

Levin v Klein
2016 NY Slip Op 30941(U)
May 16, 2016
Supreme Court, New York County
Docket Number: 805045/2013
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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VADIM LEVIN a/k/a VADIM MIRONOV and
LYUDMILA LEVIN,

Plaintiffs,

Index No. 805045/2013

-against-

**Decision, Order, and
Judgment**

MICHAEL L. KLEIN, M.D., PARK AVENUE
GASTROENTEROLOGY, P.C., and KIRA MEDICAL,
PLLC,

Defendants.

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JOAN B. LOBIS, J.S.C.:

This medical malpractice action arises out of defendant Michael L. Klein M.D.'s alleged improper performance of a colonoscopy on plaintiff Vadim Levin on October 21, 2010. Defendants now move for summary judgment. Plaintiffs oppose the motion. For the reasons that follow, the motion is denied.

In June 2002, plaintiff began treating with defendant for gastrointestinal issues. From 2002 to 2010, defendant performed approximately four endoscopies and three colonoscopies on plaintiff. On January 29, 2013 plaintiff brought this action for medical malpractice and lack of informed consent alleging that defendant perforated his colon during a colonoscopy performed October 21, 2010, which led to further complications and necessitated subsequent surgical treatment. In support of their motion defendants argue that there is no evidence that plaintiff

sustained a bowel perforation nor is there any connection between the October 21, 2010 colonoscopy and plaintiff's later procedures. Defendants contend that plaintiff's abdominal complications following the procedure resulted from plaintiff's pre-existing abdominal issues. Further, they contend that plaintiff gave informed consent for the colonoscopy after defendant discussed the risks and benefits with him, and that a reasonable person in plaintiff's position would have undergone the treatment. As plaintiff's underlying claims are without merit, they argue, Ms. Levin's derivative claim must also be dismissed.

In support of their motion, defendants submit the affidavit of Dr. Marvin Chinitz. Dr. Chinitz is a New York licensed physician who specializes in gastroenterology and is board certified in internal medicine and gastroenterology. Based on his review of the records and the documents related to this motion, Dr. Chinitz opines that defendants did not depart from the standard of care and that none of their alleged departures are related to plaintiff's injuries. He states that the October 21, 2010 colonoscopy was indicated based on plaintiff's medical history and did not result in a perforation. He opines that a perforated colon is a life-threatening condition which would have required immediate surgical intervention. He states that a March 2011 CT pathology report made no mention of a perforation. Further, he states that perforation is a known risk of the procedure and would not constitute a departure even if it had occurred. Additionally, he avers, none of plaintiff's subsequent procedures were related to the alleged perforation. According to the expert the record reflects that the only consequence potentially attributable to the colonoscopy was free air in plaintiff's abdomen, a known risk of the procedure which eventually resolved itself. Thus, he concludes all of defendant's treatment was within the standard of care and did not result in injury to plaintiff.

Defendants also submit the affidavit of Dr. Daniel Feingold. Dr. Feingold is a New York licensed physician who specializes in colorectal surgery and is board certified in general surgery. Based on his review of the relevant records and litigation documents, Dr. Feingold opines that the October 21, 2010 colonoscopy was indicated based on plaintiff's complaints of lower abdominal pain, mucous in his stool, and bloating. Further, he states there is no evidence that Dr. Klein perforated plaintiff's bowel or delayed plaintiff's care when he treated plaintiff conservatively with antibiotics. He states that any alleged delay in responding to plaintiff's complaints did not cause harm to plaintiff because both of the available alternatives to conservative treatment – hospital admission with surgical consultation, and referral to the emergency room – were eventually employed, and a different doctor determined that plaintiff did not need surgery and proceeded to employ conservative treatment. Dr. Feingold also asserts that plaintiff's subsequent surgeries were not related to Dr. Klein's treatment.

In opposition plaintiffs argue that defendants overstate the severity of his preexisting gastrointestinal conditions. Additionally, they argue that Dr. Klein did not discuss the risks or benefits of the procedure with plaintiff and that if he knew perforation was a risk he might not have gone through with the procedure. Plaintiff states that he was in unbearable pain following the October 22, 2010 procedure and that a November 15, 2010 CT scan demonstrates viscous perforation could not be excluded. Plaintiffs argue that defendants' experts rely on factual errors and improperly rely on the medical record generally instead of specifying the bases for their conclusions.

In support of their opposition plaintiffs submit the redacted affidavit of a New York licensed doctor who specializes in gastroenterology and is board certified in internal medicine and gastroenterology. Based on a review of the relevant materials, the doctor opines that defendant departed from accepted practice in his treatment of plaintiff. Plaintiff's expert states that defendant performed an unnecessary colonoscopy on October 21, 2010, did not obtain plaintiff's informed consent, and did not examine him or refer him for a CT scan upon his complaints of abdominal pain eight days after the colonoscopy. He avers that it was a departure for defendant to perform four endoscopies and three colonoscopies over the course of eight years because they were unnecessary, excessive, and not indicated. The plaintiff complained of excruciating pain following the colonoscopy, and defendant should have immediately sent him for an x-ray or CT scan. Likewise, the expert states, defendant should have physically examined plaintiff or sent him for a CT scan following his complaints of pain over the phone.

Additionally, the expert asserts, defendant negligently prescribed Cipro without first conducting a physical examination. Plaintiff's expert opines that as a result of defendant's negligence, free air in plaintiff's intraperitoneal cavity went undiagnosed and untreated until November 15, 2010, and that this delay caused plaintiff to develop abnormal colonic adhesions resulting in pain, suffering, additional surgeries, and complications from the surgeries. Plaintiff's expert states that the existence of free air in plaintiff's abdomen indicates his colon was perforated during the October 21, 2010 colonoscopy. He states if a perforation does not cause sepsis, it is possible for a patient to walk around with the perforation, which he opines likely happened here. The expert asserts that it is possible for a perforation to have existed at the time of the colonoscopy and not appear on the March 2011 pathology report if it was a microperforation or in an area that

was not excised during the March 2011 surgery. Further, plaintiff's expert avers that though conservative treatment was ultimately employed, immediate surgery could have prevented the adhesions and their consequences. The expert also states it is a deviation from the standard of care to advise a patient of the risks and benefits of a procedure when the patient is already on the procedure table, as Dr. Klein testified was his practice.

In reply defendants argue that plaintiff's expert's position that plaintiff had an undiscovered bowel perforation for almost four weeks is at odds with the expert's position that a bowel perforation is a medical emergency and requires immediate treatment. Defendants argue that records demonstrate the October 21, 2010 colonoscopy was indicated and that Dr. Klein's records demonstrate plaintiff had a history of gastrointestinal issues. They contend that Dr. Klein's repeated procedures reflect plaintiff's extensive history of gastrointestinal complaints rather than a pattern of performing unnecessary procedures. They state that plaintiffs' expert's opinion as to treatment rendered before the period at issue is irrelevant and not based on the factual record. They argue that plaintiff cannot use his expert's testimony about the earlier procedures to imply that defendant acted improperly on October 21, 2010. Further they argue, plaintiff's care following the procedure was within accepted practice. They argue that plaintiff's claim that Dr. Klein ignored his complaints immediately following the procedure is unsupported and reiterate that there is no evidence a bowel perforation existed. They assert that plaintiffs' expert essentially contends simply that he would have chosen a different course of treatment, which is insufficient to defeat summary judgment. Further, they argue, plaintiff has not alleged proximate cause. They assert that plaintiff's claimed injuries occurred too far after defendant's treatment for there to be proximate cause, especially as both sides' experts agree that a perforation requires emergency treatment.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. Courts grants the motion if, upon all the papers and proof submitted, it is warranted as a matter of law in directing judgment. Id. Summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)).

Once the defendant makes a prima facie showing, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree, the disputed issues must be resolved by a fact finder and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).

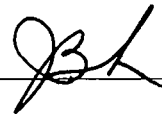
Here, through their experts defendants establish that a colonoscopy was indicated on October 21, 2010 and that defendant did not perforate plaintiff's colon, but that perforation is a known risk of the procedure. Further, they establish that plaintiff adequately consented to the procedure. This is sufficient to shift the burden to plaintiffs. Plaintiffs' expert's testimony creates triable issues of fact as to whether defendant perforated plaintiff's colon and whether it was a deviation from the standard of care for defendant not to examine plaintiff and discover the perforation. Additionally, there are issues of fact as to how soon plaintiff contacted defendant with complaints following the procedure and whether plaintiff gave informed consent for the procedure. The Court has considered the remainder of the parties' arguments and they do not change the result.

Accordingly, it is

ORDERED that the motion is denied.

Dated: *May 16*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.