

Milo v New York City Health & Hosps. Corp.

2009 NY Slip Op 30334(U)

February 11, 2009

Supreme Court, New York County

Docket Number: 400273/07

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 29

CARMINE MILO

INDEX NO. 400273/07

Motion Sequence No.: 1

Plaintiff,

-v-

NEW YORK CITY HEALTH and HOSPITALS CORPORATION, BELLEVUE HOSPITAL CENTER, THOMAS MALDONADO, M.D., EYAL BEN-ARIE, M.D., MELISSA BAGLOO, M.D., NEAL J. CAYNE, M.D. and M. SADEK, M.D.,

Defendants.

The following papers, 1- 27, were read on this motion by defendants for summary judgment dismissing the complaint.

Notice of Motion - Affidavits - Exhibits - Memo of Law
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation - Exhibits

FILED

FEB 17 2009

COUNTY CLERK'S OFFICE
NEW YORK

Papers Numbered

1-16
17-25
26-27

Cross-Motion: Yes

No

Plaintiff, Carmine Milo, commenced the instant medical malpractice action against defendants, New York City Health and Hospitals Corporation, Bellevue Hospital Center, Thomas Maldonado, M.D., Eyal Ben-Aire, M.D., Melissa Bagloo, M.D., Neal J. Cayne, M.D. and M. Sadek, M.D. with the filing of a summons and complaint on or about June 20, 2006.¹ Plaintiff alleges that defendants were negligent in their performance of a femoral to popliteal bypass surgery performed on March 22, 2005, resulting in injury. Plaintiff's complaint also contains a cause of action alleging lack of informed consent. Discovery has been completed, a note of issue/certificate of readiness

¹ It is noted that subsequent to the filing of the instant motion, plaintiff discontinued this action as against Drs. Bagloo, Cayne and Sadek.

has been filed, and this action is now ready for trial. Defendants presently move for summary judgment dismissing the complaint, pursuant to CPLR §3212.

In March of 2005, plaintiff presented to the vascular clinic at Bellevue Hospital Center, which is owned and operated by New York City Health and Hospitals Corporation, where he came under the care of Dr. Maldonado, an attending vascular surgeon, and Dr. Ben-Aire, a senior surgical resident. Approximately one year prior, on January 30, 2004, plaintiff had undergone a left femoral to popliteal bypass surgery with reverse saphenous vein graft at New York Methodist Hospital. It appears that the January 2004 surgery failed as plaintiff began developing pain in his left leg, *i.e.*, cramping claudication, after one block of ambulation. Diagnostic testing in the form of an angiogram and Doppler were performed, showing an occlusion of the left superficial femoral artery. Surgical intervention was recommended.

It appears that defendants sought to perform a percutaneous transluminal angioplasty and placement of a stent, and possibly a femoral to popliteal bypass, if the former would not be sufficient in combating plaintiff's condition. Notwithstanding, according to plaintiff, the latter procedure, which is the more invasive, was not discussed with him until moments before the March 21, 2005, surgery. Plaintiff ultimately underwent a femoral to popliteal bypass surgery, with the use of a gore-tex graft, as opposed to an autogenous vein. Plaintiff was not aware that a gore-tex graft was used until after the surgery had been completed.

During the procedure, while defendants were creating a tunnel for the graft along the same plane as the prior bypass surgery, they lacerated plaintiff's superficial femoral vein. The two (2) cm laceration was repaired intra-operatively with a vein harvested from plaintiff's right leg. As a result of swelling during the surgery, the wound was left open, post-operatively, and treated with a VAC dressing to allow for the swelling to resolve, so that the wound may be closed. The VAC dressing remained in place for seventeen days, when a skin graft, using skin removed from his right thigh, was performed to close the wound. The bypass surgery and subsequent skin graft has resulted in scarring on both of plaintiff's legs.

Defendants New York City Health and Hospitals Corporation, Bellevue Hospital Center, Dr. Maldonado, and Dr. Ben-Aire, presently move for summary judgment dismissing the complaint, arguing that they did not depart from good and accepted medical practice in their treatment of plaintiff. "[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 66 [1st Dept. 1987]. Initially, "the 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 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, prima facie, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

In support of this motion, defendants rely upon, *inter alia*, the expert affidavit of a physician, board certified in surgery, with a special qualification certificate in general vascular surgery. With respect to the care and treatment provided by Drs. Maldonado and Ben-Aire, defendants' expert sets forth that they acted in accordance with good and accepted medical practice in connection with the pre-operative studies performed on plaintiff. According to defendants' expert, the standard of care requires that an angiogram and/or Doppler be performed to assess the vascular flow and the degree of occlusion, prior to the performance of a femoral to popliteal bypass. The expert states that studies to map the anatomical structures in and around the bypass site are not required. The pre-operative tests performed herein showed the occlusion to be such that surgical intervention was required and no further testing was needed. The expert states that even if a mapping study was performed the Intra-operative complication would not have been prevented. Defendants' expert additionally sets forth that defendants' decision to perform the bypass surgery, as opposed to treating the plaintiff with a percutaneous transluminal angioplasty/stent placement, was proper because the latter option would have been insufficient to combat plaintiff's occlusion.

Defendants' expert further opines that the laceration of plaintiff's superficial femoral vein intra-operatively was not a departure from good and accepted medical practice, as it is a known and unavoidable risk of the procedure. The expert adds that the laceration was timely diagnosed and appropriately repaired. Defendants' expert also sets forth that it was not a departure on the part of the defendants to use a gore-tex or prosthetic graft, as opposed to a saphenous vein graft. The expert acknowledges that the use of a gore-tex graft slightly increases the risk of intimal hyperplasia, which is the wearing away of the lining of the graft. However, in his opinion, the gore-tex graft was a proper choice, considering that the procedure can be completed more quickly using a gore-tex graft, resulting in less blood loss, and the need to conserve the vein for a future surgery. Additionally, defendants' expert opines that it was not a departure to pass through the same plane during the subject surgery as was used during plaintiff's prior bypass surgery. According to the expert, bypasses such as the surgery at issue herein are often redone and it is the standard of care to use the same path the second time, in the absence of unusual circumstances, which were not present here.

With respect to plaintiff's informed consent cause of action, defendants' expert sets forth that plaintiff executed an informed consent document that detailed that the patient would undergo PTA (percutaneous transluminal angioplasty or ballooning)/stent placement or possible left femoral-popliteal bypass. The executed forms advised of the risks of the procedure, which included damage to adjacent structures, *i.e.*, vessels and tissues. The expert further sets forth that any reasonable prudent person in the same situation, having been advised of the risks, benefits and alternatives of a femoral to popliteal bypass would have still undergone the procedure. The expert explains that the plaintiff was suffering from an occlusion of the femoral artery, the failure of the previous graft and pain upon ambulation, as well the risk of the condition worsening, which could possibly result in amputation. Therefore, doing nothing was not an option. Moreover, an endovascular treatment such as an angioplasty or stent placement was not an option because it would not have been effective as it would not have sufficiently combated plaintiff's occlusion. Similarly, defendants' expert opines that even if plaintiff should have been informed about the use of a gore-tex graft, rather than an autogenous graft, no reasonably prudent person in plaintiff's position would have refused the gore-tex graft because "[i]t was highly likely that this patient would need coronary surgery in the future and the remaining saphenous vein would be life-saving in that surgery." To the extent that plaintiff alleges that he should have been advised that the surgery was not the same surgery that was previously performed, the expert states that the standard of care does not require such information to be expressed, as it is likely to confuse a patient.

In opposition to the instant motion, plaintiff submitted, *inter alia*, the expert affidavit of a physician, who is board certified in surgery. Plaintiff's expert opines that defendants departed from good and accepted medical care in using a gore-tex graft in connection with plaintiff's bypass surgery. According to the expert, the standard of care is to use a saphenous vein, which was readily available from the contra-lateral right leg. The expert states that the improper use of the gore-tex graft put him at high risk for intimal hyperplasia and thrombosis of the arterial graft. Plaintiff's expert sets forth that defendants and their expert are incorrect in their opinions that it is within a surgeon's discretion as to whether to use a gore-tex graft, rather than a saphenous vein. Plaintiff's expert adds that the defendants' opinion that they were "saving" the native vein for a future, unplanned procedure ignores the fact that it was a departure from the standard of care to use a gore-tex graft in connection with the subject surgery.

Plaintiff's expert further opines that defendants departed from the standard of care by lacerating plaintiff's superficial femoral vein during the bypass surgery. According to the expert, a two (2) centimeter laceration "is such a large laceration that it is clear that the instrument was not physically run through [plaintiff's] leg with proper care necessary to avoid such a serious injury to the surrounding vascular structures." It is also the opinion of plaintiff's expert that it was a departure from the standard of care to pass the tunneler in the same plane as plaintiff's prior procedure. The expert explains that this is significant because when a patient undergoes a bypass procedure it is likely that they will experience changes in their anatomical structures, such as the superficial femoral vein becoming attached to the surrounding muscle. So to avoid the exact complication that occurred, *i.e.*, the laceration of plaintiff's superficial femoral vein, the standard of care would require the defendants to pass the tunneling instrument subcutaneously, and over the sartorius muscle.

With respect to informed consent, plaintiff's expert opines that plaintiff was not provided with adequate information relating to the risks and benefits of the use of a gore-tex graft, as opposed to an autogenous vein, to provide informed consent for the surgery. The expert states that plaintiff should have been informed of the risks of the gore-tex graft, *i.e.*, intimal hyperplasia and thrombosis of the arterial graft, as well as the benefits, *i.e.*, "saving" the vein for a future procedure, so that he could have made an informed decision about the use of a gore-tex graft.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether (1) defendants departed from good and accepted medical care in using a gore-tex graft in connection with plaintiff's bypass surgery; (2) defendants departed from good and accepted medical care by lacerating plaintiff's superficial femoral vein during the bypass surgery; and (3) defendants departed from good and accepted medical care by passing the tunneler in the same plane as plaintiff's prior procedure. Such issues cannot be resolved on this motion for summary judgment (*see Bradley v. Soundview Healthcenter*, 4 AD3d 194 [1st Dept. 2004]; *Morris v. Lenox Hill Hosp.*, 232 AD2d 184 [1996]). Notwithstanding, plaintiff's expert does not address defendants' expert's opinion that defendants acted in accordance with good and accepted medical practice in connection with the pre-operative studies performed on plaintiff. Therefore, plaintiff has not demonstrated that triable issues of fact exist with respect to this issue.

Lastly, with respect to plaintiff's informed consent cause of action, plaintiff has not put forth any evidence that a reasonably prudent person in the plaintiff's position would not have undergone the surgery with the use of a gore-tex graft, if fully informed, as required to prove such a cause of action. *See* Public Health Law §2805-d[3]. Therefore, defendants' motion for summary judgment is granted with respect to plaintiff's cause of action for lack of informed consent. *See*

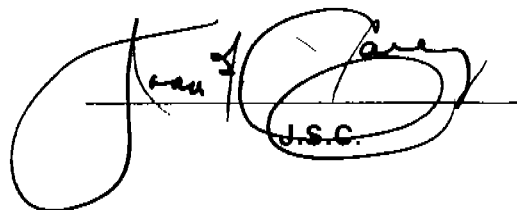
Thompson v. Orner, 36 AD3d 791 [2d Dept. 2007]; Dickstein v. Dogali, 303 AD2d 443 [2d Dept. 2003]; Dunlop v. Sivaraman, 272 AD2d 570 [2d Dept. 2000].

Based on the foregoing, it is hereby

ORDERED that defendants motion for summary judgment dismissing the complaint is granted only with respect to plaintiff's cause of action for lack of informed consent, and is denied in all other respects; and it is further

ORDERED that counsel for all parties are to appear before the court on March 2, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for jury selection.

Dated: 2/11/2009



Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

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REFERENCE

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