

Siska v Mount Sinai Hosp.

2012 NY Slip Op 31998(U)

July 23, 2012

Supreme Court, New York County

Docket Number: 118842/06

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 118842/2006
SISKA, HARRY
vs.
MT. SINAI HOSPITAL
SEQUENCE NUMBER : 005
TRIAL DE NOVO

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied in accordance with the accompanying memorandum decision. The Clerk may proceed to enter judgment in favor of the defendant pursuant to the jury's verdict.*

FILED

JUL 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUL 23 2012

Alice Schlesinger

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
HARRY SISKKA,

Plaintiff,

Index No. 118842/06
Motion Seq. No. 005

-against-

THE MOUNT SINAI HOSPITAL, THE MOUNT SINAI
MEDICAL CENTER, INC., DAVID H. ADAMS, M.D.,

Defendants.

-----X
SCHLESINGER, J.:

FILED

JUL 27 2012

NEW YORK
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On March 1, 2012, the jury hearing this medical malpractice case reached a verdict in favor of the defendant Dr. David H. Adams. There were two issues that the panel was asked to decide. Both involved the open heart surgery that had been performed on Harry Siska, the plaintiff, by Dr. Adams on September 14, 2004.

Before I discuss the CPLR §4404(a) motion before me, some background is necessary. In 1983, when Mr. Siska was 37 years old, he had a heart attack. In treating him it was learned that he had serious blockage of two of his main coronary arteries. Therefore, he underwent coronary artery bypass surgery. Specifically, what was done was the placement of a graft of a left internal mammary artery to the left anterior descending artery. Also, a saphenous vein graft was placed on the right coronary artery.

Things went well and Mr. Siska was asymptomatic until he began to suffer chest pains in 2000. He underwent coronary angiography which showed significant stenosis of the left main artery. A CT scan the following year revealed an aneurysm in the area of the right coronary artery. What followed were several interventional attempts to treat the ischemia and aneurysm. In this regard, Mr. Siska visited several cardiac surgeons who

recommended revascularization of the right side of the heart. Then he went to see Dr. Adams, who had been referred to him by his cardiologist Dr. David Reich, in the summer of 2004.

Mr. Siska saw Dr. Adams on July 21, 2004 for evaluation of his coronary artery disease. Although Mr. Siska was not actually examined on that date, both parties agree that they had a lengthy discussion about how to proceed. Also, they agree that the doctor reviewed some of the diagnostic studies that Mr. Siska had brought. However, precisely what Dr. Adams would do in the future regarding a surgical intervention constituted the main dispute in this case and certainly in this motion. What is important to further note here is that the parties agree that there was no further contact between them until the day of surgery, approximately two months later on September 14, 2004.

Mr. Siska's position was that he wanted revascularization on both sides of his heart, the right and the left. The previous cardiac surgeons he had consulted had only agreed to work on the right side of his heart, but Mr. Siska believed that Dr. Adams was different. Specifically, he contended that from July 21 through the time of surgery, because he had never heard otherwise, he was under the impression that the left side of his heart would be worked on to clear up any occlusions.

However, the actual surgery was performed only on the right side. The plaintiff said he found this out after the operation. He also stated in this regard that he would not have agreed to the surgery with Dr. Adams if he had known that the surgery was to be limited to the right side, and he would have tried to find a cardiac surgeon willing to proceed as he wished. Finally at the trial he testified that he had suffered worsening of his heart problems because there had been no intervention on the left side.

Dr. Adams' position simply was that he had never committed to performing a left-sided intervention and that he had said as much to his patient, although he had no memory of what he actually said. Further, he claimed that he had wanted to study films of the left side and then if his position changed to one where he would operate on both sides, he would let Mr. Siska know. Finally, since he did not change his mind so as to include the left side, there was no reason to contact Mr. Siska, as he was going to proceed only on the right side as originally contemplated, which he believes he communicated to the patient.

At the trial, cardiac surgeons testified as expert witnesses for both sides. The jury, as stated earlier, was given two issues in the form of interrogatories to decide. The first was:

- 1(a). Did Dr. David Adams depart from good and accepted standards of surgical care by not operating on the left side of Harry Siska's heart when he performed the right-sided cardiac surgery in September 2004?

The jury, by a vote of 5-1, answered "No".

The second interrogatory read as follows:

- 2(a). Did Dr. David Adams provide appropriate information to Harry Siska before obtaining Mr. Siska's consent to the cardiac surgery he performed in September 2004?

Here, again by a vote of 5-1, the jury answered "Yes", meaning that the doctor had "provided appropriate information".

The relief sought by the plaintiff in this motion is to set aside the verdict and to order a new trial on this second issue, the cause of action for informed consent. His counsel

argues that he is entitled to such relief as this verdict was contrary to the weight of the evidence and therefore I should grant the motion in the interests of justice. Specifically, counsel urges that by any fair interpretation of the evidence, this verdict is unsupported because Dr. Adams "admitted at trial that he never communicated to Mr. Siska his final plan for surgery." (Attorney's Affirmation ¶20)

An important item of contention at trial and on this motion is the letter Dr. Adams wrote to Dr. Reich after he saw Mr. Siska "for evaluation of his coronary artery disease" (letter of July 21, 2004 placed in evidence as part of Exhibit C, Dr. Adams' chart, and presumably part of Exhibit 6, Dr. Reich's chart, and attached to the motion as Exhibit E).

The relevant part reads as follows:

Unfortunately, he [Mr. Siska] did not have the catheterization CD here today to show the left side but I understand he has a main occlusion and his left system is fed entirely by an internal mammary artery. I talked to him at length about the rationale for surgery and the various approaches we might take. I told him I would like to look at his left sided angiogram before making a final decision, but I would lean toward a repeat sternotomy at this point with hopes of bringing the right internal mammary artery down to the PDA. We are tentatively going to get him on the schedule in late August or early September according to his wishes. He is a very nice man and we will do our best to take good care of him.

Counsel argues that the meaning of this letter is inconsistent with Dr. Adams' testimony at trial, which was that there was "no change in the plan [and] therefore, I did not communicate with Mr. Siska ..." (page 530, lines 4-5, of the trial transcript). Moving counsel insists that there was no final plan and that Mr. Siska testified that he believed the surgery would include the left side and if that was not the case, he would be told by the doctor.

As stated earlier, Dr. Adams did not remember precisely what he had said to Mr. Siska, but he still described what he strongly believed were the medical problems Mr. Siska was facing and how he intended to deal with them. He described the plaintiff as having two serious problems when he saw him in July 2004. One was the aneurysm (or abnormal ballooning) on the right bypass graft and the other, more common one, was occlusion (or blockage) of the various arteries.

Dr. Adams then described his practice of discussing these problems with his surgical patients. He did this, on examination by his counsel at trial, by first reviewing the letter that he had written to Dr. Reich after having seen the plaintiff. He stated that writing such a letter to the referring physician was always the first thing he would do after the consultation.

He was then asked what he meant when he wrote "as you know he has a very interesting history". He responded by describing Mr. Siska's heart and the fact that it "was living off this one bypass he had. The main trunk had been occluded" (pp. 405-06). He was then asked, based on the letter, "what you thought should be done surgically for Mr. Siska based upon the available information you had that day?" (p. 417). He said he concluded that the "safest" course and the "most likely and adequate thing" "would be to rebypass the right coronary artery" (p. 419).

As further support for his position that operating only on the right side was his original plan and the plan he believed he communicated to the patient, Dr. Adams explained that the risk of injury to the left internal mammary artery, which was the graft placed on the left anterior descending artery, was onerous because the entire heart was living off of it. He concluded this explanation by saying (at p. 436):

I had the records in front that we've reviewed. I've seen the opinions of other surgeons, I've had this operative note from before and I've seen several cath reports including the right side angiogram which was available to review, and all of those things taught me that my preliminary plan, after talking to him, was to perform revascularization on the right side.

Finally, opposing counsel points out that the defendant said he was very confident in stating "he never said he would do a left sided graft" (p. 438) and that his review of the left-sided films reinforced his initial impression that "the safest target is to do the right coronary" (pp 516-17).

Both counsel agree that this dispute really had nothing to do with expert testimony. But they disagree as to what precisely the evidence was and what was its import regarding the all-important issue of what Dr. Adams communicated to Mr. Siska as to the scope of his surgery. Moving counsel sees the score as 1-0, with Mr. Siska having the 1. Why? He argues that since Mr. Siska says he remembers the conversation (that the left side would be included) and Dr. Adams does not, whatever else Dr. Adams said on this subject is irrelevant.

But he is wrong. First of all, it is understandable that the defendant who has had many, many surgical patients in the intervening years, would not remember a conversation he had eight years before the trial. Secondly, one cannot simply discount the letter to Dr. Reich, which is based on the actual condition of the plaintiff's heart, the films and records Dr. Adams had reviewed, and his understanding of the risks of the anticipated surgery, all of which he testified to. Plainly, the jury had every right to believe Dr. Adams when he said what he must have told Mr. Siska about the scope of the operation, as he based it not only

on his custom and practice, but most importantly on the condition of Mr. Siska's heart at that time.

Also, the members of the jury, if they chose, had the right to reject the plaintiff's testimony as to his recollection of the conversation, which defense counsel characterized as unreliable. Finally, as opposing counsel urges, the jury had the right to weigh the testimony and compare it and decide which was, under all the circumstances, the most reasonable or the most believable account. So the score was not necessarily 1-0 in the plaintiff's favor.

With regard to the letter to Dr. Reich, again that was up to the jury to interpret. Moving counsel may believe it was ambiguous and was not a final decision. But defense counsel argued in his summation that the letter clearly indicated that Dr. Adams had decided then to redo only the right side and it simply would not be believable that he would have written that if he had told his patient the opposite only minutes earlier. Defense counsel offered this argument to show why it was unlikely that Dr. Adams had told Mr. Siska that he would do the left side.

The burden on the plaintiff in a motion such as this one to set aside a verdict is very high. A judge should not lightly vacate a decision by the jury, the exclusive fact finders. Ultimately, what this controversy is about is whether the verdict can be understood, meaning, is it rational and was there some evidence to support it. I find unquestionably that there was. The jury, particularly in its answer to the first question that Dr. Adams acted properly in not operating on the left side, certainly could have determined that, in fact, Dr. Adams had always elected to only do the right side and that he had told Mr. Siska this plan, even though he could not remember. Also, the jury could have found that Dr. Adams

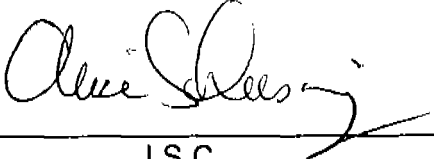
communicated this opinion to Dr. Reich that same day and that he never changed his mind. If that is what they found, all of which had an evidentiary predicate, then they also could fairly conclude that Mr. Siska was given the appropriate information before he gave his consent to the surgery.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to set aside the verdict is denied, and the Clerk may proceed to enter judgment in favor of the defendant.

Dated: July 23, 2012

JUL 23 2012



J.S.C.

ALICE SCHLESINGER

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