

Thomas v Farrago

2019 NY Slip Op 30345(U)

February 14, 2019

Supreme Court, Kings County

Docket Number: 505880/2014

Judge: Debra Silber

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

CHARLES J. THOMAS, as guardian of the property of
MAGOMED ABDUSALAMOV, an incapacitated person,
BAKANAY ABDUSALAMOVA, individually, P.A., S.A.,
and S.A., as infants by their mother and natural
guardian BAKANAY ABDUSALAMOVA,

DECISION / ORDER

Index No. 505880/2014
Motion Seq. No. 48
Date Submitted: 1/10/19
Cal No. 53

Plaintiffs,

-against-

MATTHEW D. FARRAGO, ANTHONY G. CURRERI, M.D.,
OSRIC S. KING, M.D., GERARD P. VARLOTTA, D.O.,
BARRY D. JORDAN, M.D., BENJAMIN ESTEVES, JR.,

Defendants.

x

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's
motion to renew and rearque the grant of summary judgment to defendant Varlotta.*

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>940-950</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>952-956</u>
Reply Affirmation.....	<u>957-958</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is, in part, a medical malpractice action arising out of the post-bout medical
examinations of a professional boxer, Magomed Abdusalamov, by the ringside
physicians at Madison Square Garden. Defendant Gerard P. Varlotta, D.O. was granted
summary judgment dismissing the complaint as against him by a decision and order
dated September 14, 2018. The court found, among other things, that Varlotta had

made a prima facie showing that Abdusalamov showed no signs of neurological distress during the boxing match, or during his post-bout medical examination, which warranted sending Abdusalamov immediately to the hospital emergency room and that plaintiff failed to controvert defendant's prima facie showing and raise a triable issue of fact.

Plaintiff now moves to reargue and renew the court's order which granted defendant Varlotta's cross motion for summary judgment.¹ Plaintiff contends that the court erred in failing to recognize the numerous issues of fact he raised as to defendant Varlotta's deviation or departure from the standard of care of a ringside physician, including his failing to act when he should have, and in not adequately responding to the indications of head trauma. Plaintiff also claims the court didn't acknowledge plaintiff's expert's opinion that Abdusalamov should have been held for further observation after the bout or immediately rushed to a hospital for a CT scan of his brain. Plaintiff further maintains that, regardless of the fact that he relied upon his withdrawn motion papers to serve as the opposition to Varlotta's motion, so plaintiff's "opposition" did not expressly controvert defendant's experts' conclusions, there was nevertheless a "battle of the experts" as to whether there had been a departure from good and accepted standards of medical care, which should have resulted in the denial of the defendant's motion for summary judgment. In addition, plaintiff seeks renewal of his motion, so he can add additional evidence that plaintiff claims was unavailable at the time the prior motion was made.

¹Plaintiff had initially moved for summary judgment, but after defendant cross-moved, plaintiff withdrew his motion and chose to rely on his motion papers as the opposition to defendant's cross motion.

Defendant contends the plaintiff's motion is procedurally defective in failing to appropriately reference the prior motion papers and in failing to provide copies to the court. Further, defendant contends that plaintiff fails to make the necessary showing of new evidence for leave to renew. In addition, defendant contends that the motion is just a "rehash" of plaintiff's prior arguments which were rejected in the court's prior decision.² Further, defendant contends there is simply no evidence in the record that Varlotta had clear indications that plaintiff had sustained a head trauma which defendant failed to recognize and which required either immediate treatment or further observation.

As a preliminary matter, as the prior motion's papers were voluminous, and as this is an e-filed case, plaintiff was not required to provide a complete set of the prior motion papers (see CPLR 2214(c)).³ However, to the extent that copies of the prior motion papers were not provided, plaintiff should have expressly referenced them by their e-file document numbers, as required by CPLR 2214(c). As e-filing is relatively new in Kings County, this procedural error cannot result in the court's refusal to consider the motion.

Given the unusual posture of the plaintiff's withdrawn motion papers being deemed the opposition to the defendant's cross motion, and the voluminous papers

² Defendant contends that plaintiff's choice to rely solely on his motion papers as opposition to the cross motion after withdrawing his motion, without attempting to expressly rebut defendant's experts' contentions, was a tactical decision that plaintiff should bear the consequences of.

³ Plaintiff did provide the court with courtesy copies of the plaintiff's prior motion papers but neglected to include either the court's prior decision or the defendant's prior motion papers.

involved,⁴ the court grants reargument to insure that the court properly considered all of the papers and exhibits thereto and to determine whether the court overlooked or misapprehended any issue of fact or law (see *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718 [2d Dept 2012] ["A motion for reargument must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion' (CPLR 2221[d][2)"])).

On a motion for summary judgment, the defendant in a medical malpractice case has the initial burden of establishing the absence of any departure or deviation from good and accepted standards of medical care, or the absence of causation, that is, that the plaintiff was not injured thereby (see *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16 [2d Dept 2016]). "Then, to defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect the theory of non-liability that is the subject of the moving party's prima facie showing" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]).

The underlying facts and the chronology of events in this action are fully set forth in the court's prior decisions and will not be repeated at length here. In defendant Varlotta's motion for summary judgment, defendant's expert Michael B. Schwartz, D.O. opined that Dr. Varlotta comported himself entirely within the accepted standards of care, as Abdusalamov showed no signs of neurological distress during or after the bout or during Dr. Varlotta's examination, so that Dr. Varlotta could not have reasonably anticipated that he would develop signs and symptoms of neurological distress later on.

⁴This motion consists of more than three file boxes of papers.

Likewise, Steven Allen Sparr, M.D., defendant's other expert, found that Abdusalamov did not manifest any signs or symptoms of possible neurological injury in connection with the boxing match at issue until after he had left Madison Square Garden, which was an hour after the fight ended, and that Dr. Varlotta's care (or lack thereof) was not a proximate cause of Abdusalamov's claimed injuries.

The court's prior decision perhaps overstates the point in noting that plaintiff's expert, Rodolfo Eichberg, M.D., conceded that Abdusalamov first exhibited signs and symptoms of neurological distress at 11:52 P.M., which was after Dr. Varlotta had completed his examination, and after Abdusalamov had left the Garden. Nevertheless, Dr. Eichberg did not cite to any specific indications that Abdusalamov had sustained a traumatic brain injury observable on the Madison Square Garden video footage of the bout, or which were noted in Dr. Varlotta's report of his exam of Abdusalamov. It seems the first observable indications of the injury appeared after Dr. Varlotta completed his examination (see Eichberg affidavit at ¶¶ 36, 60) and told Abdusalamov he could go home.

Plaintiff's counsel made much at oral argument of Dr. Varlotta's interpretation of the King-Devick test results and Dr. Varlotta's failure to interpret them as a failed test warranting immediate medical treatment. However, plaintiff's experts make no mention of the King-Devick test and plaintiff offers no competent expert evidence as to the proper interpretation of the test results, or that Varlotta's application and interpretation of the test results was a departure from the accepted standard of care (see *Whitfield v State*, 162 AD3d 1098, 1100 [2d Dept 2018]) ["there was no expert testimony that the failure to diagnosis a UTI based solely upon a laboratory report showing bacteria in the

urine was a deviation from accepted standards of care, or that the failure to diagnose a UTI until 2008 was a proximate cause of any of the medical conditions or ailments that the claimant allegedly sustained as a result of the allegedly delayed diagnosis"). The instructions provided for the test, which is for *non-physicians*, to determine when to remove an athlete from play, and to refer the athlete to a medical professional for a further evaluation to determine if he/she has had a concussion, cannot, without more, be read to strictly apply to a *physician* administering the test as part of a more comprehensive medical examination, or to establish the need for emergency treatment (see *Wells v State*, 228 AD2d 581 [2d Dept 1996] ["Statement in copy of medical report of treating physician, that, "after the [1989] surgery, secondary to poor follow-up arrangements, patient developed a non-union with some migration of the hardware in the area of the fracture site," was not sufficient for patient to establish a prima facie case of medical malpractice in the absence of expert medical evidence]; see also *Prete v Rafla-Demetrious*, 224 AD2d 674, 676 [2d Dept 1996] [there was no expert testimony causally linking the defendants' negligence with the alleged injuries suffered]). In conclusion, plaintiff does not offer competent expert evidence that plaintiff demonstrated signs of neurological distress which Dr. Varlotta missed.

Rather, Dr. Eichberg opined that (even in the absence of any overt signs or symptoms of neurological distress prior to the completion of Dr. Varlotta's examination) the defendant doctors departed from the standards of accepted medical care when they released Abdusalamov less than 30 minutes after the end of the match, with knowledge that he had sustained a head trauma, discussed further below, without either transferring him to a hospital or continuing to monitor him (Eichberg ¶¶ 11, 13-14). Dr.

Eichberg explained that it is not possible to clear a suspected head/brain injury patient within 30 minutes after a confirmed head trauma; that the ringside physicians should have transferred Abdusalamov to an emergency room in the ambulance, which was waiting outside the Garden, for immediate objective testing, such as a CT scan of his brain, or subjected him to "watchful waiting" for an hour or more to assure he had no signs of neurological distress (Eichberg ¶ 12). Thus, Eichberg's opinion that Dr. Varlotta departed from what would have been good and accepted medical care by a ringside physician rests largely on the fact that Abdusalamov had sustained a *confirmed head trauma* and not that Dr. Varlotta missed signs or symptoms of neurological distress.⁵ This raises the question as to the basis for Eichberg's conclusion that Abdusalamov sustained a *confirmed head trauma*, in the absence of signs or symptoms of neurological distress.

Dr. Eichberg explains that the diagnosis and medical management of a suspected head and/or brain injury in combat sports, such as boxing, is more stringent than in non-combat sports, where contact is usually inadvertent. (Eichberg ¶ 45). While a boxing match puts a boxer at a risk of head trauma, he acknowledges that not all ringside physicians agree with him that after every boxing match the boxers should be sent to an emergency room for a CT scan. However, Dr. Eichberg does maintain "there can be no debate that when over three-hundred head blows [are inflicted] in the span of thirty-nine minutes, by a heavyweight opponent, hospitalization is indicated and warranted" (Eichberg ¶ 56).

⁵Dr. Eichberg also opined that (¶ 33) Dr. Varlotta failed to diagnose Abdusalamov's cheek-bone fracture, which diagnosis was "essential to avoid contamination and subsequent infection of the facial orbit and/or the maxillary sinus . . . which puts the eye at risk and constitutes a medical emergency" (¶ 37).

As defendant's expert, Dr. Michael B. Schwartz, disagrees with Dr. Eichberg's opinions in a number of key respects (Schwartz ¶¶ 29-33), this clearly is a battle of the experts and raises issues of fact. It is not the court's role on a summary judgment motion to determine a question of fact. Similarly, there is also a dispute between the experts with regard to whether the doctors' observations of the fight and of Abdusalamov's appearance after the fight should have led them to suspect that he had sustained a brain injury or a brain bleed which required Abdusalamov to be sent to the emergency room in the waiting and ready ambulance. (Eichberg ¶ 29; Schwartz ¶ 28). Likewise, the significance of a possible nasal injury, or a cheek bone fracture, or of the Notice of Suspension, which suspended Abdusalamov from boxing for 60 days, which was issued by defendant Dr. Jordan with "Head Trauma or Facial Injury" checked off, on the issue of the need for emergency medical treatment, are analyzed differently by each of the experts, who come to different conclusions (Eichberg ¶¶ 37-38, 57; Schwartz ¶¶ 35 n4, 36, Sparr ¶ 23).

Indeed, upon further review of the record, the court finds that Dr. Eichberg's opinion is not wholly conclusory and speculative, but is supported by an extensive discussion of its factual basis and the boxer's medical records which he lists as having been reviewed by him for his report. It is not the court's role on a summary judgment motion to assess the merits of his opinions as compared to those of defendant's expert (see *Dandrea v. Hertz*, 23 AD3d 332, 333 [2d Dept 2005] ["Summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert opinions, which present a credibility question requiring a jury's resolution. Moreover, contrary to the defendants' contentions, the opinions of the plaintiff's expert were based upon facts in evidence, and were not conclusory or otherwise insufficient" (internal

citations omitted)]; *cf. Ortiz v Wyckoff Heights Med. Ctr.*, 149 AD3d 1093, 1095 [2d Dept 2017] ["plaintiffs failed to raise a triable issue of fact, as their expert's opinion that additional medical testing should have been undertaken was conclusory, speculative, and based largely on hindsight reasoning"])).

On the issue of causation, plaintiff's experts contend that if Abdusalamov had been sent immediately to the hospital, when the symptoms of brain injury did manifest, he would have received more prompt treatment which would have given him a better outcome than that which resulted from his walking into the ER after arriving in a taxi. (Silberman ¶ 11, Eichberg ¶ 17). Again, as defendant's expert Dr. Sparr disagrees with this conclusion (Sparr ¶ 20, 23), this too raises an issue of fact. It is less clear that had plaintiff simply been held for further observation at Madison Square Garden and then sent by ambulance to the emergency room once the symptoms of brain injury first appeared, rather than in a taxi, that more prompt treatment would have been administered (Sparr ¶ 22). Nevertheless, this issue still involves a question of fact to be determined by the finder of the facts.

With regard to the branch of the plaintiff's motion which seeks renewal, plaintiff has failed to make the necessary showing to support the request for leave to renew (see *Chiarella v Quitoni*, 178 AD2d 502 [2d Dept 1991] ["Generally, a motion to renew must be based upon newly-discovered material facts or evidence *which existed at the time that the prior motion was made* but which were unknown to the party seeking renewal" (emphasis added)]). In any event, the additional submitted evidence is at best tangential to the issues raised and plaintiff fails to establish that it should be considered in the interest of justice.

The "new evidence" plaintiff requests the court to consider consists of an affidavit

of defendant Varlotta's expert that was submitted in opposition to a different motion by plaintiff which sought to disqualify the defendant's expert, which post-dated plaintiff's motion for summary judgment against Varlotta; a new affidavit of a doctor (Dr. Margaret Goodman) who was previously interviewed by the New York Inspector General's office regarding the underlying events, which attests to the accuracy of the transcript of that interview; the transcript of a non-party deposition of Dr. Varlotta's daughter (she was present during Varlotta's exam) which took place after the summary judgment motion was submitted, and "a visual reproduction of the plaintiffs' (sic) facial fracture created from the hospital x rays." None of these items are relevant to the issues raised in the defendant's motion for summary judgment.

Accordingly, it is


ORDERED that the branch of the plaintiff's motion seeking reargument is granted, and upon reargument, defendant Gerard P. Varlotta, D.O.'s cross motion for summary judgment dismissing the complaint and any cross-claims against him is denied, and it is further

ORDERED that the branch of the plaintiff's motion seeking leave to renew is denied.

This shall constitute the decision and order of the court.

Dated: February 14, 2019

ENTER:



Hon. Debra Silber, J.S.C.
Hon. Debra Silber
Justice Supreme Court