

Xi Fa Lin v New York City Health & Hosps. Corp.

2012 NY Slip Op 31629(U)

June 14, 2012

Supreme Court, New York County

Docket Number: 402352/09

Judge: Douglas E. McKeon

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

Douglas E. McKeon
Justice Supreme Court

PRESENT: _____
Justice

PART 38

LIN, Xi Fa

INDEX NO. 402352/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

NYCHHC

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 and cross-motion are decided as per the annexed Memorandum Decision.

FILED

JUN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Douglas E. McKeon

Douglas E. McKeon /s.c.
Justice Supreme Court

Dated: 6/14/12

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
XI FA LIN and CHEN DE QING,

Plaintiffs,

-against-

MEMORANDUM DECISION

Index No.: 402352/09

NEW YORK CITY HEALTH & HOSPITALS CORP.,

FILED

Defendant.

JUN 19 2012

-----X
HON. DOUGLAS E. MCKEON:

NEW YORK
COUNTY CLERK'S OFFICE

Motion, by defendant New York City Health and Hospitals Corporation (NYCHHC), for an order pursuant to CPLR 3211 and 3212 dismissing plaintiffs' derivative claim and granting summary judgment to the defendant, and plaintiff's cross-motion to file an amended notice of claim is decided as follows:

This action involves medical malpractice relating to the plaintiff Xi Fa Lin's treatment at Bellevue Hospital Center on June 27, 2008. It is claimed that NYCHHC negligently performed a hernia repair surgery resulting in bladder dome injury, negligently caused bleeding in the peritoneal cavity and bladder, failed to properly repair abdominal defect, failed to properly close the operative site, and failed to adequately monitor and respond to post-operative complications.

On June 3, 2008, plaintiff received a pre-operative assessment at Gouverneur Diagnostic and Treatment Center. The records indicate that he had reported worsening of right inguinal pain associated with bulging mass. Accordingly, he was referred to Bellevue Hospital for surgical repair of a right inguinal hernia with mesh. On June 27, 2008, plaintiff underwent hernia repair with mesh performed by Joseph Carter, M.D. Plaintiff tolerated the procedure well and he was sent to the recovery room in stable condition. Four hours later, the plaintiff complained through an interpreter about lower abdominal pain that had worsened over an hour and his blood pressure

had dropped. Due to various considerations, the plaintiff was taken back to the operating room that evening for a midline laparotomy and exploration of the inguinal hernia. The hernia was repaired again. The plaintiff was discharged several days later. However, he returned to Bellevue Hospital on July 2, 2008 and was readmitted with severe abdominal pain. He subsequently underwent a second laparotomy for a small bowel, closed loop obstruction. The wound was left open and on July 6 and 9, 2008, plaintiff required re-operation for washout of the abdominal cavity. The wound was closed on July 13, 2008. On October 3, 2008, plaintiff underwent a procedure where split thickness grafts, obtained from a donor site on his leg, were applied to his abdomen. According to plaintiff's expert, Mr. Lin has no abdominal wall protecting his organs in the area of the hernia with visible and palpable loops of bowel beneath a thin abdominal wall composed of skin grafts.

Initially, defendant's application for dismissal of the derivative claim is granted. The plaintiffs failed to file a timely notice of claim on behalf of Chen de Qing. By this failure, the plaintiff did not meet a condition precedent to suit against NYCHHC. As the statute of limitations has run, this court is without discretion to grant plaintiff permission to correct this defect. Notably, the derivative claim is not tolled by the continuous treatment doctrine. *See Wojnarowski v. Cherry*, 184 AD2d 353 (1st Dep't 1992).

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.* 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.

Defendant's position is supported by the affirmation of Howard L. Beaton, M.D., attending surgeon at New York Downtown Hospital, Associate Professor of Surgery at Weill Cornell Medical College, and also board certified in surgery. He opines, to a reasonable degree of medical certainty, that the care rendered by HHC both with respect to plaintiff's surgical hernia repair performed at Bellevue Hospital on June 27, 2008 and the medical care thereafter, conformed at all times to the standard of good and accepted medical care. Furthermore, he states that any damaged alleged by the plaintiff was not proximately caused by the care of defendant HHC.

According to defendant's expert, the midline laparotomy and exploration on June 27, 2008, the subsequent laparotomy and deserosalization of the small bowel obstruction and three returns to the OR during the July 2008 admission to evaluate the abdominal wound were all procedures that were required to treat complications that occurred after the initial repair. He opines that they were all appropriate and timely performed for this plaintiff. Bleeding and damage to adjacent structures are well-known and accepted risks, and here, this occurred with no malpractice.

In opposition, plaintiff submits the affirmation of a physician who specializes in general surgery. In sum, he opines that the defendant physician, Dr. Carter, departed from accepted standards of care in failing to recognize the presence of a sliding hernia, failing to recognize that the lipoma was adherent to the bladder and fat surrounding the bladder during the initial hernia

repair surgery and mistaking the bladder and its surroundings adipose tissue for a lipoma, thereby creating a significant laceration in the dome of the bladder during the first surgery. This injury was not recognized for several hours until the plaintiff's abdomen became distended in the presence of hypotention and acidosis. As a result, the plaintiff required to undergo a subsequent open laparotomy hours later. According to plaintiff's expert, these were departures from accepted standards of care that were substantial factors causing the plaintiff's injuries, culminating in a large ventral hernia repair. Plaintiff's expert further opines that Mr. Lin's current condition is permanent and cannot be corrected because he has lost most of his abdominal wall due to the multiple surgeries necessary to repair the bladder injury and address its sequelae. It is the position of plaintiff's expert that had the surgeon performed an appropriate inspection of the operative area and surrounding structures, the laceration to the bladder wall would have been seen at the time of the initial operation. The laceration to the bladder wall would have been sutured, thereby preventing the need for a subsequent open procedure and a delayed surgical repair. Thus, the failure to recognize the sliding hernia and identify the bladder as part of the operative part of the field is a departure from accepted standards of care leading directly to the plaintiff's injuries.

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 plaintiff's injuries.

As to the informed consent claim, defendant's 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 of the plan for surgery as well as risks, including bleeding, infection and death. This was documented in the record and the consent forms were admittedly signed by the plaintiff. Additionally, plaintiff does not set forth that he would not have chosen to undergo the surgery had he been made aware of other risks.

Accordingly, defendant's motion for an order granting summary judgment as to plaintiff's malpractice claim is denied; defendant's part of the motion seeking an order granting summary judgment as to plaintiff's informed consent claim is granted; and plaintiff's cross-motion for an order granting permission to file an amended notice of claim is denied.

This constitutes the decision and order of the court.

DATED: New York, New York
 May 17, 2012
 June

FILED

JUN 19 2012


 NEW YORK
 COUNTY CLERK'S OFFICE

Douglas E. McKeon, J.S.C.