

Grissom v NY-Presbyterian Hosp.

2015 NY Slip Op 31411(U)

July 28, 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

-----X
LARRY GRISSOM,

Plaintiff,

Index No. 805017-2012

-against-

DECISION/ORDER

Motion Sequence 001

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

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:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Attorney’s Affirmation & Collective Exhibits Annexed.....	1
Answering Affirmation & Collective Exhibits Annexed.....	2
Reply Affirmation.....	3
Notice of Cross-Motion, Attorney’s Affirmation & Collective Exhibits Annexed.....	4
Affirmation in Opposition to Cross-Motion.....	5

In this medical malpractice action, defendant NY- Presbyterian Hospital (the hospital) moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing plaintiff Larry Grissom’s (plaintiff) complaint. Plaintiff opposes the motion and cross-moves for an order permitting the service *nunc pro tunc* of a supplemental bill of particulars.

Plaintiff alleges in his verified bill of particulars that the hospital’s nurses who examined plaintiff on March 19, 20 and 21, 2011, a physical therapist who examined him on March 20, 2011, a social worker who spoke with him on March 21, 2011 and an “anesthesia person” who examined plaintiff on March 20, 2011 departed from accepted standards of practice by failing to overrule the treatment undertaken by co-defendants and in failing to treat the signs of symptoms of early compartment syndrome exhibited by plaintiff. The bill of particulars further alleges that the hospital failed to diagnose plaintiff’s condition, failed to consider the neurovascular symptoms of plaintiff, failed to perform indicated treatment, allowed plaintiff’s symptoms to persist for an unreasonable period of time without treatment and denied 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, the hospital submits an affirmation from Dr. Kenneth J. Mroczek (Mroczek), a board certified orthopedist. According to Mroczek, plaintiff presented to the hospital's emergency department on March 19, 2011 with left tibial and fibular fractures sustained when plaintiff was struck by a motor vehicle. Plaintiff ultimately underwent surgery which was performed by co-defendant Dr. Gregory DiFelice (DiFelice). According to Mroczek, there was no evidence of compartment syndrome during plaintiff's hospitalization from March 19, 2011 through March 22, 2011. Specifically, Mroczek opines that there is no evidence in the medical records that plaintiff had progressive pain, paresthesia and/or functional loss in his left leg. Thus, there was no requirement that plaintiff receive further evaluation or treatment, including pressure testing and/or consultation with additional specialists.

Since there was no evidence of compartment syndrome, Mroczek contends that there was no reason for the nurses, the physical therapist, the anesthesiologist or the social worker to challenge the findings made by the emergency department physicians or the orthopedists who treated plaintiff. Mroczek opines that the hospital's nursing staff performed regular checks of plaintiff's compartments and neovascular status as indicated by physicians' orders or as warranted based upon plaintiff's condition and complaints. The staff properly documented their findings and notified physicians of any pertinent findings or complaints for physician assessment and management, which Mroczek claims is the standard of care. Moreover, Mroczek contends that the hospital records demonstrate that where appropriate consultations were requested by staff, those consultations were made in a timely manner and the various consultants all made the assessment that there was no evidence of compartment syndrome.

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 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

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

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 an 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 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 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.

Plaintiff's proposed supplemental bill of particulars alleges that the hospital, through its nurse, departed from accepted standards of medical care by erroneously scheduling plaintiff for a follow-up appointment three months after his June 2011 visit. Plaintiff's counsel contends that plaintiff was deposed extensively regarding his drop foot and clawed toes, both of which are alleged as injuries in the original bill of particulars, and that he intended to serve an amended or supplemental bill of particulars after the deposition of the hospital's nurse during which the alleged miscommunication regarding the scheduling of plaintiff's appointment was revealed. Through plaintiff's counsel's admitted oversight, however, an amended or supplemental bill of particulars was not served at the time note of issue was filed. Plaintiff contends that the hospital cannot claim to be surprised by the supplemental bill of particulars because it does not assert any new theories of liability of which the hospital was unaware. Plaintiff further argues that the hospital will not be prejudiced if he is permitted to supplement his bill of particulars because no trial date has been set and the matter is still within the court's standards and goals. Finally, plaintiff claims that because the hospital had knowledge of the drop foot and claw toes injuries from the original bill of particulars and because the original bill of particulars alleged in general terms that the hospital allowed plaintiff's symptoms to persist for an unreasonable period of time, the hospital could have addressed such claims in its summary judgment motion but chose not to.

Because a decision on plaintiff's cross-motion will directly impact the resolution of the hospital's summary judgment motion, the cross-motion will be addressed first. The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*Harris v Ariel Transp. Corp.*, 37 AD3d 308 [1st Dept 2007]). A supplemental bill of particulars is a device used to amplify existing claims rather than to add new theories of liability (*Kolb v Beechwood Sedgewick LLC*, 78 AD3d 481 [1st Dept 2010]). The theory of liability asserted in plaintiff's "supplemental" bill of particulars, i.e., that the allegedly erroneous scheduling of plaintiff's follow-up visit with DiFelice in June 2011 was a deviation from accepted medical practice, can not be readily discerned by reading the original bill of particulars. The original bill of particulars alleges deviations from the standard of care with regard to the diagnosis and treatment of compartment syndrome during plaintiff's admission to the hospital in March 2011.

The proposed supplemental bill of particulars alleges a deviation regarding the scheduling of an appointment allegedly committed in June 2011, a date not set forth in the original bill of particulars, and months after plaintiff was discharged from the hospital. There is no allegation in the proposed supplemental bill of particulars regarding a failure by the hospital's staff to diagnose and/or treat compartment syndrome. Thus, the supplemental bill of particulars does not merely amplify or elaborate on the facts and allegations set forth in the bill of particulars (*cf. Orros v Yick Ming Yip Realty, Inc.*, 258 AD2d 387 [1st Dept 1999]; *Martino v Bendo*, 93 AD3d 500 [1st Dept [2012] [the plaintiff's cross-motion to amend the bill of particulars should have been granted, despite being made after the filing of the note of issue, because the amended allegations did not amount to new theories of liability]), it materially alters plaintiff's original theory of liability (*Gaisor v Gregory Madison Ave, LLC* 13 AD3d 58 [1st Dept 2004]). Plaintiff "supplemental" bill of particulars is, therefore, an amended bill of particulars (*Bartkus v N.Y Methodist Hosp.*, 294 AD2d 455 [2d Dept 2002]; *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389 [1st Dept 2006]).

Leave to amend a bill of particulars following the filing of a note of issue is ordinarily freely given absent surprise or prejudice to the defendants (*Henchy v VAS Express Corp.*, 115 AD3d 478 [1st Dept 2014]). Where there is an "extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion" (*Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271 [1st Dept 1999]). Further, "where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied" (*Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514 [1st Dept 2007]).

Plaintiff was on notice as of the July 30, 2013 deposition of the hospital's nurse of the facts pertinent to the new theory of liability. This was nearly six months prior to plaintiff's filing of the note of issue on January 15, 2014 and plaintiff's counsel's claim that an oversight prevented him from amending the bill of particulars prior to the filing of note of issue is unavailing (*see Orros* 258 AD2d at 388). However, while plaintiff's excuse for the delay could be more compelling, the delay itself is relatively short when compared with other cases where leave to amend has been denied (*see e.g. Vega v Lenox Hill Hosp.*, 235 AD2d 302 [1st Dept 1997] [10 years after alleged malpractice, eight years after original bill of particulars served]; *Baby Togs v Faleck & Margolies*, 239 AD2d 278 [1st Dept 1997] [leave sought on eve of trial, nearly seven years after original bill of particulars filed]). More importantly, the hospital has not demonstrated any meaningful prejudice from the delay. The facts giving rise to the proposed amendment were raised during the deposition of the hospital's employee, nurse Loye. The hospital, therefore, has had knowledge of the facts giving rise to the new theory of liability for as long as plaintiff has (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [1st Dept 2007] [defendant's claim that plaintiff's new theory of liability is surprising is inapt where the amendment was based upon defendant's records and the depositions of its employees]; *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873 [2d Dept 2010] [medical information that served as the basis for the plaintiff's new allegations had been freely available to the defendants since the time of discovery]; *Adams v Jamaica Hosp.*, 258 AD3d 604 [2d Dept 1999]). Moreover, plaintiff's bill of particulars has always alleged that the hospital allowed plaintiff's symptoms to persist for an unreasonable period of time without treatment and that the hospital denied plaintiff appropriate

treatment for a lengthy period of time. Therefore, plaintiff's cross-motion to amend the bill of particulars is granted.

Turning to the hospital's motion for summary judgment, 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]).

Since the hospital was only required to address and rebut the specific allegations of malpractice set forth in plaintiff original bill of particulars (*Bhim* 123 AD3d at 865), the hospital, through the affirmation of its expert witness, established its prima facie entitlement to summary dismissal of plaintiff's complaint. However, in light of the amendment to the bill of particulars, there is a question of fact as to whether the hospital committed malpractice by erroneously scheduling plaintiff's follow-up appointment with DiFelice . Accordingly, it is hereby

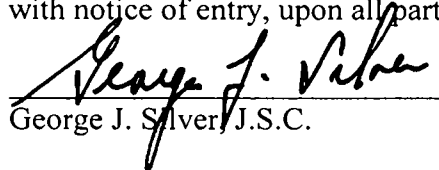
ORDERED that defendant NY- Presbyterian Hospital's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion is granted; and it is further

ORDERED that the parties are to appear for a pre-trial conference on September 29, 2015 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

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

Dated: 7/28/15
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER