Dicicco v Manhattan Diagnostic Radiology, Inc.
2013 NY Slip Op 31256(U)
June 3, 2013
Supreme Court, New York County
Docket Number: 112010/06
Judge: Alice Schlesinger
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[* 1]
SCANNED ON 6/14/2013

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

PRESENT: ALICE SCHLESINGER Schlesinger, Justice

IA PART 16

Dicicco, Bruce, et al.

- v -

Manhattan Diagnostic Radiology, Inc., et al.

INDEX NO. 112010/06

MOTION DATE

MOTION SEQ. NO. 08

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in according with the accompanying memorandum decision and the medical malpractice action is restored to the calendar for a pre-trial conference on July 17, 2013 at 11:30 a.m.

FILED
JUN 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUN 03 2013

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

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

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BRUCE DICICCO and ANNE FERNANDEZ, as Limited Administrators of the Estate of Armand Arman, Deceased, and CLORICE ARMAN, individually,

Plaintiffs,

Index No. 112010/06
Motion Seq. No. 008

-against-

MANHATTAN DIAGNOSTIC RADIOLOGY, INC., ELIAS KAZAM, BERNARD KRUGER, LENOX HILL HOSPITAL and GEORGE TOLIS, M.D.,

Defendants.

FILED
JUN 13 2013
COUNTY CLERK'S OFFICE
NEW YORK

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SCHLESINGER, J.:

In a February 21, 2013 decision by this Court, I granted motions by all of the defendants for summary judgment. With regard to the motions by Dr. Bernard Kruger, Lenox Hill Hospital and Dr. George Tolis, I granted their motions on the merits, finding that each had made out a prima facie case in favor of dismissal which the plaintiff had not successfully countered. However, with regard to the first named defendants, Manhattan Diagnostic Radiology, Inc. ("MDR") and Dr. Elias Kazam, I granted their motions on default. However, I said that the plaintiffs could move to vacate their default pursuant to my discussion of this issue in the decision. That is the motion now before the Court.

What apparently caused the default was conduct this Court had never experienced before and hopes never to experience in the future. I will now describe this conduct based on my own recollection, as well as the information contained in an Affirmation by Joseph Ruta, counsel for the plaintiffs, as part of his March 1, 2013 motion to vacate the default.

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Robert Radman was "of counsel" to the firm of Ruta Soulios & Stratis, LLP, attorneys of record for the plaintiffs, and it was in this position that he was handling this case for the partnership. It was Mr. Radman who filed the opposition papers to the defendants' motions, and it was he who attended oral argument on January 16, 2013. At that argument, defense counsel made several objections to the expert statements presented by the plaintiffs' counsel in opposition to the motions. The particular statement in question appeared as a faxed copy with no name or signature. However, this expert was identified as a board certified radiologist practicing in New York. That doctor opined on several issues relevant to the motions by MDR and Dr. Kazam.

As explained in my earlier decision, I told counsel that I was going to deny those defendants' motions on the basis of the two departures described by this unidentified radiologist. But I, along with defense counsel, was unhappy with the form of the expert's statement. I specifically asked Mr. Radman if he had seen the original hard copy with the doctor's signature on it, and he said that he had. I then gave him one week to send it to me. But he did not. So after six days, because I do not like to default people, I reminded Mr. Radman by fax to get me the document. I copied this reminder to all counsel.

But I never received the document. Mr. Ruta indicates in his supporting affirmation here that once he saw my fax, he kept reminding Mr. Radman to send the signed expert affirmation to the Court, and Mr. Radman reassured Mr. Ruta that he would. But he never did because it appears that Mr. Radman had fabricated the document himself. What Mr. Radman did ultimately send me was an affirmation with the name of Dr. Howard Gelber, a radiologist, on it. However, Mr. Ruta told me and defense counsel during a January 25th conference call that he personally had spoken to Dr. Gelber, who had informed him that

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he knew nothing of the case. He had never reviewed it nor given opinions. That is why I reached the above conclusion that Mr. Radman created the document out of whole cloth. I have heard nothing from him since this all happened.[1]

But as to the motion, Mr. Ruta was then able to contact a board certified diagnostic radiologist from New Jersey who reviewed the records and who opined about issues in the case. I told him he could attempt to submit this expert statement and I would look at it while giving counsel for these defendants a chance to respond. That has now all been accomplished. I should add, however, that opposing counsel have both requested costs which they say were incurred by their having to prepare and file new responsive papers.

Mr. Radman's conduct is, I believe, inexcusable. But I do not think it would be fair to hold the plaintiffs responsible for this misconduct, in part because they never chose Mr. Radman in the first place. Certainly, neither they nor anyone could have anticipated what he would do. Therefore, I believe it is appropriate to entertain the motion to vacate and in so doing, I find excusable default by the Ruta partnership. So I will now turn to the merits.

As stated in my earlier decision, allegations of malpractice stem from events that occurred on March 5, 2004. That is the day when Dr. Kazam attempted to remove fluid from the right chest of Mr. Arman (the decedent here) via a thoracentesis, a procedure that occurred at the offices of Manhattan Diagnostic Radiology, Inc., and that took about 30 minutes. Soon after the procedure ended, the decedent left the office with his wife Clorice at his side. At the latter's insistence, they went to see Dr. Kruger. While they were there, Mr. Arman complained of increasing weakness and became unconscious. An ambulance was called which took him to Lenox Hill Hospital.

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[1]This decision is being forward to the First Department's Disciplinary Committee for its consideration.

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Dr. George Tolis, a cardiothoracic surgeon, then performed an emergency thoracotomy. During that procedure, he evacuated a hematoma and removed a great deal of blood from the right chest. He also cauterized the intercostal artery to stop further bleeding. Two drainage tubes were then placed in the patient's chest. As I said in the earlier decision (at p 4), "the consensus of all concerned [was] that the reason for the emergency thoracotomy was Dr. Kazam's puncture of the intercostal artery during his thoracentesis earlier that day. " Mr. Arman remained at Lenox Hill until March 16, 2004, after overcoming several complications, including the development of a pneumothorax.

The defendants supported their summary judgment motion with an affirmation from Dr. Hearns Charles, who is board certified in Radiology with a Certificate of added qualifications in Vascular and Interventional Radiology. He stated that he performs thoracentesis procedures daily.

Dr. Charles used the plaintiffs' Bill of Particulars as a basis to provide his own contrary opinions. He first stated that in all respects, Dr. Kazam had performed within good and accepted medical practice. As to the individual claims, as stated in my earlier decision, Dr. Charles addressed them in the following way: first, an intercostal artery injury is a known complication of a thoracentesis; second, that before performing it, Dr. Kazam had obtained informed consent; third, that Dr, Kazam performed the procedure appropriately by using the trocar technique (this was not elaborated on); fourth, that the procedure can be performed in an office rather than in a hospital; fifth, that Lidocaine, a topical anesthesia, had been properly used for the skin for insertion of the needle; and sixth, that it was acceptable to perform the procedure despite the patient being on Plavix, which increases slightly the risk of bleeding.

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In the second (but first real) expert statement submitted by counsel for the plaintiffs in opposition, this physician states that he is board certified in Diagnostic Radiology and affiliated with a New Jersey hospital. He adds that he has performed thoracentesis procedures and is knowledgeable on the details of the procedure, as well as its risks and complications. He states that he has reviewed all of the relevant medical records, as well as the pleadings and deposition testimony of the relevant parties. Finally, he states that all of the opinions he offers are made with a reasonable degree of medical certainty.

He then opines that he sees four departures from accepted practice. They are first, the manner in which the procedure was performed, and in this regard, failing to properly identify and take precautions to avoid injuring any blood vessels. Here, he/she specifically takes issue with Dr. Kazam's description, in his deposition, as to how he proceeded. The expert says that putting an introducer needle surrounded by a catheter "between the ribs posterior, behind, along the back, is sufficient in and of itself to establish a departure from accepted standards of medical care" (¶5 of Affirmation). Instead, he/she argues that proper procedure required "the insertion of the introducer needle into the back so that it contacted the upper aspect of the rib at the target intercostal space; once the rib was contacted, the needle would then be guided just over the rib into the pleural space" (¶5).

Frankly, I must acknowledge here that this departure is not spelled out as clearly as I would want. Defense counsel makes this point much more vehemently. But the problem is that Dr. Charles' explanation, that the perforation is simply a risk of the procedure that does not demonstrate negligence, without more, also fails to give a satisfactory explanation of why the "risk" occurred here without any negligence on Dr. Kazam's part.

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The next departure is more clearly spelled out. It concerns monitoring the patient after the procedure. This physician points out that Mr. Arman was not prevented from leaving the defendants' office before Dr. Kazam performed a pre-discharge examination to assess any possible complications of this invasive procedure. Instead, the patient should have been kept in a designated patient area with "serial documentation of vital signs until such time as his condition could be assessed as stable" (¶6). Also, these defendants were required to perform a post-procedure chest X-ray and to monitor the patient's vital signs. According to the expert (¶6):

> the failure to properly safeguard Mr. Arman in the post-procedure phase directly led to him leaving the office without a proper medical evaluation and thus proximately contributed to his near exsanguination and the need for a life-saving emergency procedure and the attendant pain and suffering.

A third deviation was performing this procedure while Mr. Arman was on Plavix or anti-platelet therapy. The Plavix put the patient at a substantial risk for a major bleeding complication. Even Dr. Charles speaking for the defendants acknowledged that Plavix added a "slightly increased risk of potential bleeding". Finally, the expert opines that the defendants failed to document informed consent by not specifically advising Mr. Arman of his increased risk of a hemorrhage due to Plavix therapy.

In my earlier decision, though I felt that Dr. Charles' opinions were somewhat conclusory in nature, I also found that they succeeded in making out a prima facie case for these defendants. In opposition to this motion, defense counsel argue that the newly submitted opinions by plaintiffs' expert are conclusory and unsupported and that Plavix is not contraindicated. Counsel also ask for "reasonable costs" in light of the need to present additional arguments in new papers, an application I said I would consider.

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After reviewing the new statement by the New Jersey Radiologist, I find in the first instance that he is qualified to give opinions. As to the opinions themselves, I find that three of them succeed in creating factual issues requiring a trial. The first concerns the perforation of the artery itself; even though a further elaboration would have been welcomed, this criticism applies to both experts. However, clearly we know that the artery was injured during the thoracentesis on March 5, 2007 and that Mr. Arman almost died as a result. Risk of the procedure though it might have been, the plaintiffs' expert suggests that the way that Dr. Kazam used the first needle did not comport with standards of care and thereby caused the injury. A jury will undoubtedly hear more from both sides, and it is a jury that must decide this issue.

The failure to prevent the patient from leaving the office is a second legitimate issue. After he did leave, the delay that occurred until he received the emergency surgery almost ended his life. The fact that Mr. Arman made a unilateral decision to leave is not a sufficient rebuttal to this claimed departure. Arguably, Dr. Kazam had a responsibility to adequately explain to his patient the necessity of a post-procedure assessment so that the patient would understand and comply. There is nothing in this record to show that this was done by Dr. Kazam himself or by anyone on his staff.

With regard to Plavix, the defendants were in fact on notice of the alleged contraindication of it. Dr. Charles opined on it. Even though the fictitious expert did not bring this point up, since that document is a nullity, I see no prejudice to defendants to consider the issue as raised in the new expert statement. But I am not preserving informed consent as a claim. As pointed out by counsel, Mr. Arman had had multiple similar procedures, and there is no evidence to suggest he was not told about Plavix as an additional risk.

Finally, there is the issue of reasonable costs. While it is true that plaintiffs themselves did not commit the gross impropriety as was committed by their lawyer, he was presumably acting on their behalf. Further, defense counsel did have to do additional research and prepare further papers. They and their clients also were the victims of this hoax. Therefore, I am assessing plaintiff's counsel, the Ruta Partnership, the sum of $3000 payable to Dr. Kazam's counsel, Martin Clearwater & Bell, LLP, and $1800 to MDR's counsel, DeCorato, Cohen, Sheehan & Federico, LLP. The amount is calculated based on the submitted affirmations and on my own belief as to what is reasonable here.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to vacate counsel's default and the award of summary judgment against Manhattan Diagnostic Radiology, Inc. and Elias Kazam, M.D., as found in this Court's February 21, 2013 decision is granted; and it is further

ORDERED that the motions for summary judgment by Manhattan Diagnostic Radiology, Inc. and Elias Kazam, M.D., are granted to the extent of severing and dismissing the cause of action for lack of informed consent and are otherwise denied; and it is further

ORDERED that the defendants' request for costs is granted to the extent of directing the firm of Ruta Soulios & Stratis, LLP, to pay the sum of $3000 to Dr. Kazam's counsel, Martin Clearwater & Bell, LLP, and $1800 to MDR's counsel, DeCorato, Cohen, Sheehan & Federico, LLP; and it is further

ORDERED that all counsel shall appear for a pre-trial conference on Wednesday, July 17, 2013 at 11:30 a.m. prepared to select a trial date.

Dated: June 3, 2013

JUN 03 2013

FILED

JUN 13 2013

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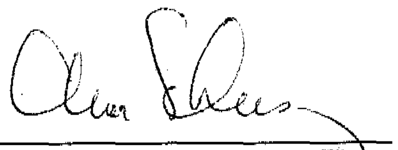

J.S.C.

ALICE SCHLESINGER