Roy v Lent
2021 NY Slip Op 33294(U)
January 7, 2021
Supreme Court, Westchester County
Docket Number: Index No. 69313/2018
Judge: Charles D. Wood
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1To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANITHA ROY and ROY PHILIP,

Plaintiffs,

-against-

DECISION & ORDER
Index No.69313/2018
Seq No.2

DAVID LENT, M.D. and SOUTHERN WESTCHESTER ORTHOPEDICS & SPORTS MEDICINE ASSOC., P.C.,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 64-82, 86-87, 92-102, were read in connection with defendants' motion for summary judgment.

This matter involves the orthopedic care and treatment provided to Anitha Roy ("plaintiff") by defendants.

On May 17, 2018, this action was transferred from Supreme Court, Bronx County.

Now, based upon the foregoing, the motion is decided as follows:

It is well-settled that a proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684,

686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court's function in considering a summary judgment motion is not to resolve issues, but to determine if any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]).

"To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (Stukas v Streiter, 83 AD3d 18,23 [2d Dept 2011]). "A defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Iulo v Staten Island University Hospital, 106 AD3d 696,697 [2d Dept 2013]). To successfully oppose a motion for summary judgment dismissing a

cause of action sounding in medical malpractice, a plaintiff must submit a physician's affidavit of merit attesting to (depending on the defendant's prima facie showing) a departure from accepted practice and/or containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]; see Arkin v Resnick, 68 AD3d 692,694 [2d Dept 2009]). Conclusory or general allegations of medical malpractice, "unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for summary judgment" (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]; see Alvarez v Prospect Hospital, supra, at 325).

In addition, the plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff's injuries (Stukas v Streiter, 83 AD3d 18). To establish proximate cause in a medical malpractice action, "a plaintiff needs do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant" (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; see Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, "the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chances [of a cure or increased her injury], as long as the jury can infer that it was probable that some diminution" in the plaintiff's chance of a better outcome (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v

Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]).

As a procedural matter, plaintiffs' request for the appointment of pro bono counsel is denied. Plaintiffs argue that the previous attorney stayed with the case more than 2 years and he left the case in spite of strong evidence. He mentioned he will do everything aggressively at the end of the case.

Nonetheless, the record shows that on September 1, 2020, this court (Lefkowitz, J.) ruled that based upon the information contained in the *in-camera* affirmation and in the absence of any objection by plaintiffs, prior counsel, Grace & Grace, made a sufficient showing of good cause for withdrawal as counsel for plaintiff. It has been almost four months since the withdrawal of counsel, and plaintiffs have not retained counsel.

Further, plaintiff does not fall within the class of persons who are entitled to have a guardian ad litem appointed under SCPA §403(2). Specifically, plaintiffs have not demonstrated that they are incapable adequately to protect their rights (SCPA §103[25]) or that they are incompetent (SCPA §103[40] [b]). Nor do plaintiffs fall into the category for poor person relief. A party who is granted poor person status (see CPLR 1101(a)) is potentially eligible for the assignment of free counsel, and under CPLR 1102(a), the court has discretion to make such an assignment. However, in civil actions, indigency by itself does not entitle a party to the appointment of free counsel (Matter of Smiley, 36 NY2d 433, 438 [1975]). This court finds that plaintiffs do not meet the standard, thus such appointment is denied.

Turning to the merits of the instant motion, this matter arose on or about August 24, 2016, when plaintiff presented to Dr. Lent, with complaints of a painful left ankle as a result of

a fall from the day before. Dr. Lent reviewed the X-ray performed at St. John's Riverside on the day of the accident and confirmed no fracture or dislocation of the ankle and no lytic or blastic lesions. Dr. Lent documented mild swelling, no erythema or ecchymosis. His impression was a left ankle sprain. She was given an aircast and instructed to return in two weeks time. Follow up appointments with Dr. Lent were attended by plaintiff. She commenced physical therapy as recommended. She had increased edema in the left ankle and increased pain at end ranges of movements. She reported difficulty ambulating further than two blocks, squatting, climbing steps, running, doing housework, getting in and out of a car and performing lower body dressing and her pain level was 4/10. On the October 31, 2016, visit, Dr. Lent documented plaintiff was not improving, or improving very, very slowly. No swelling was documented. However, tenderness laterally over the ATFL and CFL and pain on inversion were noted. Dr. Lent ordered an MRI to rule out any other potential issues, and recommended continued physical therapy for strengthening and stabilization of plaintiff's ankle sprain. Plaintiff returned to Dr. Lent on December 12, 2016. She reported discontinuance of physical therapy due to insurance issues. On physical exam she had excellent range of motion, some tenderness over the ATFL with some increased pain on inversion. Dr. Lent recommended continued strengthening, and plaintiff was given a recommended home protocol. Approximately seven and a half months after plaintiff's

final appointment with Dr. Lent, on September 22, 2017, she presented to Dr.Michael Gott at White Plains Hospital Physicians Practice. She had essentially the same complaints as when she left Dr. Lent. Dr. Gott diagnosed left ankle pain and ordered an MRI, which found there was no osteochondral defect and no disruption of the ligaments of the left ankle. At the next

visit to Dr. Gott, on October 5, 2017, the patient advised her symptoms had "improved dramatically." She was able to weight-bear with only minimal discomfort. Dr. Gott's recommended strengthening exercises and ice as needed after activity.

Plaintiffs allege Dr. Lent failed to appreciate the MRI findings, on November 8, 2016, of osteochondral fracture of the medial plantar aspect of the talar head of the left ankle; a fracture of the anterior process of calcaneus of the left ankle and a high grade partial tear of the deltoid ligament; failed to diagnose and treat the fractures of the talar head and anterior process of the calcaneus; referred plaintiff to inappropriate and contraindicated physical therapy; and, failed to advise plaintiff of risks associated with undiagnosed fractures, forgoing surgical ligamental reconstruction as well as alternative procedures that would be surgical in nature.

In support of their motion for summary judgment, moving defendants offer two medical opinions. The first, from Christopher E. Hubbard, a physician licensed to practice medicine in the state of New York specializing in Orthopaedic Surgery. It is his opinion, that the orthopaedic and physical therapy services provided by Dr. Lent and Southern Westchester Orthopedics & Sports Medicine Assoc., P.C., and physical therapist Patrick Evia, to plaintiff, conformed at all times with good and accepted medical and orthopaedic practice. Specifically, Dr. Hubbard believes that plaintiff's subsequent treatment with Dr. Michael Gott, confirmed Dr. Lent's original, correct, diagnosis of a left ankle sprain. None of the subsequent imaging revealed any fracture or dislocation of the ankle, but, rather, showed the ligaments and bone bruise had healed. Dr. Lent's, Southern's, and physical therapist, Patrick Evia's treatment of plaintiff, orders for follow up imaging, ongoing assessments of her condition, orders for physical therapy, and the physical therapy provided, were within the standard of applicable

medical care, the physical therapy provided was not too aggressive or too vigorous given the ankle sprain suffered and no alleged departure on the part of Dr. Lent, Mr. Evia or Southern caused or exacerbated the injuries alleged by plaintiff in her complaint, including but not limited to sprain, osteochondral fracture of the medial plantar aspect of the talar head of the left ankle, a fracture of the anterior process of calcaneus of the left ankle and a high grade partial tear of the deltoid ligament. (NYSCEF#66).

Dr. Hubbard also opines that plaintiff's lack of informed consent claim is entirely without merit and must be dismissed, insofar as that surgery was not an alternative form of treatment and that there was no alternative to Dr. Lent's treatment, i.e. aircast, ice, assistive walking devise to limit weight bearing and physical therapy. Therefore, plaintiff's claim that Dr. Lent and Southern failed to advise her that surgical treatment was an alternative to physical surgery is entirely without merit. It is clear that surgery was not an alternative.

The second expert opinion is by Jonathan S. Luchs, M.D. licensed to practice medicine in the State of New York specializing in Musculoskeletal Radiology, Board Certified by the American Board of Radiology. I currently hold the position of Chief Medical Officer at Premier Radiology. It is Dr. Luchs' opinion that Dr. Lent's interpretation of the August 23, 2016 X-ray and the MRI imaging studies and recommendation for treatment for plaintiff pursuant to these studies, conformed at all times with good and accepted medical and orthopaedic practice. (NYSCEF#67). Furthermore, the treatment provided by Dr. Lent and Southern Westchester Orthopedics & Sports Medicine Assoc., P.C. did not cause or aggravate any of plaintiff s alleged injuries. Dr. Luchs' continues that the MRI images performed at SL John's Riverside Hospital, confirmed an ankle sprain. There was absolutely no indication for casting or surgery.

Further, plaintiff's claim that Dr. Lent failed to appreciate a fracture of the anterior process of the calcaneus is baseless. The images show the anterior process is completely intact. There is some slight darkening outside the base of the anterior process, however, this is simply minor swelling of the soft tissue around the anterior process. Therefore, Dr. Luchs concludes that Dr I.ent's continued characterization of the injury as a sprain was correct. And nothing in this MRI required casting or surgical intervention. Approximately 11 months after her initial MRI, plaintiff had a second MRI study performed on October 4, 2017, which confirmed Dr. Lent's original, correct. diagnosis of a left ankle sprain. T'herefore, Dr. Luchs opines that Dr. Lent's treatment of plaintiff, were within the standard of applicable medical care and no departure on the part of Dr. Lent, or Southern Westchester ; Orthopedic & Sports Medicine Associates, (NYSCEF#67).

Defendants established their prima facie entitlement to summary judgment based upon plaintiff's medical records, hospital records and the medical expert affidavits, which concluded that the treatment of plaintiff did not deviate from accepted medical practice.

Accordingly, the burden shifts to plaintiffs "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 Hosp., 68 NY2d 320, 324-325.

Plaintiffs oppose the motion by unsworn letters to the court (not in admissible form) that plaintiff has the evidence from radiologist and different orthopedic specialists of her ankle injuries like talus and calcaneus bone fractures and ligament injuries in support of her case and in opposition to defendants' expert opinions and her own previous attorney's incorrect in camera affirmation. She concludes that both the expert opinions and affidavits from Dr.

Hubbard and Dr. Luchs are incorrect and unreliable. She claims that she needs an opportunity to show provable evidence of her strong case about defendants' misdiagnosis and incorrect treatment and incorrect advice leading to her disability. Plaintiffs assert that Dr. Lent failed to treat these injuries promptly and properly leading to plaintiff's disability. Even after the MRI images and report, Dr. Lent allegedly incorrectly reported and advised it is a sprain and no fracture. He gave simple aircast stirrups and physiotherapy. He advised physiotherapy is the only treatment.

Taking into consideration plaintiffs' arguments, the court finds that plaintiffs offered no medical testimony in opposition to defendants' summary judgment motion. Since plaintiffs did not offer an expert's affidavit in support of their claims, their general allegations of medical malpractice, are conclusory and unsupported by competent evidence and are insufficient to defeat summary judgment. (Deutsch v Chaglassian, 71 AD3 718 [2d Dept. 2010]). Additionally, for the same reasons, the derivative suit by Roy Philip is dismissed.

This constitutes the decision and order of the court.

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is granted, and the complaint is dismissed. The Clerk shall mark his records accordingly.

Dated: January 7, 2021
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF