

**Monroe v Rosen**

2019 NY Slip Op 31813(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 805221/15

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

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VERNON EARL MONROE, JR and MARTA GREEN,

INDEX NO. 805221/15

Plaintiffs,

-against-

ANDREW ROSEN, M.D. and EMPIRE STATE  
ORTHOPAEDICS, PLLC,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging medical malpractice and lack of informed consent, defendants Andrew Rosen, M.D. and Empire State Orthopaedics (Empire) (together the “Empire defendants”) move for summary judgment dismissing the complaint against them. Plaintiffs oppose the motions with respect to the cause of action for medical malpractice and do not oppose the motion with respect to the lack of informed consent, and defendants’ motion is granted as to that cause of action.

Background

Plaintiff’s claims for medical malpractice involve allegations that defendants departed from accepted medical practice regarding the care rendered to plaintiff Vernon Earl Monroe, Jr. (“plaintiff” or “Mr. Monroe”) by Dr. Rosen between June 25, 2013 and September 10, 2013, in connection with a right knee arthroscopy performed by Dr. Rosen. Specifically, plaintiffs allege that Dr. Rosen failed to diagnose a post-operative infection which resulted in septic arthritis, required surgeries, and ultimately a full knee replacement.

Plaintiff, a former professional basketball player, became a patient of Dr. Rosen on June

25, 2013, for concerns involving his right knee pain. Dr. Rosen recommended a right knee arthroscopy with partial meniscectomy and debridement, which Dr. Rosen performed on July 10, 2013, together with a chondroplasty of the patella and synovectomy of the patellofemoral plica. The operative notes and report indicate that the surgery was uneventful and there were no surgical complications. The knee surgery was an ambulatory procedure and plaintiff was discharged to his home by 10:30 am that same day, and the Recovery Room Discharge Summary timed at 10:30 am states that Mr. Monroe was able to ambulate, had no pain and there was no discharge from the wound.

Plaintiff was provided with Post-Operative Instructions which warned that “despite great care, any incision can become infected. If the site becomes red, swollen or shows pus or new drainage, call the office immediately.” At his deposition, Dr. Rosen testified that a sign of a post operative infection can include the discharge of fluid from the knee. Specifically, he testified that an infection of the knee can develop post operatively and that “[o]ne of the common findings with an infection within a knee would be an extra amount of fluid..[and that] the fluid can exit body.” (Rosen EBT at 11).

At his deposition, plaintiff testified that after the surgery on Friday, July 12, 2013, he felt “pretty good,” and that on the Saturday he “noticed some drippings coming out of the holes on my knee ...it was running down my leg” (Plaintiff’s EBT at 329). Plaintiff described the drippings as “greenish, because it made stains on my sock and down my leg” (Id at 330). When he called Dr. Rosen’s office on Monday (July 15, 2013) to complain about the drippings, he was told “to wait until tomorrow (i.e. Tuesday, July 16, 2013), since he had a post-operative appointment with Dr. Rosen that day. Plaintiff testified that before the July 16, 2013 office visit

in addition to the green drippings, he noticed that his knee was “starting to puff up a bit” (Id at 332), and that he reported light bleeding from the knee to Dr. Rosen at the July 16, 2013 visit (Id at 333). According to plaintiff, Dr. Rosen examined his knee and told him “that it was okay, [and that] I should just put Band-Aid on it.”

In opposition to the summary judgment motion, plaintiff submits his affidavit in which he states, as he testified at his deposition, that when he noticed greenish fluid dripping from his knee on July 15, 2013, he called Dr. Rosen’s office and was instructed to wait until the next day. In his affidavit, plaintiff further states that when he saw Dr. Rosen, he “specifically told him what his complaints were, which included oozing and dripping from the right knee, pain and tenderness.”

Dr. Rosen testified at his deposition that at plaintiff’s July 16, 2013 office visit he examined plaintiff’s surgical wounds, found that they were “essentially dry,” and “did not show specific bleeding or purulent material” (Dr. Rosen EBT at 24).

Dr. Rosen's office note from July 16, 2013 examination states that plaintiff had mild pain in the knee and light bleeding from the wound, and that plaintiff was concerned. Dr. Rosen did not document any abnormal findings. His plan was to "[c]ontinue to observe wound" and "[c]ontinue with a physical therapy program, slow return to impact exercise." The instructions to plaintiff were to follow up in one week for suture removal.

On the morning of Sunday, July 21, 2013, Mr. Monroe testified that he “went to get out of bed and could not walk,” and then called Dr. Rosen who advised him to go to Mount Sinai (Plaintiff’s EBT at 338). Plaintiff presented to the Mount Sinai Hospital Emergency Department, and Dr. Rosen met him there (Id at 340).

Plaintiff's complaints and history are documented in the Mount Sinai record on July 21, 2013, the day of his diagnosis with septic arthritis. (See Plaintiff's Opposition, Ex C) In a note dated July 21, 2013 15:12, authored by Mitchell Weisler, M.D., Orthopedic Surgery Resident, the history is documented as:

"...s/p arthroscopic debridement of Right knee 6 days ago, presents with 6 day complaints of Right knee pain and wound drainage with 1 day history of acute swelling. Patient reports that drainage and pain have persisted since OR and that o/n day before presentation in ER, the knee became acutely swollen and tender. He has not been able to bear weight on it since the acute swelling occurred."

The Emergency Department records also include a note by Emergency Medicine Attending Physician Amy Sanghvi, M.D. dated 7/21/13 14:34 which describes plaintiff's complaints about his right knee:

"...pain, swelling, redness, and drainage to right knee x 5 days. Patient states he had arthroscopic surgery with Dr. Rosen on 7/10/13. When he first started getting drainage he saw Dr. Rosen and was told just to watch it closely, but it continued to worsen."

The diagnosis of septic arthritis of the right knee was made on that day. Dr. Rosen performed irrigation and debridement surgery on the right knee. Dr. Rosen's operative note states:

"PREOPERATIVE DIAGNOSIS: Septic Arthritis, right knee, status post right knee arthroscopy. POSTOPERATIVE DIAGNOSIS: Septic Arthritis, right knee, status post right knee arthroscopy. PREOPERATIVE INDICATIONS: Mr. Monroe is a 68 year old man with a history of right knee pain. He underwent right knee arthroscopy on 7/10/13 at an ambulatory surgery center. He had an uncomplicated operative procedure consisting of partial medial meniscectomy with a chondroplasty and synovectomy. Postoperatively, he began experiencing, increasing pain and drainage from the wound following the surgical procedure...."

Plaintiff continued to see Dr. Rosen until September 2013, when he transferred his care to Dr. Jose Rodriguez. Dr. Rodriguez's office note of August 29, 2013 entitled New Patient Visit states:

"HISTORY: This is a 68-year old man who comes in for evaluation as a second opinion regarding his right knee. Mr. Monroe underwent arthroscopic debridement of degenerative mensical tears on 07/10/2013. Within just over a week, he had drainage from one of the portals. This was treated conservatively and within a few days, the drainage worsened."

Plaintiff required multiple further arthroscopic irrigation and debridement procedures for the infection in his right knee. Subsequently, Mr. Monroe required bone resection and multiple placentitis of antibiotic spacers, and long term intravenous antibiotic therapy, as well as long term rehabilitation and intensive physical therapy. When these treatments were unsuccessful, plaintiff underwent a total knee replacement on February 26, 2014, and attended post operative inpatient rehabilitation and physical therapy.

Defendants move for summary judgment, arguing that defendants did not depart from accepted standard of practice in their care and treatment of plaintiff and that none of the alleged injuries were the result of any improper acts or omissions by defendants.

In support of their motion, defendants submit the affidavit of Victor Khabie, M.D., a Board Certified Orthopedic Surgeon who maintains a sub-certification in Orthopedics Sports. Upon review of the relevant medical records, applicable witnesses' testimony, as well as the Bills of Particulars, Dr. Khabie, opines that to a reasonable degree of medical certainty, that Dr. Rosen did not depart from accepted standards of practice in his care and treatment of the plaintiff and that the alleged injuries were not caused by any improper acts or omissions by the defendants.

Dr. Khabie opines that Dr. Rosen properly evaluated Mr. Monroe, made recommendations which were well within the standard of care, conducted appropriate surgery, and conducted appropriate post-operative care. Dr. Khabie states that plaintiff's development of a post-operative infection was not through any negligence by Dr. Rosen, that the infection was timely diagnosed and that the plaintiffs' claims of negligence during the first post-operative visit on July 16, 2013, are without merit since plaintiff did not exhibit any clinical signs nor symptoms consistent with a post-operative infection. He also states that observation of the knee was within the standard of care and any other intervention at that time was not required and would have placed the plaintiff at a greater risk of contracting an infection.

With respect to plaintiff's testimony that there was some green discharge from the wound a few days prior to the July 16, 2013 visit, Dr. Khabie points out that "[t]here is no notation of this history in Dr. Rosen's record. Dr. Rosen is an experienced board-certified orthopedic surgeon. As such, if [plaintiff] had made this complaint to him, then he surely would have noted it and addressed it." In addition, he states that "even if [plaintiff] had made this complaint to Dr. Rosen, the fact that there were no signs and symptoms of an infection or greenish discharge present at the July 16 follow-up visit shows that Dr. Rosen's care and treatment, even had received this history, would have been the same."

As for the knee replacement surgery, Dr. Khabie opines that plaintiff "was eventually going to need a total knee replacement at some point. The procedure performed by Dr. Rosen was designed to put off the need for that knee replacement as long as possible. However, in my opinion, assuming [plaintiff] did not develop an infection, he still would have needed the knee replacement in the future."

In his opposition, plaintiff asserts that Dr. Khobie's opinion ignores plaintiff's testimony about his post surgical complaints and the records of Mt. Sinai and of Dr. Rodriguez regarding plaintiff's account of the history of discharge from his right knee on the date of his July 16, 2013 office visit with Dr. Rosen. In support of his opposition, plaintiff submits a redacted expert affidavit from a Board Certified Expert Orthopedic Surgeon licensed to practice medicine in New York and New Jersey. (hereinafter "plaintiff's expert").

Upon reviewing medical records, deposition testimony and upon examining plaintiff, and Dr. Khobie's expert affidavit, plaintiff's expert opines to a reasonable degree of medical certainty that Dr. Rosen departed from good and accepted medical standards in failing to timely diagnose plaintiff's knee infection which resulted in the worsening of the condition to eventually a septic arthritis of the knee joint, and which ultimately required a total knee replacement. Specifically, plaintiff's expert states that plaintiff's complaints of new drainage that developed subsequent to the surgery performed by Dr. Rosen were not adequately investigated, monitored and treated.

In this connection, plaintiff's expert opines that:

.... Dr. Rosen departed from good and accepted medical practices on July 16, 2013 in failing to properly take a history and record the plaintiff's complaints of persistent drainage from the wound. Wound drainage that appears cloudy, as it was when diagnosed, or greenish is suspicious for infection. Post operative wound drainage and persistent pain required an investigation and work up to rule out an infection and also to monitor the drainage closely for changes that may be due to septic arthritis, which is a dangerous and destructive condition to the joint, cartilage and tissues. The longer the infection persists the more destruction occurs to the joint and its cartilage and surrounding tissue. In addition, the longer the infection goes untreated, the more it progresses and spreads within the joint. Additionally, in light of the complaint of drainage one week post arthroscopic surgery, the instruction by Dr. Rosen to return in one week, keep a Band-Aid on the wound, and for [plaintiff], a person with no medical training, to monitor said drainage is entirely improper.

Plaintiff's expert further opines that:

... on July 16, 2013, a proper investigation would have included performing blood tests including a Complete Blood Count to assess the White Blood Count, a C-Reactive Protein and Sed Rate laboratory results. In addition, radiological examination of the right knee with x-rays, sonogram and MRI would have been indicated to assess if the joint had a collection of fluid present at that time [and that] ... on July 16, 2013 a drainage procedure known as an arthrocentesis was indicated to properly evaluate the nature of the fluid including its color, consistency and/or odor, and to enable microscopic examination of the fluid and test for infection. This evaluation is important because these features are useful to identify an infection.... At a minimum close follow up was indicated with a follow up examination in 1 to 2 days time to assess for any changes to the drainage and physical findings and patient complaints in light of the serious concerns involving post surgical wound drainage that develops following a arthroscopic surgery....

With regard to causation, plaintiff's expert opines that "[h]ad the proper tests and follow up been performed, timely and earlier antibiotic therapy would have been administered and prevented the substantial and severe complications suffered by plaintiff and the loss of chance for a better outcome with less treatment required and prevented the need for the joint replacement surgery."

With respect to Dr. Khabie's opinion that the infection did not cause plaintiff's injuries since plaintiff would have needed knee replacement surgery in the future, plaintiff's expert opines that:

...the right knee arthroscopy by Dr. Rosen on July 10, 2013 would have been otherwise successful in resolving his symptoms of right knee pain and there is no basis to claim that the plaintiff would have required a total knee replacement in the future. Such an assertion by Dr. Khabie is mere speculation and unsupported by any evidence. In fact, the anatomy and pathology of the right knee as described in Dr. Rosen's own operative report confirms that there were no unusual or severe findings, there were

no complications encountered during the surgery and no difficulties in performing the meniscectomy and debridement on July 10, 2013. Additionally, the plaintiff was 68 years old at the time of this surgery on his right knee. He was not a professional basketball player at that time and there is no reason to speculate that because he had other surgeries on his body that his knee would alleged fail in the future. Moreover, the fact that there is no support to this claim is further apparent from the medical records of the orthopedic physicians who actually have treated Mr. Monroe. Even defendant, Dr. Rosen's medical record has absolutely no reference what so ever that his surgery of July 10, 2013 is a temporary repair or that there will be the need for a total knee replacement in the future. In addition, the medical records of Dr. Jose Rodriguez further confirm ... the infection as the sole reason for the total knee replacement [and] there is no mention anywhere that this was a surgery that the plaintiff would have needed anyway at some point.

In reply, defendants argue that there is no evidentiary basis for the plaintiff's expert's statements that the condition of plaintiff's knee at the time of the July 16, 2013 examination provided a basis for finding that plaintiff had an infection. Defendants argue that Dr. Rosen's records, and plaintiff's testimony show that there was no actual wound leakage at the time of this visit, nor did any leakage appeared cloudy. In support of this argument, defendants contend that the statements in plaintiff's affidavit regarding the condition of his knee and his complaints to Dr. Rosen at the July 16, 2013 visit cannot be considered as they contradict plaintiff's deposition testimony. Specifically, defendants argue that while in his affidavit plaintiff states that he complained to Dr. Rosen as to pain and tenderness in his right knee and that the knee was oozing and dripping, plaintiff did not testify at his deposition that he made these complaints to Dr. Rosen. Accordingly, defendants argue that plaintiff's deposition testimony supports Dr. Rosen's testimony that on July 13, 2013, the right knee was clean, dry and intact

As for plaintiff's expert opinion that Dr. Rosen should have ordered blood tests in connection with the July 16, 2013 visit to determine if there was an infection, defendants argue

that the blood tests taken at Mount Sinai Hospital on July 21, 2013 did not indicate that there was an infection even though at that time, the condition of plaintiff's knee had worsened.

### Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id.

In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dep't 2003)).

If the movant makes a prima facie showing in medical malpractice action, the burden shifts to the party opposing the motion "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, 324-325. Specifically, this requires, in a medical

malpractice action, that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." *Id.* at 324–25. "The law is well settled that when competing experts present adequately supported but differing opinions on the propriety of the medical care, summary judgment is not proper." See Rojas v. Palese, 94 AD3d 557 (1st Dep't 2012).

Here, even assuming *arguendo* that defendants' made a prima facie showing entitling them to summary judgment, plaintiff has controverted this showing an expert affidavit raising triable issues of fact as to whether defendants departed in connection with the post-operative treatment of plaintiff and, in particular, in failing to timely recognized a treat plaintiff for signs of infection. In addition, plaintiff's expert's opinion raises triable issues of fact as to whether such departures were a substantial factor in causing plaintiff's injuries including the need for knee replacement surgery.

Furthermore, plaintiff's expert's opinion is adequately supported by the record, including plaintiff's deposition testimony and affidavit which indicate that before the July 16, 2013 office visit, his right knee was swollen, bleeding and dripping green fluid. Moreover, contrary to defendants' position, the statements in plaintiff's affidavit concerning the July 16, 2013 office visit may be considered by the court as they amplify rather than contradict his deposition testimony.

Specifically, both plaintiff's deposition testimony and his affidavit state that after the surgery in July 2013, greenish liquid was dripping from his right knee. At his deposition, plaintiff testified that he complained to Dr. Rosen's office that his right knee dripping greenish liquid on July 15, 2013, while in his affidavit he states that in addition to this complaint, he reported this condition to Dr. Rosen at the visit on July 16, 2013. Under these circumstances, it cannot be said that plaintiff's affidavit is inconsistent with his deposition testimony. See Bosshart v. Pryce, 276 AD2d 314 (1<sup>st</sup> Dept 2000)(denying summary judgment when allegations by plaintiff in opposition to the motion though more detailed did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601(2d Dept 1995)(court did not err in considering affidavit which did not contradict plaintiff's deposition testimony); compare Zylinski v Garito Contracting, 268 AD2d 427 (2d Dept 2000).

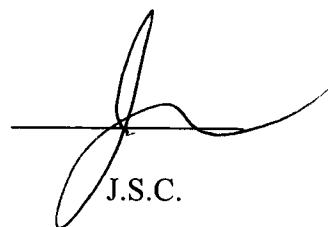
#### Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing plaintiff's claim for lack of informed consent; and it is further

ORDERED that the parties shall appear for a previously scheduled pre-trial conference on July 11, 2019 at 11:00 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: June 21, 2019

  
J.S.C.  
**HON. JOAN A. MADDEN**  
**J.S.C.**