

Masik v Lutheran Med. Ctr.

2011 NY Slip Op 34163(U)

January 3, 2011

Supreme Court, Kings County

Docket Number: 9039/08

Judge: Gerard H. Rosenberg

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At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January, 2011.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

-----X

MIHAIL MASIK,

Plaintiff,

- against -

Index No. 9039/08

LUTHERAN MEDICAL CENTER AND
NAWAIZ AHMAD, M..D.,

Defendants.

-----X

The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3
Opposing Affidavits (Affirmations) _____	4
Reply Affidavits (Affirmations) _____	5
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Nawaiz Ahmad, M.D. (Dr. Ahmad) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint, as well as all cross claims, insofar as asserted against him (mot. seq. #4).

Background Facts

The instant motion arises from a medical malpractice action where plaintiff Mihail Masik (plaintiff) alleges that Dr. Ahmad departed from the accepted standard of care in performing surgery on plaintiff's left forearm. Plaintiff, 37 years old at the time, lacerated his left forearm with an electric stone grinder machine while installing laminate floors on March 21, 2007. The injuries' severity necessitated transporting plaintiff to the emergency room at Lutheran Medical Center, the former defendant,¹ where personnel controlled his bleeding and bandaged his lacerations.

Plaintiff received additional treatment at Lutheran Medical Center on March 26, 2007 in the plastic surgery clinic where he was assessed as needing left forearm surgery to repair tendons and nerves. Dr. Ahmad performed this surgery on March 29, 2007, declared it successful, and discharged plaintiff with the recommendation that he pursue physical therapy.

Plaintiff left the United States after his discharge to visit the Ukraine, his home country, from May 2007 through August 2007. He testified at his deposition that his surgical wound, beginning in June 2007, opened and closed on numerous occasions while he visited the Ukraine. He further testified that he received medical treatment in the

¹ By short-form order, dated October 28, 2010, the motion for summary judgment by defendant Lutheran Medical Center (mot. seq. #5) was granted without opposition, and the complaint insofar as asserted this defendant was dismissed.

Ukraine from Dr. Skoropat, and that he also received physical therapy. Dr. Skoropat, according to plaintiff, advised him about the need for additional surgery and recommended that he follow up with his doctor in the United States.

Plaintiff thereafter saw Dr. Ahmad upon his return to the United States in August 2007 and complained about the condition of his left arm since the surgery. Dr. Ahmad removed some of plaintiff's stitches at this time and informed plaintiff that his failure to pursue proper rehabilitation therapy had caused the wound's improper healing.

Plaintiff then sought a second opinion and consulted with Dr. Leonard Edelstein on December 14, 2007. Dr. Edelstein performed a surgical excision of granuloma² from plaintiff's left forearm at Brooklyn Endoscopy & Amsurg Center. The operative report indicates that plaintiff had developed a granuloma on the radial side of the mid-portion of the left forearm approximately five months after the initial surgery. The report further indicates that granuloma, suture material and "rope" were excised during surgery and that the specimens were sent to pathology. The ensuing pathology report states that "soft tissue with fibrosis and soft tissue consistent with sutures" were evaluated.

Plaintiff commenced this medical malpractice action on March 19, 2008 and asserts that Dr. Ahmad improperly treated him on March 21, 2007 and August 25, 2007.

² 3-G Attorneys' Dictionary of Medicine (2009), at page G-51291 defines granuloma as a small, abnormal mass or lump composed of inflammatory cells. A granuloma forms as a response of the body to infections and various irritants.

Specifically, plaintiff argues that Dr. Ahmad negligently left foreign matter in plaintiff's arm during surgery causing granuloma. Dr. Ahmad denies negligence and contends that any matter which caused granuloma, a common occurrence with this type of injury, was suture material, not foreign material.

Discussion

Medical Malpractice Summary Judgment Standard

"[T]he proponent of a summary judgment motion 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 issue of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Granting the motion occurs if "there are no material and triable issues of fact" (*Ptasznik v Schultz*, 223 AD2d 695, 696 [1996]). However, denial will result if the proponent fails to make such prima facie showing, regardless of the opposing papers' sufficiency (*see Alvarez*, 68 NY2d at 324).

Determining whether a material issue of fact exists involves evaluating evidence in the light most favorable to the nonmovant (*Ptasznik*, 223 AD2d at 696; *Ampolini v Long Isl. Light Co.*, 186 AD2d 772, 773 [1993]; *Robinson v Strong Mem. Hosp.*, 98 AD2d 976, 976 [1983]). Courts disdain weighing the evidence, but rather determine "whether by no rational process would the trier of fact find for the nonmoving party" (*Jastrzebski v North*

Shore School Dist., 223 AD2d 677, 678 [1996], *affd* 88 NY2d 946 [1996] [internal quotation marks and citation omitted]). Denial thus occurs where factual disputes exist, where the evidence allows drawing conflicting inferences, or where a witness credibility question arises (*Id.* at 678; *see also Ampolini*, 186 AD2d at 773).

The summary judgment proponent in a medical malpractice case who has made a sufficient prima facie showing shifts the burden to the plaintiff to produce sufficient evidence and facts to rebut the prima facie showing and “to demonstrate the existence of a triable issue of fact” (*Alvarez*, 68 NY2d at 324-325). The plaintiff, in proving a triable issue of fact, may not rely on “[g]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice” (*DiMitre v Monsouri*, 302 AD2d 420, 421 [2003]). Establishing a prima facie medical malpractice claim therefore requires showing that the defendant doctor (1) departed from the accepted standard of care and that (2) the departure proximately caused an injury (*Vera v Soohoo*, 41 AD3d 586, 587 [2007]; *Amsler v Verrilli*, 119 AD2d 786 [1986]).

Measuring the standard of care for doctors involves looking to “the conduct of his or her own peers – the reasonably prudent doctor standard” (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]). “Generally, expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (*Dockery v Sprecher*, 68 AD3d 1043, 1045 [2009]). Therefore, a plaintiff meets his or

her burden if a medical expert testifies that a defendant deviated from accepted standards of care and thus caused plaintiff injury.

Dr. Ahmad's Summary Judgment Motion

(1)

Dr. Ahmad makes a prima facie showing of entitlement to summary judgment by offering an affirmation from his medical expert, Dr. Robert Gluck, a board-certified hand surgeon. Dr. Gluck finds no departure from the standard of care and that nothing either done or not done by Dr. Ahmad caused plaintiff's injuries. More specifically, Dr. Gluck discredits the allegation that Dr. Ahmad negligently performed surgery to plaintiff's arm and that such alleged negligence led to plaintiff developing granuloma. Plaintiff's particular type of injury, a large-gap deep-tissue wound, made him particularly susceptible to granuloma formation, even with proper wound care, according to Dr. Gluck. He further opines that Dr. Ahmad timely and appropriately performed the surgery in all respects on March 29, 2007 and that the granuloma development represented neither malpractice nor an unexpected event.

Dr. Gluck also regards the "rope-like" foreign material allegedly left behind by Dr. Ahmad in plaintiff's wound as probably sturdy ethibond sutures used to repair plaintiff's severely mangled tendons. He further notes that the material Dr. Edlestein described as "rope" was unsubstantiated and that Dr. Edlestein's description conflicted

with the pathology report. Dr. Gluck concludes, based upon his review of the records, that Dr. Ahmad at all times acted consistently with good and acceptable medical practice, and that Dr. Ahmad's actions or inactions failed to proximately cause injury to the plaintiff.

(2)

Plaintiff, in response, notes that Dr. Edlestein disagrees with Dr. Gluck's assessment about sutures having been the material left behind in plaintiff's arm. However, plaintiff misinterprets the summary judgment standard. He mistakenly argues that defendant has failed to establish a prima facie case and failed to require proof that a triable factual issue exists concerning the nature of the material found in plaintiff's arm. Dr. Gluck's expert opinions that Dr. Ahmad had not negligently performed the surgery and not proximately caused any resulting granuloma in fact shifted the burden to plaintiff to rebut those assertions. Such expert conclusions, in other words, enabled Dr. Ahmad to make a prima facie summary judgment showing even though Dr. Gluck may disagree regarding the nature of the material found in plaintiff's arm.

Plaintiff also mistakenly argues that res ipsa loquitur principles preclude summary judgment in this case. Res ipsa loquitur applies when the plaintiff can establish that "(1) the event [is] of the kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the

exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *see also Kambat v St. Francis Hosp.*, 89 NY2d 489 [1997]). A fact finder may infer negligence from the mere happening of an event if *res ipsa loquitor* applies.

Here, plaintiff claims that he was under Dr. Ahmad's medical supervision at all relevant times, that leaving foreign matter inside a patient's body during surgery ordinarily does not occur in the absence of someone's negligence, and that the injury must have been caused by an agency or instrumentality in the operating room within defendants' exclusive control. Thus, plaintiff contends that *res ipsa loquitor* alone sufficiently raises a triable factual issue and defeats Dr. Ahmad's summary judgment motion. Plaintiff, therefore, argues that no need exists for him to introduce expert testimony to establish a factual issue (*Leon v United Health Servs.*, 282 AD2d 860 [2001]).

Plaintiff's argument, though, assumes that a layperson could conclude that granuloma does not occur without some medical negligence. However, defendant has submitted an expert affirmation opining the exact opposite conclusion, namely, that granuloma naturally occurs with some types of injuries. Thus, plaintiff's relies on a faulty premise in introducing the *res ipsa loquitor* principle. "When expert testimony is

necessary to provide the basis for concluding that the event would not occur in the absence of negligence, the matter is outside the ken of a layperson and res ipsa loquitor is inapplicable” (*States v Lourdes Hosp.*, 100 NY2d 208, 212 [2003], *rearg denied* 100 NY2d 577 [2003]). Indeed, an expert affirmation has been used in a medical malpractice case where res ipsa loquitor applies to inform laypersons that the event does not usually occur in the absence of negligence (*see Butler v Martins*, 10 Misc 3d 1064[a], 2005 NY Slip Op 52114[U], *2 [2005]). Dr. Ahmad recognizes that a layperson cannot readily determine if granuloma results from negligence and has submitted an expert affirmation which thus shows res ipsa loquitor’s inapplicability herein.

That inapplicability and Dr. Ahmad’s prima facie summary judgment showing through an expert’s affirmation has now shifted the burden to plaintiff to demonstrate a triable factual issue (*Alvarez*, 68 NY2d at 324-325). A plaintiff in a medical malpractice case must prove that a triable factual issue exists by offering an expert’s opinion (*Dockery*, 68 AD3d at 1045). Here, plaintiff relies on Dr. Edelstein’s unsworn operative surgery report as an expert’s opinion that “rope” was left in plaintiff’s arm.


As an initial matter, however, Dr. Edelstein’s unsworn operative surgery report cannot be considered because it is not in admissible form (*see Barner v Shahid*, 73 AD3d 593, 594 [1st Dept 2010]). Moreover, Dr. Edelstein’s operative surgery report neither conclusively states that Dr. Ahmad’s negligence or any other doctor’s negligence caused

the rope-like material nor indicates that a deviation from accepted standards of medical care caused plaintiff's granuloma. Hence, the operative surgery report alone is insufficient to defeat Dr. Ahmad's summary judgment motion (*see Wind v Cacho*, 111 AD2d 808, 809 [1985], *appeal dismissed* 67 NY2d 871 [1986] [plaintiff's rebuttal of defendant's summary judgment motion insufficient where defendant had provided expert medical opinion requiring plaintiff to produce the same and instead plaintiff had supplied only her own affidavit and an affirmation of counsel which stated that she had consulted with other doctors]). Accordingly, it is

ORDERED that Dr. Ahmad's summary judgment motion is granted, and the complaint, as well as all cross claims, insofar as asserted against him are dismissed.

This constitutes the decision, order, and judgment of the court.

E N T E R,


HON. GERARD H. ROSENBERG
J. S. C.