

Reynolds v Glass

2018 NY Slip Op 31645(U)

April 17, 2018

Supreme Court, Suffolk County

Docket Number: 15-604951

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 15-604951
CAL. No. 16-02157MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 6-13-17 (003)
MOTION DATE 9-19-17 (004)
ADJ. DATE 9-26-17
Mot. Seq. # 003 MD
004 MD

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KENNETH A. REYNOLDS,

Plaintiff,

MCBREEN & KOPKO
Attorney for Plaintiff
500 North Broadway, Suite 129
Jericho, New York 11753

- against -

KENNETH S. GLASS, M.D., LONG ISLAND
ORTHOPEDIC SURGERY & SPORTS
MEDICINE,

Defendants.

CHESNEY & NICHOLAS, LLP
Attorney for Defendants
485 Underhill Blvd., Suite 308
Syosset, New York 11791

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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated April 28, 2017; Notice of Cross Motion and supporting papers by plaintiff for sanctions, dated August 29, 2017; Answering Affidavits and supporting papers by plaintiff, dated August 29, 2017; Replying Affidavits and supporting papers by defendants, dated September 15, 2017; by plaintiff, dated September 26, 2017; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the Court, *sua sponte*, recalls and vacates its prior order dated December 18, 2017; and it is

ORDERED that the Court now issues the following order in its place and stead:

ORDERED that the motion by defendants for summary judgment dismissing the complaint is denied; and it is further

ORDERED the cross motion by plaintiff seeking sanctions against defendants for making a summary judgment motion is denied.

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Plaintiff Kenneth Reynolds commenced this action to recover for personal injuries allegedly caused by defendants' medical malpractice, *inter alia*, in repairing plaintiff's Achilles tendon and causing a deep vein thrombosis (DVT). Issue has been joined, discovery is complete, and a note of issue has been filed.

Defendants now move for summary judgment in their favor dismissing the complaint. In support of the motion, they submit, among other things, copies of the pleadings; the deposition transcripts of plaintiff, Kenneth Glass, M.D., Joseph Kozlowski, and Ekaterini Hatzis, D.O.; plaintiff's medical records; and the expert affirmation of Philip A. Robbins, M.D.

Plaintiff opposes the motion and cross-moves for sanctions, including attorney fees and costs, pursuant to 22 NYCRR 130-1.1. In support of the cross motion, plaintiff submits his own affidavit, the expert affidavit of Anthony Mechree, M.D., expert affirmations of William Purtill, M.D., and Brian Durkin, M.D., various correspondence, and the deposition transcript of Marni Reynolds.

Plaintiff testified that on October 8, 2012 he injured his left Achilles tendon playing tennis. On October 9, 2012, he presented to orthopedic surgeon, Dr. Kenneth Glass, and an MRI confirmed that plaintiff ruptured his Achilles tendon. Medical records indicate that on October 17, 2012, Dr. Glass performed an Achilles tendon repair and placed plaintiff in a long leg cast (above the knee) to immobilize the operative site. On October 19, 2012, Dr. Glass "windowed" the cast and provided plaintiff with crutches. On November 13, 2012, Dr. Glass removed the cast and placed a splint on plaintiff's leg. He also prescribed a CAM walker, an orthopedic device prescribed for the treatment and stabilization of severe sprains, fractures, and tendon or ligament tears in the ankle or foot. Medical records from Dr. Glass do not reflect that plaintiff complained of pain or that plaintiff's leg was swollen. Plaintiff testified that he complained to Dr. Glass of pain, numbness, tingling, burning, discoloration and swelling in his left leg. From November 16, 2012 through March 22, 2013, Dr. Glass saw plaintiff on nine occasions. Dr. Glass testified that every time he examined plaintiff there was no evidence of deep vein thrombosis (DVT). Dr. Glass also prescribed physical therapy, which began on December 6, 2012 and continued until March 26, 2013. Medical records from Gold Coast Physical Therapy indicate that on multiple visits plaintiff had "profuse swelling," tingling, gait restriction, edema, and numbness in his left foot.

From March 22, 2013 through April 14, 2015, plaintiff was seen by internists Karrine Genovese, M.D., and Ekaterini Hatzis, D.O., cardiologists Gregory Macina, M.D., and Alice Cavanagh, M.D., and a urologist, Howard Lynn, M.D. On August 20, 2013, Dr. Hatzis, who was treating plaintiff for diabetes, noted in plaintiff's medical records "some swelling at plaintiff's left heel/Achilles" and "trace edema from tendon repair," now two years old. On October 30, 2014, Dr. Hatzis noted "chronic joint pain and chronic joint stiffness." The urologist, Howard Lynn, M.D., treated plaintiff for erectile dysfunction and hypogonadism, a condition in which the body does not produce enough testosterone. Dr. Lynn prescribed and administered testosterone injections to plaintiff. On August 15, 2014, September 9, 2014, and December 1, 2014, Dr. Lynn injected plaintiff with testosterone. Medical records indicate that plaintiff was also self-injecting testosterone every nine to ten days.

On April 14, 2015, plaintiff presented to Ali Guy, M.D., a physical medicine and rehabilitation physician. According to the medical records, plaintiff reported "[h]e was fine with intermittent bouts of pain, but now for the past several weeks, he has been noticing persistent left calf pain, left ankle pain, and

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hamstring pain.” He also complained of numbness in his left dorsal foot. Dr. Guy ordered a left lower doppler venous study and that test revealed thrombus within the proximal femoral vein. On April 15, 2015, at St. Catherine of Siena Medical Center, plaintiff was examined by Dr. Hatzis, and an additional doppler study confirmed evidence of the DVT. Dr. Hatzis ordered a consultation with vascular surgeons William Purtill, M.D. and David Landau, M.D. Thereafter, plaintiff underwent five lumbar sympathetic nerve block surgeries for pain reduction.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant must establish through medical records and competent expert affidavits that it did not deviate or depart from accepted medical practice in the treatment of the plaintiff or that it was not the proximate cause of plaintiff’s injuries (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]). To satisfy this burden, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the bill of particulars (*see Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]; *Ward v Engel*, 33 AD3d 790, 822 NYS2d 608 [2d Dept 2006]). Conclusory statements that do not address the allegations in the pleadings are insufficient to establish entitlement to summary judgment (*see Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 924 NYS2d [2d Dept 2011]). A physician owes a duty of reasonable care to his or her patients and will generally be insulated from liability where there is evidence that he or she conformed to the acceptable standard of care and practice (*see Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Barrett v Hudson Valley Cardiovascular Assoc., P.C.*, 91 AD3d 691, 936 NYS2d 304 [2d Dept 2012]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]).

Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 5088 NYS2d 923 [1986]). Once the defendant makes a prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp., supra; Kelley v Kingsbrook Jewish Med. Ctr.*, 100 AD3d 600, 953 NYS2d 276 [2d Dept 2012]; *Fiorentino v TEC Holdings, LLC*, 78 AD3d 911 NYS2d 146 [2d Dept 2010]). In a medical malpractice action, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party’s prima facie showing (*see Bhim v Dourmashkin*, 123 AD3d 862, 999 NYS2d 471 [2d Dept 2014]; *Hayden v Gordon*, 91 AD3d 819, 937 NYS2d 299 [2d Dept 2012]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Schichman v Yasmer*, 74 AD3d 1316, 904 NYS2d 218 [2d Dept 2010]).

Here, Dr. Glass and Long Island Orthopedic Surgery & Sports Medicine have established a prima facie case of entitlement to summary judgment. Their expert, Dr. Philip A. Robbins, a board certified orthopedic surgeon, opines that the care provided by Dr. Glass and Long Island Orthopedic Surgery & Sports Medicine was in keeping with the standards of good and accepted orthopedic practice and did not depart from the relevant standard of care. He also opines that Dr. Glass did not play a role in causing plaintiff to develop a DVT. He specifically opines that treatment rendered by Dr. Guy to plaintiff was significant as

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the United States Food and Drug Administration issued a warning on June 19, 2014, that testosterone increased the risk of blood clots in veins.

In opposition, plaintiff relies on the expert affidavit of Dr. Anthony Mechree, a board certified orthopedic surgeon from Rhode Island, and the affirmations of treating vascular surgeon Dr. William Purtill and treating anesthesiologist Dr. Brian Durkin. The affidavit of Dr. Mechree is not in admissible form for two reasons. First, it is not properly sworn to as it indicates that it was sworn to on July 6, 2017 before Debra A. Russotti, whose commission expires February 27, 2012. The document also fails to indicate the state in which Debra Russotti is a notary, and plaintiff fails to provide a certificate of conformity (CPLR 2309). More importantly, Dr. Mechree fails to state in his affidavit that he is familiar with the standard of care in orthopedic medicine in New York State in 2012 through 2015 (*Deadwyler v North Shore University Hosp. at Plainview*, 55 AD3d 780, 866 NYS2d 306 [2d Dept 2008]). Accordingly, the affidavit was not considered by the court.

However, plaintiff has raised triable issues of fact based upon the affirmation of Dr. Purtill, who opines that plaintiff's blood clots formed after his Achilles surgery in October of 2012, and that there were clear departures from the accepted standard of care by Dr. Glass which caused plaintiff to develop the blood clots. He opines that placing plaintiff, who is overweight, and diabetic, in a long leg cast dramatically increased plaintiff's risk of forming blood clots. He also opines that the failure to prescribe anticoagulant medication for plaintiff "enhanced the devastating progressive and permanent effects of the blood clots" in plaintiff's leg. Finally, Dr. Purtill opines that there are significant large patient population studies that have found no correlation between the use of testosterone and formation of DVT. Accordingly, defendants' motion to dismiss the complaint is denied.

Turning to the cross motion for imposition of sanctions and an award of attorneys fees, the motion is considered under 22 NYCRR 130-1.1, and is denied. The court finds that defendants did not engage in motion practice which constitutes frivolous conduct as that term is defined in 22 NYCRR 130-1.1 (c) (*see McGee v J. Dunn Constr. Corp.*, 54 AD3d 1009, 864 NYS2d 167 [2d Dept 2008]).

Dated: April 17, 2018

Mauro L. Cla
A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION