

Marin v New York City Health & Hosps. Corp.

2012 NY Slip Op 30063(U)

January 12, 2012

Supreme Court, New York County

Docket Number: 105616/06

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Douglas E. McKeon
Justice Supreme Court
Justice

PART 38

Alfonso Marin

- v -

NYCHMC et al.

INDEX NO. 105616/06
MOTION DATE _____
MOTION SEQ. NO. (003)
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided as per the annexed Memorandum Decision.

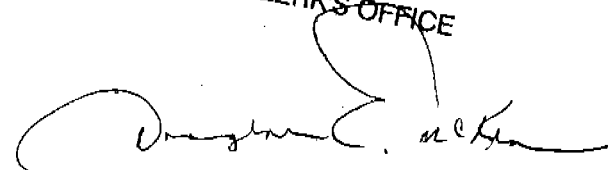
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/12/12



Douglas E. McKeon J.S.C.
Justice Supreme Court

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDGE

SETTLE ORDER/JUDGE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

ALFONSO MARIN,

Plaintiff,

-against-

MEMORANDUM DECISION

Index No. 105616/06

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, REGINALD E. MANNING, M.D. and
BRIAN A. DONALDSON, M.D.,

Defendants.

-----X

HON. DOUGLAS E. MCKEON:

FILED
JAN 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

Defendants' motion for an order, pursuant to CPLR 3212, granting summary judgment in its entirety on the grounds that no material issue of fact exists is granted in part and denied in part as follows:

Plaintiff's leg was injured in a car accident on December 3, 2004. He immediately presented to the Harlem Hospital emergency room via ambulance. Plaintiff claims that defendants failed to properly diagnose and timely appreciate the significance of the crush injury to his leg, failed to perform the proper diagnostic tests, and generally failed to adhere to accepted medical standards during treatment rendered between December 3, 2004 and June 7, 2005. Plaintiff alleges that as a result of the defendants' malpractice and negligence, he suffered an amputation of his left leg.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations

in the bill of particulars. *Id.* Conclusory statements which do not address the allegations in the pleadings are insufficient to demonstrate entitlement to summary judgment. *See Crean v. Sachs*, 65 AD3d 101, 108 (1st Dep't 2009). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action. *Id.* Specifically, in a medical malpractice action, a plaintiff opposing summary judgment must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of plaintiff's injuries. *See Roques*, 73 AD3d at 207.

Defendants set forth that the amputation of plaintiff's leg was necessary to prevent the plaintiff from bleeding to death. Shortly after plaintiff's arrival to the emergency room, it was determined that he would undergo two surgical procedures: a stabilization of the femur fracture (to be performed by defendant Dr. Manning) and a revascularization of the left leg (to be performed by defendant Dr. Donaldson). Defendants argue that the attempt to save the plaintiff's leg during the surgeries failed due to the irreparable extent of the injury, and the leg was swollen and tense, with copious bleeding. Defendants' motion is supported by affirmations of Daniel S. Rich, M.D., an orthopedic surgeon, and Steven G. Friedman, M.D., a vascular surgeon. In their respective affirmations, based on their review of relevant materials, they opine that the treatment rendered to and for the plaintiff at Harlem Hospital was consistent with the accepted standards of medical care. They also include the affirmation of Dr. Vaughn Whittaker who discusses the issue of consent and knowledge of the possible loss of plaintiff's limb.

In opposition, plaintiff argues, supported by an expert opinion, that at a point during the

surgery after procedures were performed, the limb was bleeding from the edges of the transected muscles, the leg was swollen and tense and there was copious bleeding. This indicated that the revascularization was successful and blood flow established to the limb, thus, amputation was improper. More specifically, it is the plaintiff's expert opinion, within a reasonable degree of medical certainty, that the above the knee amputation of Alfonso Marin's left leg was a direct result of (a) the defendants' failure to adhere to their initial determination that the plaintiff's left leg was salvageable; (b) the defendants' failure to appreciate that once blood flow has been restored through the successful revascularization the limb was viable; (c) the defendants' failure to appreciate that bleeding was a sign of live muscle; and (d) the defendants' failure to allow time to pass after the successful vascular surgery before determining that the limb was not viable and in need of amputation.

In reply, defendants argue that it was only after defendants exhausted all other remedies that the decision was made to amputate.

Upon a full review of the submitted papers, this Court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendants' motion for summary judgment as to the medical malpractice claim is denied. It cannot be determined as a matter of law that the defendants did not depart from accepted medical standards based upon the facts and sequence of events in this case. Under the totality of circumstances, this Court holds that it is for the trier of fact to determine whether the defendants departed from the accepted standards and whether those departures were a proximate cause of the amputation of plaintiff's leg.

As to the informed consent claim, defendants' motion is granted. A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives to the treatment rendered,

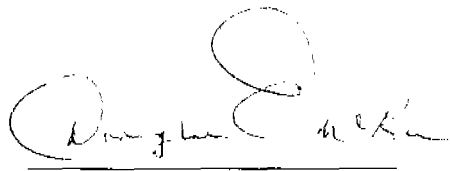
and that a reasonably prudent patient would not have declined to undergo the procedure/s if he or she had been informed of the potential complications. *Id.* To rebut a defendant's prima facie showing that he is entitled to summary judgment on the issue of informed consent, a plaintiff must demonstrate, through competent evidence, that the doctor failed to disclose a reasonably foreseeable risk; that a reasonable person, informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury. *See Orphan v. Pilnik*, 66 Ad3d 543, 544 (1st Dep't 2009).

The record supports that the plaintiff was informed by Dr. Whittaker of the extent of his injury, the plan for surgery, the hope for the best possible outcome as well as the risks of bleeding, infection and loss of limb. This was documented in the record and the consent forms were admittedly signed by the plaintiff.

Accordingly, defendants' motion for an order granting summary judgment as to plaintiff's malpractice claims is denied; defendants' part of the motion seeking an order granting summary judgment as to plaintiff's informed consent claim is granted.

This constitutes the decision and order of the court.

Date: January 12, 2012
New York, New York


Douglas E. McKeon, J.S.C.

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