

Strickland v Petrizzo

2017 NY Slip Op 32284(U)

October 24, 2017

Supreme Court, New York County

Docket Number: 805249/14

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ANGELA STRICKLAND and JOHN STRICKLAND,

Plaintiffs,

INDEX NO. 805249/14

-against-

ANTHONY PETRIZZO, D.O. and NYU HOSPITAL
FOR JOINT DISEASES,

Defendants.

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JOAN A MADDEN, J.:

This is an action for medical malpractice in connection with back surgery performed by Dr. Petrizzo on plaintiff Angela Strickland on December 13, 2012, specifically a lumbar laminectomy at L3, L4 and L5 and posterior lumbar spinal fusion at L4-L5. Plaintiff's Verified Bill of Particular alleges one departure – that the surgery should not have been performed due to Mrs. Strickland's low platelet count. Plaintiffs allege that as a result of such departure Mrs. Strickland developed a foot drop of her right foot which has not resolved.

Defendants Dr. Petrizzo and NYU Hospitals Center s/h/a NYU Hospital for Joint Diseases move for summary judgment dismissing the complaint in its entirety with prejudice (motion seq. #001).¹ In the alternative, defendant NYU Hospitals Center ("NYU") moves for summary judgment dismissing the complaint as against it based on the statute of limitations, which is pleaded as a defense in the answer. Defendant NYU asserts that plaintiff was

¹Plaintiffs oppose defendants' motion, but only with respect to the dismissal of Dr. Petrizzo. The day after oral argument and submission of defendants' summary judgment motion, plaintiffs served and filed a motion to "supplement" the bill of particulars (motion seq. no. 002). Motion sequence nos. 001 and 002 are consolidated for determination herein.

discharged from the hospital on December 18, 2010, which is the last day of accrual for any claims against it. The action was commenced three years and seven months later on July 25, 2014, after the expiration of the 2½ year statute of limitations for medical malpractice.

Plaintiffs' opposition is silent as to the statute of limitations issue, so they have conceded that the action against NYU is time-barred.. The complaint, therefore, is dismissed as against defendant NYU Hospitals Center s/h/a NYU Hospital for Joint Diseases. The remaining issue is whether defendant Petrizzo is entitled to summary judgment.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that "in treating the plaintiff, there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id. Specifically, a defendant asserting that the treatment did not depart from accepted medical standards must provide an expert opinion that is detailed, specific and factual in nature. See Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on the facts in the record or those personally known to the expert, and defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

Once defendant makes a prima facie showing, the burden shifts 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 Hospital, 68 NY2d 320, 324-325 (1986). In a medical malpractice action, “to avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.” Roques v. Nobel, supra at 207. To meet this burden, “plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” Id. Where conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

Applying the foregoing standards, the Court finds that defendant Petrizzo has satisfied his burden by submitting expert medical affirmations from Dr. Thomas Mauri, an orthopedic surgeon and Dr. Jacob Rand, a hematologist. Dr. Rand states that plaintiff’s platelet count of 146,000 on November 29, 2010 was not in any way contraindication for her planned surgery and that no reasonable internist, hematologist or surgeon would have cancelled or postponed plaintiff’s spinal surgery based solely on that 146,000 platelet count. Dr. Mauri explains that the actual number of platelets in the blood is not even the primary concern in assessing a patient’s ability to clot, as the size, shape and function of the available platelets is far more important from a hematologic standpoint. He also states that “to the extent plaintiff alleges that the hematoma development following spinal surgery was in any way affirmatively caused and/or exacerbated by plaintiff’s platelet count of 146,000 fifteen days prior to surgery, I find that allegation to be

nonsensical, and wholly unsupported by any known and credible medical literature or teaching and/or understanding in the field of hematology.”

In opposition, plaintiffs’ attorney submits a 1½ page affirmation simply arguing that a dispute exists between experts who differ on the “issues of platelet counts” which can only be resolved at trial. However, plaintiffs’s medical affirmation from Dr. Michael R. Golding, a retired thoracic and cardiovascular surgeon, is not only conclusory, but more importantly, completely silent as to the issue of platelet counts. Thus, in the absence of an expert medical affirmation addressing the departure identified in plaintiffs’ bill of particulars regarding Ms. Strickland’s low platelet count, plaintiffs have failed to rebut defendants’ prima facie showing, and defendants are entitled to summary judgment.

The day after defendants’ motion for summary judgment was argued and submitted, plaintiffs served and filed a motion (motion seq. no. 002) to supplement their bill of particulars to add the following new departures: “misreading of the CT scan” and “in failing to perform an immediate surgical procedure on December 13, 2010, and instead delaying the surgery until December 15, 2010, therefore permitting the hematoma to grow which caused or aggravated the foot drop.” Defendants oppose the motion as procedurally and substantively improper, and devoid of merit. The Court agrees.

Although plaintiffs have denominated their motion as a motion to supplement the bill of particulars, it is actually a motion to amend the bill of particulars, since plaintiffs are seeking to add new allegations as to defendants’ departures, in support of new and distinct theories of liability. See Frye v. Montefiore Medical Center, 100 AD3d 28 (1st Dept 2012); Jurkowski v. Shehan Memorial Hospital, 85 AD3d 1672 (4th Dept 2011). “Leave to amend a bill of particulars

may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant.” Tuapante v. LG-39, LLC, 151 AD3d 999, 1000 (2nd Dept 2017); see Biondi v. Behrman, 149 AD3d 562, 564 (1st Dept 2017).

“It is axiomatic that a plaintiff, however, cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers.” See id at 563-564. Here, plaintiffs’ motion to amend the bill of particulars, made immediately after defendants’ summary judgment motion was argued and submitted, is essentially an effort to make an end run around the foregoing rule. Defendants’ motion was argued and submitted on July 13, 2017; plaintiffs filed and served their motion the next day, July 14, 2017. Before receiving the May 23, 2017 affirmation of plaintiff’s expert, Dr. Golding, for the first time in opposition to their summary judgment motion, defendants had no notice of the new claims, as they were not mentioned in the pleadings or the depositions, and they are not directly related to the theory in the bill of particulars which is limited to Ms. Strickland’s low platelet count. See id. Plaintiffs’ assertion that defendants were “informed” of the potential new claim based on the “expert’s report” served a “few months ago,” is misleading, as the “expert’s report” is the same May 23, 2017 affirmation of Dr. Golding submitted in opposition to defendants’ summary judgment motion.

The proposed amendment not only involves new factual allegations and raises new theories of liability, but is also lack merit. See Biondi v. Behrman, supra; Alcala v. Soundview Health Center, 77 AD3d 591 (1st Dept 2010). Plaintiffs rely solely on the same conclusory affirmation of Dr. Golding, submitted in opposition to defendants’ summary judgment motion.

Dr. Golding fails to explain the basis for the departures and how they relate to Ms. Strickland's injuries. His theories that there was a "delay between operation #1 on December 13, 2010 and operation #2 on December 15, 2010," and that the CT scan "was misread on December 13, 2010," are speculative and without support in the record. Dr. Golding fails to explain why the two-day period between the original spinal surgery and the second procedure to remove the hematoma that had developed in the interim, constituted a "delay" and how such "delay" resulted in Ms. Strickland's foot drop condition. He further fails to annex a copy of the CT scan, nor identify precisely what was shown on the CT scan that was "misread" on December 13, 2010 and explain how such misreading relates to Ms. Strickland's foot drop condition.

Based on the foregoing, plaintiffs' motion to supplement/amend the bill of particulars is denied, and defendants' motion for summary judgment is granted and the complaint in its entirety is dismissed.

Accordingly, it is

ORDERED that defendants' motion (motion seq. no. 001) for summary judgment is granted, and the complaint in its entirety is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' motion (motion seq. no. 002) to supplement/amend the bill of particulars is denied.

DATED: October 24, 2017

ENTER:


HON. JOAN A. MADDEN
J.S.C.