

Sanders v Shutler
2025 NY Slip Op 35484(U)
February 28, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 616341/2021
Judge: David T. Reilly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 616341/2021CAL. No. 202400274MMSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY***P R E S E N T :***Hon. DAVID T. REILLY
Justice of the Supreme CourtMOTION DATE 7/17/24
ADJ. DATE 9/18/24
Mot. Seq. # 002 MotD

-----X

DELICIA T. SANDERS,

Plaintiff,

- against -

LUKAS J. SHUTLER, M.D., CRAIG
HORENSTEIN, M.D., JOSE DIAZ, D.O.,
RICHARD BAGDONAS, M.D., ELISE
SHRECK, M.D., SOUTH SHORE
UNIVERSITY HOSPITAL, GOOD
SAMARITAN HOSPITAL MEDICAL
CENTER, CATHOLIC HEALTH SERVICES
OF LONG ISLAND and NORTHWELL
HEALTH, INC.,

Defendants.

-----X

DELL & DEAN, PLLC
Attorney for Plaintiff
1225 Franklin Avenue, Suite 450
Garden City, NY 11530KAUFMAN BORGEEST & RYAN LLP
Attorney for Defendant Elise Shreck, M.D.
1205 Franklin Avenue
Garden City, NY 11530LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendants Good Samaritan
Hosp. Med. Ctr., Catholic Health Services,
Jose Diaz, D.O., and Richard Bagdonas, M.D.
1377 Motor Parkway, Suite 400
Islandia, NY 1149RUBIN PATERNITI GONZALEZ RIZZO
KAUFMAN, LLP
Attorney for Defendants Lukas J. Shutler, M.D.,
Craig Horenstein, M.D., South Shore Univ.
Hosp., and Northwell Health, Inc.
1225 Franklin Avenue, Suite 200
Garden City, NY 11530

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants Lukas J. Shutler, M.D., Craig Horenstein, M.D., South Shore University Hospital, and Northwell Health, Inc., filed June 14, 2024; Answering Affidavits and supporting papers by plaintiff as to defendants Craig Horenstein, M.D., South Shore University Hospital, and Northwell Health, Inc., filed August 15, 2024 (002); Replying Affidavits and supporting papers by

Sanders v Shutler
Index No. 616341/2021
Page 2

defendants Lukas J. Shutler, M.D., Craig Horenstein, South Shore University Hospital, and Northwell Health, Inc., filed September 13, 2024; Other ___; it is

ORDERED that the motion by defendants Lukas J. Shutler, M.D., Craig Horenstein, M.D., South Shore University Hospital, and Northwell Health, Inc., for summary judgment dismissing the complaint against them is granted to the extent set forth herein and is otherwise denied.

Plaintiff Delicia T. Sanders commenced this action to recover damages for injuries she allegedly sustained as a result of medical malpractice committed by defendants Lukas J. Shutler, M.D., Craig Horenstein, M.D., and South Shore University Hospital (hereinafter South Shore) on February 23, 2019, and defendant Northwell Health, Inc. (hereinafter Northwell) from March 5, 2019 through June 2019. The pleadings, as amplified by the bill of particulars, allege that Dr. Shutler was negligent in failing to properly interpret plaintiff's February 23, 2019 CT scan, failing to refer plaintiff for a surgical consult, prematurely discharging plaintiff, and failing to appreciate the significance of her presenting signs and symptoms. It is alleged that Dr. Horenstein was negligent in failing to properly interpret plaintiff's February 23, 2019 CT scan and in delaying diagnosis of her appendicitis and appendix rupture. Plaintiff also asserts causes of action for lack of informed consent and negligent hiring.

Defendants move for summary judgment dismissing the complaint against them, arguing that Dr. Shutler, Dr. Horenstein, and the South Shore staff acted within accepted standards of care and did not proximately cause plaintiff's alleged injuries, and that the claims against Northwell should be dismissed because it did not owe a duty to plaintiff. In support of the motion, defendants submit the affirmations of Mark Silberman, M.D., and Lawrence Schwartz, M.D.; the pleadings and the bill of particulars; transcripts of the parties' deposition testimony, plaintiff's medical records; and the affirmation of Avraham Z. Schwartz, Esq. Plaintiff opposes the motion as to Dr. Horenstein, South Shore, and Northwell, and submits the affirmation of Jordan L. Haber, M.D. and the affidavit of Stephen John Ferzoco, M.D.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The elements of malpractice are "a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898, 184 NYS3d 800, 803 [2d Dept 2023]; *see Blank v Adiyody*, 220 AD3d 832, 833, 198 NYS3d 172, 174 [2d Dept 2023]). Accordingly, a defendant moving for summary judgment dismissing a medical malpractice cause of action has the burden of

Sanders v Shutler
Index No. 616341/2021
Page 3

establishing “the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Campbell v Ditmas Park Rehabilitation & Care Ctr., LLC*, 225 AD3d 835, 836, 208 NYS3d 220, 222-223 [2d Dept 2024]; *see Xie v New York City Health & Hop. Corp.*, 226 AD3d 751, 209 NYS3d 105 [2d Dept 2024]; *Friedman v Vitale*, 224 AD3d 888, 206 NYS3d 656 [2d Dept 2024]). “To make this prima facie showing, the movant must ‘address and rebut any specific allegations of malpractice set forth in the plaintiff’s . . . bill of particulars’ ” (*Kelly v Ahn*, 224 AD3d 673, 674, 205 NYS3d 137, 139 [2d Dept 2024], quoting *Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898, 184 NYS3d 800, 803). Once the defendant makes its prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see Alvarelllos v Tassinari*, 222 AD3d 815, 201 NYS3d 489 [2d Dept 2023]; *Persuad v Hassan*, 220 AD3d 895, 198 NYS3d 196 [2d Dept 2023]). General and conclusory allegations of medical malpractice, “unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant [provider’s] summary judgment motion” (*J.P. v Patel*, 195 AD3d 852, , 854, 150 NYS3d 120, 122 [2d Dept 2021]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Neumann v Silverstein*, 227 AD3d 914, 209 NYS3d 584 [2d Dept 2024]). Summary judgment is not appropriate where the parties submit conflicting competent medical expert opinions, because such credibility issues can only be resolved by the trier of fact (*see Armond v Strangio*, 227 AD3d 758, 210 NYS3d 491 [2d Dept 2024]; *Russell v Garafalo*, 189 AD3d 1100, 136 NYS3d 317 [2d Dept 2020]).

Where a plaintiff in a medical malpractice case alleges a lack of informed consent, the plaintiff must also prove “(1) that the person providing the professional treatment failed to 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” (*Roy v Lent*, 219 AD3d 525, 525-526, 193 NYS3d 283, 285 [2d Dept 2023]; *see Ciceron v Gulmatico*, 220 AD3d 732, 197 NYS3d 556 [2d Dept 2023]; *Palagye v Loulmet*, 203 AD3d 724, 164 NYS3d 192 [2d Dept 2022]; *see Public Health Law* § 2805-d [1]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; *Gilmore v Mihail*, 174 AD3d 686, 105 NYS3d 504 [2d Dept 2019]; *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 23 NYS3d 369 [2d Dept 2016]).

Defendants established their prima facie entitlement to summary judgment dismissing the complaint against them by submitting the affirmations of Dr. Silberman and Dr. Schwartz, both of whom opine, within a reasonable degree of medical certainty, that the care rendered by defendants was at all times in accordance with good and accepted medical practice (*see Dye v Okon*, 203 AD3d 702, 160 NYS3d 641; *In Sook Choi v Doshi Diagnostic Imaging Servs., P.C.*, 152 AD3d 750, 61 NYS3d 41 [2d Dept 2017]). Dr. Silberman, who is board-certified in emergency medicine, opines that, upon plaintiff’s presentation to the emergency department, an appropriate history was obtained, and that Dr. Shutler performed a comprehensive physical examination and appropriately ordered laboratory studies, a CT scan of the abdomen and pelvis with oral and IV contrast, and intravenous fluid, Zofran, and Toradol.

Sanders v Shutler
Index No. 616341/2021
Page 4

He asserts that plaintiff's complete blood count (CBC) laboratory results were normal, and that she had a normal total white blood count (WBC). He opines that the results of the CT scan "were unequivocally negative for appendicitis," and that there were no findings consistent with appendicitis noted on the CT scan report. He further opines that, based on the Alvarado Score for Acute Appendicitis, plaintiff did not have signs or symptoms of acute appendicitis, and that her laboratory findings were not consistent with acute appendicitis.

In his affirmation, Dr. Schwartz, who is board-certified in diagnostic radiology, opines, within a reasonable degree of medical certainty, that plaintiff's February 23, 2019 abdomen and pelvic CT scan was performed and interpreted in accordance with good and accepted medical and radiologic practice. He states that he reviewed plaintiff's CT scan and that the images showed her appendix was normal and was not consistent with a perforated appendix or appendicitis. Accordingly, he concludes that Dr. Horenstein's finding of a normal appendix was appropriate. Dr. Schwartz states that when there is an obstruction, the appendix appears distended on imaging, and he opines that there was no evidence of perforation or obstruction on plaintiff's CT scan. He further asserts that plaintiff did not have any "classic" CT findings consistent with patients with acute appendicitis.

As plaintiff did not oppose the motion as to Dr. Shutler, she failed to raise a triable issue of fact (see *Kelly v Ahn*, 224 AD3d 673, 205 NYS3d 137; *Kelly v Gonzalez-Torres*, 219 AD3d 711, 194 NYS3d 312 [2d Dept 2023]). Accordingly, the first cause of action for medical malpractice is dismissed as to Dr. Shutler.

Plaintiff submits the affirmation of Dr. Haber in opposition to defendants' motion. In their reply, defendants argue that Dr. Haber's affirmation is procedurally deficient and that it does not substantially comport with the language of CPLR 2106. Dr. Haber's affirmation states that he is a "physician licensed to practice medicine in the State of New York, [and] affirms the following to be true under the penalties of perjury." The affirmation does not include the language that said penalties of perjury "may include a fine or imprisonment," nor that he understands that the affirmation "may be filed in an action or proceeding in a court of law." As the affirmation fails to substantially comply with the language of CPLR 2106, and defendants objected to the courts' consideration of it, the affirmation was not considered by this court in making its determination herein.

Plaintiff also submits the affidavit of Dr. Ferzoco, who is a board-certified physician and general surgeon. He opines, within a reasonable degree of medical certainty, that defendants' failure to correctly interpret plaintiff's February 23, 2019 CT scan led to a critical delay in treatment that "allowed the plaintiff's condition to worsen to the point of severe peritonitis, necessitating multiple surgeries, including an emergency laparoscopic appendectomy, which had to be converted to an open procedure due to the complexity of the case." He asserts that the delay also led to the formation of a significant pelvic abscess and ongoing complications. Dr. Ferzoco opines that, if not for the delay in diagnosing appendicitis, less invasive treatment options would have been available, and there would have been a reduced risk of complications.

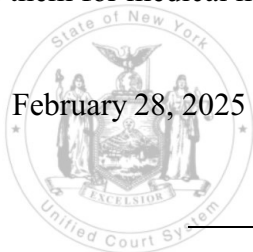
Sanders v Shutler
Index No. 616341/2021
Page 5

As the defendants met their prima facie burden as to the element of departure, plaintiff was required to raise an issue of fact as to that element (*see generally Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). Dr. Ferzoco's affidavit focuses primarily on the element of causation, and fails to address the specific assertions in defendants' experts' affirmations as to the element of departure. Accordingly, Dr. Ferzoco's affirmation is insufficient to raise a triable issue of fact as to whether defendants departed from the accepted standard of care (*see Weintroub v Maimonides Med. Ctr.*, 222 AD3d 915, 202 NYS3d 269 [2d Dept 2023]; *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; *DiLorenzo v Zaso*, 148 AD3d 1111, 50 NYS3d 503 [2d Dept 2017]).

Defendants also argue that the complaint must be dismissed against Northwell because it did not owe a duty to plaintiff. They submit the affirmation of Avraham Z. Schwartz, who states that he is the vice president of the medical malpractice program at Northwell. Mr. Schwartz asserts that Northwell is a not-for-profit domestic corporation and the corporate parent of South Shore. He further asserts that Northwell does not provide or render patient care and does not maintain insurance coverage for medical malpractice claims. However, Dr. Horenstein testified that on February 23, 2019, his employer was Northwell. Northwell failed to address plaintiff's allegation that it controlled and managed South Shore, and failed to address whether Dr. Horenstein was its employee (*see Yao v Punsal*, 2022 WL 22863256, 2022 NY Slip Op 31114(U) n 6 [Sup Ct, Nassau County 2022]; *Procida v Harrison*, 2020 WL 13302897, 2020 NY Slip Op 35009(U) [Sup Ct, Suffolk County 2020]; *Collard v Rowan*, 69 Misc. 3d 1206(A), 131 NYS3d 488 n 7 [Sup Ct, Suffolk County 2020]). Accordingly, it failed to establish its prima facie entitlement to summary judgment.

Accordingly, defendants' motion is granted to the extent that the plaintiff's first cause of action against them for medical malpractice is dismissed, and the motion is otherwise denied.

Dated: February 28, 2025



David T. Reilly, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION