

Witsell v New York Presbyt. Hosp.

2011 NY Slip Op 32990(U)

November 14, 2011

Sup Ct, NY County

Docket Number: 114629/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY **TA** PART 16

PRESENT: ALICE SCHLESINGER
Judge

PART 16

Index Number : 114629/2007
WITSELL, ANNETTE
vs.
NEW YORK PRESBYTERIAN
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant New York Presbyterian Hospital is granted in accordance with the accompanying memorandum decision.

FILED

NOV 15 2011

NEW YORK COUNTY CLERK'S OFFICE

Alice Schlesinger
J.S.C.

Dated: 11/14/11 NOV 14 2011

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
COUNTY OF NEW YORK

-----X
ANNETTE WITSELL and MARVIN WITSELL,

Plaintiffs,

-against-

NEW YORK PRESBYTERIAN HOSPITAL,

Defendant.

-----X
SCHLESINGER, J.:

Index No. 114629/07
Motion Seq. No. 003

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

New York Presbyterian Hospital, the sole defendant in this medical malpractice action, is moving for summary judgment. The action involves a gynecological surgical procedure that occurred on April 12, 2007. Before that procedure, on March 7, 2007 Dr. Andrea Reh, then a resident of the hospital, had examined the plaintiff Ms. Witsell in the hospital gynecological clinic. The history given to Dr. Reh at that time was of heavy vaginal bleeding and significant abdominal cramping that interfered with Ms. Witsell's daily activities. Also, on another topic and years earlier, the plaintiff had been diagnosed with rheumatoid arthritis and she did use a cane to walk.

At the time, Ms. Witsell was diagnosed with adenomyosis. The doctor gave several options, including removal of Ms. Witsell's uterus and if she wanted she could also have her ovaries removed. However, the latter was not necessary. The plaintiff did agree to the larger surgery, the ovary removal characterized as a bilateral salpingo- oophorectomy. She would have this as a prophylactic measure as she was concerned about ovarian cancer and believed that removal of her ovaries would prevent that.

Dr. Reh also presented Ms. Witsell with a more conservative treatment option, the medication Lupron used to shut down one's ovaries. But the plaintiff opted for the surgical hysterectomy.

On April 13, 2007, Dr. Reh, with the assistance of others, performed this operation. It began as a laparoscopic procedure but as it proceeded, the doctors believed that a conversion to an open procedure was necessary. This possibility had been discussed with the plaintiff before the surgery and before she signed her consent to this procedure.

During the procedure itself, Ms. Witsell was put in a dorsal lithotomy position, meaning she was on her back with her legs in stirrups. The stirrups used were Allen Stirrups which had padding on all sides to reduce possible nerve compression. She was also given compression venodyne boots which were given to aid in circulation. Finally, the weight of the patient's legs was placed on the bottom of her heels rather than her calves to avoid compression of her calves.

According to the hospital records, the operation was successful and the patient's condition was good after its completion. However, several days after the surgery, she began to complain of a problem in the toe of her left foot, followed by additional complaints relative to her left leg, with pain and numbness. Various diagnostic testing was done including an MRI and an EMG. These tests were both negative. After further testing involving nerve conduction and a full neurological work-up, no physical cause could be found for Ms. Witsell's complaints. She was

then referred for two psychiatric consultations. She was discharged from the hospital on April 21, 2007.

The hospital's motion is accompanied by a detailed affirmation consisting of 35 paragraphs from Dr. Gary Mucciolo, a board certified gynecologist. After reviewing all the records and based on his own experience in these procedures, he gives his opinion that there was no negligence here by any of the hospital care providers. He opines that all the doctors exercised proper clinical judgment with regard to the management of the plaintiff's complaints and the performance of the surgery. He says that the surgery was in accord with good and accepted practice. With regard to any possible nerve damage that Ms. Witsell may have suffered during the surgery, Dr. Mucciolo says that such damage is an accepted complication of this procedure but was not a result of any deviation from good and accepted practice.

He discusses all of the positioning of the patient and the devices that were used during the operation and says that they were all proper. He also says that it was good practice under the circumstances here, with a very large uterus where visibility was compromised, to convert this to an open procedure.

With regard to the complaint of a left toe problem, he points out that this complaint was made three days after the surgery. With regard to the MRI that was given, although there was a host of pre-existing conditions that could have affected neurological function, no specific deficit was found resulting from the surgery. Also, the nerve conduction tests given to her were normal. This also definitively

established that no neuropathy or lumbosacral radiculopathy occurred as a result of the surgery. Clearly, this affirmation on behalf of the hospital establishes a prima facie case in its favor, thus shifting the burden to the plaintiff to establish issues of fact concerning malpractice and informed consent.

The plaintiff attempts to do this by submitting a relatively short affirmation from a Dr. Irving Friedman. Dr. Friedman is a board certified neurologist. That fact in itself, contrary to what defense counsel later argues, is not a ground to disqualify or ignore his opinions. After all, this was a neurological injury. However, Dr. Friedman does not include in his credentials any experience or research into gynecological issues including hysterectomies.

In his affirmation, he states that he has not only reviewed the hospital chart and the affirmations of Dr. Reh, who was deposed, and Dr. Mucciolo, but he has also examined Ms. Witsell in his office as well as testing her. The EMG testing that he performed on the plaintiff occurred on May 11, 2007 revealed denervation of the left S1 pattern. A later EMG done in October 2007 showed a denervation of a left L5 S1 pattern.

Dr. Friedman opines that plaintiff did suffer a traumatic event during the April 12, 2007 surgery. He says he believed that she sustained nerve damage, specifically Reflex Sympathetic Dystrophy due to improper positioning during the procedure. Further, he opines that the hospital failed to properly diagnose Ms. Witsell's condition. He also says that the plaintiff was not referred for appropriate

treatment for the numbness in her left lower extremity. However, as pointed out in reply by the defense, he does not explain what that appropriate treatment would have been. Further, he says he does not agree that nerve damage is an accepted complication of the procedure. But again, he does not provide any indication that he has ever performed or studied this procedure.

As to the informed consent issue here, Dr. Friedman opines that the plaintiff was not properly informed of the risks of surgery and points out that nowhere is it written on the consent form that nerve injury was a possible risk.

I have a lengthy reply from the defense, which I believe is ultimately convincing as to the inadequacy of the plaintiff's opposition. I arrive at this conclusion because as the defense urges, Dr. Friedman in no way points with any specificity or particularity to what went wrong in the surgery. In other words, not only does he not give the mechanism of injury, how this nerve injury occurred, but he does not say what should have been done as opposed to what actually was done. Further, he does not make any correlation between his own EMG findings and the injury.

As to the post-operative care, even though he is critical that a "proper diagnosis" was not made, Dr. Friedman fails to say what that proper diagnosis should have been. And again, he does not point out what further tests should have been given or what further treatment was called for. It should be noted that Ms. Witsell did have physical therapy after leaving the hospital, though it was not

prescribed by the hospital. Further, Dr. Friedman does not suggest that any of the diagnostic tests done by the hospital were performed improperly or that their results were read incorrectly.

As to the informed consent issue, again it is questionable upon what authority Dr. Friedman is able to say that this kind of injury is not a normal complication of the procedure, as it appears that he has had no experience with this procedure. Finally, as pointed out by the defense, Ms. Witsell could not recall whether or not Dr. Reh did inform her that there could be nerve injury. On this point, Dr. Reh says that pursuant to her own custom and practice, she would have discussed nerve injury. However what is most important here is that there is no statement from the plaintiff, by way of affidavit or in her deposition, that she would not have proceeded with the surgery if she had known of the possibility of nerve damage. That is a fatal omission.

Therefore, in summary, because I feel that Dr. Friedman gives conclusory opinions without explaining how the injury occurred or how it was caused by malpractice, and because I also find that Dr. Friedman does not have the proper qualifications or experience to opine on the specificity of this surgical procedure or its aftermath, or the risks attached to it, I am constrained to conclude that the plaintiff has not succeeded in creating legitimate issues for trial. Therefore, the hospital is entitled to summary judgment in its favor.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 14, 2011

NOV 14 2011

Alice Schlesinger

J.S.C.

ALICE SCHLESINGER

FILED

NOV 15 2011

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COUNTY CLERK'S OFFICE**