

<b>Sarajian v Grelsamer</b>
2011 NY Slip Op 31702(U)
June 23, 2011
Supreme Court, New York County
Docket Number: 101594/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

SARASIAN, GREGORY,  
ET AL.  
- v -  
RONALD P. GILLESPIE, H.D.

INDEX NO. 101594/09  
MOTION DATE 2/8/11  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Summary judgment

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

PAPERS NUMBERED
<u>1-20</u>
<u>21-25</u>
<u>27</u>

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

JUN 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE  
**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

Dated: 6/23/11

[Signature]  
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  
**GREGORY SARAJIAN and ANITA SARAJIAN,**

**Plaintiffs,**

**Index No. 101594/09**

**-against-**

**Decision and Order**

**RONALD P. GRELSAMER, M.D.,**

**FILED**

**Defendant.**

-----X  
**JOAN B. LOBIS, J.S.C.:**

**JUN 24 2011**

In Motion Sequence Number 001, defendant Ronald P. Grelsamer, M.D., by ~~MEYMOON~~ COUNTY CLERK'S OFFICE order to show cause, for summary judgment in his favor, pursuant to C.P.L.R. Rule 3212. Plaintiffs oppose the motion. This motion was originally submitted on February 8, 2011 at which time plaintiffs were represented by an attorney. On or about February 8, 2011, plaintiffs' attorney brought a motion, by order to show cause, to be relieved as counsel (Motion Sequence Number 002), which was granted by this court's decision and order dated March 1, 2011. The court held the submission date of Motion Sequence Number 001 in abeyance in order to enable plaintiffs time to find a new attorney, and this motion was fully submitted on April 26, 2011. Plaintiffs are currently pro se.

This action, sounding in medical malpractice, arises out of a left total hip replacement that Dr. Grelsamer performed on Mr. Sarajian on April 25, 2006. Mr. Sarajian became Dr. Grelsamer's patient in February 2004 for the care and management of arthritis in his left hip and right knee. Upon examination and discussions with Mr. Sarajian, Dr. Grelsamer recommended a left total hip replacement and a right knee replacement. These surgeries were to occur on separate occasions. In preparation for the surgeries, Dr. Grelsamer provided Mr. Sarajian with a copy of his

book, "What Your Doctor May Not Tell You About Hip And Knee Replacement Surgery." In pertinent part, the book outlines complications associated with undergoing total hip replacement surgery. There is a section in the book identifying "foot drop" (also known as "drop foot" or peroneal nerve palsy) as a known risk of the procedure. A foot drop is an inability to raise the foot or turn it outwards, and it can be caused by a nonfunctioning or poorly functioning peroneal nerve.

On April 25, 2006, Dr. Grelsamer performed Mr. Sarajian's left total hip replacement at Mount Sinai Hospital ("Mt. Sinai"). Dr. Grelsamer's operative report indicates that Mr. Sarajian underwent general anesthesia for the procedure. After induction of anesthesia, Mr. Sarajian was placed in a lateral decubitus position using both an axillary roll and foam pads. An incision was made over the posterior rim of the greater trochanter down to the level of the fascia. Dr. Grelsamer's operative report indicates that the "[t]he sciatic nerve was not specifically dissected out but gently retracted with a blunt retractor as usual." Dr. Grelsamer stated at his examination before trial ("EBT") that retraction is performed with a blunt Hibbs retractor in the back, a blunt Cobra retractor in the front, a Homan retractor inferiorly, and sometimes a Wing retractor superiorly. Further, Dr. Grelsamer testified that these retractors are always placed in the same position and that the weight of the retractors creates enough pressure to displace the tissue.

After the hip was dislocated, the operative report indicates that Dr. Grelsamer fitted Mr. Sarajian with a prosthetic hip. To assess the fit of the prosthetic device, Dr. Grelsamer performed what he described as "flexion, rotation to extension and external rotation as well as with the various chuck maneuvers." He then permanently affixed the device, re-tested the fixed device,

and noted stability as "outstanding[,] as it had been during the trial." The procedure was completed and Mr. Sarajian was transferred to the recovery room. Dr. Grelsamer saw Mr. Sarajian in the recovery room where he diagnosed Mr. Sarajian with left foot drop.

On May 1, 2006, upon his discharge from Mt. Sinai to Kessler Institute for Rehabilitation, Mr. Sarajian was still experiencing left foot drop. He remained at Kessler Institute between May 1, 2006 and May 11, 2006. Upon his discharge from Kessler Institute, Mr. Sarajian continued to have persistent left foot drop. On June 6, 2006, Mr. Sarajian underwent an electromyography and nerve conduction study to assess the nerve injury. The study indicated left sciatic neuropathy with predominant involvement of the peroneal division with signs of early reinnervation and mild polyneuropathy.

Plaintiffs allege that Dr. Grelsamer departed from the standard of care and improperly performed Mr. Sarajian's left total hip replacement in that he applied and/or allowed the application of excessive force, pressure, and compression upon the soft tissues surrounding the sciatic nerve during the retraction of said tissue, and/or improperly placed said retractors during the performance of the left total hip replacement, causing compression, stretching, and damage to the sciatic nerve. Plaintiffs allege that the damage to the sciatic nerve during the hip replacement procedure caused Mr. Sarajian to suffer permanent left sciatic neuropathy and a permanent left foot drop. They further allege that Dr. Grelsamer is vicariously liable for any negligent acts or omissions of Mt. Sinai employees who assisted him and acted under his direction during the operative procedure, including, but not limited to, Jason Baynes, M.D., and other physicians and nurses participating in said procedure.

A defendant 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, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action 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). “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, 73 A.D.3d at 207 (citations omitted).

Dr. Grelsamer maintains that he is entitled to summary judgment and dismissal of the complaint as a matter of law because foot drop is an accepted risk of a total hip replacement and Mr. Sarajian’s foot drop was not the result of a deviation from the standard of care. He also argues that he is not vicariously liable for the acts or omissions of Jason Baynes, M.D., or other physicians or nurses employed by non-party Mt. Sinai who were not his employees. Alternatively, he argues that the providers assisting him during the procedure delivered their services according to accepted standards of care.

In support of his motion, Dr. Grelsamer submits expert opinion testimony from Noel Testa, M.D., who sets forth that he is a board certified orthopedic surgeon duly licensed to practice medicine in the State of New York. He reviewed the bills of particulars; Mr. Sarajian's relevant medical records and x-rays; the parties' EBT testimony; and a photograph of Mr. Sarajian's left lower extremity marked as "Exhibit B" at Mr. Sarajian's deposition. He opines that, having reviewed these materials, the care and treatment that Dr. Grelsamer provided did not depart from accepted standards of orthopedic care. He opines that the left total hip replacement was indicated and appropriate due to Mr. Sarajian's advanced arthritis of the hip and the fact that his pain did not resolve upon more conservative treatment. Dr. Testa contends that the duration of the surgery—two hours and twenty-six minutes—is the "range of duration for a surgery of this type." It is his opinion that Dr. Grelsamer performed the surgery properly and within accepted standards of orthopedic care. He avers that Dr. Grelsamer's records, Mt. Sinai's chart, and Dr. Grelsamer's deposition testimony do not support plaintiffs' claims that Mr. Sarajian's sciatic nerve injury was caused by excessive force, pressure, or compression of the soft tissue surrounding the nerve during the retraction of said tissue; that the retractors were improperly placed during the surgery; or that excessive force was used in manipulating the leg during the procedure. The expert reiterates that Dr. Grelsamer testified that he was completely in control of the position and the force applied to Mr. Sarajian's body during the procedure; that the operative report indicates that Dr. Grelsamer applied the "right" amount of ease and/or effort to insert the components of the hip replacement; and that Dr. Grelsamer testified that he only relied on the weight of the retractor itself—i.e., gentle retraction—to retract the tissues. The expert opines that the testimony shows that "gentle retraction" and proper procedures were used. Further, given that Dr. Grelsamer testified that he always places the retractors in the same positions,

Dr. Testa opines that there is “nothing in the records to suggest that the retractors were placed improperly.”

Dr. Testa contends that plaintiffs are merely speculating as to the cause of the sciatic nerve injury that Mr. Sarajian experienced, and that “it is well known in medicine that there is a small but regular incidence of sciatic nerve injury following total hip replacement. Reports of large series typically demonstrate about a 1% incidence.” He further sets forth that foot drop following a total hip replacement “is a known and accepted complication that occurs in the best hands and despite proper care[,]” and that the occurrence of foot drop is not per se evidence of a departure. To a reasonable degree of medical certainty, Dr. Testa concludes that the treatment provided by Dr. Grelsamer, and the healthcare providers assisting him in his care of Mr. Sarajian, was in accordance with good and accepted orthopedic practice, and that no deviation from proper practice caused or contributed to the injury claimed in this lawsuit.

In opposition to Dr. Grelsamer’s motion, plaintiffs point out that they are not asserting a claim for lack of informed consent and that they agree that Mr. Sarajian required a left total hip replacement for the arthritic pain in his left hip. Plaintiffs further assert that it is undisputed that there was no diagnosis of damage or dysfunction to Mr. Sarajian’s left sciatic nerve prior to the procedure on April 25, 2006. Plaintiffs raise the fact that Dr. Grelsamer testified that he could not remember whether he dictated his operative report before or after the foot drop was discovered (which was either immediately or almost immediately after the left total hip replacement was completed). They point this out because Dr. Testa heavily relied on Dr. Grelsamer’s operative report

in concluding that Dr. Grelsamer used the appropriate amount of pressure during the retraction. Plaintiffs claim that whether or not Dr. Grelsamer used appropriate pressure is a disputed fact, as set forth in their expert's opinion. Plaintiffs argue that their expert's opinion raises issues of fact with respect to deviations from the standard of care that preclude granting summary judgment in favor of Dr. Grelsamer.

Plaintiffs proffer the expert opinion of Joel W. Malin, M.D., who sets forth that he is a board certified orthopedic surgeon duly licensed to practice medicine in the States of Connecticut and Massachusetts. He asserts that he is familiar with the standards of good and accepted medical practice with respect to total hip replacement procedures and that those standards were the same in New York and Connecticut at the time of the procedure and remain so today. Dr. Malin reviewed Mr. Sarajian's relevant medical records, the report of defendant's independent medical examination, the bills of particulars, and the papers supporting Dr. Grelsamer's summary judgment motion. Upon his review of the records, there is no indication to him that Mr. Sarajian had a diagnosed injury to his sciatic nerve prior to the left hip replacement. In Dr. Malin's opinion, it is clear that plaintiff's sciatic nerve was damaged during the April 25, 2005 procedure, and that the nerve damage resulted in Mr. Sarajian's foot drop. Dr. Malin also points out that Dr. Grelsamer testified that he was in complete control of Mr. Sarajian's body during the procedure, and that Dr. Grelsamer further testified that intraoperative bleeding was not a factor in causing Mr. Sarajian's injury. Dr. Malin contends that the records reveal no other factors, such as a fracture, hematoma, trauma, or anatomic abnormality, that would have made this surgery more difficult or risky than any other hip replacement. He sets forth that the causes of damage to the sciatic nerve during total hip

replacements are known, and that if “intraoperative bleeding, trauma, or fracture are not involved . . . compression or stretching of the sciatic nerve” are among the known causes. Dr. Malin sets forth that Dr. Grelsamer, himself, testified that Mr. Sarajian’s nerve was injured by stretching during the hip replacement. Dr. Malin opines that, in the absence of complicating factors, none of which were reported in the medical records, “the only significant factor or causes of damage to the sciatic nerve are excessive force and pressure and compression upon the soft tissue surrounding the nerve during the retraction of said tissue and/or improper placement of the retractors, causing compression, stretching and damage to the sciatic nerve.” He states that either factor is a deviation from the standard of care, and that one or both of these factors was caused by Dr. Grelsamer during the procedure. Dr. Malin opines, within a reasonable degree of medical certainty, that these forces caused the nerve to become injured and the resulting foot drop.

Dr. Malin specifically takes issue with Dr. Grelsamer’s testimony that he relied on the weight of the retractors to retract the tissue during the left total hip replacement. In Dr. Malin’s opinion, the procedure cannot be accomplished with only the weight of the retractors, and that force beyond the weight of the retractors—“at least moderate pressure”—must be used. It is Dr. Malin’s belief that Dr. Testa’s opinion based on Dr. Grelsamer’s description of “gentle pressure” is inaccurate, and that Dr. Grelsamer’s description should not have been the basis of Dr. Testa’s opinion.

In reply to plaintiffs’ opposition, Dr. Grelsamer argues that plaintiffs’ expert’s opinion was insufficient to show that the retractors were improperly placed or that excessive pressure

was used, and that the opinion relies on bare speculation that the negligence must have occurred because there was an injury. Dr. Grelsamer argues that plaintiffs' expert did not refute his expert's "reference to medical literature that reports that large series typically demonstrate about a 1% incidence of sciatic nerve injury following total hip replacement."

Although Dr. Grelsamer made out a prima facie case of entitlement to summary judgment on the issue of whether there was a departure from the standard of care, plaintiffs' expert opinion sufficiently rebutted Dr. Testa's opinion that the procedure was properly performed. In contrast to Dr. Testa's opinion that plaintiffs are merely speculating as to the cause of Mr. Sarajian's injury, Dr. Malin sets forth that there is a known and limited number of ways that the nerve tissue can be damaged during a total hip replacement and that it is impossible to retract the tissue as Dr. Grelsamer described, using only the weight of the retractors. Dr. Malin's opinion raises issues of fact as to the amount of pressure used during the procedure and as to Dr. Grelsamer's credibility in describing the pressure he used. Issues of fact and credibility must be resolved by the fact finder. See 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).

As to the issue of whether Dr. Grelsamer is liable for the acts of Mt. Sinai employees assisting him during the hip replacement surgery, a private surgeon is generally liable for the acts and/or omissions of hospital employees under his/her direction. Cf. Mondello v. New York Blood Ctr., 80 N.Y.2d 219, 228 (1992); Garson v. Beth Israel Med. Ctr., 41 A.D.3d 159, 160 (1st Dep't 2007). However, plaintiffs fail to address this issue in their opposition papers in response to Dr.

Grelsamer's assertion that either he is not vicariously liable for any negligent acts or omissions of Mt. Sinai employees or that the Mt. Sinai employees were not negligent. Plaintiffs do not identify any evidence suggesting that anyone other than Dr. Grelsamer departed from the standard of care in the performance of the left total hip replacement. Dr. Grelsamer is entitled to dismissal of the claim sounding in vicarious liability. Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied, except that Dr. Grelsamer is granted summary judgment in his favor on the issue of his vicarious liability for the acts of Mt. Sinai employees assisting him during the hip replacement surgery; and it is further

ORDERED that the parties shall appear for a pre-trial conference on July 19, 2011, at 11:00 a.m., in Part 6, courtroom 345 at 60 Centre Street, New York, New York.

Dated: June 23, 2011

  
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JOAN B. LOBIS, J.S.C.

**FILED**

JUN 24 2011

NEW YORK  
COUNTY CLERK'S OFFICE