

Dunston v Patel
2021 NY Slip Op 31327(U)
April 15, 2021
Supreme Court, Kings County
Docket Number: 520070/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

NATOSHA DUNSTON,

Index No.: 520070/2016

Plaintiff,

DECISION/ORDER

-against-

DEVENDRA PATEL, M.D., MOUNT SINAI HEALTH
NETWORK, LLC, MOUNT SINAI BETH ISRAEL
MEDICAL CENTER, THOMAS BERNICK, M.D.,
LAUREN BARLOG, M.D., DONNIE BEABURN, M.D.,
THE BROOKLYN HOSPITAL CENTER and PETER
PAPPAS, M.D.,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: grant defendant's leave to renew their motion to extend the deadline to move for summary judgment pursuant to CPLR § 3212(a), § 2221 and § 2004. Upon the Court granting renewal, to award summary judgment to the defendants and a dismissal of the plaintiff's complaint.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	_____ 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other: (memo).....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, The Brooklyn Hospital ("Brooklyn Hospital") and Peter Pappas, M.D. ("Dr. Pappas") have moved (seq. 5), pursuant to CPLR§ 3212(a), § 2221 and § 2004, for an Order granting leave to said defendants to renew their motion to extend the time to move for summary judgment. Upon the Court granting renewal, the defendants seek an award of summary judgment and a dismissal of plaintiff's complaint upon the grounds that they were neither negligent nor departed from accepted medical or hospital

malpractice with respect to the care that was rendered to Natosha Dunston (“plaintiff”), and there are no issues of fact which would warrant a trial in this matter.

The plaintiff has opposed the motion by the defendants for renewal upon the grounds that the application to seek renewal of the Court’s denial of the request to extend the time to move for summary judgment is untimely. In the event the Court were to grant renewal and consider the motion by defendants to dismiss plaintiff’s complaint, plaintiff asserts that the defendants have failed to meet their burden of establishing there was no negligence or a deviation from the standard of care. Additionally, there are material issues of fact with regard to the causes of action that have been pled by the plaintiff, as against these defendants, for medical malpractice and negligence in the care and treatment that was rendered to Natosha Dunston.

Background:

This is an action sounding in medical malpractice which arose from a hysterectomy that was performed on the plaintiff on September 22, 2015 at Brooklyn Hospital. The plaintiff alleges that the hysterectomy that she underwent was not indicated and that deviations from the standard of care both during and after surgery caused plaintiff to suffer blood clots and a Heparin induced thrombocytopenia (HIT). Plaintiff further alleged that despite obvious signs of HIT, she was prematurely discharged from Brooklyn Hospital and then brought back to the hospital by ambulance six days later suffering with blood clots, where she underwent numerous surgeries including the amputation of her left leg.

An action was commenced on or about November 14, 2016, on behalf of the plaintiff, by the filing of a summons and complaint against the defendants. Issue was

joined as to defendants Brooklyn Hospital and Dr. Pappas by the service of their answers, on or about January 12, 2017.

A deposition of the plaintiff was conducted on March 20, 2018 and May 1, 2018. The EBT of co-defendant Dr. Devendra Patel was held on July 18, 2018.¹

At a Compliance Conference conducted on June 1, 2018, the parties entered into a schedule for further discovery and it was ordered that the Note of Issue should be filed on or before November 18, 2018.

On November 15, 2018, the final pre-Note conference was held which provided for the scheduling of additional depositions and the completion of other discovery. In addition, a motion by plaintiff to extend the time to file the Note of Issue was heard in the Compliance Conference Part (CCP) on November 27, 2018. JHO Martin Schneier determined that the case should remain on the trial calendar, the parties were permitted to reserve their rights to move to vacate the NOI and the time to move for summary judgment was extended until July 30, 2019.

Thereafter, on or about June 20, 2019, the defendants by motion sought an extension of time (sixty days following the completion of all depositions, which included that of Dr. Pappas as well as a representative of Brooklyn Hospital) to move for summary judgment. On July 1, 2019, JHO Schneier issued an Order in which the application to extend the deadline to move for summary judgment was denied but subject to renewal pursuant to Brill. On July 30, 2019, defendants Dr. Patel, Dr. Bernick, Dr. Barlog, Mount Sinai Health Network, LLC and Beth Israel Medical Center ("BIMC") moved for

¹ Depositions were later conducted of co-defendants Dr. Thomas Bernick (February 13, 2019) and Dr. Lauren Barlog (June 13, 2019).

summary judgment. In September 2019, Dr. Pappas was deposed but the deposition of a representative of Brooklyn Hospital was waived.

In November 2019, all of the parties participated in a private mediation. It resulted in all defendants, with the exception of Dr. Pappas and Brooklyn Hospital, entering into a settlement and a discontinuance of the action as against those defendants. On or about January 9, 2020, defendants Dr. Pappas and the Brooklyn Hospital moved for the relief sought herein which motion was referred to Part 36 by the Hon. Judge Knipel, by order dated October 6, 2020.

Facts:

On September 22, 2015, the plaintiff underwent a hysterectomy which procedure was performed by co-defendants Dr. Patel and Dr. Barlog. During the surgery, the plaintiff sustained significant blood loss which necessitated the intervention of Dr. Bernik, a vascular surgeon. Following surgery, the plaintiff was placed on Heparin, monitored, and then discharged from Brooklyn Hospital on September 28th.

On October 3, 2015, the plaintiff returned to Brooklyn Hospital by ambulance with complaints of lower extremity pain and swelling. Upon arrival, a CT scan as well as laboratory tests were ordered which tests revealed that plaintiff's platelet levels were very low. The following day (October 4th), the Hematology/Oncology team recommended that due to the low platelet level and the possibility of HIT, the plaintiff be given Argatroban treatment (which treatment was then commenced in the late evening). The CT results of plaintiff's lower extremity revealed deep vein thromboses ("DVT") in both the femoral vein and the left lower leg.

On October 5th, the Argatroban treatment was continued and an ultrasound Doppler study of the plaintiff's bilateral lower extremities revealed extensive DVT's in the right external iliac, common femoral, and femoral veins; acute non-occlusive right DVT in the popliteal vein, and acute/occlusive DVT's in the left iliac, common femoral and popliteal veins. On October 6th, the results of an exam by a vascular surgeon revealed bilateral leg swelling which had increased as well as tenderness to palpation. The plaintiff complained of severe pain upon extension of the foot, had numbness and tingling in her left foot and leg and severe pain in the left lower extremity. The plaintiff was transferred to ICU for anticoagulation. Later that day, a venogram and mechanical thrombectomy were performed. During the procedure, the radiologists removed clots from the bilateral lower extremities.

On October 7th at 2:30 a.m. the plaintiff was again examined by a vascular surgeon who documented that the plaintiff had decreased sensation over the toes with intact sensation over the leg and thigh, but no motor deficits in the left foot as she was able to dorsiflex and plantar flex. The recommendation was that the left leg remain elevated and that Argatroban and serial neurovascular exams be continued. Later that morning, Dr. Pappas performed an exam of the plaintiff upon which he found no motor function, as well as swelling of the leg and rigor mortis of the left ankle. The plaintiff was diagnosed with Phlegmasia Cerulea Albans which condition required an emergency amputation. After allegedly discussing the risks, benefits and alternatives of the procedure with the plaintiff, Dr. Pappas performed a left above knee amputation, left iliofemoral venogram, iliofemoral venous thrombectomy, left common iliac vein angioplasty and a left femoral artery thrombectomy,

On October 14th, Dr. Pappas performed a right superficial femoral vein cutdown, IVC reconstruction and angioplasty, right iliac, femoral, popliteal venogram, mechanical thrombectomy and stent replacement. On October 21st, Dr. Pappas performed a revision of plaintiff's above knee amputation with delayed primary closure.

On November 4th, the plaintiff was discharged from Brooklyn Hospital to Bushwick Gardens, a rehabilitation center where she remained until March 2016. The plaintiff testified that she continues to still have leg pain and is wheelchair dependent.

Parties' Contentions:

Here, the Court is presented with the issue as to whether defendants Brooklyn Hospital and Dr. Pappas should be granted leave to renew their motion to extend the deadline to move for summary judgment. If said relief is granted, the Court is further presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Brooklyn Hospital and Dr. Pappas, and if they deviated from the standard of medical care in their treatment of the plaintiff upon arrival in the Emergency Room.

In support of defendants' motion, counsel maintains that the time to move for summary judgment should have been extended because not all depositions were conducted and discovery completed at the time of the deadline for motions to be filed. In addition, counsel argues that Brooklyn Hospital and Dr. Pappas did not depart from good and accepted medical practice, and none of the alleged acts or omissions caused or contributed to the plaintiff's development of blood clots, need for future surgeries, and amputation of her left leg.

Plaintiff, by her attorneys, opposes the defendants' motion for summary judgment, arguing that defendants' motion is untimely as prior leave to extend the time to file such a

motion was denied. Plaintiff further argues that the defendants committed specific acts of malpractice in the treatment of the plaintiff, such as failing to timely perform surgical care and treat clotting, which plaintiff claims caused and/or contributed to the development of widespread blood clots necessitating numerous surgeries and the amputation of her left leg.

Discussion:

A motion to renew is intended to permit a party to submit additional evidence which did not exist or which was not available on the return date of the original motion. Feierstein v Moser, 477 NYS2d 545, 124 Misc. 2d 369 [1984]. It is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Joseph v Simmons, 114 AD3d 644, 979 NYS2d 675 [2d Dept 2014]. Here, defendants have made an application for renewal pursuant to Brill, as authorized in JHO Schneier's July 1, 2019 order. This Court recognizes that a motion for summary judgment made more than 120 days after the filing of the Note of Issue requires a showing of good cause to excuse the lateness. Brill v City of New York, 2 NY3d 648, 781 NYS2d 261 (2004). In determining whether good cause has been shown, the Court has a broad range of discretion. Brill v City of New York, 2 NY3d at 648, *see* CPLR §2004.

This Court finds that the defendants have presented evidence sufficient to establish good cause for the filing of the motion for summary judgment beyond the deadline of July 30, 2019, as Dr. Pappas was not deposed until September 18, 2019, which testimony was allegedly necessary to effectively move for summary judgment. In addition, plaintiff's opposition to co-defendants' motion was not filed until October 25, 2019,

wherein defendants claim plaintiffs allegedly admitted for the first time that Brooklyn Hospital and Dr. Pappas did not cause the alleged injuries. As such, this Court grants defendants' motion for renewal and leave of court to file a motion for summary judgment.

On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. Rebozo v Wilen, 41 AD3d 457, 458 [2d Dept 2007], *see* Williams v. Sahay, 12 A.D.3d 366, 368, 783 N.Y.S.2d 664 [2d Dept 2004]. In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury. Rebozo v Wilen, 41 AD3d at 458, *see* Domaradzki v. Glen Cove Ob/Gyn Assoc., 242 A.D.2d 282, 660 N.Y.S.2d 739 [2d Dept 1997].

This Court finds that the defendants have not presented evidence sufficient to meet this burden. In support of their motion for summary judgment the defendants simply offer the affirmation of counsel and have not offered an expert affidavit. Defendants rely solely on plaintiff's experts' alleged contradiction of plaintiff's own allegations set forth in the Complaint and Bill of Particulars, wherein plaintiff claims Brooklyn Hospital and Dr. Pappas caused the loss of her leg based on their failure to timely and/or properly diagnose DVT and HIT. Defendants argue that plaintiff's expert opined that co-defendant BIMC departed from the standard of care, and had such departures not occurred, the amputation of plaintiff's leg would not have been necessary. Defendants also argue that plaintiff's expert had opined that the need for an amputation was inevitable upon plaintiff's arrival at Brooklyn Hospital due to the results of the imaging, which "revealed some of the most extensive clots that I have ever seen and clots to that extent would require amputation."

(See Plaintiff's Expert Aff., annexed to Defendant's Motion as Exhibit "1", para. 1, 4, and 33). Defendants contend that plaintiff's expert asserts that plaintiff developed clots due to the HIT from the anticoagulant that was needed because she was immobile after the hysterectomy, and that if she never had the surgery, she never would have developed HIT and lost her leg. Defendants assert that plaintiff's expert states that these clots were in her legs at the time of discharge from co-defendant BIMC, and that for the clots to be so pervasive and widespread, the process must have been ongoing since plaintiff was at BIMC. Defendants claim plaintiff's expert attributes the need for amputation to BIMC's failure to timely diagnose and treat the blood clots that formed after plaintiff's hysterectomy, and as such defendants conclude that the opinion that plaintiff's injuries upon arrival at Brooklyn Hospital already existed or were inevitable, constitute judicial admissions that conclusively undermine any claim that Brooklyn Hospital and Dr. Pappas were in any way responsible for plaintiff's alleged injuries.

The Court considered these arguments, and while plaintiff's expert affirmation does include an opinion that co-defendant BIMC's deviations from the standard of care caused the development of the blood clots, defendants have not pointed to a statement made by plaintiff's expert that Brooklyn Hospital and Dr. Pappas did not contribute to any of plaintiff's alleged injuries. Further, defendants did not submit an expert affirmation to support their contention that Brooklyn Hospital and Dr. Pappas did not cause or contribute to plaintiff's alleged injuries. Plaintiff, in opposition, cites several alleged departures from the standard of care, including failure to timely perform surgical care, failure to timely perform vascular surgical care, and failure to timely treat clotting. A question of fact remains as to whether Brooklyn Hospital and Dr. Pappas' treatment after arriving at Brooklyn Hospital via ambulance contributed in any way to plaintiff's

alleged injuries. As such, the defendants' motion for summary judgment dismissing plaintiff's medical malpractice claim is denied.

Conclusion:

While the defendants have presented evidence sufficient to establish good cause for the filing of the motion for summary judgment beyond the deadline, the defendants have failed to meet their burden for establishing a prima facie case for summary judgment. Accordingly, the motion by the defendants for summary judgment and a dismissal of plaintiffs' complaint, pursuant to CPLR §3212, is denied.

In addition, in accordance with the Court so-ordering discontinuances with prejudice against defendants Dr. Patel, Mount Sinai Health Network, LLC, Mount Sinai Beth Israel, Dr. Bernick, and Dr. Barlog, the caption is amended to read as follows:

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NATOSHA DUNSTON,

Plaintiff,

-against-

DONNIE BEABURN, M.D., THE BROOKLYN
HOSPITAL CENTER and PETER PAPPAS, M.D.,

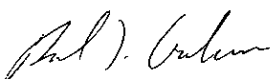
Defendants.

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This shall constitute the decision and order of this Court.

Dated: April 15, 2021
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

KINGS COUNTY CLERK
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