

Byrne v Sidhu

2020 NY Slip Op 34991(U)

May 15, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 2018-51744

Judge: Peter M. Forman

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Defendants moved for summary judgment. Plaintiff opposed the motion. For the reasons set forth herein, each of the Defendants' motions is granted.

BACKGROUND

Plaintiff reported to the Mid Hudson emergency department on October 28, 2017 complaining of right shoulder pain [*see* MidHudson Regional Medical Center Records, NYSCEF Docket No. 48]. Plaintiff was accompanied by her daughter, Eileen Olsen, and was initially seen by Alissa Silverstein, P.A. [*id.*]. Plaintiff, who was 84 years-old at the time, complained of atraumatic right shoulder pain radiating to her neck and jaw [*id.* at p 6]. She advised that the pain had started six hours earlier and rated the severity of the pain a 10 out of 10 [*id.*]. P.A. Silverstein documented that Plaintiff's past medical history included a prior right shoulder dislocation and rotator cuff injury, as well as atrial fibrillation, congestive heart failure, spinal stenosis, hypertension, and hyperlipidemia [*id.*]. Neither Plaintiff nor her daughter reported a past medical history of osteoporosis [*id.*]. Following a physical exam, Plaintiff underwent a right shoulder x-ray, which revealed a right sided anterior shoulder dislocation [*id.* at pp 7, 11].

P.A. Silverstein discussed Plaintiff's case with Mid Hudson's on-call orthopedic surgeon, Dr. Monet France [*id.* at p 9]. Dr. France advised that an attempt should be made to reduce Plaintiff's shoulder in the emergency room [*id.*]. P.A. Silverstein then discussed the matter with Dr. Sidhu, the emergency department attending physician, and asked him to perform the shoulder reduction [*id.*]. After their discussion, Dr. Sidhu performed his own independent physical examination of Plaintiff, obtained a medical history, and discussed with Plaintiff the plan of care to reduce the shoulder [*id.* at p 9]. Dr. Sidhu explained to Plaintiff the risks of the shoulder reduction procedure, which included the risk of possible fracture, inability to relocated the shoulder, nerve damage [*see* Sidhu Dep. Tr., NYSCEF Docket No. 47, pp 43-44], pain, injury to the joint, and post-procedure infection [*id.* at p 26], and obtained her verbal consent [MidHudson Regional Medical Center Records, NYSCEF Docket No. 48, p 8].

Dr. Sidhu made one attempt at reduction under local anesthesia but was unsuccessful because Plaintiff was in too much pain. As a result, Dr. Sidhu decided to reduce Plaintiff's shoulder while she was under conscious sedation [*id.* at p 9]. Dr. Sidhu again discussed the risks of the procedure with Plaintiff and Ms. Olsen, obtaining Plaintiff's verbal consent immediately prior to the procedure [*id.*]. Ms. Olsen signed the consent for anesthesia form on behalf of Plaintiff [*id.* at p 12]. As to the second attempt at reduction, Dr. Sidhu noted that:

Patient had good sedation with Ketamine. Gentle in line traction was done after patient was fully sedated with the elbow at ninety degrees. About one minute into procedure, there was a sudden give on the right forearm which was consistent with a fracture that was palpable. Procedure was immediately stopped [*id.* at p 9].

X-rays taken immediately after this second procedure revealed a mid-ulnar and mid-radial fracture of Plaintiff's right arm, as well as the continued anterior dislocation of the right shoulder [*id.* at pp 7-8]. Dr. Sidhu notified the on-call orthopedic surgeon, Dr. France, who admitted Plaintiff to Mid Hudson. Several days after admittance, on October 31, 2017, Plaintiff underwent an open reduction internal fixation of the right radius and ulnar shaft fractures [*id.* at pp 14-15].

Plaintiff's amended complaint asserts causes of action for medical malpractice and lack of informed consent [*see* NYSCEF Docket No. 42]. Plaintiff alleges that Dr. Sidhu was negligent and failed to conform to good and accepted standards of medical practice in that he², in part: failed to take a proper history; failed to appreciate the significance of and act upon the history elicited; failed to perform a proper physical examination; failed to appreciate the significance and act upon the radiological studies performed; used excessive force and misdirection in attempting to relocate Plaintiff's dislocated shoulder; failed to avoid the fracture of the right radius and; ignored Plaintiff's history of osteoporosis;

² Plaintiff asserts that defendants Emergency Medical Association of New York, P.C. ("EMA") and Westchester County Health Care Corporation ("WCHCC") are vicariously liable for Dr. Sidhu's malpractice. At the time of the incident in question, Dr. Sidhu was an employee of EMA. EMA had contracted with WCHCC, the owner of MidHudson Regional Medical Center, to provide emergency department physician services.

and in attempting to reduce Plaintiff's dislocated shoulder in an improper setting [see Bill of Particulars, NYSCEF Docket No. 45, ¶3].

DISCUSSION

Because summary judgment “deprives the litigant of its day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” [*Andre v. Pomeroy*, 35 NY2d 361, 364 (1974)]. “But when there is no genuine issue to be resolved at trial, the case should be summarily decided” [*Id.*]. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” [*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986)]. “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” [*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985)]. “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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, supra*, at 324].

a. Plaintiff's Cause of Action for Medical Malpractice

“In a medical malpractice action, a defendant moving for summary judgment has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby” [*Bacalan v. St. Vincents Catholic Medical Centers of New York*, 179 AD3d 989, 991 (2d Dept. 2020) (internal quotation marks and citations omitted); see also *Anonymous v. Gleason*, 175 AD3d 614, 616-617 (2d Dept. 2019) quoting *Schwartzberg v. Huntington Hosp.*, 163 AD3d 736 (2d Dept. 2018)]. “In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars [*Bacalan*, 179 AD3d at 991-992; *Anonymous*, 175 AD3d at 617].

Here, the Defendants established their prima facie entitlement to judgment as a matter of law through the submission of an affirmation from their emergency medicine expert, Howard S. Snyder, M.D., as well as Plaintiff's medical records and the deposition transcript of Dr. Sidhu. Dr. Snyder currently serves as the Director of Albany Medical Center Hospital's Emergency Trauma Service and is employed as a professor in the Department of Emergency Medicine at Albany Medical College. After reviewing the pleadings, medical records, and deposition transcripts of Dr. Sidhu and the Plaintiff's daughter, Dr. Snyder opined, to a reasonable degree of medical certainty, that the care and treatment Dr. Sidhu provided to Plaintiff at all times complied with the standard of care for an emergency medicine physician under the circumstances present on October 28, 2017 [*see* Snyder Aff., NYSCEF Docket No. 53, ¶30]. Dr. Snyder's opinion "had a factual foundation in the record, and adequately addressed the allegations of the plaintiff's bill of particulars" [*McGuigan v. Centereach Management Group, Inc.*, 94 AD3d 955, 956 (2d Dept. 2012), quoting *Roca v. Perel*, 51 AD3d 757, 759 (2d Dept. 2008); *Chance v. Felder*, 33 AD3d 645, 646 (2d Dept. 2006)].

Dr. Snyder, referencing Plaintiff's medical records from Mid Hudson, noted that prior to Dr. Sidhu's involvement in the case, the patient underwent a full workup with P.A. Silverstein, including a thorough history and physical exam, together with laboratory and imaging studies [*id.* at ¶9]. He opined that none of the findings from the workup impacted the Plaintiff's ability to successfully have her shoulder reduced in the emergency department [*id.* at ¶¶14, 33]. Dr. Snyder further stated: "[m]ost importantly, there were no concerning findings on the patient's shoulder x-ray images that would have prevented her from being an appropriate candidate for [shoulder reduction]" [*id.* at ¶34].

Dr. Snyder then discussed the manner in which Dr. Sidhu performed each attempt at reducing Plaintiff's shoulder. He noted that the risks of a shoulder reduction include broken bones, nerve damage, pain, and/or a rotator cuff injury, among other things [*id.* at ¶39] and that according to the medical

records, Dr. Sidhu appropriately advised Plaintiff of these risk and obtained her consent prior to the procedures [*id.* at ¶40]. As to the second reduction procedure, Dr. Snyder stated that:

Because the lidocaine did not adequately control the patient's pain [during the first shoulder reduction], it was reasonable for Dr. Sidhu to perform a second attempt at reducing the shoulder while the patient was consciously sedated with ketamine ... Dr. Sidhu performed the second reduction attempt using gentle in line traction, meaning that he gently used incremental force to relocate the shoulder joint during the procedure. Gentle in line traction is a commonly used shoulder reduction technique. This was an appropriate reduction technique, based on the circumstances and the patient's clinical presentation ... The necessary amount of force to be used during the reduction is determined by the provider's sound medical judgment and the patient's clinical presentation [*id.* at ¶¶ 35-37].

Finally, Dr. Snyder concluded that the fact that the second reduction resulted in forearm fractures, does not in and of itself mean that Dr. Sidhu did not properly perform the reduction, nor does it mean that the orthopedic surgeon should have performed the second reduction attempt [*id.* at ¶38].

In opposition, Plaintiff has failed to raise a triable issue of fact. Plaintiff relied upon the expert affirmation of an orthopedic surgeon to rebut the Defendants' prima facie showing. However, the affirmation of Plaintiff's expert is conclusory, speculative, and contradicted by facts in the record; it is therefore insufficient to defeat the Defendants' prima facie showing [*Schwartz v. Partridge*, 179 AD3d 963 (2d Dept. 2020); *Wagner v. Parker*, 172 AD3d 954 (2d Dept. 2019)].

Plaintiff's expert³ is a physician licensed in New York and board-certified in orthopedic surgery [*see* Expert Affirmation, NYSCEF Docket No. 76, ¶1]. The expert opined, to a reasonable degree of medical probability, that the treatment rendered by Dr. Sidhu to Plaintiff on October 28, 2017, deviated from good and accepted standards of medical practice in failing to properly treat Plaintiff's dislocated

³ In opposition to the motions, Plaintiff submitted an expert affirmation with the name of the expert redacted. None of the defendants raised an objection to Plaintiff's use of a redacted expert affirmation. Plaintiff has offered an explanation for its failure to identify the expert by name and offered to provide an unredacted affirmation for *in camera* review. As such, the Court will consider the redacted expert affirmation in deciding the motions for summary judgment [*see Colletti v. Deutsch*, 150 AD3d 1196 (2d Dept. 2017)].

shoulder [*id.* at ¶6]. The expert identified several departures by Dr. Sidhu that Plaintiff argued create triable issues fact. The Court will address each alleged departure in turn.

1. The use of ketamine during the shoulder reduction was a deviation from the standard of care

Plaintiff's expert's primary contention is that Dr. Sidhu deviated from the standard of care in administering ketamine, rather than a sedative with more muscle relaxing properties, during the second reduction procedure. However, this is a different theory of liability than those pleaded by Plaintiff in the amended complaint and bill of particulars. As such, the expert's affirmation is insufficient to raise an issue of fact because it improperly raised a new theory of liability for the first time in opposition to the motions for summary judgment [*Anonymous v. Gleason*, 175 AD3d 614, 617 (2d Dept. 2019); *Marti v. Rana*, 173 AD3d 576 (1st Dept. 2019), *lv app denied* 34 NY3d 906 (2019)].

2. Fracture is not a risk of shoulder reduction; the mere fact of fracture of Plaintiff's radius and ulna bones is proof that Dr. Sidhu used too much force, thereby deviating from the standard of care

Plaintiff's expert claimed that a fracture is not a known risk of shoulder reduction. The expert then concluded that because it is not a known risk, the mere fact that a fracture occurred means that Dr. Sidhu exerted too much force on Plaintiff's arm. This conclusory assertion fails to counter the detailed opinion rendered by Dr. Snyder regarding the amount of force used by Dr. Sidhu and relied upon a mischaracterization of Dr. Sidhu's deposition testimony.

The expert's opinion that the mere fact the radius and ulna were fractured is proof that Dr. Sidhu deviated from the standard of care is conclusory and fails to rebut the specific, record-based analysis offered by Dr. Snyder [*Schwartz*, 179 AD3d at 964 ("In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reason and relying on specifically cited evidence in the record" [citations omitted]); *Keun Young Kim v. Lenox Hill Hosp.*, 156 AD3d 774, 775 (2d Dept. 2017) (affirmation of plaintiff's expert failed to address specific assertions made by the defendant's expert)].

Dr. Snyder, relying on Plaintiff's medical records and Dr. Sidhu's testimony, described Dr. Sidhu's use of gentle in line traction and opined that it was an appropriate reduction technique, given the circumstances and Plaintiff's clinical presentation. Not only does Plaintiff's expert not address this assertion with "specifically cited evidence in the record" [*Schwartz, supra*], but his affirmation does not so much as mention the amount of force actually used by Dr. Sidhu during the reduction. Instead, the expert merely offered his conclusion that too much force was used. This manner of conclusory opinion, not based upon facts in the record, is insufficient to defeat the Defendants' prima facie showing [*Schwartz, supra; Wagner, supra; Keun Young Kim, supra*].

Plaintiff's expert claimed that Dr. Sidhu confirmed in his deposition that fractures of the radius and ulna are not risks of a shoulder reduction [*id.* at ¶7]. However, the excerpts of Dr. Sidhu's testimony offered by Plaintiff, and relied upon by its expert, do not paint a complete and accurate picture of Dr. Sidhu's testimony. During his deposition, when discussing the first attempt at reduction, Dr. Sidhu was asked about the risks of the procedure that he discussed with Plaintiff [*see Sidhu Dep. Tr., NYSCEF Docket No. 47, p 26*]. His answer did not include fracture. However, when discussing the second attempt at reduction, Dr. Sidhu was again asked about the risks of the procedure that he discussed with Plaintiff. His answer - which referred back to the risks he listed when asked the first time - included the risk of fracture [*id.* at pp 43-44]. Dr. Sidhu's testimony, viewed as a whole, does not confirm that fracture is not a risk of shoulder reduction, as claimed by Plaintiff.

Plaintiff's expert agreed that some force is necessary in a shoulder reduction. The expert failed to specify, however, what amount or type of force would have been appropriate under the circumstances, nor did the expert take the position that the reduction should not have been performed. Rather, the expert's ultimate opinion is simply that before continuing with the shoulder reduction, Dr. Sidhu should have administered a more appropriate anesthetic. However, as this opinion as to the manner in which

Dr. Sidhu performed the reduction is entirely dependent upon the newly-raised theory of an improper anesthetic, it is insufficient to raise a triable issue of fact [*Anonymous, supra; Marti, supra*].

3. *The failure to understand Plaintiff's history of osteoporosis prevented Dr. Sidhu from acting appropriately and within the standard of care in the method and amount of force he used in attempting to reduce the shoulder*

Plaintiff's expert opined that Dr. Sidhu failed to properly take into account Plaintiff's history of osteoporosis. However, again, the expert did not claim that Dr. Sidhu should not have performed the reduction because of Plaintiff's osteoporosis, or that Dr. Sidhu should have used a certain, different amount of force; rather, the expert merely concluded that a different anesthetic should have been used. As discussed *supra*, this newly-raised argument is insufficient to raise a triable issue of fact.

Moreover, Plaintiff's expert failed to address the fact that it was Dr. France, the on-call orthopedic surgeon, who recommended that the shoulder reduction be performed on Plaintiff in the emergency room, prior to Dr. Sidhu's involvement in the treatment. The fact that Dr. Sidhu was asked to perform the shoulder reduction "did not cause [him] to assume a general duty of care with regard to the treatment provided to the plaintiff by other physicians" [*Yasin v. Manhattan Eye, Ear & Throat Hosp.*, 254 AD2d 281, 282 (2d Dept. 1998)].

Based upon the foregoing, the affirmation of Plaintiff's expert is conclusory, speculative, and contradicted by facts in the record. It is therefore insufficient to raise a triable issue of fact warranting denial of the motion for summary judgment [*Schwartz, supra; Wagner*, 172 AD3d at 955 ("The expert affidavit proffered by the plaintiff relied upon facts that were not supported by the record and, thus, was speculative and conclusory and insufficient to defeat the defendants' motion for summary judgment"); *Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 572 (2d Dept. 2017) ("An expert opinion that is contradicted by the record cannot defeat summary judgment"); *Keun Young Kim*, 156 AD3d at 775; *Kerrins v. South Nassau Communities Hosp.*, 148 AD3d 795, 796 (2d Dept. 2017) (plaintiff's expert failed to raise triable

issue of fact because it failed to address specific assertions made by the defendants' experts, and was otherwise conclusory, speculative, and unsupported by the evidence)].

b. Plaintiff's Cause of Action for Lack of Informed Consent

The Defendants' submissions established their prima facie entitlement to judgment as a matter of law dismissing the cause of action for lack of informed consent. Dr. Sidhu's deposition transcript, the Mid Hudson medical records, and the expert affirmation of Dr. Snyder establish that Dr. Sidhu explained the risks of shoulder reduction to Plaintiff, and obtained her consent, prior to each procedure. In opposition, the Plaintiff's submissions failed to raise a triable issue of fact as to whether Dr. Sidhu failed to obtain the Plaintiff's informed consent [Public Health Law §2805-d; *Wright v. Morning Star Ambulette Services, Inc.*, 170 AD3d 1249 1252 (2d Dept. 2019); *Khosrova v. Westermann*, 109 AD3d 965 (2d Dept. 2013)].

Based upon the foregoing, Dr. Sidhu's motion for summary judgment dismissing the complaint as asserted against him is granted. Furthermore, because the affirmation of the Plaintiff's expert failed to raise a triable issue of fact as to whether Dr. Sidhu deviated or departed from accepted medical practice, no basis exists for proceeding against defendants Emergency Medical Association of New York, P.C. and Westchester County Health Care Corporation under a vicarious liability theory [*see Samer v. Desai*, 179 AD3d 860, 863-864 (2d Dept. 2020); *Feuer v. Ng*, 136 AD3d 704 (2d Dept. 2016)]. Accordingly, the separate motions for summary judgment submitted by defendants Emergency Medical Association of New York, P.C. and Westchester County Health Care Corporation are granted. It is therefore

ORDERED, that the motion for summary judgment submitted by defendants Ravinder Sidhu, M.D. and Emergency Medical Association of New York, P.C. (motion sequence no. 1) is granted in its entirety and Plaintiff's complaint is dismissed as against these defendants; and it is further

ORDERED, that the motion for summary judgment submitted by defendant Westchester County Health Care Corporation (motion sequence no. 2) is granted in its entirety and Plaintiff's complaint is dismissed as against this defendant.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 15, 2020
Poughkeepsie, New York



Hon. Peter M. Forman, A.J.S.C.

To: All counsel of record via NYSCEF