

Grissom v NY-Presbyt. Hosp.
2015 NY Slip Op 30741(U)
May 1, 2015
Supreme Court, New York County
Docket Number: 805017-2012
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LARRY GRISSOM,

Plaintiff,

Index No. 805017-2012

-against-

DECISION/ORDER

Motion Sequence 002

NY-PRESBYTERIAN HOSPITAL, PHILLIP
WILLIAM, M.D. and GREGORY DIFELICE,
M.D.,

Defendants.

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HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmations & Exhibits Annexed.....	<u>1, 2, 3, 4</u>
Answering Affirmation, Affidavit, Redacted Affirmation & Exhibits.....	<u>5, 6, 7, 8</u>
Reply Affirmation.....	<u>9</u>

In this medical malpractice action, defendant Gregory DiFelice, M.D. (DiFelice) moves pursuant to CPLR § 3212 for an order granting him summary judgment dismissing plaintiff Larry Grissom’s (plaintiff) complaint. Plaintiff presented to the emergency department of defendant NY-Presbyterian Hospital on March 19, 2011 after being struck by a motor vehicle. Plaintiff sustained left tibial and fibular fractures and underwent surgery which was performed by DiFelice. Plaintiff alleges in his bill of particulars that DiFelice committed malpractice on March 19, March 20, March 21, May 5 and June 9, 2011. Specifically, the bill of particulars alleges that DiFelice departed from accepted standards of medical practice by *inter alia* failing to conduct proper examinations of plaintiff, ignoring plaintiff’s signs and symptoms of early compartment syndrome, failing to diagnose plaintiff’s condition, failing to consider the neurovascular symptoms of plaintiff, by failing to perform indicated treatment, by allowing plaintiff’s symptoms to persist for an unreasonable period of time without treatment and by denying plaintiff appropriate treatment for a lengthy period of time, thereby insuring a poor prognosis. The injuries alleged in the bill of particulars include compartment syndrome of the left leg and foot, clawing of all five toes of the left foot, drop foot and necessity for surgical

correction of the clawed toes.

In support of the motion, DiFelice submits an affirmation from Dr. Sheldon Simon (Simon), an orthopedic surgeon, who opines that plaintiff never had compartment syndrome. Specifically, Simon argues that plaintiff's compartments and pulses were checked repeatedly following the surgery performed by DiFelice and, except for a pulse reading taken immediately after the surgery, were found to be normal every time. Simon claims that transient diminished pulse and numbness in the surgical leg is common post-operatively. Simon also contends plaintiff suffered a peroneal nerve injury from the initial trauma to his leg which resulted in a partial foot drop, toe contracture and sensory deficits to the toes and foot. Simon contends that because plaintiff did not have compartment syndrome, DiFelice did not ignore early signs of compartment syndrome, did not fail to diagnose compartment syndrome and did delay plaintiff's treatment.

In opposition, plaintiff's treating podiatrist, Dr. Betschart, contends that his examinations of plaintiff beginning in November 2011 revealed that plaintiff has a left foot drop. Betschart's examination of plaintiff on April 8, 2014 revealed a foot drop condition demonstrating a 3 out of 5, as well as plantar flexion weakness and a rigid equinus. The April 2014 examination also showed that plaintiff had restricted range of motion of the left foot. However, Betschart does not give any opinion as to how the hospital deviated from the standard of care with respect to plaintiff's left foot drop or how that deviation proximately caused the foot drop.

Betschart also opines that on November 18, 2011, plaintiff underwent a surgical procedure, performed by Betschart, consisting of arthrodesis of the first three toes of the left foot and flexor tenotomies of all five toes of the left foot. Betschart contends that his review of the hospital's records, as well as the records of the Hospital for Special Surgery¹, revealed a record dated June 2011 in which DiFelice noted that two of plaintiff's toes on his left foot were claw-like in appearance. Betschart claims that if plaintiff had received conservative treatment in the form of physical therapy or the use of a brace following the June 2011 examination, his chances of requiring the November 18, 2011 surgical procedure would have been lessened significantly. Betschart also concludes that plaintiff's foot drop and clawing of all five toes are consistent with lower leg compartment syndrome.

Plaintiff also submits a redacted affirmation from a board certified orthopedist. This expert contends that defendant deviated from accepted standards of medical care when, as a result of an alleged communication error between DiFelice and a hospital nurse during plaintiff's June 9, 2011 visit, plaintiff was given a follow-up appointment three months after the June 9, 2011 visit, when DiFelice intended to have plaintiff return in three weeks. Plaintiff's expert contends that as a result of the alleged miscommunication, plaintiff was not seen until September 8, 2011, when deformities on the first three toes of plaintiff's foot were noted. The expert claims that had proper attention been paid to the developing claw toe deformities and proper rehabilitation and splinting been performed, it is most likely that the November 2011 surgical intervention by Betschart would not have been needed and that the miscommunication between DiFelice and the nurse created a delay in the necessary treatment. The expert also contends that

¹ Plaintiff discontinued his action against The Hospital for Special Surgery by stipulation dated November 6, 2014.

stiffness on plaintiff's ankle and the left foot drop was the result of muscle injury to the flexor muscles of the calf that resulted from the severity and displacement of the compound fractures to plaintiff's left leg. The expert further claims that the contractures should have been dealt with on a conservative basis, i.e., through physiotherapy and splinting, and that it was a departure not to have done so.

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment when it establishes that in treating the plaintiff it did not depart from good and accepted medical practice or that any such departure was not the proximate cause of the plaintiff's alleged injuries (*Scalisi v Oberlander*, 96 AD3d 106 [1st Dept 2012]). Once a defendant hospital meets its burden, the plaintiff must rebut defendant's prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged (*id.*). Generally, "the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002]). Additionally, plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307, 833 NYS2d 89 [2007] [citation omitted]). However, if "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz* at 544). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice," do not suffice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 NE2d 572, 508 NYS2d 923 [1986]).

DiFelice established his entitlement to summary dismissal of the claims set forth in plaintiff's complaint and as amplified in the bill of particulars (*see Bhim v Dourmashkin*, 123 AD3d 862 [2d Dept 2014]) by showing, through the affirmation of his orthopedist, that plaintiff did not have compartment syndrome. Plaintiff failed to rebut DiFelice's prima facie showing of entitlement to judgment as a matter of law as plaintiff's experts do not address the theory of liability set forth in the bill of particulars that DiFelice deviated from accepted medical practice by ignoring and failing to treat the signs of symptoms of early compartment syndrome exhibited by plaintiff. Betschart's conclusory assertion that plaintiff's foot drop and toe clawing are consistent with lower leg compartment syndrome is not supported by any evidence in the record and fails to controvert DiFelice's expert's evidence that plaintiff did not suffer from compartment syndrome (*Ramos v Weber*, 118 AD3d 408 [1st Dept 2014]; *Denis v Manhattanville Rehabilitation & Health Care Ctr., LLC*, 111 AD3d 406 [1st Dept 2013]). Plaintiff's theory that there was a delay in conservatively treating his claw toes and drop foot caused by a miscommunication between his physicians and a nurse from co-defendant NY-Presbyterian Hospital (Presbyterian) is a new theory of liability the merits of which cannot be considered by the court (*Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]; *Keilany B v City of New York*, 122 AD3d 424 [1st Dept 2014]). It should be noted that while plaintiff cross-moved to supplement his bill of particulars in response to a motion for summary judgment by Presbyterian so as to allege that Presbyterian's nurse departed from accepted standards of care by erroneously scheduling plaintiff's follow-up

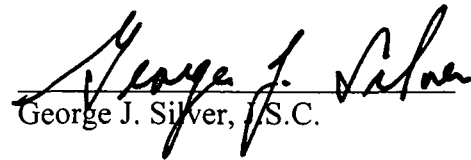
appointment 3 months after his June 2011 examination², plaintiff has not cross-moved to amend or supplement the bill of particulars with respect DiFelice. Thus, there is no allegation in either the complaint or the bill of particulars that DiFelice deviated from the standard of care by erroneously scheduling plaintiff's follow-up examination. "A plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion" (*Winters v St. Vincent's Med. Ctr.*, 273 AD3d 465 [2d Dept 2000]). Accordingly, it is hereby

ORDERED that defendant Gregory DiFelice, M.D.'s motion for summary judgment is granted and the complaint against him is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant, as movant, is to serve a copy of this order, with notice of entry, upon plaintiff and the other parties within 20 days of entry.

Dated: 5/1/15
New York County


George J. Silver, S.C.

HON. GEORGE J. SILVER

² The court denied plaintiff's cross-motion on ground that the supplemental bill of particulars alleged a new theory of recovery and was, therefore an amended bill of particulars and that amendment was improper because it would prejudice Presbyterian.