

Zejneli v Sekons

2013 NY Slip Op 30794(U)

April 17, 2013

Supreme Court, New York County

Docket Number: 107392/10

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

M. Bejneli
-v-
D. H. Sekons, M.D., et al

INDEX NO. 107392-10
MOTION DATE 2-5-13
MOTION SEQ. NO. 004 *

FORMERLY SEQ. 001

The following papers, numbered 1 to 29, were read on this motion to (o) summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1-20
Answering Affidavits — Exhibits _____ No(s) 21-24
Replying Affidavits _____ No(s) 25-29

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
ORDER

FILED

APR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/17/13

Joan B. Lobis, J.S.C.
JOAN B. LOBIS

- 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

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
NIJAZI ZEJNELI,

Plaintiff,

Index No. 107392/10

-against-

Decision and Order

DAVID HAIM SEKONS, M.D., MEG BOWERS,
M.D., THE BETH ISRAEL MEDICAL GROUP,
and BETH ISRAEL HOSPITAL,

Defendants.

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

FILED

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NEW YORK
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Defendants David Haim Sekons, M.D., Meg Bowers, M.D., and Beth Israel Medical

Center, sued here as The Beth Israel Medical Group and Beth Israel Hospital, ("Beth Israel") move pursuant to Rule 3212 of the Civil Practice Law and Rules for an order granting them summary judgment. Plaintiff opposes the motion. For the reasons stated below, the motion is denied.

This medical malpractice action arises out of plaintiff's bilateral hernia repair surgery on March 9, 2010, at Beth Israel. The surgery was performed laparoscopically by Dr. Sekons, with Dr. Bowers assisting. Dr. Sekons used meshes to strengthen the abdominal wall and prevent the intestines or other organs from protruding through the abdominal wall. Dr. Sekons used ProTacks to suture the meshes to the soft tissue. The operation concluded without complications and plaintiff was discharged home that same day. He was prescribed Colace and Vicodin for pain management and was instructed to avoid heavy lifting and other strenuous activities for four to six weeks. Although photographs were taken during the operation, Dr. Sekons testified that he was unable to locate the photographs.

On April 26, 2010, plaintiff went to Columbus Circle Imaging for a CT scan of his pelvis to ascertain the position of the meshes and condition of the hernias. The CT scan report stated that mesh used on the left side could not be observed and that there were recurrent bilateral hernias. On May 10, 2010, Dr. Sekons examined plaintiff and found that the left hernia had recurred, but did not find a recurrent hernia on the right side. Dr. Sekons reported that the hernia was reducible, meaning that the protruding organs could be pushed back manually into proper position. Dr. Sekons planned to perform open surgery to repair the left hernia. Plaintiff, however, did not return to Dr. Sekons after this visit.

On August 23, 2010, plaintiff underwent an open procedure to repair the left recurrent hernia, which was performed by Dr. Panagiotis Manolas at Mount Sinai Hospital of Queens. Dr. Manolas indicated that the hernia was incarcerated, which required surgery. Dr. Manolas reported that during surgery, he was unable to locate the mesh Dr. Sekons placed on the left side. On January 18, 2011, Dr. Manolas repaired plaintiff's right recurrent hernia, which was also incarcerated. Dr. Manolas was also unable to locate the mesh used on the right side.

Upon commencing this action on June 7, 2010, plaintiff alleged four causes of action: medical malpractice, lack of informed consent, fraud, and violation of various statutes. On February 2, 2013, during the parties' oral argument on this motion, plaintiff withdrew all causes of action, except for medical malpractice. The crux of plaintiff's allegation is that Dr. Sekons did not properly attach the meshes with the ProTacks, which caused the hernias on both sides to recur, the need for multiple surgeries, and substantial pain.

Defendants seek summary judgment on the grounds that Dr. Sekons did not deviate from the standard of care in securing the ProTacks. In support of their motion, defendants submit the expert affirmation of Dan Reiner, M.D., a board-certified general surgeon licensed to practice in New York, and a Clinical Assistant Professor of Surgery at Hofstra University School of Medicine. Dr. Reiner states that he reviewed plaintiff's medical records and the deposition transcripts of plaintiff and Dr. Sekons. He opines with a reasonable degree of medical certainty that the care and treatment rendered by Dr. Sekons, Dr. Bowers, and Beth Israel was within the standard of care. He states that the hernia repair on March 9, 2010, was indicated because plaintiff was symptomatic and complained of increasing discomfort and abdominal pain. He also opines that it was proper for Dr. Sekons to perform the procedure laparoscopically because it allowed for less recovery time and required smaller incisions in the skin than does an open procedure. Dr. Reiner avers that migration of a mesh placed during hernia repair surgery and the recurrence of hernias are well known risks of a hernia repair procedure, and that Drs. Sekons and Bowers adequately advised plaintiff of the potential risks of the procedure. He further states that the placement of the meshes on the left and right sides was properly done with ProTacks. He states that the size and type were proper. ProTacks are similar in shape to metal coils and can be screwed into tissue or bone to secure meshes and other medical fixtures. In reference to the operative report, he states that "the mesh was adjusted to cover the hernia [and a] ProTack was used to anchor the mesh in place and three ProTacks were placed on the iliopubic tract into the symphysis pubis and one superiorly." He states that it is a matter of medical judgment whether to use ProTacks, glue, staples or sutures to secure a mesh, and that the standard of care does not even require surgeons to use any devices to secure a mesh. He states that the recurrence of plaintiff's hernias is not indicative of any departures from the

standard of care.

In opposition, plaintiff argues that summary judgment should be denied. In support of the motion, plaintiff submits his own affidavit and an expert affidavit. In his affidavit, Mr. Zejneli states that he worked as a cleaner prior to the hernia operation on March 9, 2010, at Beth Israel. Following the surgery, he did not engage in any strenuous activity, lift anything weighing more than 20 pounds, or suffer any traumas or falls. When he did return to work, after the first or second followup visit with Dr. Sekons, Mr. Zejneli indicates that he only checked identification cards, which allowed him to remain seated the majority of the time.

Plaintiff's expert is a physician licensed to practice in New York with a specialty in general surgery. The expert reviewed plaintiff's medical records and the deposition transcripts of plaintiff and Dr. Sekons. The expert also examined Mr. Zejneli on September 28, 2012, during which plaintiff complained of severe abdominal discomfort and pain. The expert opines that plaintiff suffers from a traumatic neuroma in the area of the ilioinguinal nerve. The expert explains that a neuroma is a proliferative mass of cells that forms at the proximal end of a severed or injured nerve, and that plaintiff's neuroma was caused by the repeat surgeries he underwent to correct the recurrent hernias. The expert opines that the hernias recurred because the meshes migrated due to their improper attachment. Plaintiff's expert states that meshes used in hernia operations can migrate on rare occasions, but if they do migrate, it occurs slowly over a period of years, unless, in the first few months following the operation, the patient had engaged in strenuous activity or suffered trauma. Since plaintiff denies having suffered any traumas or having engaged in strenuous activity, the expert

reasons that the meshes migrated so quickly because they were improperly attached. Plaintiff's expert criticizes Dr. Reiner's affirmation for its failure to proffer a reason for the meshes' quick and substantial migration. Plaintiff's expert states that he or she is unable to determine exactly how the meshes were attached improperly because of the unavailability of photographs. In reply, defendants argue that plaintiff's expert affidavit is insufficient to defeat their motion.

"The 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 eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure 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. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). 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.

The Court finds that there remain issues of fact, precluding summary judgment. Defendants' expert opines that the standard of care does not require surgeons to use any devices to secure a mesh during a hernia repair procedure, and that the use of ProTacks was a medical judgment

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Dr. Sekons was free to make. Dr. Reiner refers to the operative report and states that the method of placing and securing the mesh on the left and right sides was proper, and that the migration of the meshes and recurrence of plaintiff's hernias are not indicative of any departures from the standard of care on the part of defendants. Plaintiff's expert, however, opines that it is unusual for meshes to migrate, and migrations result from one of two instances: (1) when the patient has engaged in strenuous activity or suffered trauma in the weeks following the surgery, or (2) when the meshes have been improperly attached. Plaintiff's expert states that, having eliminated the former, the meshes must have been improperly attached. Plaintiff's expert avers that the meshes' quick and substantial migration is evidence of a departure in their attachment. Since plaintiff's expert and defendants' expert disagree, competing expert opinions are matters best left for the jury. See Rojas v. Palese, 94 A.D.3d 557, 558 (1st Dep't 2012). Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, June 4, 2013, at 9:30 a.m.

Dated: April 7, 2013

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APR 19 2013
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ENTER:



JOAN B. LOBIS, J.S.C.