter alia, that plaintiff: has not opposed the motion for summary judgment as to defendant Klein; failed to oppose the motion as to Varma regarding multiple claims (see below); and, failed to raise an issue of fact as to Varma as to causation or departure from standard of care. NYSCEF Doc. No. 267.

Motion Sequence 3

On September 28, 2023, defendants Spyropoulos and LHH ("the LHH defendants," collectively) moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against them. NYSCEF Doc. No. 116. The LHH defendants argue, inter alia, that: their treatment of plaintiff did not depart from good and accepted medical practice; their treatment of plaintiff did not proximately cause plaintiff's injuries; there is no evidence to support plaintiff's claims of negligent supervision; plaintiffs' cause of action for lack of informed consent must be dismissed as LHH obtained valid consent; and that plaintiffs' cause of action for loss of consortium is derivative of claims for which the LHH defendants are not liable. NYSCEF Doc. No. 146. The LHH defendants submit an affidavit from Dr. Jeffrey Weitz ("Weitz"), a hematologist, who states that the LHH defendants did not depart from good medical practice, and that plaintiff's continued treatment with Xarelto was not the proximate cause of her injuries. NYSCEF Doc. No. 118.

In opposition, plaintiffs argue, inter alia, that: Spyropoulos departed from the standard of care in continuing plaintiff's treatment with Xarelto; plaintiff's use of Xarelto caused her injuries; and defendants' statements about causation are conclusory. NYSCEF Doc. Nos. 207, 244.

In reply, the LHH defendants argue, inter alia, that: plaintiffs' opposition did not contest defendants' prima facie showing of entitlement to summary judgment dismissing plaintiffs' lack of informed consent, negligent supervision, and lack of consortium claims; defendants' decision to continue plaintiff on Xarelto did not constitute a departure from good and accepted medical practice; plaintiffs' expert fails to refute defendants' expert's opinion that defendants did not proximately cause plaintiff's injuries; and plaintiffs' expert's opinion is conclusory. NYSCEF Doc. No. 263.

Discussion

In order 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).

In a medical malpractice action, “a defendant doctor establishes prima facie entitlement to summary judgment when he/she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” *Roques v Noble*, 73 AD3d 204, 206 (1st Dept 2010).

Where a party opposing a motion for summary judgment fails to address certain issues, the Court should grant summary judgment on those issues. *See, e.g., Pommels v Perez*, 4 NY3d 566, 574-575 (2005); *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 (1st Dept 2013) (“the motion court correctly dismissed the second cause of action ... as plaintiff’s papers did not address this claim.”).

Defendant Varma’s Motion for Summary Judgment (Motion Sequence 2)

Plaintiff’s medical expert opines that defendant Varma departed from the standard of care in prescribing Xarelto to a patient with high-risk APS even though the scientific literature at the time did not sufficiently address high-risk patients. NYSCEF Doc. No. 167. On the other hand, Rand, defendant Varma’s expert, opines that Varma did not depart from the standard of care in prescribing Xarelto, as the medication has a predictable efficacy and studies available at the time showed that it was a safe and effective choice for patients with APS. NYSCEF Doc. No. 76. Rand points the Court to a 2016 study on the use of Xarelto by APS patients (“the RAPS study”) that concludes that “[Xarelto] seems efficacious and safe . . . in this subgroup of patients with [APS].” NYSCEF Doc. No. 187. However, plaintiffs’ expert points to an article reviewing the RAPS study that argues that patients with high-risk APS were underrepresented and, therefore, the efficacy of Xarelto for that group is unclear from that study. *Id.* The difference between these expert opinions and studies creates a disputed issue of fact as to whether defendant Varma departed from the standard of care in prescribing Xarelto to plaintiff.

As plaintiffs fail to oppose Varma’s arguments to dismiss plaintiffs’ lack of informed consent and loss of services causes of action, this Court must dismiss them.

Defendant Klein’s Motion for Summary Judgment (Motion Sequence 2)

As plaintiffs fail to oppose defendant Klein’s arguments seeking dismissal of the complaint as against him, this Court must dismiss the complaint against Klein in its entirety.

LHH Defendants’ Motion for Summary Judgment (Motion Sequence 3)

Plaintiffs’ expert opines that defendant Spyropoulos departed from the standard of care in failing to change plaintiff’s blood thinner back to Coumadin upon examination of plaintiff and with no clinical evidence of efficacy. NYSCEF Doc. No. 208. On the other hand, LHH defendants’ expert, Weitz, opines that Spyropoulos did not depart from the standard of care, as he properly

considered all the available research at the time, plaintiff's pre-existing conditions, and plaintiff's personal preferences in recommending that plaintiff continue to use Xarelto. NYSCEF Doc. No. 118. The difference between these expert opinions creates a disputed issue of fact.

All the parties' experts rely on the same literature on the efficacy of Coumadin versus Xarelto in treating patients with APS. NYSCEF Doc. No. 118. Weitz, in addition, relied on a 2018 re-evaluation of the RAPS study, which proffered scientific evidence that Xarelto remained effective in patients with high-risk APS. *Id.* Plaintiffs' expert maintains that the RAPS study had a small sample size of high-risk APS patients, and therefore, was inconclusive in determining the drug's efficacy. NYSCEF Doc. No. 208. This gap in the scientific literature creates a disputed issue of fact as to departure.

Plaintiffs' expert opines that Coumadin was the most effective medication to reduce the risk of developing a blood clot, and if the LHH defendants had switched plaintiff back to Coumadin, her aortic thrombosis would not have been as large, and therefore less likely to embolize. NYSCEF Doc. No. 208. The LHH defendants' expert, however, opines that anticoagulation therapy, whether with Coumadin or Xarelto, has no effect on the formation of growths in heart valves, and therefore, could not have prevented plaintiff's heart attack, aortic thrombosis, and stroke. NYSCEF Doc. No. 118. Therefore, the record creates a disputed issue of fact in causation.

As plaintiffs fail to address the LHH defendants' arguments for summary judgment dismissing the lack of informed consent, loss of services, and negligent supervision causes of action, this Court must dismiss them.

Conclusion

Therefore, the subject motions for summary judgment are hereby granted in part, solely to the extent that the complaint is hereby dismissed in its entirety as against defendant Eitan Klein, M.D., and plaintiffs' second and third causes of action, alleging lack of informed consent and loss of services, are hereby dismissed as against defendants Mala Varma, M.D., Alex Spyropoulos, M.D., and Lenox Hill Medicine; and is otherwise denied, and the Clerk is hereby directed to enter judgment accordingly.

HON. ARTHUR F. ENGORON

ARTHUR F. ENGORON, J.S.C.

7/12/2024
DATE

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"/>	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