

Nunez v Wright

2017 NY Slip Op 32657(U)

November 2, 2017

Supreme Court, Bronx County

Docket Number: 300880/09

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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MARIA NUNEZ,

Plaintiff(s)

- against -

INDEX NO: 300880/09

JASON WRIGHT, M.D., CARYN ST. CLAIR,
M.D., DAN BURKE, M.D., KIMBERLY MATHIS,
M.D. VIVEK MOITRA, M.D., JED BRUDER,
M.D., KATHERINE FITZGERLAD, RN, NILDA
TANTUAN-FLORES, RN, and NEW YORK
PRESBYTERIAN HOSPITAL,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Motion by defendant Vivek Moitra, M.D., for summary judgment is decided as follows.

This is a medical malpractice action. Plaintiff, a 50 year old morbidly obese woman, with a past history of hysterectomy and removal of an ovary, was seen at the New York Presbyterian Hospital Clinic for left abdominal pain. An ultrasound showed a pelvic mass and a mass at her cervix. Plaintiff elected to undergo surgery and Dr. Moitra was the attending anesthesiologist for the September 10, 2007 surgery performed by co-defendant, Dr. Jason Wright. Pre-operatively, Dr. Moitra saw plaintiff at 7:21 on the morning of the surgery following the pre-anesthesia

evaluation by the resident assigned to this case. Dr. Moitra reviewed the pre-operative tests and pre-operative lab results and it was his duty to determine whether plaintiff was a candidate for surgery and anesthesia. As such, he needed to evaluate her risk for bleeding. The risk factor he identified was obesity, which necessitated more complicated surgery. In his opinion, none of the lab results indicated an elevated risk for bleeding. Plaintiff was in the OR at 7:40 a.m. and ready for anesthesia at 8:00 a.m. Surgery commenced at 8:31 a.m. and ended at 1:23 p.m. Ms. Nunez left the OR at 1:25 p.m. At the conclusion of the surgery plaintiff was extubated. There is no documented exam by Dr. Moitra after extubation. He did not see plaintiff again prior to her discharge from the PACU at 6:45 p.m.

Initially, plaintiff's cause of action for lack of informed consent is dismissed. Dr. Moitra has established that five days before the surgery plaintiff executed a consent form. In opposition, plaintiff failed to challenge this prima facie showing of entitlement to dismissal of the lack of informed consent claim and, as a result, said claim is dismissed.

Dr. Moitra has provided the Court with the affirmation of an expert, Dr. Brusco, who is Board Certified in Anesthesiology, Critical Care Medicine, and Internal Medicine along with medical records from New York Presbyterian Hospital and deposition testimony. Dr. Moitra argues that he neither departed from the standard of care in treating plaintiff nor did any of his acts or omissions cause the plaintiff's

injuries. Based on the evidence provided by movants, it was demonstrated that Ms. Nunez was not anemic prior to the surgery as all of her pre-operative blood work was within normal limits. Dr. Moitra showed that he did a thorough and proper pre-anesthesia evaluation and that he provided appropriate anesthetic agents throughout the surgery. He established that he monitored the plaintiff's vital signs and fluid levels throughout and that plaintiff tolerated the surgery well from an anesthesia prospective. Additionally, Dr. Moitra used the deposition testimony of Dr. Wright, a surgeon, to demonstrate that he had achieved homeostasis and Ms. Nunez was not actively bleeding at the time of the surgery. He established that no transfusion was required during the surgery and that even if she had received a transfusion it would not have prevented internal bleeding as transfused blood does not contain the clotting factors necessary to control bleeding. Dr. Moitra has also submitted evidence to show that there were no signs of internal bleeding such as unstable vital signs, low urine output, low blood pressure, pain, shortness of breath or elevated heart rate while she was under his care or for the following twelve hours. Finally, Dr. Moitra established that he was not responsible for plaintiff after she left the PACU (post-anesthesia care unit) at 6:45 p.m. on September 10, 2007. As such, the Court finds that movant has satisfied his burden of proof as a proponent of a motion for summary judgment and successfully shifted the burden to plaintiff to provide proof, in admissible form, sufficient to raise a triable issue of fact. See Alvarez v. Prospect Hospital, 68 N.Y.2d 322 (1986).

In opposition, plaintiff argues that she was admitted to the defendant hospital for elective gynecological surgery for a left adnexal mass and endo-cervical polyp but ended up suffering a massive intra-abdominal bleed which caused her to go into cardiopulmonary arrest resulting in extensive hospitalization. In support of her opposition, plaintiff has provided the Court with the affirmation of an expert, whose name has been redacted, who opines that Dr. Moitra departed from good and accepted standards of practice, operatively, intra-operatively and post-operatively, The Court notes that this physician is Board Certified in Critical Care Medicine. He opines that Dr. Moitra failed to properly evaluate plaintiff preoperatively, failed to recognize the significance of her preoperative labs including borderline high coagulation profile, failed to recognize that plaintiff lost a significant amount of blood during the surgery and that the loss of blood, combined with the administration of crystalloid fluid, caused her preoperative borderline high coagulation profile to elevate into the abnormal range. He also opines that the expert failed to test her blood levels intra-operatively, failed to administer blood during or at the end of the surgery and failed to properly monitor her postoperatively in the PACU.

In reply, defendants argue that as Dr. Moitra is a Board Certified Anesthesiologist and because the plaintiff's expert specializes in critical care and is not licensed or trained to administer anesthesia in the operating room his opinions with regard to matters herein exceed the scope of his education and training. Defendant points out that a witness may not testify as a medical expert until he

establishes his knowledge of the relevant standard of care and where an expert seeks to testify outside of his area of expertise he must first lay a foundation for his opinions and demonstrate that he possesses the requisite skill to render a reliable opinion. See Applewhite v. Accuhealth Inc. 81 A.D.3rd 94 (1st Dept. 2010). This court disagrees with defendant and holds that plaintiff's expert is sufficiently qualified and competent to render an opinion in opposition to Dr. Moitra's motion.

Recently, the court in Severino v. Weller, ___A.D.3rd___, 2017 NY Slip Op 01325 (1st Dept., 2017) wrote:

"Summary judgment pursuant to CPLR 3212 permits a defendant to dispose of a case promptly where claims lack merit. It is not intended to deprive a plaintiff of the right to adjudicate claims where factual issues exist. In this case, we adhere to the rule that summary judgment is not authorized in a medical malpractice action where the parties adduce conflicting opinions of medical experts (citation omitted)."

Here, plaintiff by its expert, has sufficiently raised issues of facts that make resolution of the claims against Dr. Moitra by summary judgment impossible. This is not to diminish, in any way, the compelling nature of Dr. Moitra's arguments. However, a nisi prius court's role in the determination of a summary judgment motion in a medical malpractice action is not to evaluate the arguments qualitatively but to determine whether there is a sufficient factual dispute as reflected by conflicting expert opinions.

Dr. Moitra's motion for summary judgment is denied except to the extent that summary judgment was granted on the informed consent claim.

So ordered.

Dated: 11/2/17



 Douglas E. McKeon, J.S.C.