

Dibenedetto v Weiner
2014 NY Slip Op 31372(U)
April 7, 2014
Supreme Court, Bronx County
Docket Number: 304727/10
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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ELLEN T. DIBENEDETTO,

Plaintiff(s)

- against -

INDEX NO: 304727/10

FRANCIS R. WEINER, M.D., NEW YORK
ASSOCIATES IN GASTROENTEROLOGY,
LLP and EINSTEIN HOSPITAL,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Motion by defendants Dr. Weiner and NYAG for summary judgment and an order dismissing the complaint against them are decided as follows. The Court notes that the Albert Einstein Hospital was previously granted summary judgment in this matter.

Movants argue that plaintiff cannot establish a prima facie case against either of them and cannot establish that anything they did or did not do was a departure from accepted standards of care or proximately caused plaintiff's injuries. Plaintiff alleges that Dr. Weiner negligently performed a colonoscopy on her on January 9, 2008 resulting in a splenic laceration and hematoma which required a hospital admission at Albert Einstein Hospital. Plaintiff's injuries include scarring of the spleen, splenic hematomas, blood in the abdominal cul-de-sac and anemia. Plaintiff

further alleges that these injuries are permanent.

On January 9, 2008 Dr. Weiner performed a colonoscopy on plaintiff for routine screening. Various diverticula were found as well as polyps. Dr. Weiner noted the colonoscopy was performed without difficulty. Plaintiff was discharged to the care of her daughter who was waiting in the waiting room. On January 10th plaintiff presented to the emergency room at Montefiore Medical Center. Her complaint was upper gastric pain and it was noted that she was status post-colonoscopy from the day before. The following day plaintiff was called back to the hospital after a re-read of the CT scan of the abdomen and pelvis showed a perisplenic hematoma. She was admitted to the hospital for two units of red blood cells and she remained in the hospital for hemoglobin and hematocrit blood testing and radiologic testing. Dr. Weiner treated plaintiff in the hospital and noted that the January 11th CT scan showed a high splenic flexure and a tear. Plaintiff was discharged on January 16, 2008. She did not require surgical intervention to her spleen which was healing on its own.

Movants argue that they are entitled to summary judgment because there is no evidence that Dr. Weiner departed from accepted standards of medical care on January 9, 2008 or at any other time. In support of their motion, the Court was provided with the expert affirmation of Dr. Scott Tenner. Dr. Tenner is a licensed New York State Physician, Board Certified in internal medicine and gastroenterology. After a review of the relevant documents Dr. Tenner opines, within a reasonable

degree of medical certainty, that the treatment rendered by Dr. Weiner at all relevant times and specifically on January 9, 2008 was in accordance with accepted standards of medical practice and that the injuries sustained by plaintiff were not proximately caused by any act of negligence or malpractice by Dr. Weiner. Dr. Tenner explains that splenic injuries are a very rare complication of colonoscopies and that in light of such rarity it is not the standard of care to inform patients of this risk prior to a colonoscopy. Dr. Tenner further explains that an anatomical abnormality such as an unusually high spleen flexure which extends above the level of the spleen and as was actually evidenced on Ms. DiBenedetto's CT scans of the abdomen can predispose a patient to a splenic injury during a colonoscopy. Dr. Tenner opines that the occurrence of a splenic injury during a colonoscopy does not mean malpractice occurred and that it in fact occurs frequently in the absence of any malpractice or excessive force in moving the colonoscope. He explains that the evidence supports that the plaintiff's injury occurred absent any malpractice herein.

In opposition, plaintiff argues that there are sufficient triable issues of fact as to whether defendants deviated from good and accepted medical standards and practice in treating plaintiff and in proximately causing her injuries sufficient to defeat the instant motion. Plaintiff has provided the Court with a redacted affirmation of a physician who is licensed to practice medicine in New York and Board Certified in Internal Medicine and Gastroenterology. This expert opines that Dr. Weiner deviated and departed from good and accepted medical standards and practice in

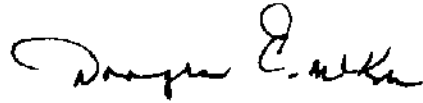
carrying for plaintiff. Plaintiff's expert disagrees with the opinions of Dr. Tenner that there is no evidence that the splenic injuries were proximately caused by Dr. Weiner. Plaintiff's expert opines that Dr. Tenner wrongfully suggests that plaintiff was at an increased risk of splenic injuries because of an abnormal anatomical presence of a high splenic flexure. He also argues that Dr. Tenner's opinion that the spleen was traumatized by the mere passage of the colonoscope and not by excessive force is not supported by the medical evidence. This expert has also raised a question as to whether Dr. Weiner's manual dexterity may have been compromised during the surgery and disagrees with Dr. Tenner's opinion on same. This expert opines that Dr. Weiner's testimony indicates a lack of anatomical knowledge of the presence of the splenocolic ligaments, lack of knowledge as to whether the capsule of the spleen could become damaged or lacerated as a result of traction upon the ligament and a mistaken belief regarding the comparative physical difficulties of maneuvering the scope through the splenic and hepatic flexures.

The Court finds that plaintiff's expert opinions have raised a question of fact to defeat the motion for summary judgment. Even accepting defendant's argument regarding the radiologic studies and therefore not considering plaintiff's expert's opinion with regard thereto (as plaintiff's expert did not actually review the studies but only relies on the radiology reports) the Court finds that there are questions of fact sufficient to defeat the motion including whether plaintiff's injuries were caused as a result of plaintiff's anatomic anomaly and whether the doctor's hand was injured

to the extent of not being able to properly maneuver the colonoscope.

So ordered.

Dated: *April 7, 2014*



A handwritten signature in cursive script, reading "Douglas E. McKeon". The signature is written in black ink and is positioned above a horizontal line.

Douglas E. McKeon, J.S.C.