

Foran v Te

2025 NY Slip Op 31492(U)

April 24, 2025

Supreme Court, New York County

Docket Number: Index No. 805399/2019

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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ROBERT FORAN,

Plaintiff,

- v -

ALEXIS TE, JONATHAN FAINBERG, PETER CAI,
ANASTASIA KANELLOPOULOS, THE NEW YORK AND
PRESBYTERIAN HOSPITAL, and WEILL CORNELL
MEDICINE,

Defendants.

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INDEX NO. 805399/2019

MOTION DATE 05/28/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, and oral argument having been heard, Defendants’ motion for Summary Judgment, seeking to dismiss the case, is granted as to Defendants The New York and Presbyterian Hospital (“NYPH”) and Anastasia Kanellopoulos, N.P., s/h/a Anastasia Kanellopoulos (“NP Stasi”), and, in all other respects, is denied as set forth herein.

Plaintiff commenced the underlying action against Defendants Alexis Te, M.D., s/h/a Alexis Te (“Dr. Te”), Anastasia Kanellopoulos, N.P., s/h/a Anastasia Kanellopoulos, NYPH and Cornell University, s/h/a Weill Cornell Medicine¹ alleging causes of action sounding in medical malpractice, vicarious liability, and lack of informed consent.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, demonstrating the absence of any material issue of fact (*see Klein v City of New York*, 89 NY2d

¹Plaintiff’s claims against Defendant, Dr. Jonathan Fainberg, M.D. s/h/a, Jonathan Fainberg, and Peter Cai, M.D., s/h/a Peter Cai, have been discontinued (NYSCEF document no. 42). Plaintiff claims as to Defendant Cornell University, s/h/a Weill Cornell Medicine were withdrawn on the record.

833, 652 NYS2d 723 (1996); *Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 (1993); *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]).

To prevail on a motion for summary judgment in a medical malpractice action, a defendant physician must initially demonstrate the absence of any factual dispute regarding their alleged deviation from accepted medical standards or establish that their treatment did not proximately cause the plaintiff's injury, thus proving their entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *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]).

On June 23, 2017, Defendant Dr. Te performed a hydrocelectomy² on Plaintiff. Three days post hydrocelectomy, Plaintiff returned to Dr. Te with worsening, firm, tense, and painful scrotal swelling, but Dr. Te dismissed it as normal. Over the next three months, despite Plaintiff's repeated reports of increasing swelling, which Dr. Te himself noted as a very large, and subsequently an even larger hematocele,³ no intervention occurred until nearly a year later. The gravamen of the Plaintiff's case is that Defendants did not comport with standards of accepted medical care by failing to timely diagnose and treat Plaintiff's post-operative peri-testicular bleed.

In support of their motion, the Defendants submit the expert affirmation of Dr. Jonathan M. Vapnek, M.D., ("Dr. Vapnek"), a board-certified Urologist with experience and knowledge in general surgery, who opines to a reasonable degree of medical certainty that Dr. Te met the standard of care in surgical management on the three post-operative visits which Plaintiff's claims resulted in his right hydrocele or hematoma.

² A hydrocelectomy is a surgery to remove a hydrocele, a fluid-filled sac in the scrotum.

³ A hematocele is a blood-filled sac in the scrotum.

June 26, 2017 (three days post-surgery): Dr. Vapnek opines that Dr. Te removed Plaintiff's Penrose drain without issue and with minimal drainage. Dr. Vapnek opines that Dr. Te appropriately prescribed prophylactic antibiotics post-operatively and properly directed Plaintiff to follow up in four months.

June 28, 2017: Dr. Vapnek also opines that there was no requirement for Dr. Te to see the Plaintiff during this visit, and it was completely appropriate and within the standards of accepted medical care for Defendant NP Stasi at the urology clinic to manage and document Plaintiff's complaints (likely noting right-sided, not left-sided, scrotal edema as a typographical error). She ordered a same-day scrotal ultrasound to rule out infection, and subsequently discussed the ultrasound results (a decreasing, non-infected hematoma) with the Plaintiff on July 31, 2017, appropriately recommending continued conservative management.

September 25, 2017: During this visit, Dr. Vapnek noted that Dr. Te's notes indicated a recurring hematoma. An ultrasound was planned (suspecting septation), and possible elective repair surgery was discussed before the ultrasound revealed a complex hematocele.

Dr. Vapnek concludes that Plaintiff's three post operative visits are within the standard of care since Defendants performed physical examinations during each of the visits, spoke to Plaintiff regarding his concerns and developed an appropriate medical plan for treatment, which initially was conservative management of the right hydrocele with hematoma, and a recommendation for further surgery at some time in the future. Dr. Vapnek further opines that given the Plaintiff's nearly two-decade history with the large hydrocele before Dr. Te's treatment, recurrence was likely despite surgical intervention. Dr. Vapnek further notes that even if intervention of a subsequent surgery was mentioned earlier than the three-month postoperative time period, Plaintiff would have refused it, as he continued to refuse it during the time frame and well after the six-month mark.

Based on Dr. Vapnek's expert affirmation, the Court finds that Defendants Dr. Te and NP Stasi have established their prima facie burden to show that the care and treatment rendered to Plaintiff was within the standard of care, and did not proximately cause Plaintiff's alleged injuries.

On the related issue of Plaintiff's claims of vicarious liability against NYPH arising from the medical malpractice claims of Dr. Te and NP Stasi, the Court finds that only the June 23, 2017, hydrocelectomy was performed at NYPH, and Plaintiff's complaint contains no allegations regarding the intraoperative surgical care performed at NYPH. Accordingly, the complaint is dismissed as a matter of law regarding NYPH.

Since Defendants have established prima facie entitlement to judgment as a matter of law, 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 that such departures were a competent producing cause of the Plaintiff's injuries (*see Roques*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

Here, based on Plaintiff's submission of the expert affirmation of Expert A,⁴ a board-certified urologist with knowledge and experience in the post-operative care and treatment of patients who have undergone hydrocelectomies, the Court finds that Plaintiff raises issues of fact, rebutting the Defendants' prima facie entitlement to summary judgment (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11 NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65 AD3d 610 [2d Dept 2009]).

⁴ Plaintiff has redacted the name of their expert pursuant to CPLR 3101(d). The expert shall be referred to as "Expert A."

Specifically, Expert A opines, inter alia, that Dr. Te departed from the standard of care by failing to diagnose and treat Plaintiff's post-operative bleed when he examined him on June 26, 2017, three days after the hydrocelectomy and that NP Stasi departed from the standard of care by failing to notify an attending physician about Plaintiff's increased scrotal swelling when she examined him on July 28. Expert A further opines that timely recognition of the post-operative bleed, drainage of the hematoma, and ligation of the bleeding vessel three days post-surgery would have resolved Mr. Foran's peri-testicular bleeding within 24-48 hours, preventing its continued persistence. Expert A also opines that Dr. Te departed from the standard of care by failing to recommend immediate re-exploration and repair of Plaintiff's surgical site after his September 25 appointment which further contributed to his injuries.

Based on the opinions of Experts A and B, the Court finds that the Plaintiffs raise triable issues of fact regarding the care and treatment rendered by the Defendants and whether the Defendants deviated from the standard of care and caused the Plaintiff's alleged injuries. Accordingly, summary judgment is denied. "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; see *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

The Court notes that while Expert A opines that NP Stasi also departed from the standard of care, the record establishes that NP Stasi acted under the supervision of Dr. Te in the treatment and examination of Plaintiff and did not exercise independent medical judgment. As a result, Plaintiff's claims as to NP Stasi are dismissed. It is well settled that where supervised medical personnel are not exercising independent medical judgment, they cannot be held liable for medical

malpractice unless the directions from the supervising doctor so greatly deviate from normal medical practice that they should be held liable for failing to intervene (*see eg Bellafiore v Ricotta*, 83 AD3d 632, 633 [2d Dept 2011]; *Muniz v Katlowitz*, 49 AD3d 511, 513 [2d Dept 2008]; *see also Cunningham v St. Barnabas Hospital*, 36 AD3d 567 [1st Dept 2007]). This is so even where the hospital staff plays an active role in physically examining a patient and participating in a patient's care, as this does not demonstrate the exercise of independent medical judgment (*see France v Packy*, 121 A.D.3d 836 [2d Dept 2014]).

The Court notes that Plaintiff withdrew its lack of informed consent claim on the record; therefore, the Court shall not consider that branch of Defendant's motion seeking dismissal of this claim.

Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment seeking dismissal is granted to the extent of dismissing Plaintiff's complaint as to NYPH and NP Stasi s/h/a Anastasia Kanellopoulos, and in all other respects the motion is denied; and it is further

ORDERED that the Defendants are directed to serve a copy of this order upon the Plaintiffs by first class regular mail to their last known address within 20 days of entry of this order; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with this order; and it is further

ORDERED that the parties are to appear for an in-person settlement conference on June 10, 2025, at 10:00am, in 60 Centre Street, Courtroom 351, New York, NY 10007.

This is the Decision and Order of this Court.

4/24/2025
DATE


KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE