

Glicklich v Marin

2010 NY Slip Op 31427(U)

June 4, 2010

Supreme Court, New York County

Docket Number: 100459/07

Judge: Alice Schlesinger

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

IA PART 16
PART

PRESENT: ALICE SCHLESINGER

Justice

Index Number : 100459/2007

GLICKLICH, MILTON

vs.

MARIN, MICHAEL L., M.D.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to

FILED

PAPER NUMBERED _____

JUN 09 2010

NEW YORK COUNTY CLERK'S OFFICE

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

for summary judgment by the various defendants is granted without opposition with respect to defendants Dr. Michael L. Marin, Dr. Sharif Hamed Ellozy, ~~Dr.~~ Jeffrey Paul Gumprecht, ~~Dr.~~ Glenn S. Hammer, M.D., P.C., Dr. Norman Hime, and Dr. Lester Silver. The Clerk is directed to sever all claims against those defendants and enter judgment dismissing those claims. The motion is denied with respect to defendants Francis Scott Nowakowski, M.D. and The Mount Sinai hospital in accordance with the accompanying memorandum decision. The cause of action for informed consent is dismissed.

Dated: JUN 04 2010

Alice Schlesinger

ALICE SCHLESINGER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
MILTON GLICKLICH,

Plaintiff,

-against-

MICHAEL L. MARIN, M.D, FRANCIS SCOTT
NOWAKOWSKI, M.D., SHARIF HAMED ELLOZY, M.D.,
JEFFREY PAUL GUMPRECHT, M.D., GLENN S.
HAMMER, M.D., P.C., HARVEY NORMAN
HIMEL, M.D., LESTER SILVER, M.D., and THE
MOUNT SINAI MEDICAL CENTER, INC.,

Defendants.
-----X

SCHLESINGER, J.:

Index No. 100459/07

Motion Seq. No. 003

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

This action concerns a then 79 year-old man who in mid-July 2004 met in the first instance with defendant Dr. Michael Marin. At the time that he had this meeting, the plaintiff Mr. Glicklich presented with a history of significant peripheral vascular disease. At that time specifically, he had a right gangrenous big toe that had to be amputated. Mr. Glicklich also presented with bilateral diffuse distal tibial disease and, with regard to the right lower extremity, ischemia which led to the gangrenous toe. There are additional co-morbidities which included intermittent claudication of both lower extremities for over six years, insulin-dependent diabetes for ten years, peripheral vascular disease and hypertension, among others.

Dr. Marin, who is a vascular surgeon and Chairman of the Department of Surgery at Mount Sinai Hospital, gave Mr. Glicklich and his family certain options. One of those options was an endovascular procedure to reestablish circulation to the diseased right foot, so that the eventual amputation of his right toe could be accomplished with an

enhanced opportunity for healing at the amputation site. Mr. Glicklich chose this option, and on the following day July 15 was admitted for a tibial angioplasty, which was to be performed by Dr. Francis Scott Nowakowski, an interventional radiologist.¹ That procedure was, in fact, performed. It began at approximately 9:45 a.m. and was completed at approximately 4:00 p.m. At that time heparin was administered so as to prevent a thrombosis, and at approximately 5:00 p.m. when his "ACT" (activated clotting time) was within acceptable levels, sheaths which had been inserted during the procedure were withdrawn bilaterally.

What happened next is significant. For approximately five minutes the plaintiff's blood pressure held, but then there was a sudden decrease, from 130 to 80. Dr. Nowakowski noted this decrease and immediately prescribed 250cc of fluid and ordered an ultrasound to look at the puncture sites in the patient's groin. The patient's pressure rose again to 130. Hemostasis was obtained in the right groin, and a small hematoma was noted in the left groin. The ultrasound at the puncture site did reveal a small amount of extravasation about the left common femoral artery. Dr. Nowakowski stayed with Mr. Glicklich for 15-20 minutes and then left.

Blood pressures were then taken of the patient three times between 6:00 p.m. and 7:00 p.m. At approximately 7:00 p.m., as the patient was being transferred to a bed, his blood pressure dropped drastically, he became cold and clammy, and was non-responsive. This condition resulted in a Code being called. When help arrived in response to the Code

¹If successful and uneventful, the hospital stay should have been several days. However, due to events that occurred during the procedure and after, Mr. Glicklich spent five months at Mt. Sinai, leaving on December 20, 2004, when he went to a rehabilitation facility.

call, the patient was given CPR and was intubated and resuscitated. Defendant Dr. Sharif Hamed Ellozy, a vascular surgeon, was called. Dr. Ellozy performed an angiogram after stabilizing the patient, which showed extravasation of contrast around the right external iliac artery. He then took various steps, with the help of fluoroscopic guidance, to stop the bleeding to this artery and then put in a graft against the arterial wall to prevent further bleeding. The bleeding stopped and the vessel filled up. Dr. Ellozy estimates that there was a loss of approximately 10 units of blood before the repair was finally completed.

I have before me a motion for summary judgment by all the defendants, and each one is supported by an affirmation by experts in various fields. All of these affirmations attest that each of these individual defendants, as well as the hospital, performed in accordance with accepted standards of medical care. With regard to Dr. Nowakowski, the moving defendant submits an affirmation from Dr. Timothy Clark, who like Dr. Nowakowski is board certified in radiology with a specialty in vascular and interventional radiology. Dr. Clark describes in great detail what Dr. Nowakowski did with regard to the endovascular procedure he performed. He also describes why this was an appropriate procedure, and he discusses the aftermath of the procedure. His position simply is that Dr. Nowakowski did adhere to proper standards and that there was no lack of due care in the performance of this procedure. He states further that an injury such as this, a laceration to the external iliac artery, is a risk of the procedure and can happen without any negligence by the physician. He opines that is what happened here.

However, as is pointed out in the opposition papers filed by the plaintiff, no real explanation is ever given for the mechanism of the injury here by Dr. Clark. Nor does he give any fuller explanation as to the basis for his opinion that Dr. Nowakowski acted in

[* 5]

accordance with accepted standards. More than that, the plaintiff opposes the summary judgment motion by Dr. Nowakowski (as well as the one by the hospital) by submitting a 22-page detailed affirmation from his own expert, who is board certified in general surgery as well as thoracic surgery. It should be noted that with regard to all the other individual defendants, plaintiff submits no opposition to the motion. Therefore, those other defendants are entitled to a dismissal of the actions against them. Also, as pointed out by the defense in their reply papers, no opposition is submitted to the request for dismissal of the cause of action sounding in informed consent. Therefore, all the defendants are entitled to the dismissal of that claim.

However, with regard to Dr. Nowakowski, the expert's opinion is that departures from accepted standards of medicine occurred in two basic ways, both causative of injury.² First, although this expert acknowledges that lacerations can occur in situations such as this without negligence, he opines with a reasonable degree of surgical certainty that here the laceration occurred due to undue pressure in the insertion and/or manipulation of the catheter, sheaths, or other instruments into or out of the vessels. He explains this opinion by describing the three layers that appear in the lumen of the external iliac artery where the injury – the laceration – occurred. The expert points out that the laceration occurred in a place other than the site of an occlusion, where some degree of pressure or manipulation was necessary.

The second category of alleged malpractice involves what happened when the procedure was concluded and the patient's blood pressure dropped dramatically. It is the

²The injuries enumerated are hypotensive arrest, cardiopulmonary arrest, shock, metabolic acidosis, encephalopathy, multiple organ failures, kidney failure and the need for dialysis, below-the-knee amputation, the development of multiple decubitus ulcers, numerous infections, sepsis, and the need for prolonged hospitalization.

focus of this expert's opinion that in a situation such as this one it is a departure for a treating physician, here Dr. Nowakowski, to simply administer fluids and do a superficial examination including an ultrasound. In this regard he states that a positive response to fluids is not sufficient to rule out a bleed. Mr. Glicklich did respond to the fluids ordered by the defendant. The expert continues that a doctor under these circumstances must include in his differential diagnosis the possibility that a hemorrhage occurred during the procedure due to a perforation, and the doctor must rule out the possibility of a bleed. According to the expert, this was not done.

To arrive at a proper diagnosis, the expert opines, a physician must perform a thorough examination that would include the examination of the patient's abdomen to check for a distension. Later on, after the Code was called, when Dr. Ellozy appeared and did such an examination, he noticed that there was, in fact, such a distension on the right side of the abdomen. Plaintiff's expert also indicates that diagnostic testing, such as the angiogram which was done by Dr. Ellozy, was also necessary to rule out a bleed.

I stated earlier that it was not until approximately 7:00 p.m., two hours after the procedure was completed, that the Code was called when Mr. Glicklich went into a crisis state. With regard to the Hospital, the expert also indicates that it departed from accepted standards by not closely monitoring the patient between 5:00 p.m. and 7:00 p.m. after Dr. Nowakowski left the hospital. In this regard, he points out that only three blood pressure readings were taken between the time Dr. Nowakowski left and the patient Coded. Also, the expert opines that, because of the pH level of the patient's blood gases, the patient should have been administered sodium bicarbonate, as there was an indication that he was in metabolic acidosis. This later failure, according to the expert, led to brain damage in the patient.

So in summary, the opposition argues that all the serious conditions which the patient developed and experienced in the ensuing five months that he spent at the hospital and afterwards in rehabilitation and at home could have been avoided if, in the first place, there had not been negligence in the performance of the procedure via the laceration of the artery, and in the second place, if the laceration had been detected and treated soon after the procedure had ended.

In reply, the remaining moving defendants first take issue with the fact that the plaintiff's expert is not a radiologist himself. However, I do not agree. The opposition expert is a surgeon and a thoracic surgeon, and in his affirmation he demonstrates very specific and persuasive knowledge of the anatomy and the blood vessels within the body. He also indicates in his affidavit that he is familiar with the evaluation and treatment of peripheral vascular disease, including endovascular treatment, and that he is fully familiar with the diagnosis, treatment, and management of patients with hemorrhage from external iliac arteries that results in a retroperiatatal hematoma. I am satisfied that he knows enough to give opinions in these circumstances.

It should also be pointed out, as plaintiff argues, that Dr. Clark, while in fact a radiologist himself, fails to provide any specifics and explanation as to the mechanism of this injury or as to why he can state with some certainty that the injury occurred without any negligence on the part of Dr. Nowakowski.

Therefore, I believe that there are legitimate issues of fact here vis-a-vis the negligence, if any, of Dr. Nowakowski in his performance of this endovascular procedure and in his care of the plaintiff after the procedure ended. I also find that there are legitimate issues of fact as to whether the hospital properly monitored its patient after

Dr. Nowakowski left and before the patient was Coded, as well as to the administration of sodium bicarbonate and when it should have been given. (The defense, in reply, points out that the administration of sodium bicarbonate is controversial and, in any event, was administered at 3:00 a.m. on July 16).

Therefore, the motion by Dr. Nowakowski and Mount Sinai is denied. The motions by all the other individual defendants are granted. Finally, the cause of action sounding in lack of informed consent is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Francis Scott Nowakowski, M.D., and The Mount Sinai Hospital is denied, except that the cause of action for lack of informed consent is severed and dismissed as to all the named defendants; and it is further

ORDERED that the motion for summary judgment is granted as to all the other individual defendants, and the Clerk is directed is sever all claims against defendants Michael L. Marin, M.D., Sharif Hamed Ellozy, M.D., Jeffrey Paul Gumprecht, M.D., Glenn S. Hammer, M.D., P.C., Harvey Norman Himel, M.D., and Lester Silver, M.D. and to enter judgment dismissing those claims.

This constitutes the decision and order of this Court.

Dated: June 4, 2010
JUN 04 2010

FILED
JUN 09 2010
NEW YORK
COUNTY CLERK'S OFFICE
Alice Schlesinger
ALICE SCHLESINGER
J.S.C.