Miot v Moskowitz
2019 NY Slip Op 32424(U)
August 6, 2019
Supreme Court, New York County
Docket Number: 805268/14
Judge: Joan A. Madden

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

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ARNOLD MIOT,

INDEX NO. 805268/14

Plaintiff,

-against-

BRUCE MOSKOWITZ, M.D.,

Defendant.

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JOAN A. MADDEN, J.:

In this action for medical malpractice, defendant moves for summary judgment dismissing the complaint against him or, in the alternative, for an order precluding plaintiff's expert from testifying at trial, and striking plaintiff's February 14, 2018 Supplemental Bill of Particulars, for failure to move to amend it prior to filing the note of issue. Plaintiff opposes the motion.

Background

This action arises out of a surgery known as a lateral canthoplasty performed on February 7, 2012, by defendant on plaintiff's right lower eye,[1] using an Alloderm graft insertion.[2] The remaining issues on this motion involve plaintiff's allegations that defendant departed from accepted medical practice as he failed to consider plaintiff's medical history before performing the surgery, and by use of an Alloderm graft material.[3]

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[1]While the surgery was performed on both eyes, only the right eye is at issue in this action.

[2]According to defendant's expert "the Alloderm graft is a dehydrated sheet of sterile tissue that is donated form human cadaver" (Schiller Aff. ¶ 8).

[3]Plaintiff's expert does not address defendant's expert opinions that defendant's post-operative treatment of plaintiff was in accordance with the applicable standard of care, as well as his

Plaintiff was referred to defendant by another doctor in or about December 2011. At that time, the then 52-year old plaintiff had undergone approximately seven eye procedures to his right eye. These procedures were based on chronic complaints, including sagging eyelid skin and eyelid bags, low lids, dry eye, ectropion condition (i.e. where eyelid turns outward), and a "missing gray line," on the lower part of the right eye.[4] (Plaintiff's Medical Records maintained by defendant at 19, 33; Plaintiff's EBT at Pages 29-50).

Defendant moves for summary judgment, arguing that he did not depart from accepted medical practice in connection with the February 7, 2012 surgery. In support of his argument defendant submits the expert affirmation of Jeffrey D. Schiller, M.D., a physician who is licensed to practice in New York and is a board certified in ophthalmology and is a member of the American Society of Oculofacial Plastic and Reconstructive Surgery, and who routinely operates on patients both cosmetically and functionally.

Dr. Schiller states that the purpose of a "lateral cathoplasty is to restore eyelid function and protect the ocular surface" (Schiller Aff ¶ 6). He opines, within a reasonable degree of medical certainty that:

> [N]otwithstanding plaintiff's prior cosmetic procedures to the eyes, which included surgery to reduce under eye bags, prior canthoplasties and a face lift, [defendant's] determination to perform a bilateral canthoplasty with Alloderm graft insertion was not a contraindication given plaintiff's complaints of tearing and irritation and presentation of bilateral ectropion

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opinion that the techniques used during the surgery were appropriate, and that contrary to the allegations in the Bill of Particulars, a hard palate graft was not used in the surgery, nor did the surgery cause a hole in plaintiff's lower right eye lid. Accordingly, these alleged departures are deemed abandoned.

[4]In addition, plaintiff stated in a email to defendant that he was without lashes on his lower lid and had scarring in both corners of the lids. Defendant also indicated in an office note that plaintiff had webbing of the right eye.

> senile, as indicated in the admitting note authored by Dr. Moskowitz, as well as throughout [defendant's] chart. The bilateral canthoplasty and Alloderm graft insertion was indicated in order to correct the defects and push the eyelid up to correct the ectropion condition.

(¶ 11).

With respect to the use of Alloderm graft insertion, Dr. Schiller opines that "the choice of the Alloderm graft was medically sound and within the standard of care, and was likely the best option, given its composition and ability to be easily "cut-down to size" (Id ¶ 13). He further opines that "[t]he insertion of any other graft material, inclusive of Enduragen or hard palate graft, would not have been a better selection for this patient, given his history and the invasive nature of a hard palate graft procedure, which is associated with additional risks and is effectively a separate surgery" (Id). He states that as "Alloderm supports tissue regeneration by allowing rapid revascularization [since]... it is made from human cadaver, it does not contain damaged cells that can lead to possible inflammation [and].. [t]his is also evidenced by the fact that plaintiff had Alloderm inserted bilaterally and had no complaints with his left eye post-surgically" (Id).

Her further opines that:

> the choice of corrective surgery, a periosteal flap for canthal reconstruction and debulking of Alloderm graft was medically indicated and proper and preferable to a "bony fixation" or drill-hole placement, given the paucity of tissue, which was thin at the tarsus and would have been more likely than not to lead to lid suspension. Moreover, the performance of a "bony fixation" or drill-hole placement, would have been more likely (than a periosteal flap surgery), to yield a undesirable outcome of the lid not being raised enough and potentially causing it pull down more, away from the ball of the eye, creating an ectropion condition due to the possibility of cheese-wiring of the damage eyelid tissue. Further, firm elevation and correction through the creation of a periosteal flap was possible, since the periosteum is attached to the bone.

(¶ 19).

With respect to causation, Dr. Schiller opines within a reasonable degree of medical certainty, "there were no complications with the performance of the February 7, 2012 bilateral canthoplasty and insertion of Alloderm graft, nor was there any deviation in the standard of care that during the course of the procedure. As such, there were no injuries that plaintiff sustained that were a proximate cause of the performance of the February 7, 2012 procedure" (Id ¶ 12). He also opines that "[i]n the area of oculoplastic surgery, the need for revision surgeries to obtain an optimal outcome is not uncommon" (Id ¶ 10).

Defendant alternatively argue that plaintiff's expert should be precluded from testifying at trial and that any allegations set forth in plaintiff's expert disclosure must not be considered by the court, as plaintiff's expert addresses theories of liability not alleged in the complaint or the Bills of Particulars. Defendant also seeks to strike plaintiff's February 14, 2018 Supplemental Bill of Particulars which was served after the note of issue was filed.

In opposition, plaintiff submits a redacted expert affidavit of a physician licensed to practice medicine in Florida who is board certified in plastic and reconstructive surgery, and is in private practice specializing in plastic surgery, and has performed eyelid surgery including lateral canthoplasty on numerous occasions. Plaintiff's expert opines, within a reasonable degree of medical certainty, after reviewing the deposition transcripts, and the medical records of defendant and the follow up surgeon Gerald Ginsberg, M.D. and photographs of the plaintiff before and after the relevant surgery that "on February 7, 2013, [defendant] deviated from good and accepted medical practice in the care and treatment of plaintiff...in failing to properly consider the plaintiff's medical history, in performing an inappropriate procedure in light of his multiple surgeries of the lower eyelid." Specifically, the expert opines that "considering [plaintiff's]

history of multiple failures of prior surgical attempts to secure his lower eyelid, a surgical procedure involving bony fixation of the lateral canthus to properly secure the lower should have been employed" (Plaintiff's expert ¶ 2). Plaintiff's expert further opines that "defendant should have used other graft material in the lower eyelid as a spacer to prevent recurring eyelid malposition...[and that]... the combination of lack of bony support and fixation in and the improper choice of acellular dermal matrix (Alloderm) led to lower eyelid contraction necessitating further revisional corrective surgery" (Id).

With respect to defendant's argument that plaintiff's expert should be expert opinion should not be considered as the departures addressed in his affidavit are not raised in the complaint of Bills of Particulars, plaintiff asserts that defendant has not been prejudiced as defendant's expert addresses both departures raised in plaintiff's expert's affidavit.

In reply, defendant argues that plaintiff's expert affidavit is insufficient as it is executed by an out-of state physician and fails to include a certificate of conformity as required under CPLR 2309(c).[1] Defendant also argues that the plaintiff's expert affidavit is insufficient to raise an issue of fact as it fails to set forth the standard of care relative to the practice of canthoplasty in New York State, and does not set forth grounds for the expert's qualifications. In addition, defendant argues that the affidavit is conclusory and speculative as it fails to address the manner in which defendant committed malpractice and what procedures or techniques should have been employed and fails to provide a nexus between the alleged malpractice and plaintiff's injuries.

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[1]CPLR 2309(c) provides, in relevant part that, "[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation."

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 Dept 2010). To satisfy this burden, a defendant 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 Dept 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 Dept 2010). A defendant's expert opinion must also "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept 2003)).

Once the moving party make a prima facie showing the burden shift 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['s]... summary judgment motion." Id. at 324–25.

In addition, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Dallas-Stephenson v Waisman, 39 AD3d 303, 307 (1st Dept 2007)(internal citations and quotations omitted). If "the 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." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002). On the other hand, "[t]he 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 Dept 2012).

Here, as defendant has made a prima facie showing entitling him to summary judgment based on Dr. Schiller's opinion that the bilateral cathoplasty and the use of the Alloderm graft material were indicated, medically sound and within the standard of care and that plaintiff did not suffer any injuries as a proximate cause of the surgery, the burden shifts to plaintiff to controvert this showing.

As a preliminary matter, with respect to defendant's argument that plaintiff should be precluded from considering plaintiff's expert opinion as it raises new theories of liability, such argument is without merit as defendant has shown no resultant prejudice, particularly as the departures asserted in plaintiff's expert affidavit are addressed by defendant's expert in this

summary judgment motion. With respect to the February 2014 Supplemental Bill of Particulars, which was served after note of issue was filed, the court notes that plaintiff's expert does not rely on the allegations in the Supplemental Bill of Particulars.[2]

Furthermore, contrary to defendant's assertion, the court may consider plaintiff's out-of-state expert affidavit which was sworn before a notary public. See Ortiz v. City of New York, 129 AD3d 611, 612 (1st Dept 2015)(motion court properly considered out-of-state expert affirmation which was sworn to before a notary public). In addition, although it is redacted, plaintiff has provided the court with an unredacted copy for in camera inspection. Furthermore, while plaintiff's expert affidavit was notarized other than in New York State and therefore under CPLR 2309(c) should be accompanied by a certificate of conformity, this defect is not a fatal to plaintiffs' opposition. See Matapos Technology Ltd. v. Compania Andina de Comercio Ltda, 68 AD3d 672, 673 (1st Dept 2009)(the absence of a certificate as required under CPLR 2309(c) "is a mere irregularity, and not a fatal defect").

As for defendant's argument that plaintiff's expert affidavit is insufficient as the expert does not set out standards for the practice of medicine in New York State, such argument is unavailing as the issue of whether defendant doctor departed from the applicable standard of care as a specialist is dependant on the standard of care where the doctor practices medicine, including local and national standards and the skill the defendant doctor possesses. See McCullough v. University of Rochester Strong Memorial Hosp, 17 AD3d 1063 (4th Dept

[2]The Supplemental Bill of Particulars alleges that "defendant was further negligent in creating a hole in the plaintiff's right lower eye lid, separating the eyelid from the eye; failing to burn follicales, failing to create a periosteal flap, and his placement of an unnecessary hard palate graft." In fact, in reply, defendants acknowledge that the departures alleged by plaintiffs' expert are not the subject of the Supplemental Bill of Particulars.

2005)("the standard of care in a medical malpractice action is measured against local, statewide, or nationwide standards and the 'superior knowledge and skill' that a provider actually possesses"); Riley v. Wieman, 137 AD2d 309 (3d Dept 1988)(rejecting defendant's argument that the court erred in admitting at trial the testimony of a plaintiff's expert, a board-certified physician from California who admitted he was unfamiliar with the standard of care in the community where the medical malpractice claim arose).

That said, however, upon consideration of plaintiff's expert's opinion, the court finds that such opinion is conclusory and unsupported by analysis and as such is insufficient to raise a triable issue of fact as to the two alleged departures at issue. See Feliz ex rel Rios v. Beth Israel Medical Center, 38 AD3d 396, 397 (1st Dept 2007)(affirming trial court's grant of defendant's motion for summary judgment in medical malpractice action where the opinions of plaintiff's experts were stated in a "conclusory fashion and without any specific analysis"). Specifically, while plaintiff's expert opines that defendant departed from applicable standards of care by failing to consider plaintiff's prior multiple surgeries, and in particular, that in light of the prior surgeries, that plaintiff required a surgical procedure involving a bony fixation to secure the lower lid, the expert does not explain why a bony fixation procedure would have been preferable or refute defendant's expert's opinion that the bony fixation procedure would have been more likely than the surgery performed by defendant to yield an undesirable outcome of the lid not being raised enough with the potential of causing it to pull down more, and to cause other complications. As for plaintiff's expert's opinion that the defendant should have used a graft material other than the Alloderm to prevent recurring eyelid malposition, such opinion fails to state what graft material other than Alloderm should have been used and why such material

would have been preferable to Alloderm. Accordingly, as plaintiff has not controverted defendant's showing, summary judgment in defendant's favor is warranted.

In view of the above, it is

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED the remaining relief sought by defendant is denied as moot.

DATED: August 6, 2019

J.S.C.

HON. JOAN A. MADDEN
J.S.C