

Thomas v Farrago

2018 NY Slip Op 32280(U)

September 14, 2018

Supreme Court, Kings County

Docket Number: 505880/14

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of September, 2018.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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CHARLES J. THOMAS, as guardian of the property of MAGOMED ABDUSALAMOV, an incapacitated person, BAKANAY ABDUSALAMOV, individually, PATIMAT ABDUSALAMOV, SHAKRIZAT ABDUSALAMOV and SAYGIBAT ABDUSALAMOV as infants, by their mother and natural guardian BAKANAY ABDUSALAMOV,

Plaintiffs,

- against -

MATTHEW D. FARRAGO, ANTHONY G. CERRERI, M.D., OSRIC S. KING, M.D., GERARD P. VARLÓTTA, D.O., BARRY D. JORDAN, M.D. and BENJAMIN ESTEVES, JR.,

Defendants.

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The following papers numbered 1 to 12 read herein:

Decision / Order

Index No. 505880/14

Motion Seq. 42 & 44

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-4</u>	<u>5-6</u>
Opposing Affidavits (Affirmations) _____	<u>7-10</u>	<u>11</u>
Reply Affidavits (Affirmations) _____	<u>12</u>	

Upon the foregoing papers, defendant Gerard P. Varlotta, D.O. (Dr. Varlotta) cross-moves (in motion sequence 42) for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint as against him with prejudice. In addition, Dr. Varlotta

cross-moves (in motion seq. 44) for an order, pursuant to 22 NYCRR § 130-1.1 (Part 130), “imposing sanctions and costs associated with addressing the issues relating to this cross-motion.”¹

Background

The Boxing Match

This personal injury action arises out of a professional heavyweight boxing match (Boxing Match) between Magomed Abdusalamov (Abduslamov) and Ismaikel Perez (Perez), which was one of the matches that took place on November 2, 2013 at the Theatre at Madison Square Garden (MSG). During the Boxing Match, neither boxer was knocked down or was knocked out; both boxers threw punches and defended themselves until the conclusion of the Boxing Match.

Dr. Varlotta was a ringside physician at the Boxing Match whose primary role was to assess Abduslamov and Perez *after* the Boxing Match, which ended at approximately 10:51 p.m. Dr. Varlotta was not assigned to either boxer’s corner. Dr. Varlotta was also responsible for assessing the boxers in the other boxing matches held at MSG on November 2, 2013.

Dr. Varlotta’s Examination

Dr. Varlotta, who arrived ringside during the Boxing Match, observed Abduslamov at ringside from approximately 10:35 p.m. until the end of the Boxing Match. Dr. Varlotta

¹ Plaintiffs’ motion for summary judgment as against defendants Anthony G. Curreri, M.D. (Dr. Curreri), Osric C. King, M.D. (Dr. King) and Dr. Varlotta (motion seq. 37) was withdrawn.

observed as Abduslamov exited the ring, as Abduslamov walked toward the back door of the arena, up the stairs, through two hallways and into the locker room at about 10:57 p.m. According to Dr. Varlotta, Abduslamov did not exhibit any neurological signs or symptoms.

Dr. Varlotta examined Abduslamov after the Boxing Match in the locker room, at which time Dr. Varlotta noted that Abduslamov did not manifest any neurological issues. Dr. Varlotta observed that Abduslamov was oriented as to person, place and time, and Dr. Varlotta asked Abduslamov for recall information, which Abduslamov was able to provide. Dr. Varlotta administered the King-Devick (KD) test to Abduslamov, both before and after the Boxing Match, which is an information recall test that is used to evaluate whether a person has sustained a concussion. For the KD test, Dr. Varlotta measured Abduslamov's recall times with a stop watch and recorded them. According to Dr. Varlotta, Abduslamov's post-bout performance on the KD test was less than five seconds different from his pre-bout KD test results, which Dr. Varlotta deemed to be insignificant. Dr. Varlotta instructed Abduslamov to stand, and observed his eye motions, felt his face and asked Abduslamov to perform facial movements. In the locker room, Dr. Varlotta also performed a balance test and observed Abduslamov walk. Dr. Varlotta inquired and noted that Abduslamov had no complaints of a headache.

During the examination, Dr. Varlotta saw no symptoms suggesting that Abduslamov had sustained any brain trauma, a brain bleed or a subdural hematoma. Dr. Varlotta completed his examination and documented his findings and also noted that Abduslamov had a laceration above his left eye (requiring suturing) and a possible nasal fracture (requiring x-

rays) on an Accident Report. Dr. Varlotta exited Abduslamov's locker room at 11:10 p.m. to examine Perez in his locker room, at which time ophthalmologist Dr. Curreri, who was present during Dr. Varlotta's examination, conducted his own evaluation of Abduslamov.

***Abduslamov First Exhibited Symptoms
of Neurological Distress After Leaving MSG***

At approximately 11:46 p.m., Abduslamov and his team left the locker room and exited MSG. At 11:52 p.m. (more than 45 minutes after Dr. Varlotta's examination), Abduslamov began to manifest signs of neurological distress and vomited outside of MSG. Abduslamov left MSG in a taxi with some of his team at 11:57 p.m. and they asked to be taken to Roosevelt Hospital. According to the Roosevelt Hospital records, Abduslamov arrived at the Emergency Department at 12:31 a.m. CT scans of the brain, face and cervical spine were ordered at 12:40 a.m. At 12:54 a.m., Abduslamov received a head CT scan, at which time he was diagnosed with a left-sided subdural hematoma, moderate mass effect and mild left-to-right midline shift resulting in transtentorial herniation. Abduslamov underwent neurosurgery at approximately 1:56 a.m.² to relieve intracranial pressure. Thus, it took Roosevelt Hospital about an hour and 25 minutes to begin surgery from the time Abduslamov arrived in the Emergency Department.

² Because at 2:00 a.m. on November 3, 2013 daylight savings time ended and the clocks reverted back 1 hour, it is unclear what time Abduslamov's surgery actually began.

The Medical Malpractice Action

On June 26, 2014, Abdusalamov's guardian and his family commenced this personal injury action, asserting seven causes of action against the ringside physicians, including Dr. Varlotta, and others involved with the Boxing Match.

After issue was joined, Dr. Varlotta successfully moved to dismiss all causes of action asserted against him *except* the first cause of action for medical malpractice/negligence and the fourth cause of action asserted by Abdusalamov's wife for loss of consortium. Plaintiffs' bill of particulars alleges that the ringside physicians, including Dr. Varlotta:

"were negligent and/or committed malpractice in that they deviated from the standard(s) of care applicable in the medical community in New York in that they failed to terminate the aforesaid professional boxing match when a medical provider in his position would have concluded that plaintiff MAGOMED ABDUSALAMOV had sustained severe physical and/or mental punishment and/or was in danger of sustaining life threatening injury or debilitation; failed to recognize, diagnose, and/or appreciate the significance of blood found in Plaintiff's urine along with signs, symptoms and complaints of progressive nausea, vomiting, headache, malaise, facial/skull fracture(s), disorientation, compromised coordination, alteration of speech pattern, lethargy and vertigo indicative of a closed traumatic brain injury during, after and at the conclusion of the aforesaid boxing match; failed to order, direct, recommend, advise, refer, provide and/or ensure meaningful, effective, purposeful, suitable, adequate, proper and appropriate emergency medical treatment as was necessary to immediately identify, diagnose, attend [to] the Plaintiff MAGOMED ABDUSALAMOV; failed to perform or refer Plaintiff MAGOMED ABDUSALAMOV for necessary diagnostic tests, including x-rays, CT-scans and MRIs; failed to perform or refer Plaintiff MAGOMED ABDUSALAMOV for necessary surgical consultations; failed to have any communication with the emergency room personnel and/or other hospital personnel regarding the need for emergency care, the need to be seen on a stat

basis, the need for emergency surgery and/or the need for emergent diagnostic testing; failed to properly, sufficiently and/or adequately examine the Plaintiff MAGOMED ABDUSALAMOV during and/or after the aforesaid professional boxing match; in falsely reassuring the Plaintiff, MAGOMED ABDUSALAMOV, and his family, that the injuries were less severe than they were in actuality; failed to direct, ensure and/or prescribe that the Plaintiff MAGOMED ABDUSALAMOV be immediately taken by ambulance to the nearest trauma center for emergency medical treatment; in instructing Plaintiff MAGOMED ABDUSALAMOV to take a cab to obtain medical treatment rather than directing him to take an ambulance and/or other EMS vehicle to the nearest trauma center; in causing, permitting and/or allowing a significant, more than two and one-half-hour delay in the evacuation of the Plaintiff MAGOMED ABDUSALAMOV's left-sided acute subdural hematoma, timed from when the fight should have been stopped and/or from the time the prize fight was actually stopped at 10:51 p.m. on November 2, 2013, which proximately caused the permanent and lifelong disability sustained by Plaintiff MAGOMED ABDUSALAMOV."

Dr. Varlotta's Summary Judgment Cross Motion

After the note of issue was filed, Dr. Varlotta cross-moved for summary judgment dismissing the first and fourth causes of action with prejudice. Dr. Varlotta contends that the medical care that he rendered to Abdusalamov was appropriate and that his alleged departures were not a proximate cause of Abdusalamov's injury.

Dr. Varlotta submits an expert affidavit from Dr. Michael Schwartz, the Chief Ringside Physician for the State of Connecticut and the founder of the American Association of Professional Ringside Physicians. Dr. Schwartz attests that he is familiar with injuries resulting from boxing matches "including the *rare* occurrence of a brain bleed such as a subdural hematoma . . ." (emphasis added). Dr. Schwartz opines that "the care and treatment

rendered by Dr. Varlotta to Mr. Abdusalamov was at all times in accordance with good and accepted medical practice [and] that Dr. Varlotta's care was not a proximate cause of the injuries claimed by Mr. Abdusalamov."

Dr. Schwartz, who observed a video of the Boxing Match, opines that "[a] boxer who was experiencing coordination-related signs of a brain injury or subdural hematoma would not have demonstrated the level of coordination which Mr. Abdusalamov demonstrated throughout the match [and] there was no reason to have stopped the match." While Dr. Schwartz notes that Abdusalamov's face was "bruised and swollen" at the end of the Boxing Match, he opines that "[t]hese conditions, by no means, raise a suspicion that a boxer has, or is at risk for a brain bleed, much less demonstrate that a boxer has a subdural hematoma."

According to Dr. Schwartz, "[v]ideo footage reveals that [after the Boxing Match], Mr. Abdusalamov was aware, interactive and he was not showing any adverse neurological signs, including while the result was announced with him standing at the center of the ring and then as he left the ring." Dr. Schwartz also opines that "[v]ideo of Mr. Abdusalamov descending the stairs from the ring to the floor further undermines any claim that he had a symptomatic brain injury or subdural hematoma at that point." Dr. Schwartz opines that "Dr. Varlotta appropriately observed Mr. Abdusalamov at ringside after the match and then as he walked back to and entered the locker room [and] Abdusalamov did not demonstrate any potential neurological signs . . . as he walked toward the door at the back of the arena, up the stairs, through a door, and then through two hallways before entering the door that led to the locker room."

Dr. Schwartz further opines, based on deposition testimony, that “Dr. Varlotta conducted an appropriate post-match locker room evaluation of Mr. Abdusalamov in all respects.” Regarding the KD test that Dr. Varlotta administered to Abdusalamov, Dr. Schwartz attests that it “had nothing to do with screening for a subdural hematoma” and “per test protocol, the post-bout KD test was not significant for a possible concussion.” Dr. Schwartz notes that “[w]hile Mr. Abdusalamov was with Dr. Varlotta, Mr. Abdusalamov did not have slurred speech, he had no issues with his gait, balance or coordination, he did not report nausea or vomiting and did not report a headache in particular.” Dr. Schwartz opines that “the findings from the examination described by Dr. Varlotta are inconsistent with a boxer manifesting neurological signs or symptoms and his clearance of Mr. Abdusalamov from a neurological perspective was appropriate and in full accord with the standard of care for post-match evaluation of boxers.”

In response to the affidavit of plaintiffs’ expert, Dr. Rodolfo D. Eichberg,³ Dr. Schwartz notes that Dr. Eichberg “does not specify in any reasonable way why Dr. Varlotta should have suspected that Mr. Abdusalamov had a brain injury . . .” and “does not point to any signs or symptoms that Mr. Abdusalamov purportedly experienced in MSG at all, let alone in Dr. Varlotta’s direct presence, which would raise the suspicion that Mr. Abdusalamov had a brain bleed.” Dr. Schwartz opines that “the number of head blows a boxer sustains is not a sufficient basis (even when coupled with facial bruising and swelling)

³ Plaintiffs submitted Dr. Eichberg’s expert affidavit in support of their summary judgment motion, which was withdrawn. Dr. Eichberg’s affidavit is now considered in opposition to Dr. Varlotta’s summary judgment cross motion.

to ‘suspect’ a brain injury or brain bleed and to send a boxer to the emergency department or to keep him in the arena for further extended observation, monitoring or reassessment.” Dr. Schwartz explains that “[t]here is no correlation between the number of head blows received by a boxer and the index of suspicion for a brain injury or brain bleed.” Dr. Schwartz also opines that “[o]nce Dr. Varlotta completed his evaluation of Mr. Abdusalamov in the locker room, Dr. Varlotta had absolutely no duty in accordance with the standard of care, to reassess Mr. Abdusalamov in the arena or plan for ‘watchful waiting’ based on what his findings were during the locker room assessment.”

Dr. Varlotta also submits the expert affirmation of Dr. Steven Allen Sparr, who is board certified in Internal Medicine and Neurology with a subspecialty certification in Vascular Neurology and Neuro-Rehabilitation. Dr. Sparr, like Dr. Schwartz, opines that “Abdusalamov did not manifest any signs or symptoms of possible neurological injury in connection with the boxing match at issue until approximately 11:52 p.m. when he was outside of MSG” and that Dr. Varlotta’s medical care was not a proximate cause of Abdusalamov’s traumatic brain injury.

Dr. Sparr explains that a subdural hematoma, which Abdusalamov experienced, is “a collection of blood below the dura and above the arachnoid membrane which covers the surface of the brain.” According to Dr. Sparr:

“Mr. Abdusalamov decompensated very quickly and severely. He went from not exhibiting any neurological signs at the time of his evaluation by Dr. Varlotta or as he left the locker room and MSG to evidencing potential neurological signs a few minutes after he left MSG. This demonstrates that Mr. Abdusalamov’s brain bleed

expanded extremely rapidly. It is uncommon for an individual with this type of TBI⁴ to present the way Mr. Abdusalamov did. . . . Here, Mr. Abdusalamov exhibited no apparent neurological signs or symptoms until one hour and one minute after the conclusion of the match and then severely deteriorated within a very short period of time.”

Dr. Sparr notes, based on the Roosevelt Hospital records, that “intracranial pressure relief from surgery would not have commenced until at least one hour and 45 minutes after [Abdusalamov’s] arrival to the emergency department [at 12:31 a.m.]” and “his brain had herniated. . . . by about 12:54 a.m. as evidenced on the head CT scan[.]” Dr. Sparr thus opines that “Mr. Abdusalamov’s skull would not have been unroofed early enough to have avoided herniation and his outcome would have been the same if he had continued to be observed at MSG until possible signs or symptoms suggestive of a subdural hematoma became apparent.”

Dr. Sparr also explains that if Abdusalamov had been taken to the hospital by ambulance immediately after the locker room evaluations “his case would have only been of moderate priority as he had no apparent possible neurological signs or symptoms before 11:52 p.m.” Based on the actual timing of the work up at Roosevelt Hospital, Dr. Sparr opines that “pressure relief from surgery would not have commenced until an hour and 45 minutes, at the earliest, after the time he began to show possible neurological signs at 11:52 p.m. or at about 1:37 a.m. However, his brain had herniated much earlier, by about 12:54 a.m. as evidenced on the head CT scan, therefore Mr. Abdusalamov’s skull would not have

⁴ Traumatic brain injury.

been opened early enough for it to have made any difference in his outcome in this scenario
...”

Plaintiffs' Opposition

Plaintiffs, in opposition, argue that Dr. Varlotta and the other ringside physicians “essentially abandoned [Abdusalamov] when they should have either kept him under their supervision through the ‘golden hour’ post bout; or sent him to a hospital for observation via an ambulance for further medical observation.” Plaintiffs’ counsel argues that “[t]he blaring departure in this case is that the fight doctors simply cleared [Abdusalamov] too early to be able to safely determine that his injuries did not require prompt medical and/or surgical attention.”

Plaintiffs submit Dr. Eichberg’s expert affidavit, in which he opines that:

“the fight doctors (collectively and individually) departed from standards of accepted medical practice when they abandoned [Abdusalamov] less than 30 minutes following the end of his November 2, 2013 bout against Mike Perez, by neither continuing to medically monitor/observe him for an hour or more, nor placing him in a scheme of care designed for continued monitoring/observation in a hospital setting where timely medical/surgical intervention could be offered to [Abdusalamov] in the event of a change in his condition.”

Dr. Eichberg further attests that “sometimes symptoms of severe brain injury are delayed and don’t present right away.” Dr. Eichberg opines that “[t]he video footage from MSG confirms that within the hour following the final bell, [Abdusalamov] exhibited telltale signs of traumatic brain injury in the form of headache, lethargy, nausea, instability, and vomiting. But because the fight doctors had prematurely and improperly discharged themselves from

caring for [Abdusalamov], *they were ignorant of these symptoms* when they occurred” (emphasis added).

Dr. Varlotta’s Reply

Dr. Varlotta, in reply, notes that plaintiffs concede the fact that Abdusalamov did not exhibit any neurological signs or symptoms until *after* he left MSG and was outside of the presence of Dr. Varlotta. Defense counsel contends that “plaintiffs are using impermissible hindsight retrospective reasoning to try to hold Dr. Varlotta liable.” Regarding causation, defense counsel argues that:

“According to our vascular neurology expert . . . even assuming either of plaintiffs’ claims that MR. ABDUSALAMOV should have been taken to the ED immediately after the locker room evaluations or that MR. ABDUSALAMOV should have been monitored at MSG until 11:50 p.m., surgery to relieve intracranial pressure would not have occurred until after there was brain herniation, the point when plaintiffs claim significant and permanent brain damage occurred.”

Discussion

To establish liability for medical malpractice, a plaintiff must prove two elements: first, that the defendant deviated or departed from accepted community standards of practice and, second, that such departure was a proximate cause of the plaintiff’s injuries (*Leavy v Merriam*, 133 AD3d 636 [2015]). “On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby” (*id.* [emphasis added]). The departure element is distinct from the causation element. As the Appellate Division, Second Department, explained:

“[I]f the defendant demonstrates only that he or she did not depart from good and accepted medical practice, the plaintiff need only raise a triable issue of fact as to whether such a departure occurred. *The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff's injuries.*”

Stukas v Streiter, 83 AD3d 18 [2011] [emphasis added].

Thus, when a defendant moves for summary judgment in a medical malpractice action, he “has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby” (*Leavy*, 133 AD3d at 637). Failure to meet such burden requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Furthermore, bare allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter of law” (*Grant v Hudson Valley Hosp. Ctr.*, 55 AD3d 874, 874 [2008]).

If the defendant satisfies his burden, then the plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact (*Stukas*, 83 AD3d at 23). Typically, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” (*Feinberg v Feit*, 23 AD3d 517, 519 [2005]), as such cases present “credibility issues which can only be resolved by a jury” (*DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2012]). Summary judgment is a drastic remedy which should

only be granted “when there is no doubt as to the absence of triable issues” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In support of his summary judgment cross motion, Dr. Varlotta has satisfied his prima facie burden of establishing the absence of a departure from good and accepted medical practice *and* that Abdusalamov was not injured as a result of anything that Dr. Varlotta did. Dr. Varlotta submits the expert affidavit of Dr. Schwartz and the expert affirmation of Dr. Sparr, both of whom opine, based on uncontested facts, that Abdusalamov did not manifest signs or symptoms of neurological injury in connection with the Boxing Match until approximately 11:52 p.m. when he was already outside MSG. Importantly, Dr. Sparr opines, based on the timing of Abdusalamov’s brain bleed at about 12:54 a.m., that further observation at MSG or immediate transport from MSG to the hospital would not have prevented Abdusalamov’s brain injury.

In opposition to Dr. Varlotta’s prima facie showing that he did not deviate from the accepted standard of medical care in treating Abdusalamov and that, in any event, any deviation did not proximately cause Abdusalamov’s injuries, plaintiffs have submitted an expert opinion that, had Abdusalamov been transferred to the hospital immediately after the Boxing Match or retained at MSG for further observation after the Boxing Match, Abdusalamov’s traumatic brain injury would have been prevented. This opinion relies on hindsight and is both speculative and conclusory (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *see also Ortiz v Wyckoff Heights Med. Ctr.*, 149 AD3d 1093, 1095 [2017] [holding that “plaintiffs failed to raise a triable issue of fact, as their expert’s opinion that

additional medical testing should have been undertaken was conclusory, speculative, and based largely on hindsight reasoning”). Importantly, plaintiffs’ expert concedes that Abdusalamov first exhibited signs and symptoms of neurological distress at 11:52 p.m., *after* Dr. Varlotta completed his examination of Abdusalamov and *after* Abdusalamov had already left MSG.

Plaintiffs’ expert fails to address the fact that a CT scan at Roosevelt Hospital revealed that Abdusalamov’s brain had herniated by approximately 12:54 a.m. and that pressure relief from surgery would not have commenced until an hour and 45 minutes, at the earliest, after the time Abdusalamov began to show possible neurological signs and symptoms at 11:52 p.m. Thus, according to Dr. Varlotta’s uncontested expert opinions (based on the actual timing of the medical work up at Roosevelt Hospital), Abdusalamov’s skull would not have been opened early enough for neurological surgery to have affected the outcome. Accordingly, summary judgment dismissing the complaint as against Dr. Varlotta is warranted because the evidence shows that Dr. Varlotta did not deviate from accepted medical practice and that any alleged deviation was not the proximate cause of Abdusalamov’s injuries.

Finally, Dr. Varlotta’s cross motion for the imposition of Part 130 sanctions is denied because plaintiffs’ conduct regarding discovery does not rise to the level of frivolous or sanctionable conduct. Accordingly, it is

ORDERED that Dr. Varlotta’s summary judgment cross motion to dismiss the complaint as against him with prejudice (motion seq. 42) is granted; and it is further

ORDERED that Dr. Varlotta's cross motion for the imposition of Part 130 sanctions and costs against plaintiffs (motion seq. 44) is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**