

Freedman v Raccuia

2009 NY Slip Op 32139(U)

September 16, 2009

Supreme Court, New York County

Docket Number: 106659/04

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

DANIEL FREEDMAN,

INDEX NO. 106659/04

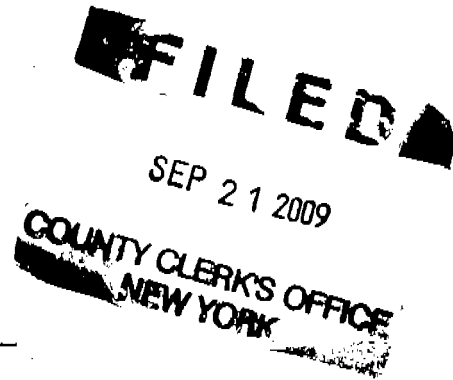
Plaintiff,

Motion Sequence No.: 3

-v-

JOSEPH S. RACCUIA, M.D., ELLEN J.
HAGOPIAN, M.D. and ST. VINCENT'S
CATHOLIC MEDICAL CENTERS OF
NEW YORK,

Defendants.



The following papers, 1- 36, were read on this motion by defendant Joseph S. Raccuia, M.D. for summary judgment dismissing the complaint as asserted against him.

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

Papers Numbered

1-21

22-34

35-36

Cross-Motion: Yes No

Plaintiff, Daniel Freedman, was diagnosed with anal squamous cell carcinoma in December of 2001. On December 17, 2001, plaintiff underwent a surgery to remove a cancerous mass from his anus, which was performed by Dr. Christian Hirsch. On March 19, 2002, Dr. Hirsch sent plaintiff for a CT scan of his abdomen, which revealed a 2 x 2 cm mass in the posterior segment of the right hepatic lobe; multiple lucencies that were less than 1 cm in size and "too small to characterize"; and a cyst in the left hepatic lobe. As a result of these findings, and a concern that such findings may represent metastatic tumors, Dr. Hirsch referred plaintiff to oncologist, Dr. John S. MacDonald. Dr. MacDonald met with plaintiff on or about May 14, 2002 and directed him to have an MRI of his abdomen and to return in one month.

On May 30, 2002, plaintiff had an MRI of his abdomen performed, which revealed the following:

- “1. Numerous hepatic nodules and masses seen demonstrating a combination of benign as well as malignant enhancing features. Specifically, the segment 8, 5/8 and 2 lesions are compatible with hepatic metastasis. The segment 6 lesion demonstrates enhancement pattern compatible with focal nodular hyperplasia. The segment 3 lesion demonstrates an enhancement pattern compatible with hemangioma.
2. Additional subcentimeter low density lesions are demonstrated, too small to accurately characterize.
3. Mild biliary dilatation seen, with no obstructing agent demonstrating. Laboratory correlation is advised.
4. No additional evidence for metastasis is demonstrated.”

Plaintiff next visited Dr. MacDonald on June 13, 2002. At that time, Dr. MacDonald told plaintiff that they were dealing with equivocal results from the scanning, and advised plaintiff to wait approximately one month and have a repeat CAT scan performed. Dr. MacDonald noted in his records that if plaintiff had a growing lesion on that CAT scan, “then that certainly would be a candidate for biopsy.” Dr. MacDonald referred plaintiff to liver surgeon, Dr. Ellen Hagopian, for consultation. Notwithstanding the referral to the liver surgeon, Dr. MacDonald sets forth in his records that “[he] told the patient that we are currently in a period of watchful waiting with his liver disease. It may very well be that he does have some form of tumor and it would be unusual for an anal cancer to recur in the liver without any evidence of local recurrence but he may very well require a biopsy and/or surgical approach in the near future.”

Plaintiff first met with Dr. Hagopian on June 17, 2002 to address the possible recurrence of anal cancer in his liver. On July 23, 2002, plaintiff underwent a left lobectomy, radiofrequency of segment 8 lesion, insertion of a hepatic artery pump for the delivery of chemotherapy; intraoperative ultrasound, and cholecystectomy (gallbladder removal). No biopsies were performed prior to the surgery to confirm the presence of cancer in plaintiff's liver. The surgery was performed by Dr. Hagopian, with Dr. Joseph S. Raccuia and surgical resident, Dr. Moncrief, assisting. Dr. Raccuia hired Dr. Hagopian as a junior associate in his practice in January of 2002, approximately seven (7) months prior to the performance of plaintiff's surgery. The surgery of July 23, 2002, was performed at St. Vincent's Catholic Medical Centers of New York (hereinafter St. Vincent's). The operative report indicates a preoperative diagnosis, as well as a post operative diagnosis, of hepatic metastases from anal carcinoma. Nevertheless, no malignancy was identified in any of the specimens taken from plaintiff during this surgery. Thereafter on September 12, 2002, Dr. Hagopian surgically removed plaintiff's hepatic artery pump. On June 4, 2003, plaintiff underwent removal of the hepatic artery catheter.

Plaintiff commenced the instant medical malpractice action against the defendants Dr. Raccuia, Dr. Hagopian and St. Vincent's with the filing of a summons and complaint on or about April 29, 2004.¹ Plaintiff alleges, *inter alia*, that Dr. Raccuia and Dr. Hagopian failed to perform biopsies of plaintiff's suspected liver lesions prior to the performance of the surgery to remove

¹ By decision of this Court, dated July 28, 2009, St. Vincent's summary judgment motion was granted, and the complaint, as asserted against it, was dismissed.

a portion of his liver, remove his gall bladder, and insert a hepatic artery pump for the delivery of chemotherapy. Plaintiff alleges that as a result of defendants malpractice, he underwent unnecessary surgery to remove a portion of his liver, remove his gall bladder, and insert a hepatic artery pump, as well two surgeries relating to the removal of the hepatic artery pump. The complaint also contains a cause of action for lack of informed consent. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendant Dr. Raccuia presently moves for summary judgment dismissing the complaint, as asserted against him, pursuant to CPLR §3212.

“[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 65 [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 his motion, Dr. Raccuia relies upon, *inter alia*, the expert affidavit of a physician who is board certified in surgery. Dr. Raccuia's expert first sets forth that all care rendered by Dr. Raccuia to plaintiff, Daniel Freedman, was in accordance with good and accepted standards of medical practice, and that such care was not the proximate cause of any injury to plaintiff. According to this expert, Dr. Raccuia had a limited role in the care and treatment of plaintiff. The expert states that Dr. Raccuia's role in the plaintiff's care and treatment was solely to assist Dr. Hagopian with the liver resection surgery, and the subsequent surgery to remove the hepatic artery catheter. The expert also states that “the decision to insert the hepatic artery pump for future chemotherapy treatment would not have been made by the liver surgeon in isolation; the pump is a means for an oncologist to administer chemotherapy directly into the liver, in . . . these devices are placed at the request of the treating oncologist who will subsequently use it.”

Dr. Raccuia's expert opines that the July 23, 2002 surgery, which included the liver resection, gall bladder removal and hepatic artery pump insertion, was indicated in light of the documented radiological interpretation of metastatic disease, and plaintiff's recent diagnosis of cancer. Dr. Raccuia's expert also adds “that the diagnosis of hepatic metastases secondary to anal cancer has not been entirely disproven in that the segment 8 lesion noted by the radiologist as suspicious for metastasis was treated by radiofrequency ablation and was not removed.” Dr. Raccuia's expert explains the following:

“[I]t is not the standard of care to routinely biopsy suspected liver metastases prior to resection, with the attendant risk of tumor dissemination and false-negative results; in a patient with cancer who is at risk for recurrence in the liver, the finding of new suspicious liver lesions on serial surveillance imaging is the usual basis for proceeding with liver resection, and the resection itself constitutes biopsy. In this

case, proceeding with hepatic resection without a preoperative biopsy was not a deviation from acceptable standards of medical care”

(emphasis in original).

The evidence submitted by Dr. Raccuia is sufficient to make a *prima facie* showing of entitlement to judgment as a matter of law (see Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998]; see also Alvarez v. Prospect Hospital, *supra*). The burden, therefore, shifts to plaintiff to come forward with evidentiary proof in admissible form sufficient to establish 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 opposition to Dr. Raccuia's motion, plaintiff relies substantially on the deposition testimony of Dr. Hagopian. Despite Dr. Raccuia's position that he had a very limited role in the planning and the performance of the plaintiff's July 23, 2002 surgery, Dr. Hagopian testified that prior to the performance of the surgery she discussed with Dr. Raccuia, as a senior associate at the their medical practice, the plan to perform the surgery and reviewed plaintiff's films with him. Not only was it her custom and practice to discuss every case with Dr. Raccuia, including the diagnosis and the plan of care for each patient, she had a specific recollection of showing Dr. Raccuia plaintiff's films. Dr. Hagopian also recalls Dr. Raccuia performing the plaintiff's surgery with her, as he did on all surgeries performed by Dr. Hagopian at that time. Dr. Hagopian, however, confirms that Dr. Raccuia did not see plaintiff as a patient at any time prior to his hospitalization in connection with the performance of his surgery.

Plaintiff has also submitted, *inter alia*, the expert affidavit of a physician board certified in internal medicine, radiation oncology, medical oncology, clinical pharmacology and quality assurance. Plaintiff's expert sets forth in this affidavit several departures on the part of Dr. Raccuia. According to plaintiff's expert, Dr. Raccuia, acting in concert with Dr. Hagopian, departed from good and acceptable medical practice by performing the surgery of July 23, 2002, without first determining whether plaintiff's prior anal carcinoma had metastasized to lymph nodes or other organs, and without performing a biopsy of the suspected liver lesions. Plaintiff's expert opines that such departures also include the failure to timely remove the hepatic artery pump once it was known that plaintiff did not have liver cancer; failing to remove the hepatic artery pump once it was known, or should have been known, that plaintiff was suffering from an infection at and around the area of the hepatic artery pump; and discharging plaintiff with the hepatic artery pump in place when it was known or should have been known that plaintiff was suffering from an infection.

Additionally, plaintiff's expert sets forth that Dr. Raccuia, acting in concert with Dr. Hagopian, failed to adequately inform plaintiff that he could have undergone a less invasive procedure, like a needle biopsy or a laproscopic biopsy, prior to the performance of the surgery of July 23, 2002, and that if plaintiff had been adequately informed he would not have consented to undergo the invasive surgical procedure. Plaintiff's expert also sets forth that these physicians failed to adequately inform plaintiff of the risks of leaving the hepatic artery pump and catheter in place after learning that he did not have cancer, and after defendants knew or should have known that plaintiff had an infection at and around the area of the hepatic artery pump. According to plaintiff's expert if plaintiff was properly informed he would have sought immediate removal of the hepatic artery pump and catheter. With respect to causation, plaintiff's expert sets forth that as a result of these departures plaintiff suffered three unnecessary surgeries (i.e., surgeries to remove a portion of his liver, remove his gall bladder, and insert a hepatic artery pump, as well two surgeries relating to the removal of the hepatic

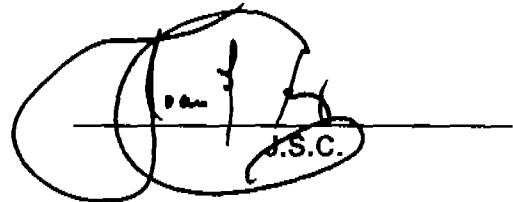
artery pump), along with the resultant pain.

Based upon the conflicting expert affidavits submitted by the parties, issues of fact and credibility exist in connection with whether Dr. Raccula departed from good and accepted medical practice in rendering care and treatment to plaintiff herein. Moreover, the deposition testimony of the defendants herein creates an issue of fact with respect to the roles of these physicians in the planning and the performance of the surgeries at issue. 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]). However, with respect to plaintiff's informed consent cause of action, it does not appear that plaintiff has a viable informed consent cause of action as against Dr. Raccuia. The evidence demonstrates that all of plaintiff's office visits were with Dr. Hagopian, and that Dr. Raccula did not see plaintiff as a patient at any time prior to his hospitalization in connection with the performance of his surgery. Therefore, the Court finds that although issues of fact exist as to what degree of participation Dr. Raccuia had in plaintiff's treatment, the duty to obtain plaintiff's informed consent rested solely on Dr. Hagopian.

Based on the foregoing, it is hereby

ORDERED that this motion by defendant Joseph S. Raccula, M.D. 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.

Dated: 9/16/2009



Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

FILED

SEP 21 2009

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