

Spielman v Pamoukian
2012 NY Slip Op 32865(U)
November 30, 2012
Sup Ct, New York County
Docket Number: 109193/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

SPIELMAN, SAMUEL
- v -
VICKEN PASOUKIAN, M.D.,
ET AL.

INDEX NO. 109193/08
MOTION DATE 8-21-12
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
<u>1-20</u>
<u>21-28</u>
<u>29-36</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING DECISION AND REASONING

FILED

DEC 03 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/30/12

JB
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

JOAN B. LOBIS

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

-----X
SAMUEL SPIELMAN,

Plaintiff,

Index No. 109193/08

-against-

Decision and Order

VICKEN PAMOUKIAN, M.D., YVONNE ZAHARAKIS, M.D., EDWARD REICH, M.D., EDWARD J. REICH, M.D., P.C., VALAVANUR SUBRAMANIAN, M.D., ADVANCED HEART PHYSICIANS & SURGEONS NETWORK, P.C., GIOVANNI CIUFFO, M.D., PRAGNES PATEL, M.D., ISRAEL BERKOWITZ, M.D., ISRAEL S. BERKOWITZ, M.D., P.L.L.C., EXECUMED MEDICAL SERVICES, P.C., and LENOX HILL HOSPITAL,

Defendants.

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

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Motion Sequence Numbers 001 and 002 are consolidated for disposition. Defendants Giovanni Ciuffo, M.D. (Motion Sequence Number 001) and Yvonne Zaharakis, M.D. (Motion Sequence Number 002) move, by order to show cause, for an order granting them summary judgment pursuant to C.P.L.R. Rule 3212. Defendants argue that there are no genuine issues of material fact and their experts maintain that they did not depart from good and accepted medical practice or cause plaintiff's injuries. Plaintiff Samuel Spielman opposes the motion. The non-moving defendants take no position on the motions.

On May 25, 2007, plaintiff was admitted to Lenox Hill Hospital ("LHH") for an "off pump coronary bypass grafting x2 with left internal mammary artery to the left anterior descending and reverse saphenous vein graft to the ramus intermedius" ("CABG") after he had difficulty breathing while walking to synagogue and felt a stiffness in the left side of his neck. Valavanur

Subramanian, M.D., a cardiothoracic surgeon, performed the procedure and Dr. Ciuffo, a cardiac surgeon, assisted him. The operation involved harvesting a segment of the saphenous vein from the left thigh to serve as a donor vein.

On May 26, 2007, plaintiff underwent a mediastinal re-exploration for postoperative bleeding and for what appeared to be an accumulation of blood clots. Dr. Ciuffo explored the left pleural space and removed several blood clots. There are no documented progress notes indicating that Dr. Ciuffo examined the patient again during this initial hospitalization.

Two days after having a segment of his saphenous vein harvested, plaintiff complained of leg pain at the harvest site; although, on May 28, 2007, it was noted that plaintiff was out of bed and did not appear to be in acute distress. On May 28 and 29, plaintiff had a "two plus" pedal edema in the left lower leg and lower leg pain. On May 29, 2007, plaintiff complained of leg pain again, but was able to walk twenty feet with a walker. The physical therapist stated that the patient did very well walking on stairs. Given plaintiff's clinical history of leg swelling, Physician Assistant Brian John ordered a Venous Ultrasound and a Doppler evaluation of the veins for the purpose of determining whether plaintiff had Deep Vein Thrombosis ("DVT"). It was determined that plaintiff did not have DVT, and plaintiff was discharged from the hospital on May 30, 2007.

On the afternoon of June 1, 2007, Mr. Gunay Ardali, a physical therapist in charge of Mr. Spielman's post-operative care at Seagate's Rehabilitation Center, noted that plaintiff's left foot dropped and that his leg was shiny and red. Mr. Ardali testified that he asked Mr. Spielman

whether he had walked this way in the hospital, and plaintiff responded “yes.”

That same day, as a result of Mr. Ardalis’ assessment, plaintiff made an emergency visit to Dr. Ciuffo’s office. Dr. Ciuffo diagnosed plaintiff with cellulitis, and suspected the onset of anterior tibialis compartment syndrome, which is characterized by a left foot drop. Dr. Ciuffo did not order a pressure test to confirm the compartment syndrome, although Dr. Ciuffo testified that compartment syndrome was part of his differential diagnosis. Dr. Ciuffo recommended an immediate vascular surgery consultation “to rule out compartment syndrome” and also recommended that the patient have a neurology consultation. Plaintiff was readmitted to LHH for continued medical care later that day. Plaintiff complained of swelling in the left calf and a foot drop of two days’ duration. Dr. Ciuffo had no further involvement with the patient.

A nurse practitioner at LHH indicated that plaintiff’s left leg was swollen, red, and warm to touch with left foot tingling and “greater than two plus” pedal edema. Vicken Pamoukian, M.D., a vascular surgeon, diagnosed plaintiff with cellulitis. He felt, however, that there was no need for vascular surgical intervention but also noted that plaintiff was “refusing surgery at this time.”

Plaintiff testified at his deposition that he wanted the surgery, even though he was told by Dr. Pamoukian that the surgery would only have a 2% chance of success. Dr. Pamoukian testified at his deposition that he diagnosed plaintiff with compartment compression syndrome, although he acknowledged that his progress and consultation notes made no mention of it. Dr. Pamoukian claims

that he offered to perform surgery on plaintiff but that plaintiff decided against surgery since he was told that given the duration of symptoms, the odds of successful restoration of nerve function were minimal. Yet, plaintiff's expert claims that despite Dr. Pamoukian's claim that he diagnosed plaintiff with compartment syndrome, chart entries memorialize that compartment syndrome was excluded or ruled out by vascular surgery.

Dr. Zaharakis was called for a neurology consultation later that evening and noted that the patient most likely had an isolated peroneal neuropathy. She documented the possibility of compartment syndrome as a differential diagnosis but noted that compartment syndrome was "unlikely" given the patient's lack of pain and that the diagnosis had been excluded by vascular surgery. She stated in her deposition testimony that Dr. Pamoukian, who was the appropriate surgeon for the matter, was addressing the vascular issue. Dr. Zaharakis recommended a variety of tests and put plaintiff on an antibiotic regimen to treat the left leg cellulitis.

On June 6, 2007, plaintiff underwent another operative procedure at LHH known as a "left anterior compartment fasciotomy" to relieve pressure in his left leg. This procedure was performed by Dr. Giangola, a vascular surgeon, after a CT scan of the leg revealed a hypo-attenuated area in the muscle compartment of the leg. Plaintiff alleges that the procedure on June 6, 2007, was performed "as a result of the failure of the defendants . . . to properly diagnose, care for, and treat him."

As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), a party moving for summary judgment motion must show that there are no disputed issues of fact. A defendant in a medical malpractice case moving for summary judgment 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, the opposing party must proffer evidence sufficient to establish the existence of a material fact requiring a trial. Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is essential for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate causation.

In deciding a motion for summary judgment, the evidence must be scrutinized in the light most favorable to the party opposing the motion, and the decision must be made on the version of the facts most favorable to that party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Moreover, an expert affidavit submitted in support of summary judgment is insufficient if its assertions are contradicted in entries of the records, or fails to address pertinent deposition testimony. See Keitel v. Kurtz, 54 A.D.3d 387, 391-92 (2d Dep't 2008). Where there are issues of credibility, they may only be resolved by the finder of fact. See Feinberg v. Feit, 23 A.D.3d 517, 519 (2d Dep't 2005).

In support of his summary judgment motion, Dr. Ciuffo submits the expert opinion

of Alfred T. Culliford, M.D. Dr. Culliford opines that plaintiff's medical malpractice cause of action has no merit and should be dismissed. C.P.L.R. Rule 3212(b). The affidavit emphasizes Dr. Ciuffo's limited role of assistant in the CABG surgery. His assistance to lead-surgeon Dr. Subramanian merely involved handing him surgical instruments, retracting the surgical field, and helping to expose the areas where Dr. Subramanian was operating. Dr. Ciuffo did not position the patient's legs or harvest Mr. Spielman's left saphenous vein. Dr. Culliford also opines that there is no merit to the claim that Dr. Ciuffo compromised Mr. Spielman's left femoral nerve or improperly harvested his left saphenous vein during the CABG surgery. He asserts that the harvesting of the left saphenous vein occurred above the knee on the left thigh. Therefore, harvesting of the left saphenous vein could not have caused the patient's left anterior tibialis compartment syndrome, since the anterior tibial compartment is at least 3-4 inches away from the lowest aspect of the saphenous vein graft site.

Similarly, Dr. Culliford maintains that the May 26, 2007 mediastinal re-exploration procedure "was appropriately performed and had no causative role in producing Mr. Spielman's subsequent compartment compression syndrome." Dr. Ciuffo's expert asserts that Dr. Ciuffo had no role in interpreting the venous doppler test taken on May 30, 2007, and that the test would not have revealed the development of the compartment compression syndrome.

Dr. Culliford opines that Dr. Ciuffo would not have been aware of Mr. Spielman's post-operative complaints after he performed the mediastinal re-exploration and was not the physician that was responsible for his discharge. Finally, Dr. Ciuffo's expert opines that the

treatment rendered to Mr. Spielman on June 1, 2007, was appropriate.

In support of her summary judgment motion, Dr. Yvonne Zaharakis offers the expert opinion of Joseph S. Jeret, M.D., a board certified neurologist, who states that Dr. Zaharakis' diagnosis of personal mononeuropathy was proper. He opines that she appropriately relied on a vascular surgeon to rule in or rule out a diagnosis of compartment syndrome.

In opposition, plaintiff argues that neither motion should be granted. He asserts that substantial issues of fact exist and that defendants did not meet their prima facie burden to entitle them to summary judgment. In addition to pointing out numerous claims in the bill of particulars that are not addressed by the movants, plaintiff states that there are inconsistencies that arise from the deposition testimony. Plaintiff offers the affidavit of a board certified general surgeon to dispute the conclusions offered by defendants' experts as to the standard of care. As to Dr. Ciuffo's motion, plaintiff is not saying that Dr. Ciuffo was negligent in assisting Dr. Subramanian in the CABG surgery itself, in harvesting the vein used as the graft, in the re-exploration performed on May 26, 2007, or in relations to the venous doppler test. Rather, plaintiff's medical expert is asserting that Dr. Ciuffo departed from good and accepted standards by failing to pay sufficient attention to Mr. Spielman's leg complaints after the surgery and prior to the discharge. Plaintiff argues that he and his daughter complained about the condition of his leg to Dr. Ciuffo. Plaintiff asserts that he developed a dropped foot, an important diagnostic clue to compartment syndrome, before he was discharged on May 30, 2007. Plaintiff disputes Dr. Ciuffo's claims that Dr. Ciuffo's assessment on

June 1, 2007, was sufficient.

Plaintiff argues that Dr. Zaharakis should not have excluded compartment syndrome on June 1, 2007, given the condition of his leg, both as documented in the hospital record and as testified by Mr. Spielman. Plaintiff's expert disagrees with Dr. Jeret as well on the degree to which Dr. Zaharakis could rely on the vascular surgeon.

In reply, Dr. Ciuffo reiterates the ways in which plaintiff does not dispute the quality of Dr. Ciuffo's treatment, particularly as to the CABG surgery itself, the vein harvest, and the mediastinal re-exploration procedure, and restates the arguments and opinions of Dr. Culliford for granting summary judgment in favor of Dr. Ciuffo on all the claims. Dr. Zaharakis' reply argues that plaintiff has not created an issue of fact or established that any departures proximately caused injury to plaintiff.

This court finds that there are disputed issues of the fact relating to the experts' conclusions, as well as differences in the opinions of the standard of care, whether Dr. Ciuffo failed to heed plaintiff's leg complaints, whether he missed clinical signs of compartment syndrome, and what his duty to Mr. Spielman was leading up to his discharge. Similarly, there are disputed issues as to the standard of care given by both movants on June 1, 2007. Plaintiff has adequately addressed proximate cause in his papers. While plaintiff shall be precluded from asserting departures by Dr.

Ciuffo on the mechanics of the CABG surgery, the vein harvest, and the mediastinal re-explorations, he has established material issues of fact that defeat summary judgment. Moreover, when experts offer conflicting opinions, summary judgment must be denied. Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008). Accordingly, it is

ORDERED that defendants Giovanni Ciuffo (Motion Sequence 001) and Yvonne Zaharakis' (Motion Sequence 002) motions for summary judgment are denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, December 18, 2012, at 9:30 a.m.

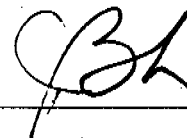
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