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DORIVAL v. PLANNED PARENTHOOD HUDSON PECONIC, INC.

6988/2001, Motion Sequence No.: 007; MOT. D

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2008 NY Slip Op 32846(U)

Michelle Dorival, Plaintiff, v. Planned Parenthood Hudson Peconic, Inc., Cliff S Blumstein, M.D., St. Catherine of Siena Medical Center and Michael Gentilesco, Defendants.

Supreme Court of the State of New York, Suffolk County.

Submitted: August 13, 2008

October 9, 2008

Motion Date: December 18, 2007

Attorney(s) appearing for the Case

John J. Guadagno, P.C., East Islip, NY, Attorney for Plaintiffs.

McAloon & Friedman, New York, NY, Attorney for Defendant, Planned Parenthood Hudson, Peconic, Inc. and Cliff S. Blumstein, M.D.

Bower, Sanger & Lawrence, P.C., New York, NY, Attorney for Defendant, St. Catherine of Siena Medical Center.

Fumuso, Kelly, Deverna, Snyder, Swart & Farrell, LLP Hauppauge, NY, Attorney for Defendant Michael Gentilesco.

Judge: WILLIAM B. REBOLINI

Upon the following papers numbered 1 to 24 read on this motion by defendant Michael Gentilesco for summary judgment: Notice of Motion and supporting papers, 1-14; Affirmation in Opposition and supporting papers, 15-21; Reply Affirmation and supporting papers, 22-24.

In this medical malpractice action, plaintiff alleges that defendant, Michael Gentilesco, M.D., departed from accepted standards of medical care in the treatment rendered to plaintiff on January 17, 2001. Plaintiff alleges that defendant failed to immediately diagnose a perforation of her uterus upon her admission to defendant St. Catherine Siena Hospital ("St. Catherine") and that he unnecessarily caused a delay in treatment thereby causing or contributing to the plaintiff's need for a total hysterectomy including the loss of her uterus and resultant inability to bear children. Defendant Gentilesco ("defendant") now moves for summary judgment dismissing the action.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (see, *Amsler v. Verrilli*, [119 A.D.2d 786](#) [2nd Dept., 1986]; *De Stefano v. Immerman*, [188 A.D.2d 448](#) [2nd Dept., 1992]). The issue of the duty owed as between physicians and, ultimately, to the patient, is a question of law (see, *Lipton by Lipton v. Kaye*, [214 A.D.2d 319](#) [1st Dept., 1995]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, *Zuckerman v. New York*, [49 N.Y.2d 557](#) [1980]).

In support of the motion, defendant submits, among other things, the pleadings, bill of particulars, medical records of defendant Planned Parenthood Hudson Peconic, Inc. ("Planned Parenthood"), records from St. Catherine Siena Hospital, defendant's office records and an affirmation from Dr. Henry

K. PRINCE, M.D. THE MEDICAL RECORDS OF PLANNED PARENTHOOD REVEAL THAT ON JANUARY 17, 2001, PLAINTIFF PRESENTED TO THE OFFICE FOR AN ABORTION, WHICH WAS PERFORMED. HOWEVER, AFTER THE PROCEDURE, PLAINTIFF DEVELOPED UTERINE ATONY AND PERSISTENT VAGINAL BLEEDING WHICH REQUIRED TRANSFER TO A HOSPITAL FOR FURTHER TREATMENT. THE MEDICAL RECORDS FROM ST. CATHERINE REVEAL THAT PLAINTIFF WAS EXAMINED BY DEFENDANT WHO OBTAINED HER CONSENT TO PERFORM A DILATATION AND CURETTAGE IN THE OPERATING ROOM WHERE DEFENDANT NOTED THAT THERE WAS NO APPARENT SIGN OF PERFORATION AT THAT TIME. THE DISCHARGE SUMMARY REVEALS THAT IN THE RECOVERY ROOM PLAINTIFF'S VITAL SIGNS SHOWED LOW BLOOD PRESSURE AND RAPID PULSE RATE AND THE BLOOD COUNT WAS STILL DROPPING. SUCCESSIVE ULTRASOUND STUDIES WERE ORDERED.

THE THIRD ULTRASOUND SUGGESTED INTRA-ABDOMINAL BLEEDING. PLAINTIFF WAS RETURNED TO THE OPERATING ROOM WHERE DEFENDANT PERFORMED AN EXPLORATORY LAPAROTOMY AND DISCOVERED THAT THE UTERUS WAS PERFORATED, THERE WAS BLEEDING IN THE ABDOMINAL CAVITY AND THE LEFT UTERINE ARTERY HAD BEEN TRANSECTED. THE REPORT REVEALS THAT IT WAS ALSO NECESSARY TO REMOVE THE UTERUS AND LEFT OVARY IN ORDER TO PREVENT LOSS OF THE PLAINTIFFS LIFE. PLAINTIFF RECOVERED FROM THE SURGERY AND WAS DISCHARGED FROM ST. CATHERINE FIVE DAYS LATER. DEFENDANT'S OFFICE RECORDS REVEAL FOLLOW UP WITH NO FURTHER PROBLEMS.

DR. HENRY K. PRINCE AVERS IN HIS AFFIRMATION THAT HE IS BOARD CERTIFIED IN OBSTETRICS AND GYNECOLOGY. HE OPINES THAT DEFENDANT ACTED APPROPRIATELY AND DID NOT DEPART FROM ACCEPTED STANDARDS OF MEDICAL PRACTICE IN HIS CARE AND TREATMENT OF PLAINTIFF. HE NOTED THAT DEFENDANT HAD PERFORMED THE SUCTION DILATION AND CURETTAGE PROCEDURE AND APPROXIMATELY TWO HOURS LATER DEFENDANT RETURNED PLAINTIFF TO THE OPERATING ROOM AFTER DIAGNOSTIC STUDIES CONFIRMED POSSIBLE INTRA-ABDOMINAL BLEEDING. DURING THE SURGERY, THERE WERE POSITIVE FINDINGS OF INTRA-ABDOMINAL BLEEDING, TRANSECTED ARTERY AND PERFORATION OF THE UTERUS. DEFENDANT THEN MADE THE APPROPRIATE DECISION TO PERFORM A TOTAL ABDOMINAL HYSTERECTOMY. INASMUCH AS PLAINTIFFS POST OPERATIVE COURSE FROM THAT MOMENT ON WAS UNEVENTFUL, AND FOLLOW UP WAS NORMAL IN THE DEFENDANT'S OFFICE, DR. PRINCE OPINES THAT DEFENDANT'S TREATMENT WAS NOT THE PROXIMATE CAUSE OF ANY OF THE ALLEGED INJURIES LISTED IN THE BILL OF PARTICULARS.

THE COURT FINDS THAT DEFENDANT HAS DEMONSTRATED, PRIMA FACIE, THAT HE DID NOT DEPART FROM ACCEPTED STANDARDS OF MEDICAL CARE (SEE, WINEGRAD V. NEW YORK UNIVERSITY MEDICAL CENTER, [64 N.Y.2d 851](#) [1985]). THUS, THE BURDEN SHIFTED TO PLAINTIFF TO RESPOND WITH REBUTTING MEDICAL EVIDENCE DEMONSTRATING A DEPARTURE FROM ACCEPTED MEDICAL PROCEDURES (SEE, CYGAN V. KALEIDA HEALTH, [51 A.D.3d 1373](#) [2nd Dept., 2008]; WHALEN V. VICTORY MEMORIAL HOSP., [187 A.D.2d 503](#) [2nd Dept., 1992]).

IN OPPOSITION, PLAINTIFF SUBMITS THE REDACTED AFFIRMATION OF A PHYSICIAN AVERRING THAT HE OR SHE IS LICENSED TO PRACTICE MEDICINE IN NEW YORK STATE AND IS BOARD CERTIFIED IN OBSTETRICS AND GYNECOLOGY. UNDER THE APPROPRIATE CIRCUMSTANCES, THE COURT MAY PERMIT A PLAINTIFF TO SUBMIT AN AFFIRMATION WITHOUT THE NAME OF HIS OR HER EXPERT WITNESS SUBJECT TO THE *in camera* INSPECTION OF AN UNREDACTED AFFIRMATION (SEE, MARANO V. MERCY HOSPITAL [241 A.D.2d 48](#) [2nd Dept., 1998]; MCCARTY V. COMMUNITY HOSPITAL, [203 A.D.2d 432](#) [2nd Dept., 1994]). THE PLAINTIFF'S EXPERT OPINES THAT DEFENDANT DEPARTED FROM GOOD AND ACCEPTED MEDICAL PRACTICE BY FAILING TO TIMELY DIAGNOSE AND TO TREAT PLAINTIFFS UTERINE PERFORATION. SUCH A DELAY WAS A SUBSTANTIAL FACTOR IN CAUSING HER TO EVENTUALLY REQUIRE A TOTAL HYSTERECTOMY WHICH NATURALLY ENTAILED THE LOSS OF HER REPRODUCTIVE ORGANS. THE EXPERT STATES THAT DEFENDANT SHOULD HAVE ORDERED AN ABDOMINAL SONOGRAM AFTER COMPLETING HIS INITIAL EXAMINATION IN THE EMERGENCY DEPARTMENT TO ASSESS FURTHER EVIDENCE OF A UTERINE PERFORATION AND TO PERFORM IMMEDIATE EXPLORATORY SURGERY TO LOCATE AND REPAIR THE PERFORATION WITH AS LITTLE DAMAGE AS POSSIBLE TO PLAINTIFFS REPRODUCTIVE ORGANS.

THE COURT FINDS THAT THERE ARE CONFLICTING OPINIONS SUBMITTED BY THE PARTIES (SEE, VITI V. FRANKLIN GENERAL HOSPITAL [190 A.D.2d 790](#) [2nd Dept., 1993]), RAISING ISSUES OF FACT AS TO WHETHER GENTILESCO DEPARTED FROM THE ACCEPTED STANDARD OF MEDICAL CARE IN THE TREATMENT OF PLAINTIFF, AND IF SUCH DEPARTURE (IF ANY) CONTRIBUTED TO PLAINTIFF'S INJURIES (SEE, VALENTINE V. LOPEZ, [283 A.D.2d 739](#), [3rd Dept., 2001]; ARPINO V. JOVIN C. LOMBARDO, PC, [215 A.D.2d 614](#), [2nd Dept., 1995]).

TURNING TO THAT PORTION OF THE MOTION SEEKING DISMISSAL OF THE SECOND CAUSE OF ACTION TO RECOVER DAMAGES FOR LACK OF INFORMED CONSENT, IN ORDER TO SUSTAIN SUCH A CAUSE OF ACTION A PLAINTIFF MUST ESTABLISH, PURSUANT TO PUBLIC HEALTH LAW § 2805-d, THAT (1) THE DEFENDANT PHYSICIAN FAILED TO DISCLOSE THE MATERIAL RISKS, BENEFITS, AND ALTERNATIVES TO THE CONTEMPLATED MEDICAL PROCEDURE WHICH A REASONABLE MEDICAL PRACTITIONER "UNDER SIMILAR CIRCUMSTANCES WOULD HAVE DISCLOSED, IN A MANNER PERMITTING THE PATIENT TO MAKE A KNOWLEDGEABLE EVALUATION", AND (2) A REASONABLY PRUDENT PERSON IN THE PATIENT'S POSITION WOULD NOT HAVE UNDERGONE THE PROCEDURE IF HE OR SHE HAD BEEN FULLY INFORMED (PUBLIC HEALTH LAW § 2805-d [1], [3]; DAVIS V. NASSAU OPHTHALMIC SERVS.. P.C., [232 A.D.2d 358](#) [2nd Dept., 1996], *IV DEN* 89 N.Y.2d 814 [1997]). HERE, DEFENDANT TESTIFIED TO THE EFFECT THAT PRIOR TO THE FIRST SURGERY, HE EXPLAINED THAT THE BLEEDING NEEDED TO BE STABILIZED AND THAT HE WOULD PERFORM A DILATION AND CURETTAGE ("D & C"), TO WHICH PLAINTIFF AGREED AND SIGNED A CONSENT FOR SURGERY, AS REFLECTED IN THE HOSPITAL RECORD. UPON REACHING A DETERMINATION THAT PLAINTIFF WAS STILL BLEEDING WHILE IN THE RECOVERY ROOM AFTER THE FIRST SURGERY DEFENDANT TESTIFIED THAT HE TOLD PLAINTIFF THAT HE NEEDED TO BRING HER TO THE OPERATING ROOM AGAIN TO SEE IF SHE WAS BLEEDING AND TO STOP THE BLEEDING. HE STATED THAT HE TOLD PLAINTIFF THAT IT MIGHT ENTAIL A HYSTERECTOMY WHICH WOULD MEAN THAT SHE WOULD NOT HAVE ANY MORE CHILDREN. PLAINTIFF CONSENTED AND SIGNED THE CONSENT FORM, AS REFLECTED IN THE HOSPITAL RECORD. THE COURT FINDS THAT DEFENDANT HAS DEMONSTRATED HIS ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW DISMISSING THE SECOND CAUSE OF ACTION BASED ON LACK OF INFORMED CONSENT (SEE, WINEGRAD V. NEW YORK UNIVERSITY MEDICAL CENTER, [64 N.Y.2d 851](#) [1985]). THUS, THE BURDEN SHIFTED TO PLAINTIFF TO RAISE AN ISSUE OF FACT AS TO THIS CLAIM (SEE, ALVAREZ V. PROSPECT HOSP., [68 N.Y.2d 320](#) [1986]). IN OPPOSITION, PLAINTIFFS' EXPERT DID NOT ADDRESS WHETHER DEFENDANT PROVIDED INFORMED CONSENT OR THE ADEQUACY OF THE INFORMATION HE PROVIDED TO PLAINTIFF (SEE, EVANS V. HOLLERAN, [198 A.D.2d 472](#) [2nd Dept., 1993]) AND THUS DID NOT RAISE AN ISSUE OF FACT. THUS, THAT PORTION OF THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE SECOND CAUSE OF ACTION IS GRANTED.

Based on the foregoing, it is

ORDERED that the motion (007) by defendant, Michael GentileSCO, M.D., for summary judgment pursuant to CPLR §3212 dismissing the action as against him is granted to the extent that the second cause of action is dismissed; and it is further

ORDERED that the plaintiff's attorney is directed to forward an unredacted copy of the physician's affirmation annexed to the plaintiffs opposition papers directly to the undersigned's chambers and to serve an affidavit of such filing upon counsel for the defendants within ten days after service upon the plaintiff's attorney of a copy of this order and, in the absence of such filing, the defendants shall have leave to move to dismiss the complaint.

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