

Karpen v Gorfine

2007 NY Slip Op 30269(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0114427

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Harry Karpen and Paula Kreizer Karpen

FILED

INDEX NO. 114427/04

MOTION DATE 1/26/07

- v -

MAR 21 2007

MOTION SEQ. NO. 001

Stephen Gorfine, Joel Bauer and Mt. Sinai Medical Center

NEW YORK COUNTY CLERK'S OFFICE

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 dismissing the complaint is granted.

This medical malpractice action arises out of colo-rectal surgery that was performed on plaintiff Harry Karpen by defendants Stephen Gorfine, M.D. and Joel Bauer, M.D. at Mt. Sinai Medical Center on May 31, 2002.

Plaintiffs allege that during the surgery defendants inadvertently left a 6-7 cm. segment of diseased bowel and did not inform Mr. Karpen of this until November 2003 when Mr. Karpen made an inquiry to Dr. Bauer.

Defendants assert that during the procedure, they determined that some rectal segment had to be retained due to the fact that plaintiff had a shortened mesentery, and that they assessed the patient's condition at the time and performed a double-stapled ileorectal anastomosis, as opposed to the originally planned ileoanal anastomosis and mucosectomy in that the

original plan was not medically viable due to plaintiff's anatomy (Expert's affirmation of Bruce S. Gingold, M.D., ¶ 9; see also depositions of defendants). However, plaintiffs question defendants' position that the bowel was intentionally left in place, noting that neither the hospital chart nor the operative report signed by Dr. Bauer on August 14, 2002 make any mention of a retained segment of bowel, or of the difficulties encountered during the procedure that have been identified by defendants in the course of discovery. They argue that if defendants are being truthful about intentionally leaving a segment of the bowel, then defendants failed to issue an accurate operative report of the May 2002 procedure. Plaintiffs also stress that Dr. Gorfine did not issue a report that mentioned the retained rectal segment until November 6, 2003.

Defendants have made a prima facie showing of entitlement to summary judgment through submission of their deposition testimony and the expert's affirmation of Bruce S. Gingold, M.D., an internist who is board certified in colon and rectal surgery and surgery. Dr. Gingold reviews the procedure that was performed on May 31, 2002 and explains why some rectal segment needed to be retained and why defendants appropriately performed a double-stapled ileorectal anastomosis instead of the originally planned ileoanal anastomosis and mucosectomy. Regarding the May 2002 operative report issued by Dr. Bauer, defendants' expert states that while the report does not clearly describe some of the details of the procedure¹, plaintiff's subsequent treaters were aware of Mr. Karpen's post operative anatomy and implications of that procedure. Dr. Gingold notes that Mr. Karpen's treating gastroenterologist Dr. Chapman was aware of the retained rectal segment because he had performed pouchoscopies on Mr. Karpen subsequent to the May 2002 surgery, and that when plaintiff

¹Dr. Bauer testified at his deposition that it was a "very poor operative report and that there were entire portions of the report that were inaccurate (Bauer EBT, pp. 94, 102-104).

consulted with Dr. James Becker in November 2003 regarding surgery to remove the retained segment, Dr. Becker was aware of the results of the May 2002 surgery, as is reflected in his office records. Dr. Gingold concludes that plaintiff's subsequent treaters were aware of his anatomy and were able to properly plan further treatment.

In opposition to the motion, plaintiffs' expert has opined:

If what the defendants say in their deposition testimony is true, and if Dr. Gorfine's November 6, 2003 report is accurate, then there was justification for leaving potentially diseased bowel. However, if they were justified in doing so, the Mt. Sinai chart, and the operative report created by Dr. Bauer on August 14, 2002, that purports to memorialize the May 31, 2002 surgery, are significantly deficient, because they fail to accurately record the surgical procedure that actually took place and the significant intra-operative findings. This deficiency, and failure to record all relevant medical and surgical information, deprives a patient's future caregivers of an accurate history, which results in flawed diagnoses, and improper treatment. Therefore, the admitted failure of the defendants to accurately document the surgery performed on May 31, 2002 constitutes a departure from the standard of care.

[Affirmation of plaintiffs' expert, ¶ 8]

Plaintiffs' expert concludes that defendants either inadvertently and unknowingly left the residual bowel in plaintiff, which is a departure from the standard of care, or they intentionally left the segment of bowel but failed to properly document their intraoperative findings, which would also be a departure.

The affirmation of plaintiffs' expert is insufficient to create a triable issue of fact because the expert has failed to identify any injuries allegedly caused by defendants' negligence. While the expert has stated that the failure to record all relevant information deprives future caregivers of an accurate history which results in "flawed diagnoses, and improper treatment", plaintiffs' expert has not identified any flawed diagnosis or improper treatment that resulted from defendants' failure to issue an accurate operative report,

or any injuries that occurred as a result. Speculative assertions that are unsupported by any evidentiary foundation are insufficient to defeat summary judgment (see Diaz v. New York Downtown Hosp., 99 NY2d 542, 544; Bullard v. St. Barnabas Hospital, 27 AD3d 206 [2006]).

Nor has plaintiffs' expert addressed the opinion rendered by defendants' expert Dr. Gingold that while the operative report does not clearly describe some of the details of the procedure, Mr. Karpen's subsequent treaters were aware of the retained rectal segment and were able to properly plan further treatment. Thus, by failing to controvert the opinion of defendants' expert, plaintiffs' expert has not raised a triable issue with respect to the claim that the deficient operative report caused injury to plaintiff (see Candia v. Estepan, 289 AD2d 38 [2004]).

Finally, while plaintiff's expert has opined that if defendants inadvertently left a segment of the bowel that this would be a departure, because "[i]t is a departure from [sic] the distal rectum in place, unless there is a surgical contra-indication to doing so" (Expert's affirmation, ¶ 4), plaintiffs' expert has not identified what injuries were caused by this departure.

In sum, plaintiffs have failed to show the existence of any genuine triable issues of fact.

Accordingly, the motion is granted.

ORDERED that the Clerk enter judgment dismissing the complaint.

FILED

MAR 21 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/13/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE