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| Rosetti v OrthopedicsNY, LLP |
| 2019 NY Slip Op 30395(U) |
| February 15, 2019 |
| Supreme Court, New York County |
| Docket Number: 805039/2015 |
| Judge: Eileen A. Rakower |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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RICHARD G. ROSETTI,

Index No.
805039/2015

Plaintiff,

**Decision and
Order**

-against-

ORTHOPEDICSNY, LLP (successor by merger to
Northeast Orthopaedics, LLP), ORTHONY, LLP,
KYLE R. FLIK, M.D., CHRISTOPHER D.
DECAMP, SETON HEALTH SYSTEM, INC.,
AND ST. PETER'S HEALTH PARTNERS,

Mot. Seq. 002

Defendants.
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HON. EILEEN A. RAKOWER, J.S.C.

Defendants OrthopedicsNY, LLP (successor by merger to Northeast Orthopaedics, LLP) ("Orthopedics"), OrthoNY, LLP ("OrthoNY"), Kyle R. Flik, M.D. ("Dr. Flik"), and Christopher DeCamp, M.D. ("Dr. DeCamp") (collectively, "Defendants") move by Order to Show Cause pursuant to CPLR § 3212 for an Order granting summary judgement dismissing Plaintiffs' Richard G. Rosetti's ("Mr. Rosetti" or "Plaintiff") Summons and Verified Complaint and pursuant to CPLR § 510 for an Order changing the place of trial from New York County to Albany County. There is no opposition. For the reasons, discussed below, the motion for summary judgment is granted in its entirety.

Background

This action, sounding in medical malpractice and lack of informed consent, concerns the medical care that was provided to Mr. Rosetti by Dr. Flik and Dr. DeCamp.

It is uncontroverted that on August 2, 2012, Mr. Rosetti fell and sustained a comminuted intra-articular distal radius fracture of his right wrist. Mr. Rosetti states that following the injury he "received hospital and nursing care, treatment, examinations, emergency room care, and surgical procedures and/or operations" at St. Mary's Hospital in Troy, New York (the "Hospital"), owned and operated by

Defendant Seton Health System, Inc (“Seton Health”). Defendants Dr. Flick and Dr. DeCamp, orthopedists, are employees of Defendants Orthopedics and OrthoNY, and rendered treatment to Mr. Rosetti at the Hospital from August 2012 through October 2012. Mr. Rosetti was cared for, treated and diagnosed by Dr. Flik. In October 2012, Mr. Rosetti received medical care and treatment, surgical procedures and examinations by Dr. DeCamp. Seton Health and St. Peter’s Health Partners have been stipulated out of the action and are no longer Defendants.

Mr. Rosetti claims that Defendants failed to discover, diagnose, and treat or cause to be discovered, diagnosed, and/or treated the cause of his symptoms; to heed his complaints and observations, to recognize the failure of Mr. Rosetti’s improvement; and to attend properly to Mr. Rosetti, by failure to have the requisite learning, skill and experience; violated their duty in failure to use reasonable care in the exercise of their skill and application of their learning.

Summary Judgment Standard

CPLR § 3212 provides in relevant part, that a motion for summary judgment,

“shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”

A defendant moving for summary judgment in a medical malpractice case has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law by showing that “there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged” by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 A.D.3d 204, 206 [1st Dept. 2010]. Once the defendant has made this showing, the burden shifts to the party opposing the motion “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 Hospital*, 68 N.Y.2d 320, 324 [1986]. Specifically, a plaintiff “must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” *Rogues*, 73 A.D.3d at 207.

A defendant moving for summary judgment on a lack of informed consent claim must show that there is no factual dispute as to whether the plaintiff was informed “of any foreseeable risks, benefits or alternatives” of the treatment rendered. *Balzola v. Giese*, 107 A.D.3d 587, 588 [1st Dept. 2013].

Change of Venue Standard

CPLR § 510(3) permits a court, upon motion, to change the place of trial of an action where “the convenience of material witnesses and the ends of justice will be promoted by the change.” “In order to obtain relief pursuant to CPLR 510(3), the movant must assert all of the following information: the names and addresses of the witnesses, the substance and materiality of their testimony relative to the issues in the case, that the witnesses have been contacted and are willing to testify on behalf of the movant, and the manner in which they will be inconvenienced by a trial in the county where the action was commenced.” *Gissen v. Boy Scouts of Am.*, 26 A.D.3d 289, 290–91 [2006].

Defendants’ Pending Summary Judgment Motion

In support of Defendants’ motion for summary judgment, Defendants submit the Affidavit of Dr. DeCamp, board-certified in Orthopedic Surgery with an added qualification in surgery of the hand. Defendants submit the Affidavit of Dr. Flik, board-certified in Orthopedic Surgery with a Subspecialty Certification in Sports Medicine. Lastly, Defendants submit the Affidavit of Edward Akelman, M.D. (“Dr. Akelman”), board-certified Orthopedic Surgeon with a Subspecialty Certificate in Orthopedic Surgery of the Hand.

Dr. DeCamp details the steps taken to treat and care for Mr. Rosetti, including the surgical procedure performed by Dr. Flik and the post-operative care by Dr. Flik and Dr. DeCamp, and opines that all of the treatment “conformed to the applicable standard of care and did not depart in any way from the accepted standards and practices of orthopedic surgery specialty”. Dr. Decamp further opines that the care and treatment rendered by himself did not “cause or aggravate any of the injuries or conditions” asserted by Mr. Rosetti. Dr. DeCamp opines that a specific plan of care is not required when the CT scan shows fracture lines following the injury. Dr. DeCamp opines that additional time was needed and he instructed Mr. Rosetti to consult a bone endocrinologist with regards to his osteopenia and to obtain another opinion from a hand specialist.

According to Dr. Fliks' Affidavit, he reviewed Mr. Rosetti's Complaint, the Verified Bill of Particulars, and deposition transcripts. Dr. Flik details the surgery that he performed on Mr. Rosetti and the post-operative care, and opines that all treatment and care were within the standard of care and the post-operative care did not cause Mr. Rosetti any injury. Dr. Flik opines that the surgery was needed first to stabilize the bones and after Mr. Rosetti heals there can be an evaluation to treat injuries or issues surrounding the structure. Dr. Flik opines that the pain Mr. Rosetti was experiencing six-weeks post-surgery were to the small ulnar styloid injury and there was no pain on the radial-side, which indicated that Mr. Rosetti's main fracture was healing. Dr. Flik opines that the ulnar styloid fragment healing does not always happen when the bone is reunited to the bone. Dr. Flik further opines that the plan was to evaluate Mr. Rosetti's ulnar-sided pain by MRI after the bone healed, and if the pain continued Mr. Rosetti would be assessed for any triangular fibrocartilage problem. Dr. Flik opines Mr. Rosetti's pain continued and he was referred to Dr. DeCamp. Dr. Flik opines that Mr. Rosetti was properly treated, evaluated and assessed and the appropriate tests were timely ordered throughout his care Dr. Flik's office.

Dr. Akelman, retained as an expert in the field of orthopedic surgery, opines that Dr. DeCamp and Dr. Flik "did not depart in any way from the accepted standards and practices of the medical profession" and "none of the alleged departures caused, exacerbated or contributed to any injury claimed by the plaintiff". According to Dr. Akelman's Affirmation, he reviewed Mr. Rosetti's Bill of Particulars, the deposition testimony, and the medical records. Dr. Akelman opines that surgery was not negligently performed by Dr. Flik, and the on-going complaints of pain were a result of the initial fracture that resulted from Mr. Rosetti's fall and not the medical treatment he received by Dr. Flik. Dr. Akelman opines that Dr. Flik "stabilized the fracture and achieved perfect and anatomic alignment".

Mr. Rosetti does not file opposition to Defendants' motion for Summary Judgment.

Discussion

Defendants make a *prima facie* showing of entitlement to summary judgment to the medical malpractice claim. *Alvarez*, 68 N.Y.2d at 324. Defendants, through their Affidavits and Dr. Akelman's Affirmation, demonstrate that they acted in accordance with good and accepted medical standards of due care in the medical care that they provided to Mr. Rosetti and that any departure in care was not a proximate cause of Mr. Rosetti's injuries. Dr. Akelman opines that Dr. Flik's surgery was correctly performed and Mr. Rosetti needed more time to heal before subsequent

steps could be taken. Mr. Rosetti received follow-up care after the surgery and was referred to Dr. DeCamp who referred Mr. Rosetti to specialists regarding issues with the fracture from Mr. Rosetti's fall and not from the surgery performed by Dr. Flik.

Since the Defendants have made a *prima facie* showing of entitlement to summary judgment, the burden now shifts to Plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 A.D.3d at 639. Specifically, in a medical malpractice claim, a plaintiff "must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." *Rogues*, 73 A.D.3d at 207. Mr. Rosetti does not oppose Defendants motion for summary judgment. Here, Mr. Rosetti failed to meet his burden that there exists material issues of fact.

Defendants are entitled to summary judgment for Plaintiffs' lack of informed consent claim. The Patient Visit Note written and electronically signed by Dr. Flik, dated August 2, 2012, states that the "[r]isks, benefits, alternatives and complications of the operation were discussed with the patient. Surgical risks including bleeding, infection, nerve injury and potential for failure of the procedure to completely relieve pain were discussed and understood." Plaintiff was informed "of any foreseeable risks, benefits or alternatives" of the treatment rendered by Dr. Flik. *Balzola*, 107 A.D.3d at 588. Mr. Rosetti failed to raise an issue of fact.

Wherefore, it is hereby

ORDERED that Defendants' motion for Summary Judgment pursuant to CPLR § 3212 is granted in its entirety without opposition and the action is dismissed; and it is further

ORDERED that Defendants shall serve a copy of this decision upon the Clerk, who is directed to amend the caption accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: February 15, 2019


Eileen A. Rakower, J.S.C.