

Andreoni v Richmond
2009 NY Slip Op 33157(U)
December 18, 2009
Supreme Court, Nassau County
Docket Number: 9130/07
Judge: Michele M. Woodard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JANET ANDREONI,

Plaintiff,

-against-

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 9130/07
Motion Seq. Nos.: 02 & 03

JEFFREY RICHMOND, M.D. and ORTHOPAEDIC
ASSOCIATES OF MANHASSET, P.C.,

Defendants.

DECISION AND ORDER

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Plaintiff's Reply Affirmation	xx

The Defendants Jeffrey Richmond, M.D. (Richmond) and Orthopaedic Associates of Manhasset, P.C. (the Defendants) move for an order seeking summary judgment.

The Plaintiff moves for an order seeking partial summary judgment as to liability by Richmond.

Plaintiff commenced this action for medical malpractice against the Defendants. Plaintiff fell down some stairs in February, 2004. She sustained a fracture to her right hip femoral neck. Plaintiff was seen by Richmond, an orthopedic trauma surgeon. On February 12, 2004, Richmond performed an open reduction internal fixation (O.R.I.F.) (to save the "native" hip) with three cannulated pins. Richmond states he informed Plaintiff if the procedure did not work in healing the fracture, Plaintiff would need a total hip replacement. The post operative visits to Richmond's office went well until November 2004 when Plaintiff began to suffer lateral thigh pain. On December 8, 2004, the pins were removed. An x-ray taken on December 17, 2004 showed the femoral head and neck fracture had healed. In January

2005, Plaintiff returned to Richmond's office complaining of significant pain. An x-ray taken in the office revealed no problems. An MRI taken in April 2005 revealed a "non-union" of the femoral neck, i.e., the break did not heal. Plaintiff sought a second opinion and the second physician recommended a hip replacement. Plaintiff contends Richmond removed the orthopedic screws prematurely, and Richmond did not properly utilize or properly read the results of the various x-rays and MRIs he performed or had Plaintiff undergo. She also contends Richmond improperly advised a more rigorous physical therapy program, and Richmond did not order a bone scan which would have revealed the bone was not healing properly.

Richmond states in his deposition (see Exhibit E annexed to Defendants' motion; the following pages refer to that exhibit) that the O.R.I.F. was done in an attempt to save the natural or native hip (pgs. 31, 32); based on Plaintiff's complaint, the "hardware" or screws were causing her pain (pgs. 75, 76); Richmond stated nine months post operation, if the bone did not heal, it was never going to heal (pgs. 78, 79). Richmond states he did all he could to save Plaintiff's natural or "native" hip.

Defendants have offered the expert affidavit of Dr. Philip A. Robbins, an orthopedic surgeon (see Exhibit I annexed to Defendants' motion).

Dr. Robbins stated the procedure followed by Richmond did not depart from good and accepted standards of medical practice and orthopedic standards of care. The non-union of Plaintiff's break, opined Dr. Robbins, was not caused by something Richmond did or did not do. Dr. Robbins contends the more vigorous physical therapy ordered by Richmond was proper. Dr. Robbins states Richmond attempted to save Plaintiff's natural hip which is much preferred over a prosthetic hip even though Plaintiff's fracture had a high probability of not healing despite the best efforts of Richmond.

Dr. Robbins stated more vigorous physical therapy was ordered by Richmond to stimulate

healing and the healing process. Dr. Robbins also stated that a bone scan nine months post injury is not a more accurate means of evaluating a patient than an x-ray and is not an acceptable diagnostic test in the Plaintiff's situation herein (see Defendants' reply affirmation, Exhibit B annexed thereto).

Plaintiff has offered her expert's affirmation (see Exhibit B annexed to Plaintiff's cross motion). The expert indicated he or she is fully aware and familiar with the treatment involved in this case based on current medical literature and experience dealing with patients treated for a fracture of the femur. The expert also stated he or she was familiar with monitoring healing, tests needed for the medical and surgical diagnosis, care and treatment of this condition.

The expert stated he or she reviewed Richmond's record, the hospital charges and record, progress reports, notes, x-rays, MRIs, rehabilitative records, etc. Plaintiff's expert opined that Richmond should have performed a bone scan prior to removing the surgical fixation screws on December 8, 2004 in that the bone scan, a quick and inexpensive test, would have demonstrated that the fracture was not healed. The expert stated the screws would have been left in place or replaced to allow/promote further healing and not have resulted in a non- or mal union. Also, the expert added Richmond should not have ordered more aggressive physical therapy without having assessed the fracture by a bone scan since an unhealed fracture should not be subjected to more stress, especially a healing fracture not secured by the surgical screws. The expert concluded that Richmond's above actions were departures from the standards of good and accepted medical practice.

To establish a *prima facie* case of liability in a medical malpractice action, the Plaintiff must prove that the Defendant physician departed from good and accepted standards of medical practice and that the departure was the proximate cause of the injury or damage (*Briggs v Mary Immaculate Hospital*, 303 AD2d 702, *lv to app den.* 100 NY2d 506 [2d Dept 2003]).

In a medical malpractice action, a Plaintiff in opposition to a Defendant's summary judgment motion, must submit evidentiary facts or materials to rebut the *prima facie* showing by a Defendant that he, she or it was not negligent in treating Plaintiff so as to demonstrate the existence of a triable issue of fact (*Bowman v Chasky*, 30 AD3d 552 [2d Dept 2006]).

In opposition to a motion for summary judgment in a medical malpractice action, the Plaintiff must submit a physician's affidavit attesting to the Defendant doctor's departure from accepted practice which departure was a competent producing cause of the injury (*Murray v Hirsch*, 58 AD3d 701 [2d Dept 2009]).

A summary judgment affidavit submitted by a patient's expert in a medical malpractice action is not viable if it contains vague and conclusory allegations; if so, it is insufficient⁴ to raise a triable fact issue (*see Sheenan-Conrades v Winifred Masterson Burke Rehabilitation Hospital*, 51 AD3d 769 [2d Dept 2008]).

A physician need not be a specialist in a particular field to qualify as a medical expert, and any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony (*Moon Ok Kwon v Martin*, 19 AD3d 664 [2d Dept 2005]).

While a medical expert need not be a specialist in a particular field to testify or submit an affidavit regarding accepted practices in the field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (*Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]).

Here, Plaintiff's expert's affidavit does indicate that he or she had familiarized himself/herself with the relevant literature and also set forth how he/she was or became familiar with the applicable standards of care in this particular area of medical practice as well as the relevant records from the

Plaintiff's medical file (including some that Defendants have not yet reviewed).

Plaintiff's expert possessed, based on the affidavit, the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered was reliable (*Postlethwaite v United Health Services Hospital*, 5 AD3d 892 [3d Dept 2001]). Thus, Plaintiff's expert affidavit was viable.

Defendants' counsel may have the opportunity if needed to plumb the depths of Plaintiff's expert's knowledge and the basis for his/her opinions once the expert takes the witness stand on cross examination before the trier of the fact.

If the action is still viable as to Dr. Richmond, it is viable as to Orthopaedic Associates of Manhasset, P.C. (*see generally Hill v St. Clare's Hospital*, 67 NY2d 72 [1986]).

Specifically as to Plaintiff's motion, there is nothing stated by Dr. Richmond that would cause this court to grant Plaintiff partial summary judgment on the issue of liability in light of the facts in the record and conflicting experts cited herein.

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; 2d Dept 2007; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

Summary judgment is not appropriate when the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution (*Roca v Perel*, 51 AD3d 757 [2d Dept 2008]; *Barbuto v Winthrop University Hospital*, 305 AD2d 623 [2d Dept 2003]).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to

judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626 [2d Dept 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

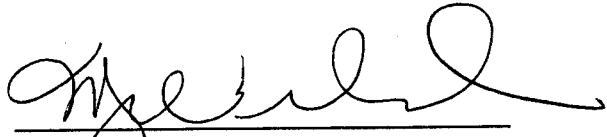
Based upon the record before the court, both Dr. Richmond and Plaintiff have failed to meet the respective levels to obtain summary relief. As such, both applications are **denied**. It is hereby

ORDERED, that the parties are directed to appear in DCM on January 13, 2010 at 9:30 a.m. for trial.

This constitutes the Decision and Order of the Court.

DATED: December 18, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED
DEC 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE