

Dampeer v Koshy

2012 NY Slip Op 30473(U)

February 29, 2012

Sup Ct, NY County

Docket Number: 405185/06

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

Index Number : 405185/2006

DAMPEER, SHERON

vs

KOSHY, NINA, M.D.

Sequence Number : 003

SUMMARY JUDGMENT

PART **IA** PART 16

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent of severing and dismissing the cause of action for lack of informed consent and is otherwise denied in accordance with the accompanying memorandum decision.

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

FILED

MAR 01 2012

NEW YORK COUNTY CLERK'S OFFICE


_____, J.S.C.
ALICE SCHLESINGER

Dated: **FEB 29 2012**

- 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
SHERON DAMPEER,

Plaintiff,

Index No. 405185/06
Motion Seq. No. 003

-against-

NINAN KOSHY, M.D. and ST. LUKE'S-ROOSEVELT
HOSPITAL CENTER,

Defendants.

-----X
SCHLESINGER, J.:

FILED

MAR 01 2012

NEW YORK
COUNTY CLERK'S OFFICE

On October 3, 2002, the plaintiff Sheron Dampeer, then a 34-year-old single woman, had gall bladder surgery at St. Luke's-Roosevelt Hospital Center performed by Dr. Ninan Koshy. She had been admitted to that hospital on October 2002 with right upper quadrant pain. Her history included prior gall bladder problems. A surgeon, Dr. Koshy met Ms. Dampeer at the hospital on October 2, 2002, and after evaluating her condition recommended surgery to remove the gall bladder. Ms. Dampeer signed a consent for this operation.

Ms. Dampeer remained in the hospital until November 16, 2002, as her post-operative course did not go smoothly. The operation started as a laparoscopic cholecystectomy but, due to dense adhesions, it was converted to an open procedure. The adhesions as well as inflammation and edema made it difficult to visualize and observe the various structures. Because of these problems, Dr. Koshy elected to remove only a part of the gall bladder. A Jackson Pratt drain was placed over the remnant and brought out through the skin to allow for the drainage of excess fluid and bile. However, because of the amount of inflammation, Dr. Koshy believed that the remnant could not be closed.

During the ensuing days, the patient experienced pain for which she was medicated and her blood was checked. Since the white blood cell count (WBC) was very close to the high end of normal, she was also given antibiotics. However, on October 8, because of increased pain despite the medication, and an abnormally high WBC despite the antibiotics, an abdominal and pelvic scan was ordered. This scan showed significant fluid around the remnant. Dr. Koshy then ordered a second exploratory surgery to assess the situation. Ms. Dampeer signed a consent for this surgery also.

At that procedure, a second Jackson Pratt drain was placed so as to deal with excessive bile drainage. This drain was placed under the first drain. The gall bladder, however, remained inflamed and again the wound could not be closed.

On October 12, a gastrointestinal consult was ordered. However, significantly, on October 17, an ERCP (Endoscopic Retrograde Cholangiopancreatography) was performed and this showed that the common bile duct was blocked. A stent was then placed to aid in further drainage.

On October 31, a second ERCP was performed which showed that the first stent had migrated. This necessitated the placement of a second stent. This seems to have finally controlled the drainage, but Ms. Dampeer then developed pancreatitis. She was finally discharged on November 5, 2002. She had been told originally that she would be released within three days of the original surgery.

It is on these events that Ms. Dampeer commenced an action sounding in medical malpractice. She claimed in her pleadings that in the first place, the defendants Dr. Koshy and St. Luke's-Roosevelt Hospital Center failed to properly perform a cholecystectomy (removal of her gall bladder) at the initial surgery of October 3, 2002. Next she claimed that these defendants failed to properly and timely treat her during the post-operative

period, which included improper monitoring for signs of a bile leak, and an untimely and improper performance of further surgery. Finally, there is a claim that the defendants failed to adequately inform her of the risks associated with a partial gallbladder removal, including drainage, infection and a need for additional surgeries.

Before the Court is a motion by Dr. Koshy and St. Luke's-Roosevelt Hospital for summary judgment. It is supported with an affirmation by Dr. Norman Sas who informs the Court that he is "duly licensed to practice medicine". He also says that he reviewed the pertinent medical records and depositions and bases his conclusions and opinions on these things "as well as on my training, knowledge and expertise as a surgeon" (§12). But he provides no information as to how long he has practiced surgery, whether he is board certified in it, and where he has practiced this speciality.¹

Unfortunately, the substance of the affirmation continues to be inadequate, as well. All Dr. Sas tells us is a recital of what occurred, interspersed periodically with phases such as "this was proper" or "this was in accordance with accepted standards". For example, Dr. Sas opines that Dr. Koshy's decision to leave the remnant and place the Jackson Pratt drain was "proper based on his findings during plaintiff's October 3, 2002 surgery. Moreover, it was also in keeping with the standard of care"(§18). But he does not elaborate on what precisely Dr. Koshy's findings were and why his treatment was in keeping with the standard of care.

In other words, there is no attempt to explain the rocky post-surgical period or to say anything beyond the following as to why only a part of the gallbladder, as opposed to the entire organ, was removed: "Removing the entire gallbladder would have risked further

¹In Reply, moving defendants again fail to provide these necessary credentials.

injury to surrounding structures and organs..."(¶8). Further examples of such scant comments are that Ms. Dampeer's pain levels were regularly assessed (¶10). But no details are provided. Dr. Sas also opines that additional surgery was properly and timely performed (¶12). However, no elaboration on this conclusion is provided.

Therefore, in the first instance, I find that moving defendants have failed to prove a prima facie case entitling them to prevail on this motion and shifting the burden to the plaintiff. *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986). This is my conclusion with the exception of the third claim, the one sounding in informed consent. Here, moving defendants did prove their entitlement by showing through various exhibits that Sheron Dampeer did sign informed consents to surgery. Since in her opposition there is nothing that addresses this point or puts it into issue, St. Luke's and Dr. Koshy are entitled to have that claim dismissed.

But as to the malpractice claims regarding the surgery itself and the post-surgical care, even though I have found a failure to shift the burden, plaintiff's counsel nonetheless, with the submission of an expert affirmation, succeeds in showing that issues certainly do exist as to the care provided.

In contrast to Dr. Sas' affirmation, the plaintiff provides an affirmation (though lacking in the name of the physician, an established practice in opposing such a motion) that does inform the Court that this person is a board certified surgeon, who "graduated from the University of Brussels, [had an] internship at Mt. Sinai Medical Center and Residency at Long Island Jewish Medical Center and [is] an attending physician at two hospitals in the metropolitan area" (¶1).

The expert then indicates that he/she has reviewed the records of St. Luke's as well as those of a subsequent hospitalization at non-party New York Presbyterian Hospital and

is prepared to explain his/her opinion "that the defendants departed from accepted medical practice in several areas".

And the expert does just that. First the doctor says that "this operation was grossly inadequate". Why? Because "the patient had a partial removal of the gall bladder without securing the remnant and creating a controlled fistula" (¶13). He/she then explains that gall bladders are poorly vascularized so that closure would be tenuous with a high incidence of leak and thus a fistula to the outside was necessary to control the drainage.

As to the period after the surgery, this doctor opines that there was a delay in diagnosis and treatment of the leak that did result. He/she says there was inadequate evaluation of the patient's post-operative symptoms, which resulted in a non-recognition of the leak for too long a period of time. This doctor points out that necessary tests were not performed such as a HIDA scan or a sonogram and that a CT scan was not performed until October 8, 2002 (¶14).

As to the second exploratory laparotomy, this doctor says "it was totally inadequate...". The gall bladder remnants remained and the leak was not repaired and continued to drain (¶15).

Finally, this doctor adds that the stenting of the common duct was necessary but was not done for a significant period of time. This delay resulted in inflammation and pancreatitis (¶16). The patient ultimately needed additional surgery.

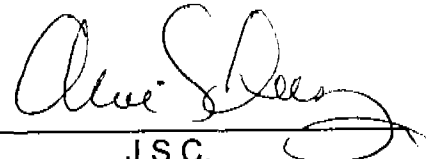
In Reply, counsel for moving defendants accuses plaintiff's opposition affirmation of being conclusory. But I disagree. Mainly, however, she points to entries in the record which she believes refutes the doctor's opinions. This, I believe, essentially confirms the Court's opinion that the records lend themselves to competing conclusions establishing that legitimate factual issues and conclusions exist.

Accordingly, it is hereby

ORDERED that defendants' summary judgment motion is granted to the extent of severing and dismissing the cause of action alleging lack of informed consent and is otherwise denied. Counsel shall appear for a pre-trial conference on March 21, 2012 at 9:30 a.m. prepared to select a trial date.

Dated: February 29, 2012

FEB 29 2012



J.S.C.

ALICE SCHLESINGER

FILED

MAR 01 2012

NEW YORK
COUNTY CLERK'S OFFICE