

Burkart v Carella

2011 NY Slip Op 33914(U)

April 22, 2011

Sup Ct, Bronx County

Docket Number: 16486/06

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

PART 06

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

Case Disposed
 Settle Order
 Schedule Appearance

BURKART, LOUISE

Index No. 0016486/2006

-against-

Hon. ~~EDGAR G. WALKER~~

CARELLA, M.D., ANTHONY

MITCHELL J. DANZIGER
 Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **June 11 2010** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	1.
Answering Affidavit and Exhibits	2	2.
Replying Affidavit and Exhibits	3	3.
<i>Correspondence 12/10/10</i> Affidavits and Exhibits	4	4.
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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APR 26 2011

Upon the foregoing papers this

*Motion is denied in accordance with the
 Memorandum Decision annexed hereto*

Motion is Respectfully Referred to:
 Justice:
 Dated:

Dated: 4, 22, 11

Hon. 
~~EDGAR G. WALKER, J.S.C.~~
MITCHELL J. DANZIGER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP1

-----X
LOUISE BURKART,

Plaintiff,

DECISION and ORDER
Index No. 16486/06

-against-

Present: Hon. Mitchell Danziger
JCC

ANTHONY CARELLA, M.D., SANSERN
HASTANAN, M.D, NILESH BALAR, M.D.,
ELENA VEZZA, M.D., and NEW YORK
WESTCHESTER SQUARE MEDICAL CENTER,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underling motion for summary judgment:

Notice of Motion and annexed Exhibits & Affidavit.....	1
Affidavit in Opposition	2
Reply Affirmation.....	3
Correspondence.....	4

Movants, Nilesh Balar, M.D., and Elena Vezza, M.D., assert that the plaintiff claims that the defendants failed to properly perform and prepare her for a right knee replacement surgery, and a compartment release/popliteal artery embolectomy and fasciotomy at the co-defendants facility, New York Westchester Square Medical Center in September of 2004. As a result of the alleged negligence, the plaintiff claims that she suffers from a right foot drop and an impaired gait.

Defendants, Drs. Balar and Vezza moves for summary judgment pursuant to CPLR 3212 on the grounds that there are no triable issues of fact warranting a trial of this matter as to the issue of their negligence.

Plaintiff asserts that she is not opposing the portion of the Motion on behalf of defendant Dr.

Nilesh Balar. As a result, the branch of the motion for summary judgment as to the defendant, Dr. Nilesh Balar is granted.

The plaintiff's complaint asserts that the defendants, Dr. Nilesh Balar and Dr. Elena Vezza rendered medical care and treatment to the plaintiff Louise Burkart between September 11, 2004 and March 11, 2005. The complaint also asserts that the defendants, Drs. Balar and Vezza were an "agent, servant and/or employee of defendant N.Y. Westchester Square Medical Center."

Plaintiff's complaint asserts that both Dr. Balar and Dr. Vezza held themselves out to the public as follows: "as possessing and utilizing the proper degree of learning and skill necessary to render medical services in accordance with good and accepted medical practice, and undertook and agreed to use reasonable care and diligence in the treatment of Louise Burkart herein."

The plaintiff asserts in her complaint that the defendants were negligent as follows: in failing to properly perform knee-replacement surgery; in failing to properly treat her compartment syndrome; in failing to properly perform debridement and fasciotomy closure; and in failing and neglecting to exercise that degree of care, caution, prudence, skill, ability, professional knowledge and training generally possessed by physicians and medical providers in the community.

Dr. Elena Vezza testified at her examination before trial that she was licensed to practice medicine in New York since 1987. Dr. Vezza is board certified in Internal medicine. In September, 2004 Dr. Vezza was self-employed by her own corporation named Elena Vezza, M.D., P.C.

Dr. Vezza referred the plaintiff to Dr. Carella. Dr. Vezza testified as follows:

Q. Before September 14, 2004, did you speak to Dr. Carella with regard to what was going on with Ms. Burkart's right knee?

A. He called me after he first saw her and decided she needed

surgery.

Q. Did Dr. Carella tell you why she needed surgery?

A. She had bad arthritis, yes.

Q. At some point in September of 2004 was that surgery scheduled?

A. Yes.

Q. Sometime in September of 2004 did you see Ms. Burkart for a preoperative evaluation?

A. Yes.

Q. Did you clear Ms. Burkart for the right knee surgery that Dr. Carella was intending to perform?

A. Yes, I did.

Q. Did you perform blood tests during that preoperative evaluation?

A. Yes, I did.

Dr. Vezza also testified as follows:

Q. Did you feel there were any contraindications to the surgery that she was about to have?

A. No, I did not.

Dr. Vezza saw the plaintiff following surgery and testified as follows:

Q. Well, specifically with regard to Ms. Burkart why were you seeing her post-operatively?

A. To manage her blood pressure, cardiovascular status and to make sure she did not have any problems during surgery or after surgery.

Dr. Vezza read her note from September 14, 2004 as follows:

A. Blood pressure 120 over 60, without complaints, temperature 99-8, post-op day 1, chest is clear, core S1/S2, abdomen normal, rehab, post-op care.

Q. During your visit with Ms. Burkart on September 14, 2004, did you examine her right lower extremity?

A. No.

Q. Why not?

A. It was a machine, it was a motion machine.

Q. When you saw Ms. Burkart on September 14, 2004, was it part of your role to examine her right lower extremity?

A. If while examining her she explained to me - - if she mentioned there was a problem, I would definitely examine the foot if it was indicated.

Q. As you sit here today is there any way for you to tell me specifically when you saw Ms. Burkart on September 14, 2004?

A. No.

Q. Do you know what time Dr. Carella called you that night? Did I ask you this already?

A. You told me during the day. The exact time I don't remember but I just know it was during the night.

Q. What did he say to you?

A. Ms. Burkart has a problem, she has got an ischemic leg, she is going to the OR.

Q. Did you see Ms. Burkart again before she had the fasciotomy?

A. No.

Dr. Vezza also spoke to Dr. Carella as follows:

Q. Have you ever had any conversations with Dr. Carella concerning what caused her right foot to drop?

A. I asked him what happened.

Q. What did he tell you?

A. That's it's a rare complication from the surgery.

In further support of her motion for summary judgment, the defendant, Dr. Vezza submits an affirmation from Dr. Michael Perskin. Dr. Perskin is board certified in Internal Medicine. Dr. Perskin's affirmation concludes as follows: "Based upon my review of the relevant materials, it is my opinion within a reasonable degree of medical certainty that, at all times, Dr. Vezza rendered care and treatment to the plaintiff within accepted standards of medical care."

Dr. Perskin's affirmation also states as follows:

As noted above, Dr. Vezza treated the plaintiff on post-operative day one following her total knee replacement surgery on September 14. Pursuant to her testimony, she stated that it was her role to manage the plaintiff's blood pressure and cardiovascular status and to ensure that she did not have any complaints post-operatively. It is my opinion to a reasonable degree of medical certainty that Dr. Vezza's

role would have been to monitor the plaintiff for a fever, monitor her breathing and heart rate and for any post-operative complaints. The plaintiff did not make any complaints regarding her leg. As such, Dr. Vezza did not need to take any further action in assessing her leg. If the plaintiff's leg was ischemic, she likely would have complained of pain as this is a very painful condition. Therefore, it is my opinion that the plaintiff's leg was not ischemic at the time of Dr. Vezza's assessment.

In opposition, plaintiff submits an Affidavit from a physician who is Board Certified in Internal Medicine. Plaintiff's expert submits an Affidavit which states as follows:

Based upon my review of the relevant medical records and materials as well as my education, training and experience, it is my opinion within a reasonable degree of medical certainty that defendant Vezza deviated from the accepted standards of medical practice in connection the care and treatment rendered to Ms. Burkart in failing to preoperatively prescribe anticoagulation therapy for Ms. Burkart in September, 2004 and that defendant Vezza's deviations from the accepted standards of medical practice standard was a substantial factor in allowing a postoperative leg blood clot to form in Ms. Burkart's right leg resulting in her compartment syndrome, permanent right foot drop, fused right knee, multiple surgical procedures and multiple right leg infections.

DISCUSSION

The proponent of a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986]; *Lesane v Tejada*, 15 AD 3d 358 [2nd Dept 2005].)

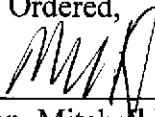
The Court finds that the aforesaid conflicting expert affidavits show that triable issues of fact existed related to aforesaid medical treatment. (*See, Rebozo v Wilen*, 41 AD 3d 457 (2nd Dept., 2007.)

For the foregoing reasons, the motion by the defendant, Dr. Nilesh Balar for summary judgment is granted without opposition. The motion by the defendant, Dr. Vezza for summary judgment is denied. Upon service of a copy of this order with notice of entry upon all sides and the Clerk the caption shall be amended to reflect the deletion of Dr. Balar as a defendant herein.

This constitutes the Decision and Order of this Court.

Dated: April 22, 2011

So Ordered,



Hon. Mitchell Danziger

MITCHELL J. DANZIGER