

D'Angiolella v Brown
2011 NY Slip Op 30754(U)
March 25, 2011
Supreme Court, New York County
Docket Number: 150467/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 150467/2007
D'ANGIOLELLA, VINCENZO
vs.
BROWN, WILLIAM, M.D.
SEQUENCE NUMBER : 008
DISMISS ACTION

INDEX NO. _____
MOTION DATE 1/5/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-12
11's x mot 13-18;
19-32
15's x mot 33-56; 6-71
57-60

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

~~THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION~~

FILED

MAR 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/25/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
VINCENZO D'ANGIOLELLA,

Plaintiff,

Index No. 150467/07

- against -

Decision and Order

WILLIAM BROWN, M.D., CONCORDE MEDICAL
GROUP, PLLC, NICOLE WHITE, M.D., TISCH
HOSPITAL - NEW YORK UNIVERSITY MEDICAL
CENTER, and NEW YORK UNIVERSITY MEDICAL
CENTER,

Defendants.
-----X

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

FILED

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Motion Sequence Numbers 005 and 006 are consolidated for disposition.

In Motion Sequence Number 005, William Brown, M.D., and Concorde Medical Group, PLLC ("Concorde") essentially move to add Concorde to the list of defendants who moved for relief on the motions decided by this court's decision and order signed on August 27, 2010, and filed with the county clerk on August 30, 2010 (the "August 2010 Order"). Apparently, as counsel for Dr. Brown and Concorde now explains, Concorde was inadvertently left off Dr. Brown's moving papers on Motion Sequence Number 004, which was decided in the August 2010 Order. Counsel explains that Concorde was defendant Dr. Brown's employer at the time of the alleged malpractice. Plaintiff opposes Concorde's motion but provides no reason why the August 2010 Order, which included a conditional order of dismissal, should not apply to Concorde with equal force as to Dr. Brown. Accordingly, Dr. Brown and Concorde's motion (Motion Sequence Number 005) is granted to the extent that references to Dr. Brown in the August 2010 Order shall hereby apply to both Dr. Brown and Concorde.

In Motion Sequence Number 006, Nicole White, M.D., and NYU Hospitals Center ("NYU") move for an order dismissing the action in accordance with the August 2010 Order and directing judgment in favor of Dr. White and NYU; prohibiting plaintiff from introducing evidence or testimony at trial; or deeming all issues related to the discovery demanded but not provided resolved in favor of defendants. Plaintiff cross-moves for an order striking Dr. White and NYU's answer for spoliation, for summary judgment in plaintiff's favor as to all defendants, and for a protective order deeming plaintiff in compliance with the court's prior orders. Dr. Brown and Concorde cross-move for relief similar to that in Dr. White and NYU's motion (Notice of Cross-Motion filed on October 29, 2010), and also separately cross-move for summary judgment (Notice of Cross-Motion filed on January 3, 2011).

The August 2010 Order dealt with plaintiff's failure to provide discovery. In that order, the court conditionally granted defendants' respective motions for orders striking plaintiff's complaint unless he provided certain court-ordered discovery. At oral argument of the present motion and cross-motion to enforce that conditional order due to plaintiff allegedly failing to provide the discovery ordered in the August 2010 Order, the parties entered into a stipulation that those portions of defendants' motions pertaining to discovery would be resolved by plaintiff providing authorizations, within thirty (30) days of the stipulation, for entities referred to on the stipulation as Europe Assistance; Dr. Mario Pasteruosto; Studio Radiologica Medica Fignano; Dr. Gennaro DeSisto; Centre Saint-Germain; Studo Dr. Radiologica Prof V. Muto IBRL Galleria Umberto; and Dr. Hospital Marclanise. In light of this stipulation, that branch of plaintiff's cross-motion seeking a protective order is denied. Plaintiff's cross-motion to strike defendants' answers and for summary

judgment, and Dr. Brown and Concorde's cross-motion for summary judgment, are the only parts of Motion Sequence Number 006 that still require resolution in this decision.

In this action sounding in medical malpractice, plaintiff alleges that defendants negligently perforated plaintiff's duodenum. Plaintiff is a doctor who at the time of the alleged malpractice was working at an NYU research facility. On June 29, 2006, the twenty-seven year old plaintiff presented to NYU with complaints of epigastric pain. A CT scan indicated that plaintiff had gallbladder stones, wall thickening, and fluid around the gallbladder. Dr. White diagnosed acute cholecystitis (inflammation of the gallbladder) and performed an emergency removal of plaintiff's gallbladder on June 30. The next day, while recuperating at NYU, plaintiff had increasing bilirubin levels, abnormal liver chemistries, jaundice, and tachycardia. Dr. White called Dr. Brown for a biliary and gastroenterology consultation. Plaintiff's condition did not improve and Dr. Brown performed an endoscopic retrograde cholangiopancreatography ("ERCP") and sphincterotomy on July 1, during which Dr. Brown removed impacted debris and stone fragments from the common bile duct. On July 2, 2006, plaintiff's bilirubin levels continued to be elevated, as were his amylase and lipase levels. On July 3, plaintiff had increased abdominal pain and an elevated white blood cell count. A CT scan was performed and indicated to Dr. White that plaintiff had a duodenal perforation; there was free retroperitoneal air in the second portion of the duodenum, a dilated common bile duct, and a dilated intrahepatic duct, consistent with a perforation. Dr. White performed a duodenal diverticulization on July 3 in an attempt to repair the perforation. During exploratory laparotomy, Dr. White observed retroperitoneal air along the duodenum and bile staining in the area, but no obvious hole. The operative report indicates that Dr. White suspected that the

hole was in the intrapancreatic portion of the duodenum, by the ampulla. The diverticulization was performed; essentially, Dr. White diverted the fluid that could potentially go through the traumatized area by inserting a T-tube from the common bile duct, inserting a duodenal tube, creating a pyloric exclusion (closing off the pylorus), and inserting a gastroenterostomy tube. The area was flushed with saline. No other bile leakage was noted. The wound was closed with two Jackson Pratt drains. Dr. White testified at her deposition that a duodenum diverticulization is designed to heal over a period of approximately four weeks, during which time the pyloric exclusion gradually reopens, the anatomy normalizes, and the tubes are appropriately removed.

The records indicate that plaintiff tolerated the diverticulization and was discharged on July 13, 2006, on a liquid diet. Very shortly after he was discharged, he traveled to Italy, where plaintiff is originally from and where his family resides. He was accompanied by a medical escort service and, upon arrival, was immediately admitted to Monaldi Hospital in Naples. His physicians there told him that everything was normalizing and that he was fine. After two days, plaintiff was discharged from Monaldi Hospital to his family home. He remained in Italy for approximately four months. During that time, he was being followed by a physician from Monaldi Hospital, Dr. Corclone. In August 2006, he went to Paris for a week to seek care and treatment from Harry Bismuth, a gastroenterologist described by plaintiff as a renowned surgeon for hepatic transplant. By this point, plaintiff testified that he was slowly getting back to a normal diet and gaining weight, but he still had the gastrojejunostomy and T-tube implants. Dr. Bismuth performed a cholangiogram and removed some of the tubes. Plaintiff testified that Dr. Bismuth told him that his duodenum was still closed and that he should return in six months so that a further surgery could be performed to

reestablish normal anatomy. Plaintiff testified that he did not return to Dr. Bismuth in six months. In June 2008, plaintiff saw Dr. Bismuth for complaints of stomach ache, bile reflux, and needing to eat every three or four hours to the extent that his sleep was interrupted. Dr. Bismuth recommended surgery and referred plaintiff to a surgeon, Dr. Emond, at Columbia Presbyterian Hospital in New York. Plaintiff testified that Dr. Emond recommended surgery to remove the gastrojejunostomy and reestablish the duodenum; the surgery would also include an Roux-en-Y procedure to establish the bile duct. The surgery was performed in September 2008. Plaintiff testified that even after the September 2008 surgery, Dr. Emond told him that he would never have normal anatomy, that it would never be restored completely to the condition it was before, but that his symptoms would probably resolve.

In moving to strike NYU's answer based on spoliation of evidence, plaintiff alleges that NYU negligently lost or destroyed the images from an intraoperative cholangiogram x-ray that Dr. White performed during the June 30, 2006 surgery. Plaintiff claims that the loss of this record has prejudiced him in proving his case because there is no way for him to definitively prove when, where, or to what extent the perforation occurred. Plaintiff submits an expert affirmation (name redacted) wherein the expert sets forth his/her opinion that it was a departure from good and accepted medical practice for NYU to fail to maintain the images. Plaintiff's expert sets forth that without the images, it is impossible say with any certainty when the perforation occurred and to what extent the operative procedure was performed correctly or incorrectly.

In opposition, counsel for Dr. White and NYU argues that plaintiff's motion to strike NYU's answer based on the alleged spoliation is disingenuous due to the nature of the images and

the fact that a hard copy of the images never existed. Counsel maintains that NYU was not required to retain pictures from the intraoperative cholangiogram x-ray because it is a radiographic moving image of the common bile duct conducted under fluoroscopy in real time. Defendants maintain that the streaming feed of images on the monitor could not be "saved" to a computer system because NYU's technology did not allow for such. They submit an affidavit from NYU's technology coordinator Warren Hendricks, affirming that in 2006, NYU did not have the technology or equipment to record cholangiogram examinations or procedures. They also submit an affirmation from their medical expert, Michael D. Lieberman, M.D., F.A.C.S., who opines that, under the accepted standards of medical practice in the medical community in 2006, neither NYU nor Dr. White had a duty to save, print, or otherwise retain any hard copy of the cholangiogram images.

In reply, counsel for plaintiff continues to assert that NYU "lost" the plaintiff's intraoperative cholangiogram images and spoliated a "key piece of evidence." He fails to adequately address the proofs presented by Dr. White and NYU that such evidence never existed in the first place.

If evidence is destroyed, spoliation sanctions may be appropriate if the movant can establish "that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such evidence might be needed for future litigation." Haviv v. Bellovin, 39 A.D.3d 708, 709 (2d Dep't 2007) (citations omitted). The court may punish a party for destroying "key physical evidence" by striking its pleading if the movant is "prejudicially bereft of appropriate means to confront a claim with

incisive evidence[.]” N.Y. Cent. Mut. Fire Ins. Co. v. Turnerson's Elec., Inc., 280 A.D.2d 652, 653 (2d Dep't 2001) (citations and internal quotations omitted). For the sanction of striking an answer to be appropriate, however, the party seeking the sanction must demonstrate prejudice so severe so that it truly hinders the ability to prosecute or defend a claim.

In this instance, plaintiff has not met his burden in seeking spoliation sanctions. First, he has not established that any evidence was lost or destroyed. Second, even if the images were lost or destroyed, plaintiff has made no showing that defendants were on notice that such evidence might be needed for future litigation. Third, and most importantly, plaintiff has not shown that the loss or destruction of the images has prevented him from being able to mount an effective prosecution of his case, or that defendants have gained an unfair advantage. Tawedros v. St. Vincent's Hosp. of New York, 281 A.D.2d 184 (1st Dep't 2000). There is sufficient information for plaintiff to maintain this action. See, Chiu Ping Chung v. Caravan Coach Co., 285 A.D.2d 621 (2d Dep't 2001); Buda v. New England Orthotic & Prosthetics Sys., LLC., 7 Misc. 3d 1025[A](Table), 2005 WL 1189033 (Sup. Ct. N.Y. Co. 2005).

Plaintiff also moves for “partial summary judgment” on the issue of liability.¹ Plaintiff's argument in favor of summary judgment is that plaintiff's proof is so convincing that the inference of negligence is inescapable and unrebutted. In making this argument, plaintiff relies on an argument that appears to be lifted from a motion on a different case against someone named “Dr.

¹ The court notes that, in moving for summary judgment, plaintiff appears to concede that he is able prosecute his case without the allegedly missing intraoperative films that served as the basis for that branch of his motion seeking spoliation sanctions.

Richmond" and a string of inapplicable cases (and one reversed case, Myers v. Fir Cab. Corp., 100 A.D.2d 29, 31 [1st Dep't 1984], rev'd, 64 N.Y.2d 806 [1985]). Plaintiff's expert opines that, to a reasonable degree of medical certainty, it was a departure from good and accepted medical practice to perforate the patient's duodenum during the procedures that were performed. The expert concludes that had the procedures been performed appropriately, the patient would not have suffered the perforation.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). When relying on expert opinion evidence to support the prima facie showing, as is required in a medical malpractice case, that opinion "must be based on facts in the record or personally known to the witness, and . . . an expert cannot reach a conclusion by assuming material facts not supported by record evidence." Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the papers in opposition. Winegrad, 64 N.Y.2d at 853. 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, at 324 (1986) (citation omitted).

Plaintiff's motion for summary judgment is denied for failure to make out a prima facie showing of entitlement to judgment as a matter of law. In that he appears to be arguing that

summary judgment should be granted on the theory of res ipsa loquitur. "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing the defendant's response so weak that the inference of defendant's negligence is inescapable." Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006). Plaintiff's submissions fail to meet the high burden for summary judgment on a res ipsa loquitur theory.

Defendants Dr. Brown and Concorde also move for summary judgment, arguing that Dr. Brown was not negligent in his performance of the ERCP procedure and that no treatment occurred at Concorde, who is only sued herein as Dr. Brown's employer. Dr. Brown maintains that the ERCP was appropriate and not performed negligently, and that perforation is a known risk of ERCP.

In support of their argument for summary judgment, Dr. Brown and Concorde submit an expert affirmation from Peter Wayne, M.D., Ph.D., who sets forth that he is a physician duly licensed to practice medicine in the State of New York and board certified in internal medicine and gastroenterology. Dr. Wayne states that he performs ERCP procedures as part of his routine practice. He states that in preparing his affirmation, he reviewed the allegations set forth in plaintiff's bills of particulars, the medical records, and the parties' deposition transcripts. Dr. Wayne sets forth that an ERCP is indicated when a common bile duct is obstructed. Indications of an obstructed bile duct are elevated liver chemistries, jaundice, and tachycardia. During ERCP, the patient is sedated and an endoscope is passed through the mouth, down the esophagus, through the stomach, and into the

duodenum until it reaches the spot where the bile and pancreatic ducts empty into the duodenum. A cannula is then inserted and used to inject contrast dye into the bile ducts. A series of x-rays are taken as the dye moves through the ducts to show the size and number of the stones. Fluoroscopy is performed at intervals throughout the procedure. Special instruments can be inserted into the scope to remove gallstones, take tissue samples, or relieve an obstruction. If stones need to be removed, a sphincterotomy can be performed. During a sphincterotomy, an incision is made to enlarge the opening of the bile duct, and endoscopic devices such as balloon catheters, retrieval baskets, or crushing baskets, can be used to remove the stones through the opening.

Dr. Wayne opines that the treatment rendered by Dr. Brown was within the standard of care, that Dr. Brown did not depart from good and accepted medical practice, and that nothing Dr. Brown did proximately caused plaintiff's alleged injuries. In Dr. Wayne's opinion, the ERCP procedure was warranted because plaintiff's symptoms indicated that his common bile duct was obstructed; he opines that although surgery is an option, ERCP is a far less invasive procedure. During the ERCP, Dr. Brown observed that impacted debris and stone fragments were present in the common bile duct, so he performed a sphincterotomy with a balloon catheter to sweep the duct and remove the debris. Dr. Wayne opines that the ERCP was performed with all precautions taken to insure against and look for the occurrence of a perforation, including an occlusion cholangiogram, visualization, and fluoroscopy. No leakage was observed during the ERCP. Dr. Wayne sets forth that a micro-perforation, which is not visible endoscopically, can occur even when all proper precautions are taken. He opines that plaintiff's need for a Roux-en-Y procedure over two years later was not related to Dr. Brown's care and treatment of plaintiff. Rather, Dr. Wayne believes that Dr.

Brown's treatment minimized the injuries that plaintiff suffered, as his treatment alleviated plaintiff's common bile duct obstruction. He opines that if a perforation occurred during the ERCP, this would not represent a deviation from the standard of care, as perforation is a known risk of the procedure.

Dr. Wayne opines that plaintiff gave informed consent to the ERCP procedure, as evidenced by the consent form signed by plaintiff that says there are risks associated with the procedure. He points out that plaintiff testified that he was informed by Dr. Brown, prior to signing the consent form, that pancreatitis and perforation were risks of the ERCP procedure. Dr. Wayne opines that a reasonably prudent person in plaintiff's position, after being fully informed of the risks, benefits, and alternatives, would not have refused to have the ERCP performed at that time, given plaintiff's abnormal liver function, increased bilirubin, and concomitant conditions.

At the outset, as to the informed consent claim, a defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered, and "that a reasonably prudent patient would not have declined to undergo the [procedure] if he or she had been informed of the potential complications[.]" Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1). Dr. Brown and Concorde met their burden by showing that plaintiff was informed of the risks, benefits, and alternatives of the ERCP, that he signed a consent form prior to the procedure, and that a reasonable patient would not have refused the treatment. Since plaintiff does not contest the assertion that his informed consent was obtained, his claim sounding in lack of informed consent against Dr. Brown and Concorde is dismissed.

Dr. Brown and Concorde failed to make out a prima facie showing of entitlement to summary judgment on the claim for medical malpractice. Most of Dr. Wayne's opinion is devoted to explaining why the ERCP was necessary and how an ideal ERCP is performed. Dr. Wayne never opines that Dr. Brown's performance of the procedure did not cause the perforation or that no perforation occurred. Indeed, he acknowledges that a CT scan of plaintiff's abdomen showed evidence of a duodenal perforation after Dr. Brown's performance of the ERCP without opining as to an alternative explanation for when the perforation occurred. Defendants' expert's bare conclusory statements that Dr. Brown acted within the standard of care and took proper precautions, with no relation to the perforation (which is, in part, acknowledged to have occurred), do not establish that the cause of action has no merit against Dr. Brown. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). His statements that a micro-perforation can occur in the absence of negligence and that perforations are one of the expected complications of an ERCP procedure do not establish the absence of negligence here.

Given that Dr. Brown and Concorde did not make out a prima facie case for judgment as a matter of law as to the claim for malpractice, the burden never shifted to plaintiff to rebut defendants' expert's opinion. Regardless, even if Dr. Brown and Concorde had made out a prima facie case for summary judgment, plaintiff's expert affirmation was sufficient to raise an issue of fact as to the cause and character of the perforation. Plaintiff's expert opines that the fact that such an extensive repair had to be performed after the ERCP means that the perforation was extreme and life threatening. Therefore, in plaintiff's expert's opinion, the perforation was not a micro-perforation but a "full thickness" perforation. This opinion evidence directly addresses and contradicts Dr.

Wayne's opinion that if any perforation did occur, it was a micro-perforation, which can occur in the absence of negligence.

Accordingly, it is hereby

ORDERED that Motion Sequence Number 005 is granted to the extent that references to Dr. Brown in the August 2010 Order shall hereby apply to both Dr. Brown and Concorde, and is denied in all other respects; and it is further

ORDERED that the motion by Nicole White, M.D., and NYU Hospitals Center on Motion Sequence Number 006, and the cross-motion by Dr. Brown and Concorde dated October 29, 2010, are denied, in accordance with the January 11, 2011 stipulation; and it is further

ORDERED that plaintiff's cross motion on Motion Sequence Number 006 is denied in its entirety; and it is further


ORDERED that Dr. Brown and Concorde's cross motion on Motion Sequence Number 006 dated January 3, 2011, is granted to the extent that the claim for lack of informed consent against William Brown, M.D., and Concorde Medical Group is dismissed as against these defendants, and is otherwise denied.

FILED

Dated: March 25, 2011

MAR 31 2011

NEW YORK
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JOAN B. LOBIS, J.S.C.