

McBride v Colby

2024 NY Slip Op 31083(U)

March 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 521629/19

Judge: Heela D. Capell

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At an IAS Term, City Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York

PRESENT: HON. HEELA D. CAPELL, J.S.C.

X

PHYLLIS MCBRIDE,

Plaintiff,

Index No. 521629/19

-against-

Mot. Seq. # 3-4

STEVEN COLBY, M.D., TERRENCE SACCHI, M.D., ROBABEH MOHAMMADZADEH, M.D., SEBRON HARRISON, M.D., SABRINA SALEEM, M.D., SOFYA KOSTANYAN, M.D., IVANCARMINE GAMBARDELLA, M.D., TIFFANY LO, P.A., BEIYI SHEN, M.D., TANYA DADASHEVA, N.P., ALEXA K. NASTI, R.N., ANDREW CHRISTIAN, P.A., and NEW YORK PRESBYTERIAN BROOKLYN METHODIST HOSPITAL,

DECISION/ORDER

Defendants.

X

Recitation, as required by CPLR § 2219(a), of the electronically filed papers considered in the review of defendants' motions for summary judgment, pursuant to CPLR § 3212(b), numbered as they appear on NYSCEF.

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits Annexed	99-114, 116-137
Opposing Affirmations and Exhibits Annexed	138, 139-140
Reply Affirmations and Exhibits Annexed	143-144, 145

Plaintiff Phyllis McBride ("Plaintiff") received medico-surgical treatment at defendant New York Presbyterian Brooklyn Methodist Hospital ("Hospital") by various individual defendants, including the moving defendants Steven Colby, M.D. ("Dr. Colby"), Sebron Harrison, M.D. ("Dr. Harrison"), and IvanCarmine Gambardella, M.D. ("Dr. Garbardella"), from October 20, 2018 to January 5, 2019. Thereafter, she commenced a timely action to recover damages for medical malpractice against, among

others, Drs. Colby, Harrison, and Gambardella (collectively, "Defendants"), alleging that as the result of Defendants' acts or omissions, she sustained multiple, life-altering injuries, including an infection with MRSA (a nosocomial superbug), vegetative endocarditis of her mitral valve, the replacement of her mitral valve, the iatrogenic (surgery-caused) impairment of her atrial valve, and the insertion of a pacemaker. After discovery was completed and a note of issue was filed, Dr. Colby individually, and Drs. Harrison with Gambardella jointly, timely moved for summary judgment dismissing Plaintiff's complaint as against them (mot. seq. # 3-4, respectively). The motion of Dr. Colby, an infectious disease specialist, is supported by (among other submissions) the expert affirmation of William Mandell, M.D. ("Dr. Colby's Expert"), a New York State-licensed, board-certified internist with the sub-certification in infectious diseases (NYSCEF Doc No. 101). The joint motion of Dr. Harrison, a thoracic surgeon, and of Dr. Gambardella, a cardiac surgeon, is supported by (among other submissions) the expert affirmation of George Tolis, M.D. ("Drs. Harrison/Gambardella's Expert"), a New York State-licensed, board-certified general and cardiothoracic surgeon (NYSCEF Doc. No. 118). Plaintiff opposed both motions solely by way of her counsel's separate affirmation and without submitting an expert affirmation in opposition to either motion (NYSCEF Doc Nos. 138-139). On February 29, 2024, both motions were fully submitted, with the Court reserving decision.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury." *DiMitri v Monsouri*, 302 AD2d 420, 421 (2d Dept 2003). "On a motion for

summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.” *Hayden v Gordon*, 91 AD3d 819, 820-821 (2d Dept 2012). “Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden.” *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 (2d Dept 2012) (internal citation omitted). “[E]xcept as to matters within the ordinary experience and knowledge of [lay persons], in a medical malpractice action, expert medical opinion evidence [both in support of, and in opposition to, a summary judgment motion] is required to demonstrate merit.” *Fiore v Galang*, 64 NY2d 999, 1001 (1985).

Here, each Defendant has demonstrated his respective entitlement to summary judgment as a matter of law by way of Dr. Colby’s Expert as to Dr. Colby and by way of Dr. Harrison/Gambardella’s Expert as to the latter Defendants. The defense experts opined, based upon their respective review of the medical records, the deposition testimony, and pleadings, that none of Defendants departed from the applicable standards of the medico-surgical practice and that, in any event, none of them caused or contributed to Plaintiff’s injuries. See e.g. *Corujo v Caputo*, ___ AD3d ___, 2024 NY Slip Op 00756 (2d Dept 2024); *Assunta v Rubin*, 189 AD3d 1321, 1323 (2d Dept 2020).

Plaintiff has failed to raise a triable issue of fact, in opposition to the motions. “Since a medical diagnosis is outside the experience and knowledge of an ordinary lay

person, . . . [P]laintiff was required to submit an expert medical opinion in opposition.” *Lingfei Sun v City of New York*, 99 AD3d 673, 676 (2d Dept 2012), *lv denied* 20 NY3d 854 (2012), *rearg denied* 20 NY3d 1057 (2013). Because Plaintiff has not submitted an expert affirmation in opposition to either motion, she has failed to raise a triable issue of fact. See *Benedetto v Tannenbaum*, 186 AD3d 1596, 1598 (2d Dept 2020); *Bethune v Monhian*, 168AD3d 902, 903 (2d Dept 2019); *Koster v Davenport*, 142 AD3d 966, 969 (2d Dept 2016), *lv denied* 28 NY3d 911 (2016); *Savage v Quinn*, 91 AD3d 748, 750 (2d Dept 2012); *D’Elia v Menorah Home & Hosp. for Aged & Infirm*, 51 AD3d 848, 851 (2d Dept 2008); *Juba v Bachman*, 255 AD2d 492, 493 (2d Dept 1998), *lv denied* 93 NY2d 809 (1999).

Further, the affirmation in opposition of Plaintiff’s counsel is “without evidentiary value and thus unavailing.” See e.g. *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980); *Rivers v Birnbaum*, 102 AD3d 26, 48 (2d Dept 2012).

Plaintiff’s contention that Dr. Colby’s motion is defective on account of his counsel’s initial failure to include with it a full transcript of his pretrial testimony is meritless. CPLR § 2001 requires that “if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.” Although Dr. Colby’s counsel initially failed to include with his motion a full transcript of his pretrial testimony, Plaintiff did submit a full transcript of Dr. Colby’s pretrial testimony with her opposition (NYSCEF Doc No. 140). As such, it is obvious that Plaintiff was in possession of a complete copy of Dr. Colby’s pretrial deposition testimony at the time of her opposition. Thus, Plaintiff was not prejudiced by Dr. Colby’s counsel’s omission. See *Long Is. Pine*

Barrens Socy., Inc. v County of Suffolk, 122 AD3d 688, 691 (2d Dept 2014), *lv denied* 25 NY3d 914 (2015); *Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello*, 97 AD3d 611, 612 (2d Dept 2012). *See also Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1359 (2d Dept 2019).

Similarly unavailing is Plaintiff's contention that Dr. Harrison/Gambardella's expert was, in effect, incompetent because he erroneously characterized Plaintiff's mitral valve replacement ("MVR") as the "ablation"¹ in ¶ 67 of his affirmation at NYSCEF Doc No. 118. The defense expert's one-time reference to the MVR as the ablation was an obvious mistake in his otherwise comprehensive affirmation. To disregard the inadvertent error would not prejudice a substantial right of Plaintiff because Dr. Harrison/Gambardella's expert had correctly referred to the MVR a total of nine times (in ¶¶ 30, 49, 50, and 66 of his affirmation) *before* he incorrectly referred to the MVR as the "ablation" (in ¶ 67 of his affirmation). *See* CPLR § 2001; *see also* CPLR § 3026 ("Defects shall be ignored if a substantial right of a party is not prejudiced."); *Matter of Greenfield v Town of Babylon Dept. of Assessment*, 76 AD3d 1071, 1073 (2d Dept 2010).

Plaintiff's final contention that Dr. Gambardella did not properly obtain her informed consent to the MVR represents a new theory of liability which she previously failed to assert in her complaint and bills of particulars.² "A plaintiff cannot, for the first

¹ "Ablation" is defined as the "complete removal or extinction, not merely mitigation or reduction"; for example, "[r]emoval of a body part or the destruction of its function, as by a surgical procedure or morbid process, or the presence or application of a noxious substance." *Stedman's Medical Dictionary*, Entry 1180 Ablation (online edition).

² *See* Verified Complaint, dated October 1, 2019; Verified Bill of Particulars as to Defendant Ivan Carmine (footnote continued).

time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars.” *Palka v Village of Ossining*, 120 AD3d 641, 643 (2d Dept 2014). *See also Bacalan v St. Vincent’s Catholic Med. Ctrs. of New York*, 179 AD3d 989, 992 (2d Dept 2020). Plaintiff’s belatedly asserted lack-of-consent theory, therefore, cannot be entertained.

The Court has considered Plaintiff’s remaining contentions and found them without merit.

Accordingly, it is

ORDERED that Dr. Colby’s motion (in mot. seq. # 3) is granted in its entirety, and Plaintiff’s complaint is dismissed as against him without costs and disbursements; and it is further

ORDERED that Drs. Harrison and Gambardella’s joint motion (in mot. seq. # 4) is granted in its entirety, and Plaintiff’s complaint is dismissed as against each and both of them without costs and disbursements; and it is further

ORDERED that Dr. Colby’s counsel, Rubin Paterniti Gonzales Rizzo Kaufman LLP, is directed to submit a proposed judgment, pursuant to 22 NYCRR § 202.48, as to Dr. Colby; and it is further

Gambardella, M.D., dated January 2, 2020; Supplemental Verified Bill of Particulars as to Defendant Ivan Carmine Gambardella, M.D., dated May 8, 2023 (NYSCEF Doc Nos. 119, 121, and 126, respectively).

ORDERED that Drs. Harrison and Gambardella's joint counsel, Aaronson Rappaport Feinstein & Deutsch, LLP, is directed to submit a proposed judgment, pursuant to 22 NYCRR § 202.48, as to Drs. Harrison and Gambardella; and it is further

ORDERED that, to reflect the dismissal of Drs. Colby, Harrison, and Gambardella from this action, as well as the prior stipulated dismissal of Robabeh Mohammadezede, M.D., Tiffany Lo, P.A., Beiyi Shen, M.D., Tanya Dadasheva, N.P., Alexa K. Nasti, R.N., and Andrew Christian, P.A., from this action, the caption is amended to read in its entirety as follows:

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PHYLLIS MCBRIDE,

Plaintiff,

-against-

Index No. 521629/19

TERRENCE SACCHI, M.D.,
SABRINA SALEEM, M.D.,
SOFYA KOSTANYAN, M.D., and
NEW YORK PRESBYTERIAN
BROOKLYN METHODIST HOSPITAL,

Defendants.

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This constitutes the decision/order of this Court.

Dated: Brooklyn, New York
March 18, 2024

HON. HEELA D. CAPELL, A.S.C.
KINGS COUNTY CLERK
FILED
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