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| Salzberg v St. Vincent Hosp. |
| 2011 NY Slip Op 31872(U) |
| July 6, 2011 |
| Supreme Court, New York County |
| Docket Number: 116834/08 |
| Judge: Joan B. Lobis |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

CHARLES SAZBERG
- v -

ST. VINCENTS HOSPITAL

INDEX NO. 116834/08
MOTION DATE 5/3/11
MOTION SEQ. NO. 4
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
1-12
13-16
17-19

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order

Dated: 7/6/11 _____ JBH
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
CHARLES SALZBERG,

Plaintiff,

Index No. 116834/08

-against-

Decision and Order

ST. VINCENT'S HOSPITAL AND DR. DAVID
FLEISS, LEE ZANK, M.D., and GREENWICH
MEDICAL ANESTHESIA, P.C.,

FILED

Defendants.

JUL 08 2011

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

NEW YORK
COUNTY CLERK'S OFFICE
of New York s/h/a "St.

Defendants Saint Vincent's Catholic Medical Centers of New York s/h/a "St.

Vincent's Hospital" (the "Hospital"), Lee Zank, M.D., and Greenwich Medical Anesthesia, P.C.,
move for summary judgment dismissal of the medical malpractice and lack of informed consent
claims asserted against them by plaintiff Charles Salzberg, for injuries related to a right knee
osteotomy performed by co-defendant David Fleiss, M.D., on December 6, 2007.

Plaintiff suffered a peroneal nerve compression injury due to a tight cast that was
placed after the surgery. As against Dr. Zank (an anesthesiologist), plaintiff alleges, *inter alia*, that
Dr. Zank improperly administered a femoral nerve block without first consulting with plaintiff's
surgeon Dr. Fleiss, in contravention of the pain plan ordered by Dr. Fleiss, and in contravention of
the standards of care. Plaintiff contends that the nerve block dulled and diminished his pain and
sensation in a way that delayed the diagnosis that the cast was too tight. As against the Hospital,
plaintiff alleges, *inter alia*, that the Hospital failed to timely monitor him, failed to follow his
surgeon's orders, and failed to timely notify his surgeon of his condition, and that these failures
contributed to the delayed diagnosis that the cast was too tight.

In support of the moving defendants' contention that Dr. Zank did not depart from the standard of care, they submit an affidavit from him in which he states that the femoral nerve block was proper and indicated to alleviate plaintiff's pain and that there is nothing contraindicated about administering a femoral nerve block to a patient in a cast. Dr. Zank further sets forth that he informed plaintiff of the risks, benefits, and alternatives to the nerve block, and that a reasonable person in plaintiff's condition would have chosen to have the nerve block.

In support of the moving defendants' contention that the Hospital did not depart from the standard of care, they submit an affirmation from Matthew Wert, M.D., who at the time of the alleged malpractice was an orthopedic surgery resident at the Hospital and who assisted Dr. Fleiss in performing the osteotomy and in caring for plaintiff postoperatively. Dr. Wert sets forth that, postoperatively, he observed plaintiff for any "untoward complications." It came to his attention that plaintiff had pain and discomfort postoperatively. He states that the Hospital's nurses administered pain medication pursuant to a standard order for postoperative pain management. Dr. Wert opines, to a reasonable degree of medical certainty, that the postoperative monitoring and evaluation of plaintiff's complaints and condition was in accordance with good and accepted medical practice.

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. A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to the treatment and there reasonably foreseeable risks and benefits of the treatment, and “that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]” Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Public Health Law § 2805-d(1). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposition papers. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted).

As plaintiff points out in his opposition papers, the moving defendants failed to address the essential allegations in the bill of particulars. Certainly, unresolved issues of fact remain as to whether plaintiff was properly monitored postoperatively, whether the moving defendants followed Dr. Fleiss’ postoperative pain orders, whether the moving defendants failed to consult with Dr. Fleiss prior to administering the femoral nerve block, and whether the nerve block exacerbated plaintiff’s injuries by contributing to the delay in diagnosing the fact that his cast was too tight and was compressing the peroneal nerve. Dr. Fleiss even testified that a nerve block was contraindicated in this patient and that his pain plan was not followed. Defendants’ motion is insufficient to make out a prima facie entitlement to summary judgment on the issue of malpractice. Further, Dr. Zank’s bare, conclusory, and unsupported statements that plaintiff was informed of the risks, benefits, and alternatives to the nerve block, and that a reasonable person in plaintiff’s condition would have chosen to have the nerve block, are insufficient to shift the burden to plaintiff on the issue of lack of informed consent.

Nevertheless, if the burden had shifted to plaintiff to raise an issue of fact, he did so by submitting an expert's affirmation which indicates that a femoral nerve block was contraindicated because plaintiff's orthopedic surgeon set forth specifically which pain medications he wanted to be available to plaintiff. If, after exhausting the surgeon's pain plan, the patient was still in pain, plaintiff's expert opines that this would have been considered "inordinate pain and an indication that there could be a tight cast." Plaintiff's expert opines that a femoral nerve block in a patient with a full leg cast obliterates sensation in the area, preventing the patient from feeling inordinate pain, "an important sign to the orthopedist of a tight cast" which could cause a nerve injury. The expert opines that plaintiff never "maxed out" on the pain medications ordered by Dr. Fleiss and, at the time the nerve block was administered, was not even reporting that much pain, so there was no indication to give a nerve block. Rather, in plaintiff's expert's opinion, there was every indication that Dr. Zank should have consulted with Dr. Fleiss prior to treating his patient with a nerve block. The expert sets forth that but for the nerve block, plaintiff's nerve injury would not have occurred because plaintiff's inordinate pain would have prompted an earlier intervention to release the cast. Accordingly, it is hereby

FILED

JUL 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

ORDERED that the motion is denied; and it is further

ORDERED that the parties shall appear for their previously scheduled pre-trial conference on July 26, 2011, at 9:30 a.m.

Dated: July 6, 2011



 JOAN B. LOBIS, J.S.C.