

Hindin v Garan

2010 NY Slip Op 30294(U)

February 8, 2010

Supreme Court, New York County

Docket Number: 112495/06

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

PART **LA** PART 16

Index Number : 112495/2006

HINDIN, HOWARD G.

vs

WEOLLETT, IAN

Sequence Number : 002

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 11 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: FEB 08 2010

Alice Schlesinger
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

-----X
HOWARD G. HINDIN,

Plaintiff,

-against-

HASAN GARAN and NEW YORK PRESBYTERIAN
HOSPITAL, COLUMBIA PRESBYTERIAN MEDICAL
CENTER,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 112495/06
Motion Seq No. 002

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Between September 10 and September 25, 2009, the action entitled *Howard G. Hindin against Hasan Garan and New York Presbyterian Hospital* was tried before this Court and a jury. The case involved causes of action sounding in medical malpractice and informed consent. Specifically, it focused on a procedure performed on Dr. Hindin (a dentist) by Dr. Garan, an expert in the field of cardioelectrophysiology and the Director of Clinical Cardiac Electrophysiology at New York Presbyterian Hospital, on November 26, 2003 for correction of an atrial flutter.

In March of 2003, Dr. Hindin had had an earlier ablation procedure with Dr. Garan, then to correct an atrial fibrillation. The plaintiff had no complaints as to the first procedure, but as to the second, he claimed that the negligence of Dr. Garan was a substantial factor in causing him to develop pulmonary vein stenosis. He also claimed that he had not been provided with appropriate information before the November procedure, specifically, that the ablation would involve his left atrium in addition to his right atrium. He insisted that if he had been given this information, he would not have consented to the procedure, fearing a risk of injury to his pulmonary vein.

The claimed departures from good and accepted standards of cardioelectrophysiological care were two in number and were testified to by plaintiff's

expert, Dr. David Rawling, a practicing board certified cardiologist and Associate Adjunct Professor at the University of Utah. He had also, up until 2002, been board certified in cardiac electrophysiology as well. The first question, 2(a) on the verdict sheet, concerned Dr. Garan's non-use of a lasso catheter during the November 26, 2003 procedure. The second question, 3(a) on the verdict sheet, concerned Dr. Garan's not having referred Dr. Hindin to a specialist at an earlier time than he did.

The jury found in favor of the plaintiff on all three submitted issues. They then made an award of \$833,000 for past pain and suffering, a period of approximately 6 years, and an award of \$350,000 for future pain and suffering for a period of 14 years. At the time of the trial, the plaintiff was 68 years old.

Before the Court now is a motion made by defendant's counsel pursuant to CPLR 4404(a) for the following relief, setting aside the verdict and awarding judgment as a matter of law in favor of Dr. Garan, or alternatively, setting aside the verdict and ordering a new trial either on the ground that the verdict was contrary to the weight of the evidence, or on the ground that Dr. Garan was deprived of a fair trial due to this Court's alleged improper interference in the examination of witnesses, or alternatively, conditionally reducing the awards for both past and future pain and suffering.

After carefully reviewing the papers submitted by both sides and reviewing the trial transcript, the motion is in all respects denied. I will now briefly discuss the basis for this decision. I say "briefly" because I emphatically believe that the jury here had a rational basis for its findings, based on the law and the credible evidence, and great deference should be given to those findings, and because I also believe that all parties here received, perhaps not a perfect trial, but certainly a fair and impartial one.

The thrust of movant's argument with regard to all three issues is that Dr. Rawling, as a physician and a witness, simply did not stand up as compared with the credentials of Dr. Garan himself and the expert he called, Dr. Larry Chinitz, the Director of Cardiac Electrophysiology at NYU. Therefore, Rawling's opinions were unworthy of belief or acceptance by the jury, defense counsel contends. In this regard, counsel here and in argument proffered by counsel at the trial, pointed out that Dr. Rawling had never done any ablation procedures or actually used a lasso catheter himself. Further, he had not specifically researched the issues of the trial. Nor was he familiar with authorities in the field.

However, as referred to earlier, Dr. Rawling was a board certified cardiologist and up to one year before this procedure was certified in cardiac electrophysiology, the category cardiac ablations fall under. He was also associated with a University, not a New York one, but arguably a respected one as well.

It should also be noted that despite counsel's efforts both here and at the trial to discredit and demean Dr. Rawling and his experience and credentials, never was a motion made before or during the trial to preclude his testimony based on his failing to have the requisite credentials to opine on the issues. If such a motion had been made, certainly it would have been denied since it was clear that Dr. Rawling had the relevant education and experience in cardiology and electrocardiology to share his opinions on what information should be given to a patient before obtaining consent to an invasive procedure involving the chambers of the heart, what precautions should be taken in protecting the pulmonary vein, and when it was most prudent to refer a patient to a specialist so as to achieve a better recovery. In the latter regard, it was undisputed that the vein was not completely stenosed after a December 2003 CT scan but was months later. The jury had every right

to consider and ultimately credit Dr. Rawling's opinions, assuming they made sense. Here, as counsel for plaintiff points out, there was corroborating evidence which supported those opinions.

For example, on the issue of informed consent, the jury was shown the consent forms for the two procedures performed by Dr. Garan. The March one, to correct an atrial fibrillation, described the procedure as "radio-frequency catheter ablation of a-fib, trans-septal catheterization." The November consent form, however, merely stated "radio-frequency catheter ablation." All agreed that the pulmonary veins were found in the left atrium and that entry for ablation is made via the right atrium. Therefore, the contrasting descriptions in the two consent forms were some evidence that tended to corroborate Dr. Hindin's account that the second procedure would not involve trans-septing into the left atrium with risk to the pulmonary vein.

The jury had a right to accept plaintiff's version that he had not been told that the November procedure for atrial flutter could put that vein at risk, and all who testified on this point agreed that it was information the patient should have been provided with. Dr. Garan testified that he did discuss this information, but he had not documented it. The jurors are entitled to choose between conflicting testimony.

Further, as to the use of the lasso catheter, Dr. Garan did acknowledge that, in part, this was a tool used to protect the pulmonary vein. And significantly, he did use it in the March procedure when he planned ahead of time to go into the left atrium and, according to the plaintiff, Dr. Garan had specifically discussed the risks then in March of injury to the pulmonary vein.

As to this Court's alleged improper interference with the examination of witnesses, I strongly disagree with this accusation. Normally, I would simply let the record speak for

itself. However, here counsel for plaintiff chose not to discuss these interventions by the Court individually and in reply, moving counsel concluded that he (plaintiff's counsel) therefore did not "dispute these errors and/or cannot defend each one on their merits." But I certainly do. So reluctantly I will discuss each, although I believe the record clearly shows no impropriety.

First, it should be pointed out that there are approximately six examples given, in a transcript that ran over 1000 pages. Second, no explicit claim of any actual prejudice to the defense case is even suggested, presumably because there was not any. The first complaint refers to page 171, on Dr. Rawling's direct examination. There was a form objection to a question made by defense counsel. There was then a brief discussion of the objection, I overruled it, and then plaintiff rephrased it without adopting any of the Court's language (it was the Court's suggested language that was complained of in the motion). On pages 173-176, the Court, in response to objections by defense counsel, reminded plaintiff's counsel that he first had to lay a proper foundation before eliciting Dr. Rawling's opinion on the consent issue. On pages 218 and 225, I did not "invite" counsel for Dr. Hindin to object; he was indicating an objection without saying the word and then he asked for a sidebar to give the basis for it.

On pages 223-36, counsel is simply wrong when he says speeches were allowed to be made before the jury. They were not. On pages 236-37, I used the word, perhaps inappropriately, "esoteric" but allowed defense counsel to pursue his inquiry of Dr. Rawling's knowledge of the area. Finally, on pages 712-13 involving the examination by defense counsel of Dr. Andrew Krumerman, a Fellow working with Dr. Garan, over objection by plaintiff's counsel I allowed the witness to interpret a note in the medical

record based on his recent recollection of this case even though he had earlier testified that he had no such recollection. I wished to ascertain that this was in fact the case, the recent recollection, and when he established that it was, I allowed the questioning.

As to the issue of the excessiveness of the awards, I am unable to conclude that they materially deviate from what would be reasonable compensation. Both sides cite to a plethora of cases, but not one has precisely the kind of injury the plaintiff suffers from here, i.e., the inability to use his left lung which results in pulmonary and cardiac deficiencies. Also, each side points to various parts of the evidence to support his position. Clearly this is a permanent condition and, according to the plaintiff and his treating physician, it has limited plaintiff's personal and professional activities considerably and will continue to do so. The jurors had a right to accept this testimony in making their awards, as they did in accepting the evidence supporting liability.

This was a complicated case and an extremely well tried one as well. The issues were clearly delineated by counsel, and each of the witnesses presented were questioned in depth on the issues. The jury's conclusions on each of these issues had an understandable and rational basis.

Accordingly, it is hereby

ORDERED that defendant's motion to set aside the verdict is denied and judgment may be entered in favor of the plaintiff.

This constitutes the decision and order of this Court.

Dated: February 8, 2010

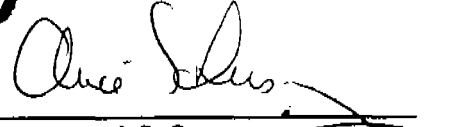
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