

Morton v Richmond Univ. Med. Ctr.

2014 NY Slip Op 33615(U)

November 19, 2014

Supreme Court, Richmond County

Docket Number: 101317/10

Judge: Desmond A. Green

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

JAMES MORTON,

Plaintiff,

-against-

RICHMOND UNIVERSITY MEDICAL CENTER,
DAVID L. CORNELL, M.D. and ALEXANDER
CHANG, M.D.

Defendants.

DCM Part 3
Present:
Hon. Desmond A. Green

DECISION AND ORDER

Index No. 101317/10
Motion No. 2223-002

The following papers numbered 1 to 3 were fully submitted on the 10th day of October, 2014:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendants Richmond University Medical Center and David L. Cornell, M.D., with Supporting Papers, Exhibits and Memorandum of Law (dated July 14, 2014).....	1
Affirmation in Opposition by Plaintiff, with Supporting Papers, Exhibit and Memorandum of Law (dated August 29, 2014).....	2
Reply Affirmation (dated September 9, 2014).....	3

RICHMOND COUNTY CLERK
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Upon the foregoing papers, defendants' motion for summary judgment is denied.

This is a medical malpractice action arising out of the care rendered to plaintiff, James Morton, by defendant Dr. David Cornell during a surgical procedure to remove his gall bladder performed at defendant Richmond University Medical Center (hereinafter "RUMC") on December 1, 2009.¹ In pertinent part, plaintiff claims that Dr. Cornell's failure to, e.g., "perform the proper surgical and medical procedures" caused plaintiff to sustain a "[l]aceration of right hepatic artery, blood vessels and/or organs resulting in an extensive loss of blood and requiring extensive surgery to repair same; abdominal pain and discomfort; [and] permanent scarring to abdomen" (see Verified Bill of Particulars, paras 3, 9). Plaintiff further alleges that the doctor failed to procure his informed

¹The action against defendant Dr. Alexander Chang was discontinued, with prejudice, in a so ordered stipulation dated April 10, 2014.

consent to the "risks, hazards and alternatives" connected with the procedure (*see* Verified Complaint, paras 21-26). As to RUMC plaintiff claims that the hospital was negligent in failing to "investigate the qualifications, competence, capacity, abilities and capabilities of [Dr. Cornell]" (*see* Verified Bill of Particulars, para 3).

In moving for summary judgment, defendants maintain that there are no triable issues of fact as to whether any act or omission on the part of Dr. Cornell was the proximate cause of plaintiff's injuries. In support, defendants submit the affirmation of Dr. Robert Ward, a physician board certified in surgery and surgical critical care. Based on his review of the pertinent pleadings, bills of particulars, medical records and the deposition transcripts of the parties and non-party witnesses, Dr. Ward opines "within a reasonable degree of medical certainty that there were no departures from any standards of medical or surgical care by either defendant, and that there was no action or inaction by the defendants which proximately caused the plaintiff's alleged injuries" (*see* Expert Affirmation of Robert Ward, M.D., para 3).

More specifically, Dr. Ward opines that "[g]iven Mr. Morton's history, clinical findings and diagnostic testing, it is clear that he had a significant case of acute cholecystitis... [and that, i]f left untreated, serious complications can occur, including, but not limited to, rupture of the gallbladder, [and] infection leading to sepsis, or death" (*id.* at 58-59). Dr. Ward further opined that "Dr. Cornell's informed consent was sufficient and comported with the standard of care, as well as Public Health Law §2805-d." Upon reviewing Dr. Cornell's deposition testimony, Dr. Ward opined that Dr. Cornell had "fully explained the risks associated with a laparoscopic procedure, including the possibility that visualization can be limited, that an artery can be lacerated, that bleeding can occur, and that the procedure may need to be converted to an open procedure" (*id.* at 63). With regard to plaintiff's "claim that it was [his]... hepatic artery which was lacerated, [Dr. Ward ventured that] this does not comport with the evidence as the patient's liver and liver function tests were subsequently [found to be] normal for this patient (who had a history of alcohol abuse)". According to defendant's expert, "had there been an actual injury to the hepatic artery, [plaintiff's] liver function

tests would have been significantly more elevated and there would have been evidence of ischemia to the liver” (id. at 72).

In addition, Dr. Ward opines within a reasonable degree of medical certainty that plaintiff’s “cholecystitis was appropriately treated, including [the] administration of antibiotics to defervesce the inflammation in order to facilitate surgery... [, and that] Dr. Cornell used appropriate judgment in deciding to remove Mr. Morton’s gallbladder in order to prevent a recurrence, rupture, sepsis or death. [Moreover, he opined that t]here were no alternatives to removal in Mr. Morton’s case”. Furthermore, in the opinion of defendant’s expert, “Dr. Cornell waited for an appropriate amount of time before proceeding with [the] surgery, and there were no contraindications to performing surgery on December 1, 2009. [In brief,] Dr. Cornell [was adjudged to have] sufficiently informed Mr. Morton of all the risks, including [the] lack of visualization, [possible] laceration of a vessel, bleeding and need to convert [to an open procedure... Hence,] the informed consent obtained by him was sufficient. [In addition, t]he laceration of the aberrant vessel in this case was a recognized risk of the procedure, as well as the attendant bleeding and required conversion” (id. at 73).

On a motion for summary judgment dismissing the complaint in a medical malpractice action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, that the departure was not the proximate cause of the alleged injuries (*see Brinkley v. Nassau Health Care Corp.*, __AD3d__, 2014 NY Slip Op 06166 [2nd Dept]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut defendant’s prima facie showing, so as to demonstrate the existence of a triable issue of fact. In this regard, “[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of such a claim, are insufficient” (id.). Rather, in order to defeat the motion, plaintiff must demonstrate the existence of a triable issue of fact and address the specific assertions made by defendants’ expert, including those regarding proximate cause (id.).

Here, plaintiff submits in opposition the affirmation of an unnamed physician board certified in general surgery. Based on this physician's review of the pleadings, bills of particulars, medical records and all of the deposition transcripts, he or she opines within a reasonable degree of medical and surgical certainty that "defendants deviated from the standard of care when they lacerated Mr. Morton's right hepatic artery...[:] when they proceeded with Mr. Morton's surgery knowing that the gall bladder and surrounding area was still infected, inflamed, murky and cloudy... [as it] prevented them from visualizing and identifying the [internal] structures... [; and] when they allowed and permitted a resident, [former co-defendant] Dr. Chang, to perform Mr. Morton's surgery, particularly, in this case, when the attending surgeon, Dr. Cornell, knew that the gall bladder and the surrounding area was still infected..." (see Physician's Affirmation, paras 71-73). Plaintiff's expert further opines that the treating physicians "were not exercising 'surgical judgment,' when they decided to convert to an 'open' procedure[, as t]he reason the laparoscopic surgery was converted to an 'open procedure' was due to the negligence of the[se same] defendants, when they lacerated Mr. Morton's right hepatic artery. At that point, it was not a matter of 'surgical judgment,' it was the only option they had to save Mr. Morton's life, given the fact that they had lost control of the bleeding once his right hepatic artery was lacerated and he was hemorrhaging on the operating table" (*id.* at 75). Plaintiff's expert also opines that Drs. Cornell and/or Chang did not obtain plaintiff's informed consent to perform the surgical procedure performed on December 1, 2009 at RUMC, and "that a reasonable person would not have consented to the procedure performed upon Mr. Morton on December 1, 2009, had he been properly informed of the risks and/or alternatives to having his gall bladder removed at that time" (*id.* at 68-70).

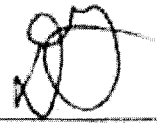
In the case at bar, defendants established their prima facie right to judgment dismissing plaintiff's cause of action for medical malpractice through, *e.g.*, the deposition testimony of Dr. Cornell and the expert affirmation of Dr. Ward, who opined that plaintiff's treatment was in accordance with good and accepted medical and surgical practice. However, plaintiff raised a triable issue of fact through the affirmation of his surgical expert, who expressed a nonspeculative or

conclusory contrary opinion (*cf. Sukhraj v. New York City Health & Hosps Corp*, 106 AD3d 809, 810 [2nd Dept 2013]). Summary judgment is inappropriate in a medical malpractice action where the parties adduce the conflicting opinions of medical experts (*see Schmitt v. Medford Kidney Ctr.*, __AD3d__, 2014 NY Slip Op 07344 [2nd Dept 2014]). Such conflicting opinions raise credibility issues which can only be resolved by a jury (*id.*).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

ENTER,



J.S.C.

DATED:

HON. DESMOND GREEN

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STEPHEN J. FIALA CLERK