

Thompson v Toal

2019 NY Slip Op 34419(U)

September 5, 2019

Supreme Court, Tompkins County

Docket Number: Index No. EF2017-0226

Judge: Joseph A. McBride

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 26th day of July 2019.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

MELISSA THOMPSON and RICKY GRISWOLD,

Plaintiffs,

-vs-

THOMAS TOAL, M.D., CAYUGA ANESTHESIA
ASSOCIATES, PLLC and CAYUGA MEDICAL
CENTER AT ITHACA, INC.,

Defendants.

DECISION AND ORDER

Index No. EF2017-0226
RJI No.: 2018-0226

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JOSEPH A. MCBRIDE, J.S.C.

The case before the Court follows a medical malpractice claim filed by Melissa Thompson (“Thompson”) and Ricky Griswold (“Griswold”) alleging Defendant, Thomas Toal M.D. (“Dr. Toal”) and through vicarious liability Dr. Toal’s employer Defendant, Cayuga Anesthesia Associates, PLLC (“CAA”) negligently performed his medical duties below the normal standard of care. The complaint also claimed a cause of action against Defendant, Cayuga Medical Center (“CMC”). As originally filed, there were two outstanding motions pending before the Court. First, Dr. Toal and CAA seek summary judgment pursuant CPLR §3212 that the claims by Thompson against them should be dismissed as well as an order of dismissal against Griswold as a matter of law. Second, CMC also filed a motion for summary judgment for claims asserted against them. Plaintiffs filed a response in opposition as to Dr. Toal and CAA’s motion for summary judgment ONLY. There is no opposition for the motion seeking to dismiss the claims against Griswold and Plaintiff consents to dismissal of that claim. There is no opposition for CMC’s motion for summary judgment and Plaintiff consents to dismissal of that claim. On August 26, 2019, the Court signed an Order dismissing the complaint against CMC. Upon consent of the parties, the claim filed by Griswold is hereby DISMISSED. The only remaining issue is Dr. Toal and CAA (collectively “Defendants”) motion for summary judgment for Thompson’s (“Plaintiff”) claims. The case was heard at oral argument on July 26, 2019. Court received and reviewed said motions and decided; as discussed below.¹

BACKGROUND FACTS

On November 21, 2016, Plaintiff arrived at CMC, for the delivery of her child. On the morning of November 22, 2016, Dr. Toal was contacted to administer an epidural prior to delivery. Dr. Toal claims he reviewed the procedure and risks associated with Plaintiff and her partner Griswold, allowing them time to ask questions. Plaintiff executed a consent form for the epidural procedure. After the consent was executed, Dr. Toal began the procedure using the loss

¹ All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

of resistance technique which caused an increase heart rate in the Plaintiff. Dr. Toal attempted to administer the epidural unsuccessfully three times before contacting an associate, Dr. Sanito, who successfully administered the epidural on his first attempt. Later that day, Plaintiff complained of swelling at the epidural site and headaches. Dr. Toal spoke about the possibility of an epidural blood patch and told her he would follow-up with her the next morning. That was the last involvement Dr. Toal had with Plaintiff. The next day, Dr. Fellows followed-up with Plaintiff, when she complained that her headache had worsened. Dr. Fellows explained that Plaintiff might need an epidural blood patch, however, Plaintiff chose not to undergo that procedure and was discharged. Subsequently, Plaintiff had the epidural blood patch on December 2, 2019, at CMC.

LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. “When faced with a motion for summary judgment, a court’s task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact.” Boston v. Dunham, 274 AD2d 708, 709 (3rd Dept. 2000); see, Boyce v. Vazquez, 249 AD2d 724, 726 (3rd Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” Haner v. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). Mere conclusions and expressions of hope are insufficient to

conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

In the case at bar, the Defendants, as the moving party, must establish a *prima facie* case that such treatment did not deviate from the accepted community standard of medical care. See Stuart by Stuart, v. Ellis Hosp., 198 A.D.2d 559, 560 (3rd Dept. 1993). “The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice and (2) evidence that such departure was a proximate cause of injury or damage.” *Id.* At 560.

Here, the Court finds that Defendants established a *prima facie* case that Dr. Toal’s methods did not deviate from the accepted standard of medical care. Specifically, Dr. Toal submits his own expert opinion affirmation which states that the loss of resistance technique he used is still appropriate and consistent with the standard of care for anesthesiologists. Dr. Toal further opines that the increased heart rate in itself does not require the administer to abort the attempts and that it is a known occurrence, that an epidural must be attempted more than one time before the injection is successful. Dr. Toal claims he acted appropriately and in accordance with the accepted practice. Dr. Toal further concludes that the multiple epidural attempts, while appropriate, did not cause the injury and damages claimed as the Plaintiff reported a history of migraines before Dr. Toal ever treated her. Therefore, based on Dr. Toal’s medical expert opinion that he treated the Plaintiff appropriately and consistent with accepted medical practice and that the claim did not cause the injury, the Court finds the Defendants have met their burden.

Now, the burden shifts to the Plaintiff to illustrate, through admissible evidence, that a triable question of fact exists to establish a “departure from accepted medical practice, as well as a nexus between the alleged malpractice and the plaintiff’s injury.” Natale v. Riverview Cancer Care Med. Assoc., 68 A.D.3d 1574, 1575 (3rd Dept. 2009). Here, the Court finds there are triable questions of fact to survive the present motion. While mere conclusory statements and speculations of medical malpractice are “insufficient to defeat a defendant physician’s summary judgment motion,” *Id.* At 1575, the Court’s role is to spot whether there are outstanding questions of fact, not to determine the outcome of a fact question. One question of fact revolves around the informed consent. Griswold affirms that Dr. Toal never discussed the risks of the

epidural. He alleges that a nurse simply gave the consent form to Plaintiff in which she signed. Questions of credibility are for the jury. Further, it is clear that Dr. Toal made three failed attempts before asking for assistance. Plaintiff's expert opines that too many punctures in the spine can cause dural tears causing leaking spinal fluid. Griswold alleges that he overheard Dr. Toal say he should have gotten someone after the second failed attempt. Looking at Dr. Toal's affidavit, he only states, "must be attempted more than once" is the usual practice. The discrepancy lies in "more than one" and whether three attempts are "too many" failed attempts. The Court finds this is more than speculation, but a question of fact. Moreover, to the point of causation, while Plaintiff may have complained about migraines that occurred prior to the epidural procedure, she developed blackouts and severe back pain and had to eventually undergo an epidural blood patch.

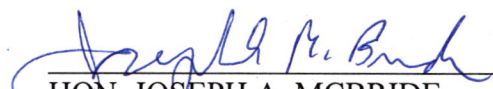
Therefore, looking at the facts in the light most favorable to the Plaintiff and giving every reasonable inference, she successfully defeats the motion for summary judgment by presenting admissible evidence that raises questions of fact for the jury to decide. The Defendant's motion for summary judgment is DENIED.

CONCLUSION

Based on all the factors and the foregoing discussion, Defendants', Dr. Toal and CAA's motion for summary judgment as to Plaintiff Thompson's complaints is DENIED. The Defendants' motion for summary judgment as to Griswold's complaint, is GRANTED, without objection and that cause of action is DISMISSED. CMC's motion for summary judgment is GRANTED without objection (by Order dated August 26, 2019).

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 9/5, 2019
Ithaca, New York



HON. JOSEPH A. MCBRIDE
Supreme Court Justice
5