

Garcia v University Diagnostic Med. Imaging, P.C.
2016 NY Slip Op 31344(U)
June 13, 2016
Supreme Court, Bronx County
Docket Number: 310226/2010
Judge: Stanley B. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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DOMINICO GARCIA,

INDEX NO: 310226/2010

Plaintiff (s),

-against-

UNIVERSITY DIAGNOSTIC MEDICAL IMAGING, P.C.
AND DR. RICHARD DENISE,

Defendant (s).

DECISION

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HON. STANLEY GREEN:

The motion by University Diagnostic Medical Imaging, P.C. (UDMI) for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is denied.

Plaintiff claims that as a result Dr. DeNise's negligence in the performance of a liver biopsy, he suffered a pneumothorax which required surgery and hospitalization. He also claims that defendants did not obtain his informed consent to the procedure.

On 6/12/08, plaintiff presented to UDMI for an ultrasound-guided liver biopsy. He did not speak English, but was accompanied by his adult son who spoke both English and Spanish. Plaintiff was given consent forms by a staff member, which he signed.

According to plaintiff, he was taken into the procedure room where Dr. DeNise was holding a "pistol" [spring-loaded biopsy needle], but his son was told to remain outside. Dr. DeNise demonstrated how the biopsy needle operated and the clicking sound it made. After a liquid was placed on plaintiff's skin, Dr. DeNise triggered the pistol twice. After being "shot" with the pistol, plaintiff began having difficulty breathing. Dr. DeNise immediately sent plaintiff to another office for a CT scan, which showed a pneumothorax of the right lung (escaped air).

EMT's were called and plaintiff was transported by ambulance to Jacobi Medical Center. At Jacobi, a chest tube was placed and any free air was suctioned. Plaintiff remained at Jacobi until 6/14/12, when he was discharged home.

University seeks dismissal of the complaint on the ground that the biopsy was properly performed and plaintiff's informed consent was obtained prior to the procedure. In support of the motion, University submits a consent form with plaintiff's signature, deposition testimony, medical records and the affirmation of Dr. Ivy Engel, a board certified radiologist.

Dr. Engel opines that the care and treatment rendered by Dr. DeNise and UDMI staff was within good and accepted medical practice. She notes that Dr. DeNise explained the procedure to plaintiff with the assistance of a technologist and then inserted the biopsy needle in the correct space. She explains that damage to adjacent organs is a risk of the procedure and occurs in the absence of negligence or carelessness by the physician.

Dr. Engel also opines that informed consent was obtained. She notes that the standard of care obliged Dr. DeNise and his staff to inform plaintiff of the risks of the procedure in a language he could understand. She notes that plaintiff and his son first spoke to the radiation technologist, who "would have obtained the patient's informed consent" which would have included a discussion of the risks of bleeding, infection and damage to adjacent organs. She also notes that the records indicate that this explanation was made through a translator.

Plaintiff contends that the evidence presented is insufficient to meet defendants' prima facie burden because Dr. Engel fails to address plaintiff's testimony that he does not speak English well and that there was no translator to explain what was in the papers he signed. Plaintiff also contends that Dr. DeNise's testimony shows that he failed to inform plaintiff, in a

language he understood, not only of the reasonably foreseeable risks associated with the treatment that a reasonable practitioner would have disclosed under the same circumstances and of any alternative to this procedure, but also of how to breathe during the procedure.

In opposition to the motion, plaintiff submits his own testimony, which shows that the office personnel gave him the paperwork to sign, that no one explained what the forms said and that his son was told to remain outside during the procedure. Plaintiff submits his own affidavit to show that he was never informed of the risk of a lung puncture and that had he been informed of this risk, he would not have undergone the procedure and would have chosen blood tests.

Plaintiff also submits Dr. DeNise's testimony, which shows that he did not recall if plaintiff's son was present during the procedure and only recalled that other than plaintiff, he was present with his technologist, whom he did not believe spoke Spanish. Dr. DeNise's testimony also shows that when he demonstrated the biopsy needle, plaintiff had an exaggerated response and that during the procedure plaintiff was "non-compliant" because when he was asked to take a breath, let the breath out and hold it at the moment of biopsy, he would breathe.

Plaintiff also submits the affirmation of an expert (name redacted) who opines, inter alia, that defendants were negligent in: (1) failing to instruct plaintiff in a language he understood [Spanish] as to the correct manner in which to breathe during the procedure; (2) failing to take into consideration plaintiff's exhibited anxiety and nervousness and provide a mild sedative just before the biopsy to alleviate his nervousness; and (3) in failing to insert the biopsy needle at an appropriate location and angle in order to avoid the pleural cavity. The expert opines that Dr. DeNise's actions in attempting to perform a fine needle biopsy of the liver were the proximate cause of plaintiff's pneumothorax and led to the injury to his lung and pleural cavity.

Plaintiff also contends that the doctrine of *res ipsa loquitur* is applicable to this case because Dr. DeNise was in exclusive possession and control of the instrumentality that caused the injury.

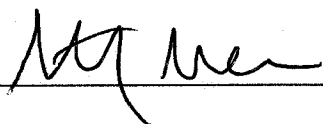
Despite defendants' contention to the contrary, the evidence presented is insufficient to establish their entitlement to summary judgment as a matter of law. While defendants have submitted competent evidence in support of their motion, including an expert's affirmation and deposition testimony, Dr. Engel's opinion that there was informed consent lacks probative value because she assumes that plaintiff was informed of the risks, benefits and alternatives to the procedure and disregards plaintiff's testimony that the forms were not translated or explained to him and Dr. DeNise's testimony, which shows that his technologist, whom he did not believe spoke Spanish, was responsible for obtaining the informed consent. Thus, triable issues of fact exist as to whether informed consent was obtained which preclude a grant of summary judgment.

Even assuming, *arguendo*, that the evidence presented were sufficient to establish defendants *prima facie* entitlement to summary judgment, Dr. DeNise's testimony that he only recalled himself and his technologist being present during the procedure and did not know if anyone in the suite spoke Spanish, coupled with his testimony that plaintiff was "non-compliant" as he did not breathe in the proper manner, coupled with the opinion of plaintiff's expert that Dr. DeNise's failure to instruct plaintiff, in his own language, on how to breathe, failure to provide a mild sedative to address plaintiff's anxiety and failure to insert the biopsy needle at an appropriate angle and location raise material issues of fact as to whether defendants departed from the standard of care in their treatment of plaintiff and caused the claimed injuries which precludes a grant of summary judgment.. Accordingly, this motion for summary judgment is denied.

With respect to plaintiff's contention that the doctrine of res ipsa loquitur is applicable to this case, the fact that plaintiff was awake during the procedure and that Dr. DeNise testified that plaintiff was "non-compliant" tend to show that this is not the type of case in which the doctrine of res ipsa loquitur should be invoked. However, this issue is left to the trial court to decide.

This constitutes the decision and order of the court.

Dated: June ¹³~~9~~, 2016


STANLEY GREEN, J.S.C.