

Devita v Durban

2020 NY Slip Op 35303(U)

September 25, 2020

Supreme Court, Nassau County

Docket Number: Index No. 606040/2014

Judge: Jack L. Libert

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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 20
NASSAU COUNTY

GIOVANNI DEVITA and LINA DEVITA,

Plaintiff,

-against-

MOTION # 02
INDEX # 606040/2014
MOTION SUBMITTED:
JULY 14, 2020

LAWRENCE H. DURBAN, M.D. and ST. FRANCIS
HOSPITAL, ROSLYN, NEW YORK,

Defendants.

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Cross Motion/Answering Affidavits.....**
- Reply Affidavits.....**

Defendant, Lawrence H. Durban, M.D. moves unopposed for an order:

- (a) pursuant to CPLR 3212, granting summary judgment in favor of defendant Lawrence H. Durban, M.D. and dismissing this action with prejudice; or
- (b) pursuant to CPLR 3212(e) and (g), granting partial summary judgment in favor of defendant, Lawrence H. Durban, M.D.

Factual Background

The happening of the events leading up to the alleged negligence are summarized in the moving papers and the annexed exhibits as follows. Mr. Devita was diagnosed with colon cancer in April 2012. On May 14, 2012, he was admitted to St. Francis Hospital to undergo a laparoscopic colectomy. Dr. Robert Dring began to perform the surgery on May 14, 2012. However, during the initial stages, Mr. Devita's heart rate dropped into the range of approximately 20 beats per minutes (normal heart rate range: 60 - 100 beats

per minute). Mr. Devita's condition was deemed to be too unstable to permit the surgery to continue. The surgery was aborted with the plan being to operate again when the patient was hemodynamically stable.

A Swan-Ganz Catheter (SGC) was placed by the anesthesiologist. The SGC was removed on May 15, 2012. Dr. Durban testified that he did not order the SGC and did not remove the SGC. Dr. Durban's first involvement with the patient was on May 17, 2012 when he was consulted for the sole purpose of inserting a temporary transvenous ventricular lead in preparation for the repeat colectomy. Mr. Devita was brought back to the operating room on May 17, 2012 to undergo the colectomy.

In order to place a temporary pacemaker prior to the surgery, Dr. Durban cut the right internal jugular introducer sheath to advance a 0.038 guide wire. The introducer sheath that was in place was then exchanged for a #7 Model #5076 introducer. He then advanced a Medtronic CapSureFix Novus Lead, Model 5076 into the high septal area of the right ventricle. The temporary pacing wire was placed without any complications. The pacemaker was tested to make sure it was functioning properly. A chest x-ray was performed to verify that the pacemaker wire was in the correct location and that patient did not sustain a bleed. Radiologist Kenneth Crystal, M.D. interpreted the study as follows: "Pacemaker lead in place. Conical correlation suggested. Swan-Ganz catheter has been removed. Mild pulmonary vascular congestion" (See, Exhibit J, Notice of Motion). Dr. Durban then left the operating room and Dr. Dring performed the colectomy. Dr. Durban's operative report stated that "follow up evaluation and removal will be performed based on clinical course."

Mr. Devita was asymptomatic following the colectomy with the exception of a mild vague intermittent left upper quadrant pain as described by Dr. Robert Dring over one year later on July 23, 2013. Dr. Dring referred the patient for a CT scan of the abdomen and pelvis (See Exhibit K). The study revealed a "partially imaged catheter coiled within the right heart, not previously imaged..." (See, NYU Records, Exhibit L, Notice of Motion). On September 25, 2013, Mr. Devita underwent a chest x-ray which revealed a 10 cm. segment of catheter in the region of the inferior cardiac chamber that was "likely foreign body catheter fragment..." Dr. Durban was notified of these findings (See, Copy of Xray, Exhibit M).

On August 5, 2014, the foreign body was removed by Dr. Michael Attubato at NYU. It was sent to

the pathology department for evaluation. The pathology report documents the specimen to be a yellow tan plastic tube that measured 17.3 cm x 0.3 cm. It was noted to probably be a PA (pulmonary artery) catheter.

Plaintiff's Allegations

As a result of the alleged negligence, plaintiff claims to have required a further cardiac catheterization procedure; left chest pain; abdominal pain; stress and fear of worsening cardiac issues. Plaintiff's Bill of Particulars alleges that Dr. Durban deviated from standards of medical practice by failing to follow up on the plaintiff's complaints; failing to perform or recommend to plaintiff that diagnostic tests be performed to discover the cause of the condition; failing to properly remove and place a cardiac stent; failing to properly interpret plaintiff's physical signs, symptoms, medical history and/or complaints; failing to diagnose the existing cardiac stent; failing to heed to the plaintiff's complaints of pain; failing to obtain a consultation; and in allowing the cardiac stent to remain in plaintiff's body.

Discussion

"[T]he 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 issues of fact [citations omitted]. . . . 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 [citation omitted]. . . . 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 [citations omitted]" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925, 501 NE2d 572 [1986]).

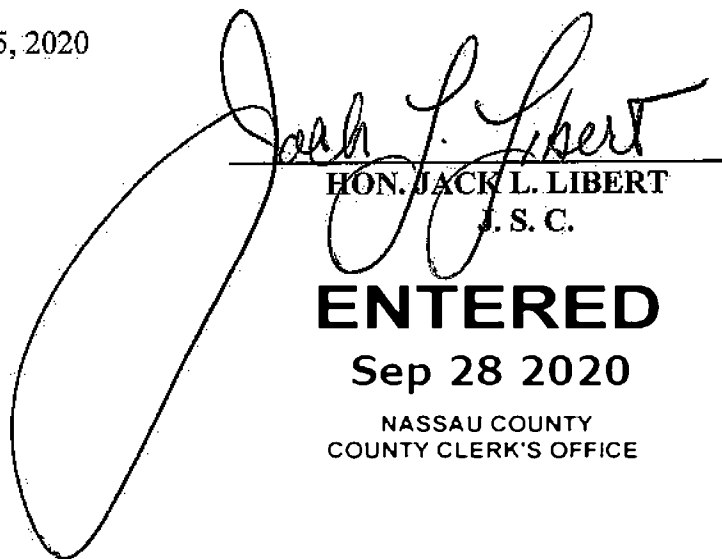
In support of the instant motion, Dr. Durban maintains that all the care and treatment provided was at all times in accordance with good and accepted practice. In support Dr. Durban submitted the expert affirmation of Alfred Culliford, M.D., a board certified cardiothoracic surgeon. It is Dr. Culliford's opinion within a reasonable degree of medical certainty, that Dr. Durban, at all times conformed to the standard of care and did not proximately cause the plaintiff's claimed injuries (See, Exhibit 1, Expert Affirmation of

Alfred Culliford, M.D.).

The movant has established a *prima facie* entitlement to summary judgment. There being no opposition to refute that *prima facie* entitlement, the motion for summary judgment on behalf of Dr. Durban is granted and the case is dismissed as against him.

ENTER

DATED: September 25, 2020



HON. JACK L. LIBERT
J. S. C.

ENTERED

Sep 28 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE