

Webster v Garvey

2019 NY Slip Op 34334(U)

May 30, 2019

Supreme Court, Nassau County

Docket Number: Index No. 602547/17

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

DEBORAH WEBSTER,

Plaintiff,

- against -

JULIUS W. GARVEY, M.D., and
JULIUS W. GARVEY, M.D., P.C.,

Defendants.

TRIAL/IAS PART 5
NASSAU COUNTY

INDEX NO. 602547/17

MOTION SUBMISSION
DATE: 4/1/19

MOTION SEQUENCE
NOS. 5 & 6

The following papers read on this motion:

| | |
|--|--------------|
| Notice of Motion and Affidavits..... | <u> X </u> |
| Notice of Cross-Motion and Affidavits..... | <u> X </u> |
| Affirmation in Opposition..... | <u> X </u> |
| Reply Affirmation..... | <u> X </u> |

Relief Requested

Motion by the defendants, Julius W. Garvey, M.D. and Julius W. Garvey, M.D., P.C., for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the plaintiff's complaint (Motion Sequence No. 5). Cross motion by the plaintiff for an order, pursuant to CPLR 3126, precluding the affirmation of defendant's expert, George J. Todd, M.D (Motion Sequence No. 6). The defendants submit an affirmation in opposition to the plaintiff's cross motion and in reply. The plaintiff submits a reply affirmation.

Background

The plaintiff initiated this action sounding in medical malpractice and negligent hiring. It is undisputed that plaintiff was experiencing pain and discoloration in her foot as of December 25, 2014. Plaintiff's condition continued to worsen, and she ultimately visited with Dr. Garvey on December 29, 2014. Dr. Garvey examined her and diagnosed her with acute ischemia. Records

indicate that Dr. Garvey recommended an "urgent" Magnetic Resonance Angiography Test (hereinafter referred to as "MRA") be performed, and that he instructed plaintiff to go to the emergency room if the pain or discoloration worsened. Of note, an issue with plaintiff's insurance prevented authorization of the MRA on the date of plaintiff's visit with Dr. Garvey, as well as on the following day, December 30, 2014.

Plaintiff next sought treatment on January 1, 2015. On January 7, 2015, her left leg was amputated below the knee. Plaintiff alleges that the defendants failed to give clear and proper instructions regarding the immediate need for an MRA to be performed while her leg was still salvageable, and that the defendants should have instructed her to immediately go to an emergency room for further evaluation and treatment on December 29, 2014.

Applicable Law

The Court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 165 N.Y.S.2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v. Ceppos*, 413 N.Y.S.2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 200 N.Y.S.2d 627). The role of the Court is to determine if bonafide issues of fact exist, and not to resolve issues of credibility (*Gaither v. Saga Corp.*, 203 A.D.2d 239; *Black v. Chittenden*, 69 N.Y.2d 665).

"The elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was the proximate cause of injury" (*Ortiz v. Wyckoff Heights Medical Center*, 149 A.D.3d 1093, citing *Sampson v. Contillo*, 55 A.D.3d 588). "Thus, on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Ortiz, supra*, citing *Bongiovanni v. Cavagnuolo*, 138 A.D.3d 12). In order "to defeat summary judgment, the nonmoving party 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" (*Ortiz, supra* citing *Stukas v. Streiter*, 83 A.D.3d 18).

A necessary element of causes of action for negligent hiring is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (see *Johansmeyer v. New York City Dept. of Educ.*, 165 A.D.3d 634).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury (*Roca v. Perel*, 51 A.D.3d 757). The submission by the parties of conflicting medical opinions necessarily presents an issue of fact requiring the denial of the motion (*Viti v. Franklin General Hospital*, 190 A.D.2d 790; *Zimmer v. Phelps Memorial Hospital*, 140 A.D.2d 436). The existence of conflicting expert opinions in a medical malpractice action creates a triable issue of fact (*Wallenquest v. Brookhaven Mem. Hosp. Med. Ctr.*, 28 A.D.3d 538).

In determining whether a plaintiff had made out a prima facie case thereby precluding judgment to the defendant as a matter of law, plaintiff's evidence must be accepted as true and plaintiff is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence (*Corvino v. Mt. Pleasant Cent. Sch. Dist.*, 305 A.D.2d 364; *Mosheyev v. Pilevsky*, 283 A.D.2d 469; *Akseizer v. Kramer*, 265 A.D.2d 356; *Hughes v. New York Hospital - Cornell Medical Ctr.*, 195 A.D.2d 442). In the context of a medical malpractice action, it has been held that all reasonable inferences are drawn from the alleged departures from acceptable medical practice and the injury from the affirmation of the plaintiff's expert (*Wallenquest, supra*; *Baez v. Lockridge*, 259 A.D.2d 573).

A court has the discretion to impose a specific deadline for expert disclosure under CPLR 3101(d)(1)(i). If a party fails to comply with expert disclosure, the court has the discretion to impose appropriate sanctions pursuant to CPLR 3126 (*Rivers v. Birnbaum*, 102 A.D.3d 26).

Discussion

As a preliminary matter, as this court had not set a specific deadline for expert disclosure in this matter, and as no prejudice results from the inclusion thereof, this court does not see fit to preclude the defendants' expert affirmation (see *Rivers, supra*).

In support of their motion, the defendants submit the affirmation of George J. Todd, M.D. Dr. Todd, a board certified vascular surgeon, opines that the care rendered to the plaintiff on December 29, 2014, in examining and diagnosing the plaintiff, was consistent with good and accepted standards of medical practice. Dr. Todd notes that plaintiff had an extensive history, including treatment with a vascular specialist dating back ten years prior to her visit with the defendant.

Dr. Todd opines that the plaintiff's ultimate amputation was caused by her extensive history and her four day delay between experiencing issues on December 25, 2014 and presenting to the defendants on December 29, 2014. Dr. Todd adds that Dr. Garvey could not have done anything to avoid the need for amputation, because an MRA should have been performed within the first eight hours of plaintiff's issues on December 25, 2014. Dr. Todd further opines that, since two of plaintiff's toes were ischemic at the time of her visit with Dr. Garvey, all of plaintiff's toes were already irreversibly ischemic. As the amputation was inevitable in his opinion, Dr. Todd concludes that Dr. Garvey acted within accepted standards, and that performing any procedures would only have carried additional risk with no benefit.

The plaintiff, in opposition, submits the affirmation of James B. Alexander, M.D. Dr. Alexander, a board certified vascular surgeon, opines that the plaintiff's left foot would have been salvageable if the plaintiff had been properly and timely evaluated and treated. Dr. Alexander notes that plaintiff's condition did not prevent Dr. Garvey from providing effective treatment in an attempt to salvage plaintiff's leg. Rather, the defendants failed to properly treat plaintiff or provide her with proper instructions regarding the need for an immediate MRA and further treatment.

Dr. Alexander takes issue with Dr. Todd's assessment that thrombolytics are only effective within the first eight hours of an acute ischemic event, opining instead that an MRA could be done as much as one week later. Dr. Alexander opines that the success rate of such treatment decreases with time, and as such, needless delay must be avoided. Based on his review of records and photographs taken at the time of the subject visit, Dr. Alexander opines that, while two of plaintiff's toes were discolored, the other three were still healthy, indicating arterial blood flow which implies that some arteries were not filled with clot.

Dr. Alexander concludes that the defendants departed from accepted standards of practice by failing to give clear instructions resulted in a three day delay for further evaluation and treatment, and that such departure was a substantial factor in the plaintiff's ultimate need for amputation.

Conclusion

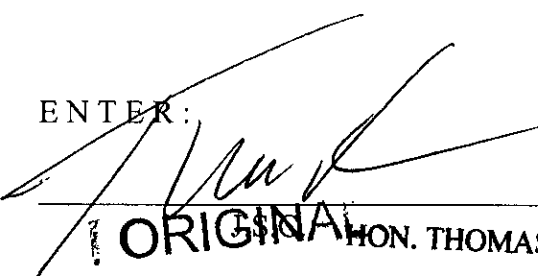
Here, the moving defendants have made a prima facie showing of entitlement to summary judgment. However, the plaintiff, in opposition, has raised a triable issue of fact to warrant denial of this summary judgment motion. The opinions set forth by the plaintiff's expert directly conflict with the opinions set forth by the defendants' expert. The defendants' expert opines that Dr. Garvey did not depart from accepted standards of medical practice, and that the plaintiff's leg was unsalvageable when she first presented to Dr. Garvey regardless of anything he may or may not have done or instructed plaintiff to do. The plaintiff's expert opines that Dr. Garvey departed from accepted standards of medical practice in failing to instruct plaintiff to immediately seek further evaluation and treatment, which caused a delay that contributed to the plaintiff's leg being amputated. Further, plaintiff failed to provide any information that would raise an issue of fact with regard to her claim of negligent hiring (see *Johansmeyer, supra*).

In light of the foregoing, it is hereby

ORDERED that the defendants' motion for summary judgment is denied in part, and granted only with respect to plaintiff's cause of action for negligent hiring, and it is further

ORDERED that the plaintiff's cross motion to preclude the defendants' expert affirmation is denied.

ENTER:


ORIGINAL HON. THOMAS FEINMAN

Dated: May 30, 2019

ENTERED

JUN 05 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE