

Blake v Sekhon

2018 NY Slip Op 34466(U)

December 11, 2018

Supreme Court, Kings County

Docket Number: Index No. 22067/12

Judge: Michelle Weston

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December, 2018.

P R E S E N T:

HON. MICHELLE WESTON,
Justice.

-----X

LESLIE BLAKE and HILLARY BLAKE,

Plaintiffs,

- against -

JASPREET SEKHON and
KINGS HIGHWAY ORTHOPEDIC ASSOCIATES, P.C.,

Defendants.

-----X

DECISION AND ORDER

Index No. 22067/12

Mot. Seq. No.

2018 DEC 17 AM 8:18
KINGS COUNTY CLERK
FILED

The following papers numbered 1 through 7 read herein:

Papers Numbered:

Notice of Motion and Affirmations Annexed _____
Affirmations and Affidavit in Opposition _____
Reply Affirmation _____

1-3
4-6
7

In this action to recover damages for medical malpractice and lack of informed consent, defendants Jaspreet Sekhon, M.D., sued herein as Jaspreet Sekhon (Dr. Sekhon), and Kings Highway Orthopedic Associates, P.C. (Associates), jointly move for summary judgment dismissing the complaint.

Background

Plaintiff Leslie Blake (plaintiff) injured his right shoulder while working as an electrician. When his condition – a tear in the anterior aspect of the glenoid labrum – failed to improve after three months of conservative treatment at defendant Associates, he underwent a right shoulder arthroscopic biceps tenodesis and subacromial decompression/

bursectomy by defendant Dr. Sekhon, an orthopedic surgeon employed by Associates. During surgery, Dr. Sekhon discovered that plaintiff's right biceps were unstable. Specifically, Dr. Sekhon observed intraoperatively that plaintiff had a full (or to the bone) wear on the glenoid side of his shoulder joint and some wear on the humeral side of his shoulder joint. To address this chondromalacia, Dr. Sekhon performed, as part of the same operation, a glenoid microfracture and a humeral head chondroplasty. Following surgery, plaintiff experienced pain and had difficulty raising his right arm above his shoulder level. In addition, he developed a "Popeye" deformity indicative of the long-head biceps tendon rupture.

Thereafter, plaintiff and his wife, derivatively, commenced this medical malpractice action. Plaintiff alleged in his bills of particulars that Dr. Sekhon was negligent in performing surgery, and that Dr. Sekhon failed to inform him of the risks, hazards, and alternatives to surgery, which prevented him from giving informed consent.¹ Plaintiff explicitly stated in his bills of particulars that he did *not* claim that Dr. Sekhon failed to administer a diagnostic test, a particular a course of therapy, or some contraindicated medications, treatments, tests, or surgical procedures.²

¹ The lack of informed consent is alleged in, among other places, ¶ 11 of each of plaintiff's Verified Bill of Particulars as to all defendants, dated June 18, 2013, and his Verified Bill of Particulars as to Associates, dated August 28, 2013.

² See Verified Bill of Particulars as to all defendants, dated June 18, 2013, ¶¶ 3-5; Verified Bill of Particulars as to Associates, dated August 28, 2013, ¶¶ 3-5.

Following disclosure, Dr. Sekhon and Associates (collectively, defendants) moved for summary judgment dismissing the complaint. The Court heard oral argument and reserved decision.

Discussion

Medical Malpractice Claim

“On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dept 2015]). In opposition, the plaintiff must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, so as to demonstrate the existence of a triable issue of fact (*see Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]). “In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017] [internal quotation marks omitted]).

In support of their motion for summary judgment, defendants submit the expert medical affirmation of Charles M. Jobin, M.D. (Dr. Jobin), a New York State-licensed physician who is board certified in orthopedic surgery. Dr. Jobin avers that Dr. Sekhon performed surgery on plaintiff in an exemplary manner. As Dr. Jobin explains, Dr. Sekhon treated the torn labrum in plaintiff’s right shoulder with a biceps tenodesis, a surgical procedure in which the biceps tendon is initially cut from the torn labrum and then re-

attached to the humerus. As Dr. Jobin further explains, Dr. Sekhon also performed a subacromial decompression to reduce impingement in the subacromial space in plaintiff's right shoulder (which, in addition to the torn labrum, had significant cartilage injury) by performing chondroplasty and microfracture techniques to stimulate bone marrow cells to heal the area of the worn cartilage. Dr. Jobin points out that the Popeye deformity is a known risk of plaintiff's tenodesis surgery, since it statistically occurs in approximately 10-25% of surgical cases of this type.

The Court finds that Dr. Jobin's expert affirmation, which is fully supported by Associates' medical records and Dr. Sekhon's deposition testimony, is sufficient to establish defendants' prima facie burden that Dr. Sekhon (and, hence, Associates) did not depart from good and accepted orthopedic practice in performing tenodesis surgery on plaintiff and that, in any event, Dr. Sekhon's surgery did not proximately cause plaintiff's claimed injuries (*see Mauro v Ostrowski*, 165 AD3d 644, 645 [2d Dept 2018]; *Paone v Lattarulo*, 123 AD3d 683, 684 [2d Dept 2014]).

In opposition, plaintiff has not raised a triable issue of fact on his medical malpractice claim. Plaintiff's expert affirmation fails to address the theory of liability alleged in his bills of particulars regarding surgery, asserting instead an alternative theory of liability that defendants' pre- and post-operative care of plaintiff was deficient.³ The Court declines to

³ In particular, plaintiff's expert opines (in ¶ 5 of his or her affirmation) that defendants failed to (1) take plaintiff's complete history; (2) perform appropriate and indicated physical examinations, including notation of shoulder appearance, passive range-of-motion testing, palpation for tenderness, neurovascular testing, and biceps-instability testing; (3) *review the MRI films before surgery*; (4) ascertain that plaintiff had undergone the recommended appropriate course of conservative therapy, including three months of physical therapy, and failed to offer plaintiff selective injections such as subacromial/intra-articular and/or biceps injections to differentiate the source of his shoulder pain; and (5) obtain postoperative MRI's and diagnostic studies to elucidate the postoperative issues. Although plaintiff's expert
(continued...)

entertain the alternative theory because of plaintiff's inexcusable delay in raising it for the first time more than four years after commencing this action (*see Michel v Long Is. Jewish Med. Ctr.*, 125 AD3d 945, 946 [2d Dept 2015], *lv denied* 26 NY3d 905 [2015]; *Dolan v Halpern*, 73 AD3d 1117, 1119 [2d Dept 2010]; *Langan v St. Vincent's Hosp. of NY*, 64 AD3d 632, 633 [2d Dept 2009]; *Mainline Elec. Corp. v Pav-Lak Indus., Inc.*, 40 AD3d 939, 939-940 [2d Dept 2007]). The alternative theory rests on nothing more than speculation, as more fully set forth in the margin,⁴ and is without basis in the record (*see Spiegel v Beth Israel Med. Ctr.-Kings Highway Div.*, 149 AD3d 1127, 1129 [2d Dept 2017]; *Shashi v South Nassau Communities Hosp.*, 104 AD3d 838, 839 [2d Dept 2013]; *Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 1178 [2d Dept 2010]). Accordingly, the branch of defendants' motion

³ (...continued)

claims (in the italicized item 3 above) that Dr. Sekhon should have reviewed the MRI films before surgery, the affirmation of plaintiff's expert, in describing the materials he or she reviewed in preparing his or her affirmation, placed the words "and films" in brackets, thereby raising some doubt, which the Court need not resolve, whether plaintiff's expert did, in fact, review the MRI films, and particularly the pre-operative MRI films, in preparation of his or her affirmation (*see* Affirmation of Plaintiff Expert, ¶ 3).

⁴ As reflected by the italicized text reproduced below, plaintiff expert's "litany of supposition" (to borrow a phrase from *Brown v Bauman*, 42 AD3d 390, 392 [1st Dept 2007]) fails to constitute probative evidence:

"Although . . . [Dr. Sekhon] noted positive provocative tests . . . , [he] did not offer the plaintiff selective injections such as subacromial, intra[a]rticular and/or biceps injections in order to further elucidate the etiology of the shoulder pain. The positive provocative tests *could be* positive in the clinical setting of impingement, rotator cuff tendinitis, biceps tendinitis, slap tear, acromioclavicular joint arthrosis[,] and further selective injections *could have aided* in diagnosing the plaintiff correctly. With a reasonable degree of medical certainty it is my opinion that a subacromial injection *would have possibly* alleviated some or all of [plaintiff's] symptoms since the first injection le[d] to 3-4 weeks of relief. It is also my opinion that other selective injections *would have possibly* also le[d] to some symptom relief.

* * *

[Plaintiff] had only Naprosyn [an anti-inflammatory medication] prescribed by [Dr. Sekhon's colleague] *but perhaps* he did not take the medication correctly or as prescribed . . .

* * *

. . . Dr. Sekhon *could have* ordered another MRI or a[n] MRI arthrogram in order to *possibly* elicit additional information. . . . I believe this is a departure from standard of care as additional diagnostic tests *could have* assisted Dr. Sekhon in understanding the extent of [plaintiff's] injuries and diagnoses. . . ."

(Affirmation of Plaintiff's Expert, ¶¶ 22-23 [italics added]).

for summary judgment dismissing plaintiff's medical malpractice claim is granted, and such claim is dismissed.

Informed Consent Claim

To establish a cause of action to recover damages based on lack of informed consent, "plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002] [internal quotation marks omitted]). "The mere fact that the plaintiff signed a consent form does not establish the defendant[']s prima facie entitlement to judgment as a matter of law" (*Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]).

Although Dr. Sekhon's deposition testimony establishes that he informed plaintiff about the general risks, benefits, and alternatives to surgery, the consent form⁵ provided by defendants and signed by plaintiff did not warn him of the *specific* risk of the Popeye deformity, which, as noted by defendants' own expert, statistically occurs in approximately 10-25% of surgical cases of this type. Dr. Sekhon's pre-operative consultation note describing his discussion with plaintiff regarding surgical benefits and risks is silent about the *specific* risk of the Popeye deformity, which, as noted, indicates the long-head biceps

⁵ See Request and Authorization for Operation And/Or Procedure, dated August 5, 2011, Exhibit L to defendants' motion, pages 006-007.

tendon rupture.⁶ Plaintiff's deposition testimony likewise reveals a factual dispute as to whether Dr. Sekhon properly advised him of the risk of the long-head biceps tendon rupture and the resulting development of a Popeye deformity. Accordingly, the remaining branch of defendants' motion for summary judgment dismissing plaintiff's informed consent claim is denied (*see Mathias v Capuano*, 153 AD3d 698, 700 [2d Dept 2017]; *Schussheim*, 136 AD3d at 789; *Lavi v NYU Hosps. Ctr.*, 133 AD3d 830, 831-832 [2d Dept 2015]).

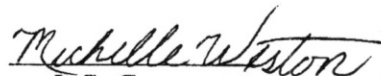
Conclusion

The defendants' motion is *granted to the extent* that plaintiff's medical malpractice claim is dismissed, and the remainder of their motion is denied. The action shall proceed to trial on plaintiff's informed consent claim and on the derivative claim of plaintiff's wife.

The defendant is directed to serve a copy of this decision on all parties.

This constitutes the decision and order of the Court.

ENTER,


J. S. C.

Hon. Michelle Weston

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⁶ *See* Dr. Sekhon's consultation note, dated June 23, 2011, Exhibit K to defendants' motion, pages 009-010 ("I [Dr. Sekhon] reviewed the risks, benefits and alternatives, including but not limited to[,] bleeding, infection, anesthetic risks, neurovascular injury, persistent pain, stiffness, *retear*, reoperation, progression of arthritis in the future.") (italics added). The italicized word "retear" means, in the context of Dr. Sekhon's consultation note, the re-tear of the shoulder labrum.