

<b>Feuerstein v Stifelman</b>
2015 NY Slip Op 31685(U)
August 31, 2015
Supreme Court, New York County
Docket Number: 805030/13
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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NEIL FEUERSTEIN and CHRISTINE FEUERSTEIN,

Plaintiffs, Index No. 805030/13  
Motion Seq. No.004

-against-

MICHAEL STIFELMAN, M.D., and  
NYU HOSPITAL a/k/a and d/b/a NYU LANGONE  
MEDICAL CENTER and/or NYU HOSPITALS CENTER,  
Defendants.

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SCHLESINGER, J.:

In the Fall of 2010, Neil Feuerstein, the plaintiff, learned that he had cancer of the prostate and was referred to Dr. Michael Stifelman, a neurologist and the main defendant in this case.<sup>1</sup> On November 15, 2010, Mr. Feuerstein, had an initial visit with Dr. Stifelman. The two had a “long discussion” (taken from the Doctor’s notes from that visit) and the defendant presented Mr. Feuerstein with various options as to the management of his cancer. Dr. Stifelman believed that mere active surveillance (*i.e.*, no actual intervention), was not a viable option. In other words, Dr. Stifelman felt that some kind of active treatment had to be selected.

The plaintiff indicated he wanted to discuss these options with his family and presumably did so. He then elected to have a robotic prostatectomy. This surgery,

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<sup>1</sup>NYU Hospital is also included as a defendant but no meaningful allegations of negligence have been pursued by plaintiff against that institution. Therefore, the action continues based exclusively on the treatment that Dr. Stifelman provided.

specifically a robotic assisted laparoscopic radical prostatectomy and bilateral pelvic dissection, was performed by the defendant on December 17, 2010.

In the course of his deposition, Dr. Stifelman explained precisely what he did during this procedure. For purposes of what ultimately occurred here, Dr. Stifelman amputated the bladder off the prostate to free up that organ. After that was done, he used Weck clips as well as electrocautery to seal off the bladder. According to Dr. Stifelman these clips were intended to permanently remain in Mr. Feuerstein's body where sutures were also placed.

The patient saw Dr. Stifelman for several post-operative visits. In the course of these, various tests were taken and issues involving the aftermath of the surgery were noted. Specifically, on December 28, 2010, a cystoscopy was done revealing that the urethra was within normal limits and the anastomosis was in tact. The bladder was also inspected and found to be normal. A new catheter was placed.

The next visit was on January 4, 2011. On that date, Dr. Stifelman found that Mr. Feuerstein had a small posterior anastomosis leak. However, on January 13, an ultrasound of the bladder showed no evidence of this leak. Additionally, there were no new complaints at that visit.

The final visit that Mr. Feuerstein had with Dr. Stifelman was on April 18, 2011. This was four months since his surgery. The plaintiff did have various complaints which concerned frequent loss of urine. However, according to Dr. Stifelman this was an expected consequence of the surgery. The doctor also noted on that date that

Mr. Feuerstein had a “very aggressive disease”. Therefore, he was placed on hormonal ablation and the plan was to have him undergo radiation therapy in the near future. Dr. Stifelman noted that Mr. Feuerstein’s progress was good and he would like to see him again in two months. However, as it turned out, and as noted above, the April 18 visit was the last visit between these two. In March 2012, the plaintiff was diagnosed with large B-cell lymphoma and he received chemotherapy until June 2012.

With regard to Mr. Feuerstein’s urinary issues, he consulted with a urologist, Dr. Troy Sukkarieh in September 2012. This doctor conducted a sonogram of the bladder which was normal. Believing that Mr. Feuerstein had a bladder neck contracture, he recommended a cystoscopy which revealed a large bladder stone. Again, treatment options were discussed with the plaintiff who chose to undergo a cystolitholapaxy, to break up this large stone. This procedure did accomplish the dissolution of the stone. However, a plastic clip in the bladder was found. It was grasped and removed by Dr. Sukkarieh.

The primary claim here that Mr. Feuerstein makes against Dr. Stifelman is that the doctor negligently left this surgical clip in his body during the prostatectomy and that this object in his bladder caused him injury. Before the Court now is a motion for summary judgment by Dr. Stifelman. In support of the defendant’s motion is an affidavit from a Dr. David Lee. He is an extremely well credentialed board certified Urologist, who is licensed to practice medicine in New Jersey and Pennsylvania. He

does minimally invasive surgery and states that he began performing robotic prostatectomies in 2002. Therefore, he approximates that he has done over 4,000 of these. He is now Chief of Urology at Pennsylvania Presbyterian Medical Center and Director of the Robotic Surgery Training Center at the University of Pennsylvania as well as Associate Professor of Urology in Surgery at the Perelman School of Medicine at the University of Pennsylvania. After reviewing all of the relevant medical records and legal papers in this case, he has formed opinions which state in essence that Dr. Stifelman in all ways met the prevailing standards of care in his treatment of the plaintiff. He also opines that nothing that Dr. Stifelman did or failed to do proximately caused injury to Mr. Feuerstein.

Dr. Lee proceeds in his affidavit to describe the kind of prostate cancer surgery that Mr. Feuerstein underwent. He explains that this procedure involves a cutting of various blood vessels in order to remove the prostate and adjacent structures which may be malignant. He further states that when blood vessels are cut, bleeding occurs. Of course, the bleeding must be controlled. In this regard, Dr. Lee says that a widely accepted practice is to use Weck Hem-O-Lock clips. These are V-shaped polymer clips that lock on to a vessel or tissue structure. These clips also prevent leakage of lymphatic fluid. (¶7)

Dr. Lee then goes on to say that the use of these Weck clips is "the best way to try to control bleeding during the surgery." (¶8) Further, since it is the best method, Dr. Lee also states that "it is the standard of care among surgeons who perform

Robotic Prostatectomies to use Weck clips to accomplish hemostasis and seal any leakage” (¶9). Dr. Lee then states that these clips were appropriately placed. Further, he agrees with Dr. Stifelman’s statement that these clips were intentionally left in Mr. Feuerstein’s body to make sure bleeding or leakage did not occur after the procedure was over. Therefore, he opines that leaving the clips behind was not a departure from the standard of care and the clip was not a “foreign object”.

However, when this clip was found in September 2012, it was found in Mr. Feuerstein’s bladder. Dr. Lee explains this by saying that “there is less than a 1% chance that they (the clips) will migrate to the bladder despite the adequacy of the surgical technique and choice of hardware.” He continues “migration of a Weck clip is a rare, but known risk of using the clip.” He also says, “That a surgical clip migrated to the bladder is not evidence of malpractice but rather it demonstrates the occurrence of a rare but known risk of using surgical clips. Therefore, the fact that the clip migrated was not the result of any departure from the standard of care.” (¶10)

Dr. Lee then discusses the aftercare provided by Dr. Stifelman during the four months post surgery. Here he opines that there was nothing that Dr. Stifelman did during these four months or anything that occurred during these four months which should have alerted him to any migration of the surgical clips. Rather, Dr. Lee states, in accordance with Dr. Stifelman’s opinion, the plaintiff presented with expected consequences of this kind of procedure.

Finally, Dr. Lee disputes the claim made by Mr. Feuerstein that any injuries he has suffered are the result of anything to do with the clip migrating to the bladder. Instead Dr. Lee points out that Mr. Feuerstein had significant urinary symptoms even before undergoing the procedure with Dr. Stifelman. He also points out that the plaintiff underwent radiation and hormone therapy after the procedure. These therapies he opines may also compromise the patient's urinary continence. Specifically, he notes that radiation does weaken tissue and could have worsened the plaintiff's urinary symptoms. He says the same thing with regard to the use of the hormone therapy, Eligard. (¶12) In conclusion, Dr. Lee urges the Court to dismiss the complaint against Dr. Stifelman because he says, "there is no merit to the allegations that have been made...." (¶13)

The issue now which the Court is presented with is does the defendant, with the aide of Dr. Lee's affidavit, make out a prima facie case entitling Dr. Stifelman to summary judgment in his favor. That is a particularly important question here because for reasons to be presently discussed, I am finding that the opposition, in the form of an affirmation from a Dr. Bruce Charash, fails to establish any valid issues of fact.

I am making this finding because of the credentials and experience which Dr. Charash presents or perhaps better, fails to present to the Court. Dr. Charash is a physician licensed to practice here in New York. He has completed a fellowship

in Cardiology at an esteemed institution, New York Hospital-Cornell Medical Center.<sup>2</sup> Dr. Charash also states that he has provided medical services in New York and Comprehensive Clinical Care, which include routine check-ups, preventions, diagnosis, treatment, patient education and follow-up services. He adds that he is “fully familiar with the standards of care in the context of this case because of my general knowledge of clinical practice” (¶2).

But as strenuously pointed out in defendant’s reply, he does not state that he possesses any specific training or experience which gives him the expertise to opine on the subject of urological surgery. Counsel for the defendant points to a number of cases in support of his position to discount Dr. Charash’s opinions, including one familiar to this Court, *Colwin v. Katz*, 122 AD23d 523 (1<sup>st</sup> Dept 2014). There the First Department rejected the opinion of a plaintiff’s expert. That action involved in part, a dermatologic condition. The Court therein said that that expert’s opinions “lacked probative value because the expert failed to profess the requisite personal knowledge on the issue of the existence of a deviation from the standard of care in the performance of liposuction, whether acquired through his practice or studies or on some other foundational basis.” (p.525). This finding by the First Department was made even though the Trial Court, this Court, stated that “significantly, he (the

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<sup>2</sup>Dr. Charash is personally known to this Court as he has appeared as a trial witness several times before me where he has given opinions as to cardiac procedures. I have found him to be an intelligent and competent witness.



expert) has treated patients with Lymphedema and other vascular medical conditions since the inception of his clinical practice at NYU beginning in 1998.” (Exh. A in reply papers) Here Dr. Charash does not even state that he has any experience dealing with male urological problems and certainly no experience involving surgery and radical prostatectomies.

But there are other problems with Dr. Charash’s affirmation as well. He draws conclusions and assumptions which have no real basis in the record. For example, he seems to say that Dr. Stifelman actually left the clip in Mr. Feuerstein’s bladder. But there is simply no support for that. Rather, pursuant to Dr. Lee’s statement, a migration of the clip occurred which is an extremely uncommon risk of the procedure. Further, Dr. Charash also speculates that this clip was an open clip. He bases this on a photograph taken during the September 2012 cystoscopy which he says he has seen. However, as noted by counsel in reply, nothing in the record indicates the existence of such a photograph.

But most significant to this Court is Dr. Charash’s lack of relevant training and experience in this highly specialized area, urological surgery. Dr. Charash, I believe is an extremely well qualified cardiologist. But that is not enough here, particularly since he fails to show any particularized expertise in urology sufficient to give opinions in this case. Therefore, I cannot accept Dr. Charash’s affirmation as providing meaningful opposition.

Additionally, Dr. Charash, if I were to accept his affirmation, opines as to only

one actual departure by Dr. Stifelman. That departure is one that concerns Dr. Stifelman's failure to inform Mr. Feuerstein of the possibility of the risk of a migrating clip. Here, he points to Dr. Lee's statement that the migration of a clip is a rare but known risk. Dr. Charash then opines that the defendant departed from good and accepted medical practice by not discussing this risk with the plaintiff. He then adds without any explanation that "had Mr. Feuerstein been made aware of this additional risk he would have pursued alternative treatments" (§11). But the problem here is, that no where does counsel for the plaintiff, either in the Complaint or the Bill of Particulars state a claim which sounds in lack of informed consent. So I must conclude, that that departure is a new theory, never before announced.

Finally, again without any documentation, Dr. Charash states "The retention of a Hem-O-Lok clip in a patient's bladder has been a documented cause of bladder neck contracture and urinary incontinence." Therefore he says, "to a reasonable degree of medical certainty the retention of the Hem-O-Lok clip in Mr. Feuerstein's bladder was a proximate cause of Mr. Feuerstein (sic) surgery to remove the clip and increased urinary incontinence." (§12). Not only is this opinion provided without any reference to an accepted medical document, it is also completely conclusory as it gives no explanation as to why and how this is the case. In fact, nowhere in the papers is it explained by counsel for the plaintiff or the plaintiff himself or Dr. Charash precisely the mechanism of injury here, resulting from the clip found in Mr. Feuerstein's bladder.

The moving defendant Dr. Stifelman is entitled to have this action dismissed against him. This is so because I find that Dr. Lee's affidavit, one from an extremely well credentialed urologist who specializes in robotic aided radical prostatectomies, does establish a prima facie case of no departures by the defendant. Since the submission of the affirmation from Dr. Charash is deficient in the ways already discussed, there is no meaningful opposition to this prima facie case. Therefore, I am granting the motion to dismiss the action. The dismissal is in favor of all of the named defendants since as I stated earlier in this decision, no meaning claims have ever been made vis-a-vis the defendant institution.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Michael Stifelman, M.D. and NYU Hospital a/k/a and d/b/a NYU Langone Medical Center and/or NYU Hospitals Center is granted, and thus plaintiff's complaint is dismissed with prejudice; it is further


ORDERED that the Clerk shall enter judgment in defendants' favor accordingly without costs or disbursements; it is further

ORDERED that counsel for defendants shall serve on plaintiff's counsel a copy of this order with notice of entry within 30 days of entry.

This constitutes the order of the Court.

Dated: August 31, 2015

**AUG 31 2015**

  
**ALICE SCHEESINGER**