

Winslow v Syed

2021 NY Slip Op 33230(U)

April 20, 2021

Supreme Court, Dutchess County

Docket Number: Index No. 51731/17

Judge: Maria G. Rosa

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

ANTHONY WINSLOW and DEBORAH WINSLOW,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 51731/17

OMAR N. SYED, M.D., MARSHALL PERIS, M.D.,
and THE PINES AT POUGHKEEPSIE CENTER FOR
NURSING AND REHABILITATION,

Defendants.

The following papers were read on Defendants' motions for summary judgment.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - O

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - O

AFFIRMATION IN OPPOSITION
EXHIBITS A - B

AFFIRMATION IN OPPOSITION
EXHIBITS A - R

REPLY AFFIRMATION
EXHIBIT A

REPLY AFFIRMATION
EXHIBIT A

This is medical malpractice and negligence action. On February 2, 2015 Defendant Doctors Omar Syed and Marshall Peris performed decompression and fusion surgery on Plaintiff's vertebrae at L4-L5 and L5-S1. Plaintiff was discharged from Northern Westchester Hospital to the Defendant The Pines at Poughkeepsie Center for Nursing and Rehabilitation ("The Pines") on February 10,

2015. On February 17, 2015 Plaintiff reported severe pain in his lower back. The following day Dr. Syed examined Plaintiff and on February 19, 2015 Dr. Syed and Dr. Peris performed revision surgery. Plaintiff alleges that the Defendants deviated from accepted standards of care in connection with the February 2, 2015 surgery and rehabilitation services rendered thereafter. Defendants move for summary judgment.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, “the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant.” Szczerbiak v. Pilat, 90 NY2d 553 (1997). In a medical malpractice action, a defendant physician demonstrates a *prima facie* showing of an entitlement to judgment as a matter of law by submitting sufficient proof that he or she did not deviate or depart from accepted community standards of practice or that any departure is not a proximate cause of the plaintiff’s injuries. See Rosenthal v. Alexander, 180 AD3d 826 (2nd Dept 2020).

In support of their motion for summary judgment, Drs. Syed and Peris have submitted copies of the pleadings, deposition transcripts, Plaintiff’s medical records and an expert affirmation. The foregoing establishes that Plaintiff had an extensive history of lower back problems. In 2008 he underwent a laminectomy at L5 and S1. In 2013 the doctor who performed that surgery recommended Plaintiff have fusion surgery. Plaintiff obtained a second opinion from an orthopedic spinal surgeon who also recommended surgery. Plaintiff then consulted Dr. Syed in December 2014. Following a physical examination, Dr. Syed recommended a two-level transforaminal lumbar interbody fusion at L4-L5 and L5-S1. The surgery involved a decompression of the spinal cord in addition to fusion achieved by using a bone graft. On February 2, 2015 Dr. Peris performed the decompression and Dr. Syed performed the fusion. There were no complications with the procedure and Plaintiff reported significant pain relief. After the surgery Plaintiff was able to walk and shower on his own. On February 10, 2015 Plaintiff was transferred to the Pines for post-surgical physical therapy. A CT scan conducted prior to discharge showed the hardware installed during the surgery was in good position without migration.

Upon admission to the Pines, Plaintiff’s attending physician ordered the administration of pain medications, spinal precautions and the use of a brace when out of bed. A physical therapy initial evaluation was performed on February 11, 2015. The treatment care plan devised included therapeutic exercises, neurological re-education, gait training, ice/heat, manual therapy, and physical therapy sessions five to six days per week for six weeks.

On February 17, 2015, Plaintiff participated in a morning physical therapy session. He testified at his deposition that it involved only his upper body with the exception of some walking with a walker. A note in his chart from 11:31 a.m. that day reported that Plaintiff was alert, orientated, ambulating with a walker with a steady gait but complaining of back pain. He was

administered oxycontin at 9:00 a.m. and again at 10:15 a.m. A note from 12:22 p.m. states that Plaintiff was complaining of insomnia due to back pain, and was taking Valium for the pain. Plaintiff stated at his deposition that between 2:00 p.m. and 3:00 p.m. a Pines' employee transported him by wheelchair to the first floor. He asserted that he was confused about why he was being brought to therapy in a different room than the one in which he usually had therapy. Plaintiff asserts that he was then taken out of his wheelchair, told to get in line with others in a group session and instructed to do three sets of genie squats with twelve squats in each set. He claims he repeatedly informed the therapist that he did not believe he was supposed to perform these squats but was advised they were appropriate. He stated a genie squat involved crossing his arms against his chest and squatting down. Plaintiff maintains that he did the first two sets of squats by going half way down but they caused him great pain. He asserts that the pain gradually became more severe until he heard a pop in his back which caused excruciating pain. He claims that a therapist then placed what he described as a tow strap around his waist and instructed him to walk down the hall. Plaintiff contends that after taking a few steps he blacked out and next recalled being placed in a wheelchair. A note in his chart from 5:18 p.m. states that after physical therapy Plaintiff was complaining of sudden pain in his back, in his left leg and behind his left knee.

Dr. Syed examined Plaintiff the following day. Prior to the examination Plaintiff underwent a CT scan and x-rays. Dr. Syed viewed the CT scan and x-rays and noted that the left L4 screw appeared to be toggling upwards into the superior endplate. He determined that revision surgery was necessary. He and Dr. Peris performed that surgery on February 19, 2015. It involved removal of hardware at L4, placement of L5 pedicle screws, a posterolateral fusion and posterior segmental fixation with revision laminectomy at L4, L5 and S1. Plaintiff was discharged from the hospital on February 23, 2015.

Dr. Syed and Dr. Peris have submitted an affirmation of Dr. John Houten, a specialist in neurosurgery of the spine and brain. Dr. Houten reviewed Plaintiff's medical records, the pleadings and deposition testimony and concludes that Drs. Syed and Peris did not deviate from accepted standards of medical practice in their care and treatment of Plaintiff. He further opines that they did not proximately cause Plaintiff's alleged injuries. Based on Plaintiff's medical history and Dr. Syed's December 14, 2014 evaluation of Plaintiff, Dr. Houten states that Dr. Syed performed a proper pre-operative assessment, properly recommended transforaminal lumbar interbody fusion surgery to decompress and restabilize the spine and prevent further movement and degeneration. Based on the deposition testimony and Plaintiff's records, he further concludes that Drs. Syed and Peris did not deviate from surgical standards of care in performing the surgery. He notes it was well within the standard of care for the placement of pedicle screws at the top of the construct at L4 and bottom of the construct at S1. He further opines that Drs. Syed and Peris properly placed and attached the screws. He notes that a post-surgery CT scan in the operating room confirmed proper placement of the screws post-surgery. Dr. Houten states that it is not the role of an operating spine surgeon to instruct experienced physical therapists in the types of physical therapy that a post-operative spinal fusion patient should perform. He further concludes that the loosening of the pedicle screws at L4 was not due to improper placement and that revision surgery was warranted based on a CT scan and x-ray showing the left L4 screw toggling upward. Finally, he concludes that Drs. Syed and Peris timely performed the revision surgery in accordance with applicable standards

of care. The foregoing is sufficient to demonstrate Drs. Syed and Peris' *prima facie* entitlement to summary judgment. They have produced competent evidence that they did not deviate from rendering accepted medical treatment and that their treatment was not a causal factor of Plaintiff's alleged injuries.

Plaintiffs' opposition to the motion of Drs. Syed and Peris is premised on an affidavit of Dr. Jeffrey Arle. Dr. Arle states that Dr. Syed's initial determination to perform the fusion and decompression surgery was warranted and he found no deviations with respect to the February 2, 2015 surgery. He opines, however, that the decision to perform the revision surgery on February 19, 2015 was a deviation from accepted standards of medical practice and procedure. He asserts that there was nothing in the studies he reviewed or in Plaintiff's history suggesting that surgery was necessary. He acknowledges that there appeared to be some movement of the L4 screw. He claims, however, that there was no finding on examination of gross instability and/or neurological deficits warranting revision surgery. He further states that the revision surgery was a competent producing cause of the pain, instability and neurological deficits Plaintiff now experiences.

The foregoing is insufficient to defeat Drs. Syed and Peris' *prima facie* showing of an entitlement to summary judgment. Plaintiffs' bills of particular allege that these Defendants deviated from accepted standards of care in connection with their performance of the February 2, 2015 surgery, by failing to properly assess Plaintiff pre-operatively, failing to stabilize Plaintiff's spine, failing to properly place and insert the screws used in the surgery, failing to timely and appropriately post-operatively assess Plaintiff, failing to perform diagnostic studies and to institute surgical intervention to address loosening of these screws, Plaintiffs' expert states that neither Dr. Syed nor Dr. Peris committed malpractice in connection with the February 2, 2015 surgery. The only claimed departure is in connection with performing the revision surgery. This was not a theory of malpractice asserted by Plaintiffs in their complaint or bills of particular. A theory of liability asserted for the first time in opposition to a motion for summary judgment may not serve as a basis for defeating the motion. See Pinn v. Baker's Variety, 32 AD3d 463 (2nd Dept 2006). Plaintiffs' expert does not allege a deviation from accepted standards of care on any of the theories of liability alleged in Plaintiffs' bills of particular. As the sole grounds for malpractice asserted are based on a new theory of liability raised for the first time in opposition to Defendants' motion, the affirmation is insufficient to create a material issue of fact to defeat Defendants' motion. Based on the foregoing, it is

ORDERED that the motion of Defendants, Drs. Omar Syed and Marshall Peris for summary judgment dismissing all claims and cross-claims against them is granted. **The caption of this action is hereby amended to remove Drs. Syed and Peris as Defendants.**

The Pines' motion for summary judgment is premised on Plaintiff's medical and treatment records, deposition transcripts, expert affirmations of Dr. David Clements and Lawrence Diamond, and an expert affidavit of occupational therapist Alison Weiner-Lasher. The Pines maintains that the physical therapy services it provided between February 10 and 17, 2015 were reasonable, appropriate and did not contribute to the pain and injuries claimed in Plaintiffs' bills of particular. The expert affidavit of Dr. Weiner-Lasher states that Plaintiff has a long history of back pain treated

with surgery and physical therapy. She notes that upon admission to the Pines his attending physician ordered pain medication, spinal precautions and the use of a brace when out of bed. His physical therapy initial evaluation recounted his medical history pertaining to his lower back and that he was using a cane for ambulation prior to his February 2, 2015 surgery. An examination noted that his balance was fair and his movement was deliberate with a rolling walker and an antalgic gait (a way to walk without pain). The records further note that Plaintiff required "contact guard" (assistance by the physical therapist) for all functional activities. The Pines developed a treatment plan to increase bed mobility, ambulation, balance and to decrease right and left lower back pain.

The plan was for Plaintiff to receive physical therapy five to six days a week for six weeks. Plaintiff's treatment notes indicate that he was complaining of severe pain in his lower extremities while at the Pines. Significant pain medication was administered as a result. Plaintiff's physical therapy daily flow chart indicates that on February 17, 2015 Plaintiff needed minimum to moderate assistance with transfers and was able to walk sixty feet with a rolling walker. It further indicates Plaintiff made complaints of back pain at a level eight out of ten and was returned to his unit. A service log matrix indicates Plaintiff had no group therapy but had concurrent physical therapy, which is two residents performing different exercises at the same time. The records state that he performed eleven minutes of therapeutic exercise, nine minutes of gait training therapy and that this was not the first occasion he was returned to the unit before completing his physical therapy session. Dr. Weiner-Lasher notes that a February 17, 2015 note states Plaintiff was complaining of extreme pain and numbness to his left hip area down to knee. As a result, Dr. Syed was notified and pain medications were administered.

Dr. Weiner-Lasher opines that Plaintiff was properly evaluated upon arriving at the Pines and that the physical therapy treatment plan was thorough and conservative. She states that the pain Plaintiff experienced on the afternoon of February 17, 2015 was a result of the February 2, 2015 surgery and not due to any physical therapy received on February 17, 2015. The basis of this opinion is Plaintiff's complaints of pain dating from his February 2, 2015 surgery through February 17, 2015. She states that his level of pain did not change from before his physical therapy on February 17, 2015 to after that therapy. She further opines that the physical therapy Plaintiff performed on February 17, 2015 did not include genie squats. The basis of this opinion is Plaintiff's physical therapy assessment from February 12, 2015 indicating that he had fair to poor balance necessitating at least contact guard assistance. She asserts his balance and lower extremity muscle strength would not have improved sufficiently in six days to enable him to complete a genie squat. The Pines has also submitted an affirmation of Dr. Lawrence Diamond. Dr. Diamond concludes that the Pines did not deviate from accepted nursing home care in treating Plaintiff. He states the initial physical therapy evaluation was proper, his treating physician properly administered pain medication, and that his complaints of increased pain following his February 17, 2015 physical therapy session were appropriately addressed by medical staff. The Pines has also submitted an expert affirmation of Dr. David Clements. Dr. Clements is not licensed to practice medicine in the State of New York and thus is not permitted to submit an affirmation in lieu of an affidavit under the exception set forth in CPLR 2106(a). His statement was also not competent evidence because it was not subscribed and affirmed to be true under the penalties of perjury. See Barouh v. L.Offs. of Jason L. Abelove, 131 AD3d 988, 991 (2nd Dept 2015). However, the Pines corrected this technical defect in reply by submitting the same evidence in proper form. Under the circumstances, the court shall consider it.

See Matos v. Schwartz, 104 AD3d 650 (2nd Dept 2013). Dr. Clements opines that the screw loosening was not caused by physical therapy but pre-existed the February 17, 2015 physical therapy session. The sole basis for his opinion is the pain level Plaintiff reported prior to the February 17, 2015 physical therapy session.

In opposition to the Pines' motion, Plaintiffs maintain that the expert affidavits and affirmation are conclusory and insufficient to establish a *prima facie* entitlement to summary judgment. Assuming, without deciding, that the Pines' evidence in conjunction with Dr. Diamond's affirmation is sufficient to establish a *prima facie* entitlement to summary judgment, Plaintiffs' opposition papers demonstrate material issues of fact. Plaintiff testified at his deposition that he performed genie squats at the February 17, 2015 physical therapy session. He testified that his pain level increased dramatically after hearing a loud popping noise in his back that occurred during that physical therapy session. Plaintiff testified as to a qualitative increase in the amount of pain he experienced after that event. Plaintiff has further submitted an expert affirmation of Dr. Jeffrey Arle stating that the popping sound Plaintiff reported would be consistent with an issue related to the screws placed during his surgery. An expert affidavit of Doctor of Physical Therapy Dimitrios Kostopoulos states that Plaintiff's physical therapy records indicate he was making progress prior to February 17, 2015. He opines that the performance of genie squats was contra-indicated based on the nature of Plaintiff's surgery and Plaintiff's condition on February 17, 2015. He states that a direction for Plaintiff to perform genie squats would deviate from the appropriate standard of physical therapy care. The foregoing creates an issue of fact as to whether the Pines was negligent in its treatment of Plaintiff, specifically whether he was directed to, and performed, genie squats on February 17, 2015, and whether this activity was a proximate cause of injury. Based on the foregoing, it is

ORDERED that the motion of the Pines at Poughkeepsie Center for Nursing & Rehabilitation for summary judgment is denied. The court finds no merit to the Pines' claim that it may not be held liable to Plaintiffs based on a contractual indemnification clause in a contract it had with non-party Preferred Therapy Solutions. That issue is not properly raised in this action and such clause would have no impact on Plaintiffs' right to pursue negligence claims against the Pines.

The foregoing constitutes the decision and order of the Court. A pre-trial conference of this action will be held on June 10, 2021 at 9:30 a.m.

Dated: April 20, 2021
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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