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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten Justice PART 6

0124733/2002

ANDERSON, ROBERT A.
vs
BETH ISRAEL MEDICAL

SEQ 1

SUMMARY JUDGMENT

INDEX NO. 124733/02
MOTION DATE 1/18/05
MOTION SEQ. NO. 01
MOTION CAL. NO. 02

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

FILED
MAR 0 3 2005
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

HON. EILEEN BRANSTEN
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-24-05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

HON. EILEEN BRANSTEN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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ROBERT A. ANDERSON and
LINDA HALL ANDERSON,

Plaintiffs,

-against-

BETH ISRAEL MEDICAL CENTER
and WILLIAM J. BOOK, M.D.,

Defendant.

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Index No. 124733/02
Motion Date: 1/18/05
Motion Seq. No.: 001
Motion Cal. No.: 002

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendants Beth Israel Medical Center ("Beth Israel") and William Jeffrey Book, M.D. ("Dr. Book") move for summary judgment dismissal of the action commenced by plaintiffs Robert A. Anderson ("Mr. Anderson") and Linda Hall Anderson ("Mrs. Anderson"). Plaintiffs oppose this motion.

*Background*

On May 11, 2000, Dr. Scott Gold ("Dr. Gold"), an otolaryngologist, installed a peripherally-inserted central catheter ("PICC line") in Mr. Anderson's left arm so that Mr. Anderson could self-administer antibiotics to cure his sinus infections. Defendants' Affirmation in Support of Motion ("Aff."), at ¶ 14. Dr. Gold then performed sinus surgery on Mr. Anderson at Beth Israel on May 23, 2000. Aff., at ¶ 15.

Before surgery, Mr. Anderson told the anesthesiologist, Dr. Book, that he had a PICC line in his left arm and that the IV should be inserted into his right arm. Aff., at ¶ 16. Dr. Book inserted a 22-gauge IV line into Mr. Anderson's left arm. Aff., at ¶ 17. He also placed an intra-operative blood pressure cuff on Mr. Anderson's right arm. Aff., at ¶ 18.

In this medical malpractice action – commenced on November 11, 2002 – plaintiffs claim that Dr. Book negligently placed an intra-operative blood pressure cuff over the PICC line and failed to monitor Mr. Anderson's IV fluids, and that these departures proximately caused Mr. Anderson to sustain a blood clot in his left upper arm and shoulder. Aff., at ¶¶ 3,8. In the complaint, plaintiff specifically alleges that "the blood pressure cuff was placed on Plaintiff's left arm." Aff., Ex. A, at ¶ 11.

Defendants now move for summary judgment, arguing that they conformed with accepted standards of medical care in treating Mr. Anderson. Aff., at ¶ 2. In support of their motion, defendants submit the affirmation of Sheldon H. Deluty, M.D. ("Dr. Deluty"), a physician board-certified in Anesthesiology. Aff., Ex. F, at ¶ 1. Dr. Deluty concludes, after careful review of all the records and testimony in this case, that defendants did not depart from accepted standards of medical care in treating Mr. Anderson. Aff., Ex. F, at ¶ 6. Specifically, Dr. Deluty states that Dr. Book properly placed the IV line in Mr. Anderson's left arm and started a new line for the IV, instead of using the existing PICC line, which could result in complications. Aff., Ex. F, at ¶ 7. Furthermore, Dr. Deluty opines that Dr.

Book placed the intra-operative cuff on Mr. Anderson's right arm and that this was not a departure from accepted standards of medical care. Aff., Ex. F, at ¶ 11.

Plaintiffs oppose this motion, arguing that there is an issue of fact as to whether Dr. Book placed the intra-operative blood pressure cuff on Mr. Anderson's right or left arm. Opp., at ¶ 3. In support of their position, they submit the affidavit of Mr. Anderson, who states that the blood pressure cuff was placed on his left arm. Affidavit of Mr. Anderson ("Anderson Aff."), at ¶ 5. Furthermore, Mr. Anderson corrects the testimony he gave at deposition, in which he stated that he was not sure on which arm Dr. Book placed the blood pressure cuff. Anderson Aff., at ¶ 7.

In response to plaintiffs' opposition, defendants submit a reply affirmation in which Dr. Deluty states, for the very first time, that even if Dr. Book had placed the intra-operative blood pressure cuff on the same arm as the PICC line, it would not have been a departure from accepted standards of medical care. Defendants' Reply ("Reply"), Ex. A, at ¶ 8.

*Analysis*

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dep't 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996). Indeed, because summary

disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324.

Here, defendants rely on the expert affirmation of Dr. Deluty. Dr. Deluty opines, among other things, that defendants' placement of the blood pressure cuff on Mr. Anderson's right arm was not a departure from accepted standards of medical care.

In response, plaintiffs submit the affidavit of Mr. Anderson, in which he states the blood pressure cuff was placed on his left arm, not his right arm. Taking this evidence in the light most favorable to the plaintiff, Mr. Anderson's affidavit raises a definite question

of fact, namely, whether the blood pressure cuff was placed on his right or left arm and whether this was a departure from accepted standards of medical care.

Although defendants claimed at oral argument that this was a feigned issue and that Mr. Anderson had not previously raised the left arm/right arm question of fact, Mr. Anderson's complaint clearly states that defendants placed the blood pressure cuff on his left arm. Aff., Ex. A, at ¶ 11. Therefore, defendants, from the very outset of this litigation, had clear and unambiguous notice that Mr. Anderson intended to claim that the blood pressure cuff was on his left arm.

Thus, in order to prevail in summary judgment, defendants were required in their initial motion papers to submit expert evidence stating that regardless of the arm on which they placed the blood pressure cuff, they did not depart from accepted standards of medical care. Defendants did not set forth such evidence until they submitted reply papers. The expert evidence submitted on reply, however, cannot be considered by this court because it raises new arguments to which plaintiffs never had an opportunity to respond. *See*, *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561 (1st Dep't 1992) (defendant cannot introduce new arguments on reply in summary judgment motion).

In the end, defendants have not demonstrated their entitlement to summary judgment as a matter of law and their motion must be denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February 24, 2005

ENTER

Hon. Eileen Bransten