Negron v Jian Shou
2018 NY Slip Op 33139(U)
December 4, 2018
Supreme Court, New York County
Docket Number: 805059/16
Judge: Martin Shulman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

YESENIA NEGRON,

Index No. 805059/16

Plaintiff,

DECISION

- against -

JIAN SHOU, M.D., CHEGUEVARA I. ANAFEH, M.D., PHILIPP FRANCK, M.D. and NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER,

Defendants.

In this medical malpractice action, defendants Jian Shou, M.D. (Dr. Shou) and The New York and Presbyterian Hospital s/h/a New York-Presbyterian/ Weill Cornell Medical Center (NYPH) (collectively defendants)[1] move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff Yesenia Negron (plaintiff or Ms. Negron) opposes the motion.

BACKGROUND

This action arises from plaintiff's robotic[2] cholecystectomy[3] and umbilical hernia repair surgery which Dr. Shou performed at NYPH on April 14, 2014. Plaintiff alleges[4] in relevant part that Dr. Shou: performed the surgery improperly by clipping her common bile duct (CBD); failed to perform an intraoperative cholangiography (x-ray of the bile duct) and post-operative MRI, CAT scan and sonogram; failed to properly

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[1] Plaintiff discontinued this action as to co-defendants Drs. Afaneh and Franck.

[2] Both parties agree that the pleadings incorrectly identify the procedure as a laparoscopic cholecystectomy.

[3] A cholecystectomy entails surgical removal of the gallbladder.

[4] The allegations against both defendants are virtually identical.

interpret test results; failed to consult with specialists; and failed to follow her post-operatively. Among the injuries listed in plaintiff's bill of particulars are injury and trauma to the gall bladder, punctured gall bladder, placement of two surgical drains and a biliary drain, frequent urination, severe abdominal pain, nausea, vomiting, sweating and extreme gas.

Except where indicated, the following factual allegations are essentially undisputed.[5] Plaintiff first met with Dr. Shou on March 14, 2014, complaining of discomfort and abdominal pain. Her primary care physician previously diagnosed a hernia. Ms. Negron's medical history was significant for gallstones, thyromegaly, eczema, cervical radiculopathy, fibroids, anemia and three Cesarean sections. Dr. Shou performed a physical examination and ordered an abdominal/pelvic CT scan and recommended surgery for the hernia.

Plaintiff returned to Dr. Shou on April 8, 2014 to review the results of the CT scan, which confirmed the hernia and revealed significant gallstones within the gallbladder. Based upon the CT scan and Ms. Negron's prior history of gallstones, Dr. Shou recommended hernia repair surgery and the cholecystectomy.

Dr. Shou discussed the various surgical techniques with plaintiff, who opted for a single port robotic surgery for cosmetic reasons. The records document that Dr. Shou disclosed the risks of the procedures, including infection, bleeding and injury to the CBD. He also advised that it was possible that the surgery would require use of

[5] In fact, plaintiff's expert adopts the facts outlined in defendants' expert's affidavit almost verbatim.

multiple surgical ports and that it was possible he may need to convert the procedure to an open cholecystectomy.

During the April 14, 2014 surgery Dr. Shou encountered chronic inflammation at the gallbladder and chronic fibrosis at the Calot's triangle,[6] indicating that Ms. Negron had gallstones for a significant period of time and suffered prior acute inflammation to the gallbladder and adjacent structures within Calot's triangle. This inflammation complicates the surgical dissection, requiring the surgeon to take care to identify the relevant structures since adhesions can distort this anatomy.

During the surgery, the robotic grasper punctured the gallbladder, resulting in a bile leakage which was suctioned out. It was necessary to insert an additional surgical port in order to more readily identify the cystic duct and cystic artery. Defendants contend that Dr. Shou then clipped the cystic duct and cystic artery "using surgical clips as is standard procedure in cholecystectomy." These structures were then transected to allow for the gallbladder's removal while preventing arterial bleeding and bile leakage. Plaintiff disagrees with the foregoing, stating that Dr. Shou clipped and transected the CBD rather than the cystic duct because he was unable to adequately visualize the surgical field. The hernia was repaired and at the surgery's conclusion all areas were inspected for bleeding and bile leakage.

Plaintiff's post-operative complaint of pain and lab results showing elevated white blood cell count and liver function prompted Dr. Shou to admit her to the hospital for monitoring. Ms. Negron's pain was monitored and lab tests were repeated. On April

[6] This area is bordered by the cystic duct, the common hepatic duct and the inferior border of the liver.

16, 2014 her pain and elevated bilirubin levels led Dr. Shou to order a hepatobiliary scan (HIDA) to evaluate whether she had a bile leak. The HIDA was performed that day and confirmed a bile leak, though it was unclear where it originated. That evening Dr. Shou performed an emergency laparoscopic washout and bile drainage. He performed a cholangiogram to determine the source of the bile leak. When Dr. Shou was unable to visualize the CBD he requested an endoscopic retrograde cholangio-pancreatography (ERCP) which was performed by non-party gastroenterologists. The ERCP revealed disruption to the CBD. A stent was placed to relieve obstruction caused by a gallstone which could not be endoscopically removed.

Thereafter, Dr. Shou consulted with non-party surgeon Dr. Benjamin Golas (Dr. Golas), a hepatobiliary specialist, who recommended placing a JP drain and performing a percutaneous transhepatic cholangiography (PTC).[7] Dr. Golas further recommended a hepaticojejunostomy at a future date to repair the injury to the CBD.

On April 17, 2014, interventional radiologists performed the PTC, documenting biliary leakage arising from the upper third of the CBD. A catheter was placed for biliary drainage. Ms. Negron was continuously monitored until her discharge on April 23, 2014. An abdominal CT scan confirmed proper placement of the JP drains and CBD stent, as well as no evidence of biliary leakage. Thereafter, one of the JP drains was removed. Plaintiff still had a PTC drain and a JP drain at the time of her discharge.

When Ms. Negron followed up with Dr. Shou on May 2, 2014 he noted that she was recovering well. She was then readmitted to NYPH from May 13, 2014 through

[7] A PTC is a procedure performed by interventional radiologists to better visualize and drain the bile duct system.

May 17, 2014 for abdominal pain after one of her drains became dislodged after becoming caught on a gate. On May 15, 2014, interventional radiologists performed a cholangiogram and replaced the dislodged biliary drain.

On May 29, 2014 plaintiff presented to NYPH's emergency department complaining of abdominal pain, vomiting and decreased bile output from her drain. Upon examination, Dr. Shou determined that Ms. Negron had forgotten to unclamp her drain, preventing fluid from draining. The drain was unclamped and found to function normally, whereupon plaintiff was discharged home.

She returned the following day because she was concerned the drain was not functioning properly. However, Dr. Shou and an interventional radiologist performed a saline flush test which confirmed it was working properly, and again discharged plaintiff home. On June 17, 2014 Dr. Golas successfully performed surgery to repair Ms. Negron's bile duct. The report from this procedure indicates that "2 previous Hem-o-Lock clips that had been placed in the region of the common bile duct that were in close proximity to the right hepatic artery" were found.

EXPERT'S CONTENTIONS

In support of their motion for summary judgment dismissing the complaint, defendants argue that they did not depart from accepted medical standards in treating plaintiff. They submit an expert affirmation from Sherry Wren, M.D. (Dr. Wren), a physician who is board certified in general surgery and specializes in performing hepatobiliary surgery utilizing open, laparoscopic and robotic techniques. Dr. Wren sets forth within a reasonable degree of medical certainty that the treatment defendants rendered to Ms. Negron was in accordance with the standards of good and accepted

medical-surgical practice and none of defendants' acts or omissions proximately caused plaintiff's alleged injuries. She states in relevant part that:

- injury to the CBD is a well-known surgical risk of a cholecystectomy that can occur in the absence of negligence;
- Dr. Shou properly added a second port after encountering chronic inflammation which increased the visualization of the surgical field;
- it was unnecessary to perform an intra-operative cholangiogram because the records indicate that Dr. Shou was able to visualize the anatomy;
- since fibrotic tissue can be dissected, it was not necessary to convert to an open procedure, which would have increased the risk of infection, bleeding, scarring and injury to the CBD;
- injury to the CBD is also a risk of open procedures and it is speculative to conclude that plaintiff's injury would have been avoided if converted to an open surgery;
- the puncture of the gallbladder did not result from surgical negligence and is irrelevant because the intended purpose of the procedure was to remove the gallbladder;
- Dr. Shou surgically corrected plaintiff's hernia and it has not recurred;
- Dr. Shou and NYPH staff timely diagnosed plaintiff's CBD injury and there was no reason to suspect such an injury intra-operatively since the records confirm that Dr. Shou specifically looked for bile leakages at the surgery's conclusion and found none;
- post-operative pain for several days after surgery is common and is not indicative of a CBD injury, and plaintiff's pain improved with medication;
- plaintiff's bilirubin levels were normal on April 14 and 15, evidencing good liver function and thus not indicating a bile leak;[8]
- plaintiff's post-operative recovery was normal, as indicated by the fact that she remained afebrile and was able to walk;

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[8] Dr. Wren explains that the liver produces bile, which contains bilirubin. Elevated levels can indicate a bile leak.

- Dr. Shou timely detected the bile leak on April 16 when lab work showed that plaintiff's bilirubin level had increased, and nothing prior to that date suggested injury to the CBD;

- after receiving the HIDA results, Dr. Shou timely returned plaintiff to the operating room for exploratory emergency surgery;

- the time frame in which plaintiff's CBD injury was diagnosed did not proximately cause her alleged injuries because, even if she had been diagnosed prior to April 16, she would still have had to undergo the ERCP, PTC drainage and hepaticojejunostomy;

- Dr. Shou consulted with gastroenterologists and a hepatobiliary specialist on April 16 as soon as there was suspicion for a bile leak, and consulted with interventional radiologists on April 17;

- the records indicate that NYPH staff were neither independently negligent nor did they follow any contraindicated orders; and

- subsequent hospitalizations and emergency room visits were not due to any malpractice on defendants' parts and resulted from Ms. Negron's own failure to unclamp her drain.

In opposition, Ms. Negron submits an affidavit from Elliot Goodman, M.D. (Dr. Goodman), who has been board certified by the American Board of Surgery since 1997. Plaintiff's expert avers within a reasonable degree of medical certainty that the care defendants rendered to Ms. Negron deviated from good and accepted medical-surgical practice and proximately caused her alleged injuries. He concludes the following:

- given Ms. Negron's prior medical history, Dr. Shou should have been prepared to encounter dense adhesions and a distorted surgical field;

- as evidenced by the June 17, 2014 procedure Dr. Golas performed, a surgical clip was found on the CBD rather than the cystic duct, thus Dr. Shou misidentified plaintiff's internal structures, which is not merely an accepted risk of the procedure; and

- Dr. Shou would have been in a better position to visualize the surgical field and would not have misidentified plaintiff's internal structures if he had performed an intra-operative cholangiography.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be drawn from the evidence. *See Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad*, *supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc.*, *supra*.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2)

evidence that such departure was a proximate cause of plaintiff's injury." *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 (1st Dept 2009) (citation omitted). A defendant physician seeking summary judgment must make a prima facie showing establishing the absence of a triable issue of fact as to the alleged departure from accepted standards of medical practice (*id*).

In opposition, "a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice'." *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d at 325. "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor (citation omitted)." *Id.* However, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment. *Id.*, citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002).

In this case, the record reveals that all parties' experts have extensive experience in the relevant medical specialties and are knowledgeable in their fields. Additionally, they all base their opinions on their review of Ms. Negron's medical records as well as the pleadings and deposition transcripts herein. Therefore, it appears that all experts are qualified to offer their opinions. *See Frye v Montefiore Med. Ctr.,* 70 AD3d at 24-25; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008)

("whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court . . .").

Defendants have established their prima facie entitlement to summary judgment, thus shifting the burden to plaintiff. Plaintiff fails to meet her burden of establishing that issues of fact preclude summary judgment.

Defendants characterize Dr. Goodman's affidavit as lacking probative value. It is largely speculative and conclusory and fails to rebut virtually all of Dr. Wren's opinions. Specifically, Dr. Goodman does not address plaintiff's following allegations, which Dr. Wren effectively refutes: (1) that the surgery should have been converted to an open procedure; (2) that the hernia repair was performed improperly; (3) that the gallbladder puncture represented a deviation from the standard of care; (4) that post-operative care was untimely and improper; and (5) that Dr. Shou failed to consult with specialists. Accordingly, summary judgment is granted and these claims are dismissed.

Dr. Goodman only summarily concludes that Dr. Shou failed to plan for dense adhesions and take appropriate steps when he encountered them. Dr. Wren details the steps Dr. Shou took when the surgery became complicated and her opinions are corroborated by the record. Dr. Goodman does not state what steps should have been taken or indicate how Dr. Shou's surgical technique (to wit, adding a second port to increase visualization of the surgical field) was inadequate.

Further, Dr. Goodman only speculates that Dr. Shou did not properly visualize the surgical field. He does not address Dr. Wren's opinion that an intra-operative cholangiography was not warranted, nor does he indicate how such a procedure would

have been preferable to adding a second port, particularly where the cholangiography also entailed the risk of injury to the CBD.

Finally, neither plaintiff nor Dr. Goodman addresses NYPH's purported negligence. Nothing in the record indicates that NYPH staff was independently negligent or followed contraindicated orders. Nor can NYPH be held vicariously liable for Dr. Shou's treatment as it is undisputed that he was not an NYPH employee. Accordingly, summary judgment is granted in NYPH's favor and the action is dismissed as to it.

For the foregoing reasons, it is

ORDERED that defendants' motion is granted in its entirety and the action is dismissed.

The Clerk is directed to enter judgment in defendants' favor accordingly. The foregoing is this court's decision and order.

Dated: New York, New York
December 4, 2018

Hon. Martin Shulman, J.S.C.