SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

IA PART 16

PRESENT: ALICE SCHLESINGER Justice

PART _____

Index Number : 116556/2008
PARCO, VINCENT
vs.
ANGEVINE, PETER M.D.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent provided in the accompanying memorandum decision and is otherwise denied.

FILED

FEB 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: FEB 07 2013

Alice Schlesinger J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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VINCENT PARCO, as Administrator of the Estate of CAROL PARCO, and VINCENT PARCO, Individually,

Plaintiffs,

Index No. 116556/08
Motion Seq. No. 004

-against-

PETER ANGEVINE, M.D., NEW YORK PRESBYTERIAN HOSPITAL, NEUROLOGICAL ASSOCIATES, P.C., COLUMBIA PRESBYTERIAN MEDICAL CENTER and THE UNIVERSITY HOSPITAL OF COLUMBIA,

Defendants.

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SCHLESINGER, J.:

In the Spring of 2008, Carol Parco was sixty-one years old and was not well. Her surgical history had included a gastric bypass with abdominoplasty in 2006, placement of a pacemaker, and a right ankle arthrodesis/bone graft also in that year. More significantly for our purposes, Ms. Parco had undergone three surgical procedures by defendant Dr. Peter Angevine, a neurosurgeon, in 2007, the last in November of that year where hardware which he had placed was removed and replaced. Her medical history also included diabetes, diabetic neuropathy and hypertension.

It was on May 7, 2008, at an office visit that Dr. Angevine evaluated his patient, who was at the time six months past revision for a thoracolumbar junctional fracture. Mrs. Parco was not doing well. Her spine was curved in such

a way that it was difficult for her to stand up straight or to walk.

Because of this bleak situation, the defendant took great pains on several occasions, the first at the May 7, 2008 visit, to explain to Mrs. Parco that she needed a pedicle subtraction, osteotomy and revision of her fusion. Dr. Angevine explained to his patient that there was significant risk involved in the procedure. He memorialized this conversation in a lengthy note in the record of that date. The note began, "This is a large and dangerous operation ... ." He went on to write, "She is at significant risk for this surgery such as infection, non-healing, stroke, and other medical complications". But, the doctor continued, "I do not see an alternative. Physical therapy is not going to help her." (Exh. K to moving papers).

Dr. Angevine asked Mrs. Parco to return to his office before the day of surgery. She and her husband did return on June 9, 2008. The defendant again explained the significant risks of the surgery and again memorialized this conversation. (Exh. L).

Surgery was set for June 13, 2008 and on that morning, Mrs. Parco signed a consent form, witnessed by her adult son Christopher Parco. The form was detailed and complete, and after the above signatures, Dr. Angevine signed it as well, attesting to the fact that he had discussed "the nature, purpose and the reasonably foreseeable risks and benefits of the procedure" and that he was satisfied that his patient understood them. (Exh. M).

The surgery did go forward on June 13, 2008, but there were certain disturbing symptoms that occurred in the ensuing days. The most worrisome, on June 16 at about 1:00 p.m., when Dr. Angevine had the impression that Mrs. Parco was in septic shock. (This is shock derived from an infectious process). He then consulted with General Surgery and ordered a CT angiogram, which evidenced free air/fluid in the patient's abdomen. Surgeon Dr. Tracey D. Arnell was called in to do an exploratory laparotomy, wherein she identified a 1cm perforation in the junction between the stomach and jejunum. The surgeon drained the area and placed a drain to divert secretions and preserved her findings in an operative report of July 3, 2008. She believed the perforation could not be safely closed.

In the days ahead, Mrs. Parco was administered antibiotics as she had developed sepsis and respiratory failure. She also had additional surgery for bowel resection and placements of various abdominal tubes. But none of these efforts succeeded in preserving her life, and on October 4, 2008, Mrs. Parco died.

Before the Court is a motion by all of the defendants for summary judgment. It is supported by an affidavit from Dr. Peter Angevine, the primary defendant in this action (Exhibit T). Additionally, Mrs. Parco's records from both Dr. Angevine's office and the hospital are submitted.

In the affidavit, the doctor first describes his credentials, which include board certification in the field of neurological surgery. He is licensed to practice

medicine in several states, including New York. He is currently a member of the Spine Center at the Columbia University Medical Center. However, he relates that in 2007-8, he was an Assistant Professor in the Department of Neurological Surgery at Columbia University's College of Physicians and Surgeons and an employee of both Columbia University and defendant Neurosurgical Associates, P.C.

He then states that all of his opinions "are expressed within a reasonable degree of medical/neurosurgical certainty" (¶6). After this he relates Mrs. Parco's surgical history and his involvement in her care. Appropriately, he then points out the care he took in explaining the risks and complications of the surgery he recommended. Here, he notes that he had similarly discussed these risks prior to his three earlier surgeries on her.

He states that he discussed foreseeable risks, which he states a bowel perforation is not. He specifically says in that regard: "while a bowel perforation is a known and accepted risk of the recommended procedure, it is not a common complication" (¶15). Therefore, it is not the standard of care to specifically indicate it. Rather, it falls under "unanticipated complications" (¶16).

The major portion of Dr. Angevine's affidavit, as is appropriate under these circumstances, is his discussion of the bowel perforation that occurred during his surgery and his attempts at explaining why it happened. It is clear that this endeavor by him involves speculation, as it must, because if the doctor had seen

precisely what had happened, he would have known why and how and, most importantly, he would have immediately attended to it. But he did not.

Therefore, in the defensive posture that he assumes, he offers various "possible scenarios" (¶35) to explain the perforation. First, he explains what he says he told the family on June 16, that "the perforation was possibly a blunt injury that occurred during the dissection for the partial corpectomy that we did to repair the nonhealing fracture on June 13" (¶30).

Then he suggests that since there was no free air seen on radiology films until June 16, 2008 (but this was the first CT angiogram performed), it "suggests that the bowel perforation likely developed subsequent to the surgery on June 13, 2008". He goes on to say that "there was probable scar tissue that is not elastic, and when manipulated, caused a stretch injury or a blunt injury to the region that led to the perforation" (¶33).

He then supports the above theory by noting extensive adhesions seen during the patient's prior gastric bypass surgery and noted in that operative report (¶34). However, as pointed out by Dr. Bill Mastrodimos, a well-credentialed board certified neurosurgeon, in an opposition affidavit, Dr. Arnell, in her operative report of her June 16, 2008 surgery, said nothing about any fibrosis or adhesions in the area; if there had been any, Dr. Arnell would have noted them, Dr. Mastrodimos submits. This plaintiffs' expert then opines that the "absence of findings of adhesions or fibrosis in the area of the gastrojejunal perforation

invalidates Dr. Angevine's supposition that the injury Mrs. Parco sustained could have been the result of adhesions, non-elastic scar tissue and/or the presence of bowel adherent to the vertebral bodies." (¶18 of Dr. Mastrodimos' affidavit).

The defendant's final possible scenario for the bowel perforation is that "some bowel my have been attached to the vertebral bodies involved in the surgery". Therefore, by peeling "the muscle off the T12 vertebral body, the serous membrane may have been damaged, leading to a weakened bowel that eventually ruptured a short time after surgery." (Dr. Angevine Aff., ¶35).

Discussion

In most summary judgment motions submitted by defendants in medical malpractice actions, the papers are supported by an expert in the same field as the defendant, but not by the defendant himself. In those cases, it is easier to determine whether the neutral stranger expert has sufficiently stated enough in a qualitatively suitable way so as to have made out a prima facie case in favor of the moving defendant. Here, it is not clear if that has been done, at least in order to shift the burden to the plaintiff.

But that is not the case here vis-a-vis the cause of action which sounds in informed consent. There, besides the self-serving statement from the doctor that he met the standard, there are his contemporaneously prepared notes, as well as a detailed consent form signed not only by the patient and her adult son, but also by the doctor himself. Thus, a prima facie case on this cause of action is clearly

made out. The plaintiff, in opposition papers then never discusses it. Therefore, this cause of action is dismissed.

But it is different as to the bowel perforation. Dr. Angevine's position is that this was an unanticipated risk of the procedure. He offers various possible ways it could have happened, always involving what he says was "a blunt injury". On the other hand, Dr. Mastrodimos, who also offers his opinions within a reasonable degree of medical certainty, says that Dr. Angevine did depart from accepted standards of neurosurgical care of Carol Parco and caused injury during the performance of the surgery by actually penetrating the gastro jejunostomy, which had been created during the gastric bypass, as opposed to causing a blunt and/or stretch injury. Dr. Mastrodimos states further that by the defendant attempting to avoid cutting the anterior longitudinal ligament, "violated the vertebral membrane by plunging with a periosteal elevator or other dissecting instrument" (¶16).

As noted earlier, the expert states that his opinion is supported by Dr. Tracey Arenll's operative report. Beside Dr. Arnell's not alluding to any adhesions, Dr. Mastrodimos also states that "Dr. Arnell did not note any findings of bruising, edema and/or swelling in the area of the one centimeter opening." He adds that if there was a blunt and/or stretch injury, there would have been findings of bruising, edema, irregular edges on the perforation, and/or swelling" (¶17). But again none were noted. It is clear that it was this perforation that set Mrs. Parco down a road filled with serious, unremitting infection from the leakage

which ultimately caused her death.

Therefore, vis-a-vis this injury caused by the defendant, which I do find Dr. Mastrodimos sufficiently characterizes as a departure, I find an issue of fact has been stated as to whether the injury was simply an unanticipated risk of the surgery or whether it was caused by the negligence of Dr. Angevine.

However, there is a second alleged departure wherein I reach a different conclusion. Dr. Mastrodimos also points to the post-surgical period from June 13-16 as being a departure by the defendants for failing to timely, diagnose Mrs. Parco's bowel perforation.[1] Here, he says the signs were such that when together with the patient's history, a bowel perforation should have been suspected and acted upon earlier, before it was, late in the day of June 16. Then he opines "that the failure to diagnose Mrs. Parco's bowel perforation either intra-operatively and/or at an earlier time in the post-operative period, deprived Mrs. Parco of the best possible chance of recovery from the June 13, 2008 surgery" (¶19).

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[1]Earlier, I described Dr. Mastrodimos as a well-credentialed, board certified neurosurgeon. But more should be stated. He received his medical degree from Robert Wood Johnson Medical School in 1987. He then completed an internship in general surgery at the Cleveland Clinic in 1988 and a residency in neurosurgery from the same Clinic in 1993. He had further training in Neurotrauma at the Mount Sinai Medical Center, also in Cleveland. Now, he is licensed to practice medicine in California and is a member of the Skull Base Surgery Center of Excellence for Kaiser Permanete Southern California.

It is clear that causing the perforation and then failing to see it and fix it is responsible, at least in part, for the decedent's downward course leading to her death. But regarding the three days following the surgery, Dr Mastrodimos fails to explain how that delay had a specific, harmful effect on Mrs. Parco's further course. His opinion on this issue is simply too vague and conclusory to support a departure resulting in an injury. Therefore, the action against the Medical Center and against Dr. Angevine for actions or inactions during that three-day period is dismissed, along with the informed consent of action discussed above.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of severing and dismissing the cause of action against Dr. Angevine sounding in lack of informed consent, and is

ORDERED that the motion is further granted to the extent of severing and dismissing all claims against all defendants relating to the post-operative period from June 13-16, 2008; and it is further

ORDERED that defendants' motion is otherwise denied, and counsel shall appear in Room 222 on Februa[illegible] 2013 prepared to select a jury and proceed to trial.

Dated: February 7, 2013

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FILED

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COUNTY CLERK'S OFFICE NEW YORK

ALICE SCHLESINGER J.S.C.