

**O'Brien v Allam**

2017 NY Slip Op 32468(U)

October 16, 2017

Supreme Court, Suffolk County

Docket Number: 13-6162

Judge: Denise F. Molia

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INDEX No. 13-6162  
CAL. No. 16-00668MM

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 9-7-16 (001)  
MOTION DATE 9-12-16 (002)  
MOTION DATE 9-19-16 (003)  
ADJ. DATE 5-12-17  
Mot. Seq. # 001 - MG  
          # 002 - MG  
          # 003 - MG; CASEDISP

-----X  
JULE ANN O'BRIEN,

Plaintiff,

- against -

MEDHATE ALLAM, M.D., LAWRENCE J.  
TARASUK, D.O., EASTERN LONG ISLAND  
SURGERY, P.C. and SOUTHAMPTON  
HOSPITAL,

Defendants.  
-----X

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Upon the following papers numbered 1 to 51 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 31; 32 - 51 ; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#001) by defendant Southampton Hospital, the motion (#002) by defendant Lawrence Tarasuk, D.O., and the motion by defendants Medhat Allam, M.D., and Eastern Long Island Surgery, P.C., are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion (#001) by defendant Southampton Hospital for summary judgment dismissing the complaint against it is granted; and it is

**ORDERED** that the motion (#002) by defendant Dr. Lawrence Tarasuk for summary judgment dismissing the complaint against him is granted; and it is further

**ORDERED** that the motion (#003) by defendants Dr. Medhat Allam and Eastern Long Island Surgery, P.C., for summary judgment dismissing the complaint against him is granted.

Plaintiff Jule Ann O'Brien commenced this action to recover damages for medical malpractice and lack of informed consent allegedly committed by defendants Dr. Medhate Allam, Dr. Lawrence Tarasuk, Eastern Long Island Surgery, P.C., and Southampton Hospital. Plaintiff first presented to defendant Dr. Allam's office on November 3, 2009 in a consultation for lap band surgery. On May 27, 2010, plaintiff underwent the lap band surgery, which was performed at defendant Southampton Hospital by defendant Dr. Allam, with defendant Dr. Tarasuk assisting. Plaintiff saw Dr. Allam at his medical office post-operatively throughout 2010 and 2011. On July 9, 2011, plaintiff was admitted to Southampton Hospital with complaints of weakness and inability to keep solids and liquids down, and Dr. Tarasuk adjusted plaintiff's lap band. On August 29, 2011, plaintiff went to the emergency room of Southampton Hospital with complaints of abdominal pain. She was examined by Dr. Tarasuk and diagnosed as suffering from muscle strain. Plaintiff saw Dr. Allam at his office on September 7, 2011 with complaints of a painful bulge at her incision site. Plaintiff went to the emergency room of Southampton Hospital on September 12, 2011 with an incarcerated hernia, and Dr. Allam performed a procedure to repair the hernia. Plaintiff continued to follow up with Dr. Allam at his office after the procedure.

Plaintiff was admitted again to Southampton Hospital on February 13, 2012 with complaints of abdominal pain. Dr. Allam examined her, adjusted her lap band, and noted that she might have an incisional hernia. He advised her to return to the emergency room if she experienced symptoms consistent with a hernia. Plaintiff was seen by Dr. Allam at his office on February 15, 2012, with no complaints of abdominal pain. On March 5, 2012, plaintiff went to Southampton Hospital with complaints of abdominal pain and was examined by Dr. Tarasuk, who diagnosed her with an incarcerated incisional hernia and redundant excess skin consistent with chronic panniculitis. On that day, Dr. Allam performed a panniculectomy on plaintiff and repaired the incarcerated incisional hernia.

Plaintiff was discharged from the hospital on March 7, 2012 and followed up with Dr. Allam at his office. On April 1, 2012, plaintiff went to the emergency room at Southampton Hospital and was diagnosed with a wound infection. On the next day, plaintiff underwent a sharp wound debridement, performed by Dr. Allam. Plaintiff was discharged from the hospital on April 3, 2012 and was last seen at Dr. Allam's office on April 11, 2012. The complaint alleges that defendants failed to properly perform the lap band surgery, failed to properly perform repair of the hiatal hernia and the incisional hernia, and the panniculectomy. It further alleges that defendants failed to provide proper post-operative care and failed to timely diagnose and treat plaintiff's infection.

Southampton Hospital now moves for summary judgment dismissing the complaint against it, arguing that it cannot be held vicariously liable for any malpractice that was allegedly committed by Dr. Allam and Dr. Tarasuk, as they are independent, private attending physicians. Southampton Hospital also argues that the claims regarding treatment rendered on May 27, 2010 are barred by the statute of limitations, and that its doctors, nurses and staff did not deviate or depart from accepted medical practice in the care of plaintiff. In support of its motion, Southampton Hospital submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, copies of plaintiff's medical records, and an expert affidavit of Dr. Fred Kimmelstiel.

Dr. Tarasuk moves for summary judgment dismissing the complaint against him, arguing that he followed good and accepted medical practices as assistant surgeon during plaintiff's surgeries. In support of his motion, Dr. Tarasuk submits, among other things, copies of the pleadings, transcripts of defendant's deposition testimony, plaintiff's medical records, and an expert affidavit Dr. Dominic Gadaleta.

Dr. Allam and Eastern Long Island Surgery move for summary judgment dismissing the complaint against them, arguing that they did not depart from accepted medical practice in the care of plaintiff. In support of the motion, they submit, among other things, copies of the pleadings, copies of plaintiff's medical records, excerpts of the parties' deposition testimony, and an expert affidavit of Dr. Michael Leitman. No papers were submitted in opposition to defendants' motions.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice, and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998], *lv denied* 92 NY2d 814 [1998]). On a motion for summary judgment dismissing the complaint, a defendant hospital or physician has the burden of establishing through medical records and competent expert affidavits the absence of any departure from good and accepted practice, or, if there was a departure, that the plaintiff was not injured thereby (*see Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). In opposition, “a plaintiff must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, so as to demonstrate the existence of a triable issue of fact” (*Deutsch v Chaglassian*, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]). Further, the plaintiff “need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party’s prima facie showing” (*Stukas v Streiter*, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011]).

It is fundamental that the primary duty of a hospital’s staff is to follow the physician’s orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders (*Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see Sledziewski v Cioffi*, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). Moreover, “not every negligent act of a nurse [is] considered medical malpractice, but a negligent act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice” (*Bleiler v Bodnar*, 65 NY2d 65, 72, 489 NYS2d 885 [1985]; *see Spiegel v Goldfarb*, 66AD3d 873, 889 NYS2d 45[2d Dept 2009]). “A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician’s orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same” (*Toth v Bloshinsky*, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see Sela v Katz*, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; *Cerny v Williams*, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). However, “an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient’s choosing” (*Schultz v Shreedhar*, 66 AD3d 666, 666, 886 NYS2d 484 [2d Dept 2009], quoting *Salvatore v Winthrop Univ. Med. Ctr.* 36 AD3d 887, 888, 829 NYS2d 183 [2d Dept 2007]; *see Sampson v Contillo*, 55 AD3d 588, 865 NYS2d 634 [2d Dept 2008]). Therefore, “in order to establish its entitlement to judgment as a matter of law to defeat a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee” (*Muslim v Horizon Med. Group*, 118 AD3d 681, 683, 988 NYS2d 628 [2d Dept 2014], quoting *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 875, 911 NYS2d 174 [2d Dept 2010]), and that “the exception to the general rule [does] not apply” (*Rizzo v Staten Is. Univ. Hosp.*, 29 AD3d 668, 668-69, 815 NYS2d 162 [2d Dept 2006]).

Dr. Michael Leitman, a physician duly licensed and board certified in surgical critical care, states in his affidavit that, in his opinion within a reasonable degree of medical certainty, Dr. Allam and Eastern Long Island Surgery did not depart from the standard of care in any manner in the care and

treatment of plaintiff. He states that Dr. Allam properly obtained a history from plaintiff, examined her when she first presented to his office, and determined that she was an appropriate candidate for lap band surgery. He opines that plaintiff's alleged injuries, including infection and scarring, are well known risks of the procedure, and that she was aware of such risks based upon the detailed consent forms that she signed. He states that Dr. Allam performed the lap band procedure appropriately and within the standard of care, and that the care rendered to plaintiff at all times fully comported with the standard of care. He states that following the procedure, Dr. Allam took appropriate notes, ordered appropriate consults, performed appropriate post-operative testing, and adjusted the lap band as needed within the standard of care. He opines that the hernia repair surgery on September 12, 2011 was properly performed and necessary, as plaintiff's hernia was incarcerated, and explains that the development of a hernia is a risk of the lap band procedure. He states that it was appropriate for Dr. Allam to indicate that such surgery was not emergent on September 7, 2011, as the hernia was not yet incarcerated.

Dr. Leitman further states that the post-operative care provided to plaintiff by Dr. Allam after the hernia repair fully comported with the standard of care, as he performed appropriate tests, took appropriate notes, ordered necessary consults, and adjusted plaintiff's lap band as needed. He opines that the panniculectomy and hernia repair surgery performed on March 5, 2012 was necessary, because plaintiff had a history of chronic panniculitis, which is documented by her primary care provider. He states that extensive scarring is a well-known risk of this particular procedure, and that Dr. Allam advised plaintiff of these risks and that the consent form, signed by plaintiff, explains this risk. Dr. Leitman also states that the panniculectomy and hernia repair surgery were performed properly and within the standard of care, and that the care plaintiff received during her admission to Southampton Hospital during the procedure comported with the standard of care. He states Dr. Allam properly prescribed Augmentin to plaintiff upon her discharge, because it was believed she merely had a superficial wound infection as there was no wound discharge or collection of fluid. When plaintiff followed up with Dr. Allam on March 6<sup>th</sup> and March 23<sup>rd</sup>, there was no sign of an infection.

In addition, Dr. Leitman states that when plaintiff presented to the emergency room at Southampton Hospital on April 1, 2012, she was diagnosed with a wound infection, which was a known risk of the panniculectomy and hernia repair surgery. He states that plaintiff was appropriately placed on IV antibiotics, and that appropriate tests and consultations were ordered. Plaintiff underwent a sharp wound debridement, performed by Dr. Allam on April 2, 2012, as it was necessary to get rid of plaintiff's infection and allow the wound to heal properly. Dr. Leitman opines that the procedure was performed within the standard of care, and that the prescription of a wound VAC and home nursing care was appropriate and comported with the standard of care.

Dr. Gadaleta, a physician duly licensed and board certified general surgeon, states in his affidavit that in his opinion, within a reasonable degree of medical certainty, Dr. Tarasuk at all times comported with the accepted standards of general surgical and medical practice. He states that in Dr. Tarasuk's role as the assistant surgeon, he acted at the direction of the surgeon and any decisions associated with the surgery are made by the surgeon. Dr. Gadaleta states that Dr. Tarasuk was not involved in the decision regarding placement of the lap band during the surgery on May 27, 2010, and that he did not make any incisions or close the "fascia associated with the incisions made during the three surgical procedures" as they were done by Dr. Allam. He states that when Dr. Tarasuk examined plaintiff at Southampton

Hospital on July 9, 2011, he acted appropriately in removing one milliliter of fluid from plaintiff's lap band and discharge her with instructions to follow up with Dr. Allam.

Dr. Gadaleta also states that Dr. Tarasuk's treatment of plaintiff at the emergency room of Southampton Hospital on August 29, 2011 was in accordance with good and accepted medical practices and that he did not observe signs of infection or observe incisional hernias protruding from her abdomen during his examination. He explains that the diagnosis of muscle strain was appropriate based on plaintiff's medical history, and that it was appropriate to discharge her with instructions to follow up with Dr. Allam. Dr. Gadaleta opines that Dr. Tarasuk acted in accordance with good and accepted medical practices when he saw plaintiff at Southampton Hospital on April 3, 2012, the day of her discharge following the wound debridement procedure, as he examined her and found she did not have a fever and the wound had a good seal with minimal drainage. He further states that based upon the examination, it was appropriate for Dr. Tarasuk to follow Dr. Allam's order to discharge plaintiff home with a vacuum-assisted closure of the wound.

Dr. Kimmelstiel, a physician duly licensed and board certified in surgery, states in his affidavit that it is his opinion to a reasonable degree of medical certainty that the care and treatment rendered to plaintiff by the nurses and other staff at Southampton Hospital did not deviate from the accepted standard of care. He states that a review of the hospital records reveals no evidence of a failure to perform necessary tests or diagnostic procedures. He states that during all of plaintiff's admissions and hospital presentations, she was consulted and admitted by her private attending physician, Dr. Medhat, and that testing and diagnostic procedures are ordered by the physician and not the hospital staff. He states that all orders for testing and blood work were performed in a timely and proper manner by the staff at the hospital and were timely noted in plaintiff's medical chart for her physicians to review.

Here, defendants Dr. Allam and Dr. Tarasuk established a prima facie case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the parties' deposition testimony, and expert affidavits (*see Sandmann v Shapiro*, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]; *Jonassen v Staten Is. Univ. Hosp.*, 22 AD3d 805, 803 NYS2d 700 [2d Dept 2005]). In addition, Dr. Tarasuk established that he did not exercise any independent judgment as he only assisted Dr. Allam during the lap band surgery and the other procedures that plaintiff underwent (*see Zhuzhingo v Milligan*, 121 AD3d 1103, 995 NYS2d 588 [2d Dept 2014]; *France v Packy*, 121 AD3d 836, 994 NYS2d 364 [2d Dept 2014]; *Muniz v Katlowitz*, 49 AD3d 511, 856 NYS2d 120 [2d Dept 2008]). Furthermore, defendant Southampton Hospital's submissions also established a prima facie case that its staff did not deviate or depart from accepted medical practice. Therefore, the burden shifted to plaintiff to come forth with admissible evidence refuting defendants' prima facie showing (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]; *Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 616 NYS2d 815 [2d Dept 1994]). Plaintiff failed to submit any evidence in opposition to the motions by defendants.

As to the cause of action for lack of informed consent, to succeed on such an action, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably

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prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d; *Orphan v Pilnik*, 15 NY3d 907, 914 NYS2d 729 [2010]; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Innucci v Bauersachs*, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]). Here, defendants Dr. Allam and Eastern Long Island Surgery have established their prima facie entitlement to summary judgment by offering the consent forms signed by plaintiff, which are notarized, authorizing Dr. Allam to perform the lap band surgery and the panniculectomy (*see Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; *Spano v Bertocci*, 299 AD2d 335, 749 NYS2d [2d Dept 2002]). Plaintiff failed to present any evidence in opposition (*see Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]). Thus, the application by defendants Dr. Allam and Eastern Long Island Surgery for summary judgment on this claim is granted.

Accordingly, defendants' motions for summary judgment are granted.

Dated: 10-16-17



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A.J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION