

Sackett v Bayer

2014 NY Slip Op 30432(U)

February 18, 2014

Sup Ct, New York County

Docket Number: 800351/2011

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 : 800351/2011
SACKETT, MERCEDES
vs.
BAYER, MICHAEL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion tofor _____

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 granted in accordance with the accompanying memorandum decision and the action is dismissed as against defendant Paul Freudenman, M.D.

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

FILED

FEB 25 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 18 2014

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
MERCEDES SACKETT and ROBERT SACKETT,

Plaintiffs,

Index No. 800351/2011
Mot. Seq. No. 002

-against-

MICHAEL BAYER, M.D., PAUL FREUDMAN, M.D.,
and ANESTHESIA PROVIDER, P.C.,

Defendants.

FILED

-----X
SCHLESINGER, J.:

FEB 25 2014

NEW YORK
COUNTY CLERK'S OFFICE

Before the Court in this medical malpractice action is a motion for summary judgment by the defendant Dr. Paul Freudman, an anesthesiologist, dismissing the claims against him. The underlying claim relates to medical services provided to plaintiff Mercedes Sackett, a 70 year-old female, who presented to the office of defendant Dr. Michael Bayer for a colonoscopy on July 13, 2011. On that date, Dr. Freudman provided Ms. Sackett with anesthesia services. In her Bills of Particulars, plaintiff alleged that departures from accepted medical practice by both defendants caused a perforation in the sigmoid colon and related injuries.

In support of his motion, Dr. Freudman submits an Affirmation from Lewis Stein, M.D., a well-credentialed and highly experienced physician board certified in anesthesiology since 1990. Dr. Freudman begins by confirming that he has reviewed all relevant medical records and deposition transcripts, as well as the pleadings and the Bill of Particulars served in this case. He then states (at ¶ 5) that, based upon his review of those materials and years of experience, it is his opinion "to a reasonable degree of certainty that all care rendered by Dr. Freudman was performed in accordance with accepted standards of practice [and] that no act or omission on the part of Dr. Freudman in any way caused or contributed to any of the Plaintiff's alleged injuries."

According to the medical records, the only date Dr. Freudman rendered service to Ms. Sackett was on July 13, 2011, when Dr. Bayer performed the colonoscopy. At that time, beginning at around 9:30 a.m., Dr. Freudman provided Ms. Sackett with “monitored anesthesia care with intravenous sedation that utilized routine monitoring through pulse oximetry, automatic blood pressure recorder, cardiac rhythm monitoring, and end-tidal carbon dioxide monitoring.” (¶ 6). Before administering the anesthesia, Dr. Freudman did a full evaluation of the patient and documented his findings in a Pre-Anesthesia Evaluation (¶ 7).

Dr. Stein then explains in detail the dosages of Propofol administered by Dr. Freudman to the patient at various times throughout the procedure, while monitoring the patient’s vital signs at all times. (¶ 8). He opines (at ¶ 9) that Dr. Freudman took a proper history and appropriately monitored the patient, that the selection of Propofol was appropriate, and that the anesthesia was administered in a timely fashion with proper dosages. Even if the patient moved slightly during the procedure (a claim not conceded by the expert), slight movement does not establish that the doctor deviated from the standard of care because the “goal of the anesthesia during a colonoscopy is to make the patient comfortable and prevent vigorous abrupt movements.” (¶ 13). That goal was achieved, according to the expert.

During the immediate post-procedure and post-anesthesia period, Ms. Sackett experienced lower abdominal pain, so Dr. Bayer arranged for a transfer to Lenox Hill Hospital to rule out a colon perforation. In fact, at Lenox Hill, Ms. Sackett was diagnosed with a sigmoid colon perforation for which she underwent laparoscopic repair. Dr. Freudman was not involved in the Lenox Hill treatment; he stopped rendering care to the plaintiff at about 10:00 a.m. on the date of the colonoscopy at Dr. Bayer’s office (¶ 10).

Regarding the issue of informed consent relating to Dr. Bayer's alleged tremors, the expert opines that Dr. Freudman "did not have a duty to discuss Dr. Bayer's head tremor with the patient." (§ 11). Further, he recalls that Dr. Freudman testified at the deposition that he could not recall whether Dr. Bayer had a tremor in his hands and that any noticeable head tremors did not cause him concern about the doctor's ability to perform colonoscopies. Dr. Freudman did advise the patient of the risks, benefits and alternatives of the anesthesia. (§ 12).

Dr. Stein concludes by reiterating that there is "no evidence that there was a breach in the standard of anesthesia practice, which could be attributed to the Plaintiff's claimed damages." (§ 14).

By means of Dr. Stein's detailed affirmation and his credentials and experience, the defendant Paul M. Freudman, M.D., has made a *prima facie* showing of entitlement to summary judgment as a matter of law. *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The burden then shifts to the plaintiff opposing the motion to produce evidentiary proof in admissible form sufficient to create a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980).

The only papers submitted by the plaintiff is a letter from counsel dated February 18, 2014, stating that plaintiff "will not be opposing Dr. Freudman's motion for summary judgment." Nor has the co-defendant Dr. Bayer opposed the motion. Without submitting an affirmation or affidavit from a qualified medical expert opining as to departures from accepted standards of care based on the medical records and testimony in this case, plaintiff has failed to create an issue of fact to defeat the motion for summary judgment. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).


Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Paul Freudman, M.D., is granted in its entirety, and the Clerk is directed to enter judgment dismissing the complaint as to that defendant; and it is further

ORDERED that counsel for the remaining parties shall appear in Room 222 on March 26, 2014 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: February 18, 2014

FEB 18 2014



J.S.C.
ALICE SCHLESINGER

FILED

FEB 25 2014

NEW YORK
COUNTY CLERK'S OFFICE