

Rigby v St. Charles Hosp.

2010 NY Slip Op 31570(U)

June 18, 2010

Supreme Court, Suffolk County

Docket Number: 07-20317

Judge: Ralph F. Costello

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the supraspinatus and infraspinatus tendons that occurred at work on June 18, 2004. Plaintiffs allege that defendant Gugliotti performed an experimental maneuver in which plaintiff lay face down with his hands folded under his forehead while defendant Gugliotti pushed down on his right shoulder causing a popping sound in his shoulder and leaving plaintiff unable to move his arm for the following three days and causing pain and a continued loss in range of motion and weakness in his right arm and shoulder thereafter. Plaintiffs further allege that said maneuver caused the tear in the supraspinatus tendon of the right rotator cuff to recur as corroborated by the results of an MRI that was performed in August 2005.

Plaintiffs allege claims of medical malpractice and negligence in physical therapy treatment and care and lack of informed consent against defendants. By their bill of particulars, plaintiffs allege that defendant Gugliotti was negligent and departed from good and accepted standards of medical care and treatment of plaintiff by, among other things, performing experimental and inappropriate maneuvers and applying excessive force during therapeutic maneuvers; failing to appreciate plaintiff's physical condition so as to be able to provide an appropriate plan of treatment; failing to advise plaintiff's treating orthopedic surgeon, Dr. Schrank, of plaintiff's complaints and defendant Gugliotti's findings upon assessment and examination; failing to recommend or suggest appropriate imaging studies to Dr. Schrank; advising that plaintiff continue an exercise therapy home program after plaintiff's treating orthopedic surgeon directed that therapy be stopped; and failing to document all treatment rendered. Plaintiffs also claim that defendant Hospital is vicariously liable for the actions of defendant Gugliotti.

Defendant Gugliotti now moves for summary judgment dismissing the complaint with prejudice as against him on the grounds that there is no evidence that he deviated from the applicable standard of care in his treatment of plaintiff and that plaintiff's injury involving the recurrence of the tear of his right rotator cuff was not proximately caused by any negligent care or treatment by defendant Gugliotti. In support of his motion, defendant Gugliotti's submissions include the summons and complaint, his answer, plaintiffs' bills of particulars, plaintiff's treating orthopedic surgeon's records, plaintiff's rehabilitation records, deposition testimony from plaintiff, plaintiff wife and defendant Gugliotti, and the affidavit of an expert physical therapist and the affirmation of an expert orthopedic surgeon.

Defendant Hospital now cross-moves for summary judgment dismissing the complaint with prejudice as against it adopting and incorporating the factual summary, arguments and exhibits of the motion. Defendant Hospital points out that the claims against it are limited to vicarious liability with respect to the alleged negligence of defendant Gugliotti and argues that there is no evidence to support the allegation that any staff or employee of defendant Hospital deviated from the applicable standard of care during any of plaintiff's physical therapy sessions nor any evidence that causally links plaintiff's claimed injuries to any treatment provided by any staff or employee of defendant Hospital. In support of its cross-motion, defendant Hospital submits the summons and complaint, its answer and plaintiffs' bills of particulars. By its answer, defendant Hospital admits that defendant Gugliotti was a physical therapist affiliated with the Hospital.

The proponent of a motion for summary judgment must make a prima facie showing of the entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case, see, Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]. The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers,

see, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]. In addition, the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, see, Scott v Long Island Power Auth. 294 AD2d 348 [2d Dept 2002].

A claim sounds in medical malpractice “when the challenged conduct ‘constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician,’ ” Weiner v Lenox Hill Hosp., 88 NY2d 784, 788 [1996], quoting Bleiler v Bodnar, 65 NY2d 65, 72 [1985]; see, Pacio v Franklin Hosp., 63 AD3d 1130, 1132 [2d Dept 2009]. In contrast, a claim sounds in negligence “when ‘the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital’s failure in fulfilling a different duty,’ ” Weiner v. Lenox Hill Hosp., 88 NY2d at 788 quoting Bleiler v Bodnar, 65 NY2d at 73; see, Pacio v Franklin Hosp., 63 AD3d at 1132. Physical therapists may be liable for medical malpractice, see, Meiselman v Fogel, 50 AD3d 979, 980 [2d Dept 2008].

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of the injury, see, Roca v Perel, 51 AD3d 757 [2d Dept 2008]; DiMitri v Monsouri, 302 AD2d 420, 421 [2d Dept 2003]. Thus, “[o]n a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby,” Chance v Felder, 33 AD3d 645, 645 [2d Dept 2006] [internal quotation marks and citations omitted]; see, Roca v Perel, 51 AD3d at 758 -759.

At his deposition, plaintiff testified that during a physical therapy visit in April 2005, defendant Gugliotti told plaintiff that plaintiff had a problem with external rotation and that defendant Gugliotti had spoken to his wife about it and that she had suggested a maneuver and that defendant Gugliotti was going to try it on plaintiff. According to plaintiff, the maneuver involved his laying face down on the table with both of his hands underneath his forehead and defendant Gugliotti was to push down on plaintiff’s right rotator cuff. Plaintiff also testified that at that point, they heard a pop and he could not pick up his right arm and he immediately felt pain in the entire socket area of his right shoulder. Plaintiff further testified that defendant Gugliotti said that it was good, that it was what he wanted, that he was trying to break up the scar tissue and that plaintiff would have a little discomfort. Plaintiff described that defendant Gugliotti turned “white as a ghost” the next time that plaintiff saw him and told him that he could not lift his arm for three days.

Defendant Gugliotti testified at his deposition that he is a licensed physical therapist since 1995, that he treated plaintiff at St. Charles Rehabilitation in Centereach, New York, and that he was employed by the Hospital during the time that he treated plaintiff. In addition, he testified that his initial evaluation of plaintiff occurred on December 1, 2004 and that he recommended that plaintiff see Dr. Schrank, the orthopedic surgeon who later performed surgery on plaintiff’s shoulder, for a second opinion. Defendant Gugliotti indicated that he first saw plaintiff post-surgery on January 17, 2005 and that the general practice was to follow the prescription as advised by the surgeon who knows where the surgery was performed and how to progress in accordance with it. According to defendant Gugliotti, the April 7,

2005 prescription slip that he received from plaintiff's treating orthopedic surgeon, Dr. Schrank, included passive range of motion in all planes as tolerated and authorized defendant Gugliotti to use therapies with more resistance and that the choice of therapies was within his discretion. When he saw plaintiff on April 8, 2005 and April 13, 2005, he noted that plaintiff's pain was zero and that plaintiff had no new complaints and that although there was continued improvement, there was a diminished capacity for range of motion. Then, when another physical therapist next saw plaintiff on April 18, 2005, plaintiff reported pain at the 3,4,5 level and when defendant Gugliotti next saw plaintiff on April 25, 2005, plaintiff again complained of pain at the 3,4,5 level, mild soreness was noted but plaintiff did his normal routine.

Defendant Gugliotti also testified that he spoke to his wife, who is also a physical therapist, mentioning that he was treating someone with a shoulder condition who was status post surgery with limitations into external rotation and abduction and that he was going to start using a progression in mobilization technique to help plaintiff and that his wife responded that it sounded reasonable and that thereafter he started using said technique. Defendant Gugliotti described the progression of range of motion, passive range of motion and joint mobilization maneuver as involving plaintiff lying on his stomach with the upper surface of his right hand resting under his forehead, his left arm at his side and his right elbow over the side of the table pointing towards the floor. Defendant Gugliotti testified that he did not know when he first performed said maneuver or how many times he performed said maneuver but that the April 8, 2005 report first listed "PROM (passive range of motion)/joint mobilization." He also testified that "[g]eneral practice is that, I take it to a range where you start to incur resistance or feel the resistance of the motion, I would take it to that range and give gentle oscillations of impulses from the back side of his shoulder to help further range the motion of the upper arm to the other side. Generally, five to ten oscillations." Defendant Gugliotti also explained that "[t]he grading of the oscillations or the mobilization are based on a four-point scale, grade one and two being shy of the first onset of resistance. And then three and four, working towards the resistance, itself, towards the end of the available range or limit. It doesn't necessarily correlate with the end of anatomical range." He further explained that he chose said mobilization to help bring plaintiff's elbow from a pointed down position to one more pointed to the side and "to help stretch the structures more anterior to the shoulder" because plaintiff's "greatest limitations were into abduction and external rotation."

Defendant Gugliotti further testified that he could not recall hearing a popping sound while treating plaintiff and that the popping sound was something that could happen but was insignificant. He could not say with certainty that just because plaintiff had a "pop" with pain that plaintiff had a rotator cuff tear. According to defendant Gugliotti, he could not recall plaintiff having told him that plaintiff could not lift his arm for three days and that if he had been told so, he certainly would have documented it. Defendant Gugliotti stated that passive range of motion exercises were intended to have an effect on scar tissue, to mobilize internal fibrosis or scarring and to mobilize any restrictions of the capsule and tissue. He admitted that plaintiff reported pain during almost all of the office visits after April 13, 2005.

The affirmed report of defendants' expert orthopedic surgeon explains that plaintiff initially sustained a massive tear of the supraspinatus and infraspinatus tendons of his right shoulder, a massive rotator cuff tear, on June 18, 2004 and that surgical repair under arthroscopy was performed by non-party Dr. Philip Schrank on January 4, 2005. Defendants' expert orthopedic surgeon informs that by their

nature, rotator cuff repairs have a high incidence of mechanical failure due partly to decreased circulation, decreased oxygenation and the possibility of degenerative and/or arthritic changes. He adds that the risk of mechanical failure was increased in plaintiff's case by the six month lapse in time from injury to repair during which the torn tendons retracted and scarred decreasing their flexibility and by plaintiff's history of smoking, which decreases the oxygenation to the body's muscles, tissues and tendons. Defendants' expert orthopedic surgeon points out that in April 2005, plaintiff was three months post-surgery and under optimal circumstances should not have had impingement, commonly caused by inflammation in the capsule, therefore plaintiff's shoulder was not healing at an acceptable rate and the tendons were not adhering to the bone.

Defendants' expert orthopedic surgeon opines that the physical therapy did not cause the recurrence of the tear but that instead it was caused by a lack of healing which was "a natural consequence of the circumstances of the initial injury." In addition, he opines that during the subject maneuver, the arm was passively oscillated around the 180 degree mark, which cannot result in a tear of the supraspinatus tendon because there is very minimal force or tension being applied to the shoulder and the muscle was contracting during this maneuver, not stretching, such that the tendon could not have torn. Defendants' expert orthopedic surgeon opines that based upon a review of the relevant medical and physical therapy records and based on a reasonable degree of medical certainty that the recurrence of the tear of plaintiff's rotator cuff was not proximately caused by the care and treatment of defendant Gugliotti. He adds that the pendulum home exercises suggested in June 2005 were not contraindicated, would not cause the subsequent tear and based on the alleged timeline, could not have caused the subsequent tear.

Defendants' expert orthopedic surgeon also states that defendant Gugliotti adhered to the prescriptions written by Dr. Schrank and engaged in a conservative course of physical therapy in accordance with them and kept Dr. Schrank apprised of plaintiff's progress through monthly reports. Defendants' expert orthopedic surgeon points out that contrary to the allegations, it is the responsibility of the surgeon, not the therapist, to recommend radiological studies and a physical therapist does not have the authority to order radiological studies. He opines with a reasonable degree of medical certainty that defendant Gugliotti properly followed Dr. Schrank's orders, conducted timely and thorough evaluations of plaintiff, and prepared and sent progress reports to Dr. Schrank in a timely fashion. In conclusion, defendants' expert orthopedic surgeon opines with a reasonable degree of medical certainty that defendant Gugliotti did not deviate from the applicable standards of care and that the alleged negligent acts or omissions of defendant Gugliotti did not cause his alleged injuries.

By affidavit, defendants' expert physical therapist states that although a great deal of force is required to tear the tendon from the bone or from the surgical anchors, overuse of the affected shoulder can result in the recurrence of a tear over time especially if there is a lack of healing due to decreased oxygenation and/or pre-surgical retraction of the tendons. Defendants' expert physical therapist points out that activities such as driving, painting or performing yard work can also cause or contribute to such recurrence. Defendants' expert physical therapist compares the parties' descriptions of the subject maneuver and states that rather than pushing or pressing on the shoulder as described by plaintiff, defendant Gugliotti testified that he gently oscillated the shoulder slightly up and down, which defendants' expert indicates is a common, rather than new or experimental, joint mobilization technique

used to mobilize internal scar tissue. According to defendants' expert physical therapist, said joint mobilization is indicated when someone like plaintiff has limited external rotation or abduction problems and such progressive mobilization maneuvers involve gently oscillating the patient's arm to the point of resistance which mobilizes internal scar tissue and increases range of motion. Defendants' expert physical therapist also opines that said maneuver would not cause the supraspinatus to tear because it causes flexion rather than stretching and no force is applied and that the use of said maneuver was not a deviation from the standard of care. The expert physical therapist also indicates that there is no evidence in the St. Charles Rehabilitation records or Dr. Schrank's records to support plaintiff's claim that defendant Gugliotti used excessive force, that plaintiff was unable to lift his arm for three days, or a drastic increase in pain. In conclusion, defendants' expert physical therapist opines with a reasonable degree of medical certainty that at all times defendant Gugliotti's care and treatment of plaintiff was in accordance with the applicable standard of care and was not the proximate cause of the recurrence of the tear of plaintiff's supraspinatus tendon.

Here, whether viewed as a negligence or medical malpractice case, defendants did not submit sufficient proof to eliminate any material issues of fact, compare, Sloane v Repsher, 263 AD2d 906, 908 [3d Dept 1999]. Defendants failed to meet their initial burden of submitting evidence that defendant Gugliotti did not deviate from accepted standards of care in his treatment of plaintiff and that, in any event, the specific maneuver allegedly performed on plaintiff in April 2005 did not cause plaintiff's supraspinatus tendon to tear again, compare, Bickom v Bierwagen, 48 AD3d 1247 [4th Dept 2008]. Although both experts opine that the physical therapy did not cause plaintiff's rotator cuff tear to recur, that instead "it was a natural consequence of the circumstances of the initial injury," they do not explain whether such a second tear could occur spontaneously or would require a triggering event. Notably, both experts state that the subject maneuver could not cause plaintiff's rotator cuff to tear again because an extreme amount of force would have to be applied to a healed rotator cuff to tear the tendon away from the bone. However, given both experts' opinions that plaintiff did not have a properly healed rotator cuff in April 2005, as evidenced by his impingement, such an explanation would be inapplicable to plaintiff. Curiously, neither of defendants' experts addresses plaintiff's claim that there was a popping sound when defendant Gugliotti performed the subject maneuver or explains what inside the shoulder would cause such a sound and what such a sound would indicate, such as, whether it is indicative of the use of too much force or pressure or movement in the wrong direction, thereby leaving the Court to speculate its significance. Although defendant Gugliotti testified during his deposition that a popping sound was insignificant, he did not explain why it was insignificant. The omission is particularly glaring inasmuch as plaintiff testified that his original rotator cuff tear was accompanied by such a sound. In addition, contrary to the expert physical therapist's assertion, there is a recorded drastic increase in pain after the April 13, 2005 visit with defendant Gugliotti.

Also, defendant Gugliotti's description at his deposition of how he actually moved plaintiff's arm during the subject maneuver is unclear. Although the expert physical therapist's opinion is based on a characterization of defendant Gugliotti's testimony as "he testified that he gently oscillated the shoulder up and down," that characterization cannot be gleaned from defendant Gugliotti's actual deposition testimony that "I take it to a range where you start to incur resistance or feel the resistance of the motion, I would take it to that range and give gentle oscillations of impulses from the back side of his shoulder to help further range the motion of the upper arm to the other side." Thus, the expert physical therapist's

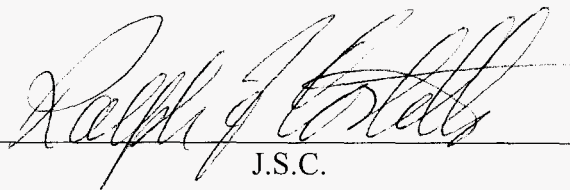
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opinion that defendant Gugliotti properly performed a common joint mobilization technique is rendered speculative. Therefore, the defendants' submissions raise credibility issues concerning whether any force was used on "the back side of [plaintiff's] shoulder" on the day of the alleged injury and the direction of any force and of the movement of plaintiff's arm; as well as issues of fact as to whether defendant Gugliotti actually performed the joint mobilization maneuver properly and whether the "gentle oscillations" in the direction and manner testified to by defendant Gugliotti would cause a repeat tendon tear in a patient with alleged healing problems like plaintiff, see generally, Colao v St. Vincent's Med. Ctr., 65 AD3d 660, 661 [2d Dept 2009].

Under these circumstances, the Court need not consider whether the plaintiffs' papers in opposition were sufficient to raise a triable issue of fact, see, Rezvani v Somnay, 65 AD3d 537 [2d Dept 2009].

Accordingly, the instant motion and cross-motion are denied.

Dated: June 18, 2010



J.S.C.

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