

Massie v Lenox Hill Hosp.

2013 NY Slip Op 30470(U)

March 5, 2013

Supreme Court, New York County

Docket Number: 113953/06

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 113953/2006
MASSIE, GRAEME
vs.
LENOX HILL HOSPITAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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~~ *for summary judgment* by defendant John Fracchia, M.D., is denied, and the motion and cross-motion by defendant Noel Armenakas is denied in accordance with the accompanying memorandum decision.

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

FILED

MAR 08 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

MAR 05 2013

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

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
GRAEME MASSIE,

Plaintiff,

Index No. 113953/06
Motion Seq. No.001

-against-

LENOX HILL HOSPITAL, NOEL ARMENAKAS, M.D.,
JOHN FRACCHIA, M.D., GINGER ISOM-BATZ, M.D.,
and JEFFREY S. ARONOFF, M.D.,

FILED

Defendants.

MAR 08 2013

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SCHLESINGER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

The multiple motions before me in this medical malpractice action have been reduced to ones by Dr. Noel Armenakas, Graeme Massie's treating urologist from November 2005 until his discharge from Lenox Hill Hospital ("LHH") on February 11, 2006, and by Dr. John Fracchia, a surgeon called in to aid Dr. Armenakas during a retro-peritoneal lymph node dissection ("RPLND") on December 27, 2005 on Mr. Massie at LHH. All of the other named defendants have been the subject of a Stipulation of Discontinuance and therefore their motions were determined pursuant to that Stipulation on August 14, 2012. Finally, at the outset of this decision, it should be noted that Dr. Armenakas filed not only an original motion for partial summary judgment relating solely to the RPLND surgery, but he also filed a cross-motion to the summary judgment motion by his co-defendants, this time asking for full relief and including his post-surgical treatment of the plaintiff from December 27, 2005 through January 10, 2006.

Because of some confusion regarding the cross-motion, I extended plaintiff's time to oppose it and defendant's time to reply. I did this so that the cross-motion could be decided on the merits, the same way the earlier motions will be.

Briefly, I will summarize Mr. Massie's medical history relevant to this action. He had self-palpated a mass in his left testicle in the Fall of 2005, which led to a testicular sonogram on November 9 of that year. A mass was seen and analyzed as likely cancerous, which then led to a referral to the defendant Dr. Noel Armenakas on November 14, 2005. The doctor performed an examination and arranged for relevant blood tests that resulted in a diagnosis of a non-seminomatous germ cell tumor. Dr. Armenakas recommended a radical left orchiectomy to remove the testicle, which Mr. Massie agreed to. This procedure was performed by Dr. Armenakas, a urologist, on November 17, 2005. The pathology following this procedure showed a mixed germ cell tumor that was predominately embryonal carcinoma with foci of yolk sac tumor.

Following this, the defendant arranged for the plaintiff to have a CT scan of his chest, abdomen and pelvis. The findings there suggested lymph node involvement in the paraaortic region. Additional meetings between the two occurred, as well as more blood testing. Dr. Armenakas then discussed options for further treatment, one of these being RPLND. The plaintiff told the defendant on December 7, 2005 that he would undergo this procedure.

On December 27, 2005, Mr. Massie was admitted to LHH for this surgery, which was to be performed primarily by Dr. Armenakas and assisted by Chief Urology Resident Dr. Ginger Isom-Batz and secondarily by defendant Dr. John Fracchia. It is at this point that the claims against Dr. Armenakas and Dr. Fracchia begin. With regard to Dr. Fracchia, that surgery with the alleged injury to Mr. Massie's pancreas is the only claimed departure against him. But as to Dr. Armenakas, there are also claims relating to his alleged failure to diagnose a pancreatic injury and to treat it much earlier than was the

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actual treatment here. As noted earlier, in his cross-motion he seeks summary judgment for his post-surgical care as well.

Supporting the motion by Dr. Armenakas and Dr. Fracchia is an affirmation from Dr. Joel Sheinfeld (Exh A). He is a board certified urologist who received training at Strong Memorial University Hospital at the University of Rochester and now is affiliated with a New York metropolitan hospital. His experience includes treating urological cancers including testicular cancer which Mr. Massie suffers from. He also reports that he has performed numerous RPLND's. Finally, he has reviewed all the relevant records.

Dr. Sheinfeld first explains that the testicles drain via lymphatic channels to the retroperitoneal lymph nodes contained in the retroperitoneal space. At this surgery on December 27, 2005, Dr. Armenakas and Dr. Isom-Batz made an abdominal incision into the peritoneal cavity and then proceeded to move the various organs and structures out of the way and keep them there by using retractors. He describes the pancreas as being located in the upper left quadrant of the retroperitoneum where it sits on the upper border of the left renal vein. Dr. Armenakas and Dr. Isom-Batz were on either side of the patient.

After the incision and during the lymphadenectomy part of the surgery, which Dr. Sheinfeld states can be technically challenging because the lymph nodes are situated along the great vessels, Dr. Fracchia was called in to assist. He was positioned at Mr. Massie's right lower quadrant, not close to the pancreas. He was only there for this part of the procedure and left after it was completed. He arrived after the Bookwalker retractor was placed (this retractor is described by Sheinfeld) and before it was removed. Since this expert assumes that any alleged injury to the pancreas came from contact with the retractors and since he points out Dr. Fracchia's role did not involve the retractors, Dr.

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Fracchia's surgical intervention could not and was not involved in and did not cause any injury to Mr. Massie's pancreas, according to Dr. Sheinfeld.

With regard to the actions of Dr. Armenakas during the surgery, Dr. Sheinfeld opines that the doctor did not depart from the standards of urological/surgical care. Again this expert attributes any injury to the pancreas to the use of the Bookwalker retractor. But he explains that this instrument is heavily padded so as to protect the organs. Despite these precautions, "injuries can occur absent negligence." "Here, the technical challenges of gaining exposure to the retroperitoneum may result in retraction injury, but does not necessarily constitute improper surgical technique" (¶22).

Dr. Sheinfeld then points out that according to the operative report prepared following this procedure, "the organs and structures were properly inspected and replaced in their anatomical position. The abdominal cavity was irrigated, examined and further inspected for evidence of any injury within the surgical field". But no injury was found and the abdomen was closed (¶'s 24-25).

The opposition takes a very different stance. First of all, the plaintiff's expert is not a urologist like Dr. Sheinfeld. Rather, he/she is a board certified surgeon. After completing a residency in general surgery at Maimonides Medical Center, this physician completed a fellowship in surgical oncology at Sloan-Kettering Cancer Center. He/she states that he/she is currently a Clinical Professor at NYU Langone Medical Center, a Surgical Lecturer at Mount Sinai Medical Center and in private practice.¹ (Exh A to Opp).

¹I have used a "he/she" designation because the physician's name is not given. However, since this physician is not supporting an application for affirmative relief by the plaintiff, the name need not be given.

This physician opines the following with a reasonable degree of medical certainty: 1) that during the RPLND, Mr. Massie sustained a surgical transection of the distal portion of his pancreas. The expert believes this injury manifested itself in the immediate post-operative period by the patient exhibiting symptoms of pancreatic injury, including nausea, vomiting and significant elevations in his amylase and lipase levels (¶6); and that 2) this injury was not from the use of a Bookwalker retractor. Why? The operative report indicates nothing about the pancreas being specifically retracted during any part of the surgery, and if it had been, it would have and/or should have been noted in the report.

This physician does not opine alternatively when and how the injury occurred. S/he points out in this regard that none of the surgeons participating in the surgery had any specific recollection of the pancreas and whether or not it had been retracted, stating that it was not visible since it was not a part of the operation. (Here the expert cited to Dr. Armenakas' deposition testimony). However, based on what each defendant testified to as to what he and she did during the surgery, the expert cannot know which doctor was responsible for the actual transection. However, since all played an active role in the surgery, any of the doctors could have cut into the pancreas.

In Reply on behalf of these defendants, counsel characterizes this omission as fatal to the opposition. She says that because the doctor cannot show facts that a pancreatic transection occurred or how it occurred, the opinion is "speculative, conclusory and insufficient to rebut defendants' prima facie showing of entitlement to summary judgment" (¶6 of Reply).

This is a common criticism by defense counsel to opinions expressed in opposition papers by plaintiffs. However, I do not find it a convincing criticism, certainly not here. Nor

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do I find that Dr. Sheinfeld's opinions create a prima facie case for defendants. He also does not know how an injury occurred. He does not even acknowledge that there was one, even though a later operative report from January 10, 2006 by surgeon Dr. Joseph Iraci states that during his operation he found "disruption in the very distal pancreas approximating a V in nature with only the inferior portion of the parenchyma still intact at that level".

Dr. Sheinfeld simply opines that if there was an injury, it was from a retractor, but he does not know how this happened. Yet he describes all of the defendants' actions as consistent with the standard of care because injuries can happen, particularly during the challenging part of an RPLND procedure.

The reciprocal uncertainty, as I choose to characterize the experts' opinions in this case, carries over to the cross-motion dealing with the post-surgical treatment provided by Dr. Armenakas, Mr. Massie's attending physician while he was a patient at LHH.

There, the cross-motion is supported by affirmations from Dr. Elliot L. Cohen, a urologist, and Dr. Henry S. Partridge, a surgeon. Both of these doctors state that their affirmations are in support of summary judgment motions on behalf of the Hospital, Dr. Ginger Isom-Batz, the urological resident that aided Dr. Armenakas and Dr. Jeffrey S. Aronoff, a consultant called in by Dr. Armenakas. Both of these experts are board certified in their respective fields.

The opinions expressed by these experts perpetuate the same basic difference in opinion as was expressed in the primary motion, that being the issue of whether there was injury to the pancreas that occurred during the procedure as the plaintiff's expert opined, or whether there was simply a severe case of pancreatitis, "a common occurrence with

such an extensive procedure such as a RPLND.” (¶18 of Dr. Cohen’s Aff). Consistent with this opinion, Drs. Cohen and Partridge opine that since “exploration of the pancreas carries its own risk of disruption to the pancreas or other organs” (Cohen ¶18), with regard to the December 29th and January 2nd wound repairs “exploration of the pancreas would have been contraindicated [because] exploration of the pancreas is invasive, requires manipulation of the surrounding ... organs, and carries its own risk of injury to the pancreas.” (¶19 of Partridge Aff).

Both agree that exploration should not have been done unless there was substantial reason to believe that the patient had a direct injury to the pancreas or a pancreatic disruption. But these doctors insist that Mr. Massie’s symptoms can be explained by inflammation of the pancreas or pancreatitis, which could develop as a result of stress from the RPLND.

However, not surprisingly, because the opinions are being expressed by the plaintiff’s expert vis-a-vis the primary motion, that physician opines that Dr. Armenakas did deviate from accepted standards of post-operative care in his treatment and management of Mr. Massie’s care by “failing to timely recognize and appropriately treat Mr. Massie’s pancreatic transection.” (¶5).

After reviewing Mr. Massie’s post-surgical course, this expert again repeats the opinions he expressed earlier, that this patient suffered a surgical transection of the tail of the pancreas that was not the result of an intra-operative compression injury by a retractor. This physician then explains why he believes the injury occurred but did not occur by way of a retractor. Here, he points out that Dr. Armenakas should not have been working on the same plane as the pancreas, where the kidney and renal vessels also lie, but under it. But

according to the operative note, the defendant did dissect the area adjacent to the pancreas and it was undoubtedly during this dissection that the direct injury to the pancreas occurred.

As to the immediate post-surgical period, he says that the various symptoms, including the very high pancreatic enzymes, can best be understood by an existing pancreatic injury, not one that later developed due to pancreatic necrosis. He argues that these very high readings on December 30, 2005, the first time the enzymes were tested, would not have been present without a then-existing pancreatic injury.

Unlike the defendants' two experts, this physician believes that post-operative pancreatitis is a rare complication of abdominal surgery that only occurs in the face of pre-existing health conditions which Mr. Massie did not have.

The expert then discusses the various scans performed on January 5 and again on January 8. If there was significant pancreatic inflammation, it should have been seen then in light of the degree of pancreatic disruption found at the January 10 surgery by Dr. Iraci.

Finally, this physician discusses the significance of that later surgery with findings by Dr. Iraci. This expert says they are consistent with an almost complete separation of the body and tail of the pancreas but inconsistent with a history of fulminating pancreatitis leading to pancreatic necrosis and pancreatic disruption.

As to causation, plaintiff's expert repeatedly speaks as to what procedures or tests should have been done in early January 2006 because if they had been done, he insists, the injury to the pancreas would have been noted and treated. This would have sharply reduced the plaintiff's stay in the hospital and the number of procedures he was, in actuality, subjected to.

I find that this expert succeeds in explaining to the Court why his opinions make sense. Therefore, the plaintiff has a right to have such opinions and explanation heard and evaluated by a jury. I make this finding despite defense counsel's belittlement of this expert's credentials. It is true that his specialty is head and neck oncology. However, as a general surgeon with a fellowship in cancer from Sloan Kettering, together with his explanation that he has had experience with retroperitoneal dissections and post-operative management of same, I do find that he is qualified to discuss the pancreas and surgical techniques affecting it. Further, counsel will certainly have an opportunity to question him further on these qualifications if he/she should be called as a witness at the trial.

Further, I do not agree that this expert does not deal with Drs. Cohen and Partridge's opinions. He certainly does. But also, it should be noted that the thrust of these doctors' opinions is on behalf of the defendants now dismissed from the case. Dr. Armenakas, as Mr. Massie's attending physician, was always intensely involved with his care and was present and involved in that capacity in virtually any decision concerning the plaintiff, not only during the surgery but after it as well.

Finally in that regard, it is not this Court's role to second guess why counsel for the plaintiff decided to discontinue the action against the other defendants. However, it should be noted that contrary to what defense counsel argues, Dr. Armenakas' treatment can be separated from that of the others who were bit players in the action while he was the one in charge, the one making the key decisions including what consultants to bring in. His role never changed.

ACCORDINGLY, it is hereby

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ORDERED for the reasons stated above, that the motion for summary judgment by defendant John Fracchia, M.D., concerning the December 27, 2005 surgery is in all respects denied; and it is further

ORDERED that the motion and cross-motion for summary judgment by defendant Noel Armenakas, M.D., are in all respects denied; and it is further

ORDERED that counsel shall appear in Room 222 on Wednesday, March 13, 2013 at 9:30 a.m as previously scheduled prepared to discuss settlement and select a firm trial date.

Dated: March 5, 2013

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J.S.C.

ALICE SCHLESINGER

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