

Guylian v Aronoff

2012 NY Slip Op 32311(U)

September 5, 2012

Sup Ct, New York County

Docket Number: 104662/10

Judge: Joan B. Lobis

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

PRESENT: LOBIS

PART 6

Justice

Mark J. Lukan

Jeffrey S. Aronoff

INDEX NO.

104662/10

MOTION DATE

6-12-12

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to 14 were read on this motion to (for) Summary Judgment

PAPERS NUMBERED

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

1-12

Answering Affidavits — Exhibits

13-14

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

SEP 06 2012

NEW YORK COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order

Dated: 9/5/12

Jh
JOAN B. LUBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
NICK GUYLIAN,

Plaintiff,

Index No. 104662/10

-against-

Decision and Order

JEFFREY S. ARONOFF, M.D., F.A.C.S., P.C.,
JEFFREY S. ARONOFF, M.D., ANAND S.
MORANKAR, M.D., and L. JOHNSON, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

FILED

SEP 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Jeffrey Steven Aronoff, M.D., P.C., s/h/a Jeffrey S. Aronoff, M.D., F.A.C.S., P.C., and Jeffrey S. Aronoff, M.D. ("Dr. Aronoff"), move, by order to show cause, for an order granting them summary judgment, pursuant to C.P.L.R. Rule 3212. Plaintiff Nick Guylian opposes the motion.

This action involves allegations of medical malpractice and lack of informed consent pertaining to a colonoscopy procedure. Plaintiff initially presented to Dr. Aronoff on May 12, 2009, on a referral from a nonparty doctor. Dr. Aronoff noted that plaintiff had a history of rectal bleeding, and upon examination, found that plaintiff had internal hemorrhoids. Under the belief that the bleeding resulted from the hemorrhoids, Dr. Aronoff recommended that plaintiff undergo a colonoscopy. On June 11, 2009, plaintiff underwent a colonoscopy at Dr. Aronoff's office. Dr. Aronoff injected plaintiff's hemorrhoids with sclerosing solution in order to stop the bleeding. During the procedure, Dr. Aronoff also observed a 1 centimeter polyp in plaintiff's cecum, a location which was anatomically remote from the hemorrhoids, and performed a "hot" biopsy polypectomy

to remove the polyp. Following the procedure, plaintiff's only complaints were of rectal pain and generalized weakness, and he was discharged with his wife's assistance. In the early morning of the following day, plaintiff called Dr. Aronoff with complaints of significant right lower quadrant abdominal pain. Dr. Aronoff instructed plaintiff to go to an emergency room. Plaintiff was taken by ambulance to Maimonides Medical Center, where he was treated for a perforated cecum.

In his bill of particulars, plaintiff alleges, inter alia, that Dr. Aronoff was negligent in performing the colonoscopy; in failing to recognize and repair the perforation; and in failing to perform various studies to rule out colonic perforation prior to releasing plaintiff. He also alleges that as a result of Dr. Aronoff's negligence, he suffered, inter alia, a perforated cecum, extreme pain, subsequent hospitalization, and emotional distress. In addition, plaintiff alleges that he was not informed of the risk of a perforated cecum as a possible risk of the colonoscopy.

Dr. Aronoff now seeks summary judgment as to all causes of action on the grounds that no issues of fact exist that he did not depart from the standard of care in performing plaintiff's colonoscopy on June 11, 2009, and that he obtained plaintiff's informed consent. Dr. Aronoff submits an expert affirmation from Bruce Gingold, M.D., a physician licensed in New York State and certified by the American Board of Colon and Rectal Surgery, who opines with a reasonable degree of medical certainty that Dr. Aronoff treated plaintiff in accordance with good and accepted standards of medical practice, and that Dr. Aronoff advised plaintiff of the reasonably foreseeable risks, benefits, and alternatives prior to the procedure. Specifically, Dr. Gingold opines that Dr. Aronoff's performance of a hot biopsy was within the standard of care. He explains that a hot biopsy

is a method of polypectomy in which the physician maneuvers forceps through the channel of the colonoscope to grasp the polyp and then uses an electrocautery to burn the polyp to remove it. Dr. Gingold opines that a hot biopsy was indicated given the increased risk of bleeding due to the polyp's size of 1 cm, and that using a hot biopsy polypectomy allowed for the complete removal of the polyp. He opines that Dr. Aronoff would have risked leaving residual tissue had he simply performed a cold biopsy, which is a method in which the jaws of the forceps are used to "clip" a portion of the polyp. He opines that a cold biopsy method should not be used on a polyp that is more than three to four millimeters in size. In addition, Dr. Gingold opines that a hot snaring method could also have been used in plaintiff's case; however, he adds, the decision of whether to use the hot snaring method or the hot biopsy method is a surgical judgment that the physician is free to make. Dr. Gingold explains that the hot snaring method also utilizes an electrocautery and has similar risks to the hot biopsy method. Further, Dr. Gingold opines that Dr. Aronoff's decision to not mark the site where the polyp had been located was appropriate because the polyp was located in the cecum, which is an area of the colon that is stable, has various landmarks, and is easily identifiable during future colonoscopies. Dr. Gingold sets forth that there was no need for Dr. Aronoff to conduct diagnostic studies to rule out colonic perforation because Dr. Aronoff did not observe signs of perforation, and that Dr. Aronoff's documentation that the procedure was uncomplicated was also appropriate. Dr. Gingold states that plaintiff's complaints of rectal pain and general weakness are complaints that are normally associated with a colonoscopy, and that the perforation that plaintiff experienced does not usually present itself immediately during the procedure. As to informed consent, Dr. Gingold states that the perforation of the colon is a well-known risk of a colonoscopy and polypectomy, and that plaintiff was informed of the risk of perforation and consented to the procedure.

In opposition, plaintiff maintains that summary judgment should be denied because issues of fact exist. Plaintiff submits an affirmation from an expert (name redacted) who is licensed to practice medicine in New York State and board certified in gastroenterology. He or she opines to a reasonable degree of medical certainty that Dr. Aronoff departed from accepted medical practice with respect to his performance of the colonoscopy and hot biopsy polypectomy. Specifically, he or she opines that plaintiff's polyp should have been removed with a snare; that Dr. Aronoff improperly administered the hot biopsy polypectomy; that Dr. Aronoff improperly failed to rule out a colonic perforation; that Dr. Aronoff improperly failed to mark the location of the polyp; and that Dr. Aronoff improperly failed to obtain plaintiff's informed consent. Plaintiff's expert states that a hot biopsy technique, or use of an electrocautery, was contraindicated in plaintiff's situation, given the size of his 1 cm polyp and its location in the thin-walled cecum. The expert states that a polyp's size and location are factors that can lead to an increased risk of damage to the colon. He or she opines that Dr. Aronoff did not follow proper procedure in using the hot biopsy method; rather, the proper medical procedure would have been to elevate the polyp by injecting salt water at the base to limit the risk of perforation before removal. Plaintiff's expert explains that as the salt water separates the mucosa and the polyp from the colonic wall, it insulates the colonic wall from the heat and coagulation of the electrical current used to remove the polyp and adjacent tissue. He or she opines that the polyp should have been removed with a snare to ensure that the entire polyp was removed, after which a pathologist should have examined the removed polyp to determine if cancer was present and to confirm that the entire polyp was removed. By not evaluating the polyp in this manner, plaintiff's expert opines, Dr. Aronoff departed from the accepted standard of care. Plaintiff's expert adds that Dr. Aronoff should not have performed a hot biopsy without a proper diagnosis to determine if cancer was present, because had the polyp been cancerous, the perforation

could have disseminated the malignancy, resulting in an increased risk of death. He or she opines that Dr. Aronoff departed from the standard of care by discharging plaintiff without post-operative antibiotic therapy and observation because of the high-risk nature of the procedure. As to informed consent, plaintiff's expert opines that the consent form that plaintiff signed did not specifically refer to the performance of a hot biopsy, so plaintiff's informed consent was never obtained.

“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 eliminate any material issues of fact from the case.” Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

In moving for summary judgment dismissal of a claim for lack of informed consent, a defendant must demonstrate the absence of any factual disputes as to (1) whether plaintiff was informed of the alternatives to, and the foreseeable risks and benefits of, the proposed procedure, and (2) whether a reasonably prudent patient would not have declined to undergo the proposed treatment

had he or she been so fully informed. Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643-44 (1st Dep't 2009); Pub. Health L. § 2805-d. The alternatives and foreseeable risks and benefits are defined as those which "a reasonable . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Pub. Health L. § 2805-d(1). If a defendant makes out a prima facie case on lack of informed consent, it is incumbent upon the plaintiff to raise an issue of fact 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." Orphan v. Pilnik, 66 A.D.3d 543, 544 (1st Dep't 2009) (citations omitted); Pub. Health L. § 2805-d.

As to the cause of action sounding in medical malpractice, although Dr. Aronoff makes out a prima facie entitlement to summary judgment, plaintiff raises sufficient issues of fact to defeat the motion. While both experts agree that the 1 cm size of plaintiff's polyp presented an increased risk of complications, they differ on whether the method that Dr. Aronoff utilized to remove it was within the standard of care and whether post-operative observation was warranted. Dr. Aronoff's expert opines that, in plaintiff's case, the hot biopsy polypectomy was the preferable method over the cold biopsy, but that the hot biopsy was just as preferable as hot snaring because both methods use an electrocautery and have similar risks. However, plaintiff's expert opines that any technique that utilizes an electrocautery was contraindicated given the size of plaintiff's polyp and that Dr. Aronoff failed to even follow proper protocol in performing the hot biopsy because he did not elevate the polyp with salt water prior to its removal. As to post-operative care, while Dr. Aronoff's expert opines that there were no signs indicating a colonic perforation to warrant further hospitalization or examination, plaintiff's expert opines that, given the polyp's high risk of

complication, post-operative observation and/or antibiotic therapy was necessary. It is well settled that a battle of experts, such as presented here, raises credibility issues which must be resolved by a fact finder and which preclude summary judgment. Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009); Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623, 624 (2d Dep't 2003).

As to the cause of action sounding in lack of informed consent, Dr. Aronoff fails to make out a prima facie entitlement to summary judgment. Although Dr. Aronoff's expert states that plaintiff was informed of the risk of perforation and consented to the procedure as evidenced in the consent form that plaintiff signed prior to the procedure, Dr. Aronoff's expert fails to establish that a reasonably prudent person in plaintiff's position would not have declined to undergo the treatment had he or she been fully informed. Thus, Dr. Aronoff does not eliminate all issues of fact as to this cause of action. Accordingly, it is hereby

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a pretrial conference on October 2, 2012, at 9:30 a.m.

Dated: September 5, 2012

ENTER:

FILED

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JOAN B. LOBIS, J.S.C.