Berkowitz v Dunsky
2018 NY Slip Op 31014(U)
May 22, 2018
Supreme Court, New York County
Docket Number: 805282/15
Judge: Martin Shulman

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

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MITCHELL BERKOWITZ and MARY BERKOWITZ,

Plaintiffs,

-against-

KEVIN DUNSKY, M.D. and THE MOUNT SINAI HOSPITAL,

Defendants.

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Index No. 805282/15

DECISION

In this action alleging medical malpractice, defendants Kevin Dunsky, M.D. (Dr. Dunsky) and The Mount Sinai Hospital (MSH) (collectively defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff Mitchell Berkowitz (plaintiff or Mr. Berkowitz), then fifty-one years old, first presented to cardiologist Dr. Dunsky on January 20, 2012 at his office at MSH with complaints of ongoing chest pressure. Dr. Dunsky ordered a stress transthoracic echocardiogram (TTE) which was performed on January 24, 2012 and revealed positive ischemia[1] at the left ventricle with mild pulmonary hypertension after exercise. Based upon these results, Dr. Dunsky ordered a diagnostic cardiac catheterization to evaluate the ischemia's severity.

Dr. Michael Kim, an interventional cardiologist, performed the catheterization on February 10, 2012 at MSH, which revealed 90 to 95 percent blockage at the left anterior descending artery (LAD) and 30 to 50 percent occlusion at the mid-LAD. As a result of

[1] Ischemia is a condition characterized by inadequate blood supply to an organ or part of the body, especially the heart muscle.

these findings Dr. Kim placed a drug-eluting stent at the proximal LAD. He recommended an initial loading dose of Effient 60 mg, a blood thinner, followed by a daily regimen of Effient 5 mg for a period of one year and aspirin 81 mg for life.[2] Mr. Berkowitz was to follow up with Dr. Dunsky in two to four weeks.

Plaintiff presented to Dr. Dunsky on March 1, 2012, at which time he concurred with Dr. Kim's plan to continue Effient and aspirin. Mr. Berkowitz next returned to Dr. Dunsky on February 28, 2013 to obtain pre-operative cardiac clearance for spinal surgery. At that time, Dr. Dunsky discontinued Effient as it had been a year since the stent placement and plaintiff was asymptomatic. Plaintiff underwent spinal surgery on March 6, 2013.

After his spinal surgery, plaintiff called Dr. Dunsky to ask if he could finish the remaining Effient he had which was left over from his pre-surgery prescription. Dr. Dunsky advised him it was safe to do so but medically unnecessary. Mr. Berkowitz took the Effient "sporadically" until the prescription ran out. He did not request another prescription because Dr. Dunsky had stated it was not necessary.

On November 16, 2013, Mr. Berkowitz presented to the emergency department at New York Hospital Queens (NYHQ) with complaints of severe chest pain radiating to the left arm. An emergent cardiac catheterization and mechanical thrombectomy showed an acute anterior wall myocardial infarction (i.e., a heart attack) and a partial thrombotic occlusion of the proximal LAD at the distal edge of the stent. The doctor at

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[2] According to plaintiff's expert, this regimen of prescribing aspirin plus a blood thinner such as Effient is known as dual antiplatelet therapy (DAPT) and is used to prevent blood clots.

NYHQ recommended Effient for a minimum of one year. Prior to his heart attack, it is unclear how long it had been since plaintiff stopped taking Effient.[3]

Mr. Berkowitz did not see Dr. Dunsky again. He presented to various cardiologists for follow up and testing from December 2013 through July 2014. At a February 2017 visit to Dr. David Goldstein, plaintiff was noted as having "no current symptoms" related to the November 2013 myocardial infarction.

Plaintiff and his wife, Mary Berkowitz, commenced this action on July 9, 2015 alleging causes of action for medical malpractice and a derivative claim for Mrs. Berkowitz. The sole claim of negligence against defendants relates to Dr. Dunsky's discontinuance of Effient on February 28, 2013, which allegedly caused the November 2013 myocardial infarction. Vicarious liability is alleged with respect to MSH.

EXPERTS' CONTENTIONS

In support of their motion for summary judgment dismissing the complaint, defendants argue that they did not depart from good and accepted standards of medical care in treating Mr. Berkowitz. They submit an expert affirmation from Robert Campagna, M.D. (Dr. Campagna), who is board certified in internal medicine and cardiology and has approximately 30 years of training and experience (Motion at Exh. A).

Dr. Campagna sets forth, with a reasonable degree of medical certainty, that defendants followed accepted standards in treating plaintiff and the alleged departures are not causally connected to the claimed injuries. He avers in relevant part that:

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[3] Mr. Berkowitz testified that he could not specifically recall when his prescription ran out but believed it was "a couple of months" prior to his heart attack.

- Dr. Dunsky's recommendation as to the dosage and duration of Effient following placement of a drug-eluting stent is fully supported by the 2012 American Heart Association (AHA)/American College of Cardiology (ACC) guidelines;[4]

- Dr. Dunsky appropriately discontinued Effient as Mr. Berkowitz had been asymptomatic and more than a year had elapsed since the stent placement;

- Dr. Dunsky appropriately weighed the risks and benefits of discontinuing Effient, having testified as to the risk of significant and potentially fatal bleeding such as in the event of head trauma; and

- the passage of months between discontinuing Effient and plaintiff's myocardial infarction demonstrates that stopping Effient was unrelated to the November 2013 infarction.

In opposition, Mr. Berkowitz submits an affirmation from a physician who states that he/she is board certified in internal medicine and cardiovascular disease and has practiced cardiology for more than 30 years. Plaintiff's expert physician disagrees with defendants' expert's opinions.

He/she explains that the proximal LAD supplies over half of the heart muscle with blood, thus a blockage of the LAD has a heightened likelihood of death as compared to blockages of other arteries. A known risk of drug-eluting stents is the development of clots on the stent, known as stent thrombosis, which can block the artery in which the stent is implanted and cause myocardial infarctions. DAPT helps to prevent such clots. Contrary to Dr. Campagna's averments, plaintiff's expert states that:

- patients with drug-eluting stents can develop stent thrombosis well beyond one year after implantation;

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[4] AHA/ACC guidelines relating to DAPT in the context of stent placement are attached to Dr. Campagna's affirmation.

- it was appropriate to discontinue DAPT temporarily to avoid bleeding issues during plaintiff's spinal surgery, but surgery and the recovery process cause increased coagulation[5] and it is generally accepted treatment of patients with drug-eluting stents to resume and continue DAPT after surgery to prevent thrombosis;

- given the location of plaintiff's stent in his proximal LAD, discontinuing Effient increased the risk of myocardial infarction and death, and the risk of stent thrombosis far outweighed any risk of bleeding issues;

- the risk of continuing Effient was negligible as plaintiff was responding well to it and lacked any bleeding problems or disorders;

- defendants' argument that discontinuing Effient did not cause plaintiff's heart attack, as evidenced by the time frame between the drug's discontinuance and plaintiff's heart attack, is incorrect, as the infarction occurred only a few months after plaintiff stopped taking it; and

- discontinuing Effient was a substantial factor in causing Mr. Berkowitz's heart attack.

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

[5] Plaintiff's expert states that increased coagulation after surgery is the result of the surgery's effect on a patient's health, stress, adrenaline and inflammation.

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*.

A. Medical Malpractice

"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, neither party challenges the qualifications of the other's expert. The record reveals that both experts have cardiology backgrounds of approximately 30 years. Both experts based their opinions on their review of Mr. Berkowitz's medical records, the pleadings and the deposition transcripts herein. Therefore, it appears that both the parties' experts are qualified to provide expert 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 . . .").

Characterizing Dr. Campagna's affirmation as conclusory and speculative, plaintiffs dispute that defendants established their prima facie showing of entitlement to judgment as a matter of law. On certain points this court agrees. For instance, Dr. Campagna states that the cited AHA/ACC guidelines "unequivocally recommend that Effient may be discontinued at any point in time after one year status-post stent placement." However, they are merely guidelines, indicating in their preamble that they:

> are intended to assist healthcare providers in clinical decision making by describing a range of generally acceptable approaches to the diagnosis, management, and prevention of specific diseases or conditions. The guidelines attempt to define practices that meet the needs of most patients in most circumstances. The ultimate judgment about care of a particular patient must be made by the healthcare provider and patient in light of all the circumstances presented by that patient.

See *Diaz v New York Downtown Hosp.*, 99 NY2d 542 (2002) (rejecting plaintiff's expert's use of clinical practice guidelines to prove an accepted practice where the authoring body explicitly states that such guidelines are not rules and the expert failed to allege a factual basis for relying upon them).

Moreover, as presented and referenced in Dr. Campagna's affirmation, the guidelines are being offered on this motion for the truth of the matters asserted therein. As plaintiffs note, the guidelines are inadmissible hearsay and are insufficient to establish entitlement to summary judgment. See *Hinlicky v Dreyfuss*, 6 NY3d 636, 647 (2006) (algorithm contained in medical guidelines was admissible because it was not admitted to establish a standard of care, but because the testifying physician relied on it to explain his evaluation process);

This court also agrees that Dr. Campagna's opinion that no causation can be established based upon the passage of time between discontinuing Effient and Mr. Berkowitz's heart attack is conclusory and unsupported. In any event, as previously stated, it is unclear how long that time period was.

Nonetheless, defendants do establish a prima facie case on one ground. Specifically, Dr. Campagna's opinion that Dr. Dunsky appropriately weighed the risks and benefits of discontinuing Effient is sufficiently supported by Dr. Dunsky's testimony and the medical records that indicate that plaintiff was asymptomatic as of February 28,

2013, the bleeding risks involved in continuing Effient were significant, and in Dr. Dunsky's opinion outweighed any benefits of continued therapy.

Having thus established a prima facie case, the burden shifts to plaintiffs to establish an issue of fact requiring trial. Plaintiffs have met that burden by establishing that a question of fact exists as to whether defendants departed from accepted medical practice. Contrary to Dr. Campagna's opinion, plaintiffs' expert opines that the benefits of continuing DAPT outweighed the risks. Plaintiffs' expert supports this conclusion by citing certain risks Mr. Berkowitz faced, specifically increased risks of coagulation due to the effects of his spinal surgery and increased risks attendant to the stent's location in the proximal LAD.

Thus, an issue of fact exists as to whether the life saving benefits of continuing Effient for the purpose of preventing stent thrombosis outweighed any potential risks for bleeding. A fact finder must thus determine whether Dr. Dunsky, and his employer MSH, deviated from accepted standards of medical care.

B. Derivative Claim

Finally, as summary judgment has been denied as to the medical malpractice cause of action, Mrs. Berkowitz's derivative cause of action is similarly not subject to dismissal.

For all of the foregoing reasons it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

Counsel for the parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on June 19, 2018 at 9:30 a.m.

In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing is this court's decision and order.

Dated: New York, New York
May 22, 2018

Hon. Martin Shulman, J.S.C.