

Philgence v New York City Health & Hosps. Corp.
2021 NY Slip Op 31104(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 805072/2018
Judge: Judith Reeves McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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PAUL PHILGENCE

Plaintiff,

- v -

NEW YORK CITY HEALTH & HOSPITALS CORPORATION,

Defendant.

-----X

INDEX NO. 805072/2018
MOTION DATE 03/24/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for DISMISSAL

Defendant New York City Health & Hospitals Corporation ("Defendant" or "NYC Health + Hospitals") moves this Court for an Order pursuant to CPLR §3212 granting it summary judgment in its favor and dismissing all claims against it with prejudice. The Court hereby denies Defendant's Motion.

This action surrounds allegations of medical malpractice made by Plaintiff Paul Philgence ("Plaintiff") against the Defendant in connection with an operation he underwent at NYC Health + Hospitals. On May 30, 2017, Plaintiff presented to NYC Health + Hospitals/Bellevue and underwent an elective Automatic Implantable Cardioverter Defibrillator ("AICD" or "Defibrillator") implantation by Dr. Scott Bernstein. Plaintiff signed an informed consent form and the AICD implantation was uncomplicated. The next day, Dr. Joshua Ladder interrogated the Defibrillator and noted a change in RV lead parameters that was somewhat concerning for dislodgment. Despite this indication, it was determined that Plaintiff was able to

be discharged and he was told to follow up in the PACE clinic on June 14, 2017. Plaintiff was also informed that a revision procedure would be necessary if the lead parameters did not improve.

On June 7, 2017, Plaintiff sought treatment at the Emergency Department at SUNY Downstate for left-sided chest pain at the location where the AICD was placed. The medical staff interrogated the AICD device, which revealed no “firing”, and believed that Plaintiff’s pain was due to musculoskeletal inflammation from his surgery. Plaintiff was given Percocet for pain and told to follow up at Bellevue on June 14, 2017. Plaintiff presented to the NYC Health + Hospitals/Bellevue clinic on June 14, 2017 and reported having multiple vibrating episodes and shocks upon movement. The AICD device was interrogated and there was no capture of RV threshold at 7.5V. While Plaintiff’s chest x-ray showed that the device lead extended to the right ventricle, the impression was that the device was malfunctioning due to the right ventricular lead being dislodged. Plaintiff was discharged with a plan to undergo an elective lead revision.

On June 19, 2017, Plaintiff returned to the NYC Health + Hospitals/Bellevue with reports of constant “firing” from the AICD device. The device was interrogated, showing very low RV sensing amplitude with concern for dislodgment, and Plaintiff was admitted to the hospital. On June 20, 2017, Dr. Scott Bernstein performed a lead revision, during which the generator was extirpated and the lead was detached and removed. Dr. Bernstein implanted a new lead, put back the generator and attached the generator to the lead. The device was found to be performing normally and Plaintiff was discharged on June 21, 2017. Plaintiff continued following-up at the NYC Health + Hospitals/Bellevue cardiac clinic through August 2017 with no reports of additional shocks.

Plaintiff alleges that Defendant negligently and improperly implanted the AICD device, which resulted in repeated shocks and the need for revision surgery. Plaintiff alleges that Defendant's departures exacerbated his latent diseases and aggravated his cardiomyopathy. Defendant now moves this Court for dismissal of Plaintiff's Complaint in which Plaintiff alleges Defendant departed from the standard of care in treating him.

DISCUSSION

"A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries." *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]. (See *Costa v. Columbia Presbyt. Med. Ctr.*, 105 AD3d 525, 525 [1st Dept 2013]). "Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to 'rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.'" *Ducasse v. New York City Health and Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] (internal citations omitted). "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants." *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]. "To defeat summary judgment, the expert's opinion 'must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered.'" *Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015] (internal citations omitted).

In support of its motion, Defendant submits the affirmation of cardiologist Andrew Krumerman, M.D. ("Dr. Krumerman"), who opines that Defendant acted within the applicable

standard of care and did not proximately cause Plaintiff's alleged injuries. Dr. Krumerman details how Plaintiff met the criteria for the AICD implantation procedure and states that the installation procedure was done correctly and without complication. Dr. Krumerman also opines that it was not a deviation from the standard of care to wait and see if Plaintiff's inflammation subsided when he reported feeling shocks on June 7, 2017. Dr. Krumerman states that Plaintiff's device was properly interrogated on June 14, 2017. According to Dr. Krumerman, lead dislodgement is a known complication of the AICD installation device and can occur without negligence. Dr. Krumerman states that while he cannot give a specific opinion as to why Plaintiff suffered pain, he can state that the device never emitted a shock based upon the tests performed. According to Dr. Krumerman, "if the plaintiff's symptoms were truly related to electric shocks from the device and not merely typical post-surgical pain, Percocet would have had no effect on the plaintiff's symptoms as it would not have stopped the shocks from coming."

Based upon Dr. Krumerman's affirmation, the Court finds that Defendant showed prima facie that it did not depart from the standard of care or proximately cause Plaintiff's alleged injuries. The burden now shifts to Plaintiff to show the existence of a triable issue of fact.

The Court finds that based upon the affirmation of Dr. Bruce Charash, Plaintiff has met its burden and shown the existence of a triable issue of fact. Dr. Charash states that Defendant improperly diagnosed Plaintiff's chest pain as musculoskeletal inflammation due to surgery. Dr. Charash opines that Plaintiff's chest pain was caused by the implantation of the AICD device, which resulted in an inappropriate placement of the RV lead. This, Dr. Charash explains, led to the need for the revision surgery. Dr. Charash details how the ineffective insertion of the AICD device caused it to be functionally a "loose wire", as the RV lead was not in appropriate contact with the RV.

Dr. Charash also opines that Defendant’s expert failed to consider the AICD’s secondary function, which is to serve as a pacemaker to the right atrium and right ventricle. When this secondary feature “kicked in”, it sent inappropriate and unnecessary beats, which resulted in Plaintiff’s chest pain. Therefore, the dysfunctional RV lead caused the pacemaker to have a false impression that Plaintiff wasn’t receiving normal electrical beats to the right ventricle.


According to Dr. Charash, such shocks from the pacemaker would not show up during the interrogation. Furthermore, Dr. Charash states that Plaintiff’s lack of pain after the revision demonstrates that the cause of his chest pain was not caused by inflammation. Therefore, Dr. Chrash opines, Defendant departed from the standard of care by improperly implanting the AICD, failing to consider the pacemaker function as a cause of shock, and negligently diagnosed Plaintiff’s pain as musculoskeletal inflammation.

This Court holds that Dr. Charash’s nonconclusory affirmation sufficiently demonstrates the requisite nexus between Defendant’s alleged malpractice and Plaintiff’s alleged injuries. (*See Anyie B. v. Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Therefore, the Court finds that Plaintiff met his burden and sufficiently rebutted Defendant’s prima facie showing necessary to preclude the granting of summary judgment.

Accordingly, it is hereby

ORDERED that Defendant’s Motion for Summary Judgment is denied in its entirety.

This is the Decision and Order of the Court.

<u>3/29/2021</u> DATE	 JUDITH REEVES MCMAHON, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE