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

PRESENT: ALICE SCHLESINGER PART IA Part 16

Index Number : 115942/2005

BECK, RICHARD

VS

SHAMAMIAN, PETER, M.D.

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	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

FILED
JAN 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JAN 07 2008

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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RICHARD BECK,

Plaintiff,

-against-

Index No. 115942/05
Motion Seq No. 003

PETER SHAMAMIAN, M.D.,

Defendant.

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SCHLESINGER, J.:

Richard Beck is a physician, who, in July of 2004, was a Radiology Fellow at New York University, specializing in the abdomen. On July 19, after being diagnosed with an infection and inflammation of the urachal remnant, he underwent surgery at NYU Medical Center-Tisch Hospital with defendant physician, Dr. Peter Shamamian. While the operation itself was uneventful, complications developed within a few days thereafter, leading to a second surgery at Paoli Memorial Hospital, in Pennsylvania, near his parents' home, where he had gone to recuperate.

Dr. Beck is alleging that Dr. Shamamian was negligent in improperly suturing a portion of his intestine to his abdominal wall during this first surgery and that this resulted in injury including a small bowel obstruction as well as intra-abdominal adhesions.

As a consequence of the second surgery, the plaintiff was billed for out-of-network services, $427.00 for anesthesia and $300.00 for the hospitalization. The total came to $727.00. After returning to New York and seeing the defendant for follow-up care, Dr. Beck brought this bill to Dr. Shamamian's attention. The defendant, noting his patient's concern over these bills, gave copies of them to his office "for further investigation for payment". In early 2005, Dr. Beck also sent copies of the bills to NYU Insurance

Department, as an enclosure to a letter reviewing the events of July 2004.

What followed was a March 16, 2005 letter to the plaintiff from an Insurance Specialist, Patricia Lascarides, R.N. from NYU's Insurance Department. Ms. Lascarides wrote that she had been informed that Dr. Beck was agreeable to accepting a payment of $1,000.00 as full and final settlement of his claim relative to his surgical procedure at NYU's Tisch Hospital on July 19, 2004. Ms. Lascarides enclosed a General Release, which she advised Dr. Beck to sign and return. The release specifically mentioned NYU Medical Centers and Peter Shamamian, M.D. She indicated that upon receipt of same, a payment of the $1,000.00 would be made to him.

The release was then signed by Dr. Beck and notarized on March 29, 2005 and returned. On May 12, 2005 he was sent a check for $1000 "representing settlement of the captioned matter." The subject line of the letter was "Richard Beck v. NYU Hospital Center."

However, on June 20, 2005, Dr. Beck changed his mind and, in a letter of that date to Joseph E. Ginley, Vice President of Operations of Affiliated Risk Central Administrators, the individual who had sent him the check, he stated he had decided not to accept the settlement amount. In that correspondence, he gave as his reason his readmission to NYU Hospital on April 11, 2005 through April 13. He stated: "This admission was related to a previously unknown abdominal condition, a condition that ultimately occurred as a result of an initial bowel injury during surgery at NYU." He indicated he had not been aware of this complication when he had agreed to the $1,000 settlement. He returned the check uncashed and referred all inquiries to his attorney, Robert Becker. A lawsuit sounding in medical malpractice was then commenced by counsel on November 16, 2005.

It was on the above, largely undisputed set of facts, that I received an earlier motion by the defendant to dismiss the complaint pursuant to CPLR §3211(a)(5). That motion argued that the action was barred by the aforementioned release. Plaintiff's opposition was included with his cross-motion to set aside the release and strike the defendant's relevant affirmative defense.

On June 14, 2006 I decided the competing motions by denying both, but without prejudice to bringing them again after depositions had gone forward. In the course of that decision, after discussing what I believed were some relevant appellate court opinions, including the 1969 Court of Appeals decision *Mangini v McClurg,* 24 NY2d 556, wherein Judge Breitel established a standard by which one evaluates releases in tort actions, I felt that here, as in most of the cited cases, issues of fact existed and discovery was needed to flush those out.

Taking my cue from *Mangini*, I delineated the issue as to whether the plaintiff's problems, which led to his readmission to NYU in 2005, were merely the anticipated sequelae of the initial 2004 injury or whether the adhesions and bowel obstruction were rather in the nature of a new or unknown or unanticipated injury. In the former case, the release would stand. The fact that the same body part was involved was not necessarily determinative. However, as indicated by the *Mangini* court (at p. 564): "A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release"

Again, I concluded that decision by stating that both motions were denied without prejudice to renewal if either party felt that was warranted. Now that Dr. Beck's deposition has been concluded, the defendant has done precisely that. He has again moved to

dismiss the action pursuant to CPLR §3211(a)(5) on the ground that it is barred by a prior release. And at this juncture, I believe Dr. Shamamian is entitled to such relief.

Moving counsel factually supports her motion in three ways. The first, not surprisingly, is the broad release itself, signed by the plaintiff after he acknowledged reading it, which includes the language that the release and settlement "constitutes complete payment for all damages and injuries." The second is the testimony of Dr. Beck himself, at least the sworn answers given at his lengthy deposition on October 30, 2006, together with his own knowledge of his medical condition at the time these events occurred.[1]

The third item defendant relies upon is an affirmation included in the moving papers from a Dr. Peter Levine Geller, Board Certified in surgery and critical care surgery. Dr. Geller opines in relevant part, after reviewing the records from the two hospitals and Beck's March 22, 2006 affidavit and deposition testimony, that the abdominal adhesions and bowel obstructions the plaintiff has already experienced and those that could reasonably develop over time were a result of the second, July 23 surgery in Pennsylvania, as opposed to Dr. Shamamian's surgery the week before. Further, he states that adhesions form as a natural consequence of the body healing and are thus a common complication of abdominal surgery. According to Dr. Geller, this is knowledge that the

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[1]On January 22, 2007, plaintiff Richard Beck executed a correction sheet which changed certain of his answers relating to his understanding of what the $1,000.00 was meant to cover. He made these changes without providing any explanation or statement as to why he was making them. Counsel argues this failure to comply with CPLR §3116(a) should result in the Court's consideration of only the original uncorrected answers. *Garcia v. Stickel*, 37 AD3d 368 (1st Dep't 2007), a case cited in the moving papers supports this position. In opposition, the plaintiff fails to address this issue.

plaintiff would have had. He bases that opinion on Dr. Beck's specialized training during and after medical school, as well as Beck's testimony, asserting that Beck most certainly would have known that he was a candidate for developing intra-abdominal adhesions and medical complications including further bowel obstructions as a consequence of the initial surgery.

Finally, counsel relies on the applicable case law including the First Department decision, *Calavano v. New York City Health and Hospitals Corp.*, 246 AD2d 317 (1998). There, after an automobile injury, the plaintiff was diagnosed with a herniated disc at the L4-L5 level. A month after he entered into a stipulated settlement of the action in the amount of $30,000.00, a stipulation reached in court, he experienced severe back pain which led to emergency surgery to relieve a herniated disc at that same level. He sought to set the settlement aside, arguing he was mistaken in not realizing the severity of his injuries or the need for surgery. But the Court declined to set aside the settlement, stating (at pg 319):

> Although plaintiff does allege mutual mistake, it bears repeating that there was no mistake as to the injuries, but only an uncertainty as to potential consequence of the injuries.

In his opposition papers, the plaintiff tries to make a distinction between injuries such as intra-abdominal adhesions that could be here anticipated, and small bowel obstructions. He does this in an undated affidavit included in his papers. He also states that he understood the settlement to reimburse him for medical bills, not for personal

injuries, which he now may suffer as a result of his chronic condition.[2]

However, these assertions by Dr. Beck are disingenuous in light of his prior sworn testimony at his deposition, wherein he stated that from the time of his surgical internship he had an understanding as to the causes of small bowel obstructions and that those included abdominal adhesions (pg 20-21). And in two places in his original deposition, he acknowledged that the difference between the $1000 he received and the actual cost of his medical bills was a "bonus" for his "hardship" (pg 108-09) and for "pain and suffering that I endured during the hospitalization" (pg 128).

Finally, this Court can easily distinguish the many cases his counsel cites where the deciding courts found factual issues as to the existence of mutual mistake, several of which this Court discussed in its earlier decision, such as *Carola v. NKO Contracting Corp.*, 205 AD2d 931 (3rd Dep't 1994) and *Gibli v Kadosh*, 279 AD2d 35 (1st Dep't 2000). In these cases, as well as others relied upon by the plaintiff, the injured plaintiff settled his case before he knew or could have reasonably anticipated the true consequences of his injury. Such is definitely not the situation here. Dr. Beck was a medical doctor with specialized training in structures of the abdomen. In fact, two days before the first surgery, on July 17, he correctly diagnosed his own condition by jumping on a scanner and then interpreting the imaging study himself.

Further, Dr. Beck acknowledged that he was concerned, before the initial surgery, with the possibility of adhesions and inquired about them of the defendant. After the Pennsylvania surgery, he received a full report from the surgeon there as to what had

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[2]It should be noted that after the two-day April hospitalization at NYU, the plaintiff has experienced no further complications or need for treatment.

occurred and what his condition then was. Thus, when he signed the release, which paid his outstanding bills in their entirety as well as an additional $200 more for his trouble, he knew precisely what his injury was and he could have anticipated further problems, such as the only one to date, which occurred on April 11, 2005.

Judge Breitel said in *Mangini*, 24 NY2d at 563:

> This is not to say that a release may be treated lightly. It is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice.

Here, I find that allowing the release to stand as a bar to litigation would not result in any grave injustice. The plaintiff has failed to prove otherwise. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed without costs or disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This decision constitutes the order of the Court.

Dated: January 7, 2008

JAN 07 2008

J.S.C.
ALICE SCHLESINGER