Sageman v Kennedy
2018 NY Slip Op 32965(U)
November 16, 2018
Supreme Court, New York County
Docket Number: 805192/2016
Judge: George J. Silver

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

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SHARON SAGEMAN,

Index №.805192/2016
Motion Seq. №. 001

DECISION & ORDER

Plaintiff,

-against-

DR. JOHN KENNEDY AND THE HOSPITAL FOR SPECIAL SURGERY

Defendants

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

In this medical malpractice action, defendants JOHN G. KENNEDY, M.D. ("Dr. Kennedy") and HOSPTAL FOR SPECIAL SURGERY ("HSS," collectively "defendants") move for summary judgment. Plaintiff SHARON SAGEMAN ("plaintiff") opposes the motion. For the reasons below, the court denies the motion.

This action stems from a surgery to correct plaintiff's right hallux valgus (bunion), second hammertoe, and metatarsalgia performed by Dr. Kennedy at HSS on June 4, 2014. Plaintiff alleges that this surgery was improper and resulted in delayed healing of her surgical wound, and the subsequent destruction of her first metatarsophalangeal ("MTP") joint. Indeed, plaintiff alleges

that Dr. Kennedy negligently performed a cheilectomy, or removal of bone spurs from the base of her right big toe, for a hallux rigidus that was not adequately explained to her prior to the surgery. Plaintiff further alleges that Dr. Kennedy should have performed a Wilson osteotomy, a surgical operation whereby a bone is cut to change its alignment, as opposed to a Scarf osteotomy (which describes the shape of the bone cut), to address her hallux valgus. Plaintiff also alleges that Dr. Kennedy's post-operative instructions regarding her weight bearing status were "overly aggressive," which delayed healing of her operative wound and caused her to develop pain in her right foot. In her bills of particulars, plaintiff does not make specific allegations of negligence as to HSS.

ARGUMENTS

Based on the record submitted in connection with this motion, defendants argue that summary judgment in their favor must be granted, because plaintiff cannot establish that defendants' medical treatment deviated from accepted standards of care or that this treatment proximately caused plaintiff's alleged injuries.

In support of their motion, defendants annex the affirmation of Christopher P. Chiodo, M.D. ("Dr. Chiodo"), a board-certified orthopedic surgeon. Dr. Chiodo opines that Dr. Kennedy recommended the proper procedures to address plaintiff's symptoms including a Scarf osteotomy, Akin osteotomy and Modified McBride, based upon plaintiff's complaints, clinical presentation, and radiographic studies. In addition, Dr. Chiodo opines that Dr. Kennedy employed an excellent technique and properly performed a Scarf osteotomy of the first metatarsal and an Akin osteotomy of the proximal phalanx on June 4, 2014 in a manner that was well within the standard of care. Dr. Chiodo also opines to a reasonable degree of medical certainty that plaintiff's alleged current

symptoms have no causal relationship to negligence during the surgery performed on June 4, 2014 or negligence during the defendants' post-operative care.

Dr. Chiodo harangues that Dr. Kennedy's choice to perform a Scarf osteotomy to address plaintiff's hallux valgus was within the standard of care. In fact, Dr. Chiodo states that a Scarf osteotomy is a common procedure used to address patients like plaintiff who have a malalignment of the foot including a hallux valgus deformity and related pain under the second metatarsal head. Dr. Chiodo further avers that this procedure is performed because it allows for multi-plane correction of a multi-plane deformity.

Dr. Chiodo goes on to assert that he believes plaintiff's allegation that she should have had a Wilson osteotomy instead of a Scarf osteotomy is without merit. Dr. Chiodo affirms that a Wilson osteotomy is used less often and is a less versatile procedure than the Scarf procedure used by Dr. Kennedy. Further, a Wilson osteotomy would not allow for multi-plane correction. Dr. Chiodo conclusively affirms that a Scarf osteotomy was an appropriate procedure given the plaintiffs pre-operative diagnosis, and that Dr. Kennedy's decision to perform a Scarf osteotomy was within the standard of care.

Further, Dr. Chiodo states that plaintiff's medical records demonstrate that Dr. Kennedy performed the June 4, 2014 surgery without complication and achieved excellent post-operative alignment of the first ray and second toe. Notably, by her own testimony, defendants state that plaintiff has conceded that the alignment of her big toe was "never an issue. Thus, defendants argue that there is no question that Dr. Kennedy performed an uncomplicated successful surgery to correct plaintiff's bunion and hammertoe deformities.

Dr. Chiodo further states that Dr. Kennedy did not perform a true cheilectomy on plaintiff, since Dr. Kennedy testified that he removed only one to two millimeters of bone from the top of

plaintiff's first metatarsal rather than a standard 25 to 30% removal of the metatarsal head. Accordingly, defendants argue that Dr. Kennedy did not negligently perform a cheilectomy, and that no consent was required since the procedure was not performed in a standard sense. Defendants further highlight Dr. Kennedy's testimony that the removal of a bone spur is often an intra-operative decision made at the surgeon's discretion depending on whether the surgeon finds that the bone spur would impede a patient's normal motion. Here, Dr. Chiodo agrees and opines that Dr. Kennedy properly used his discretion in removing one to two millimeters of bone from the top of the metatarsal to promote better movement of plaintiff's first phalanx. Dr. Chiodo concludes that Dr. Kennedy's intra-operative decision to shave off a small bone spur was wholly within the standard of cheilectomy.

Finally, Dr. Chiodo' s opines that defendants' post-operative treatment of plaintiff was proper and within the requisite standard of care. For instance, Dr. Chiodo affirms that it was proper to permit plaintiff to bear limited weight on her right foot, and that plaintiff's wound was properly dressed following surgery. To the extent that plaintiff's wound did not heal as anticipated, defendants state that plaintiff bears responsibility since she took a medication known to delay wound healing without consulting a physician.

Based on the foregoing, defendants state that they are entitled to judgment in their favor.

In opposition, plaintiff states that contrary to Dr. Kennedy's assertions, her cheilectomy procedure was unwarranted. Plaintiff further states that defendants' post-operative care was deficient and caused a delay in her healing process. Plaintiff also argues that Dr. Kennedy was required to obtain her consent for the cheilectomy procedure, but neglected to do so. Such conduct,

plaintiff argues, was in contravention of the appropriate standard of care. Plaintiff's arguments are reinforced by the affirmation of a board-certified physician[1] who opines as follows:

> It is my opinion with a reasonable degree of professional certainty that defendant departed from good and accepted practice in his surgery' of June 4, 2014 by performing a cheilectomy instead of the surgery he agreed to do, with a direct and proximate result that he, (a) caused unnecessary destruction of the metatarsalphalangeal joint, first toe, and (b) caused plaintiff to have hallux rigidus, leading to chronic pain and difficulty standing.

The physician further adds:

> In my opinion a Wilson procedure in conjunction with an Akin procedure would have been the proper and accepted procedure for Dr. Sageman's condition. The cheilectomy was an unnecessary procedure which was in my opinion was one of the proximate causes of Dr. Sageman's resulting hallux rigidus.

The physician then addresses the issue of informed consent as follows:

> In addition the informed consent which plaintiff signed listed right foot correction hammer toe 2nd phalanx, extensor lengthening, plantar chondylectomy, osteotomy metatarsal, Scarf osteotomy, Akin osteotomy, modified McBride, and did not list a cheilectomy . Cheilectomy is used to address a dorsal exostosis indicated on the pre-operative X-rays. There was no dorsal exotosis present in the pre-operative x rays and no indication for a cheilectomy.
>
> According to the records plaintiff was never given any information concerning a cheilectomy procedure and did not consent to such a procedure. Plaintiff did not give any informed consent to such a procedure. Plaintiff sustained a very significant injury directly to her first toe as a result of her having surgery to which she did not consent, and which she did not need. As a result, plaintiff sustained severe injury causing her chronic pain.

Plaintiff's expert also attacks Dr. Chiodo's affirmation, stating that "Dr. Chiodo neglected to address the fact that Dr. Kennedy performed an operation termed 'repair hallux rigidus' for a

[1] Plaintiff shielded the identity of plaintiff's expert from disclosure in her answering papers pursuant to CPLR 3101(d).

condition which, according to the preoperative X-ray and physical examination, did not exist." Plaintiff's expert states that such conduct was contrary to good and accepted medical practice.

In plaintiff's view, the gravamen of defendants' motion centers on Dr. Kennedy's performance of a cheilectomy procedure that was not medically indicated, and for which Dr. Kennedy did not obtain plaintiff's consent. Plaintiff further states that the fact that plaintiff and defendants present conflicting versions of the surgery, in and of itself, illustrates the existence of issues of fact sufficient to defeat defendants' motion. Considering this observation, and the proofs annexed to her answering papers, plaintiff submits that judgment in defendants' favor is unwarranted.

In reply, defendants challenge the credentials of plaintiff's expert, and argue that his assertions are conclusory in nature and unsupported by the medical records. In contrast, defendants reaffirm their position that they have submitted requisite proof to demonstrate that their actions did not depart from accepted medical practice, and did not proximately cause plaintiff's alleged injuries.

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 the 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, a 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 the relevant medical records and testimony, as well as Dr. Chiodo's affirmation, which attests to the diligent care defendants rendered and provides support for the contention that nothing defendants did or did not do proximately caused plaintiff's alleged injuries. To be sure, Dr. Chiodo's affirmation is detailed and predicated upon ample evidence within the record. Most pertinently, Dr. Chiodo opines that Dr. Kennedy's performance of a Scarf osteotomy was medically indicated based on plaintiff's symptoms, clinical presentation, and radiographic studies. Dr. Chiodo further opines that Dr. Kennedy's choice to perform a Scarf osteotomy to address plaintiff's hallux valgus fell within the requisite standard of care. Dr. Chiodo goes on to assert that he believes plaintiff's allegation that she should have had a Wilson osteotomy instead of a Scarf osteotomy is without merit. Dr. Chiodo further states that since Dr. Kennedy did not perform

a true cheilectomy on plaintiff, her consent for such a procedure was never necessary. Finally, Dr. Chiodo opines that defendants' post-operative treatment of plaintiff was proper and within the requisite standard of care. As defendants have made prima facie showing through the submitted proofs, the burden shifts to plaintiff.

To defeat summary judgment, plaintiff highlights several issues of fact that this court finds cannot be resolved as a matter of law. Plaintiff properly contends that issues of fact are raised by Dr. Kennedy undertaking a cheilectomy procedure that plaintiff did not conspicuously consent to. Whether or not Dr. Kennedy had discretion to perform the procedure absent explicit consent, and whether Dr. Kennedy performed the procedure at all, are questions of fact for a jury to resolve. The same applies to alleged deficiencies in defendants' post-operative care, and whether those deficiencies contravened good and accepted medical practice. A jury weighing the relevant medical records and testimony will discern whether defendants' conduct was in accordance with accepted medical practice. Plaintiff's expert affirmation reinforces the need for a trial, as plaintiff's expert contends that the same medical practice that Dr. Chiodo stated was in accordance with the requisite standard of care was in fact a sharp deviation from it. Most prominently, the very fact that plaintiff and defendants present conflicting accounts of plaintiff's surgery, and the resultant damage that flowed from it, demonstrates the existence of issues of fact sufficient to defeat defendants' instant motion.

Defendants' challenges to plaintiff's expert's credentials have no merit. Although plaintiff's expert works in the field of podiatry rather than orthopedic surgery, plaintiff's expert established the necessary experience to qualify as an expert (*see Walsh v. Brown*, 72 AD3d 806, 806 [2nd Dept. 2010]). Any alleged lack of knowledge as to the intricacies of orthopedic practice merely raises credibility issues defendants can advance at trial. Similarly, defendants' comments

that plaintiff's expert has a simplistic understanding of the medical issues at hand and that does not grasp the nuances of plaintiff's situation are arguments regarding credibility best left for trial.

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

ORDERED that the parties are directed to appear for a conference before the court on Tuesday JANUARY 8, 2019 at 9:30 AM at 111 Centre Street, Room 1227, New York, NY 10013.

This constitutes the decision and order of the court.

Dated: 11/16/18

HON. GEORGE J. SILVER