Green v Harlem Hosp. Ctr.
2025 NY Slip Op 34976(U)
December 18, 2025
Supreme Court, New York County
Docket Number: Index No. 805184/2017
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON — Justice — PART 37

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PAMELA GREEN,

Plaintiff,

- v -

HARLEM HOSPITAL CENTER, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, SANJIV GRAY MD, SUSAN M. TALBERT, DANNE R. LORIEO, ZEAH N. VENITELLI, MOUNT SINAI ST. LUKE'S, AKELLA CHENDRASEKHAR, RICHMOND UNIVERSITY MEDICAL CENTER,

Defendants.

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INDEX NO. 805184/2017

MOTION DATE 04/24/2025, 04/24/2025

MOTION SEQ. NO. 003 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 288, 292, 295, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 328, 331, 332, 333, 335, 336,

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 290, 294, 311, 312, 313, 314, 315, 316, 317, 318, f319, 320, 321, 322, 323, 324, 325, 334,

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons hereinbelow and stated at virtual oral argument on October 15, 2025, defendants' respective motions for summary judgment are granted in part and denied in part.

Background

The instant action arises out of treatment that defendants, Harlem Hospital Center, New York City Health and Hospitals Corporation ("NYCHHC"), Sanjiv Gray MD, Susan M. Talbert, Danne R. Lorieo, Zeah N. Venitelli, Mount Sinai St. Luke's, Akella Chendrasekhar, and Richmond University Medical Center, rendered to plaintiff, Pamela Green, in 2016. NYSCEF Doc. No. 1.

In 2014, plaintiff was diagnosed with diverticulitis and had "several diverticulitis episodes." NYSCEF Doc. No. 188. In late 2015, plaintiff had another diverticulitis attack, which she described as constant stabbing pain in her left lower quadrant. NYSCEF Doc. No. 195. For three days prior to presenting to Harlem Hospital on February 5, 2016, plaintiff developed left abdominal pain and abdominal swelling. NYSCEF Doc. No. 192.

The Instant Action

On May 10, 2017, plaintiff filed a verified complaint against defendants NYCHHC and Dr. Gray, alleging the following causes of action: (1) negligence; and (2) lack of informed consent arising from a violation of Public Health Law § 2805-d. NYSCEF Doc. No. 1.

On June 5, 2017, defendant NYCHHC submitted a verified answer with a general denial and ten "defenses[.]" NYSCEF Doc. No. 5. On July 14, 2017, defendant Dr. Gray submitted a verified answer with a general denial and ten "defenses[.]" NYSCEF Doc. No. 9.

On July 2, 2019, plaintiff's separate medical malpractice action in this Court, entitled Pamela Green v Sustan M. Talbert, M.D. et al., (Index No. 805221/2018), was consolidated with the instant action, to include the following additional defendants: Susan M. Talbert, Danne R. Lorieo, Zeah N. Venitelli, and Mount Sinai St. Luke's (as well as Richmond University Medical Center and Dr. Akella Chendrasekhar, who have since been dismissed from this action). NYSCEF Doc. No. 40. The causes of action are the same. NYSCEF Doc. No. 266. The verified answers of the remaining additional defendants are on NYSCEF as Doc. No. 267.

On October 2, 2020, plaintiff served a Supplemental Bill of Particulars directed to all defendants. NYSCEF Doc. No. 193. On December 20, 2024, plaintiff filed on NYSCEF a Supplemental and Amended Bill of Particulars directed to Dr. Gray. NYSCEF Doc. No. 194.

Harlem Hospital Admission (NYCHHC)

From February 5, 2016, through April 27, 2016, plaintiff, then 47 years-old, was treated at Harlem Hospital Center, by, inter alia, defendant Sanjib Gray, M.D. NYSCEF Doc. No. 1. During that admission, it was noted by Nurse Badawi that plaintiff was a "known current smoker." NYSCEF Doc. No. 298. Upon presenting to Harlem Hospital on February 5, plaintiff's pain was a ten on a ten-point scale and had abdominal swelling the size of a plum. NYSCEF Doc. No. 192. Also on February 5, a CT scan established plaintiff had another diverticulitis episode. NYSCEF Doc. No. 212. Plaintiff received antibiotic treatment. Id. Plaintiff agreed to undergo an elective sigmoidectomy, which was to be scheduled for a future date. NYSCEF Doc. No. 195.

On February 7, she was discharged. NYSCEF Doc. No. 212. On February 24, 2016, plaintiff presented to Harlem Hospital's Bariatric Clinic (the "Clinic") with complaints of worsening left lower quadrant pain, intermittent fever, inability to tolerate regular diet and severe vaginal itching. NYSCEF Doc. No. 213. At the Clinic, defendant Dr. Gray referred plaintiff to Harlem Hospital's emergency department and for a gynecology consultation. Id. On February 25, 2016, plaintiff went to the Harlem Hospital's Gynecology Clinic for a gluteal abscess and was diagnosed with an anal/gluteal abscess, with recommendations for a possible incision and drainage ("I&D") a week later. NYSCEF Doc. No. 188.

From February 29 to March 2, 2016, plaintiff was in Harlem Hospital. NYSCEF Doc. No. 214. On February 29, upon arriving at the emergency department, plaintiff had complaints of a right labia boil, increased pain and swelling to the left anus/gluteal abscess site and abscesses to the left axilla, right buttock and left mons pubis. NYSCEF Doc. No. 188. Also on February 29, plaintiff provided an informed consent for the I&D which was performed on the same day. NYSCEF Doc. No. 214.
A wound culture from the I&D was positive for methicillin-resistant Staphylococcus aureus ("MRSA"), thus plaintiff received antibiotic treatment. Id. On March 2, 2016, plaintiff was discharged from Harlem Hospital with instructions including to take Clindamycin. Id.

On March 10, 2016, plaintiff attended an appointment at the Clinic and saw Dr. Gray, with complaints of pain with spasms and large bloody bowel movement two days prior. NYSCEF Doc. No. 213. Per Dr.

Gray's testimony (NYSCEF Doc. No. 203), during the appointment he had an informed consent discussion with plaintiff for the sigmoidectomy, discussing general risks for surgery, alternatives and benefits; however, plaintiff disputes and denies this.

On March 30, 2016, plaintiff presented to the Clinic to discuss the results of her colonoscopy and had another informed consent discussion with Dr. Gray. NYSCEF Doc. Nos. 213, 203. On the same date, plaintiff was given the colorectal preparation kit, which included Chlorhexidine wipes and ChloraPrep, and given instructions how to use these products prior to the subject surgery, which was scheduled for April 12. Id. On March 31, 2016, plaintiff signed the consent form for the subject surgery, which is on NYSCEF as Doc. No. 217.

Plaintiff was in Harlem Hospital from April 12 to April 20, 2016, for the sigmoidectomy procedure, performed by Dr. Gray. NYSCEF Doc. No. 218. On April 12, plaintiff signed a second consent form for the sigmoidectomy, on NYSCEF as Doc. No. 218 pages 17 - 18. During the sigmoidectomy procedure, proctoscopy confirmed the anastomosis (surgical connection between remaining healthy intestine) was intact and not leaking. NYSCEF Doc. No. 218. The procedure was performed without complications. NYSCEF Doc. No. 189.

Harlem Hospital states, and plaintiff does not dispute, that on April 20, 2016, at the time of plaintiff's discharge from Harlem Hospital, her abdomen was soft and non-tender, the incision site was clean and dry without evidence of infection, and abdominal dressings were intact. Id.

On April 23, plaintiff returned to Harlem Hospital with complaints of abdominal pain, passing red stool, and foul odor from the surgical site. NYSCEF Doc. No. 264. A CT scan revealed a clearly defined and walled off fluid collection in the right pelvis adjacent to the lower anastomotic sutures, consistent with a postoperative abscess. Id. On April 25, plaintiff signed a consent form for an abscess drainage (NYSCEF Doc No. 219 pages 21-22), and it was performed the same day. The wound culture was negative for infection. On April 27, plaintiff was discharged with instructions to continue oral antibiotics. NYSCEF Doc. No. 189.

On May 6, plaintiff followed up in Harlem Hospital's general surgery clinic for additional pelvic abscess drainage. Id.

St. Lukes Admission

On May 9, 2016, plaintiff first presented to defendant St. Luke's with complaints of lower abdominal and rectal pain and fever for two days. NYSCEF Doc. No. 264. Plaintiff was admitted to St. Luke's "for a recurrent collection at the anastomosis, received antibiotics, remained afebrile and her bloodwork remained within normal range." NYSCEF Doc. No. 189.

On May 9, Dr. Talbert administered a CT scan, which showed a fluid collection adjacent to the anastomosis consistent with an abscess. NYSCEF Doc. No. 311. Non-party, Dr. Ronald Dreifuss, an Interventional radiologist, reviewed the CT scan and found the pelvic abscess to be too small to drain. NYSCEF Doc. No. 264. Dr. Talbert testified that plaintiff was to be monitored and that if she did not clinically improve, she would undergo further imaging to determine whether the collection was amenable to drainage. NYSCEF Doc. No. 273.

On May 10 and 11, plaintiff improved clinically with IV antibiotics. NYSCEF Doc. No. 264. Dr. Talbert testified that as plaintiff was clinically stable and there was no evidence of leukocytosis or anything other than mild to moderate tenderness, which was documented to be improving, there was not an indication for a repeat CT scan and plaintiff could be managed as an outpatient. NYSCEF Doc. No. 273.

On May 13, 2016, plaintiff was discharged home. Id.

Richmond Admission

From May 18 through May 25, 2016, plaintiff was in Richmond University Medical Center ("RUMC") and treated by, inter alia, Dr. Akella Chendrasekhar. During this admission, plaintiff underwent the placement of an end colostomy, which she continued to have until it was reversed in June 2018. NYSCEF Doc. No. 29.

Pursuant to this Court's October 15, 2025, Decision and Order on Motion Sequence Nos. 4 and 5 (NYSCEF Doc. No. 337), and without opposition from plaintiff, defendants RUMC and Dr. Akella Chendrasekhar were granted summary judgment, dismissing the complaint as against said defendants only.

St. Luke's Outpatient Treatment and Second Admission

On June 6, 2016, plaintiff commenced treatment with defendant Dr. Danne R. Lorieo as an outpatient, "for follow up care following end colostomy creation at RUMC due to anastomotic leak and pelvic abscess." NYSCEF Doc. No. 264. At that time, the colostomy was functioning and healthy, and Dr. Lorieo noted that colostomy closure would be possible in August 2016. Id.

On June 17, 2016, plaintiff followed up with complaints of deep left lower quadrant abdominal pain and rectal pain. Id. On July 8, plaintiff underwent an abdominal CT scan "which showed pelvic presacral collections (fluid accumulation in space between rectum and sacrum) reducing in size with possible adjacent phlegmon and inflammatory stranding (inflammation extending into fat tissue)." Id.

On an August 1 visit to Dr. Lorieo, plaintiff denied nausea, vomiting, fever, chills, and pain and her exam was normal. She was directed to obtain prior colostomy records for reversal procedure planning. Id. Dr. Lorieo also recommended a follow up CT scan, which Dr. Lorieo testified would be used to determine if the infection was getting better or worse before making a decision to move forward with colostomy reversal. However, plaintiff was not feeling well enough to have another CT scan throughout August.

On September 1 and October 10, plaintiff underwent barium enemas, which Dr. Lorieo testified he recommended in order to evaluate the condition of the distal bowel (the portion farthest from the mouth). The October 10 enema revealed a normal distal colon.

On October 20, 2016, Dr. Loreio performed the elective reversal/closure of the colostomy at St. Luke's. NYSCEF Doc. No. 189. Plaintiff testified that Dr. Lorieo discussed the surgery with her in depth, including risks and benefits, and she was given an opportunity to ask questions, which Dr. Lorieo answered. NYSCEF Doc. No. 264. Plaintiff also acknowledged signing a consent form. NYSCEF Doc. No. 237.

Dr. Venitelli testified that there were no perforations, tears, or leaks present prior to closure. NYSCEF Doc. No. 245. Dr. Venitelli also testified that a leak test was performed that confirmed the foregoing, although he acknowledged that a leak test was not documented in the operative report. Id. Plaintiff disputes that a leak test was performed. In Dr. Lorieo's testimony, he did not confirm performing a leak test. NYSCEF Doc. No. 272.

On October 24, plaintiff was not passing gas or having bowel movements, so there was a question of whether she had an ileus (inability of the intestine to contract) or obstruction, which Dr. Talbert testified can be common during post-operative recovery. NYSCEF Doc. No. 264. A CT scan was performed the same day. Id.

An exam of October 25 was similar, though plaintiff was also vomiting, so an NG tube was placed for decompression. Id. Dr. Talbert testified that plaintiff had a moderate amount of drainage from the tube overnight. NYSCEF Doc. No. 273.

On October 26, a repeat CT scan was performed that revealed a small fluid collection adjacent to the staple line of the anastomosis but nothing amenable to IR drainage. NYSCEF Doc. No. 264. Dr. Talbert testified that these could be normal or expected postoperative changes. NYSCEF Doc. No. 273.

On October 27, plaintiff developed sepsis and was transferred into the SICU. NYSCEF Doc. No. 264. Plaintiff developed a fever and elevated heartrate with increased WBC. Id.

On October 28th, plaintiff underwent an abdominal CT scan, which was consistent with an anastomotic leak. Id. On the same date, Dr. Talbert performed an emergent exploratory laparotomy on plaintiff. Id. In the process of dissecting adhesions, several pockets of murky fluid were encountered and drained. Id. Dr. Talbert also found an area of perforation, which she testified was "really an anastomotic leak[,]" and that the bowel appeared ischemic, meaning there was poor blood supply to a segment of bowel. NYSCEF Doc. No. 273. Plaintiff's intestine was not immediately rejoined to prevent further contamination and later reconstruction. NYSCEF Doc. No. 264. Plaintiff was taken back to the ICU for further resuscitation and was on a ventilator with ongoing fluid resuscitation but was in clinically stable condition. Id.

On October 31, 2016, Dr. Talbert took plaintiff back for an abdominal washout, creation of a proximal transverse colostomy, and abdominal closure with a VAC dressing (wound care method that uses suction to help wounds heal). Id. Plaintiff underwent 11 additional washouts up until her discharge on November 30, 2016. From October 31 to November 30, plaintiff continued to be examined at bedside, and it was documented that she was feeling much better, and her pain was well-controlled. Id.

On November 30, 2016, plaintiff's date of discharge, her ostomy was functioning well, her sepsis had been resolved, and she was tolerating food by mouth. Id.

Plaintiff testified that she continued to smoke against medical advice until at least November 2024. NYSCEF Doc. No. 270.

Subsequent Surgeries (that are not a part of this action)

In June 2018, plaintiff underwent an ileostomy reversal by a non-party doctor. NYSCEF Doc. No. 264. In July 2020, plaintiff underwent implantation of a Sacral Nerve Stimulator. Id.

Plaintiff testified that as of January 2025, her sacral nerve stimulator was no longer working and needed to be replaced, which led to a recurrence of frequent loose bowel movements throughout the day, upwards of 10-15 times per day. NYSCEF Doc. No. 270.

Discussion

General Principles

"Where a defendant makes a prima facie case of entitlement to summary judgment dismissing a medical malpractice action by submitting an affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact." Bartolacci-Meir v Sassoon, 149 AD3d 567, 570 (1st Dept. 2017). "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or

experience from which it can be assumed that the opinion rendered is reliable" Behar v Coren, 21 AD3d 1045, 1046-47 (2d Dept. 2005) (internal quotation marks and citations omitted).

"Generally, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants. To defeat summary judgment, the expert's opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Anyie B. v Bronx Lebanon Hosp., 128 AD3d 1, 3 (1st Dept. 2015) (internal citations and quotation marks omitted). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Alvarez v Prospect Hosp., 68 NY2d 320, 325 (1986).

"[A] doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective or a diagnosis proves inaccurate. Not every instance of failed treatment or diagnosis may be attributed to a doctor's failure to exercise due care." Nestorowich v Ricotta, 97 NY2d 393, 398 (2002).

"Public Health Law § 2805–d(1) requires that the provider disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation. In order to prevail on a claim of lack of informed consent, plaintiff must also show that, had a reasonable person in her position been properly informed of the risks and alternatives, she would not have undergone the procedure (Public Health Law § 2805–d[3])." Perez v Park Madison Professional Labs., Inc., 212 AD2d 271, 274 (1st Dept. 1995) (internal quotation marks omitted).

Motion 3

On April 25, 2025, defendants NYCHHC and Dr. Gray moved, pursuant to CPLR 3212, for summary judgment dismissing all claims and crossclaims against them and to amend the caption to remove said defendants. NYSCEF Doc. No. 187.

In support, defendants argue, inter alia, all claims as to them preceding March 23, 2016, must be dismissed as plaintiff failed to file a timely Notice of Claim to pursue any claims that allegedly arose during that period. NYSCEF Doc. No. 189. Defendants point out that "[p]ursuant to the applicable statute, a claimant is required to serve a Notice of Claim within 90 days after the claimed negligence" and that here, "since the Notice of Claim was filed June 21, 2016, all claims preceding March 23, 2016, must be dismissed as a matter of law." Id. Further, defendants noted during oral argument that plaintiff's opposition addressed only the April 12th admission, despite the Bill of Particulars addressing February through April.

During oral argument, plaintiff agreed that any claims prior to the April 12th surgery are abandoned, except for lack of informed consent pursuant to the violation of Public Health Law § 2805–d. More specifically, plaintiff confirmed that the following four theories of negligence are abandoned:

(1) Failure to refer to colorectal surgeon/have colorectal surgeon perform the sigmoidectomy;
(2) Failure to monitor post-operatively;
(3) Failure to perform CT scan/imaging; and
(4) Failure to diagnose and treat an anastomotic leak.

Based on the Bill of Particulars, plaintiff's opposition, and oral argument, the following five claims are not abandoned and remain:

(a) Sigmoidectomy not indicated;
(b) Lack of informed consent;
(c) Improper surgical technique for the sigmoidectomy;
(d) Failure to prescribe antibiotics/negligently introducing MRSA infection and failure to treat it; and
(e) Premature discharge.

In general, plaintiff alleges that defendants provided negligent care and treatment of plaintiff at Harlem Hospital on April 12, 2016, in relation to the performance of a laparoscopic sigmoidectomy by Dr. Gray due to complicated diverticulitis. NYSCEF Doc. No. 189. Plaintiff also alleges that the care defendants rendered over the ensuing several months was negligent. Id.

Defendants submit the affirmation of Dr. Daniel L. Feingold, M.D., a colorectal surgical expert, who attests, inter alia, that Dr. Gray and NYCHHC complied with all accepted standards of surgical and medical practice and that the claimed acts and/or omissions were not a proximate cause and did not cause, contribute to, or exacerbate plaintiff's claimed injuries. NYSCEF Doc. No. 190. Dr. Feingold opines that, to a reasonable degree of surgical/medical certainty, plaintiff's diverticulitis was properly diagnosed and her sigmoidectomy was medically indicated. Id. Dr. Feingold explains that "treatment recommendations are based upon the totality of a patient's picture and whether the patient has recurring attacks and how the episodes affect the patient's quality of life." Id. Dr. Feingold asserts that here, based on plaintiff's worsening diverticulitis attacks, a "sigmoidectomy was medically warranted and Dr. Gray's recommendation for said procedure complied with the accepted standards of care." Id.

Additionally, Dr. Feingold opines that "[based upon the written informed consents, the medical records, and plaintiff's and Dr. Gray's deposition testimony, informed consent was timely and properly obtained." Id.

Dr. Feingold disagrees with the claim that Dr. Gray failed to use proper surgical techniques, and he notes that Dr. Gray performed an end-to-side anastomosis, which he opines "is a common technique employed by many surgeons as a matter of routine to connect the ends of the colon." Id. Dr. Feingold states that "it was appropriate to use this anastomosis technique, which is based upon the surgeon's medical judgment and preferred technique and/or whichever method is more suitable to a patient's anatomy. Id. Further, Dr. Feingold opines that "a leak test is required to meet the standard of care when performing a sigmoidectomy to ensure the freshly created anastomosis is patent and intact and Dr. Gray met that standard." Id.

Dr. Feingold disagrees with plaintiff's claim that defendants failed to prescribe antibiotics and negligently introduced a MRSA infection that they failed to treat it. Id. Dr. Feingold notes that while plaintiff had a "perineal/peri-anal skin abscess" near the buttock "that was treated February 29, 2016[,]" the "MRSA bacteria that was cultured from that abscess had nothing to do with the pelvic abscess found on the April 23, 2016, CT scan. Id. Dr. Feingold opines that "all medically indicated antibiotics were proper and timely prescribed during each admission and clinic visit, and that plaintiff's "Bill of Particulars does not set forth which admission or clinic visit this allegation refers [to], does not set forth the basis for the allegation, does not set forth what antibiotic was improperly prescribed or not prescribed, and does not indicate how the prescribed antibiotics or antibiotics not prescribed caused or contributed to any of the claimed injuries." Id.

Dr. Feingold further opines that at discharge on April 27, 2016, "plaintiff was properly prescribed antibiotic Augmentin" and that "there was no medical indication for intravenous, different or additional antibiotics." Id. Dr. Feingold asserts that, "[a]lthough plaintiff claims she was improperly discharged

from the April 12 admission, there is no medical fact or evidence that plaintiff should not have been discharged on April 20." Id.

In opposition, plaintiff contends, inter alia, that "Dr. Gray's surgical technique deviated from accepted standards in multiple critical ways" and submits an affirmation from a board-certified expert colorectal surgeon, whose name is redacted ("plaintiff's Expert"). NYSCEF Doc. No. 298. Plaintiff's Expert opines, inter alia, that "[a] review of Dr. Gray's operative report of April 12, 2016, in conjunction with subsequent imaging, as well as his deposition, reveal significant technical mismanagement that deviated from the standard of care." NYSCEF Doc. No. 299.

Plaintiff's Expert identifies a side-to-side, low-pelvic anastomosis that was revised intra-operatively and left the bowel folded at roughly 90°, which plaintiff's Expert opines created undue tension and compromised perfusion. Id. Plaintiff's Expert asserts that "[a]lthough a leak test was performed intraoperatively, this alone does not insulate the surgeon from liability where [as here,] the anastomotic construct itself was anatomically unsound and poorly perfused." Id. Plaintiff's Expert points to Dr. Gray's testimony (NYSCEF Doc. No. 301 at 114-115) where Dr. Gray stated that this was done out of "personal preference," not medical necessity. Id. Plaintiff's Expert concludes that "such elective deviation" in the "anatomically constrained and perfusion-vulnerable pelvis manifests poor surgical judgment and constitutes a significant breach of the standard of care." Id.

Plaintiff's Expert did not contend that plaintiff's discharge was premature but does opine that the pain and bleeding she experienced on April 23, 2016 (three days post-discharge) was a result of Dr. Gray's deviation from accepted technique. Id. Although plaintiff's Expert refers to a lack of informed consent, ultimately there is documentary evidence of plaintiff's informed consent. Furthermore, while plaintiff's Expert takes issue with how Dr. Feingold discussed plaintiff's MRSA infection, plaintiff's Expert acknowledges that defendants had plaintiff complete "a course of antibiotics" in reference to MRSA. Id.

In reply, defendants note, inter alia, that as to whether the surgery was necessary, plaintiff's Expert contends only that a reasonable person "might" have delayed the surgery. NYSCEF Doc. No. 331.

Analysis

This Court finds that plaintiff's cause of action for lack of informed consent pursuant to an alleged violation of Public Health Law § 2805–d fails. Defendants have demonstrated their prima facie entitlement to summary judgment; therefore, that cause of action must be dismissed.

Further, defendants have met their burden to establish summary judgment in their favor for the following theories of negligence: (1) that the sigmoidectomy was not necessary; (2) failure to prescribe antibiotics/negligently introducing MRSA infection and failure to treat it; and (3) premature discharge.

However, whether the surgery was performed properly or not is an issue of fact, and the negligence cause of action can proceed under this theory. Thus, defendants' motion for summary judgment must be granted in part and denied in part.

Motion 6

On April 24, 2025, defendants Susan M. Talbert, M.D., Danne R. Lorieo, M.D., Zeah N. Venitelli, M.D., and Mount Sinai St. Luke's Hospital s/h/a Mount Sinai St. Luke's moved, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint with prejudice. NYSCEF Doc. No. 262.

As a preliminary matter, during oral argument, plaintiff consented to dismiss Dr. Venitelli, M.D., from the instant action.

The May 2016 Admission

As to plaintiff's allegations about the May 2016 admission, plaintiff attested during oral argument that the following claims have not been abandoned:

(1) the failure to drain timely a documented abscess; and
(2) failure to obtain informed consent reflective of the patient's known risk factors.

However, in the affirmations of plaintiff's two experts, neither expert opined that Dr. Talbert failed to obtain an informed consent from plaintiff during the May 2016 admission.

In support of their motion, defendants argue, as affirmed by their expert, Dr. David Brooks, a general surgeon, that no act or omission on the part of the defendants proximately caused or contributed to plaintiff's claimed injuries. NYSCEF Doc. No. 263. Dr. Brooks explains that the standard of care in treating an abscess "is drainage with interventional radiology, if the collection is large enough to be drained, and IV antibiotics." NYSCEF Doc. No. 265. As drainage is not possible if the collection is too small, as was the case here, Dr. Brooks explained that the standard of care is IV antibiotics alone. Id.

Dr. Brooks further opines that "it was well within the standard of care" for Dr. Talbert to "rely upon the findings and recommendations of interventional radiology as the consulted specialist for determining further treatment." Id. Dr. Brooks notes that the risks of "drainage, including potential perforation, bleeding, vascular compromise, among others, clearly outweighed the benefit and therefore antibiotic management alone was indicated and within the standard of care." Id. Additionally, Dr. Brooks opines that "the fact that plaintiff's condition worsened between St. Luke's and RUMC was not indicative of a deviation from the standard of care nor failure to identify the anastomotic leak that was seen many days later at RUMC." Id.

Dr. Brooks asserts that it is speculation to suggest that a small leak may have been present at St. Luke's which worsened after discharge, and that even so, "a small leak will often resolve on its own and it was not required nor standard of care to address such a leak, if it existed, surgically at that time." Id. Dr. Brooks states that "there was no delay by Dr. Talbert in diagnosing or operating on a suspected leak because there was simply none present at the time she was caring for the patient." Id. Dr. Brooks concludes that "even if one were to accept plaintiff's contention that "Dr. Talbert should have drained it, the patient simply would have undergone surgery five days earlier than she did and the treatment and outcome would have been identical." Id.

In opposition, plaintiff contends, inter alia, that Dr. Brooks' opinion regarding Dr. Talbert's decision not to drain the peri-anastomotic fluid collection is "conclusory as he defers uncritically to the interventional radiologist's statement that the collection was too small to drain." NYSCEF Doc. No. 311.

Plaintiff submits the expert affirmations of a board-certified colorectal surgeon ("plaintiff's Expert 1") and of a radiologist ("plaintiff's Expert 2"). NYSCEF Doc. Nos. 312, 313. Plaintiff's Expert 1 opines, inter alia, that to a reasonable degree of medical certainty, defendants' May 9, 2016, care and treatment led to the significant intra-abdominal pathology found on May 18, 2016, at RUMC, and that this "could have been mitigated or even avoided had the abscess been drained" by defendants. NYSCEF Doc. No. 312. Plaintiff's Expert 1 further opines that Dr. Brooks fails to address whether the radiologic interpretation itself is accurate. Id.

In a two-page affirmation, plaintiff's Expert 2 notes that he has reviewed the May 9, 2016, CT imaging taken at St. Luke's as well as Dr. Talbert's report that "IR was consulted but deferred the drainage procedure since the collection was too small to drain." NYSCEF Doc. No. 313. Expert 2 opines that he

"disagrees with that assessment." Id. He further opines that the description of the collection of fluid as "too small to drain" is improper. Id.

In reply and further support, defendants contend, inter alia, that their surgical expert, Dr. Brooks, has demonstrated that Dr. Talbert appropriately managed plaintiff during her May 9, 2016, admission "in diagnosing a pelvic abscess, assessing whether the abscess was amenable to drainage with interventional radiology, appropriately relying on interventional radiology opinion that the abscess could not be drained, and treating plaintiff with IV antibiotics." NYSCEF Doc. No. 334.

The October 2016 Surgery

Defendants contended, during oral argument, that plaintiff has abandoned all claims pertaining to the treatment of plaintiff during October 2016. Although plaintiff largely agreed, plaintiff asserts that it has not abandoned the following claims:

(1) failure to obtain informed consent reflective of the patient's known risk factors for the October 20, 2016, surgery;
(2) serious technical errors during the colostomy reversal;
(3) that Dr. Lorieo was negligent in pre-operative planning, arguing that such claims were included in the Bill of Particulars via the allegation that the surgery was not proper; and
(4) that Dr. Lorieo's alleged failure to perform a leak test prior to the surgery deviated from the standard of care for a colorectal surgery, which is also encompassed in the Bill of Particulars via the allegation that the surgery was not proper.

As to the allegation in the Bill of Particulars that the surgery was not proper, the Court rejects plaintiff's argument that this allegation encompasses pre-operative planning and finds that this allegation lacks particularity.

However, there is an issue of fact as to whether a leak test was performed (based on inconsistent testimony and no notation in the hospital records), this Court allows this claim of plaintiff's to remain and withstand summary judgment.

As to the lack of informed consent claim for this surgery, defendants contend that plaintiff suffered a known complication of this surgery, and that plaintiff's Bill of Particulars did not raise the theory that plaintiff was not warned she was high risk due to her smoking and raised this only in later papers. NYSCEF Doc. No. 263.

Plaintiff's Expert 1 argues that despite plaintiff being an active daily smoker with known obesity, "there is no documentation that" she was advised to cease smoking, lose weight, or that "she was even informed" of the increased risk of anastomotic leak in smokers. NYSCEF Doc. No. 312. Defendants contend that the allegation in the preceding sentence is not in plaintiff's Bill of Particulars, and, in any event, Dr. Lorieo testified (NYSCEF Doc. No. 272) that he told plaintiff that she was high risk and advised her of alternatives to surgery. Further, defendants' expert, Dr. Brooks, opines that a reasonable person would not have declined the surgery, to which plaintiff's Expert fails to respond. NYSCEF Doc. Nos. 265, 312.

Analysis

Plaintiff has raised an issue of material fact as to whether the abscess was too small for Dr. Talbert to operate on it. Plaintiff's Expert 2, a radiologist, opined that the subject abscess "which measures 3.6 x 2.7 x 2.9 cm, [was] in fact, amenable to Interventional Radiology ("IR") drainage." NYSCEF Doc. No. 313.

However, plaintiff's experts did not opine that there was a lack of informed consent by Dr. Talbert. Thus, plaintiff's complaint should be dismissed as against Dr. Talbert to the lack informed cause of action only.

Further, as to the October 20, 2016, surgery, plaintiff has failed to show that Public Health Law § 2805–d was violated. This Court finds that defendants have established their prima facie right to summary judgment that there was an informed consent for the October 20, 2016, surgery Dr. Lorieo performed. Therefore, plaintiff's claims arising out of the October 2016 admission must be dismissed, except for the theory of negligence that Dr. Lorieo's failure to perform a leak test prior to the October 20, 2016, surgery deviated from the standard of care for a colorectal surgery and could have led to the complications that plaintiff experienced.

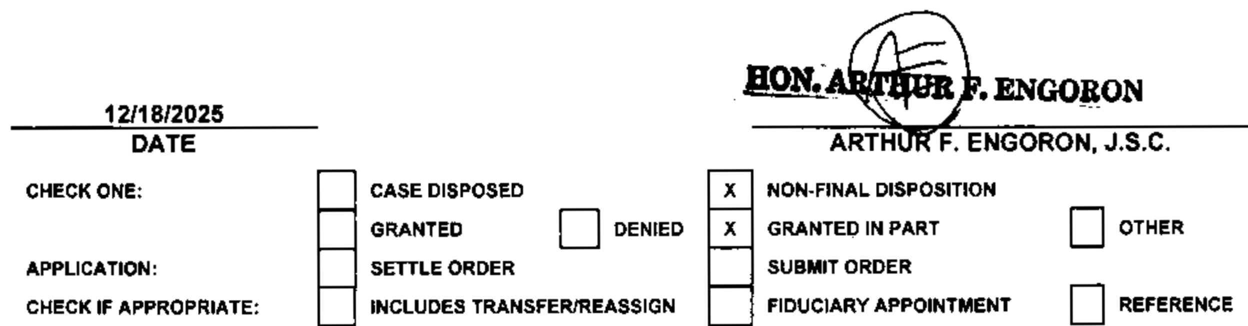
Accordingly, defendants' motion must be granted in part and denied in part.

Conclusion

Thus, the motion for summary judgment of defendants Harlem Hospital Center, New York City Health and Hospitals Corporation and Sanjiv Gray, M.D., is hereby granted in part and denied in part as follows: (1) granted in favor of defendants as to plaintiff's lack of informed consent cause of action; (2) denied as to plaintiff's negligence cause of action, as to whether the subject surgery was performed properly; and the Clerk is hereby directed to enter judgment accordingly.

Additionally, the motion for summary judgment of defendants, Mount Sinai St. Luke's Hospital s/h/a Mount Sinai St. Luke's, Susan M. Talbert, M.D., and Danne R. Lorieo, M.D., is hereby granted in part and denied in part as follows: (1) granted in favor of defendants as to plaintiff's lack of informed consent cause of action; (2) denied as to plaintiff's negligence cause of action, as to whether the subject abscess was too small for Dr. Talbert to drain and as to whether Dr. Loreio should have performed a leak test; and the Clerk is hereby directed to enter judgment accordingly.

Further, defendant Zeah N. Venitelli, M.D., is hereby dismissed from the instant action.



HON. ARTHUR F. ENGORON

12/18/2025
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
	[ ] GRANTED [ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE