

Andreoli v Gumprecht

2023 NY Slip Op 32377(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 156230/2014

Judge: Erika M. Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

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BRIAN ANDREOLI,

Plaintiff,

- v -

EVA GUMPRECHT, as the Executor of the Estate of
JEFFREY GUMPRECHT, M.D., MARTIN CAMINS, M.D.
and MOUNT SINAI HOSPITAL,

Defendants.

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INDEX NO. 156230/2014

MOTION DATE 09/27/2022,
12/05/2022

MOTION SEQ. NO. 004, 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 192, 193, 194

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 191, 195

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court grants in part Defendant Eva Gumprecht, as the Executor of the Estate of Jeffrey Gumprecht, M.D.’s (“Dr. Gumprecht”) and Mount Sinai Hospital’s (“Mt. Sinai”) motion for summary judgment dismissal of Plaintiff Brian Andreoli’s (“Plaintiff”) Verified Complaint, filed under motion sequence 004, to the extent that the court grants dismissal of Plaintiff’s claims against the movants, except as to whether Dr. Gumprecht departed from good and accepted standard of medical practice in his care and treatment of Plaintiff’s alleged infection as set forth herein; whether Mt. Sinai is liable for Dr. Gumprecht’s alleged negligence under the theory of respondeat superior as an apparent or ostensible agent of Mt. Sinai; and whether any of moving Defendants’ alleged acts or omissions were a proximate cause of Plaintiff’s alleged injuries and damages.

The court grants Defendant Martin Camins, M.D.'s ("Dr. Camins") motion for summary judgment dismissal of Plaintiff's Verified Complaint, filed under motion sequence 005, and the court dismisses the Verified Complaint as against Dr. Camins.

Plaintiff brought this medical malpractice action against Defendants regarding his care and treatment involving an elective spinal surgery performed by Dr. Camins on January 10, 2012, at Defendant Mt. Sinai which involved an L3-L4 laminectomy, discectomy, facetectomy, and an L3-L4 fusion with instrumentation. Plaintiff alleges in substance that Defendants departed from good and accepted medical practice by failing to properly and timely diagnose and treat Plaintiff's post-operative infection following Plaintiff's spinal surgery; failing to prescribe the correct types and doses of antibiotics to treat the infection which caused Plaintiff's infection to develop into osteomyelitis; failing to perform the proper diagnostic tests; failing to remove the hardware at L3-L4 and negligently hiring medical staff.

Plaintiff further alleges in substance that his injuries include back pain, leg weakness, numbness, paresthesia, a prolonged spinal infection that developed into osteomyelitis, and edema in his spine resulting in permanent weakness and chronic pain, resulting in a lengthy and complicated course of hospital treatment and antibiotic treatment.

Defendants Dr. Gumprecht and Mt. Sinai now move under motion sequence 004 for summary judgment in their favor and for dismissal of Plaintiff's complaint against them. They rely on the expert opinions of four experts: Drs. Bruce F. Farber, Michael Lavyne, Devon A. Klein and Roger A. Bonomo. Defendants Dr. Gumprecht and Mt. Sinai argue in substance that their care and treatment of Plaintiff regarding Plaintiff's elective spinal surgery performed on January 10, 2012, his hospital admissions and office visits met the appropriate standards of practice in the specialty areas of infectious disease, internal medicine, neurosurgery, radiology

and neurology. They further argue in substance that Plaintiff was never diagnosed with osteomyelitis of the spine and that there is nothing in his medical records to support his claim.

They also argue that Plaintiff provided informed consent as he signed documents entitled “Consent for Spinal Surgery,” “Some Common Risks of Spinal Surgery” and “Consent for Surgery” forms prior to the surgery, Dr. Camins sufficiently advised Plaintiff of the risks, benefits and alternatives of the surgery and appropriately answered Plaintiff’s questions. They further argue that they considered the risks of postoperative infection and that such risks were elevated in patients with diabetes and they administered the appropriate diagnostic tests and antibiotics and performed the appropriate evaluations of Plaintiff.

They further argue that Mt. Sinai cannot be held vicariously liable for Dr. Gumprecht’s or Dr. Camins’ acts or omissions because Plaintiff was Dr. Camins’ longtime private patient and Plaintiff began his treatment with Dr. Camins at his private office on November 24, 2010. The movants further argue in substance that Dr. Camins asked Dr. Gumprecht to perform an infectious disease consult on Plaintiff.

Defendants Dr. Gumprecht and Mt. Sinai argue in substance that they did not cause or contribute to Plaintiff’s post-operative complaints of lower back pain, numbness, paresthesia, and left lower extremity weakness and that these complaints were caused by his preexisting surgical and medical history, which included diabetic neuropathy, chronic and severe back pain, left leg pain, arthritis and fatigue.

Defendant Dr. Camins now moves for summary judgment dismissal of Plaintiff’s Verified Complaint against him under motion sequence 005. He relies on the expert opinions of Dr. Martin Zonenshayn, who opined in substance that Dr. Camins took all appropriate precautions to prevent against infection, including obtaining the proper pre-operative clearance,

administering the proper antibiotics and allowing them to treat the infection, rather than removing the surgical hardware, which would have increased the risk of infection and potentially destabilized Plaintiff's spine. He argues that he appropriately diagnosed and treated Plaintiff's spinal infection until Dr. Gumprecht began treating Plaintiff for the infection and appropriately managed Plaintiff's care. He further argues that he ordered the appropriate tests and specialist consultations. Dr. Camins further argues that Plaintiff is not claiming that he committed any malpractice regarding Dr. Camins' performance of the spinal procedure, but Plaintiff alleges claims regarding his post-operative infection and the Defendants' management of that infection. He further argues in substance that Plaintiff failed to appear at several scheduled visits and terminated his care with Dr. Camins following the June 21, 2012 visit.

Dr. Camins further argues that there were no deviations in the performance of the procedure and that he properly managed Plaintiff's post-operative infection at all times. He further argues that there is no evidence that Plaintiff developed osteomyelitis. Dr. Camins further argues in substance that the presence of the 1 cm ulcer distal to the operative field did not render the procedure contraindicated, as it was superficial and did not affect the status of the surgery, but Dr. Camins took the appropriate prophylactic steps to ensure that the wound did not develop into a post-operative infection. Dr. Camins also argues in substance that Plaintiff's expert, Dr. Maletz's, opinions regarding Dr. Camins' departures from the standard of care were speculative, conclusory, not based on the complete record, which included Dr. Camins' office chart, and failed to rebut Dr. Zonenshyn's opinions.

Dr. Camins further argues in substance that the court should not consider Plaintiff's allegation that Dr. Camins failed to appreciate the ulcerated wound because it is a new theory raised for the first time in Plaintiff's opposition to the summary judgment motion.

Additionally, Defendant Dr. Camins argues in substance that none of his acts or omissions caused Plaintiff's alleged injuries and that Plaintiff's alleged symptoms were caused by his diabetic amyotrophy.

Plaintiff opposes the motions and relies on the expert opinions of Dr. Frank Maletz and Dr. Richard Snepar. Plaintiff argues in substance that Defendants committed malpractice by negligently and recklessly deciding to proceed with Plaintiff's elective spinal implant surgery in the presence of an ulcerated wound near the surgical site, particularly since Plaintiff was a severely diabetic, immunocompromised patient. Plaintiff further argues that Defendants failed to properly recognize, diagnose and manage a hospital-caused post-operative spinal infection, which should have included debridement of tissue and failed to use proper diligence and aggressive infection treatment. Plaintiff further argues in substance that Defendants' acts or omissions caused Plaintiff's damages, which included the need for a revision surgery and profound neurologic deficits in his lumbar plexus distribution, neurogenic pain, and significant impairments in the ability to walk and perform his daily activities, causing him to be home-bound and severely disabled.

Plaintiff further argues in substance that the medical records and other evidence support his arguments that Dr. Camins and Mt. Sinai negligently decided to go forward with the surgery and Dr. Gumprecht negligently failed to diligently and properly treat the infection and Plaintiff's deteriorating condition. Plaintiff further argues that Mt. Sinai is vicariously liable for Plaintiff's injuries and that Dr. Gumprecht admitted that he was an employee of Mt. Sinai during his deposition testimony. Plaintiff argues in substance that Mt. Sinai is directly liable for its nursing staff's negligence for failing to recognize, log or otherwise identify Plaintiff's ulcerated wound and its severity as it was in close proximity to the surgical site.

Plaintiff also argues in substance that Dr. Camins and Mt. Sinai should not have allowed the elective spinal implant surgery to proceed because prior to the surgery, they discovered the ulcerated wound close to the surgical site in Plaintiff's back, which caused Plaintiff's infection to enter the spine, spread and smolder for months severely damaging the vertebrae and spinal nerves and caused Plaintiff's rapid deterioration.

Plaintiff further argues in substance that the Defendants' negligence proximately caused his damages, including the need for a revision surgery and profound neurologic deficits in the lumbar plexus distribution, neurogenic pain, and significant impairments in the ability to walk and perform virtually all activities of daily living. Plaintiff also alleges that he was caused to be home-ridden, severely disabled, depressed and in constant pain. He argues in substance that Dr. Zonenshayn's opinions regarding lack of proximate causation are incorrect and conclusory.

Plaintiff also argues in substance that issues of fact exist which preclude summary judgment in this case. Plaintiff argues that the parties disagree as to whether the evidence demonstrates that Dr. Camins should have proceeded with the surgery in the presence of the wound, whether Defendants properly treated Plaintiff's infection and whether Plaintiff was diagnosed with osteomyelitis. Additionally, Plaintiff argues that many of Defendants' experts' opinions were conclusory, incorrect or failed to address Plaintiff's expert's opinions which were voluntarily disclosed to Defendants prior to the filing of their motions.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial

burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden,

then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting 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 (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician who is retained by the patient himself (*see e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendants met their initial burdens of demonstrating their entitlement to summary judgment in their favor as a matter of law, however Plaintiff’s experts raised triable issues of fact regarding Dr. Gumprecht’s and Mt. Sinai’s motion, which were sufficiently based on the record, but failed to raise any triable issues of fact regarding Dr. Camins’ motion. Therefore, the court dismisses Plaintiff’s complaint against Dr. Camins only, but limits Plaintiff’s claims against Dr. Gumprecht and Mt. Sinai as set forth herein.

The court determines that the questions of fact which remain to be tried include, but are not necessarily limited to, whether Dr. Gumprecht departed from good and accepted standard of medical practice in his care and treatment of Plaintiff’s alleged infection, whether Mt. Sinai is liable for Dr. Gumprecht’s alleged acts or omissions under the theory of respondeat superior as an apparent or ostensible agent of Mt. Sinai; whether any of Dr. Gumprecht’s alleged departures or negligence were the proximate cause of Plaintiff’s alleged injuries and damages; whether the medical records indicate that Plaintiff was diagnosed with an infection while under Dr. Gumprecht’s care; whether Plaintiff was diagnosed with osteomyelitis, or whether any of the

records indicating that there was “evidence of osteomyelitis” was sufficient to indicate the presence of osteomyelitis.

The court does not find any support in the deposition transcript for Plaintiff’s claim that Dr. Gumprecht admitted that he was an employee of Mt. Sinai. Instead, he testified in substance that he was self-employed, that he worked exclusively at Mt. Sinai and that he had no other affiliations. Under the circumstances, the court finds that a question of fact exists as to whether Plaintiff could reasonably have believed that Dr. Gumprecht was provided by Mt. Sinai and that he acted on behalf of Mt. Sinai. As such, whether Mt. Sinai can be held vicariously liable for Dr. Gumprecht’s alleged acts or omissions remains a question of fact to be determined by the jury.

Even though the court dismisses all claims against Dr. Camins, even if any claims against him had survived, then the court would still have found that Mt. Sinai was not liable under a theory of respondeat superior. Dr. Camins was a private physician and Plaintiff was his long-time patient who was treated at his private office. Additionally, the court dismisses Plaintiff’s allegations regarding Mt. Sinai’s vicarious liability for the alleged acts or omissions by any members of the nursing or hospital staff, including for their alleged failure to document the wound. The court also dismisses all of Plaintiff’s claims against Mt. Sinai alleging direct liability, including, but not necessarily limited to, Mt. Sinai’s failure to cancel the surgery.

The court dismisses all of Plaintiff’s causes of action against Dr. Camins. The court finds that Plaintiff failed to raise any material questions of fact based on the evidence sufficient to defeat this motion. Plaintiff alleged in substance that Dr. Camins departed by failing to cancel the procedure, failing to order the appropriate diagnostic tests or biopsies, and by delaying the follow-up visit for six months.

The court finds that Dr. Maletz's opinions were conclusory, speculative and unsupported by the medical records. It does not appear that Dr. Meletz reviewed Dr. Camins' office chart prior to forming his opinions as to Dr. Camins' liability. Additionally, Dr. Meletz failed to rebut or even address Dr. Camins' expert's opinions regarding liability and causation. The court agrees with Dr. Camins that Plaintiff failed to oppose several portions of Dr. Camins' motion, including Plaintiff's allegations that Dr. Camins disregarded Plaintiff's continued complaints of pain and weakness, his failure to remove the hardware at L3-L4 and his failure to order diagnostic tests to determine if Plaintiff had an infection.

The court also agrees with Dr. Camins and finds that Plaintiff's allegations regarding Dr. Camins' failure to cancel the procedure in light of the ulcerated wound and his failure to appreciate the wound prior to the surgery are new theories of liability which were not included in Plaintiff's Bill of Particulars or Verified Complaint. Plaintiff's Bill of Particulars discussed the alleged post-operative infection and injuries and failed to mention any alleged liability by Dr. Camins regarding his decision to go forward with the operation or his pre-operative acts or omissions regarding his appreciation and treatment of the wound. As such, these allegations were raised in Plaintiff's expert report for the first time. Although the report may have been provided to the Defendants in advance of Dr. Camins' summary judgment motion, Plaintiff failed to file a Supplemental Bill of Particulars to include the additional allegations. Therefore, the court dismisses these claims for this reason as well as the others stated above.

Therefore, the court grants in part Dr. Gumprecht's and Mt. Sinai's motion as set forth herein and grants Dr. Camins' motion.

The court has considered any additional arguments raised by the parties, which were not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

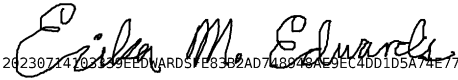
As such, it is hereby

ORDERED that as to motion sequence 004, the court grants in part Defendant Eva Gumprecht, as the Executor of the Estate of Jeffrey Gumprecht, M.D.'s and Mount Sinai Hospital's motion for summary judgment dismissal of Plaintiff Brian Andreoli's Verified Complaint, to the extent that the court grants dismissal of Plaintiff's claims against the movants, except as to whether Dr. Gumprecht departed from good and accepted standard of medical practice in his care and treatment of Plaintiff's alleged infection as set forth above; whether Mt. Sinai is liable for Dr. Gumprecht's alleged negligence under the theory of respondeat superior as an apparent or ostensible agent of Mt. Sinai; and whether Dr. Gumprecht's alleged acts or omissions were a proximate cause of Plaintiff's alleged injuries and damages; and it is further

ORDERED that as to motion sequence 005, the court grants Defendant Martin Camins, M.D.'s motion for summary judgment dismissal of Plaintiff Brian Andreoli's Verified Complaint, the court dismisses the complaint as against Defendant Martin Camins, M.D. and directs the Clerk of the Court to enter judgment in favor of Defendant Martin Camins, M.D. as against Plaintiff Brian Andreoli without costs to any party; and it is further

ORDERED that the parties are directed to appear for a conference to set a trial date and to discuss settlement on August 24, 2023, at 9:30 a.m., in Part 10, located in room 412, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.


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7/14/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: