Dressel v New York Presbyt. Hosp.
2015 NY Slip Op 30743(U)
May 1, 2015
Supreme Court, New York County
Docket Number: 805097-2013
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
---X
KATHERINE DRESSEL,

Plaintiff,

Index No. 805097-2013

-against-

DECISION/ORDER

Motion Sequence No. 002

NEW YORK PRESBYTERIAN HOSPITAL,
PALLAVI UTUKURI and JEFFREY DERMSIAN,

Defendants.
---X

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

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

Papers	Numbered
Notice of Motion, Affirmation In Support & Collective Exhibits Annexed..........	1, 2, 3
Answering Affirmation& Collective Exhibits Annexed	4, 5
Reply Affirmation..	6

In this medical malpractice action, defendant Jeffrey Dermksian (defendant) moves by notice of motion dated December 15th, 2014 for an order granting him summary judgement and dismissing the complaint of plaintiff Katherine Dressel (plaintiff). Plaintiff opposes the motion. Plaintiff alleges in her verified bill of particulars that defendant failed to diagnose and treat a fracture of plaintiff's left calcaneus by failing to take an x-ray and failing to read x-rays taken at New York Presbyterian Hospital. Plaintiff further alleges that the fracture went onto non-union and necessitated surgery performed on December 17, 2012.

In support of the motion, defendant submits an affirmation from Dr. Frank D. Lombardo (Lombardo), a board certified radiologist. According to Lombardo, plaintiff first presented to the emergency room on March 22, 2011 following a fall down stairs. X-rays were taken of plaintiff's left foot and ankle and were reported as negative. Defendant saw plaintiff on April 8, 2011 and recommended conservative treatment of physical therapy with follow-up if needed. Lombardo contends that the x-rays taken on March 22, 2011 were negative and defendant would have made the same finding on April 8, 2011 if he had reviewed the films. Lombardo also claims that even if defendant had ordered x-rays on April 18, 2011, the repeat x-rays also would have been read as negative for a fracture of the calcaneus. Finally, while Lombardo concedes that x-rays taken on August 21, 2012 by plaintiff's podiatrist demonstrate a fracture of the

anterior process of the calcaneus, Lombardo contends that this fracture was an acute injury because there was no evidence on the x–ray of callus formation which would have been present on a fracture alleged to be 17 months old. According to Lombardo, an MRI taken on August 23, 2012 confirms the acute nature of the fracture seen on the August 21, 2012 x-ray because of the unequivocal manifestation of extensive bone marrow edema, extensive soft tissue edema, and the lack of callus formation or sclerosis at the fracture site. Lomobardo claims that

Defendant avers that his April 18, 2011 physical examination of plaintiff did not reveal evidence of tenderness of the calcaneal tuberosity or calcaneofibular ligament. There was also no evidence of swelling or bruising and the only abnormality was tenderness over the anterior talofibular ligament. Based upon this examination, the fact that plaintiff was weight bearing, and the fact that plaintiff advised him that her March 22, 2011 x-rays were negative for a fracture, defendant's assessment was that plaintiff was suffering from a left foot sprain. Defendant referred plaintiff for physical therapy and home exercises. Defendant contends that it is acceptable practice to rely on a patient's self-reported history and even if he had reviewed the x-rays, he would not have found a fracture and his treatment plan would have remained the same[1]. Defendant also claims that there was no reason to order an x-ray on April 18, 2011 because there was no indication plaintiff was suffering from an undiagnosed calcaneal fracture as plaintiff was full weight bearing and not using crutches.

In opposition, plaintiff submits an affidavit from Dr. Neal Blitz (Blitz), a licensed podiatrist and a redacted affirmation from a board certified orthopedist. Blitz, who is plaintiff's treating podiatrist, states that he ordered x-rays of plaintiff's left foot and ankle when she presented to him in November 2012. Blitz claims those x-rays showed non-healed fracture at the anterior portion of the calcaneus. Blitz contends that the fracture was not acute but was a chronic condition consistent with plaintiff's fall in March 2011. Blitz also contends that the fracture was visible on the x-rays taken in March 2011 but also notes that fractures are typically more apparent on x-ray after the initial injury due to resorption and that the fracture at issue here would have been more obvious on April 8, 2011 than on March 22, 2011 if x-rays had been taken.

Plaintiff also submits a redacted affirmation from a board certified orthopedist. The orthopedist contends that because fractures become more apparent on x-ray over time and because of plaintiff's history of a fall and presentation to emergency room with x-rays negative for a fracture, as well as the finding of tenderness at the anterior talofibular ligament, defendant should have taken an x-ray of plaintiff's left foot and ankle on April 8, 2011. The orthopedist claims that if defendant had taken an x-ray, plaintiff's fracture would likely have been visible to defendant, plaintiff's foot and ankle would have been immobilized and the fracture would have healed. According to the orthopedist, defendant's diagnosis of a sprain allowed resumption of plaintiff's normal activity, which in turn caused the non-displaced fracture to become displaced. The orthopedist contends that defendant deviated from good and accepted medical practice by (1) failing to take an x-ray of plaintiff's left foot on April 8, 2011, (2) failing to diagnose a fracture of the anterior left calcaneus (3) failing to treat said fracture with immobilization and appropriate treatment. The orthopedist also claims that defendant's misdiagnosis directly resulted in the

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[1] Defendant reviewed the March 22, 2011 x-rays after the commencement of this litigation.

fracture becoming non-union and led to the need for surgery by Blitz. In his/her opinion, Dermksian's diagnosis of a sprain allowed resumption of normal activity, which in turn caused the non-displaced fracture to become displaced.

To obtain summary judgement, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgement in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]. This standard requires that the proponent of a motion for summary judgement make a prima facie showing of entitlement to judgement as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851,853,746 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holtzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

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 plaintiffs 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

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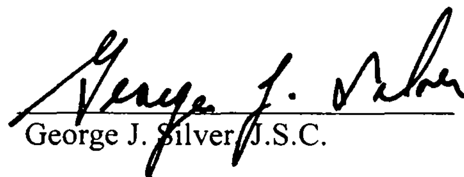
York Downtown Hosp., 99 NY2d 542, 544, 784 NE2d 68, 754 NYS2d 195 [2002]). Additionally, plaintiff's expert's opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307, 833 NYS2d 89 [2007] [citation 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]).

In response to defendant's prima facie showing of entitlement to summary dismissal of the complaint, plaintiff fails to raise a triable issue of fact. Plaintiff's orthopedist's assertions that the fracture would likely have been visible to defendant if defendant had x-rayed plaintiff's foot and ankle on April 8, 2011 and that immobilization and appropriate treatment would likely have resulted in a healed, non-displaced fracture are speculative and conclusory and thus insufficient to raise a triable issue of fact as to causation (*Shashi v South Nassau Communities Hosp.*, 104 AD3d 838 [2d Dept 2013] [plaintiff's expert's speculative and conclusory assertions that a diagnosis of a fracture would have led to adequate immobilization and may have resulted in normal healing did not raise a triable issue of fact]). Accordingly, it is hereby

ORDERED that Jeffrey Dermksian's motion for summary judgment is granted and the complaint against him is dismissed; and it is further

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

ORDERED that the movant is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.



George J. Silver, J.S.C.

Dated: 5/1/15
New York County

HON. GEORGE J. SILVER