Kinney v Dines
2014 NY Slip Op 30195(U)
January 16, 2014
Sup Ct, Suffolk County
Docket Number: 10-16069
Judge: Jeffrey Arlen Spinner

SHORT FORM ORDER

INDEX No. 10-16069
CAL No. 12-01081MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-26-13
ADJ. DATE 8-7-13
Mot. Seq. # 003 - MG; CASEDISP

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GERARD W. KINNEY,

Plaintiff,

- against -

DAVID M. DINES, M.D., F.A.C.S., DAVID M. DINES, M.D., F.A.C.S., P.C., JORDAN T. KERKER, M.D., LONG ISLAND JEWISH MEDICAL CENTER and NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM,

Defendants.

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Upon the following papers numbered 1 to 33 read on this motion to renew and reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion (003) by the defendants, David M. Dines, M.D., F.A.C.S., David M. Dines, M.D., F.A.C.S., P.C., Long Island Jewish Hospital Center, and North Shore-Long Island Jewish Health System, pursuant to CPLR 2221(e) to renew their prior motion for summary judgment, which was denied with leave to renew by order dated April 22, 2013 (Spinner, J.), is granted as to renewal, and upon renewal, summary judgment dismissing the complaint as asserted against the moving defendants is granted with prejudice.

The prior order, dated April 22, 2013, (Spinner, J.) was served upon the plaintiff, Gerard W. Kinney, on May 1, 2013, and upon his prior counsel, Kaye & Lenchner, with notice of entry on May 7, 2013. Kaye & Lechner had been granted leave to withdraw as counsel for the plaintiff. The order provided that the moving defendants could renew their prior motion for summary within thirty days after expiration of the sixty day stay imposed in that order. Accordingly, the moving defendants' application

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is timely. A copy of this motion was served upon the plaintiff on July 8, 2013, pursuant to the affidavit of service. No counsel has appeared on behalf of the plaintiff who has not opposed this application. This action, as asserted against defendant Jordan T. Kerker, M.D., was previously discontinued with prejudice by stipulation dated May 16, 2012.

This medical malpractice action asserts causes of action against the defendants premised upon their alleged negligent departures from good and accepted standards of medical care and treatment on or about January 3, 2008 until July 1, 2009, in the performance of surgery to the plaintiff's ruptured right biceps tendon, causing him to sustain certain alleged injuries consisting of, inter alia, partial tear of the common extensor tendon at its origin, mild infraspinatus tendinosis, neuropathy, and atrophy and weakness of the right arm. Causes of action for negligence, vicarious liability of defendant hospitals for the acts and omissions of their employees and staff, and lack of informed consent have been asserted.

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 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, the moving defendants have submitted, inter alia, an attorney's affirmation; affirmation of Elton Strauss, M.D.; copies of the summons and complaint, defendants' answers with demands, and plaintiff's verified bills of particulars; transcripts of the examinations before trial of Gerard W. Kinney, David M. Dines, M.D.; medical records maintained by defendant Dines, Long Island Jewish Medical Center, various MRI, radiology, and diagnostic testing reports, Hands on Health records, NYSI records; order dated April 22, 2012; affirmation of compliance dated May 1, 2013 with proof of service; order with notice of entry dated May 7, 2013; and defendant's proposed order which is not signed by this court.

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 Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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 Dept 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; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Elton Strauss, M.D., expert for the moving defendants, affirms that he is licensed to practice medicine in New York State and is board certified in orthopaedic surgery. He set forth his training, work experience, and affiliations, and the records and materials which he reviewed. It is Dr. Strauss' opinion within a reasonable degree of medical certainty that the defendants' care and treatment of the plaintiff complied with the standards of care, and that there were no acts or omissions by the defendants which were the proximate cause of injury to the plaintiff.

Dr. Strauss set forth the plaintiff's relevant medical history, including that the plaintiff first became a patient of defendant David Dines, M.D., on or about January 3,1996 when the plaintiff complained of right shoulder pain. An MRI indicated tendinitis and impingement. His clinical examination was consistent with chronic bursitis and impingement, for which arthroscopic decompression, acriomioplasty, and bursectomy of the right shoulder was performed on February 1996. Follow up care was provided by Dr. Dines. Thereafter, a lumbar MRI of May 19, 1997 revealed small posterocentral disc herniations at L4-5, and L5-S1, with discogenic changes. A March 7, 2000 cervical myelogram showed mild to moderate C5-6 central stenosis with bilateral C5-6 root sleeve distortion and mild paracentral C6-7 bulge, small focal midline C7-T1 herniation, small central T4-5 herniation and mild left T7-8 disc bulge. A radiological scan dated January 9, 2003 revealed degenerative disease at L4-5 and spondylolysis at L5.

From August 2007 until December 2007, the plaintiff continued under the care and treatment of Dr. Russell Miller of Island Musculoskeletal Care, at which time he complained of increased paresthesias in the left upper extremity to the index and small fingers. When the plaintiff saw Dr. Drazic at the group, he complained of sustaining an injury on December 23, 2007 while pushing an heavy object. Dr. Drazic's impression was right biceps-rule out torn distal tendon versus muscle. On December 26, 2007, when the plaintiff saw Dr. Miller, he complained that he was injured when he grabbed someone on December 23, 2007. A defect was noted over the distal right arm with clinical evidence of a complete tear of the biceps tendon. He was diagnosed with a rupture of the right biceps tendon, right elbow. Dr. Straus stated that the MRI of December 27, 2007 revealed a full thickness tear of the distal biceps tendon with tendon retraction, focal hematoma, and partial tear/strain of the distal biceps muscle.

Dr. Strauss continued that on January 2, 2008, the plaintiff returned to Dr. Dines and advised that he was involved in an altercation when accosted by someone who grabbed his arm, and that he fought back. Dr. Dines recommended surgery and advised the plaintiff of the risks and benefits. On January 10, 2008, Dr. Dines, assisted by the resident physician, Dr. Jordan Kerker, performed repair of the plaintiff's right biceps tendon at Long Island Jewish Medical Center. Initially, the plaintiff was placed in a sling post-operatively. A brace was apparently placed by the physician's assistant at Dr. Dines' office on January 15, 2008. On January 22, 2008, when Dr. Dines saw the plaintiff, he noted that the distal

biceps was very swollen because the brace was too tight. The brace was removed and the plaintiff's right arm was placed in a sling for a week. On February 1, 2008, Dr. Dines noted the plaintiff was doing well as the wounds were well healed on the distal biceps, and swelling was down; however, the plaintiff had stiffness and soreness. Thus, the sling and/or brace were to be used when he was upright, and increased range of motion exercises of the hand and wrist especially were recommended. On February 27, 2008, the plaintiff was noted by Dr. Dines to be doing "beautifully." Physical therapy was started on February 29, 2008 for decreased motion in the right elbow and difficulty using the arm during activities of daily living. Dr. Strauss noted that the physical therapy record of March 8, 2008 indicated that the plaintiff was concerned about hand pressure and wrist pain. On March 17, 2008, the plaintiff believed his hand was sprained and his elbow sore. Dr. Dines prescribed Naprosyn for the plaintiff on April 8, 2008 due to nonspecific thumb, forearm, and hand discomfort.

The plaintiff saw Dr. Miller again on May 7, 2008 for difficulties with his neck and back. On June 3, 2008, the plaintiff complained to Dr. Dines that his right hand, his thumb, and forefinger were not feeling right. Sensation, motor, and neurologic function were good, with no muscle wasting or atrophy. He had full range of motion and strength. Dr. Dines referred the plaintiff to Dr. Tuckman, a hand surgeon. However, the plaintiff never went to see him for evaluation. On August 8, 2008, the plaintiff told Dr. Miller that he had aches mainly in his right thumb, index, and long fingers since using the brace after the distal biceps tendon repair surgery. Examination revealed satisfactory pinch strength in the right hand, with satisfactory interosseous strength, and negative Tinel's sign over the median nerve at the wrist. Dr. Strauss stated that the EMG/NCS done on August 28, 2008 at Dr. Miller's office, by report, revealed mild right cubital tunnel syndrome and right C7-8 radiculopathy related to his previous neck injury. The plaintiff contacted Dr. Dines on November 12, 2008 advising that his right hand was a problem, at which time he was again advised to see Dr. Tuckman for a report on his hand. Thereafter, on December 9, 2008, the plaintiff saw Dr. Patrick DeRosa, and on January 13, 2009, saw Dr. Alexandre B. deMoura, for right hand pain. January 27, 2009 nerve conduction studies at Dr. deMoura's office revealed no evidence of abnormality. The plaintiff saw Dr. Miller on March 12, 2008. On March 13, 2009, an MRI ordered by Dr. DeRosa revealed a grossly intact appearance of postoperative changes in the region of the distal biceps tendon, presumably reflecting fibrosis and susceptibility artifact after distal biceps tendon repair of the partial tear of the common extensor tendon at its origin.

Dr. Strauss stated that on March 24, 2009, Dr. Dines found the plaintiff with vague neurological weakness in his hand, and yet, a totally normal examination. Biceps were flabby. An MRI of April 3, 2009 revealed mild infraspinatus tendinosis, among other things, with no evidence of rotator cuff tear. On July 1, 2009, Dr. Dines noted that the plaintiff complained he was no better and presented with strange and bizarre set of symptoms, heaviness, a numbness, and not feeling right. The biceps tendon, which was repaired, was anchored and healing according the MRI. Unrelated lateral epicondylitis was noted on the MRI. Due to the flabbiness of the biceps, and his other symptoms, Dr. Dines opined that the plaintiff's symptoms all pointed to a neurological issue higher up, for which the plaintiff was recommended to a neurologist.

Dr. Strauss opined that the plaintiff's allegations are without merit, and that the defendants did not deviate from the standard of care in their treatment of the plaintiff, and that no act or omission of the

defendants was the proximate cause of the injury to the plaintiff. Dr. Strauss explained the nature of the plaintiff's injury to his distal biceps tendon, and the surgery performed by Dr. Dines, as well as risks and benefits, and alternatives to surgery, and pros and cons of surgery as opposed to no surgery. Dr. Strauss stated that there was no indication of any complications during surgery. Postoperatively, the plaintiff was placed in a plaster posterior splint in 90 degrees of flexion with full supination, then placed in a sling, which was the appropriate method of protecting the arm postoperatively. He continued that it was appropriate postoperative care to place the plaintiff's right upper extremity in a brace on January 15, 2008, as this permitted for increased range of motion. It was the proper decision to remove the brace when it became too tight. Dr. Strauss continued that there were no indications that the plaintiff suffered nerve injury as the nerve conduction studies in January 2009 were normal, negating any claim that the brace caused neurological injury to the plaintiff. He stated that the complaints contained in the physical therapy records were not specific enough to require intervention by Dr. Dines, such as referral to another physician, radiology scan, or further surgery.

Dr. Strauss continued to set forth the plaintiff's complaints, the findings upon clinical and radiologic testing, and electrodiagnostic studies, all of which showed no evidence of abnormality. It is Dr. Strauss' opinion that had the plaintiff suffered any neurologic injury due to the brace that was placed on January 15, 2009, the nerve conduction study would have been abnormal, and because it was normal, it confirms his opinion that the plaintiff did not suffer any nerve injury secondary to the Dr. Dines' distal tendon repair surgery and/or postoperative brace. There was no re-tear of the distal right biceps tendon upon MRI study. He continued that a partial tear of the common extensor tendon is irrelevant as such was not involved in Dr. Dines' January 2008 surgery to repair the biceps injury, and there is no evidence that it was touched, torn, damaged, or manipulated in any way during the plaintiff's surgery of January 2008. The etiology of the tear of the common extensor tendon is unknown, and there is no evidence that it was due to any act or omission by the defendants either during or after the plaintiff's January 2008 surgery. Further MRI and EMG testing were timely and appropriately suggested, and based upon the plaintiff's symptoms and complaints, the plaintiff was properly referred to a neurologist as Dr. Dines' impression was that the plaintiff had neurological issues higher up. Even if the plaintiff's right biceps never reverted to its pre-injury condition, such is a known consequence that can occur with this type of injury and subsequent repair without fault of the operating physician, and is not an indication that the surgery was performed in an improper manner, as the repair does not provide a patient with an entirely new arm. The formation and presence of scar tissue is not an indication of any deviations from the standard of care. In conclusion, Dr. Strauss opined that the care provided to the plaintiff by Dr. Kerker, Dr. Dines, Long Island Jewish Hospital Center, and North Shore-Long Island Jewish Health System was all in accord with the standard of care, and no act or omission of those defendants was the proximate cause of injury to the plaintiff.

Based upon the foregoing, it is determined that the moving defendants have established prima facie entitlement to summary judgment dismissing the complaint.

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]). Here, the plaintiff has not opposed the instant motion and has thus failed to raise a triable issue of fact to preclude summary judgment from being granted to the defendants.

Accordingly, motion (003) is granted and the complaint as asserted against the moving defendants is dismissed with prejudice.

Dated: JAN 16 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION