

Weiss v Whang
2018 NY Slip Op 30570(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 805098/14
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MARK WEISS,

Index No. 805098/14

Plaintiff,

Decision & Order

-against-

Motion Seq. 003

WILLIAM WHANG, M.D., COLUMBIA DOCTORS
and NEW YORK-PRESBYTERIAN HOSPITAL,

Defendants.
-----X

Martin Shulman, J.:

In this medical malpractice action, defendants William Whang, M.D. (Dr. Whang), Columbia Doctors and The New York and Presbyterian Hospital s/h/a New York-Presbyterian Hospital (NYPH), move pursuant to CPLR 3212 for summary judgment dismissing the complaint. Plaintiff Mark Weiss (Mr. Weiss or plaintiff) opposes the motion.

This action arises from plaintiff's first pacemaker implantation. The complaint alleges that Dr. Whang departed from accepted standards of care by mis-diagnosing plaintiff's condition and causing him to undergo unnecessary and unwarranted pacemaker insertion. Plaintiff alleges vicarious liability as to NYPH and Columbia Doctors.

Factual Background

Plaintiff first presented to Dr. Whang, a cardiologist, on September 22, 2010, having been referred to him by his internist after an abnormal electrocardiogram (EKG).¹ He had a long history of abnormal EKGs but denied

¹ An EKG detects and records the heart's electrical activity.

any history of dizziness or syncope (i.e., loss of consciousness or fainting). After reviewing Mr. Weiss' EKG Dr. Whang determined he had a right bundle branch block² and left anterior hemiblock.³ Dr. Whang diagnosed conduction disorder and recommended a conservative approach to treatment which included annual EKGs.

On June 6, 2012 plaintiff experienced his first documented syncopal episode. His internist's assessment included hypertension and intraventricular conduction delay. He recommended ten days of cardiac monitoring, the results of which Dr. Whang reviewed and found to be insignificant⁴ and not warranting potentially invasive further testing.

Subsequently, on September 4, 2012 Mr. Weiss had a second syncopal episode while in Scotland, which resulted in him falling and sustaining head trauma and a concussion. On September 17, 2012 he presented to his internist, who called Dr. Whang upon learning of the second episode.

Concerned about the two recent episodes and plaintiff's underlying conduction disease, Dr. Whang recommended implanting a pacemaker to prevent further episodes and potential resulting injuries, as well as to obtain diagnostic information regarding plaintiff's heart rhythm if syncope were to recur.

² Bundle branch block is a delay or obstruction of the pathway electrical impulses travel to make the heart beat.

³ A left anterior hemiblock occurs when the left bundle branch is unable to conduct electrical impulses to the left ventricle.

⁴ Dr. Whang noted no heartbeat irregularity and only ten seconds of supraventricular tachycardia.

Dr. Whang implanted a dual chamber pacemaker on September 24, 2012. On November 7, 2012 he reviewed the cardiac events the pacemaker had recorded and observed that, despite having the pacemaker in place, plaintiff experienced a syncopal episode. From this Dr. Whang concluded the episode was unrelated to a heart rhythm condition.

Mr. Weiss subsequently complained of discomfort and a diminished quality of life. He indicated he wanted the pacemaker removed and although Dr. Whang urged plaintiff to keep the device in place since there was still a high risk of heart block and cardiac related syncopal episodes, on February 5, 2013, Dr. Whang removed it. Dr. Whang last saw Mr. Weiss on February 11, 2013 for a post-operative follow-up appointment. He documented swelling on the incision site and up plaintiff's neck, which is common after removing a pacemaker.

Plaintiff underwent various procedures and testing at the direction of other physicians from March 2013 through March 2015, at which time he was diagnosed with thoracic outlet syndrome (TOS).⁵ Mr. Weiss experienced a recent syncopal episode on June 7, 2017, again while in Scotland. At that time he had bradycardia (low heart rate) of 27 beats per minute and an EKG revealed complete heart block. A single chamber pacemaker was implanted that day.

Plaintiff's bill of particulars alleges in relevant part that Dr. Whang: implanted a pacemaker in response to episodes of syncope and in the presence

⁵ TOS occurs when blood vessels or nerves in the space between the collarbone and first rib are compressed, potentially causing shoulder and neck pain. Additional symptoms include arm pain and swelling, blood clots, and numbness, tingling and weakness in the arms and neck.

of a right bundle-branch block/left anterior hemiblock; implanted the pacemaker without sufficient basis to conclude that plaintiff was becoming bradycardic secondary to arrhythmia;⁶ failed to follow American College of Cardiology guidelines for device based therapy of cardiac rhythm abnormalities; failed to first use an implantable loop recorder to investigate any relationship between plaintiff's syncope and arrhythmia or bradycardia; and improperly implanted the device as a diagnostic tool without properly investigating other possible causes of plaintiff's condition. Mr. Weiss claims he suffered the following injuries: incision site swelling; cellulitis and inflammation at incision site; surgery to remove the pacemaker; brachial vein occlusion; brachial angioplasty; limb swelling; lymphedema; persistent and permanent left upper extremity dysfunction (edema, weakness and pain); and subclavian vein stenting.

DEFENDANTS' EXPERT

In support of their motion for summary judgment dismissing the complaint, defendants submit an expert affirmation from Laurence Mark Epstein, M.D. (Dr. Epstein), who is board certified in cardiac electrophysiology, cardiovascular disease and internal medicine (Motion at Exh. A). Dr. Epstein states that he has been a board certified physician for more than 25 years. Dr. Epstein offers the following opinions within a reasonable degree of medical certainty:

- cardiac monitoring after Mr. Weiss' first syncopal episode of June 6, 2012 revealed only insignificant supraventricular tachycardia, thus Dr. Whang did not deviate from the standard of care by not ordering an invasive

⁶ Arrhythmia occurs when the heart's electrical impulses happen too fast, slow or erratically, causing the heart to beat too fast, slow or erratically.

electrophysiology study (EPS) to test his heart's electrical conduction system;

- given his conduction disease, after Mr. Weiss' second syncopal event, where he sustained a head injury, he was seriously at risk for further syncopal episodes and it was reasonable for Dr. Whang to attempt to prevent such occurrences by recommending pacemaker implantation;
- based upon plaintiff's medical history and syncopal episodes, he was at high risk for bradycardia,⁷ which can be corrected by implanting a pacemaker;
- Dr. Whang's recommendation to implant the first pacemaker was in accordance with the American College of Cardiology/American Heart Association's (AHA) Class 2A Guideline from 2008 to 2012, which provides that pacemaker insertion was appropriate in patients with possible bradycardia;
- the June 7, 2017 syncopal episode and placement of a second pacemaker validates Dr. Whang's treatment of plaintiff, who progressed from having right bundle branch block/left anterior hemiblock to a complete block;
- plaintiff's ultimate development of bradycardia and complete heart block demonstrate that the first pacemaker was indicated, and had it not been removed would likely have prevented the June 7, 2017 episode;
- Mr. Weiss' complaint of left shoulder pain likely is due to a preexisting condition as evidenced by his internist's records; and
- TOS is a well known cause of venous obstruction and occlusion and likely contributed to plaintiff's symptomology, rather than the pacemaker implantation and explanation.

PLAINTIFF'S EXPERT

In opposition, Mr. Weiss submits an affidavit from Bruce D. Charash, M.D.

(Dr. Charash), who is board certified in cardiology (Ruffo Aff. in Opp., Exh. C).

Dr. Charash avers within a reasonable degree of medical certainty that:

⁷ Dr. Epstein explains that bradycardia is a condition characterized by a slower than normal heart rate, which can cause dizziness, chest pains, shortness of breath and syncope.

- because the cardiac monitoring after plaintiff's first syncopal event did not indicate any heartbeat irregularity that would explain the syncope, Dr. Whang should have done a further work-up of plaintiff with EPS to establish the severity of his conduction disease, as EPS would have revealed that his conduction disease was unrelated to the first syncope;⁸
- AHA guidelines mandate that the decision to insert a pacemaker in the presence of conduction disorder requires that bradycardia be the documented cause for the syncope, whereas Dr. Whang implanted a pacemaker solely as a diagnostic tool;
- as neither of plaintiff's first two syncopal events was related to bradycardia, pacemaker implantation was not indicated;
- the standard of care requires that other causes of syncope be ruled out prior to implanting a permanent pacemaker, which can cause vein occlusion, upper extremity edema and lymphedema as it did with plaintiff;
- the fact that plaintiff's 2017 syncopal episode was linked to bradycardia and required a second pacemaker to be implanted at that time does not validate Dr. Whang's implanting the first pacemaker five years previously; and
- Dr. Epstein's conclusion that plaintiff's symptoms are related to TOS is misplaced and not supported by the records, in that TOS does not cause venous occlusion, the occlusion causes TOS.

DISCUSSION

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andrea v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York*

⁸ Contrary to Dr. Epstein, Dr. Charash states that EPS is a minimally invasive procedure.

Univ. Med. Ctr., 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979).

In deciding the motion, the court views the evidence in the light most favorable to the nonmoving party and gives him the benefit of all reasonable inferences that can be drawn from the evidence. See *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985). Moreover, the court should not pass on issues of credibility. *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad, supra*), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Freedman v Chemical Constr. Corp.*, 43 NY2d 260 (1977); see also, *Friends of Animals, Inc., supra*.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury." *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 (1st Dept 2009) (citation omitted). A defendant physician seeking summary judgment must make a prima facie showing establishing the absence of a triable issue of fact as to the alleged departure from accepted standards of medical practice (*id*).

In opposition, "a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice'." *Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d at 325. "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor (citation omitted)." *Id.* However, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment. *Id.*, citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (2002).

In this case, neither plaintiff nor defendants challenges the qualifications of their respective experts, and the record reveals that both parties' experts have extensive experience in cardiology. Additionally, both sets of experts base their opinions on their review of Mr. Weiss' medical records as well as the pleadings and deposition transcripts herein. Therefore, it appears that both experts are qualified to offer their opinions. *See Frye v Montefiore Med. Ctr.*, 70 AD3d at 24-25; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008) ("whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court . . .").

Plaintiff does not argue that defendants fail to meet their burden of proof on this motion for summary judgment but instead points to multiple conflicts

between the experts' opinions. For the reasons set forth below, this court agrees that issues of fact preclude summary judgment in defendants' favor.

In simplistic terms, Dr. Epstein concludes that Dr. Whang properly implanted the pacemaker to prevent further syncopal events and potential traumatic injury resulting therefrom. While acknowledging that it is possible that syncopal events can be non-cardiac related, as was the case with Mr. Weiss' first two such episodes, in such event the pacemaker would yield beneficial diagnostic information. Dr. Whang denies plaintiff's claim that the pacemaker was implanted solely as a diagnostic tool, claiming it was also a preventive measure.

Plaintiff's position is that Dr. Whang improperly implanted the pacemaker, a permanent device, after only two syncopal events in the absence of bradycardia and solely as a diagnostic tool. He concludes that this "erroneous decision to implant caused plaintiff injury consistent with vein occlusion which still manifests with chronic left upper extremity lymphedema and dysfunction." Charash Aff. at ¶6. By not ruling out non-cardiac causes for Mr. Weiss' syncopal events prior to implantation, Dr. Whang deviated from the standard of care.

The experts' conflicting affidavits regarding the appropriate standard of care and AHA guidelines⁹ create an issue of fact as to whether the pacemaker implantation Dr. Whang performed was indicated at the time. There is a dispute as to whether Dr. Whang should have performed additional testing to determine

⁹ The court was not provided with a copy of the subject AHA guideline and therefore is unable to confirm the parties' interpretations of it.

the cause of plaintiff's first two syncopal episodes. A trier of fact must resolve this issue, and the court notes that defendants' reply papers do not include a further expert affidavit refuting plaintiff's expert's opinion.

Further, as to Mr. Weiss' alleged injuries, an issue of fact exists as to whether his left shoulder pain was due to a preexisting condition or to venous occlusion resulting from the pacemaker's implantation and explantation. The experts also disagree as to the affect, if any, plaintiff's TOS may have had on his venous occlusion.

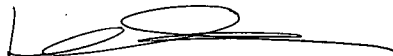
Finally, in light of this court's denial of this motion as to Dr. Whang, dismissal of the claims for vicarious liability against Columbia Doctors and NYPH must also be denied. Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

Counsel for the remaining parties are directed to appear for a pre-trial conference at Part 1 MMSP, 60 Centre St., Room 325, New York, New York on June 5, 2018 at 9:30 a.m. In the event that no settlement can be reached, counsel shall be prepared on that date to stipulate to a firm trial date in Part 40 TR.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
March 29, 2018



HON. MARTIN SHULMAN, J.S.C.