

**Dalmau v Metro Sports Physical Therapy 48th St.,
P.C.**

2014 NY Slip Op 3131 Q(U)

April 25, 2014

Supreme Court, Bronx County

Docket Number: 305316/09

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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ERIC DALMAU,

INDEX No. 305316/09

Plaintiff(s),

- against-

METRO SPORTS PHYSICAL THERAPY 48TH
STREET, P.C., and "JOHN DOE".

Said name being fictitious and unknown,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Metro Sports Physical Therapy 48th Street, P.C. (Metro Sports) for summary judgment dismissing the complaint is denied.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as a result of Metro Sport's negligent administration of physical therapy.

On January 19, 2009, plaintiff underwent a left shoulder arthroscopic subacromial decompression, arthroscopic biceps tenodesis (a procedure that cuts the normal attachment of the biceps tendon on the shoulder socket and reattaches the tendon to the bone of the humerus to take the pressure of the biceps attachment off the cartilage rim of the shoulder), arthroscopic distal clavicle excision and arthroscopic debridement. On January 26, 2009, plaintiff's surgeon, Dr. Reish, gave him a prescription to begin physical therapy. The prescription provided for physical therapy to the left shoulder three times a week for four weeks, with active and passive range of motion, but a restriction of no active range of motion of the biceps.

On February 3, 2009, plaintiff presented to Metro Sports and was seen by Michael Cormican, P.T., a co-owner of Metro. Cormican examined plaintiff and noted that his left shoulder was positive for moderate effusion and thickening of the left proximal humerus, positive tenderness of the left posterior rotator cuff muscle belly, positive for well healed incisions, positive for atrophy of left biceps moderate to severe. Based on plaintiff's medical history and physical examination, Cormican devised a physical therapy plan to restore range of motion, strength and function to plaintiff's left shoulder. The plan incorporated heat and ice packs, ultrasound, soft tissue and joint mobilization, passive and active range of motion, isotonic/isometric exercises, aerobic upper body ergometer, manually resisted proprioceptive neuromuscular facilitation proprioceptive exercises, stabilization exercises, posture and body mechanics, home exercises, and activities of daily living.

On February 5 and 6, 2009, plaintiff underwent physical therapy at Metro with Cormican. The therapy consisted of pulling, stretching and lifting weights with his wrist, but not engaging in any curling of his biceps. The exercises were generally the same on both days and plaintiff made no complaints during these sessions. However, on February 9, 2009, plaintiff was assigned to Kerry Mota, a physical therapy assistant, who was working under the supervision of Paul Kelly, P.T. That day, Ms. Mota added a new exercise called the umbrella shoulder external rotation exercise to plaintiff's therapy program. Ms. Mota testified that she consulted Mr. Kelly prior to adding the new exercise, but there is no documentation of this in Metro Sport's records. The exercise was performed with plaintiff lying on his back, holding an umbrella in both hands with his elbows at his side. His arms were bent at a 90 degree angle with the umbrella held above his abdominal area. According to plaintiff, during the exercise Ms. Mota stood above him and took

the umbrella and pushed it down "far" and "too fast," causing him to experience pain in his left biceps area. He claims that the pain in his left biceps and shoulder was constant over the next three days. Ms. Mota denies that she pushed the umbrella down.

Plaintiff was scheduled to return for therapy on February 11th, but didn't return because of the pain in his left biceps and shoulder. Someone from Metro Sports called him to find out why he missed his appointment and he explained that he didn't return because his arm hurt. The person encouraged plaintiff to come back. On February 12, 2009, plaintiff returned to Metro Sports. He reported that he'd had increased pain in his left arm that week and that his left bicep looked lower than his right bicep. Physical therapist Virginia Cadot noted plaintiff's complaints and the appearance of possible biceps tear. She encouraged plaintiff to call the doctor and schedule a follow up visit to check the biceps. Plaintiff participated in therapy on February 12 and 13, 2009. On February 19, 2009, plaintiff saw Dr. Reish and was diagnosed with a tear of the proximal biceps. Dr. Reish's notes show that plaintiff reported "an episode in therapy last week and had an injury and felt a pop" and that "since that time he has a deformity over the anterior aspect of his biceps."

Plaintiff claims that Metro's physical therapists, assistants and employees deviated from good and accepted standards of physical therapy practice by: (1) failing to follow Dr. Reish's prescription; (2) adding an exercise involving active range of motion of the biceps; (3) failing to have plaintiff re-assessed by a licensed physical therapist or physician before the umbrella exercise was added; and (4) by applying inappropriate force to plaintiff during the exercise. Plaintiff claims that as a result of these departures, he suffered a rupture of the left arm biceps, left arm biceps weakness and left arm biceps deformity.

Metro Sports seeks dismissal of the complaint on the ground that the care and treatment it provided was in accordance with good and accepted standards of physical therapy practice and did not cause the claimed injuries. In support of the motion, Metro submits the affidavit of Michael Cormican and the affirmation of Dr. Zambetti, an orthopedic surgeon.

Mr. Cormican states that at the time he first examined plaintiff, in addition to the moderate effusion and thickening of the left proximal humerus, etc., he also observed the plaintiff to have a "Popeye presentation" of the left biceps. He explains that "Popeye presentation" is a term used in physical therapy and orthopedic practice to describe the clinical presentation of a retracted biceps muscle in the arm causing a prominent bump and is consistent with a rupture of the biceps tendon. Mr. Cormican and Dr. Zambetti opine that: (1) the treatment plan developed by Metro Sports was consistent with the prescription from Dr. Reish; (2) the umbrella external rotation exercise was appropriately incorporated into plaintiff's physical therapy program; (3) the umbrella external rotation exercise did not actively engage the biceps, even if done in the manner described by plaintiff, with force and in a quick motion; (4) the umbrella exercise would not put stress on the biceps tenodesis and could not have been the proximate cause of the failure of the biceps tenodesis procedure; and (5) that plaintiff's "Popeye presentation" of the left biceps on February 3, 2009 demonstrates that the alleged failure of the biceps tenodesis and biceps tendon tear occurred prior to the administration of physical therapy on February 9, 2009. Dr. Zambetti also opines that plaintiff suffered no injury as a result of any physical therapy at Metro Sports because upon presentation to Dr. Reish after February 9, 2009, plaintiff was asymptomatic with no further restriction of the range of motion in his left shoulder, no pain or reduction in strength in his left shoulder and he did not require any further additional

treatment due to his clinical presentation of a failed biceps tenodesis and/or tear of the biceps tendon and suffered no limitations in his activities of daily living.

Plaintiff contends that Metro has failed to establish its entitlement to judgment as a matter of law because it relies on the statement of Cormican, that plaintiff presented with a "Popeye" presentation when he was first evaluated at Metro, but fails to note that this claim is undocumented and that the first mention of a possible biceps tear in the record is on February 12, 2009, after the umbrella exercise was added by Ms. Mota. Plaintiff also contends that Metro Sports' claim that plaintiff suffered no injuries lacks merit because it ignores plaintiff's testimony that he was in constant pain after the February 9, 2009 session, that Dr. Reish diagnosed him with a biceps tear after the February 9, 2009 session and that he has a permanent deformity.

In opposition to the motion, plaintiff submits the affidavit of Kevin J. Basile, P.T. and the affirmation of Dr. Gabriel Dassa, an orthopedic surgeon. Both Basile and Dr. Dassa opine that Metro Sports deviated from good and accepted standards of practice by: (1) failing to follow Dr. Reish's prescription restricting plaintiff from performing exercises that involve active range of motion of the biceps for the first four weeks of physical therapy; (2) by adding the umbrella external rotation exercise without having had plaintiff reassessed by a physician or physical therapist; and (3) by allowing Ms. Mota to practice beyond the scope of her license as set forth in Education Law §6738 (provides that the duties of a physical therapy assistant "shall not include evaluation, testing, interpretation, planning or modification of patient programs)." Both Basile and Dr. Dassa disagree with Metro Sport's experts' opinion that the umbrella external rotation exercise does not involve the biceps in any active range of motion. They explain that "when someone is lying down with their elbows bent to 90 degrees and they attempt to move their

shoulder into external rotation, the biceps tendon will develop tension because it crosses the shoulder joint at its point of origin and it crosses the elbow joint at its point of attachment.” They opine, based upon plaintiff’s testimony and the records, that plaintiff’s left biceps ruptured as a result of Ms. Mota’s application of too much additional external force during the umbrella external rotation exercises. Dr. Dassa also disagrees with Dr. Zambetti’s opinion that plaintiff suffered no injury as a result of any physical therapy at Metro Sports. He examined plaintiff on February 4, 2013 and noted an obvious deformity to his proximal biceps indicating proximal biceps rupture, weakness to the forearm flexion of the left arm, as well as supination indicating biceps function impairment. He opines that plaintiff’s condition is permanent as there is no surgical correction that is available to correct this condition and that it was caused by the negligent administration of physical therapy by Metro Sports.

In reply, Metro contends that plaintiff has failed to present evidence sufficient to raise a material issue of fact and that Dr. Dassa’s affirmation should not be considered because he was not timely disclosed as an expert. Metro points out that Dr. Dassa’s expert witness disclosure was not served by plaintiff until September 12, 2013, eight months after he generated a report after examining plaintiff and one month after plaintiff was served with the instant motion. Metro also contends that the expert provides an opinion that was never disclosed before, which is that the exercise was in violation of plaintiff’s prescription or that the exercise caused tension on the biceps as plaintiff is now alleging in his opposition.

On a motion for summary judgment pursuant to CPLR §3212, the proponent of the motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact; failure to

do so requires denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724). General allegations of negligence, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion (Alvarez v. Prospect Hospital, 68 NY2d 325).

Here, the affidavit of Mr. Cormican and the affirmation of Dr. Zambetti establish, prima facie, that Metro did not depart from good and accepted standards of physical therapy practice in its treatment of plaintiff, that its therapy plan was consistent with plaintiff's prescription, it was appropriate for Ms. Mota to add the umbrella external rotation exercise on February 9, 2009 and that Metro Sport's physical therapy did not cause the claimed injuries. Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a triable issue of fact (Zuckerman, supra).

While Metro Sports contends that the affidavit of Mr. Basile and the affirmation of Dr. Dassa are insufficient to defeat the motion because they are speculative and conclusory and Dr. Dassa's affirmation cannot be considered because he was not timely disclosed as an expert, Dr.

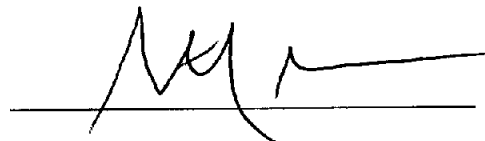
Dassa's opinion is nearly identical to that of Mr. Basile. Under the circumstances, there is no prejudice to Metro Sports in considering Dr. Dassa's opinion, other than that it rebuts the argument that Mr. Basile's opinion was insufficient to establish that the claimed injuries were due to Metro Sport's treatment. As to Metro Sports' claim that new theories of liability are raised in the expert's opinions, the Fourth Amended Expert Disclosure of Kevin Basile, P.T., dated June 18, 2013, does not allege that the exercise was in violation of plaintiff's prescription. Therefore, that claim may not properly be considered pursuant to this court's order dated August 7, 2013, which limited plaintiff's claims to those contained in the Fourth Amended Expert Disclosure. However, the experts' opinions that the exercise caused tension on the biceps is not precluded as it is part of the experts' explanation of how the application of too much additional external force during umbrella exercises caused the claimed injury to the biceps.

Upon consideration of the evidence presented by plaintiff, discrepancies between plaintiff's testimony and Ms. Mota's testimony as to whether Ms. Mota pushed down on the umbrella on February 9, 2009, between Mr. Cormican's statement that plaintiff had a "Popeye presentation" on February 3, 2009 and the records which do not mention a "Popeye presentation" and only mention a possible biceps tear for the first time on February 12, 2009, coupled with the opinions of Mr. Basile and Dr. Dassa, that the umbrella external rotation exercise causes the biceps tendon to develop tension and the physical therapist assistant applied too much additional external force causing the biceps to rupture, raise triable issues of fact and credibility as to whether Metro was negligent and departed from the standard of care in its treatment of plaintiff and if so, as to whether its departures proximately caused the claimed injuries, which precludes a grant of summary judgment (Cregan v. Sachs, 65 AD3d 101). Accordingly, Metro's motion for

summary judgment is denied.

This constitutes the decision and order of the court.

Dated: April 25, 2014



STANLEY GREEN, J.S.C.