

Campbell v New York City Health & Hosps. Corp.

2024 NY Slip Op 34977(U)

August 8, 2024

Supreme Court, Bronx County

Docket Number: Index No. 26902/2020E

Judge: Alicia Gerez

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19A

-----X
JANICE CAMPBELL,

Index No. 26902/2020E

Plaintiff,

Hon. ALICIA GEREZ,

- against -

Acting Justice of the Supreme Court

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Defendant.

-----X

The following papers numbered 17 to 49 were read on these motions (Seq. No. 001) for SUMMARY JUDGMENT noticed on April 1, 2024 and duly submitted as Nos. on the Motion Calendar of _____

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	17-38
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	39-44
Reply Affidavit	45-49

The motion is decided in accordance with the annexed memorandum decision.

Dated: 8/8/24

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

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
JANICE CAMPBELL,

Plaintiff,

- against -

DECISION and ORDER
Index No. 26902/2020E

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Defendant.

-----X

HON. ALICIA GEREZ

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“defendant”) moves for an Order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiffs’ complaint with prejudice. 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.

Plaintiff alleges, generally, that defendants were negligent in the care provided to plaintiff from February 19, 2019, until her last day of treatment on April 17, 2019. In the complaint, plaintiff alleges she suffered a bladder perforation and/or laceration when defendant failed to properly perform a total abdominal hysterectomy with salpingectomy. Plaintiff also alleges that she was caused to suffer from temporomandibular joint dysfunction, jaw dislocation, and pain due to repeated and improper Endotracheal intubation. As a result of the improper intubation, plaintiff alleges she suffered nerve damage and associated sequella including loss of range of motion in the jaw and mouth.

Plaintiff presented to Lincoln Medical Center¹ (“Lincoln”) for medical treatment in relation to heavy menses dating back to February 2016. Treatment for fibroids, anemia, and abnormal uterine

¹ Lincoln is a defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION facility.

bleeding was provided to plaintiff along with discussion of a hysterectomy or myomectomy to treat her symptoms.

On April 27, 2016, plaintiff underwent an abdominal myomectomy without complication. Less than two years later, in February of 2018, plaintiff reported heavy periods again and a hysterectomy was discussed as treatment. A pelvic ultrasound on May 1, 2018, revealed small fibroids. During a May 4, 2018, visit to Lincoln plaintiff was encouraged to try a Mirena IUD as treatment prior to any major surgical intervention. On the same day an endometrial biopsy was performed revealing a diagnosis of leiomyoma of the uterus. Plaintiff returned to the Lincoln gynecology clinic on December 18, 2018, with complaints that her symptoms had not improved. During this visit plaintiff also requested for her IUD to be removed.

In chronic pain from her condition, plaintiff requested a hysterectomy. Dr. Sandra Semple (“Dr. Semple”) met with plaintiff and scheduled a total abdominal hysterectomy (TAH) and possible bilateral salpingo-oophorectomy (BSO) for February 21, 2019. Prior to surgery, plaintiff met with Dr. Sara Nicole Lillo to discuss the risks and benefits of the TAH and BSO including damage to surrounding organs such as the bladder. The risks associated with prior abdominal surgeries and scar tissue was also discussed. Consent forms for the procedure and general anesthesia were signed by the plaintiff.

The procedure began with standard IV induction followed by attempted intubation twice by Dr. Adlai Pappy (“Dr. Pappy”) which was unsuccessful. Dr. Pappy requested the help of Dr. Dimitris Giannaris (“Dr. Giannaris”) in the OR. Dr. Giannaris was unsuccessful in completing a direct laryngoscopy. During these attempts plaintiff was mask ventilated without compromise. After airway prep and clearing of secretions, Dr. Giannaris intubated plaintiff with a Glidescope and Mac 3 blade so that the TAH could proceed.

During the TAH procedure dense adhesions were encountered throughout the abdominal wall. A thick adhesive band attached the uterus to the underlying fascia and was incised. Loops of small bowel were freed from the left adnexa and uterus. There were also adhesions of bladder and visceral peritoneum were dissected from the anterior uterus to mobilize and free the bladder. It was at this time that plaintiff alleges the dome of the bladder was lacerated.

Before the procedure concluded, blood-stained urine was seen in the Foley. At this point the bladder was filled retrograde with Methylene blue and dye was found in the abdomen. As a result, a urology consult was called wherein Urologist Dr. Michael Shy repaired a 2 cm bladder laceration. The bladder was instilled with Methylene blue again which showed intact anastomosis. A JP drain was inserted in the right suprapubic region and the Foley remained in place. Plaintiff's incision was closed and she was transferred to the recovery room in stable condition.

In the Post Anesthesia Care Unit plaintiff complained of left jaw pain which was reproducible to palpation. Plaintiff was evaluated by the Oral Maxillofacial Surgery team who manipulated plaintiff's jaw. Although not a part of the medical record, plaintiff testified that an anesthesiologist told her that he dislocated her jaw during the procedure and needed the help of another anesthesiologist to successfully intubate her.

On February 22, 2019, the JP drain was removed, and the incision was noted to be clean, dry and intact. Plaintiff's jaw was noted to be comfortable at this time post manipulation. Plaintiff was cleared for discharge on February 24, 2019, with a Foley catheter in place. She returned to the Lincoln Emergency Department on March 12, 2019, complaining of abdominal pain and foul-smelling brown discharge from the anterior lower abdominal wall. Plaintiff was tachycardic and febrile with an elevated white blood cell count.

A gynecological consult was held wherein plaintiff reported four days of fever and chills. A differential diagnosis of wound abscess, wound infection, enterocutaneous fistula, and necrotizing

fasciitis was made. Plaintiff was started on antibiotics and CT findings indicated severe cellulitis and an enterocutaneous fistula and small bowel obstruction (“SBO”).

Dr. Meno Leuders performed an anterior abdominal wall wound exploration and debridement with drainage of an abscess on March 13, 2019. Plaintiff was successfully intubated on the first attempt utilizing a Glidescope. During the procedure necrotic, nonviable skin and tissue was removed and incised. The wound cavity was irrigated and inspected. A post-operative diagnosis of panniculitis with subcutaneous soft tissue infection of pannus and abscess was made. During plaintiff’s extubation, OMFS consulted for a spontaneous mandibular condylar (jaw) dislocation. Plaintiff had her jaw manually reduced and was advised to follow up in the dental/OMFS clinic on an outpatient basis.

On March 14, 2019, plaintiff had a wound pac placed. By March 18, 2019, plaintiff was placed in isolation due to wound cultures growing MRSA and Klebsiella. Plaintiff received IV antibiotics prior to discharge on March 20, 2019. Plaintiff returned home with a portable wound vac and Foley with instructions to continue antibiotic use. On March 29, 2019 the wound vac was removed.

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, 2 [1st Dept. 2015]). 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]).

Defendants have met their *prima facie* burden with the submission of two expert physician affirmations. First, the affirmation of Tirsit Asfaw, M.D., ("Dr. Asfaw") a board certified physician in Obstetrics and Gynecology with a sub-certification in female pelvic medicine and reconstructive surgery (Urogynecology) practicing in New York. Dr. Asfaw opines that bladder injuries are a known and accepted risk of hysterectomies and the plaintiff's injury was addressed appropriately intraoperatively. Ultimately, the expert finds that none of plaintiff's alleged injuries, including the post-operative infection, were caused by a deviation from the standard of care by defendant.

Defendants also present the expert affirmation of Adam Levine, M.D., ("Dr. Levine") a board certified Anesthesiologist. After review of this case Dr. Levine determined that the care and treatment rendered to plaintiff by the anesthesia providers was at all times within good and accepted standards of practice. Dr. Levine explains that that there is no evidence that excessive force or orofacial trauma (bruising, etc.) was used by the defendant during her surgeries, and instead were the consequence of undiagnosed temporomandibular joint (jaw) dysfunction. Dr. Levine points to the medical records and testimony which he believes shows that defendant used appropriate and common techniques for intubation. The expert goes on to explain that an unsuccessful laryngoscopy is not evidence of negligence.

In opposition, plaintiff proffers the expert affirmation of Martin Gubernick, M.D., ("Dr. Gubernick") a board-certified obstetrician and gynecologist. Dr. Gubernick opines that proper precautions were not taken to eliminate the risk of bladder perforation, particularly that there was a failure to plan for how to properly address lysis of plaintiff's adhesions including implementing alternate techniques. The expert explains that the safe technique of briefly retrograde filling of the

bladder would have provided better definition of the location and boundaries of the bladder during dissection and it was a departure to not consider it.

This expert contributed the lack of preparation to the length of time the instant surgery took (more than double what the expert anticipated) which increased the risk of perforation to the bladder. The expert also believes that the extended length of time of the surgery coupled with the difficulty defendant doctors faced in separating the bladder from the uterus was due to a failure to identify the bladder's dimensions. In his report, the expert found that the assistance of a general surgeon should have been sought to assist to lyse plaintiff's adhesions.

Further, Dr. Gubernick identified that the location of the laceration suffered by plaintiff is not typical. He goes on to explain that there was nothing in the operative reports, imaging, or deposition transcripts which attest to an obstruction of view, unusual anatomy, or existing disease of the bladder which would have increased the risk of injuring plaintiff in such a way.

Plaintiff's expert contributes the listed departures to not just the laceration of the bladder but also the necessity of the drain used which later became infected. Additionally, the expert believes that the drain was removed prematurely and should have been prophylactically treated with antibiotics to prevent infection.

In reply, defendant correctly contends that plaintiff has failed to rebut all anesthesia claims when they failed to provide an expert report from a qualified individual. The expert report of Dr. Gubernick does not contain any foundation as to his knowledge or specialization in anesthesia care and therefore claims related to the anesthesia care in this matter are aptly dismissed as not properly opposed by a qualified expert and for failing to make out a *prima facie* case of medical malpractice (*Behar v Coren*, 21 AD3d 1045 [2d Dept 2005]; *Feuer v Ng*, 136 AD3d 704 [2d Dept 2016]).

With respect to the remaining contentions of plaintiff's expert, defendant argues, and the Court agrees, that dismissal is appropriate when the main tenants of Dr. Gubernick's expert report:

not retrograde filling the bladder and or calling in a general surgeon to assist with plaintiff's adhesions, are raised for the first time in opposition to the instant summary judgment motion and are not contained in the notice of claim or complaint (*Rosado v New York City Hous. Auth.*, 194 AD3d 586 [1st Dept 2021]). Significantly, "[p]laintiff's expert's affirmation was conclusory and did not adequately address the *prima facie* showing in the detailed affirmation of defendants' expert" (*Foster-Sturup v Long*, 95 AD3d 726, 728 [1st Dept 2012][internal citation and brackets omitted]). Accordingly, it is hereby

ORDERED that the motion for summary judgment is GRANTED.

This is the Decision and Order of the Court.

ENTER

Dated: _____

8/8/24


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