Relucio v New York Westchester Sq. Med. Ctr.
2016 NY Slip Op 31355(U)
June 20, 2016
Supreme Court, Bronx County
Docket Number: 301005/12
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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NOEL RELUCIO and CAMILLA RELUCIO,

INDEX No. 301005/12

Plaintiff(s),

- against-

NEW YORK WESTCHESTER SQUARE MEDICAL CENTER, DR. ANIBAL PUENTE, and DR. KENNETH SHAPIRO,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Dr. Anibal Puente for an order pursuant to CPLR §3212 dismissing the complaint is granted only to the extent that plaintiff's cause of action for lack of informed consent is dismissed.

Plaintiff claims that as a result of Dr. Puente's failure to timely diagnose and treat appendicitis, he suffered a ruptured appendix and an infection which required nine days of hospitalization.

On September 19, 2010, at 11:10 p.m., plaintiff presented to New York Westchester Square Hospital with complaints of abdominal pain. At 1:25 a.m., IV fluids were started and at 1:30 a.m., the House Physician saw him. The physician noted that plaintiff had normal vital signs and his abdomen was soft and tender on palpation. Plaintiff's private physician, Dr. Pintauro, was contacted and requested a surgical consult. A CT of the abdomen and pelvis performed at approximately 2 a.m. was "suspicious" for possible rupture of the appendix.

At approximately 2: 10 a.m., Dr. Puente received a phone call from the ER physician.

The decision was made to admit plaintiff to the service of Dr. Pintauro and place him on antibiotics.

At 6:55 a.m. on September 20, 2010, Dr. Pintauro evaluated plaintiff. He noted that plaintiff's chief complain was diarrhea for one week that had stopped five days earlier, but mild lower abdominal pain persisted. Plaintiff was nauseous and intermittently feverish. Dr. Pintauro noted that the CT showed acute appendicitis and plaintiff's white blood count was slightly elevated. Dr. Pintauro requested an EKG on a stat basis and plaintiff was determined to be an acceptable risk for surgery. Prior to his surgery, plaintiff received two shots of Demerol.

At approximately 12:40 p.m., anesthesia was administered and Dr. Puente, assisted by Dr. Shapiro, performed a laparoscopic appendectomy. The operative report noted severe inflammatory changes in the right lower quadrant extending to the pelvis with obvious signs of appendicitis. When the appendix was freed, several cc's of pus were drained from the pelvis. The appendix was removed without difficulty, the small bowel loops were run, and there were no signs of abscess collection. Post operatively, plaintiff developed an ileus and remained in the hospital until 9/28/10 when he was discharged by Dr. Pintauro and Dr. Shapiro.

Dr. Puente seeks dismissal of the complaint on the ground that the care and treatment he provided was proper and did not proximately caused the claimed injuries. Dr. Puente also contends that there is no proof in the record to support plaintiff's claim that the eight days he remained in the hospital after the surgery was due to a prolonged infection and that he remained in the hospital because of diarrhea and an ileus, which are known post-operative complications.

In support of the motion, defendant submits the affirmation of Dr. Belsley, a board certified general surgeon. Dr. Belsley opines that Dr. Puente's care and treatment of plaintiff was

at all times appropriate and within the standard of care and did not cause any injury to plaintiff. He notes that at the time plaintiff was evaluated in the ER, his white blood count was slightly elevated, but his vital signs were normal and he had no signs of peritonitis. Thus, he opines there was no evidence of a surgical emergency. Dr. Belsley acknowledges that the CT scan performed at 2:00 a.m. revealed acute appendicitis with an appendix that was "suspicious for possible rupture," but opines that none of the findings reported on the CT scan "independently demand" immediate surgical intervention because there were no signs of "gross perforation" as there were no findings of free air and peritonitis. He opines that the decision to initially treat plaintiff with IV antibiotics and fluids was completely appropriate and within accepted standards of surgical care.

Dr. Belsley notes that the photograph taken prior to dissecting the appendix shows an appendix that is "not grossly perforated" and opines that there is no proof that the inflamed appendix had changed in any significant manner from the time of CT diagnosis to what was discovered in the operating room. He also notes that Dr. Puente explained that the appendix was friable in the area of necrosis and opines that "the more likely scenario is that a preexisting perforation at the site of a fecalith was made evident during the operation for its removal." (Dr. Belsley explains that a fecalith is "hardened stool" that is "unrelated to any alleged delay in performing the surgery, as it was seen on the pre-operative CT scan").

Dr. Belsley opines that the several cc's of pus that were drained from the pelvis "developed as a result of the natural course of appendicitis and not necessarily the product of a perforation of the appendix." He also opines that a few cc's of pus is often found in the pelvis during an operation for appendicitis and that it is not a sign of a serious infection from a

perforation caused by an alleged delay in performing the surgery.

Dr. Belsley opines that there is no evidence that plaintiff suffered a "serious infection" which required nine days of hospitalization or any surgical complication. Rather, plaintiff developed diarrhea and an ileus, which is a known complication of abdominal surgery and occurs when the intestine's motility or propulsion is disrupted preventing the proper functioning of the bowel. He notes that plaintiff's ileus resolved after a few days and that the claim that he had a change in his bowel habits is contrary to the records and plaintiff's own testimony.

In opposition to the motion, plaintiff submits the affirmation of Dr. Richard Garvey who is a board certified surgeon. Dr. Garvey opines that the medical care rendered to plaintiff was not in accord with accepted practice and that Dr. Puente's delay in taking him to surgery eleven hours after the CAT scan of approximately 1:54 a.m. led to a prolonged hospital stay, increased pain, infection and an ileus bowel.

Dr. Garvey notes that when plaintiff presented to Westchester Square Hospital 9/19/10, he already had signs and symptoms of acute appendicitis and the CAT scan showed suspicion for a possible rupture of the appendix. He opines that based on the CAT scan findings of a marked wall thickening of the appendix, plaintiff's elevated white blood count, diarrhea for one week and right lower quadrant pain, plaintiff should have been brought to the operative room after the CAT scan results were known, not 11 hours later. He explains that the CAT scan demonstrated an acute appendicitis with possible rupture. He opines that such a condition does not heal itself and, while the rupture may not be grossly perforated, it is none the less perforated. He also opines that the operative finding of Dr. Puente, that the appendix was friable and necrotic, is an indication of delicate tissue and dead tissue and that the severe inflammatory changes at the

operative site extending into the pelvis so that pus developed requiring drainage, is a clear indication of an infection. Dr. Garvey notes that plaintiff needed two shots of Demerol before his surgery, which is indicative of pain and opines that the fact that plaintiff was given Cipro and Flagyl (two antibiotics) throughout his nine day stay to combat the elevated white blood count, is a clear indication of an infection. He explains that while the formation of an ileus can be a complication of abdominal surgery, it generally does not happen for appendix removal except in cases such as this one, where the surgery is delayed for 11 hours. He opines that in light of the severe inflammatory changes, the friable and necrotic appearance of the appendix when it was removed, there is no basis in the chart for defendant's expert to say that the perforation of the appendix did not significantly change from the time of the CAT scan until the surgery 11 hours later. He also opines that delaying surgery for 11 hours after the CAT scan was not within accepted medical practice and that this was the cause for plaintiff's infection, increased pain and change in his bowel habits as testified to by his wife.

In reply, Dr. Puente contends that Dr. Garvey's opinion lacks probative value because he is a plastic surgeon who's board certification expired on 12/31/2013. Dr. Puente also submits a further affirmation by Dr. Belsley who disagrees' with Dr. Garvey's opinions that: (1) Dr. Puente departed from the standard of care by treating plaintiff with antibiotics; (2) there was a change in plaintiff's condition from the time he was admitted until the time of surgery; (3) an acute appendicitis with possible rupture is a condition that does not heal itself; (4) administration of antibiotics proves the existence of an infection; and (5) the fact that plaintiff's white blood cell count was slightly elevated over normal subsequent to the surgery is not proof of a "serious infection." Dr. Belsley also opines that there is no evidence that plaintiff has had any change in

his bowel habits and the plaintiff relies solely on plaintiff wife's self-serving testimony regarding same.

Initially, it is noted that plaintiff discontinued the action against New York Westchester Square Medical Center and Dr. Kenneth Shapiro.

As to Dr. Puente, the affirmation of Dr. Belsley, medical records and testimony presented are sufficient to establish, prima facie, that the care and treatment rendered by Dr. Puente was proper and did not caused the claimed injuries. However, the opinion of Dr. Garvey to the contrary raises material issues of fact as to whether Dr. Puente was negligent in administering antibiotics and delaying the surgery for approximately 11 hours after the CAT scan confirmed the diagnosis and, if so, as to whether plaintiff suffered the claimed injuries, which preclude a grant of summary judgment. The fact that Dr. Garvey is not a general surgeon does not render his opinion insufficient as there is no requirement that a medical expert be a specialist in a particular field if he possesses the requisite knowledge necessary to make a determination on the issues presented (Joswick v. Lenox Hill Hospital, 161 ADd2d 352). Accordingly, Dr. Puente's motion for summary judgment must be denied. However, plaintiff has failed to address the cause of action for lack of informed consent in his expert disclosure and in opposition to this motion, the cause of action for lack of informed consent is dismissed.

This constitutes the decision and order of the court.

Dated: June 20, 2016

STANLEY GREEN, J.S.C.