

Gelber v Paksima

2016 NY Slip Op 31411(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 805361/2013

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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KENNETH GELBER,

Plaintiff,

-against-

Index No. 805361/2013

Decision and Order

NADER PAKSIMA, D.O., "JOHN" (first name unknown)
CORSI, P.A., and NYU LANGONE MEDICAL CENTER'S
HOSPITAL FOR JOINT DISEASES,

Defendants.

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This medical malpractice case stems from injuries that plaintiff allegedly sustained due to his November 5, 2012 surgery. Plaintiff's primary care physician referred him to defendant Dr. Nader Paksima for the procedure for the removal or repair of an inflamed bursa of the left olecranon, and Dr. Paksima performed the surgery at defendant NYU Langone Center's Hospital for Joint Diseases (NYU) with the aid of a physician's assistant, defendant "John" Corsi. The complaint alleges in essence that Dr. Paksima failed to consider that plaintiff's diabetes would increase the risk associated with the procedure, that the doctor exerted too much pressure on the tourniquet post-operatively and for an excessive period of time, that the doctor did not adequately inform plaintiff of the risks of the procedure, that the doctor did not respond to plaintiff's post-surgical complaints of numbness in a timely fashion, and that these deviations proximately caused or increased the chances of plaintiff's permanent nerve injuries. As a result of these injuries, plaintiff contends, he has effectively lost the use of his left hand.

Currently, in motion sequence number one, plaintiff Kenneth Gelber moves for summary judgment against all defendants. He additionally seeks to strike Dr. Paksima's errata

sheet for his deposition transcript as untimely and as seeking to make substantive changes to his testimony. Finally, plaintiff seeks to strike Dr. Paksima's answer based on his alleged discovery failures. In addition, in motion sequence number two, defendants P.A. Corsi and NYU seek summary judgment dismissing them from the case. The Court consolidates the motions for the purpose of disposition and, for the reasons below, denies plaintiff's motion for summary judgment and grants P.A. Corsi and NYU's motion.

In support of his motion for summary judgment, plaintiff submits the report of his expert, Dr. Richard Lechtenberg, a New York licensed doctor board certified in psychiatry and neurology. Dr. Lechtenberg states that Dr. Paksima deviated from the standard of care because he did not consider the fact that plaintiff, who was sixty-two at the time, suffered from diabetes, which increased his risk of nerve damage. In using a tourniquet, moreover, Dr. Paksima exerted excess pressure for a prolonged period of time. As a result, the expert opines, Dr. Paksima caused irreversible nerve damage. He rejects Dr. Paksima's statement that plaintiff sustained injuries due to his edema, which in turn was due to the fact that plaintiff's arm was in a dependent position for an extended period of time. According to the expert, the edema from plaintiff's arm position could not have been sufficiently severe to cause nerve damage. He additionally alleges that Dr. Paksima deviated from the standard of care when he did not recognize that plaintiff's immediate complaints of numbness were due to nerve injury. He also contends that Dr. Paksima deviated from the standard of care when he failed to adequately document plaintiff's complaints. He claims proximate cause exists because the tourniquet caused the nerve damage and a quicker diagnosis of plaintiff's post-operative problems may have reduced that damage. In addition, plaintiff alleges

that because defendants were in sole control of the operation and plaintiff did not contribute to his resulting condition, the doctrine of res ipsa loquitur applies and mandates summary judgment.

In opposition, defendants raise issues of fact precluding summary judgment. Dr. Paksima submits the expert affirmation of New York licensed orthopedic surgeon Philip A. Robbins, M.D. Dr. Robbins states that the procedure performed was proper and within the standard of care, and that because plaintiff's diabetes was well controlled and the pressure of the tourniquet was not excessive the use of the tourniquet was not a deviation. He states that the records show plaintiff did not complain of residual or new pain at his follow-up visit on November 13, and that during Dr. Paksima's phone conversation with plaintiff's wife on November 8, his wife indicated that plaintiff was back at work and recovering nicely. He claims that the median nerve could not have been damaged due to the surgery at issue and, listing several alternative causes, emphasizes that the etiology of the problem is unclear. He states that plaintiff's causation argument is speculative rather than definitive and does not support summary judgment. Dr. Robbins' expert affirmation, along with other evidence, raises issues of fact as to whether use of the tourniquet was a deviation and whether the surgery caused the damage to plaintiff's medial nerve. See 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). Plaintiff's arguments in response are insufficient to defeat Dr. Paksima's opposition. As there are issues of fact as to whether Dr. Paksima deviated from the standard of care, what caused the plaintiff's injuries, and the reason for plaintiff's post-operative complaints, summary judgment as to plaintiff's post-operative care is also denied.

Plaintiff's res ipsa loquitur argument has no merit. If it did, virtually every medical malpractice case would be granted summary judgment on this basis. Although plaintiff is correct that his expert is qualified to submit an affirmation outside his area of certification, he is not correct that defendants' experts failed to consider the impact of plaintiff's diabetes. Plaintiff's disputes with the two sets of expert testimony merely show that issues of fact exist. The Court has considered the parties' additional arguments for and against summary judgment and they do not alter its conclusion that summary judgment is unwarranted.

In addition, plaintiff seeks judgment against Dr. Paksima on the ground that he has willfully ignored discovery demands and discovery orders. In particular, plaintiff alleges that the doctor provided three sets of his records, all of which were different, and that he has refused to certify that the records are complete. Thus, plaintiff states, he cannot tell which set of records is complete, or whether the three sets together comprise an entire set of records. Dr. Paksima, however, explains that the three sets of records, together, include all of his records, and that he could neither provide the NYU records, which plaintiff obtained from NYU, nor attest to their completeness. Plaintiff has not shown bad faith conduct justifying the striking of the pleadings or another extreme sanction. See Jackson v. Hunter Roberts Constr. Groups L.L.C., -- A.D.3d --, --, 29 N.Y.S.3d 170, 171 (1st Dep't May 3, 2016); McMahon v. Cobblestone Lofts Condominium, 134 A.D.3d 646, 646 (1st Dep't 2015). However, Dr. Paksima must provide an affidavit explaining how he compiled the records that he produced, stating (as his counsel asserts here) that he has produced all the records in his possession, and indicating why he produced the records in three parts and in this form.

The Court denies the application to strike the errata sheet. The changes are not substantive, and the brief delay was not prejudicial.

On behalf of P.A. Corsi and NYU's motion for summary judgment, New York licensed orthopedic surgeon Dr. Elton Strauss, their medical expert, opines that P.A. Corsi was not responsible for the actions of the doctor or of those limited actions she undertook at the direction of the doctor. See Vaccaro v. St. Vincent's Medical Center, 71 A.D.3d 1000, 1003 (2nd Dep't 2010). This is the basis for P.A. Corsi's motion for dismissal. In response, plaintiff claims that P.A. Corsi failed to follow Dr. Paksima's orders because although she allegedly reported to the doctor that plaintiff was experiencing pain she did not ask plaintiff when his post-operative pain began. Even if true, this is not sufficient to show a deviation since the doctor was in charge of plaintiff's care, and it is not sufficient to show how this alleged deviation proximately caused plaintiff's injury. Compare to Zapata v. Buitriago, 107 A.D.3d 977, 978 (2nd Dep't 2013) (physician's assistant allegedly failed to wash hands or use gloves when administering cortisone shot to plaintiff, allegedly resulting in staph infection). Moreover, if the doctor needed the information and it was not in the P.A.'s notes, he bore the responsibility of getting the answer. As movants point out in their reply papers, plaintiff's additional arguments also lack merit.

NYU additionally argues that, contrary to plaintiff's contention, it did not employ Dr. Paksima. The doctor himself testified that he received salary from "NYU" but that he was not sure of which department or part of NYU employed him. NYU provides the affidavit of Nicole Delts, the assistant director of employee and labor relations at NYU Langone. She states, based on her review of the employment records, that Dr. Paksima was employed by the school of medicine

and not by the hospital. Moreover, as NYU points out, plaintiff was referred to Dr. Paksima as a private patient and was not referred to NYU in particular.

For the reasons above, therefore, it is

ORDERED that plaintiff's motion for summary judgment is denied except to the extent that, within 30 days of entry of this order, Dr. Paksima shall provide an affidavit explaining how he compiled the records that he produced, stating that he has produced all the records in his possession, and indicating why he produced the records in three parts and in this form ; and it is further

ORDERED that NYU and P.A. Corsi's motion to dismiss the claims against them is granted. The Clerk is directed to enter a judgment of dismissal and to amend the caption accordingly, and all further papers shall use the amended caption; and it is further

ORDERED that the parties are directed to appear in Part 6, 60 Centre Street, room 345 on August 2, 2016, at 9:30 a.m. for a pretrial conference.

Dated: *July 14*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.