Jain v Eachempati
2018 NY Slip Op 31740(U)
July 20, 2018
Supreme Court, New York County
Docket Number: 805330/15
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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MOHIT JAIN and NAINA JAIN,

Plaintiffs,

-against-

SOUMITRA EACHEMPATI, M.D., NEW YORK PRESBYTERIAN HOSPITAL, STEVE K. LEE, M.D., And THE HOSPITAL FOR SPECIAL SURGERY,

Defendants.

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Index 805330/15
Motion Seq. 001

DECISION & ORDER

GEORGE J. SILVER, J.S.C.:

In this medical malpractice action, defendants STEVE K. LEE, M.D. ("Dr. Lee"), and the HOSPITAL FOR SPECIAL SURGERY ("HSS" collectively "defendants") move for summary judgment[1]. Plaintiffs MOHIT JAIN (individually "plaintiff") and NAINA JAIN ("Mrs. Jain" collectively "plaintiffs") oppose the motion. For the reasons discussed below, the court grants the motion.

In 2008, plaintiff was diagnosed with a lipoma, a benign fatty tumor, in the back of his right thigh. During the spring and summer of 2013, the lipoma enlarged. In June 2013, an MRI revealed that the tumor was 23 cm x 15 cm x 7 cm. Plaintiff consulted Dr. Soumitra Eachempati ("Dr. Eachempati") on August 14, 2013 for management of the tumor, and Dr. Eachempati recommended surgery to remove the tumor. On August 23, 2013, Dr. Eachempati operated on plaintiff at the New York Presbyterian Hospital ("NYPH"). After the procedure, plaintiff complained of numbness and a total inability to move his right foot in any direction. An MRI on August 24, 2013 revealed "nonvisualization of the sciatic nerve in the region of hematoma in the

[1] Plaintiffs also alleged a cause of action for negligent hiring/credentialing against New York Presbyterian Hospital only. Because this claim was not addressed in defendants' motion, the court does not address or resolve this issue.

mid thigh consistent with sciatic nerve transection." Dr. Eachempati consulted Dr. Lee at HSS to evaluate plaintiff's condition, and plaintiff was transferred to HSS for further treatment.

The following day, August 25, 2013, Dr. Lee performed a right posterior thigh irrigation and debridement, a hematoma evacuation, and a neuroplasty of the sciatic nerve. While performing exploratory surgery, Dr. Lee found that plaintiff's sciatic nerve had been completely transected, leaving a 10-cm gap between the proximal and distal ends. Dr. Lee noted that plaintiff would require nerve reconstruction surgery, but recommended postponing the procedure until pathology definitively ruled out any malignancy of plaintiff's tumor. According to Dr. Lee, if the tumor was benign, he would proceed with the reconstruction surgery, but if the tumor was malignant, he would refer plaintiff for appropriate treatment.

On August 29, 2013, Dr. Lee saw plaintiff as an out-patient for a post-operative follow-up. Plaintiff's wound was healing with no signs of infection, and Dr. Lee was waiting for the pathology results from NYPH. Dr. Lee was sent the lipoma specimen to the Memorial Sloan Kettering pathology department for a second opinion. On September 3, 2013, NYPH pathology report revealed that plaintiff's tumor was a benign hibernoma, and Dr. Lee scheduled a nerve reconstruction surgery for September 18, 2013. On September 6, 2013, Memorial Sloan Kettering issued a pathology report which confirmed that plaintiff's tumor was a benign hibernoma.

On September 10, 2013, Dr. Lee informed plaintiff that the pathology results were negative for malignancy, and that plaintiff could undergo the right sciatic nerve reconstruction surgery using bilateral sural nerve grafts and allograft if necessary. On September 18, 2013, Dr. Lee performed the surgery. Dr. Lee saw plaintiff several times post-operatively.

On March 31, 2014, Dr. Lee noted that plaintiff "has not had any foot pain that he had prior with the nerve problem. He feels some feeling coming back in his foot, however, very minimally.

He does not have any motion yet." Nerve conduction studies performed on June 27, 2014 and January 19, 2015 revealed no evidence of axonal regeneration. Plaintiff alleges that he has not regained any motor function in his right foot.

ARGUMENT

Based on the record before the court, defendants argue that summary judgment must be granted, because plaintiffs cannot establish that defendants' medical treatment of plaintiff deviated from accepted standards of care or proximately caused plaintiff's alleged injuries.

Defendants assert that Dr. Lee treated plaintiff in full conformance with the applicable standard of care, and that plaintiffs' sole claim of malpractice against defendants is that Dr. Lee "delayed" in performing plaintiff's nerve reconstruction surgery. Defendants contend that plaintiffs did not allege any departure from the standard of care in the manner or technique that Dr. Lee employed during the surgery, that the surgery was unnecessary, or that any aspect of the procedure was performed incorrectly.

Defendants argue that neither Dr. Lee nor HSS caused injury to plaintiff's sciatic nerve and cannot be held responsible for plaintiff's sciatic nerve transection or its sequelae. Defendants point out that plaintiff presented to Dr. Lee with a transected sciatic nerve, no sensation in his right lower extremity, and a total inability to move his right foot in any direction. Defendants also highlight that Dr. Eachempati conceded that he transected plaintiff's sciatic nerve while performing plaintiff's August 23, 2013 surgery to excise the lipoma/hibernoma, and that Dr. Lee was not present for and did not participate in this surgery. Defendants further note that Dr. Lee had no physician-patient relationship with plaintiff when Dr. Eachempati operated on him on August 23, 2013. Defendants further assert that the transection of plaintiff's sciatic nerve is the sole cause of his foot drop, as well as his other alleged neurological injuries and their sequelae.

Defendants also argue that the 24 days between plaintiff's first presentation to Dr. Lee and his nerve reconstruction surgery did not affect plaintiff's outcome or prognosis, and therefore, no causal connection exists between defendants' alleged departure and plaintiffs' alleged injuries. In support of their motion, defendants annex the affirmation of Dr. Jonathan Isaacs ("Dr. Isaacs"), a board-certified physician in orthopedic surgery. Dr. Isaacs opines that plaintiff was already afflicted with sciatic nerve palsy and had no sensation or mobility in his right foot when he first met Dr. Lee. According to Dr. Isaacs, plaintiff's clinical presentation combined with the NYPH MRI on August 24, 2013 were highly suspicious for a transection (i.e. severing) of the sciatic nerve. Dr. Isaacs explains that the sciatic nerve connects the spinal cord with the outside of the thigh, the hamstring muscles, and the muscles in the lower leg and feet, and that sciatic nerve damage can lead to muscle weakness, including a foot drop, and/or numbness or tingling in the leg, ankle, foot and toes. In that regard, Dr. Isaacs clarifies that the only method for obtaining a definitive diagnosis of plaintiff's motor and sensory impairment was the performance of exploratory surgery, and that treatment could not be recommended or provided until the cause of plaintiff's symptoms was identified.

Dr. Isaacs also opines that due to the severity of plaintiff's injury, namely, the complete transection of a large portion of the nerve, plaintiff was not a candidate for primary repair of the nerve. Dr. Isaacs observes that the distance between the proximal and distal ends of the nerve was too great for an end-to-end repair, and that the only chance to restore any sensation and/or function to plaintiff's right foot was to perform nerve reconstruction surgery through nerve grafting[2]. According to Dr. Isaacs, although it was possible for Dr. Lee to perform the nerve reconstruction surgery on August 25, 2013, Dr. Lee acted in accordance with good and accepted practice by

[2] Nerve grafting is a surgical technique in which segments of unrelated nerves are used to bridge a gap between the proximal and distal ends of a nerve.

recommending that the surgery be postponed until receipt of a final and definitive pathology result from the excised tumor since it is important to know whether the excised tumor was benign or malignant before performing the surgery. Dr. Isaacs further remarks that if the reconstruction surgery was done before the pathology results were available and the tumor turned out to be malignant, then treatment for the cancer would require the nerve grafting to be dismantled.

In Dr. Isaacs' opinion, Dr. Lee performed the nerve reconstruction surgery in a timely manner, and the passage of 24 days between Dr. Lee's discovery of the nerve transection and the date of the repair had no adverse impact on plaintiff's prognosis, outcome, or recovery. According to Dr. Isaacs, when plaintiff's sciatic nerve was transected, the limb below the transection stopped communicating with the brain, and plaintiff lost sensation in his right lower extremity and the ability to move his right foot because the disconnected nerve was unable to send or receive the necessary signals to and from plaintiff's skin and muscles. Dr. Isaacs explains that in a case like this, where there has been a complete separation of the nerve, surgery is required to achieve recovery, and full recovery to pre-transection status is not possible. Dr. Isaacs further remarks that because the rate of nerve regeneration does not change and is not dependent on the timing of the surgery, the alleged "delay" in performing the surgery did not and could not have deprived plaintiff of a chance for a better recovery. Dr. Isaacs concludes that plaintiff had the same chance to achieve the surgical objectives of decreasing his neuropathic pain, increasing his sensation, and increasing his motor function even if Dr. Lee had performed the nerve grafting surgery within hours of when his nerve was severed as he had when Dr. Lee performed the nerve reconstruction surgery 26 days later.

Dr. Isaacs further asserts that timing of the surgical repair is only one of several factors that affects a patient's prognosis, outcome, and capacity to recover following nerve injury. Dr. Isaacs

enumerates the other factors include age, the location of the injury, and the extent of the injury. Taking these factors into account, Dr. Isaacs notes that plaintiff was 41 years old when his sciatic nerve was severed and his injury was quite severe, namely, his sciatic nerve was completely transected leaving a large gap between the proximal and distal ends of the nerve. Dr. Isaacs concludes that this factor alone significantly diminished plaintiff's chance for recovery regardless of when the reconstruction surgery was performed. Defendants further contend that there was no chance for plaintiff to make a full recovery from the transection of his sciatic nerve, and that plaintiff's loss of 10 cm of his sciatic nerve greatly diminished his chance for even a partial recovery of sensation in his right lower extremity, let alone the possibility of regaining motor function of his right foot. Dr. Isaacs explains that the more proximal (higher up or further away) the nerve injury is from the affected muscles, the worse the prognosis will be for recovery, and notes that plaintiff's sciatic nerve was severed high up in his thigh, proximal to the affected muscles in and around his calf which control the movement of his ankle and foot. Defendants explain that plaintiff would not have regained any additional sensation or any additional motor function even if Dr. Lee had performed the nerve reconstruction surgery on August 25, 2013 or any other date before September 18, 2013.

Moreover, Dr. Isaacs remarks that over time, the ability of denervated muscle to recover decreases, and eventually the injury becomes irreversible. Dr. Isaacs notes that, "In order for [plaintiff] to regain motor function in his right ankle/foot, he needed axonal regeneration from the most proximal end of his transected sciatic nerve to the substance of the muscle belly of the muscles in his calf," and because plaintiff is 5'10'' tall, he would have needed approximately 30-40 cm of axonal regeneration to cover the required distance. Dr. Isaacs further observes that with a regeneration rate of 1 mm per day, the necessary growth would take approximately 300-400

days, and "Assuming the longest distance of 40 cm and the longest time of 400 days, even with a delay' of 24 days in performing the surgery, plaintiff still had several more months before his loss of motor function would be considered irreversible." Accordingly, Dr. Isaacs concludes that the 24-day "delay" between August 25, 2013 and September 18, 2013 made no difference in plaintiff's recovery, and that it is grossly speculative for plaintiffs to suggest that it had any impact on plaintiff's outcome.

In addition, defendants argue that plaintiffs' lack of informed consent claim with respect to plaintiff's exploratory surgery on August 25, 2013 must be dismissed since plaintiff was fully apprised of the risks, benefits, and alternatives to the surgery, plaintiff executed consent forms acknowledging and accepting those risks, and no reasonably prudent person in plaintiff's position would have declined the surgery. Defendants point out that Dr. Lee's August 25, 2013 operative report indicates that Dr. Lee had a "full discussion with the patient . . . [and that he] discussed all the alternatives, risks and benefits. The alternatives of non operative treatment were discussed . . . The potential risks include, but are not limited to, infection, nerve or artery damage, anesthesia risks, wound healing problems, and the need for further surgery. [Plaintiff] understood and wished to proceed." Dr. Isaacs also opines that no reasonably prudent person with plaintiff's condition would have refused the exploratory surgery. According to Dr. Isaacs, there was no viable alternative to reach a definitive diagnosis of plaintiff's sciatic nerve palsy since the August 23, 2013 CT scan was neither informative nor diagnostic for the cause of plaintiff's sciatic nerve palsy and the August 24, 2013 MRI raised a strong suspicion of a transected sciatic nerve. Defendants also contend that plaintiffs' lack of informed consent claim with respect to plaintiff's September 18, 2013 nerve reconstruction surgery must be dismissed since plaintiff executed Surgical Authorization document on September 3, 2013, demonstrating unequivocally, that he was fully

informed of, understood, and accepted the risks associated with the nerve reconstruction surgery, including the risk that the surgery might not be successful. According to Dr. Isaacs, Dr. Lee provided plaintiff with sufficient information concerning the risks, benefits, and alternatives to the surgery, and properly obtained his informed consent.

Similarly, defendants argue that Mrs. Jain's claim for damages for loss of services and consequences to the marital relationship must be dismissed. Specifically, defendants contend that to the extent that plaintiff's individual claims against defendants for medical malpractice and lack of informed consent are dismissed, Mrs. Jain's claims must likewise fail since her cause of action is strictly derivative of plaintiff's claims.

Lastly, defendants argue that plaintiffs' cause of action for negligent credentialing and vicarious liability must be dismissed since Dr. Lee was employed by HSS, treated plaintiff during the course of his employment, and acted within the scope of his employment in treating plaintiff. Defendants also assert that plaintiffs cannot simultaneously maintain a cause of action against HSS based on vicarious liability for its personnel and a cause of action directly against HSS for negligent hiring, retention, credentialing, and supervision. Defendants further proffer that because Dr. Lee is entitled to summary judgment, plaintiffs' claim against HSS based on a theory of respondeat superior for Dr. Lee's alleged transgressions must similarly be dismissed.

Plaintiffs failed to oppose defendants' motion for summary judgment.

DISCUSSION

To prevail on summary judgment in a medical malpractice case, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept.

2010]). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g.*, *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts in the record or personally known to the expert (*Roques*, 73 AD3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once defendant makes a *prima facie* showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (*see Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Here, defendants set forth a *prima facie* case in favor of dismissal, as evidenced by the submission of defendants' medical records, and defendants' expert affidavit, both of which attest to the fact that defendants' treatment of plaintiff was in accordance with accepted standards of care and did not proximately cause plaintiff's alleged injuries. To be sure, defendants' expert affirmation is detailed and predicated upon ample evidence within the record. As defendants have made a *prima facie* showing, the burden shifts to plaintiffs.

Because plaintiffs failed to oppose defendants' *prima facie* showing, plaintiffs have not raised any triable issues of fact (*Lally v. New York City Health & Hosps. Corp.*, 277 A.D.2d 9, 9–10 [1st Dept. 2000] [granting defendants' motion for summary judgment dismissing the complaint where plaintiff did not oppose defendants' motion]; *see also Total Equip., LLC v. Praetorian Ins. Co.*, 34 Misc. 3d 141(A) [App. Term 2012] [granting defendant's motion for summary judgment dismissing the complaint since plaintiff did not submit papers opposing defendant's motion]; *Lawrence v. Albany Cty. Dep't for Children, Youth & Families,* 61 A.D.3d 1126, 1127 [3d Dept. 2009] [trial court properly granted defendant summary judgment where plaintiffs did not oppose defendants' motion which set forth multiple grounds for dismissal as matter of law]; *Ajlouny v. Town of Huntington*, 184 A.D.2d 486, 487 [2d Dept. 1992] [same]; *Davey v. Ohler*, 188 A.D.2d 726, 727 [3d Dept. 1992] [same]. Accordingly, summary judgment must be granted in defendants' favor.

Specifically, because plaintiff failed to submit opposition, plaintiffs cannot rebut defendants' assertions that defendants treated plaintiff in conformance with the applicable standard of care and did not proximately cause plaintiff's alleged injuries. Plaintiffs have not alleged what the appropriate standard of care should have been, or the manner in which defendants departed from that standard. Moreover, plaintiffs did not challenge defendants' assertion that the 24 days between plaintiff's first presentation to Dr. Lee and his nerve reconstruction surgery did not affect plaintiff's prognosis, outcome, or recovery, and that no causal connection exists between defendants' alleged departure and plaintiffs' alleged injuries. In contrast, defendants set forth undisputed evidence that Dr. Lee performed the nerve reconstruction surgery in a timely manner, and that the 24-day "delay" had no adverse impact on plaintiff's outcome or prognosis since plaintiff was 41 years old when his sciatic nerve was severed, plaintiff's injury was quite severe,

and the locations of the severed sciatic nerve was high up in plaintiff's thigh. Plaintiffs also failed to dispute Dr. Isaacs opinions that the only method for obtaining a definitive diagnosis of plaintiff's motor and sensory impairment was through exploratory surgery, and that treatment could not be recommended or provided until the cause of plaintiff's symptoms was identified. To that end, plaintiffs also failed rebut Dr. Isaacs' opinion that Dr. Lee acted in accordance with good and accepted practice by recommending that plaintiff's surgery be postponed until receipt of a final and definitive pathology result from the excised tumor to know whether the excised tumor was benign or malignant before performing the surgery. Based on plaintiffs' failure to refute or challenge defendants' assertions, there are no triable issues of fact here sufficient to defeat summary judgment.

Furthermore, plaintiffs failed to proffer any evidence to rebut defendants' assertion that defendants obtained plaintiff's informed consent for the surgical procedures. In contrast, defendants submit ample evidence that plaintiff was fully apprised of the risks, benefits, and alternatives of the procedures, that plaintiff executed consent forms acknowledging and accepting those risks and further, and that no reasonably prudent person in plaintiff's position would have declined the surgery. Significantly, the *coup de grâce* of plaintiffs' collective claim comes from plaintiff's execution of a Surgical Authorization document on September 3, 2013, demonstrating unequivocally, that he was fully informed of, understood and accepted the risks associated with the nerve reconstruction surgery, including the risk that the surgery might not be successful (*Orphan v. Pilnik*, 66 A.D.3d 543, 544 [1st Dept. 2010] [motion court correctly granted defendant summary judgment dismissing the complaint where plaintiff signed a consent form after being informed of the surgical procedure and the alternatives, as well as the reasonably foreseeable risks

and benefits]). Because plaintiff failed to address or rebut these assertions, plaintiffs' lack of informed consent claim must be dismissed.

Similarly, since plaintiffs failed to submit opposition, plaintiffs cannot raise a triable issue of fact as to Mrs. Jain's claims for loss of services and consequences to the marital relationship. Moreover, because defendants are entitled to summary judgment on plaintiff's medical malpractice and lack of informed consent claims, and because Mrs. Jain's claims are derivative of plaintiff's claims, Mrs. Jain's claims must also be dismissed (*Cabri v. Park*, 260 A.D.2d 525, 526 [2d Dept. 1999] ["Because the first cause of action, which seeks damages on behalf of the injured plaintiff, must be dismissed, the second cause of action, which is a derivative cause of action on behalf of the injured plaintiff's wife, must also be dismissed."]; *Hazel v. Montefiore Med. Ctr.*, 243 A.D.2d 344, 345 [1st Dept. 1997] [cause of action for loss of consortium was properly dismissed since it is derivative of the other claims; *Clarke v. Mikail*, 238 A.D.2d 538, 539 [2d Dept. 1997] [same]).

Finally, defendants are entitled to summary judgment as to plaintiffs' negligent hiring claim since plaintiffs failed to submit opposition. "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer" (*Karoon v. New York City Transit Auth.*, 241 A.D.2d 323, 324 [1st Dept. 1997] [granting defendants summary judgment dismissing plaintiff's negligent hiring, retention, and training claims]). Because Dr. Lee is entitled to summary judgment as previously indicated, and because defendants have sufficiently established that Dr. Lee was employed by HSS, treated plaintiff during the course of his employment, and acted within

the scope of his employment, plaintiffs' cause of action against HSS based on a theory of respondeat superior must similarly be dismissed.

Accordingly, based on the foregoing, it is hereby ORDERED that defendants' motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED that the caption is amended as follows:

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

MOHIT JAIN and NAINA JAIN, Index No. 805330/15

Plaintiffs,

-against-

SOUMITRA EACHEMPATI, M.D. and NEW YORK PRESBYTERIAN HOSPITAL,

Defendants.

; and it is further

ORDERED that the remaining parties are directed to appear for a pre-trial conference on August 21, 2018 at 111 Centre Street, New York, NY 10013.; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

July 20, 2018

George J. Silver

HON. GEORGE J. SILVER