

Reyes v Sequerira

2011 NY Slip Op 33845(U)

April 8, 2011

Sup Ct, Bronx County

Docket Number: 14553/05

Judge: Mark Friedlander

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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MIREYA REYES,

Plaintiff,

DECISION/ORDER
Index No.14553/05

-against-

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Present:
HON. MARK FRIEDLANDER
J.S.C.

RODRIGO J. SEQUERIRA, and MT. SINAI
HOSPITAL OF QUEENS,

APR 14 2011

Defendants.

The following papers numbered 1 to 5 read on this motion
on the calendar of November 29, 2010

Papers Numbered

| | |
|---|------|
| Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed..... | 1-2 |
| Answering Affidavits and Exhibits Annexed..... | 3, 4 |
| Replying Affidavits and Exhibits Annexed..... | 5 |

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

Dated: 4/8/11

MARK FRIEDLANDER, J.S.C.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

MIREYA REYES,

Plaintiff,

-against-

RODRIGO J. SEQUERIRA, and MT. SINAI
HOSPITAL OF QUEENS,

Defendants.

**MEMORANDUM DECISION/
ORDER**
Index No.14553/05

HON. MARK FRIEDLANDER:

Defendants Mount Sinai Hospital of Queens ("MSQ"), Montefiore Hospital and Medical Center ("MMC"), and Stephen Michalski, M.D. ("Dr. Michalski") move for summary judgment in their favor, dismissing all claims and cross-claims against them in this medical malpractice action. The action arises out of various treatments received by plaintiff in 2003, 2004 and 2005, from physicians and hospitals in the boroughs of Queens and The Bronx.

The initial treatment involved here was rendered by defendant Rodrigo J. Sequeira, M.D. ("Dr. Sequeira"), who is, or was, an attending physician at MSQ. Dr. Sequeira took no part in the instant motion and the claims against him are therefore not considered hereinafter.

Movants claim that MSQ cannot be held liable for any actions of Dr. Sequeira, because Dr. Sequeira was not an employee of MSQ. Further, plaintiff was already a patient of Dr. Sequeira's when she first presented to MSQ. Movants also attach an affirmation from their expert opining that the relevant records show no departures by the staff of MSQ. Plaintiff, in her opposition papers, does not oppose this portion of the motion, and does not make any showing that MSQ, or its staff, bears liability for the actions of Dr. Sequeira, or for any other treatment rendered to plaintiff.

Consequently, such portion of the instant motion as seeks summary judgment in favor of MSQ is granted in all respects.

MMC makes no argument here that it was not vicariously responsible for the treatment rendered to plaintiff by Dr. Michalski. Thus, the Court must assume, for purposes of this motion, that, either the doctor was an MMC employee, or MMC's emergency room directed plaintiff to Dr. Michalski for care (or both). Thus, MMC is not entitled to dismissal on the ground articulated supra by MSQ.

Plaintiff's claims sound, inter alia, in lack of informed consent, and the moving papers seek dismissal of such claims, presenting the various consent forms signed by plaintiff, and other evidence as to the advice given to plaintiff before her procedures. Plaintiff, in her opposition papers, also fails to oppose the contention that claims of lack of informed consent should be dismissed.

Consequently, such portion of the instant motion as seeks summary judgment dismissing claims of lack of informed consent is granted in all respects.

Thus, there remain in contention only claims of departures from accepted medical practice by Dr. Michalski, and vicariously, by MMC.

Plaintiff had an extensive history of medical and surgical treatment prior to her initial encounter with Dr. Michalski, including, as recounted by plaintiff's own expert, a cesarean-section, tubal ligation, a hysterectomy, repair of a recto-cystocele, liposuction and abdominoplasty. All of this was followed by her 2003 procedure in MSQ, where Dr. Sequeira attempted to remove her gallbladder laparoscopically, but, after 30 minutes of poking around her umbilicus and finding too much scar tissue to proceed, completed the gallbladder removal with an open surgery. When plaintiff subsequently suffered discharges from her umbilical area, she first came to the attention of Dr. Michalski.

Movants recite the purported history of plaintiff's encounters with Dr. Michalski, emphasizing the gaps in her return visits, when she allegedly ignored recommended follow-up, or consulted other practitioners instead, or both. However, in plaintiff's opposition papers, an alternative history is offered, complete with records from Dr. Michalski showing continual visits to Dr. Michalski during periods not recounted in defendant's moving papers.

Further, the description of plaintiff's initial visit to MMC appears completely different, depending on

whether one credits the moving papers or the description by plaintiff's expert. It is not even clear whether Dr. Michalski saw plaintiff on her first visit to MMC, or whether he performed the initial procedure on her at that time.

In their reply, movants summarily discount their failure to submit to the Court evidence of plaintiff's repeated visits to Dr. Michalski, but the reply arguments are unpersuasive at best. The narrative in the moving papers, seen in light of the exhibits to plaintiff's opposition, appears too much like an effort to misinform the Court as to Dr. Michalski's involvement, or, at the very least, like a convenient oversight. It is movants who bear the onus for submitting a motion that is lacking a complete narrative as to the physician's contacts with the patient – especially since the nub of plaintiff's complaint revolves around how long it took Dr. Michalski to realize what the problem was.

Plaintiff's expert opines that Dr. Michalski should have realized earlier that plaintiff had, in her abdomen, a disconnected piece of umbilicus that was infected and that would continue to cause oozing and draining. Movants, in reply, argue that plaintiff's expert is basing his theory on the ultimate discovery of the problem and reasoning backward, as if the expert were, in effect, a "Monday Morning Quarterback." Movants claim that such reasoning is impermissible as a basis for establishing a departure.

A careful reading of the affirmation of plaintiff's expert, though, shows that the expert is not basing his conclusion merely on the ultimate discovery of the umbilical tissue, but rather on the claimed unreasonableness of Dr. Michalski's initial diagnosis that he observed a piece of mesh within plaintiff's abdomen, when no such larger foreign object ever existed. A physician could infer that a piece of infected mesh might have remained in plaintiff's abdomen as a result of her previous abdominoplasty or gallbladder removal. Such reasoning may have led to an assumption on the part of defendant. Plaintiff's expert, however, opines that this did not support Dr. Michalski's conclusion, without further testing, that this was the source of the problem, or his suggestion in the medical record that he thought he had visualized the non-existent mesh.

Because of the dispute between the parties' experts as to whether or not a departure existed, and because of the failure of movants to submit to the Court an accurate narrative of the contacts between plaintiff and Dr.

Michalski, summary judgment as to this final issue must be denied, as issues of fact exist, regarding not only possible departures by Dr. Michalski, but also how many times Dr. Michalski missed an opportunity to diagnose the problem.

It can be suggested, though, that the departures outlined by plaintiff's expert do not present a foundation for the award of enormous damages from the moving defendants. Plaintiff appears to be suffering the effects of numerous earlier treatments, including very possibly the gallbladder removal by defendant Dr. Sequeira. Following all these assaults on her abdominal area, plaintiff first came to Dr. Michalski, and, it must be said, her problem was eventually properly addressed, with only the delay of some months arguably attributable to the moving defendants. Under these, circumstances, and considering the causes of action already dismissed without opposition herein, it would be in the best interests of the parties to get together in an attempt to resolve this matter quickly. Undoubtedly, plaintiff has suffered significantly from her medical issues, as the Court can understand. Such part of the suffering as may have developed through any alleged departures by the moving defendants should, as a practical matter, be resolvable by compromise. In this effort, the Court stands ready to be of assistance, if the parties so desire.

By consequence of the foregoing, such portion of the motion as seeks dismissal of the medical malpractice claims against Dr. Michalski and MMC is denied. All other portions of the motion are granted, as described supra.

This constitutes the Decision and Order of the Court.

Dated: 4/8/11



MARK FRIEDLANDER, J.S.C.