Santos v Elmhurst Hosp.
2024 NY Slip Op 35230(U)
January 3, 2024
Supreme Court, Queens County
Docket Number: Index No. 716400/2018
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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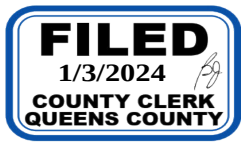
Juana Santos,

Plaintiff,

Index Number: 716400/18

- against -



Motion Date: 12/18/23

Elmhurst Hospital, Queens County Neuropsychiatric Institute, New York City Health and Hospital Corporation,

Motion Seq. No.: 1

Defendants.

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The following papers numbered E26-E35 read on this motion by Defendants, New York City Health and Hospitals Corporation also s/h/a Elmhurst Hospital, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E26-35

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, New York City Health and Hospitals Corporation also s/h/a Elmhurst Hospital, for summary judgment is granted, there appearing no opposition.

This is a medical malpractice action alleging departures from good and accepted medical practice in the treatment of fractures to Plaintiff's tibia and fibula. The three page complaint broadly alleges that the Defendants failed to render treatment with the proper diagnosis, negligently prescribed medications, failed to order necessary testing, and failed to obtain informed consent.

The relevant facts are as follows. Plaintiff fell in her home on or about October 30, 2017, resulting in fractures to her right tibia and fibula. She presented at Elmhurst Hospital on October 30, 2017 with complaints of pain. Subsequent x-rays confirmed a

comminuted fracture of the fibula and an oblique fracture of the tibia. Plaintiff was admitted to the hospital on October 31, 2017 by attending Orthopedic, David Joseph, M.D. After examination, Plaintiff was placed in a non-weight bearing splint while the hospital obtained consent to schedule surgery for an open reduction and internal fixation. On November 1, 2017, a Spanish language consent was obtained. A pre-operative appointment was held on November 2, 2017 with Javier Guzman, M.D. On the same day, Dr. Joseph, with the assistance of Dr. Guzman performed the surgery. An intramedullary nail ("IM nail") with screws were inserted during the procedure. From November 2nd through November 4th, no post-operative issues were recorded. Additional orthopedic evaluations were performed on November 6th, 10th and 13th. Images were taken on November 2nd and 13th and confirmed satisfactory alignment of the hardware and the lower right extremity. Plaintiff was ultimately discharged on November 15, 2017 to Long Island Care for further rehabilitation in good condition and with no complications.

Movants contend that they are entitled to summary judgment. In support, movants proffer the expert affirmation of Richard Bochner, M.D. Dr. Bochner is a physician, Board Certified in Orthopedic Surgery. Dr. Bochner opines with a reasonable degree of medical certainty that the Plaintiff was appropriately evaluated and treated for fractures to the right tibia and fibula. Imaging was obtained to confirm the fractures and subsequent surgical management was recommended and performed. Use of an IM nail was the appropriate course of action for the sort of fractures sustained by the Plaintiff in order to achieve proper alignment. To achieve alignment, an incision was made above the knee in order to slide the IM nail down the shaft of the tibia. Screws were used to secure the IM nail in place, which was the proper course of action. The radiology images from November 2nd and November 13th confirm that proper alignment was achieved, the hardware was situated in the correct position, and the surgery was overall successful. Based on his review of the records, Dr. Bochner opines that there was no additional injury to Plaintiff as a result of her fall, including to any of her nerves, tendons, or ligaments. In fact, Dr. Joseph's positioning of the IM nail avoided all possible contact with Plaintiff's nerves. There was no subsequent sign that Plaintiff suffered a nerve impingement. Indeed, Plaintiff's post-operative evaluations repeatedly found that her sensation was intact. Dr. Bochner further opines that the surgery was timely performed. The standard of care requires surgical operation within two weeks for fractures such as those sustained by Plaintiff. Here, the surgery was performed within three days. Additionally, there were no post-operative complications. The records indicate normal healing. Plaintiff was weightbearing and began physical therapy with days after the procedure. Her physical therapy was timely commenced. She

was evaluated for physical therapy on November 2, 2017, two days post-surgery, and began physical therapy on November 7, 2017, four days post-surgery. Dr. Bochner notes that one of the benefits of use of the IM nail was that it allowed Plaintiff to begin weightbearing physical therapy sooner than a patient who receives plates and screws.

With regard to the informed consent claim, Dr. Bochner opines that consent was appropriately obtained from Plaintiff and the risks and benefits were provided to her. Plaintiff ultimately executed a Spanish language consent and Spanish speaking staff spoke to her regarding her surgery both before and after it was performed.

Dr. Bochner addresses the allegations contained in the Bill of Particulars that the Plaintiff's cast was wrapped too tightly. He opines that no cast was required and notes that there is no evidence that Plaintiff was ever placed in a cast following the surgery. Finally, Plaintiff's allegations of, among other things, an altered gait, are not a result of her treatment at Elmhurst Hospital. Her difficulties instead are likely related to the traumatic fall which caused the fractures. The treatment she received achieved proper alignment in her lower right extremity. The post-operative imaging confirms an acceptable alignment, and not a deformity, as Plaintiff alleges.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Plaintiff has met her burden. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (see Hutchinson v. New York City Health & Hosps. Corp., 172 A.D.3d 1037 [2d Dept. 2019]). Here, moving Defendants have submitted the expert affirmation of Dr. Bochner, which establishes, prima facie, that there was no departure from good and accepted medical standards in their treatment of Plaintiff, and that no alleged departure was the proximate cause of her injuries. Plaintiff and the remaining Defendant, Queens County Neuropsychiatric Institute, failed to appear on this record to oppose the motion. Any party in opposition would be required to refute the specific opinions set forth in Dr. Bochner's affirmation in order to defeat summary judgment (see Marsh v. City of New York, 191 A.D.3d 973 [2d Dept. 2021]; Attia v. Klebanov, 192 A.D.3d 650 [2d Dept. 2021]; Tsitrin v. New York Community Hosp., 154 A.D.3d 994 [2d Dept. 2017]; Abalola v. Flower Hosp., 44 A.D.3d 522 [2d

Dept. 2007]).

The branch of the motion for summary judgment on the claim of lack of informed consent is granted. To establish a cause of action of lack of informed consent, a Plaintiff must establish that 1) that the person providing the professional treatment failed to properly disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, 2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and 3) that the lack of informed consent is a proximate cause of the injury (see Walker v. Saint Vincent Catholic Med. Ctrs., 114 A.D.3d 669 [2d Dept. 2014]). Here, the movants sufficiently established that they obtained the Plaintiff's consent by way of her execution of the Spanish language consent and her subsequent conversations with Spanish speaking hospital staff. Moreover, based on Dr. Bochner's affirmation, any allegation of lack of informed consent cannot survive, as there it was not the proximate cause of any injury to the Plaintiff.

Accordingly, the motion is granted and the complaint is dismissed as against the New York City Health and Hospitals Corporation and Elmhurst Hospital. The caption is hereby amended to the following:

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Juana Santos,

Plaintiff,

Index Number: 716400/18

- against -

Queens County Neuropsychiatric Institute,

Defendants.
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Serve a copy of this order with notice of entry without undue delay.

Dated: January 3, 2024

KEVIN J. KERRIGAN, J.S.C.

FILED
1/3/2024
COUNTY CLERK
QUEENS COUNTY