| **Rockman v Babu** |
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| 2016 NY Slip Op 32416(U) |
| December 1, 2016 |
| Supreme Court, New York County |
| Docket Number: 805343/2013 |
| Judge: Joan B. Lobis |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**NEW YORK COUNTY: IAS PART 6**

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LEE E. ROCKMAN and KIM ROCKMAN,

Plaintiffs,

Index No. 805343/2013

-against-

**Decision and Order**

RAMESH P. BABU, M.D.,

Defendants.

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In this medical malpractice action, the single remaining defendant, Ramesh P. Babu, M.D., moves for summary judgment dismissing the action. Plaintiffs oppose the motion. The Court notes that its order dated June 22, 2016, directed that the caption be amended to reflect the discontinuances against the other defendants. The correct caption is above.

Mr. Rockman had a non-contrast MRI on March 18, 2011 due to his complaints of bilateral arm weakness and numbness. The MRI revealed stenosis, extruded discs which compressed the cervical cord, and other problems consistent with cord compression. He treated with neurologist Dr. Gopinathan on March 28. Dr. Gopinathan's notes indicate that Mr. Rockman was hyperreflexic, had a positive Babinski sign, some sensory loss, and other problems. The doctor opined that Mr. Rockman suffered from cervical myelopathy and from severe spondylosis, or spine degeneration, with disc bulges which had compressed the spinal cord. He recommended surgery.

On March 31, 2011, Mr. Rockman first treated with Dr. Babu, a neurosurgeon. At the appointment, Mr. Rockman indicated that he had neck pain as well as difficulty with his hands and feet which made it hard for him to play piano, limited his daily activities, and prevented him from walking more than a few blocks at a time. Dr. Babu also noted that the patient showed signs

of spinal cord compression. He performed a Babinski test and tested other reflexes as well. He found quadriparesis, weakness in all four limbs. Mr. Rockman's gait, Dr. Babu noted, was normal. Based on his own findings, the MRI results, and Dr. Gopinathan's notes, Dr. Babu recommended emergency cervical discectomy and fusion, which he stated would prevent additional and irreversible neurologic damage. Dr. Babu contends that he advised Mr. Rockman of the risks and benefits of surgery, and his notes from March 31 state this as well. Mr. Rockman decided to undergo the surgery, which took place on April 4, 2011 at NYU Medical Center. According to Dr. Babu, the surgery went well in most but not all respects. The doctor's notes indicate that on April 6, Mr. Rockman complained of pain and stiffness in his hands, and right hand paresthesia, both of which were improving. Mr. Rockman was discharged that day.

On April 7, Ms. Rockman called Dr. Babu and stated that her husband was suffering from shortness of breath and hoarseness. He directed her to call an ambulance and have the EMTs in the ambulance contact him with an update about Mr. Rockman's condition. The ambulance took Mr. Rockman to Nyack Hospital. According to Dr. Babu, he spoke to the emergency room doctor as well as the neurosurgeon who was on call, informing them that he suspected his patient had a hematoma. When he learned the on-call neurosurgeon would not go to the hospital, Dr. Babu drove there himself. Ultimately, Mr. Rockman was diagnosed with a hematoma in his neck and a surgical evacuation was performed. At a follow-up appointment on June 15, 2011, Dr. Gopinathan determined that Mr. Rockman's recovery was fifty percent complete and that he still manifested symptoms of cord compression. Although Mr. Rockman was undergoing outpatient rehabilitation, the doctor noted that it would take at least six months before Mr. Rockman's condition could improve. A June 30, 2011 MRI revealed persistent cord compression and other problems.

Mr. Rockman presented to a new doctor, nonparty Dr. McCormick, on July 27, 2011. He complained that he was unstable on his feet, that there was pain in both arms, and that his numbness, weakness, and loss of dexterity had increased. Dr. McCormick recommended surgical intervention, and he and another doctor performed decompression and fusion surgery on August 30, 2011. Mr. Rockman followed up with Dr. McCormick annually until March 5, 2014. At that point, over two-and-a-half years after the second surgery, the doctor noted although his hands were hypersensitive, his gait was not quite as good as it had been before the treatment with Dr. Babu, and he suffered mild residual myelopathy, "for the most part" he was "doing well." In addition, the MRI did not show any cord compression.

In support of his motion for summary judgment, Dr. Babu submits the affirmation of Dr. George DiGiacinto, a New York-licensed physician who is board-certified in neurological surgery. Dr. DiGiacinto states he reviewed all the pertinent records and has reached his conclusions to a reasonable degree of medical certainty. Initially, he states that on March 31, 2011, when he first treated Mr. Rockman, Dr. Babu took a comprehensive medical history, in keeping with the standard of care, appropriately reviewed the MRI and performed a thorough and proper medical examination. Based on Dr. Babu's testimony, the expert contends that Dr. Babu properly advised Mr. Rockman of the risks and benefits of the proposed surgery and therefore Mr. Rockman gave his informed consent. He states that Dr. Babu's diagnosis, cord compression, was accurate, and states the operation he chose for Mr. Rockman was the most logical and most viable. He states that, contrary to plaintiffs' contention, a posterior laminectomy was unwarranted based on Mr. Rockman's condition at that time. According to the expert, it also was within the standard of care

to wait until Mr. Rockman's condition had stabilized to determine whether additional surgery was necessary. A more aggressive approach at the outset, he opines, would have been much riskier.

Further, the expert states that the surgery was performed properly and within the standard of care and that Dr. Babu provided proper post-surgical care and did not discharge Mr. Rockman prematurely or without taking all proper precautions. He argues that the neck hematoma Mr. Rockman developed the day after his discharge was a known risk of the procedure. He also states that this hematoma did not impinge on the spinal cord or cause compression and thus did not create any neurological injury. He opines that Dr. Babu exceeded the standard of care by traveling to Nyack Hospital in order to oversee the treatment of Mr. Rockman. He alleges the treatment by Dr. McCormick is not inconsistent with Dr. Babu's proposed course of action – that is, Dr. Babu wanted to wait until Mr. Rockman's condition stabilized before determining whether additional surgery was required, and Dr. McCormick made the decision to proceed with another surgery around July 27, 2011, just under four months after the April 6 surgery date. The expert stresses that, as Dr. McCormick waited over a month before performing the surgery, the need was not urgent.

In opposition, plaintiffs submit the affidavit of Mr. Rockman. Mr. Rockman states that Dr. Babu did not advise him of the risks of the procedure and instead told him that paralysis was very possible if he did not undergo the surgery. He speaks about his deterioration in the ensuing months, and states that by the time he visited Dr. McCormick his pain and his physical limitations were much greater than they had been prior to the surgery. He states that Dr. McCormick informed Mr. Rockman that because he'd experienced cord compression for so long,

the doctor could not reverse his condition but hoped to arrest its progress. For factual support regarding the state of Mr. Rockman's compression and his status at various junctures, plaintiffs also rely on the deposition testimony of Dr. Babu and Dr. McCormick.

Additionally, plaintiffs submit the expert affidavit of Jeffrey E. Arle, M.D., a Massachusetts-licensed doctor board-certified in neurosurgery who has experience performing surgeries and has been an instructor at Tufts and Harvard's medical schools. Dr. Arle reviewed the medical charts, deposition transcripts, and other relevant material in reaching his conclusions, which he presents to a reasonable degree of medical certainty. He opines that Dr. Babu deviated from the standard of care by performing a C4-C5 discectomy on Mr. Rockman, and that because of this deviation the surgery did not decompress the spinal cord sufficiently at C4-C5. Dr. Arle states that the March 18, 2011 MRI revealed extruded disc material behind the C5 vertebra, and that because of this the procedure Dr. Babu selected did not allow him to see and remove this extruded material sufficiently. He states that the standard of care required the doctor to perform a corpectomy, which would have removed the C5 vertebra entirely and enabled Dr. Babu to remove the disc material and the ligament that caused the compression. Furthermore, he contends that Dr. Babu did not "place the graft within the dis[c] space adequately, flatten anterior osteophytes, or seat the anterior fusion plate appropriately." Arle Aff. p. 3. For these reasons the implanted construct failed, necessitating revision. He alleges that a neck hematoma occurs rarely and "more likely than not" resulted from Dr. Babu's improper surgical approach. Id. p. 4. Dr. Arle states that, as Mr. Rockman's June 30, 2011 MRI shows, the surgery did not correct his compression. Id. In addition, Dr. Arle states that these deviations proximately caused the injuries. A corpectomy, would have decompressed the spinal cord properly and likely would have arrested Mr. Rockman's

spinal compression and myelopathy. Instead, the procedure Dr. Babu performed, was a substantial cause of their progression. Absent malpractice, Dr. Arle states, Dr. McCormick likely would not have needed to perform the fusion surgery on Mr. Rockman. He argues that Dr. Babu's malpractice was a substantial factor in causing Mr. Rockman's physical decline.

In reply, Dr. Babu states that Dr. Arle points out only two departures: 1) he performed a discectomy rather than a corpectomy and 2) he did not decompress the spinal cord sufficiently. He contends that Dr. Arle provides no explanation for his proximate cause argument, does not explain why he disagrees with Dr. DiGiacinto, and ignores the fact that even a successful decompression surgery might not have cured Mr. Rockman. He says that though there was significant compression on June 30, 2011, this does not mean the April surgery was unsuccessful. He states that if the Court does not dismiss this case, it should limit the litigation to the two claims above and dismiss all claims relating to 1) Dr. Babu's preoperative evaluation, 2) his decision to make an anterior approach, 3) the performance of the surgery itself, including the placement of screws and a PEEK implant, 4) any allegations relating to his post-surgery hospitalization, and 5) the doctor's decision not to perform an MRI postoperatively, and 6) lack of informed consent.

To prevail on summary judgment in a medical malpractice case, defendants must show that they did not depart from accepted standards of practice or that the alleged departures did not proximately cause the patient's injury. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). The movant must provide a detailed, specific, fact-based expert opinion. Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The defense expert should state "in what way" a patient's treatment was proper and explain the standard of care, as well as "'what defendant did and why.'"

Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010) (citation omitted). If the defendant makes a prima facie showing, the plaintiff must provide evidence establishing the existence of material factual issues, Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), including an expert affidavit stating the defendant departed from the accepted standard of care and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Summary judgment is improper where conflicting expert opinions exist. Elmes v. Yelon, 140 A.D.3d 1009, 1011 (2nd Dep't 2016).

Here, defendant makes a prima facie showing of entitlement to summary judgment. In response, however, plaintiffs show that triable issues exist. The expert's affidavit as well as Mr. Rockman's affidavit are sufficient to rebut defendant's prima facie case. As defendant notes, plaintiffs' expert opines that defendant improperly performed a discectomy rather than a corpectomy and that defendant did not adequately decompress the spinal cord. Further, although Dr. Arle does not state "I disagree with Dr. DiGiacinto because" of certain factors, throughout his affidavit he explains the bases of and reasons for his disagreement with Dr. DiGiacinto. Thus, the expert affidavit presents an adequate explanation for his disagreement.

Defendant is incorrect in his argument that plaintiff has waived all but the above two allegations and the rest of the claims defendant challenges in his motion, including proximate cause and negligence, should be dismissed. Contrary to defendant's position, plaintiffs' expert expressly discusses proximate cause at pages three through four of his affidavit, affirming that the alleged malpractice was a "substantial factor" in causing the injuries rather than stating the malpractice "proximately caused" them. In particular, Dr. Arle says that Mr. Rockman's condition deteriorated due to the alleged malpractice, and adds that this limited his potential recovery. As

for Dr. Babu's preoperative evaluation and performance of the surgery, defendant misconstrues plaintiffs' arguments. Plaintiffs state that the procedure the doctor chose was improper, and that – rather than the failure to conduct a thorough examination pre-operatively or negligence in the execution of the allegedly incorrect surgery -- the conclusions Dr. Babu's reached upon his initial examination and the type of surgery he chose to perform were the deviations. Plaintiffs should be permitted to raise these arguments. Dr. Arle also argues that Dr. Babu's post-operative care was a departure in that the doctor did not determine whether spinal compression remained after the surgery. Although defendant is correct that the expert did not state that there was lack of informed consent, Mr. Rockman himself submits an affidavit in which he swears that he was not advised of the risks of surgery. Thus, plaintiffs sufficiently challenged defendant's position that there was informed consent. Defendant's request to deem plaintiffs to have conceded the five points defendant sets forth in his reply would unduly restrict plaintiff's ability to present evidence at trial.

The Court has considered the remaining arguments, which do not alter this decision. Based on the above, therefore, it is

ORDERED that the motion is denied.

Dated: Dec. 1, 2016

ENTER:

**JOAN B. LOBIS, J.S.C.**