

Memoli v Winthrop-University Hosp.

2014 NY Slip Op 33875(U)

September 10, 2014

Supreme Court, Nassau County

Docket Number: 19704/10

Judge: Jerome C. Murphy

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

PAUL MEMOLI, as Executor of the Estate of LINDA
MEMOLI, deceased, and PAUL MEMOLI,
individually,

Plaintiff,

TRIAL/IAS PART 23
Index No.: 19704/10
Motion Date: 6/18/14
Sequence Nos.: 005 and 006

DECISION AND ORDER

- against -

WINTHROP-UNIVERSITY HOSPITAL, ARTEM Y.
VAYNMAN, M.D., LEE ERIC TESSLER, M.D.,
NEUROLOGICAL SURGERY, P.C., MOHAMMED S.
IBRAHIM, M.D., ELZBIETA WIRKOWSKI, M.D.,
WINTHROP NEUROLOGY FACULTY PRACTICE,
JEFFREY LIU, M.D., ADVANCED PULMONARY
DIAGNOSTICS, MICHELE NEILSEN, P.A., THERESA
ESTRELLA, P.A., EDWARD WEICK, P.A., GRACE
DeGREGORIO, P.A., JOANN NOTO, P.A. and
DARLENE DAYE, P.A.,

Defendants.

The following papers were read on this motion:

Sequence No. 5:
Notice of Motion, Affirmation in Support and Exhibits (Parts 1, 2, 3 & 4)..... 1

Sequence No. 6:
Notice of Motion, Affirmation and Exhibits (Parts 1,2 & 3)..... 2
Affirmation in Opposition..... 3
Reply Affirmation of Brett Milgrim and Exhibit..... 4
Stipulation to Reargue..... 5
Reply Affirmation of Barbara Ann Myers..... 6

PRELIMINARY STATEMENT

Sequence 5 is an application from defendants, Lee Eric Tessler, M.D. and Neurological Surgery, P.C., for leave to reargue the prior order of this Court dated March 17, 2014 and, upon such reargument, for the Court to grant summary judgment and dismissal of all claims to defendants, pursuant to CPLR § 3212, and for such other and further relief as to this Court seems

just and proper.

Sequence 6 is an application from defendant, Winthrop University Hospital, for an order pursuant to CPLR § 2221(d) granting said defendant leave to reargue the prior Order of this Court dated March 17, 2014 and, upon such reargument, for the Court to grant summary judgment and dismissal of all claims to defendant, pursuant to CPLR § 3212, as well as for such other and further relief as this Court deems just, proper and equitable.

BACKGROUND

Defendants Lee Eric Tessler, M.D. (“Tessler”) and Neurological Surgery, P.C. (“Neurological”) argue in Motion Sequence 5, that the Court erred in failing to dismiss the cause of action for lack of informed consent, claiming that they requested such in their motion, made a prima facie showing of entitlement to dismissal of that cause of action, and plaintiff failed to meet the burden, which had shifted to them, to show, by sufficient evidentiary proof, that there remained a factual issue on the subject of informed consent. They contend that their expert, Dr. Hirschfeld, made a prima facie showing that defendants had obtained informed consent from plaintiff, but that plaintiff’s expert failed to address this issue in his affirmation in opposition. Plaintiff, in their thorough response to this motion, does not specifically address this aspect of the motion for reargument.

They also argue that plaintiff failed to raise a triable issue of fact in opposition to the motion in that the affirmation of their expert, a Board Certified Neurologist, was not qualified to opine on the standards of medical care involving neurosurgery. Citing cases such as *Behar v. Coren*, 21 A.D.3d 1045 (2d Dept. 2005); *Mustello v. Berg*, 44 A.D.3d 1018 (2d Dept. 2007); *Geffner v. North Shore University Hospital, et al.*, 57 A.D.3d 839 (2d Dept. 2008); and *Ozugowski v. North Shore University Hospital, et al.*, 90 A.D.3d 875 (2d Dept. 2011), defendants contend that the expert has failed to establish any knowledge in the field of neurosurgery, that his opinions have no probative value, and were therefore insufficient to defeat the motion for summary judgment.

In addition to being unqualified to express an opinion in the matter, defendants also claim that the expert affirmation was conclusory, vague, unsubstantiated and unsupported by the record, and was insufficient to defeat the motion for summary judgment. They contend that decedent did not have any of the conditions which would cause her to be at high risk for deep vein thrombosis as contained in the exhibit upon which plaintiff’s expert relied. In addition, the expert considered decedent’s weight of 160 to constitute moderate obesity, and constituted an additional risk factor. Defendants contend that the only basis for this determination of decedent’s

weight was an estimate by the pathologist who performed the autopsy at Winthrop. To the contrary, decedent's weight was reported to be 130 lbs. at time of admission, within the ideal body weight stated by plaintiff's expert to be between 124 and 132 lbs.

In Motion Sequence 6, defendant Winthrop University Hospital also moves for reargument of the prior Order of the Court dated March 17, 2014. Counsel contends that the Court overlooked critical errors and deficiencies in the affirmation of plaintiff's expert, in that he professed no knowledge or expertise in neurosurgery; and that his affirmation contains factual errors which are contradicted by the record. If, in fact, the Court determines that plaintiff's expert was unqualified to render an opinion in this matter, then the disqualification would apply to all defendants, including Winthrop.

The hospital also argues that the opinion of plaintiff's expert is conclusory, vague, unsubstantiated and unsupported by the record. Defendant also incorporates the arguments made by counsel for Dr. Tessler and Neurological, to the effect that plaintiff's expert did not address specific standards for deep vein thrombosis prophylaxis, and ignores the fact that on the date of admission, decedent was moving her legs normally, and continued to do so for the remainder of her admission.

DISCUSSION

Plaintiff's Second Cause of Action alleges that each of the named defendants, individually and/or collectively, failed to inform decedent, or any members of her family, "of the seriousness and true nature of her illness; the risks and hazards of and/or alternatives to the treatment rendered to plaintiff's decedent, by defendants, their agents, servants and/or employees."

Defendant's expert comment in this respect is located at page 4 of the Affirmation of Alan Hirschfeld, M.D. He states that Dr. Tessler testified that he discussed the proposed procedures with Ms. Memoli's family, and that he may not be able to remove the entire cyst, based on its location near the fornix; that the cyst could recur, requiring additional surgery; that she was at risk for permanent hydrocephalus, requiring the placement of a shunt to drain the ventricles. He also testified to having discussed the risks of intracranial hemorrhage, stroke, infection, neurologic injury, weakness, speech difficulty, difficulty with memory, numbness, coma, and death, together with the risks of anesthesia.

The affirmation submitted by plaintiff's expert does not address the issue of informed consent. It neither denies that such information was provided, nor raises additional risks which should have been communicated to decedent or her family in order to obtain informed consent

for the surgical procedure. Notably, plaintiff does not submit opposition to this aspect of the motion for reargument.

The motions for reargument by defendants Lee Eric Tessler, M.D., Neurological Surgery, P.C., and Winthrop University Hospital are granted, and upon reargument, the Second Cause of Action of the Complaint, alleging the failure of defendants to give informed consent, is dismissed.

The motions by defendants for reargument of the motions for summary judgment on the grounds that plaintiff failed to raise a question of fact based upon the inadequacy of the affirmation submitted in opposition to the motion are denied.

Defendants contend that plaintiff's expert witness failed to establish his qualifications to venture an opinion on the standards of practice of a neurosurgeon, based his opinion on erroneous assumptions of fact, and that his report was conclusory, vague, unsubstantiated and unsupported by the record.

The first issue is whether or not plaintiff's expert was qualified to venture an opinion in this matter. It is essential to note that many of the important issues in this case do not revolve about the performance of surgery on the decedent; rather, they involve the post-operative care regarding the administration or discontinuance of heparin, and the application of sequential compression stockings. As counsel for defendants Tessler and Neurological stated in the original motion "(t)he thrust of plaintiff's claim appears to be an alleged failure to prevent, diagnose and treat deep vein thrombosis, failure to properly administer anticoagulants, failure to properly monitor the decedent and in allowing decedent to fall."

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." *Postlethwaite v United Health Servs. Hosps.*, 5 AD3d 892, 895 [2004] [internal quotation omitted]. The question presented, then, is whether or not plaintiff's expert was "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable."

In asserting that he was not, defendants rely on a number of cases. The first of these, *Behar v. Coren*, 21 A.D.3d 1045 (2d Dept. 2005), involved an appeal from a denial of a motion for summary judgment dismissing the complaint. Defendant claimed that the expert affidavit submitted by plaintiff was insufficient as a matter of law, and was insufficient to dispute the findings of the defendants' experts who asserted that the diagnosis and treatment did not deviate

from good and accepted medical practice.

Defendants were found to have made a prima facie showing of entitlement to judgment, and the burden then shifted to plaintiff, to produce sufficient evidentiary proof of the existence of a triable factual issue in accordance with *Holbrook v. United Hosp. Med. Ctr.*, 248 A.D.2d 358 (2d Dept. 1998). In attempting to do so, plaintiff submitted an affidavit from a pathologist to evaluate surgical and gastroenterological treatment. The witness made no mention of training in surgery, gastroenterology, or pediatrics, the specialties involved in the treatment. Neither was there any indication that he had familiarized himself with relevant literature on the subjects, or how he became familiar with the applicable standards of care in the specialized area of practice.

In *Mustello v. Berg*, 44 A.D.3d 1018 (2d Dept. 2007), plaintiff appealed from the grant of a motion to dismiss a medical malpractice complaint in which the Court determined that plaintiff had failed to raise a triable issue of fact so as to defeat a motion for summary judgment. After defendants submitted an expert medical affidavit attesting that the treatment rendered conformed to good and accepted medical practice. Plaintiff responded with an affidavit of a general surgeon who contested the opinion of defendants' expert concerning gastroenterological treatment rendered plaintiff.

The affidavit did not mention whether he had any specific training or expertise in gastroenterology. In addition, it did not indicate that the witness had familiarized himself with the relevant literature, or otherwise set forth how he became familiar with the applicable standards of care in this specialized area of practice. The Court concluded that plaintiff's expert had "failed to lay the requisite foundation for his asserted familiarity with the applicable standards of care, his affidavit was of no probative value." *Id.* at 1019.

Geffner v. North Shore University Hospital, 57 A.D.3d 839 (2d Dept. 2008) produced the same result where a physician certified in emergency medicine opined on the treatment rendered by defendant hematologist and medical oncologist. The Court concluded that the plaintiff's expert witness, an emergency medicine physician, was of no probative value in raising a question in opposition to the prima facie evidence of treatment in accordance with the appropriate standards of care. Plaintiff also submitted an affidavit of a pharmacist, who rendered that drug overdosing was a proximate cause of decedent's pain, suffering, and death, but failed to render an expert opinion as to the appropriate standard of care for physicians in the administration and use of drugs in 2002, and what, if any, departures from that standard were committed by defendants. Lastly, plaintiff submitted affirmations from physicians certified in clinical pathology and

cytopathology, which alleged that defendant doctors misdiagnosed the decedent as suffering from myelodysplastic syndrome, acute myeloid leukemia, and adenocarcinoma. These affirmations were determined to be insufficient to raise a triable issue of fact with respect to the alleged misdiagnoses, since they failed to address the evidence relied upon by North Shore's experts in rendering their opinions that the diagnoses were correct.

Similarly, in *Ozugowski v. City of New York*, 90 A.D.3d 875 (2d Dept. 2011), the Court determined that the opinion of an internist and cardiologist, licensed in Illinois, was insufficient to overcome the prima facie showing that defendant, which provided psychiatric care to plaintiff, had not deviated from the accepted standards of psychiatric practice in the New York area. Because the plaintiff's expert affidavit failed to raise a triable issue of fact as to whether defendant's staff failed to make a careful evaluation of decedent, in accordance with the applicable standard of care, the Court affirmed the dismissal of the action by the trial court.

These must be contrasted with the affirmation submitted by plaintiff in this action in opposition to the motion for summary judgment.

Plaintiff's complaint does not contain any allegation that the surgical procedures performed on decedent were contraindicated, or performed in a negligent fashion. The issue of the position of defendant as a neurological surgeon is therefore not a consideration in the evaluation of the statement of a neurologist concerning post-operative care, particularly with respect to the administration or termination of anticoagulants and the utilization of pressure leg stockings.

In *Lang v. Newman*, 54 A.D.3d 483 (3d Dept. 2008), a matter otherwise unrelated to the claims in this action, the Court was involved with the issue of whether or not the administration of heparin was appropriate for a patient diagnosed with migraine headache, but actually experiencing an ischemic stroke, the Court relied upon testimony as to what neurologists would do in the face of the conditions presented by plaintiff. This is of no importance, other than to demonstrate that it is neurologists who deal primarily with such issues as the administration of blood thinner in the consideration of the formation of clots.

The affirmation submitted by plaintiff in this case includes a statement that the witness is familiar with the standard of care for DVT (deep vein thrombosis) Prophylaxis Protocol in patients such as decedent based on his education and clinical experience over 40 years.

Whether or not decedent presented an increased risk for DVT is a factual question, properly left for the trier of facts. Defendants' claim that plaintiff's expert's estimate of decedent's weight was at odds with the statement of her weight upon admission, but there is no

clear indication as to whether or not the weight was simply reported, or the patient was weighed. She was a transfer from another hospital, and it may well be that there was no actual weigh-in of the patient.

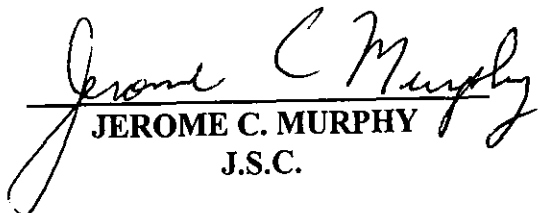
Defendants also contend that none of the risk factors for increased possibility of DVT were present in plaintiff. Plaintiff, on the other hand, points out that one of the conditions was 60 years of age or older, and that decedent was only five months short of that age.

The issues raised by defendants are insufficient to render the opinions of plaintiff's expert of no probative value. Plaintiff has adequately raised issues of fact sufficient to overcome the prima facie establishment of entitlement to summary judgment.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 10, 2014

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

SEP 10 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE