

Farbman v Abittan

2010 NY Slip Op 32322(U)

August 26, 2010

Supreme Court, New York County

Docket Number: 109395/08

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: LAS PART 6**

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MILTON FARBMAN

Plaintiff,

Index No.: 109395/08

- against -

Decision and Order

MEYER ABITTAN, M.D., ST. FRANCIS HOSPITAL, and
ELIZABETH HARRINGTON, M.D.

Defendant.

FILED

AUG 27 2010

NEW YORK
COUNTY CLERK
JUDGE

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JOAN B. LOBIS, J.S.C.:

Defendant Elizabeth Harrington, M.D., moves, pursuant to C.P.L.R. Rule 3212, for an order granting her summary judgment dismissing this matter in its entirety. For the reasons discussed below, the motion is denied.

This action sounds in medical malpractice. Plaintiff also makes allegations in his bill of particulars sounding in lack of informed consent. Since he never asserted a cause of action for lack of informed consent nor made such allegations in the complaint, allegations of lack of informed consent will not be considered. See Singh v. Boodhoo, 17 A.D.3d 345 (2d Dep't 2005). Moreover, in this motion, plaintiff does not argue that his consent was not obtained.

On February 11, 2002, plaintiff underwent a chest x-ray at St. Francis Hospital. It is undisputed that the x-ray was normal in all respects. In 2004 and 2005, plaintiff underwent two medical procedures that required the use of intravenous peripheral catheters ("IV catheter[s]"), which are generally inserted into a patient's arm veins. On October 19, 2006, Dr. Harrington performed leg endovascular laser therapy ("EVLT") plaintiff's right leg in order to treat varicose veins. On

January 25, 2007, she performed the same procedure on his left leg. Plaintiff alleges that during one of the two EVLT procedures, a portion of a catheter that was inserted into his leg vein became detached, traveled through his bloodstream, and became lodged in his pulmonary vessels.¹

EVLT is performed by passing a catheter, also described under these circumstances as a sheath, and a dilator through a leg vein under sonographic control. The catheter is thin, flexible, and measures about 45 centimeters in length. A laser fiber with a tip that produces enough energy to sever the catheter is pushed through the top of the catheter and subsequently activated at close proximity to the saphenofemoral junction. The activated laser fiber tip, the catheter, and the dilator are then pulled down the vein while the energy to the laser fiber tip is reduced. All three items are then removed from the leg.

According to Dr. Harrington's testimony at her examination before trial, she typically inspects the catheter before and after insertion. She does not use damaged catheters and has never encountered a catheter that was damaged upon withdrawing it from the leg vein. Additionally, Dr. Harrington asserted that she confirms the location of the laser fiber tip with the sonogram. According to the medical records, on October 19, 2006, the laser fiber tip was confirmed by sonogram to be three (3) centimeters above the sheath, and, on January 25, 2007, the laser fiber tip was again confirmed to be three (3) centimeters above the sheath.

¹ Plaintiff has since voluntarily discontinued this case against defendants Meyer Abbitan, M.D., and St. Francis Hospital pursuant to a stipulation which was so-ordered by the undersigned on July 20, 2010. Dr. Abbitan performed two cardiac catheterizations at St. Francis Hospital on plaintiff in 1997 and in 2002. Since those catheterizations involved the arteries, plaintiff conceded that the an arterial catheter fragment would not travel to the pulmonary vessels.

On July 17, 2007, plaintiff underwent a chest x-ray. According to the radiology exam report, a catheter fragment was visible in his left hemithorax (chest area), specifically in the lower lobe pulmonary vessels. On or about September 4, 2007, Alvin Teirstein, M.D., performed a bronchoscopy on plaintiff in order to retrieve the catheter fragment. According to the records, Dr. Teirstein concluded that the fragment was in the left pulmonary artery. Dr. Teirstein could not remove it and recommended that plaintiff not undergo any further invasive procedures.

On or about July 17, 2008, plaintiff commenced this action with the filing of a supplemental summons and an amended verified complaint. Plaintiff alleges, inter alia, that Dr. Harrington negligently performed the EVLT; that he is in fear of his life due to possible complications from having a catheter fragment in his lung; and that he suffers from attendant emotional anguish and distress.

Dr. Harrington now seeks an order granting her summary judgment and dismissing the action. The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 A.D.3d 204 (1st Dep't 2010) (citations omitted). To satisfy the burden, the defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted).

Dr. Harrington relies on the affirmation of Paul Yang, M.D., a vascular surgeon. After reviewing plaintiff's medical records and the depositions of the parties, Dr. Yang opines that Dr. Harrington did not deviate from the standard of care. Dr. Yang contends that the catheter fragment in plaintiff's pulmonary artery was likely from an IV catheter. Dr. Yang opines that IV catheters can be damaged in several ways and, as a result, can travel through the vascular system or embolize. According to Dr. Yang, one way in which damage can result to an IV catheter occurs when a needle is withdrawn from the catheter then reinserted. The reinstertion can cause the needle to pierce a portion of the catheter and introduce it into the bloodstream. Another way in which damage can result occurs during removal of the IV catheter. Dr. Yang asserts that during the removal process, a treating nurse typically uses scissors to cut the tape or adhesive that secures the IV catheter. If used erroneously, the scissors can cut the IV catheter and introduce a portion of it into the bloodstream. Dr. Yang maintains that one of these events led to plaintiff's catheter fragment embolization. . Dr. Yang asserts that the manner in which Dr. Harrington performs EVLT makes

“catheter embolization . . . unlikely if not impossible.” He maintains that it is appropriate to check the catheter before insertion for any damage. He asserts that Dr. Harrington’s method of observing the catheter with a sonograph is proper. Dr. Yang notes that Dr. Harrington’s post-EVLT reports verified that the laser fiber tips were above their respective catheters before activation. Dr. Yang asserts that the reduction of energy, while the catheter and the laser fiber tip are pulled down the leg, as well as the constant sonographic visualization, make it “highly unlikely or impossible to lose a 3+ cm section of the marked sheath and be unaware.”

Dr. Yang further maintains that Dr. Harrington appropriately explained the likely risks of an EVLT procedure. He asserts that the loss of a piece of a catheter is so rare a possibility that it is not within the standard of care to discuss it as a risk. As for plaintiff’s alleged injuries, Dr. Yang maintains that, due to its size, the catheter fragment cannot travel any further. He notes that a CT-scan report demonstrates no evidence of pulmonary infarction. He asserts that the catheter fragment has reached a small, inconsequential branch of the pulmonary vessels and is in no danger of blocking a large pulmonary vessel. Dr. Yang sets forth that the catheter fragment “will remain asymptomatic in all respects forever.”

In opposition, plaintiff relies on the affirmation of a board certified vascular surgeon, whose name has been redacted. The expert presents facts that led the expert to the conclusion that the fragment was part of the EVLT catheter. The expert maintains that the catheter fragment in plaintiff’s pulmonary artery is between 4 and 6 centimeters in length and that IV catheters measure about 2.5 to 5 centimeters in length. Thus, if the fragment were from an IV catheter, the IV catheter

would have been noticeably gone from its site on plaintiff's arm. The expert further maintains that given the size of peripheral vein, a 4 to 6 centimeter fragment would take several hours if not several days to travel to the pulmonary artery. The expert asserts that it is routine for a nurse or health care professional to check the IV site and either would definitely notice both the absence of the catheter and its migration up the vein. The expert points to the absence of any notation in this respect in plaintiff's 2004 and 2005 medical records as evidence that the catheter fragment in plaintiff's lung is not from an IV catheter. Since the only other catheters used on plaintiff were from the EVLT procedures, the expert concludes that Dr. Harrington caused the catheter fragment embolization. The expert contends that Dr. Harrington likely did not thoroughly inspect the EVLT catheter before and after its insertion into plaintiff's leg.

As to the alleged injuries, the expert maintains that the presence of the catheter fragment places plaintiff at risk for bacterial infection and attendant complications. The expert also asserts that the fragment could erode through the spongy and frail tissue of the lung and cause bleeding, massive hemoptysis, and asphyxiation.

In reply, Dr. Yang provides a further affirmation, arguing that the position of plaintiff's expert is unsupported by the medical record. Dr. Yang also asserts that it is conceivable that the catheter fragment is from a peripheral catheter even in the absence of a notation from a nurse or health care professional. He contends that it is "a big leap of faith [to say] that the absence of a *mea culpa* note shows that the event did not occur." [italics in original]. Dr. Yang further contends that plaintiff's expert is overestimating the size of the catheter fragment as well as the danger that


the catheter fragment presents to plaintiff.

Dr. Yang, in relying on Dr. Harrington's habit and medical records as well as his own expertise, has made out a prima facie case that the fragment is not from the EVLT catheter and that the catheter fragment will not complicate plaintiff's health. The burden now shifts to plaintiff to raise triable issue of facts. Plaintiff's expert, in relying on the expert's own expertise, has pointed to circumstantial evidence that rebuts the prima facie showing and creates triable issues of fact as to whether Dr. Harrington caused the catheter embolization. See Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494-95 (1997). Plaintiff's expert also points to several reasons why the catheter fragment can cause serious injury. Ultimately, there is a clear conflict of opinion that can only be resolved by assessing the credibility of the experts as well as the evidence on which they rely. Since "[r]esolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury," summary judgment is not warranted. Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009) (citations omitted); see also Ferrante v. American Lung Ass'n., 90 N.Y.2d 623, 631 (1997) (citations omitted). Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a scheduled pre-trial conference on September 28, 2010 at 9:30 a.m.

Dated: August 26, 2010

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.