

<b>Mari v New York City Health &amp; Hosps. Corp.</b>
2019 NY Slip Op 31785(U)
June 13, 2019
Supreme Court, New York County
Docket Number: 805354/2016
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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ANTONIO MARI

Index №.805354/2016  
Motion Seq. №. 001

**DECISION & ORDER**

Plaintiff,  
-against-

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION, REESHEMAN, COWART, DPM  
AND MARIOLA R. MORELL, M.D.

Defendants  
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**GEORGE J. SILVER, J.S.C.:**

In this medical malpractice action, defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“NYCHHC”), REESHEMAN COWART, DPM (“Dr. Cowart), MARIOLA R. MORELL, DPM s/h/a MARIOLA R. MORELL, M.D. (“Dr. Morell”) collectively “defendants”) move for summary judgment. Separately, Dr. Morell seeks to dismiss the summons and complaint as against her, claiming that the applicable statute of limitations has expired. Plaintiff ANTONIO MARI (“plaintiff”) opposes the motion in its entirety.

This action stems from plaintiff’s allegation that defendants were negligent from March 2015 to May 2016 in causing instability of the first metatarsophalangeal joint (“MPJ”) and failing to recognize a misaligned and dislocated first MPJ, thus necessitating three additional surgeries. The records indicate that plaintiff had a history of long-standing complaints relating to his right MPJ (otherwise known as his big toe), as well as five prior knee surgeries including three on his right knee and two on his left knee, a left ankle surgery, and shoulder surgery. On May 28, 2014, plaintiff presented to the emergency department of Bellevue Hospital with complaints of pain in his right big toe after bumping his foot two weeks earlier. Plaintiff related that he had previously fractured his right big toe in 2012 in Brazil. An x-ray was taken and he was referred to the podiatry

clinic of Bellevue Hospital where he was seen for his right big toe from July 9, 2014 to May 2, 2016. The records indicate that plaintiff was subsequently seen at the podiatry clinic at Bellevue Hospital by various podiatrists from July 9, 2014 to May 2, 2016 relating to his right big toe. Plaintiff was referred by another podiatrist to Dr. Cowart for surgery on November 12, 2014. He was seen for preoperative evaluation by Dr. Cowart who performed a total joint replacement on March 12, 2015, assisted by Dr. Morell. He was then placed in a CAM boot (CAM-Controlled Ankle Movement) at discharge and given crutches to ambulate. Although plaintiff was repeatedly instructed to be non-weight bearing after surgery, he walked excessively on his right foot. Consequently, he developed stress fractures on his second and third toes. It is not disputed by plaintiff that these stress fractures resolved without surgical treatment. All weight bearing x-rays taken of the right foot after the March 12, 2015 to May 2016 confirm appropriate alignment and do not show any dislocation of the implant.

Plaintiff continued to complain of pain in his right foot in the year after the surgery at issue and on July 22, 2016, underwent fusion surgery at Metropolitan Hospital. Although a bone stimulator was utilized to advance healing, there was nonunion and some screws broke. On May 22, 2017, plaintiff underwent revision fusion surgery at NYU/HJD, which again resulted in nonunion. Screws started to back out and additional screws broke. On January 18, 2018, plaintiff underwent another procedure to remove the plate and screws that had backed out. The remaining broken screws were embedded in the hallux and were left in. This fourth surgery was performed at NYU/HJD.

### ARGUMENTS

Based on the record submitted in connection with this motion, defendants argue that summary judgment in their favor is warranted, because plaintiff cannot establish that defendants' medical treatment deviated from accepted standards of care or that this treatment proximately caused plaintiff's alleged injuries.

In support of their motion, defendants annex the expert affirmation of Paul Greenberg, DPM ("Dr. Greenberg"), a board-certified foot and ankle surgeon, who explains in detail that the care and treatment rendered to plaintiff by defendants was in accordance with accepted medical practice and did not proximately cause plaintiff's asserted injuries. To be sure, Dr. Greenberg opines that Dr. Cowart performed the correct procedure in an appropriate manner on March 12, 2015. Dr. Greenberg further states that the precision of Dr. Cowart's procedure is confirmed by the fact that all the weight bearing radiology films taken after the surgery until May 2, 2016 confirm proper alignment of the implant. Dr. Greenberg further states that plaintiff's complaints of pain were treated with appropriate reminders not to walk on his right foot and to use a CAM boot.

Moreover, Dr. Greenberg affirms that the stress fractures on the second and third toes were caused by plaintiff's non-compliance in walking and putting pressure on his foot and were not caused by a misaligned or dislocated implant as plaintiff claims. Dr. Greenberg further explains that the "medial subluxation" of the first MPJ in the records does not mean the implant was dislocated or misaligned. Mild or medial subluxation, according to his affirmation, does not require surgical intervention and is not evidence that the implant was placed improperly. Rather, Dr. Greenberg affirms that "perfect" alignment was not expected in this case because plaintiff had a total joint replacement, a lengthy history of complaints relating to his right big toe, and had a prior big toe fracture occurring in Brazil many years prior.

As such, according to Dr. Greenberg, plaintiff's argument that a fusion should have been performed is flawed because both fusions performed by Dr. Rotsteyn on July 22, 2016 and Dr. Mroczek on May 22, 2017 resulted in nonunion. Consequently, plaintiff had another fusion at NYU/HJD on May 22, 2017 which again resulted in nonunion. The screws placed during the July 22, 2016 surgery which had broken were removed by Dr. Mroczek during the May 22, 2017 fusion surgery. However, Dr. Mroczek's May 22, 2017 fusion surgery also resulted in nonunion and on January 18, 2018, Dr. Mroczek removed the plate and screws that had backed out. The screws that were embedded in the hallux were not removed. Dr. Greenberg affirms that the nonunion is not evidence of negligence on the part of defendants but rather an indication of poor healing that may have been exacerbated by plaintiff's "occasional" cigarette smoking and borderline diabetes.

Defendants further contend that plaintiff does not have a valid claim for lack of informed consent since plaintiff requested the required surgical intervention, and consented to the surgery. Indeed, plaintiff requested surgery after discussing his options in detail with Dr. Morell and Dr. Cowart, among others. In addition, the risks, benefits and alternatives were set forth in an informed consent form signed by plaintiff on February 23, 2015.

Finally, defendants contend that since Morell's last involvement in plaintiff's treatment was on March 12, 2015, the statute of limitations expired as to Dr. Morell on June 9, 2016. Since plaintiff commenced this action on September 6, 2016, after the applicable statute of limitations as to Dr. Morell, defendants argue that any claims against Dr. Morell are time-barred.

In opposition, plaintiff annexes the expert affirmation of a podiatrist, who opines that the podiatric care and treatment rendered to plaintiff by defendants deviated from accepted standards of podiatric/surgical care and treatment concerning the incorrect placement of the Osteomed Reflexion implant. To be sure, plaintiff's expert attests that the implant was incorrectly placed,

which resulted in the subsequent failure of the implant and stress fractures of the adjacent toes, all requiring multiple revision surgeries. Plaintiff's expert further opines that defendants' sub-standard care was the proximate and significant causative factor contributing to the need or further revision surgery, need for removal of the implant hardware, and was a significant factor in the poor result and chronic pain which crippled plaintiff.

Plaintiff further argues that it is uncontested that Dr. Morell was a resident and employee of NYCHHC when she assisted Dr. Cowart at the time of the surgery. Plaintiff further states that it is also uncontested that she testified that although she did not place the implant at the surgery, she assisted Dr. Cowart in the surgery, and testified that she reviewed the immediate post-op x-ray and agreed that it was correctly placed. Plaintiff further highlights that Dr. Morell testified that she continued in her residency program through 2015. As such, plaintiff contends that the statute of limitations was tolled as against Dr. Morell as an employee of NYCHHC and that she should remain in this case. Moreover, plaintiff contends that the issues of fact highlighted by plaintiff's expert affirmation can only be properly resolved by a jury, thereby necessitating the denial of defendants' motion.

In reply, defendants reiterate their position that they are entitled to judgment in their favor as well as full dismissal of all claims against Dr. Morell on statute of limitations grounds.

### **DISCUSSION**

To prevail on summary judgment in a medical malpractice case, a hospital and the physicians therein must demonstrate that they did not depart from accepted standards of practice or that, even if they did, they did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature

(see e.g., *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once a 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 material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that defendant departed from accepted medical practice and that the departure proximately caused the injuries (see *Roques*, 73 AD3d at 207). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the factfinder (*id.*).

Moreover, actions against a municipal entity such as NYCHHC are governed by McKinney's Unconsolidated Laws of N.Y. § 7401 which, in relevant part, provides that such action may not be commenced "more than one year and ninety days after the cause of action thereof shall have accrued" (see *Mignott v. New York City Health and Hospitals Corp.*, 250 AD2d 165 [2d Dept. 1998][one year and 90 day statute of limitations applicable to medical malpractice actions against NYCHHC and its employees]).

Here, as to defendants' claims regarding the viability of this action against Dr. Morell, it is unpersuasively challenged that Dr. Morell's last direct involvement with the treatment of plaintiff was on March 12, 2015. Therefore, the applicable statute of limitations expired as to Dr. Morell on June 9, 2016. Plaintiff does not dispute that he commenced this action on September 6, 2016, after the applicable statute of limitations expired as to Dr. Morell. Instead, absent any reference to a binding authority, plaintiff argues that the statute of limitations should be extended as to Dr. Morell because Dr. Morell continued to be employed as a resident until June 30, 2015. This argument, that continued employment absent direct involvement in care, can serve as a basis for tolling the statute of limitations runs athwart to the mandates of McKinney's Unconsolidated Laws of N.Y. § 7401. Endorsing it would have dire consequences for physicians, who would arguably face the prospect of having to defend lawsuits for care rendered from the beginning of their employment through retirement, assuming continued employment at the same facility. Moreover, the fact that Dr. Morell, a third-year resident at the time of plaintiff's surgeries, did not disagree with the interpretations of her supervisor, Dr. Cowhart, regarding the postoperative non-weight bearing film taken in the recover room, does not mean that she should be held liable for the injuries plaintiff is alleging. Accordingly, the court finds that all claims asserted by plaintiff as against Dr. Morell are time-barred.

Turning to the merits of defendants' summary judgment motion, the court finds that defendants have set forth a prima facie case in favor of dismissal, as evidenced by the submission of the relevant medical records and testimony, as well as Dr. Greenberg's affirmation, which explains in detail that the care and treatment rendered to plaintiff by defendants was in accordance with accepted medical practice and did not proximately cause plaintiff's asserted injuries. To be sure, Dr. Greenberg's affirmation is detailed, and contains findings in support of the proposition

that Dr. Cowart performed the correct procedure in an appropriate manner on March 12, 2015. Dr. Greenberg cites the confirmation of alignment of the implant in weight bearing radiology films taken after the surgery until May 2, 2016 as evidence that Dr. Cowart performed the surgery on plaintiff correctly. Dr. Greenberg states that Dr. Cowart properly dealt with plaintiff's complaints of pain by reminding plaintiff not to walk on his right foot and to use a CAM boot. As such, Dr. Greenberg concludes that plaintiff's treatment was proper and within the requisite standard of care. As defendants have made a prima facie showing through the submitted proofs, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324, *supra*).

In response to defendants' prima facie showing, plaintiff's own expert affirmation raises triable issues of fact with respect to whether Dr. Cowhart incorrectly placed plaintiff's implant. To be sure, plaintiff's expert attests that the implant was incorrectly placed, which resulted in the subsequent failure of the implant and stress fractures of the adjacent toes. Contrary to Dr. Greenberg's conclusion that further revision surgeries would have been required regardless of how Dr. Cowhart performed plaintiff's surgery, plaintiff's expert opines that plaintiff's multiple revision surgeries were required because Dr. Cowhart performed plaintiff's surgery negligently. Indeed, plaintiff's expert opines that defendants' sub-standard care was the proximate and significant causative factor contributing to the need for further revision surgery, need for removal of the implant hardware, and was a significant factor in the poor result and chronic pain which crippled plaintiff. Because defendants have not adequately debunked the conclusions drawn by plaintiff's expert, enough issues of fact exist to defeat defendants' prima facie showing. Accordingly, defendants are not entitled to summary judgment as a matter of law.

However, as plaintiff does not challenge the dismissal of claims against defendants premised on lack of informed consent, those claims are dismissed.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is DENIED, except as to dismissal of plaintiff's claims premised on lack of informed consent, which is GRANTED; and it is further

ORDERED that defendants' motion for dismissal of all claims against Dr. Morell based on the expiration of the applicable statute of limitations, is GRANTED; and it is further

ORDERED that the caption of this case is amended to read as follows:

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ANTONIO MARI

Index No.805354/2016

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, REESHAMAN, COWART, DPM.

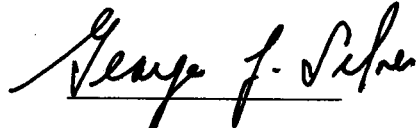
Defendants

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; and it is further

ORDERED that the remaining parties are directed to appear for a conference before the court on Tuesday July 30, 2019 for a pre-trial conference before the court at the courthouse located at 111 Centre Street, Room 1240, at 9:30 AM (Part 10).

This constitutes the decision and order of the court.

Dated: June 13, 2019

  
HON. GEORGE J. SILVER