

Anduiza v Silver

2020 NY Slip Op 32272(U)

July 1, 2020

Supreme Court, New York County

Docket Number: 805270/2018

Judge: George J. Silver

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

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PATRICIA ANDUIZA and FRANK ANDUIZA,

Plaintiffs,

Index No. 805270/2018
Motion Seq. 001

-v-

DECISION & ORDER

**RHETT SILVER, M.D., 24/7 EMERGENCY CARE, P.C.,
JACK S. MORGANI, M.D., SOUTHAMPTON HOSPITAL,
SOUTHAMPTON RADIOLOGY, P.C., NORTH FORK
RADIOLOGY, P.C., RUSSELL F. WARREN, M.D., and
HOSPITAL FOR SPECIAL SURGERY,**

Defendants.

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

Defendants JACK S. MORGANI, M.D. (“Dr. Morgani”), NORTH FORK RADIOLOGY, P.C., and SOUTHAMPTON RADIOLOGY, P.C. (collectively “defendants”) move for summary judgment. Plaintiffs PATRICIA ANDUIZA (“plaintiff”) and FRANK ANDUIZA (collectively “plaintiffs”) oppose the motion. For the reasons discussed below, the court grants the motion.

Plaintiffs allege that as a result of plaintiff’s visit at Southampton Hospital’s Emergency Department (“ED”) on or about August 21, 2016, and subsequent surgical care by co-defendants RUSSELL F. WARREN, M.D. (“Dr. Warren”) and HOSPITAL FOR SPECIAL SURGERY (“HSS”), plaintiff sustained a serious and permanent injury to her right shoulder.

ARGUMENTS

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 argue that Dr. Morgani was neither working, nor on-call when plaintiff presented to Southampton Hospital's ED on August 21, 2016. Rather, defendants contend that Dr. Morgani reviewed plaintiff's x-rays taken at the ED after RHETT SILVER, M.D. ("Dr. Silver") reduced plaintiff's shoulder dislocation, and after plaintiff had been discharged home. As such, defendants submit that Dr. Morgani played no role in treating plaintiff's alleged injuries.

Defendants also argue that Dr. Morgani correctly interpreted plaintiff's post-reduction x-ray, which revealed a fracture and a residual dislocation, and that Dr. Morgani promptly notified an ED physician of his findings. Defendants further posit that the ED physician then notified plaintiff of Dr. Morgani's findings and the need for follow-up care. Finally, defendants note that North Fork Radiology, P.C. was not involved in plaintiff's care and treatment.

In support of defendants' argument, defendants annex the affidavit of Dr. Morgani. Dr. Morgani asserts that in August of 2016, he was an attending radiologist at Southampton Hospital, and that he was acting on behalf of Southampton Radiology, P.C. when he reviewed plaintiff's x-rays. Dr. Morgani notes that Southampton Radiology, P.C. provides radiological services to Southampton Hospital, and that North Fork Radiology, P.C. was, and is a radiological office located in Riverhead, New York with no affiliation with Southampton Hospital.

Dr. Morgani explains that on August 21, 2016, he worked from 8:00 a.m. to 5:00 p.m. at Southampton Hospital, and that he was not working when plaintiff arrived at the ED at 2:28 a.m., or when plaintiff was discharged at 6:40 a.m. Rather, Dr. Morgani highlights that he was required to review x-rays taken from the previous night, and therefore, his involvement with plaintiff's care and treatment was limited to reviewing plaintiff's x-rays after plaintiff had been discharged from the ED. As such, Dr. Morgani avers that he played no role in eliciting plaintiff's medical history, deciding how plaintiff's shoulder should be treated, issuing plaintiff's discharge instructions, or

advising plaintiff as to the need for follow-up care since these aspects of plaintiff's treatment were completed in the ED prior to the beginning of his shift.

Additionally, Dr. Morgani asserts that he issued a report on plaintiff's pre-reduction x-rays at 11:53 a.m. on August 21, 2016, which showed a dislocation at the glenohumeral joint, however, fine detail was limited by positioning and "likely body habitus" (the patient's weight and build). Dr. Morgani also notes that he issued a report on plaintiff's post-reduction x-rays at 12:31 p.m., in which he observed a persistent dislocation or subluxation of plaintiff's glenohumeral joint, and an impaction-type fracture of the humeral head which did not appear to be displaced. Dr. Morgani further attests that he conveyed his findings to the ED physician at 1:00 p.m. However, Dr. Morgani maintains that he did not have any contact with plaintiff's orthopedists, and that none of the orthopedists asked for plaintiff's Southampton Hospital x-rays or Dr. Morgani's reports.

Finally, Dr. Morgani posits that he reviewed plaintiff's August 21, 2016 x-rays again after the commencement of this lawsuit, and that even in hindsight, he stands by his prior interpretation of plaintiff's x-rays. Notably, Dr. Morgani emphasizes that plaintiff's pre-reduction x-rays show a dislocation, not a fracture, and that plaintiff's post-reduction x-rays show a residual dislocation and a fracture. Dr. Morgani also asserts that he reviewed plaintiff's ED records after this action was commenced, which confirm that he spoke to Dr. Darin Wiggins ("Dr. Wiggins"), the ED physician, about his findings, and that Dr. Wiggins notified plaintiff of Dr. Morgani's findings and the need for follow-up care. As such, Dr. Morgani argues that he did not cause plaintiff's alleged injuries.

In opposition, plaintiffs argue that defendants' motion is not supported by an expert affidavit. Plaintiffs also assert that defendants' motion should be denied as premature since the parties have yet to conduct defendants' depositions, and since there are triable "questions of fact"

that must be answered through the discovery process. Specifically, plaintiffs highlight that there are questions as to who was working the shift prior to Dr. Morgani's shift on August 21, 2016, whether Southampton Radiology, P.C. employed the radiologists who worked at Southampton Hospital on August 21, 2016, and whether there were additional Southampton Radiology, P.C. employees on-call at Southampton Hospital's ED during the time of plaintiff's presentation. Plaintiffs also point out that there are questions as to whether there were other radiologists available at Southampton Hospital to review x-rays on August 21, 2016 prior to plaintiff's discharge and prior to Dr. Morgani's shift, whether there was a contract between Southampton Hospital and Southampton Radiology, P.C. which governs the scope of the duties of the radiologists who interpret films at Southampton Hospital on behalf of Southampton Radiology, P.C., and whether there is a relationship between Southampton Radiology, P.C. and North Fork Radiology, P.C.

In reply, defendants argue that plaintiff does not allege or establish that Dr. Morgani's interpretation of plaintiff's x-rays on August 21, 2016 was "incorrect or injurious." Defendants also contend that the questions posed in plaintiffs' opposition papers are irrelevant to the issue of causation. In that regard, defendants highlight that plaintiff's deposition establishes that plaintiff underwent x-rays before and after her reduction procedure, plaintiff's husband was present for the procedure, and that plaintiff was told that she had a fracture. Defendants also point out that plaintiff testified that she received a sling, and was discharged at 6:00 a.m. with instructions to see an orthopedist. Defendants further note that plaintiff testified that she was seen by an orthopedist who ordered an MRI, and that her condition did not change between her ED visit on August 21, 2016 and her subsequent visit with Dr. Warren. As such, defendants maintain that their motion for

summary judgment should not be denied based on plaintiffs' speculation as to what additional discovery may reveal.

Additionally, defendants argue that plaintiffs have failed to demand discovery during three successive court conferences, including a conference that was held after defendants made the instant motion. Defendants further aver that plaintiffs' argument as to the possible involvement of "other radiologists" and the "availability" of radiological services cannot preclude summary judgment since these issues were not raised in plaintiffs' bills of particulars. Rather, defendants argue that plaintiffs' bills of particulars allege, *inter alia*, that defendants allowed plaintiff to undergo unnecessary procedures, failed to inform plaintiff that her post-reduction x-rays showed a persistent dislocation and a fracture, improperly discharged plaintiff from the ED, and failed to ensure that plaintiff knew of the severity of her injury and received urgent follow-up care.

Finally, defendants argue that contrary to plaintiffs' assertion, courts have granted summary judgment based upon a physician's affidavit.

DISCUSSION

"In order to meet [the initial burden on a motion for summary judgment in a medical malpractice action,] [a] defendant [is] required to 'present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [he or she] complied with the accepted standard of care or did not cause any injury to the patient'" (*Webb v. Scanlon*, 133 A.D.3d 1385, 1386 [4th Dept. 2015] [citations omitted]; *Swezey v. Montague Rehab & Pain Mgmt., P.C.*, 59 A.D.3d 431, 433 [2d Dept. 2009]). "A defendant physician may submit his or her own affidavit to meet that burden, but that affidavit must be 'detailed, specific and factual in nature' and must 'address each of the specific factual claims of negligence raised in [the] plaintiff's bill of particulars'" (*id.* [citations omitted]).

Here, Dr. Morgani's affidavit sufficiently establishes that his care and treatment of plaintiff on August 21, 2016 was limited to a review of plaintiff's x-rays taken in the ED prior to the start of his shift, and that nothing Dr. Morgani did or failed to do caused or contributed to plaintiff's alleged injuries. Indeed, in his affidavit, Dr. Morgani highlights that he was not working when plaintiff arrived at the ED, or when plaintiff was discharged, but rather, his involvement in plaintiff's care was limited to reviewing plaintiff's x-rays taken from the previous night, hours after plaintiff had been discharged from Southampton Hospital. Dr. Morgani also notes that because plaintiff was discharged prior to the start of his shift, he played no role in eliciting plaintiff's medical history, deciding how plaintiff's shoulder should be treated, issuing plaintiff's discharge instructions, or advising plaintiff as to her follow-up care and treatment.

Similarly, Dr. Morgani's affidavit establishes that on August 21, 2016, he issued a report on plaintiff's pre-reduction x-rays at 11:53 a.m., and a post-reduction report at 12:31 p.m., in which he detailed his findings of plaintiff's x-rays. Dr. Morgani also demonstrates that he conveyed his findings to Dr. Wiggins at 1:00 p.m., and that he did not have any contact with plaintiff's treating orthopedists. Moreover, Dr. Morgani notes that his interpretation of plaintiff's August 21, 2016 x-rays after the commencement of this lawsuit is consistent with his prior findings. Accordingly, Dr. Morgani has established his entitlement to summary judgment as a matter of law (*see, Webb*, 133 A.D.3d at 1386, *supra*; *Macaluso v. Pilcher*, 145 A.D.3d 1559, 1561 [4th Dept. 2016]).

In response, plaintiff has failed to submit proof in the form of an expert affidavit to rebut Dr. Morgani's *prima facie* showing of entitlement to summary judgment. "To raise an issue of fact to defeat defendants' motion [for summary judgment], plaintiffs were required to submit 'evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician' beyond mere '[g]eneral allegations of medical malpractice'" (*id.*; *Noonan v. New York Blood Ctr., Inc.*,

269 A.D.2d 323, 323 [1st Dept. 2000]). Here, plaintiffs' opposition does not address, let alone refute any of Dr. Morgani's statements or defendants' arguments contained in the instant motion. Indeed, plaintiffs' opposition not only lacks an expert affidavit to rebut defendants' *prima facie* case,¹ but plaintiffs have also failed to allege or demonstrate how defendants deviated from the standard of care, or how such deviations proximately caused plaintiff's alleged injuries (*see, Shattuck v. Anain*, 174 A.D.3d 1339, 1340 [4th Dept. 2019]; *Biondi v. Behrman*, 149 A.D.3d 562, 565 [1st Dept. 2017]; *Colwin v. Katz*, 122 A.D.3d 523, 524 [1st Dept. 2014]; *Grzelecki v. Sipperly*, 2 A.D.3d 939, 941 [3d Dept. 2003]; *Sloane v. Repsher*, 263 A.D.2d 906, 908 [3d Dept. 1999]).

Plaintiffs' sole opposition that defendants' motion is premised on the fact that discovery is outstanding. Such opposition, in the absence of additional evidence or testimony, is insufficient to rebut defendants' *prima facie* showing of an entitlement to summary judgment as a matter of law (*see, CPLR* § 3212(f)). Notably, while plaintiffs argue that further discovery is needed to answer certain questions in this case, none of plaintiffs' questions relate to Dr. Morgani's care and treatment of plaintiff on August 21, 2016. Specifically, the question as to "who was working the shift prior to Dr. Morgani's shift" has no bearing upon whether Dr. Morgani comported with the standard of care in his interpretation of plaintiff's x-rays, or whether Dr. Morgani proximately caused plaintiff's alleged injuries. Similarly, questions related as to whether Southampton Radiology, P.C. employed the radiologists who worked at Southampton Hospital on August 21, 2016, and whether there were additional Southampton Radiology, P.C. employees on-call at

¹*See, Fiore v. Galang*, 64 N.Y.2d 999, 1001 [1985] [granting defendants summary judgment where the "failure to diagnose cancer and the performance of an abdominal operation are not matters within the ordinary experience of laypersons," and plaintiff failed to supply an affidavit of merits from a person competent to attest to the meritorious nature of the claim]; *see also, Webb*, 133 A.D.3d at 1387, *supra* [plaintiff failed to submit the requisite expert medical response in opposition to the motion as plaintiff's attorney's affidavit was insufficient to raise a triable issue of fact"].

Southampton Hospital during the time of plaintiff's presentation are not relevant or germane to Dr. Morgani's radiological interpretation of plaintiff's x-rays.

Moreover, even if plaintiffs had alleged that defendants departed from the standard of care by failing to provide radiological services to plaintiff earlier than Dr. Morgani's shift, plaintiffs have failed to establish how this alleged departure caused or contributed to plaintiff's alleged injuries. In that regard, further discovery on this issue would be futile. To be sure, plaintiffs' opposition does not allege or demonstrate any negligence with respect to Southampton Hospital,² Southampton Radiology, P.C., or North Fork Radiology, P.C. such as to provide a sufficient basis for denial of defendants' motion for summary judgment. Significantly, plaintiffs' argument that further discovery may reveal a potential relationship or contract between some of the parties in this action is insufficient to warrant denial of summary judgment, especially since plaintiff does not demonstrate how such information relates to any issues on the standard of care or proximate causation (*see, Savage v. Quinn*, 91 A.D.3d 748, 750 [2d Dept. 2012] [defendants' motions for summary judgment were not premature where plaintiff "failed to demonstrate that additional discovery may have led to relevant evidence or that the facts essential to oppose the motion were exclusively within the knowledge and control of these defendants"]; *Gasis v. City of New York*, 35 A.D.3d 533, 534 [2d Dept. 2006]; *Noonan*, 269 A.D.2d at 324, *supra*). Accordingly, summary judgment is granted in defendants' favor.

As plaintiffs have failed to rebut defendants' argument that North Fork Radiology, P.C. was, and is a radiological office located in Riverhead, New York with no affiliation with

² Plaintiffs' question as to whether there were other radiologists at Southampton Hospital who were available to review x-rays on August 21, 2016 prior to plaintiff's discharge and prior to Dr. Morgani's shift goes to Southampton Hospital's potential negligence and liability in this action. Therefore, denial of summary judgment is unwarranted on this basis as Southampton Hospital is still a defendant in this action, and plaintiffs will have the opportunity to further explore this issue.

Southampton Hospital, and that North Fork Radiology, P.C. was not involved in plaintiff's care and treatment, summary judgment must be granted in favor of North Fork Radiology, P.C. Moreover, plaintiffs have failed to show how further discovery of a speculative relationship between Southampton Radiology, P.C. and North Fork Radiology, P.C. relates to defendants' alleged negligence, or plaintiff's alleged injuries (*Savage*, 91 A.D.3d at 750, *supra* ["The 'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process' is an insufficient basis for denying the motion"]; *Pow v. Black*, 182 A.D.2d 484, 485 [1st Dept. 1992]). Accordingly, summary judgment is granted in favor of North Fork Radiology, P.C.

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 clerk is directed to enter judgment in favor of Dr. Morgani, North Fork Radiology, P.C., and Southampton Radiology, P.C.; and it is further

ORDERED that the caption is amended as follows:

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PATRICIA ANDUIZA and FRANK ANDUIZA,
Plaintiffs,

-v-

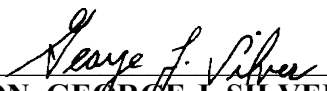
RHETT SILVER, M.D., 24/7 EMERGENCY CARE, P.C.,
SOUTHAMPTON HOSPITAL, RUSSELL F. WARREN, M.D.,
and HOSPITAL FOR SPECIAL SURGERY,
Defendants.

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; and it is further

ORDERED that the remaining parties are directed to appear for a virtual conference before the court on August 3, 2020 at 10:00 A.M.

Date: July 1, 2020


HON. GEORGE J. SILVER