Perez v Lewis
2013 NY Slip Op 32069(U)
August 26, 2013
Supreme Court, Suffolk County
Docket Number: 05-26205
Judge: Jerry Garguilo

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 05-26205
CAL No. 13-00364MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 5-23-13 (#002)
MOTION DATE 7-24-13 (#003)
ADJ. DATE 7-24-13
Mot. Seq. # 002 - MD
Mot Seq. # 003 - XMG

---X

THOMAS PEREZ,

Plaintiff,

- against -

RICHARD LEWIS, M.D.,

Defendant.

---X

STEVEN R. BLYER, ESQ.
Attorney for Plaintiff
300 Marcus Avenue, Suite 2E5
Lake Success, New York 11042

FELDMAN & KIEFFER, ESQS.
Attorney for Defendant
110 Pearl Street, Suite 400
Buffalo, New York 14202

Upon the following papers numbered 1 to 30 read on this motion for summary judgment; and cross motion to supplement the bill of particulars; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 10 ; Notice of Cross Motion and supporting papers (003) 11-26 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 27-28; Other 29-30 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant Richard Lewis, M.D. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that cross motion (003) by the plaintiff Thomas Perez for an order pursuant to CPLR 3042 for leave to serve an amended/supplemental bill of particulars is granted and the proposed amended verified bill of particulars is deemed served *nunc pro tunc*.

In this medical malpractice action, Thomas Perez alleges that defendant, Richard Lewis, M.D., negligently departed from good and accepted standards of medical care and treatment when he performed kidney transplant surgery on the plaintiff on or about May 9, 2003 at Stony Brook University Hospital. It is alleged that the defendant perforated, lacerated, or cut the bowel/intestine, causing the plaintiff to sustain injury and undergo additional surgical repair. It is further alleged that the defendant failed to discover and diagnose the trauma to the bowel during surgery, failed to properly monitor him after surgery, and delayed treatment of the injury causing further damage.

JH

Defendant Dr. Lewis seeks summary judgment dismissing the complaint on the basis the care and treatment he delivered to the plaintiff was within the standard of care, and was not a proximate cause of the injuries claimed by the plaintiff.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, defendant Lewis has submitted, inter alia, an attorney's affirmation; the affidavit of Richard Lewis, M.D.; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; and an uncertified copy of the Stony Brook University Hospital record which fails to comport with CPLR 3212 and 4518 and is not in admissible form. Expert testimony is limited to facts in evidence (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2d 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 221 AD2d 674, 638 NYS2d 700 [2d 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475[1998]; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's

affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.***, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In his expert affidavit, Richard Lewis, M.D. has set forth his education and training as well as the materials and records which he reviewed. He is licensed to practice medicine in New York State and is board certified in internal medicine, nephrology, and urology. Dr. Lewis opined within a reasonable degree of medical certainty that the care and treatment he rendered to Thomas Perez in 2003 met the applicable standard of care. He continued that at no point did he enter the peritoneum or cause injury to the peritoneum as the kidney transplant was performed in the extraperitoneal space. Dr. Lewis stated that had the peritoneum been damaged during his surgery, he would have observed the injury and it would likely have resulted in intraperitoneal fluid moving into the extra peritoneal space into which the kidney was engrafted, which would have facilitated recognition of a tear in the peritoneum, which could have been repaired immediately. Dr. Lewis also opines that he closely monitored the plaintiff and provided appropriate instructions to the hospital staff to monitor his progress after the surgery of May 9, 2003, and that he did not delay in treating the bowel perforation.

Dr. Lewis avers that at no time did he damage the peritoneum or the bowel, yet he offers no explanation for the cause of the plaintiff's perforated peritoneum and bowel. He continued that on May 12, 2003, bacteria grew from the fluid culture previously taken on May 11, 2003, however, he does not indicate the type of bacteria grown in the culture or its possible source. On May 15, 2003, the plaintiff became acutely ill with drainage from his operative site. His clinical presentation was consistent with that of a perforated colon which required immediate surgical intervention. Dr. Lewis stated that surgery was performed by Dr. Brebbia who noted that the right colon, including the cecum, had herniated through a peritoneal defect into the area of the extra peritoneal transplant, and that there was a perforation in the colon requiring a segmental resection of the colon and a diverting colostomy. Dr. Lewis further stated that he now believes that the peritoneal defect and the perforated, herniated colon were not present during the surgery of May 9, 2003 and that they were not caused by his surgery. Dr. Lewis stated that although the plaintiff alleges a theory of *res ipsa loquitur*, he does not believe he was negligent in his care and treatment and that the plaintiff's injuries were likely related to the postoperative peritoneal dialysis. However, he does not state the basis for this conclusory opinion.

It is noted in reviewing Dr. Lewis' operative note of May 9, 2003, that he stated that a combination of sharp and blunt dissection was used to separate the peritoneum from its attachment to the wall and floor of the right iliac fossa. He does not discuss this dissection of the peritoneum in his report or state that there was no damage caused to the peritoneum during this dissection. He does not indicate that any time prior to closure that he inspected the peritoneum, particular in the area of dissection, for rents or tears, or any damage, leaving this court to speculate as to the same.

The plaintiff has submitted a conflicting report from his expert who is licensed in New York State.[1] He set forth his education and work experience and the records and materials which he reviewed. It is the plaintiff's expert's opinion that Dr. Lewis departed from the standard of care during the surgery of May 9, 2003. He continued that while a nick or rent or damage to the peritoneum is a risk of the surgery the plaintiff underwent, the departure from the standard of care is that Dr. Lewis did not observe, recognize, repair, or attempt to repair the damage to the peritoneum while the plaintiff was still on the operating room table. The plaintiff's expert stated that it is obvious that the peritoneum was damaged and not repaired based upon the postoperative lab work which showed fecal bacteria in the peritoneal fluid, and as set forth in the preoperative report of Dr. Brebbia just prior to the second surgery. He continued that based upon the deposition testimony of Dr. Lewis, and further confirmed by the lab work done on the plaintiff from May 11 through May 15, 2003, it was obvious that the infection and bacteria demonstrated by the labs indicated fecal matter in the blood, which could only have come from damage to the bowel caused by the damage to the peritoneum.

The plaintiff's expert continued that when Dr. Brebbia performed the subsequent surgery on the plaintiff, he noted a 6 cm hole in the peritoneum through which the colon descended and became herniated and ischemic, allowing bacteria to enter the blood stream. He affirmed that such hole in the peritoneum could only have occurred as a result of a cut, or injury, or damage to the peritoneum during the first transplant which Dr. Lewis failed to repair. The plaintiff's expert further stated that the damage to the peritoneum is also consistent with the hospital note by the infectious disease physician on May 13, 2003, wherein Dr. Lewis acknowledged that he "nicked" the peritoneum, which fact was also related to Mrs. Perez immediately following the surgery of May 15, 2013. Plaintiff's expert further stated that the 6 cm hole in the peritoneum is consistent with such a statement.

The plaintiff's expert stated that Dr. Lewis further departed from the standard of care in his failure to order any diagnostic tests, such as an ultrasound, MRI, CAT scan, after the initial diagnosis of an infection was noted on May 11, 2003. The plaintiff's expert stated that there is no explanation offered by Dr. Lewis on what caused the 6 cm hole in the peritoneum. He concluded by stating that the ileostomy and subsequent reversal are causally related to the damage to the peritoneum.

Based upon the foregoing, it is determined that the conflicting expert opinions with regard to departures from the good and accepted standards of medical care and treatment, and proximate cause of the plaintiff's claimed injuries, including a perforated peritoneum, perforated bowel, and subsequent surgery, preclude summary judgment from being granted.

Accordingly, motion (002) by defendant Dr. Lewis for summary judgment dismissing the complaint is denied.

---

[1]The plaintiff has submitted an unredacted expert affirmation pursuant to (***Marano v Mercy Hospital***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]) with a copy of the expert's curriculum vitae, which this court has reviewed and found to be identical to the affirmation contained in plaintiff's opposing papers, and which affirmation and curriculum vitae have been returned to counsel for the plaintiff.

Turning to motion (003), the plaintiff seeks leave to serve a supplemental/amended bill of particulars in which he is seeking to add an additional response to paragraph Number 4 of the bill of particulars dated February 23, 2007. Such additional response sets forth that defendant Richard Lewis, M.D. was further negligent and departed from the standard of care in that during the kidney transplant surgery he nicked, cut, damaged the peritoneum; failed to repair the damage done to the peritoneum during the surgery, and failed to visualize or discover the damage to the peritoneum before the surgery was completed. It further adds that the damage to the peritoneum was a direct cause of the injuries set forth in the bill of particulars.

Motions for leave to amend bills of particular are to be liberally granted in the absence of prejudice (***Simino v St. Mary's Hospital of Brooklyn***, 107 AD2d 800, 484 NYS2d 634 [2d Dept 1985]). The plaintiff, by counsel, has clearly set forth the reason for the delay in seeking the amendment. No prejudice to the defendant can be demonstrated as both Dr. Lewis and plaintiff's expert addressed the very issues, sought to be pleaded in the proposed amended bill of particulars, in their respective affidavit and affirmation.

Accordingly, motion (003) is granted and the proposed amended verified bill of particulars is deemed served nunc pro tunc.

Dated: 8/26/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**