

**Rodriguez v New York City Health & Hosps. Corp.**

2013 NY Slip Op 30045(U)

January 10, 2013

Sup Ct, NY County

Docket Number: 110005/05

Judge: Douglas E. McKeon

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

PRESENT: Douglas E. McKeon  
Justice Supreme Court  
*Justice*

PART 38

Eva Rodriguez

-v-

NYCHHC

INDEX NO. 11 0005/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. (004)

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

Motion is decided as per the annexed Memorandum Decision.

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

**FILED**

JAN 11 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/10/13

Douglas E. McKeon, J.S.C.

Douglas E. McKeon  
Justice Supreme Court

- 1. CHECK ONE: .....  CASE DISPOSED
- 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

NON-FINAL DISPOSITION

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

-----X

EVA RODRIGUEZ,

Plaintiff,

-against-

MEMORANDUM DECISION

Index No. 110005/05

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

Defendant.

-----X

HON. DOUGLAS E. MCKEON:

**FILED**

JAN 11 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant's motion for an order pursuant to CPLR 3212 granting summary judgment is denied as follows:

This is an action to recover damages for alleged medical malpractice arising out of treatment rendered to plaintiff at Bellevue Hospital Center during an admission from June 3, 2004 through June 14, 2004. Specifically, plaintiff alleges that as a result of an improperly administered epidural catheter by Bellevue anesthesiologists, the failure to timely remove the epidural after surgery and the failure to order tests and neurological consultations during plaintiff's post-operative period at Bellevue, she sustained sensory and motor deficits to her lower extremities, including right foot drop.

On June 3, 2004, plaintiff presented to Bellevue Hospital Center for a left-sided hemicolectomy to remove her colonic polyps. On June 7, 2004, she underwent the procedure. Immediately prior to the procedure, Dr. Cory Schneider, a third-year resident, administered a thoracic spinal epidural to plaintiff for post-operative pain management. Within hours of waking up from surgery, plaintiff complained of bilateral lower extremity weakness, numbness and pain on June 7, 2004 in the post-operative period. Although the left leg problems resolved soon after her initial complaint, her right leg problems did not resolve. She continued to complain and on June 9, 2004,

the epidural catheter was ordered to be discontinued. Numerous physical examinations performed on plaintiff's right lower extremity throughout her stay at Bellevue confirmed she had decreased strength, decreased motor function, loss of sensation, paresthesia and restricted range of motion. By June 11, 2004, plaintiff was noted as having a right foot drop. Studies conducted at Bellevue later confirmed that plaintiff had sustained nerve damage to her right lower extremity. Plaintiff was transferred to the Bellevue Hospital Center Rehabilitation Unit on June 16, 2004 and remained in rehabilitation until June 29, 2004. After she was discharged, plaintiff continued at home with physical and occupation therapy. To date, her right lower extremity injuries are not resolved.

Notably, plaintiff has a history of prior back pain radiating down her right leg as a result of a prior car accident but there is no evidence of a diagnosis or complaints consistent with the specific allegations made in this action.

Defendant argues that HHC is entitled to dismissal of plaintiff's complaint because plaintiff's allegations are medically implausible. Defendant bases its argument on the testimony, hospital record and upon the affirmation of Dr. Jonathan E. Singer, a physician board certified in anesthesia. Dr. Singer opines that the anesthesia services provided to plaintiff, including administration of a thoracic epidural, cannot be the proximate cause of any of her alleged sensory and motor deficits to her lower extremities. Defendant's expert explains that if the epidural had been placed into a spinal nerve, plaintiff would have reported an immediate and very painful paresthesia of the affected nerves and then injecting medication through the epidural catheter would have caused an additional reaction of excruciating pain. Additionally, the correct placement of the epidural catheter was confirmed by injecting a test dose immediately after it was placed with no negative reaction reported. Furthermore, he opines that the sensory and motor dysfunctions alleged following the June 7, 2004 surgery at Bellevue was not proximately caused by the insertion of the epidural or

as a result of using epidural anesthesia for post-operative pain management.

Plaintiff opposes defendant's motion with the support of an expert affirmation from a physician who is board certified in anesthesia and pain management. Plaintiff's expert opines that plaintiff's right lower extremity neurological deficits were proximately caused by the misadministration of the thoracic epidural administered on June 7, 2004 based on a constellation of factors, including but not limited to, the timing of the onset of her right lower extremity neurological deficits, the anatomy and bodily distribution of the plaintiff's neurological deficits, the correlation between abnormal EMG findings relative to plaintiff's right lower extremity on June 21, 2004, the plaintiff's complaints regarding her right lower extremity, and the physician's abnormal clinical examination findings.

In reply, defendant sets forth that plaintiff's expert's opinion is conclusory and speculative and does not defeat defendant's entitlement to summary judgment. It is further argued that any post-operative malpractice allegations should not be considered by this court as they were not included in plaintiff's bill of particulars.

This court allowed plaintiff to submit a sur-reply to address new arguments raised in defendant's reply. Plaintiff specifies paragraphs in the bill of particulars indicating the post-operative allegations were made and that defendant can not claim that prejudice lies here.

Upon a full review of the submitted papers, this Court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendant's motion for summary judgment is denied. Additionally, plaintiff's bill of particulars specifies allegations of malpractice prior to and post surgery and this court will allow the post-operative claims to be pursued.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that in treating the

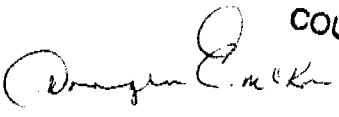
plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged. *See Roques v. Nobel*, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require trial of the action. *Id.*

Upon a full review of the submitted papers, this court determines that the plaintiff has demonstrated that material issues of fact exist, such that defendant's motion for summary judgment is denied. It cannot be determined as a matter of law that the defendants did not depart from accepted medical standards based upon the facts and sequence of events in this case. Under the totality of circumstances, this court holds that it is for the trier of fact to determine whether the defendant departed from the accepted standards and whether those departures were a proximate cause of the plaintiff's right lower extremity neurological deficits.

Accordingly, defendant's motion is denied.

This constitutes the decision and order of the court.

Date: January 10, 2013  
New York, New York

  
\_\_\_\_\_  
Douglas E. McKeon, J.S.C.

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COUNTY CLERK'S OFFICE