

Martinez v Klapper

2012 NY Slip Op 31446(U)

May 24, 2012

Sup Ct, New York County

Docket Number: 117039/2008

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

MARTINEZ, RAYON, ET AL.

INDEX NO. 117039/08

MOTION DATE 3/6/12

- v -
ANDREW KLAPPER, M.D., ET AL.

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

The following papers, numbered 1 to 25 were read on this motion to for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-18
19-24
25

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

FILED

MAY 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/24/12

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
RAMON MARTINEZ, as Administrator of the Estate of
TAMARA MARTINEZ, deceased, and RAMON
MARTINEZ, individually and on behalf of the next of kin,

Plaintiff,

Index No.: 117039/2008

- against -

Decision and Order

ANDREW M. KLAPPER, M.D., LITE TOUCH PLASTIC
SURGERY CENTER P.C., NEW YORK SURGERY
CENTER a/k/a PARKMED LLC, and
DR. SOKOL,

Defendants.

FILED

MAY 31 2012

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

In Motion Sequence Number 010, defendants Andrew M. Klapper, LITE TOUCH Plastic Surgery, P.C. (the "P.C.") move, by order to show cause, for an order granting them summary judgment and dismissing the complaint against them. Plaintiff Ramon Martinez, individually and as administrator of the estate of Tamara Martinez, opposes the motion.

This case arises out of events related to Dr. Klapper's performance of an abdominal lipodystrophy on Ms. Martinez. There has been prior motion practice related to Dr. Klapper's use of, and subsequent destruction of, a Sequential Compression Pressure Device ("SCD") and boots (devices used during surgery performed on Tamara Martinez), by which court denied plaintiff's application to strike the answers of Dr. Klapper and the P.C. on the grounds of spoliation. As set forth in this court's decision and order on Motion Sequence Number 006, dated September 23, 2011:

On December 18, 2007, Ms. Martinez underwent an abdominal lipodystrophy (commonly known as a tummy tuck) at the New York Surgery Center a/k/a Park Med LLC (the "Surgery Center"), an

outpatient ambulatory surgery center. Dr. Klapper performed the surgery while [Sharyn Sokol, M.D.] administered the anesthesia. During the procedure, the SCD and boots were attached to Ms. Martinez's legs to aid in preventing thrombosis. The surgery was deemed successful and Ms. Martinez was discharged to her home that day.

On December 20, 2007, while at her home, Ms. Martinez suffered a cardiac arrest and was transported by ambulance to New York Presbyterian Hospital ["NYPH"]. On December 21, 2007, Dr. Klapper became aware of Ms. Martinez's hospitalization at NYPH and her underlying condition. On December 24, 2007, Dr. Klapper contacted his medical malpractice insurance carrier to report that his patient, Ms. Martinez, had suffered a pulmonary embolism. Ms. Martinez died on December 25, 2007. According to the autopsy report, Ms. Martinez died from "a bilateral pulmonary thrombosis of [the] lower extremity complicating limited mobility following [the] cosmetic liposuction and abdominoplasty."

On December 26, 2007, the Surgery Center arranged for the SCD unit to be inspected for electrical safety by an outside agency. Thereafter, Dr. Klapper discarded the SCD and the boots. The exact date of the discarding of items is unclear. The parties do not dispute that boots of this nature were regularly discarded after use, although they were occasionally reused if not soiled.

In February 2008, counsel that had been retained by [plaintiff] contacted Dr. Klapper by letter, instructing him to provide a complete copy of the decedent's medical records. Counsel sent a follow-up letter on March 6, 2008. According to a confirmation letter dated April 22, 2008, counsel received the records, albeit allegedly incomplete. The letter does not reference the SCD or the boots.

The record also contains the April 12, 2011 deposition testimony from Debra Rossi, a former employee of Dr. Klapper. Ms. Rossi testified that Dr. Klapper "threw [the SCD] out as soon as the papers came in regarding the lawsuit." Ms. Rossi later set forth that "he was really terrified about the case and he did say that he was throwing [the boots] away because they had not been certified." [Dr. Klapper and the P.C.] dispute Ms. Rossi's version of the events and characterize her as a witness of dubious reliability.

The court notes that Dr. Klapper did not annex Ms. Rossi's deposition testimony to the instant motion for summary judgment. The court further notes that in Motion Sequence Numbers 011 and

012, submitted on the same date as the instant motion but without opposition, the court granted the respective motions for summary judgment of the Surgery Center and Dr. Sokol, and dismissed the complaint as against them.

At his deposition, Dr. Klapper testified that his deep vein thrombosis (“DVT”) prophylaxis includes positioning the patient during the procedure, using the SCD, and stressing to his patients that they need to ambulate after the procedure. The SCD is a device that squeezes the leg, calf, or ankle muscles to reduce the risk of a DVT. Dr. Klapper testified that the SCD that he used during Ms. Martinez’s procedure was purchased from an unknown dealer and was a reconditioned model. Dr. Klapper testified that the surgery took about three hours to complete. Dr. Klapper testified that Ms. Martinez was walking an hour after her operation, and he specifically recalled emphasizing the need to get up and walk around to both Ms. Martinez and her husband over the telephone on the evening after the procedure during his routine post-operative telephone call.

It is not disputed that plaintiff’s tummy tuck was an elective cosmetic procedure. On December 11, 2007, Ms. Martinez initialed and signed a form titled “Consent for Surgery,” which set forth that she had been fully informed of the possible risks and complications of the surgery, and that she had been advised that all surgery involves general risks, including but not limited to bleeding, infection, nerve or tissue damage, and, rarely, cardiac arrest, death, or other serious bodily injury. The “Consent for Surgery” form was part of a larger packet of information that Ms. Martinez received prior to the surgery. Although the packet provided to Ms. Martinez was not exchanged in discovery, while he was deposed, Dr. Klapper testified about a representative copy of the packet. Dr. Klapper testified that he would have gone over the packet, including the parts about the risks of

fat emboli and blood clots contained in the packet, in great detail with Ms. Martinez. Additionally, on the day of the surgery, Ms. Martinez signed a second form titled "Informed Consent for Surgery," which set forth that Dr. Klapper had informed her of the expected benefits, complications, discomforts, and risks that could arise from the tummy tuck. Further, Dr. Klapper testified at his deposition that he specifically remembered discussing with Ms. Martinez her options for surgery, her alternatives, and all the risks involved in the operation. He also testified that it was his custom and practice to review the risks of blood clots, fat emboli, and pulmonary emboli with his patients, and to inform them that a pulmonary embolism can cause death.

The essential allegations in plaintiff's bills of particulars are that Dr. Klapper and the P.C. negligently rendered medical care to Ms. Martinez before, during, and after the tummy tuck; recommended a contraindicated procedure and utilized improper and contraindicated surgical technique; failed to perform proper physical, neurological, and vascular examinations; failed to prevent the development of thrombi and emboli; failed to provide DVT prophylaxis, including preoperative antibiotics, Venodyne boots, and postoperative compression stockings; and ignored Ms. Martinez's symptoms of obesity and propensity for clotting. Plaintiff also alleges that defendants failed to inform Ms. Martinez of the risks of, and alternatives to, the procedure, and failed to advise her of her increased risk of the development of a thrombus. Plaintiff alleges that a reasonable person in similar circumstances would not have consented to the procedures in question.

Dr. Klapper and the P.C. now seek summary judgment. As established by the Court of Appeals in Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) and Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and as has recently been reiterated by the First

Department, it is “a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law.” Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep’t 2012), citing Winegrad, 64 N.Y.2d at 853. In a malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

Defendants submit an affirmation from Robert Grant, M.D., who sets forth that he is a physician licensed to practice in New York and board certified in surgery and plastic surgery. Dr. Grant states that he has reviewed plaintiff’s bills of particulars, pertinent medical records, and deposition testimony given in this matter. Dr. Grant explains that a DVT occurs when a blood clot forms in a deep vein in a patient’s extremity and partly or completely blocks blood flow, causing pain, swelling, and redness. He explains that the clot may damage valves in blood vessels or can break free and travel to major organs, such as the heart or lungs, causing damage and even death within minutes. He states that symptoms of a DVT are pain, swelling, and/or redness of one or both legs; difficulty walking; visible surface veins; and leg fatigue. Dr. Grant explains that a pulmonary embolism (“PE”) is a blockage of the main artery of the lung by a substance that has traveled from

elsewhere in the body through the blood stream, and can be caused by a blood clot from the deep veins in the legs. Obstruction of blood flow through the lungs and the resultant pressure on the heart causes shortness of breath, chest pain, heart palpitations, low blood pressure, and/or sudden death.

Dr. Grant opines that there are several risks and complications of a tummy tuck, including a DVT, a PE, a poor reaction to anesthesia, respiratory or heart rate complications, an infection, and death, which were all explained to Ms. Martinez. Dr. Grant states that plaintiff acknowledged that one of the risks of the procedure was death and accepted that risk. Dr. Grant opines that it was appropriate for Dr. Klapper to perform the tummy tuck after a physical examination, blood work, and informed consent was obtained. He points out that Ms. Martinez underwent the tummy tuck on December 18, 2007, without any noted complications, and that the procedure was appropriately performed by Dr. Klapper. Dr. Grant points out that Ms. Martinez had no signs or symptoms of a DVT or a PE when she was released from the Surgical Center, and that there was no evidence of a PE during or following the tummy tuck until December 20, 2007. He opines that Dr. Klapper provided appropriate postoperative care and instructions.

Dr. Grant opines that the development of a PE after a tummy tuck is not a departure from medical practices, and the fact that Ms. Martinez ultimately sustained a PE does not impute negligence. He further opines that because there were no signs or symptoms of a PE until two days after surgery, there is no evidence that the DVT or PE was related to the surgery. Dr. Grants states that a DVT can develop within hours, even while a person sleeps. He opines, to a reasonable degree of medical certainty, "that Dr. Klapper's treatment used to prophylactically prevent DVTs from occurring was consistent with the standard of medical practices in 2007."

In opposition, plaintiff maintains that defendants' motion must be denied because the court held, in the September 23, 2011 decision and order, that the issue of whether Dr. Klapper destroyed the SCD and boots intentionally, negligently, or in the regular course of business would have to be determined by a jury. He argues that while Dr. Grant opines that a PE is a known risk of surgical procedures, he fails to mention that not all victims of a PE are victims of fate. He points out that the only equipment that Dr. Klapper used to prevent a PE was purchased in used condition from an unknown source, and was never tested for anything other than electrical safety. Plaintiff argues that Dr. Grant's silence in his affirmation regarding SCD "speaks volumes." Plaintiff submits two signed expert statements which were submitted in prior motion practice on the issue of the destroyed SCD and SCD boots. Bruce Charish, M.D., opined that the PE that killed Ms. Martinez began as clots in the blood vessels of her legs during the surgery on December 18, 2007. Fredrick Hetzel, Ph.D. (a medical device failure analysis expert) opined that if an SCD and boots are not functioning properly, a patient is at a substantially increased risk of developing a DVT or PE. Both experts state that they are unable to provide an opinion as to whether the SCD or SCD boots contributed to Ms. Martinez's injury and death because Dr. Klapper destroyed both.

Further, plaintiff provides an affirmation from a physician (name redacted), who states that s/he is board certified in plastic surgery and licensed to practice medicine in New York. Plaintiff's expert states that s/he has reviewed the medical records, deposition transcripts, and Dr. Grant's affirmation. The expert states that he reviewed the forms provided to Ms. Martinez prior to the surgery and finds nothing mentioned about a DVT or PE. The expert states that good and accepted practice requires the physician to provide the patient with sufficient information to permit

a reasoned decision, and to simply insert “death” on a consent form does not inform the patient that she is at risk, but rather equivocates the risks of surgery by making them all seem equal. The expert maintains that risks such as a PE should be specifically enumerated to prompt a physician-patient dialogue about the severity and frequency of the risks and permit the patient to ask questions. Plaintiff’s expert opines that Ms. Martinez was deprived of the reasonable opportunity to give informed consent because, as someone who had never before had surgery, she should have been informed of the attendant risks and benefits of the various procedures and not just surgery in general. Plaintiff’s expert opines that Ms. Martinez’s likelihood of developing a PE was lower than the population as a whole. The expert opines that it is the standard of care to utilize a properly functioning SCD and boots during the surgery involved here; that not to use said equipment or to use said equipment while not in proper operating order would constitute departures from good and accepted practice and would substantially increase the likelihood of a patient developing clots, PE, and death; and that given the circumstances of this case, the most likely explanation for Ms. Martinez’s death was that there was inadequate sequential compression applied intra-operatively, which was avoidable. The expert questions why Dr. Klapper would destroy the SCD—the one piece of evidence that would exonerate him—unless it would prove his guilt. The expert states that Ms. Martinez “did not consent to undergo surgery wherein the only safeguard used to prevent the development of [a DVT and PE] was so worthless that the defendant accepted the consequence of destroying it rather than permitting it to be examined.”

In reply, defendants argue that an SCD is used to minimize the risk of a DVT “during surgery” and “is irrelevant to the issue of whether a DVT can form in the days following surgery.”

However, the court notes that nowhere did defendants' expert Dr. Grant opine that an SCD is used to minimize the risk of a DVT solely during surgery; his only statement directly addressing SCD is: "Dr. Klapper told the patient that there are several measures taken in the operating room to minimize the risk of pulmonary embolism such as using SCD boots on the legs during the surgery to keep a constant flow of circulation." Defendants also argue, in reply, that if the DVT had formed during the surgery or was related to the functionality of the SCD, then Ms. Martinez would have had symptoms of leg pain, swelling, and redness shortly after surgery and not two days later. However, this opinion is nowhere expressed by Dr. Grant in his affirmation.

Defendants failed to make out a prima facie case on the causes of action sounding in medical malpractice, as material issues of a fact remain unresolved. While Dr. Grant opines that a DVT is a risk of any surgery, he also opines, without further explanation, that there is no evidence that Ms. Martinez's DVT was related to the surgery that Dr. Klapper performed. He provided little testimony as to the prophylactic measures undertaken by Dr. Klapper to prevent a DVT except a conclusory opinion that the measures that Dr. Klapper undertook were consistent with the standard of medical practices in 2007. Moreover, the issue of the SCD having been destroyed by Dr. Klapper remains, which plaintiff maintains is material to his theory of the case. Accordingly, summary judgment as to plaintiff's claims sounding in medical malpractice are denied.

As to plaintiff's claim for lack of informed consent, in order to

establish a prima facie case of failure to procure informed consent to a medical procedure, a plaintiff must show that the doctor failed to disclose a reasonably foreseeable risk; that a reasonable person,

informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury.

Orphan v. Pilnik, 66 A.D.3d 543, 544 (1st Dep't 2009) (citations omitted). Pub. Health L. § 2805-d.

In moving for summary judgment dismissal of such a claim, a defendant must demonstrate the absence of any factual disputes as to (1) whether plaintiff was informed of the alternatives to, and the foreseeable risks and benefits of, the proposed procedure, and (2) whether a reasonably prudent patient would not have declined to undergo the proposed treatment had he or she been so fully informed. Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643–44 (1st Dep't 2009); Pub. Health L. § 2805-d. The alternatives and foreseeable risks and benefits are defined as those which “a reasonable . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” Pub. Health L. § 2805-d(1).

Defendants established their prima facie entitlement dismissal of plaintiff's cause of action for lack of informed consent by offering the consent forms that Ms. Martinez signed, which included the risk of death; the testimony of Dr. Klapper, who set forth that he informed Ms. Martinez of the risks of the procedure, that he reviewed with Ms. Martinez the risks of fat emboli and blood clots as contained in the information packet he provided to her, and that it was his custom and practice to inform his patients of the risks of a PE and a DVT; and Dr. Grant's affirmation, by which he opines that the risks of blood clots in the legs or lungs, pulmonary embolism, and death, were all explained to Ms. Martinez, and that she accepted those risks. In opposition, while plaintiff's expert maintains that risks such as a PE should be specifically enumerated to the patient, the expert never addresses Dr. Klapper's testimony that he did specifically address the risk of a PE with plaintiff.

Additionally, plaintiff's expert concedes that Ms. Martinez's likelihood of developing a PE was lower than the population as a whole, which contradicts plaintiff's expert's position that Dr. Klapper failed to emphasize her risk of suffering from a PE. Moreover, aside from opining that plaintiff did not consent to her tummy tuck being performed in a negligent manner, plaintiff's expert fails to raise one risk that was not provided to plaintiff which would have caused a reasonable person, informed of the risk, to have opted against the procedure. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is partially granted, to the extent that plaintiff's cause of action sounding in lack of informed consent is dismissed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that all other relief sought in defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on June 5, 2012, at 9:30 a.m.

Dated: May 24, 2012

ENTER:

FILED

MAY 31 2012

NEW YORK
COUNTY CLERK'S OFFICE


JOAN B. LOBIS, J.S.C.