SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____ PART IA PART 16
Justice

Index Number : 113077/2007
JONES, DOREEN
vs
HOSPITAL FOR JOINT DISEASES
Sequence Number : 002
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 determined in accordance with the accompanying memorandum decision.

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

FILED
JUN 18 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUN 14 2013

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

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

DOREEN JONES and GERARD CORSO,

Plaintiffs,

-against-

HOSPITAL FOR JOINT DISEASES ORTHOPAEDIC INSTITUTE, JEFFREY SPIVAK, M.D., JOHN AWAD, M.D., MATTHEW NALBANDIAN, M.D., and NORMAN BLOOM, M.D.,

Defendants.

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Index No. 113077/07
Motion Seq. No. 002

SCHLESINGER, J.:

As the predicate for this medical malpractice action, the plaintiff Doreen Jones underwent a major surgical procedure on her spine that was performed by both defendants Dr. Jeffrey Spivak and Dr. Matthew Nalbandian on April 6, 2005 at NYU Hospital Center, sued here as the Hospital for Joint Diseases. Ms. Jones had previously had a failed spinal surgery by another surgeon, as well as many other abdominal and gynecological procedures. Specifically, in September 2004, she had an anterior lumbar fusion at L5-S1. Before that she had undergone a total abdominal hysterectomy as well as several C-sections.

Ms. Jones first saw Dr. Spivak on February 28, 2005. She complained at that time that her pain had worsened since the spinal fusion in September. She stated that she had constant pain in the low back as well as pain radiating into her right lower extremity. She was taking medication for her pain.

With regard to the surgery, Dr. Spivak asked Dr. Nalbandian to join him in performing a second spinal fusion. Both doctors then explained at length the risks of the surgery, which included bowel injury.

The surgery was a complicated one and commenced with Dr. Nalbandian, a general and vascular surgeon, making an abdominal incision in preparation for Dr. Spivak to do the first part of the surgery via an anterior approach. Dr. Nalbandian then identified various structures and moved them out of the operative field. These structures included the peritoneum with the intestines contained inside. Dr. Nalbandian made a retroperitoneal approach, utilizing an old midline incision from a prior C-section. Once the anterior exposure phase was completed, Dr. Spivak proceeded with the anterior spinal fusion by removing the hardware from the prior surgery and then replacing it, along with a bone-healing protein to the bone graft. Dr. Spivak used no sutures during this anterior portion of the surgery.

After the anterior fusion was completed, Dr .Nalbandian repositioned the blood vessels to their normal anatomical position, which included returning the peritoneal contents to their previous location. Dr. Nalbandian closed and irrigated the wound and placed a sterile dressing.

Dr. Spivak then proceeded to do the posterior phase of this surgery with an approach from the right side of plaintiff's back. He made an incision and harvested a bone graft from the iliac crest of the pelvis, after which he made a midline incision from L3 to the sacrum and placed screws and the bone graft. He then closed the patient. It should be noted that the bowel was not in his operative field during the posterior surgery. Nor did Dr. Nalbandian participate in this part of the procedure.

In the days following this surgery, Ms. Jones complained about abdominal pain. Therefore, on April 11, 2005 a CT scan of her abdomen was done. This test showed a dilation of the proximal small bowel that was compatible with a small bowel obstruction.

Dr. Norman Bloom, a surgeon and once a defendant in this case, reviewed the scan and stated that he believed that it showed either a small bowel obstruction or an ileus, which can occur when peristalsis slows or stops. He had a repeat scan done on April 14, which was interpreted to show a "high- grade" small bowel obstruction.

This led to another surgery, this time by Dr. Bloom who did an exploratory laparotomy and lysis of adhesions. The plaintiff asserts here that what Dr. Bloom saw and did during this procedure is the central issue in this case. Specifically, it is plaintiff's position that during the original surgery on April 6, the doctors, while trying to repair a small puncture to the peritoneum that required suturing, negligently caught part of the bowel in with the suture. According to the opinion of plaintiff's expert Dr. David Mayer, this caused the abdominal pain by Ms. Jones, which was remedied after Dr. Bloom freed up the bowel during the April 15 procedure. (Exh 4 to Aff in Opp).

The claim by the plaintiff relies to a large extent on the original operative report prepared by Dr. Bloom soon after his operation (Exh 1). The significant part of that report identified by plaintiff's counsel reads as follows:

> ...a piece of bowel, which had already underwent a loop adhesion, which was stuck down to the top of the L5 vertebral body into the suture that was there just above the screw that was used to lock in the L5-S1 bone graft that was placed in prior procedure approximately one week earlier.

According to Dr. Mayer this statement means what it says. In other words, Dr. Bloom "very clearly means that the loop of bowel which caused the obstruction was caught by the stitch, kinked off, causing dilated obstructed loops of bowel proximal to the obstructing point and compressed loops distal to the obstruction." (¶12 of Mayer

Aff). Dr. Mayer explains further that this occurred at the precise site where Dr. Nalbandian had placed his suture at the location of the bowel obstruction.

However, what makes this claim controversial is that Dr. Bloom corrected this report, without giving any date as to when he made those corrections and without describing the circumstances that led him to make the changes, which were handwritten. (Exh 2). First, he changed the date of his surgery, which had originally been shown incorrectly as April 6, to the actual date of his surgery, April 15, 2005. But more significantly, Dr. Bloom added at the end of his operative findings, again by hand, the following: "This later adhesion was the cause of the acute obstruction." He also made several other minor changes. Even more significantly, Dr. Bloom in his deposition testimony makes it clear that he never saw a suture in the bowel and that his statement should not be read or interpreted to suggest otherwise. (A copy of the deposition transcript is attached to the moving papers as Exh M).

In describing his exploratory procedure, Dr. Bloom testified that he utilized the same incision which Dr. Nalbandian had used at the lower midline of the abdomen. But he said that he extended the incision above the belly button because he wanted to make sure that he did not run into any errant bowel at the incision site. He then stated that once he got into the patient's abdominal cavity, he saw multiple adhesions between the bowel, between the loops of the small bowel, between the small bowel and large intestines on the left side, and in the pelvic area as well. He said that he spent three hours freeing up all of these adhesions and that he remembered the events clearly at his deposition on March 9, 2012, seven years after the events in question. Dr. Bloom goes on to say that once he was able to free up all of the bowel adhesions, he was able

to bring out the patient's small intestines from her pelvis and at that juncture he could see a screw screwed into the sacrum. This is the only screw he saw during the operation.

Dr. Bloom acknowledged that the screw that he saw was the same screw that was placed on April 6 by Dr. Spivak during the anterior portion of his surgery. Dr. Bloom says (p 48) that he saw "a single silk, what looked to me like a silk tie that was in the location where a blood vessel that crosses over that disc space would have been ligated." Very significantly, he adds that this was the only suture material he encountered, other than in the abdominal wall itself. He acknowledged that this suture material that he saw was near the screw that he had mentioned, but he says that the silk tie "was nowhere in connection to the screw." (p. 49).

Dr. Bloom was consistent in his testimony that no part of the bowel was actually stuck to a suture. It also should be noted that in the original uncorrected operative report he used the word "into" when describing that the small intestines had been stuck "into the suture". However, at his deposition he insisted that this also was a mistake, that he had meant to say "onto the suture": "It's 'onto the suture.' Shouldn't be 'into,' should be 'onto'." (p. 67, lines 9-10). Dr. Bloom testified that he did not have to do anything to the bowel, meaning release it from a suture. He states that "there was nothing that I had to do other than pull it out. It was not physically stuck to it that I had to cut anything to get it out or it came out." (p. 71).

Dr. Bloom then tries to explain what he meant when he added the sentence about the latter adhesion being the cause of the obstruction. To put it simply, one more time Dr. Bloom testified at his deposition that he was successful in relieving the obstruction by easily pulling out the mass of loops of bowel that were stuck together in

the pelvis; that the obstruction point was a wad of small bowel which was adherent to itself and stuck in the pelvis (p.80); and that there was "no attachment" there (p. 81).

Counsel for the plaintiff argues that Dr. Bloom's testimony is obviously inconsistent with his operative report, which he dictated on the same day as the surgery. He then argues that Dr. Bloom's credibility is certainly an issue here that must go before a jury. As stated earlier, Dr. Mayer, who says he is board certified in surgery, attempts to reconcile Dr. Bloom's original operative note with the surgery performed on April 6, specifically by Dr. Nalbandian.

During the course of Dr. Nalbandian's part of the surgery, which was to expose the spine for Dr. Spivak to work on it, he created a small hole in the peritoneum while he was doing his retroperitoneal dissection. Dr. Mayer says that there was nothing wrong in doing that, meaning that Dr. Nalbandian was not negligent in creating this hole; it was within accepted standards of care. However, Dr. Mayer argues that Dr. Nalbandian, in attempting to close this small hole, caught the small bowel in the 3-0 vicryl stitch that he used. Further, he points out that neither doctor, but primarily Dr. Nalbandian who was right at that spot, had noticed that the suture had caught the bowel. It is Dr. Mayer's opinion with a reasonable degree of medical certainty that the doctors departed from accepted standards of care by failing to recognize that the small bowel had been caught by the suture and that this departure caused Ms. Jones to suffer post-operative high grade small bowel obstruction and to need a second surgery. This is the obstruction that Dr. Bloom relieved on April 15, 2005.

Dr. Mayer argues again that his explanation is the only logical way that one can interpret Dr. Bloom's original operative report, which states that a piece of bowel "was

stuck down to the top of the L5 vertebral body into a suture that was there just above the screw."

What is interesting here is that in both the moving papers by the defendants and their reply, counsel fails to mention this alleged inconsistency or the handwritten "corrected" operative report by Dr. Bloom. Instead, the moving papers contain two expert affirmations. One is from Dr. Nathaniel Tindel, a board certified orthopedic surgeon who has been in practice over 15 years with a speciality in spinal reconstruction. His opinions here, for obvious reasons, deal with the work performed by Dr. Spivak. Dr. Tindel does refer to Dr. Bloom's original operative report but simply says that he thinks that the lawsuit is based on an incorrect interpretation of it. He says that the records indicate that an obstruction occurred, not from a misplaced suture, but rather from adhesions caused by prior surgeries.

He then goes on to describe what Dr. Spivak did both during the anterior and posterior part of his surgery. He clearly opines that Dr. Spivak did nothing wrong during the surgery. On this point, counsel urges that Dr. Spivak was not even present when Dr. Nalbandian placed the suture so that he should not be faulted if it was placed incorrectly.

The second expert is Dr. Gary Fantini. He is double boarded in general and vascular surgery. He begins his affirmation by indicating that he has reviewed all the relevant documents and EBTs. He also understands the claim to be that there was an attachment of a suture to a portion of Ms. Jones' bowel at the top of the L5 vertebral body. Dr. Fantini reviews Dr. Nalbandian's role in this complicated surgery and notes that he created a small hole in the peritoneum, which was repaired with a single stitch.

He then reviews the remainder of the surgery and discusses the plaintiff's complaints after the surgery and the subsequent procedure performed by Dr Bloom. Dr. Fantini then points to that part of the deposition, earlier quoted by this Court, that the bowel was not adhered to or incorporated into any suture during the April 6 surgery. He specifically refers to that part of the testimony where Dr. Bloom refers to his freeing up the bowel by manipulation and further Dr. Bloom's statement that the bowel was not physically stuck to anything and that he did not have to actually repair it. Therefore, in the opinion of this expert, it was the extensive adhesions that were a real problem in the April 6 surgery and that Dr. Bloom found no evidence of any direct trauma or injury to the bowel from that prior surgery.

These two defense experts also opine that Ms. Jones was given explicit information with regard to the risks of the April 6 procedure that included an injury to the bowel and that the consent which she gave was an informed one. On this point, Dr. Mayer asserts that the consent was not informed because the plaintiff was never told that a risk of the procedure might occur by a medical mistake or error on the part of the surgeon. This is silly. Dr. Mayer may have perfectly legitimate opinions with regard to negligence during surgery, but his opinion with regard to informed consent does not comport with the law. Certainly a surgeon would never tell a prospective patient that he might be negligent during the surgery and that that was a separate risk. Therefore, since I find that this part of the opposition is really not legitimate, I am dismissing the cause of action sounding in informed consent.

However, as stated numerous times, my job here is not to decide who is telling the truth or determine the real facts relevant to the April 6 surgery and the subsequent bowel obstruction. Rather, the Court's sole function is to see if an issue exists as to

whether Dr. Nalbandian was negligent in catching the bowel in his suture and not immediately discovering this problem. I do find such an issue exists.

However, I do not think that any negligence can be placed on Dr. Spivak. Despite the fact that the operation was performed by both surgeons, each one had a distinct role to play. It is clear that Dr. Spivak had nothing to do with the suture that Dr. Nalbandian used in repairing the small hole that he had created. Further, as pointed out earlier, Dr. Spivak did not even see this part of the procedure. Therefore, I am granting his motion and dismissing the action against Dr. Spivak. But because I find that an issue exists as to the cause of the bowel obstruction, which involves the credibility of Dr. Bloom, I am denying his motion. Also, since the Hospital has not put forward a separate argument for dismissal, the motion is denied as to NYU as well.

Accordingly, it is hereby

ORDERED that the motion by defendant Jeffrey Spivak, M.D., is granted and the Clerk is directed to sever and dismiss all claims against Dr. Spivak; and it is further

ORDERED that the motion by defendant Matthew Nalbandian, M.D., is granted to the extent of severing and dismissing the cause of action for lack of informed consent but is otherwise denied; and it is further

ORDERED that the motion by defendant NYU Hospital Center, s/h/a Hospital for Joint Diseases Orthopaedic Institute is denied. Counsel shall appear on June 19, 2013 at 11:00 a.m. for a pre-trial conference prepared to select a trial date.

Dated: June 14, 2013

FILED
JUN 18 2013
COUNTY CLERK'S OFFICE
NEW YORK

JUN 14 2013

J.S.C.
ALICE SCHLESINGER