Bones v Spencer
2017 NY Slip Op 33483(U)
November 21, 2017
Supreme Court, Westchester County
Docket Number: Index No. 58563/2015
Judge: Charles D. Wood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANGEL M. BONES,

DECISION & ORDER
Index No. 58563/2015
Sequence Nos. 1&2

Plaintiff,

- against -

ERIC M. SPENCER, M.D., PATRICK EVIA, P.T., and SOUTHERN WESTCHESTER ORTHOPEDICS & SPORTS MEDICINE ASSOCIATES, P.C.,

Defendants.

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WOOD, J.

The following documents were read in connection with defendant Patrick Evia, P.T., ("Evia") motion for summary judgment (Seq 1); cross-motion by plaintiff (Seq 2); and opposition by Eric M. Spencer MD and Southern Westchester Orthopedics & Sports Medicine Associates, P.C. (collectively, "Spencer Defendants")

Evia's Amended Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
Plaintiff's Notice of Cross-Motion, Counsel's Affirmation, Exhibits.
Spencer Defendants' Counsel's Affirmation in Opposition to Plaintiff's Cross-Motion, Exhibits, Plaintiff's Counsel's Reply Affirmation, Exhibits
Plaintiff's Counsel's Affirmation in Reply, Exhibits.
Evia's Counsel's Affirmation in Reply.

Plaintiff commenced the instant action by electronically filing a summons and complaint on May 12, 2015, to recover for personal injuries allegedly sustained by treatment provided by defendants after his rotator cuff repair surgery. Plaintiff is a police officer with the NYPD. In 2012, while on the job, plaintiff was involved in a motor vehicle accident. On June 22, 2012,

plaintiff presented to Southern Westchester Orthopedics & Sports Medicine Associates, PC. for an orthopedic evaluation following the accident. Orthopedic surgeon Eric Spencer, MD, diagnosed plaintiff with a labrum tear in his right shoulder. On November 13, 2012, plaintiff underwent surgery performed by Dr. Spencer at St. John's Riverdale Hospital. On December 28, 2012, Spencer referred plaintiff to Evia for PT for plaintiff's injured shoulder. In addition, plaintiff had follow up post operative appointments with Spencer, who gave him a Cortisone shot in the area. Before administering the shot, Spencer had plaintiff raise his arm to determine range of motion in shoulder. As plaintiff complied, Spencer allegedly tried to push plaintiff's arm higher, and a pop sound came from his shoulder. This increased plaintiff' pain. When plaintiff returned to Spencer on February 15, 2013, he reported complaints of pain in his shoulder with extreme stiffness.

Evia now brings a motion for summary judgment dismissing plaintiff's complaint with prejudice. Plaintiff's cross motion seeks to strike defendants' Answers or in the alternative for the court to give an adverse inference against defendants at the time of trial for missing portions of plaintiff's medical records.

Upon the foregoing papers, the motions are decided as follows:

It is well settled that a proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986];

see Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez at 324).

Generally, a hospital has a duty to safeguard the welfare of its patients even from harm inflicted by third persons measured by the capacity of the patient to provide for his or her own safety; however, this sliding scale of duty is limited, and it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance (N.X. v Cabrini Med. Ctr., 97 NY2d 247 [2002]).

The Second Department has found that "the distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" (D'Elia v Menorah Home & Hosp. for Aged & Infirm, 51 AD3d 848, 850 [2d Dept 2008]). Thus, when the complaint challenges the medical facility's performance of functions that are "an integral part of the process of rendering medical treatment" and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in

medical malpractice (D'Elia v Menorah Home & Hosp. for Aged & Infirm, 51 AD3d 848, 851 [2d Dept 2008]).

To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care at the facility where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of the injury (Elliot v Long Island Home, Ltd., 12 AD3d 481, 482, [2d Dept 2004]).

In support of Evia's motion for summary judgment (Seq 1), he points to plaintiff's testimony that while undergoing examination and treatment for an unrelated shoulder injury, he was re-injured during an office visit with the Spencer Defendants.

Evia also offers the affidavit of physical therapist Elaine Rosen. She reviewed plaintiff's medical records and verified bill of particulars. In her opinion, there is nothing in plaintiff's chart or deposition testimony showing that any action or omission of Evia proximately caused the complained of injury. The PT exercises employed by Evia were proper and within the applicable standard of care. Rosen notes that plaintiff testified that he believes that he was injured after a visit with his orthopedist and not Evia. Rosen concludes that she does not find anything in the patient's records which demonstrate that the exercises selected, or the manner in which they were executed, caused or contributed to plaintiff's injuries. Evia properly evaluated plaintiff when he presented for physical therapy and administered exercises in accordance with the applicable standard of care.

Evia himself testified that he did not believe plaintiff sustained a rotator cuff tear during PT because a rotator cuff usually requires a violent traumatic movement or action. Evia argues that plaintiff cannot demonstrate that his injuries were caused by the negligence of Evia.

From this record, Evia has met his initial burden to his entitlement to summary judgment.

In opposition, plaintiff offers the expert opinion from Aleksandr Dekhtyarev, a physical therapist licensed in New York, who is familiar with the diagnosis and treatment of labral and rotator cuff injuries. The expert recites that as part of a more aggressive physical therapy, Evia applied pressure to push plaintiff's hand upward to achieve a range of motion as close to 180 as possible. Evia failed to actually read the report and failed to appreciate that plaintiff underwent a repair of the rotator cuff on November 12, 2012, which constituted a departure from accepted physical therapy standard of care. Thus, Evia did not formulate an appropriate course of PT. In January 2013, Evia utilized weights during physical therapy exercises. By February 3, 2013, Evia already utilized five pound weights for bicep curls, chest press, and shoulder press. And performed seated rows using 45 pounds weights. The expert believes that it was premature to start PT exercises using weights in the first month of PT rehabilitations following plaintiff's injury. Using five pound weights for bicep curls, chest press and shoulder press was excessive in view of a recent labral and rotator cuff repair. Using weights this early in PT significantly increases the risk of re-injury. It is his opinion that commencement of PT with weights in the first month of physical therapy was premature and a substantial contributing factor to re-injury of the rotator cuff.

Plaintiff also offers the expert affirmation of Jonathan Vigdorchik, MD a physician certified by the American Board of Orthopaedic Surgery. He is familiar with the diagnosis and treatment of labral and rotator cuff injuries, and has seen and treated patients with such injuries. Although Evia acknowledged that he restricted plaintiff's PT regimen in view of his recent surgical history of a labral repair, his restriction did not take into account the history of a rotator cuff repair. It is his opinion that improper, premature and excessive PT performed by Evia was a

substantial contributing factor to the rotator cuff injury sustained by plaintiff which required surgical repair.

In light of this evidence, there is a triable issue of fact as to whether the alleged premature and excessive PT performed by Evia was a substantial contributing factor to the rotator cuff injury sustained by plaintiff which required surgical repair. There is evidence in the record that suggests that PT in this case, should have been gradual and monitoring improvement or regression is essential so as not re-injure the rotator cuff. These evidentiary submissions raised a triable issue of fact that the treatment provided by Evia was consistent with the instructions set forth in the prescriptions issued by Spencer Defendants; deviated from good and accepted physical therapy practices, as to whether the alleged overly aggressive administration of physical therapy was a proximate cause of the plaintiff's second surgery to his rotator cuff (Shank v Mehling, 84 AD3d 776, 778 [2d Dept 2011]).

Turning to plaintiff's cross-motion, the Spencer Defendants' counsel represents that as the two daily progress reports in question have been located after having been misfiled, and have been provided to plaintiff, his cross-motion is moot. As detailed in the affidavit of Linda Aiello, Southern Westchester's Custodian of Records, the records in question were not previously disclosed due to inadvertence and misfiling between multiple files of the plaintiff, rather than any willful or contumacious conduct. Plaintiff claims that having certified the previously exchanged medical record as complete, Spencer Defendants should not be permitted to supplement the record after the Note of Issue was filed.

In view of the reasonable excuse provided by Ms. Aiello, and the lack of prejudice to the plaintiff, plaintiff's cross-motion is **denied**.

Regarding informed consent, Evia asserts that there is no evidence that plaintiff raised objections to PT or that he would not have submitted to it had he been informed of risks associated with treatment. The record shows that he voluntarily participated in PT. In opposition, plaintiff have failed to raise a triable issue of fact. Thus, any cause of action related to informed consent by Evia is dismissed.

Accordingly, based on the foregoing, it is

ORDERED, that defendant Evia's motion for summary judgment (Seq 1) dismissing the complaint is **denied**, except that the cause of action relating to Informed Consent by Evia is **dismissed**; and it is further

ORDERED, that the parties are directed to appear at the Settlement Conference Part on Jan. 9, 2018, at 9:15 AM in Room 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601; and it is further

ORDERED, that plaintiff's counsel shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service.

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: November 21, 2017
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF