

Moscato v Levine

2011 NY Slip Op 33009(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 102143/09

Judge: Alice Schlesinger

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ALICE SCHLESINGER

IA PART 16
PART _____

Justice

Index Number : 102143/2009
MOSCATO, SUSAN
vs.
LEVINE, SUZANNE MARLIN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

Motion to/for _____

_____ | No(s). _____

_____ | No(s). _____

_____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

granted in accordance with the accompanying memorandum decision, and all claims against defendant Dr. Darlene Kulhas are severed and dismissed with prejudice.

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

FILED

NOV 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: NOV 15 2011

Alice Schlesinger

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
SUSAN MOSCATO and FRANCO MOSCATO,

Plaintiffs,

-against-

DR. SUZANNE MARLIN LEVINE, DR. DARLINE
KULHAN and INSTITUTE BEAUTE, INC.,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 102143/09
Motion Seq. No. 001

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This action sounds in medical malpractice, specifically podiatric malpractice, and more specifically the surgery on plaintiff's left foot on September 21, 2007. This surgery was actually performed by co-defendant Dr. Suzanne Levine, with the moving defendant in this summary judgment motion, Dr. Darline Kulhan, assisting.

There are competing affidavits from Dr. Steven Abramow, DPM, a board certified podiatrist, opining in support of Dr. Kulhan and her motion, and Dr. Lawrence P. Horl, DPM, a board certified podiatrist opining in opposition to the motion on behalf of the plaintiff. Frankly, neither expert impressed the Court, as both speak in general, conclusory terms. For example, Dr. Abramow, whose affidavit consists of thirty paragraphs, spends the first four on his credentials and review of the records, paragraphs five through twenty-one in what such review of the treatment history showed and finally from paragraphs twenty-two to the end, in the most general of ways, he simply says that Dr. Kulhan did not deviate from accepted standards of podiatric care between September 10, 2007, when she first saw and examined the plaintiff, until March 10, 2008, the last post-operative visit. Each visit is dealt with in succeeding paragraphs; twenty-three speaks of September 10,

twenty-four speaks of September 21 and the surgery, twenty-five speaks of the first post-operative visit of September 27 and so on. Paragraph twenty-nine is the doctor's opinion that there was no need to refer the patient to an orthopedist, and paragraph thirty sums up the earlier opinions. Only in paragraph twenty-four, the one dealing with the surgery itself, does Dr. Abramow specifically point to the very limited role played by Dr. Kulhan and detail what she did there. These tasks included setting up the trays, cutting the sutures and getting the injections ready.

But as stated earlier, the affidavit on behalf of plaintiff by Dr. Horl, who has also examined Ms. Moscato, is equally general, conclusory and repetitive. An example of his criticism appears in paragraph twenty-three where he opines that with the plaintiff's history of osteoarthritis, it was contraindicated to perform a bunionectomy. But he never explains either how he knows that the plaintiff presented with osteoarthritis to Drs. Kulhan and Levine or how or why that condition made her a poor candidate for surgery. However, most important for purposes of this motion, nowhere before in any court papers, including the complaint, bill of particulars, etc., is there any claim that malpractice was committed by performing surgery that was contraindicated in general and/or contraindicated due to her pre-existing condition of osteoarthritis.

Further, with regard to the post-surgical visits, which primarily involved the moving defendant Dr. Kulhan, Dr. Horl does not point to any departure. Significantly, the only area of care that he discusses with any specificity is the surgery that occurred on September 21, 2007. Dr. Horl has many criticisms of that surgery, presumably directed at the doctor who performed it, the co-defendant Dr. Suzanne Levine who is not moving for summary judgment. He opines that this procedure, one he characterizes as unnecessary,

caused all of the plaintiff's injuries. He believes conservative treatment should have been opted for, as the bunion on the left foot he believes should have been characterized as mild.

With regard to the specifics of the surgery, first he opines that the "K"-wire (for Kirshner) that Dr. Levine used to fix the sections of the first metatarsal was the wrong fixation device and that a screw should have been used instead. This is because a K-wire, which will to some extent apply splintage by keeping the two bone fragments in alignment, does not provide compression of the bone fragments. Compression is advantageous as it aids in bone healing. He points to x-rays, later taken, which showed inadequate bone formation in that first metatarsal.

Dr. Horl proceeds to detail other departures involving the second and third digits, which he believes resulted in a permanent lack of flexibility and other injury to this foot. In fact, toward the end of his statement, he presents a laundry list of things that he believes were done wrong during the surgical procedure.

Dr. Horl then gives his opinion, arguably on something outside of his expertise, on the relationship between the defendants Drs. Kulhan and Levine. He believes that regardless of the details of the doctors' own relationship (they both testified that Dr. Kulhan was an independent contractor), and regardless of the amount of participation in the surgery that each had, Dr. Kulhan owed a duty to act as a reasonable and competent podiatrist in recommending the surgery, as well as a duty to ensure that the surgery was performed in accordance with good and accepted podiatric practice.

In following up on the above opinion, counsel for the plaintiff argues that Dr. Kulhan and Dr. Levine closely participated together in the care of Ms. Moscato. In this regard

counsel points out that Ms. Moscato first saw Dr. Kulhan, who took diagnostic tests and was the one who recommended this surgery. Plaintiff also points to records indicating that Dr. Kulhan was the podiatrist primarily involved in the plaintiff's post-operative care. Based on these facts, plaintiff argues that each physician is vicariously liable for the other's acts.

I believe I understand why counsel emphasizes this joint participation. He has to. I say this because when we closely scrutinizes Dr. Horl's actual position on what the malpractice was here, he only cites to two events. The first is his opinion that the surgery was unnecessary and in fact contraindicated. The other is the quality or lack thereof in the surgery itself, such as the decision to use K-wire. With regard to these two events, as moving counsel points out, the first one was never pled or raised before. The allegation of negligence by plaintiff in all of her papers begins with September 21, the day of the surgery. Therefore, plaintiff cannot now rely on actions by Dr. Kulhan on September 10 never before pled to show malpractice. *Golubov v. Wolfson*, 22 AD3d 635 (2nd Dep't 2005).

All of this means that it is the events of the surgery that constitute the only viable malpractice claim. In this regard it should be noted, as moving counsel does, that Dr. Horl does not address the quality of any of the post-operative care, the days when Dr. Kulhan was the primary doctor. This ultimately means that if Dr. Kulhan, under the circumstances existing here, cannot be held jointly liable with Dr. Levine for the decisions and actions of the surgery, then she cannot be held liable at all.

The depositions of the doctors are dispositive about what occurred during the surgery and who was in control. First, it is clear that despite the initial examination and testing by Dr. Kulhan on September 10, it was Dr. Levine who reviewed these tests, did some of her own such as an ultrasound, and actually made the decision to operate on

September 13, a decision to which the plaintiff Ms. Moscato consented. With regard to the surgery itself, both defendant doctors agree that Dr. Levine was in control and was responsible for what was done or in her own words: "I was captain of the ship" (pg 139 of Levine's EBT). No one disputes this point. Nor do the records. Dr. Levine did all the actual work in the procedures and made all the decisions. As stated earlier, Dr. Kulhan's role was to watch and to assist. She did this by preparing the surgical tray, cutting sutures, getting the injectables ready and retracting.

Based on these facts and on the authority of such cases as *Graddy v. New York Med. Coll.*, 19 AD2d 426 (1st Dep't 1963) and *Kavanaugh v. Nussbaum*, 71 NY2d 535 (1988), I find there is no joint responsibility between Dr. Levine and Dr. Kulhan, who worked in the office, not as a partner but as an independent contractor who on occasion shared patients with Levine. Further, there is no vicarious liability by Dr. Kulhan for the surgical acts performed by Dr. Levine. *Bedard v. Klein*, 930 N.Y.S.2d 656 (2nd Dep't 2011).

Finally, one cannot say here that Dr. Kulhan had an individual responsibility to intervene during the surgery. While Dr. Horl is critical of the surgical decisions and techniques used by Dr. Levine, critical to the point of characterizing them as departures from accepted practice, certainly Dr. Abramow feels otherwise, as does Dr. Kulhan. The latter in her deposition opined that Dr. Levine was an excellent surgeon who does wonderful work. Therefore, no one suggests here that Dr. Kulhan had an independent duty to intervene. (*Bedard, supra*).

Therefore, in conclusion, the only viable claim of malpractice here is the surgical decisions and actions. Those can only be attributed to Dr. Levine, who is silent during this motion. The moving party Dr. Kulhan is therefore entitled to be removed from the action.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Dr. Darline Kulhan is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

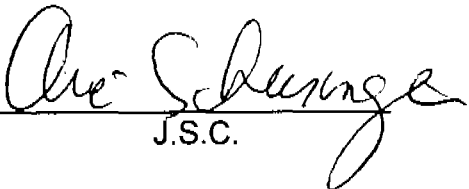
ORDERED that the action is severed and continued against the remaining defendants who shall appear for a pre-trial conference on January 25, 2012 at 11:30 a.m.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: November 15, 2011

NOV 15 2011



J.S.C.

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