Grayson v Weisman
2015 NY Slip Op 32022(U)
October 23, 2015
Supreme Court, Suffolk County
Docket Number: 13-1235
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 13-1235
CAL No. 14-01326MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-11-14 (#003)
MOTION DATE 1-8-15 (#004)
MOTION DATE 3-5-15 (#005)
ADJ. DATE 4-23-15
Mot. Seq. # 003 - MD
004 - MD
005 - XMD

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GEOFFREY GRAYSON,

Plaintiff,

- against -

ALAN WEISMAN,

Defendant.

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WIDLITZ & STERN, P.C.
Attorney for Plaintiff
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Huntington, New York 11743

HEIDELL, PITTONI, MURPHY & BACH, LLP
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Upon the following papers numbered 1 to 104 read on this motion for summary judgment, vacate note of issue ; Notice of Motion/ Order to Show Cause and supporting papers 1-48 (#004); 59-90 (#003) ; Notice of Cross-motion and supporting papers 91-96 (#005) ; Answering Affidavits and supporting papers 49 - 56 (#004); 97-104 (#005); Replying Affidavits and supporting papers 57 - 58 (#004) ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions (#003, #004, and #005) are hereby consolidated for purposes of this determination; and it is further

ORDERED that defendant's motion (#004) for summary judgment dismissing the complaint is denied; and it is further

ORDERED that defendant's motion (#003) for an order vacating the note of issue, among other things, is denied; and it is further

ORDERED that plaintiff's cross-motion (#005) for an order compelling defendant to provide copies of the letters defendant sent to nonparty treating physicians is denied.

Plaintiff commenced this podiatric malpractice action to recover damages for personal injuries he allegedly sustained due to negligence of defendant Dr. Alan Weisman. By his complaint and verified bill of particulars, plaintiff alleges that Dr. Weisman was negligent in failing to properly treat a diabetic foot ulcer, and in failing to diagnosis and properly treat osteomyelitis, causing him to undergo a below-the-knee amputation. Further, plaintiff alleges that Dr. Weisman was negligent in failing to consult with a vascular surgeon, in failing to consult with an orthopedist, and in failing to consult with an endocrinologist. Additionally, plaintiff alleges that Dr. Weisman was negligent in failing to prescribe or administer intravenous antibiotics, and in failing to conduct, among other things, an x-ray or magnetic resonance imaging examination of his foot.

Dr. Weisman now moves for summary judgment dismissing the complaint on the grounds that he did not deviate or depart from accepted podiatric practice in his care and treatment of plaintiff, and that his care and treatment of plaintiff were not a proximate cause of plaintiff's injuries. In support of the motion, defendant submits copies of the pleadings, the verified bill of particulars, an expert affidavit, and transcripts of the parties' deposition testimony.

Plaintiff Geoffrey Grayson testified that he presented at defendant's office on October 9, 2010, with a blister on his left foot pursuant to a referral from his primary care physician, Dr. Amir Herman. Plaintiff testified that he was diagnosed with diabetes in 2008, and that Dr. Herman monitored and controlled his sugar levels. He testified that in 2009 an electromyogram (EMG) test performed by a neurologist, Dr. Rudansky, showed severe diabetic neuropathy, a circulatory issue with the nerves and nerve endings in his feet. He testified that he was instructed to inspect his feet for blisters and abrasions, and not to cut his toe nails. Plaintiff testified that the neuropathy causes pain in his feet, for which he regularly takes pain medicine. He further testified that his wounds heal slowly, and that he discussed his diabetes and other conditions during his first appointment with Dr. Weisman. Plaintiff testified that Dr. Weisman took his foot pulse, obtained a specimen from and debrided the ulcer on his foot, and prescribed antibiotics, foot pads, and a topical cream. Plaintiff testified that defendant instructed him on how to properly care for the ulcer and warned him of the risks of a serious infection. Plaintiff testified that he informed Dr. Weisman that he worked part-time at a pizza place where he stood on his feet for up to eight hours a day. He testified that Dr. Weisman gave him orthotics and sandals to wear while he was standing.

Plaintiff testified that he returned to Dr. Weisman's office on October 16, 2010, at which time Dr. Weisman took his foot pulse, measured the blister and noted some improvement. He testified that Dr. Weisman prescribed more antibiotics, as a bacteria was found in the wound culture that was taken on the previous visit. He testified that Dr. Weisman dressed the wound and they discussed cellulitis. He testified that Dr. Weisman told him to return to the office if he noticed any sort of inflammation or an increase in pain. Plaintiff testified he returned to Dr. Weisman's office on November 24, December 11, and December 22, 2010 for follow-up visits, and that Dr. Weisman inquired about his diet and his visits with Dr. Herman. Plaintiff testified that Dr. Weisman was not pleased with the progress of the foot ulcer and prescribed further antibiotics. He testified that he had been working longer hours during the holiday season and his diet was poor. He testified that Dr. Weisman told him stop playing "wallyball," which he did. Plaintiff further testified that his blood sugar levels were very high during the holiday season which he attributed to his poor diet.

Plaintiff testified that he scheduled an appointment for January 5, 2011, and that the pain in his left foot had increased significantly between his December 22nd visit and January 5th visit. He testified that when Dr. Weisman examined him on January 5, 2011, he conducted routine tests and gave him another sandal. Plaintiff testified that on January 12, 2011 , he suffered substantial pain in his foot and phoned Dr. Weisman. He testified that Dr. Weisman told him that he was at his Manhattan office and that he would see him the following day. Plaintiff testified that he stayed in bed with his foot elevated all day, and that his blood sugar level was very high. Plaintiff testified that Dr. Weisman examined his foot the next day and informed him it was infected and he needed to go to the hospital for treatment. Plaintiff testified that he asked Dr. Weisman if he could go to the hospital the next day, so he could get his affairs in order, and that Dr. Weisman said yes. On January 14, 2011, plaintiff was admitted to Huntington Hospital, where he was diagnosed with gangrene. He testified that three of his toes on his left foot were amputated, and that from January 14, 2011 until April 2011, he was in and out of the hospital with a total of nine surgeries. The final surgery was a below-the-knee amputation of his left leg performed in November of 2011.

Dr. Weisman, a board certified podiatrist, testified that plaintiff presented for treatment of an ulcer on his left foot. He testified that plaintiff had mild edema and "stasis dermatitis." Dr. Weisman testified that he cultured and debrided the ulcer, assessed the pedal pulses in plaintiffs's feet, and educated plaintiff about his diabetic condition and its risks. He testified that plaintiff told him his blood sugar was being monitored by his primary physician, Dr. Herman. He also testified that he asked plaintiff to go for x-ray and magnetic resonance imaging (MRI) examinations, but plaintiff said that he did not have the time. Dr. Weisman testified that plaintiff's culture revealed a heavy growth of streptococcus, and on plaintiff's visit of October 16, 2011, he prescribed antibiotics to treat the infection. He testified that he did not believe plaintiff had vascular compromise, as he tested his foot pulse at every visit and always found them to be within the normal range of 2/4. Dr. Weisman testified that plaintiff returned to his office on November 24, 2011 at which time plaintiff told him he debrided his own ulcer. He testified that both of plaintiff's ankles had mild edema, and that there was cellulitis around the wound.

On December 11, 2011, plaintiff returned to Dr. Weisman's office for a follow-up visit. Dr. Weisman testified that the cellulitis in plaintiff's foot was 95% resolved, but both of plaintiff's ankles had mild edema. He ordered Puracol, a collagen-type dressing to help heal the wound. Dr. Weisman testified that he measured the ulcer on plaintiff's foot during an appointment on December 22, 2011, and found it to be worse. He further testified that plaintiff did not have cellulitis or purulence, and that he did not prescribe an antibiotic. Dr. Weisman testified that plaintiff's blood sugar level was 200, and that 120 is the highest level consistent with good health. He testified that plaintiff's visit of January 5, 2012, plaintiff had cellulitis, and the ulcer on his foot was worse. He testified that he prescribed Levaquin, an antibiotic, and cleaned and dressed the ulcer. Dr. Weisman testified that he did not perform a culture and did not confer with Dr. Herman or refer plaintiff to any other specialists. Dr. Weisman testified that he treated plaintiff on an emergency basis on January 13, 2011 at which time plaintiff stated he was in severe pain and his left ankle was swollen. He testified that plaintiff had left medial knee pain which caused him concern, so he advised him to go to the hospital immediately for treatment. He testified that he dressed the wound and wrote a note for the hospital staff, but no further contact was made.

It is well-settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

A physician owes a duty of reasonable care to his or her patients and generally complies with such duty where there is evidence that he or she conformed to the acceptable standard of care and practice (*see* ***Spensieri v Lasky***, 94 NY2d 231,701 NYS2d 689 [1999]). The defendant, in a medical malpractice action, is generally held to the level of skill and care used by others in the community who practice the same profession. "The requisite elements of proof in a medical malpractice and podiatric malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (***Paone v Lattarulo***, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). To establish a *prima facie* showing of entitlement to summary judgment, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient or that any departure was not a proximate cause of plaintiff's injuries (*see* ***Lau v Wan***, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Castro v New York City Health & Hosps. Corp.***, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy his or her burden on a motion for summary judgment, defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see* ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

In support of his motion, defendant submits an affidavit of Dr. Edwin Wolf, D.P.M., a board certified podiatrist. Dr. Wolf states that he is familiar with the applicable standards of podiatric care and practice as they pertain to the diagnosis, management and treatment of patients with diabetic foot ulcers. "The affidavit of a defendant physician may be sufficient to establish a *prima facie* entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Lau v Wan***, 93 AD 3d 763, 940 NYS2d 662 [2d Dept 2012]; ***Micciola v Sacchi***, 36 AD3d 869, 828 NYS 2d 572 [2d Dept 2007]). Dr. Wolf states that he reviewed the medical records, the deposition testimony and the pleadings in this action, and concludes that Dr. Weisman did not depart from acceptable podiatric standards of care in treating plaintiff's foot ulcer. Dr. Wolf opines that Dr. Weisman properly prescribed antibiotics to plaintiff and that there was no need for intravenous antibiotics, as plaintiff was responding to the oral antibiotics up until January 11, 2012. Dr. Wolf opines that Dr. Weisman did not deviate from the requisite standard of care by not referring plaintiff to a vascular surgeon, as plaintiff did not exhibit evidence of vascular compromise. However, Dr. Wolf fails to address the allegation that Dr. Weisman was negligent in failing to obtain an MRI, an x-ray, or a CT examination. Dr. Wolf opines that Dr. Weisman appropriately recommended that plaintiff have an MRI and x-ray but plaintiff refused. Although Dr. Wolf states that a CT scan was not necessary because MRI and x-ray examinations are better scans for diagnosing deep-seated infections, the undisputed facts establish that neither an MRI nor an x-ray examination were performed on plaintiff; they were merely recommended. Dr. Wolf does not

express an opinion or state the appropriate standard of care that a podiatrist owes to his or her patient when the patient declines to undergo such diagnostic tests. Dr. Wolf fails to set forth the applicable standard of care, he merely recounts the treatment rendered, and opines that such treatment did not represent a departure from good and accepted medical practice (***Tomeo v Beccia***, 127 AD3d 1071,7 NYS3d 472 [2d Dept 2015]; ***Barlev v Bethpage Physical Therapy Assoc., P.C.***, 122 AD3d 784, 995 NYS2d 514 [2d Dept 2014]). Thus, Dr. Wolf's affidavit is insufficient to establish, *prima facie*, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured as a result. As such, it is unnecessary to address plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 487 NYS.2d 316). Accordingly, defendant's motion for summary judgment is denied.

Defendant's motion for an order, among other things, dismissing the plaintiff's complaint pursuant to CPLR 3126 is denied. According to the Court's computerized records, a note of issue and certificate of readiness were filed in this action on August 7, 2014. The filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (***Arons v Jutkowtiz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; *see* ***Tirado v Miller***, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). A party seeking additional discovery after the note of issue is filed must show "unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21[d]; *see* ***Portilla v Law Offs. of Arcia & Flanagan***, 125 AD3d 956, 5 NYS3d 142 [2d Dept 2015]; ***Stock v Morizzo***, 92 AD3d 672, 938 NYS2d 206 [2d Dept 2012]; ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]). Furthermore, a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). Here, the affirmation of defense counsel does not refer to any communications between the parties evincing a diligent effort by the movant to resolve the discovery dispute; hence, it does not satisfy 22 NYCRR 202.7 (c) (*see* ***Murphy v County of Suffolk***, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]; ***Amherst Synagogue v Schuele Paint Co., Inc.***, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]).

Plaintiff's cross-motion (#005) for an order compelling defendant to provide plaintiff with copies of all correspondence forwarded to non-party treating physicians is denied, as plaintiff's counsel failed to include an affirmation of good faith with the moving papers.

The unredacted affirmation of plaintiff's podiatric expert is being mailed back to plaintiff's attorney this same date.

Dated: October 23, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**