

Trachtenberg v Singh
2021 NY Slip Op 32954(U)
December 21, 2021
Supreme Court, New York County
Docket Number: Index No. 805407/2017
Judge: Judith N. McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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INDEX NO. 805407/2017

MORTON TRACHTENBERG, FAY TRACHTENBERG,

MOTION DATE N/A, N/A

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

VARINDER SINGH, LENOX HILL HOSPITAL, JANE FARHI

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 90

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents,

Defendant Jane Farhi, M.D.s' motion (sequence # 001), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendant, is granted as detailed herein.

Defendants Varinder Singh, M.D. and Lenox Hill Hospital's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendants, is granted in part and denied in part as detailed herein.

This is an action seeking damages for personal injuries resulting from alleged medical malpractice. This case involves a then 81-year-old man, who as a result of a cardiac stress test which had to be stopped after 2 minutes, underwent a CT (computerized tomography) angiogram that revealed severe LAD (Linear immunoglobulin A dermatosis) disease. Consequently,

Defendant cardiologist Dr. Farhi referred Plaintiff Decedent Morton Trachtenberg to Defendant Dr. Singh who evaluated him and subsequently performed a cardiac catheterization. In the midst of that procedure Decedent appeared diplopic and a stroke code was called. An MRI (magnetic resonance imaging) of the brain later found a tiny punctuate thalamic midbrain embolic infarct. Plaintiff Decedent is alleged to have suffered significant injury, including but not limited to: hemorrhagic stroke, cerebral dysfunction, brain damage, inability to ambulate, and cognitive issues.

Defendants now move for summary judgment to dismiss Plaintiffs' case as against them.

As part of the summary judgment motion of Dr. Singh and Lenox Hill Hospital, Defendants seek to dismiss the Complaint due to Plaintiffs' lack of capacity to bring the action. "[A] person of unsound mind but not judicially declared incompetent may sue or be sued in the same manner as any other person." *Rivera v. New York City Transit Auth.*, 141 A.D.3d 441, 33 N.Y.S.3d 900 (N.Y.A.D. 1st Dept. 2016). Defendants failed to submit any evidence of Plaintiff Decedent having been judicially declared incompetent.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendant Dr. Farhi established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Malcolm Phillips. Defendants Dr. Singh and Lenox Hill Hospital established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the

Affirmations of Dr. John Fox and Dr. Alan Segal. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008); *See also Bamberg-Taylor v. Strauch*, 192 A.D.3d 401, 142 N.Y.S.3d 537 (N.Y.A.D. 1st Dept. 2021).

In support of Defendant Dr. Farhi's motion, Dr. Phillips opined "that with the CTA revealing a 'greater than 75% stenosis in the proximal left anterior descending artery,' along with the symptoms elicited during the stress test, the standard of care required the recommendation for and the performance of a coronary angiogram/catheterization by an interventional cardiologist – unless otherwise contraindicated. Thus, FARHI timely made the appropriate recommendation for a possible coronary angiogram/catheterization, subject to a further evaluation by the interventional cardiologist SINGH. More importantly, while FARHI, as a cardiologist, may make a recommendation for a possible coronary angiogram/catheterization, she could not, and did not, make the decision to perform the patient's catheterization (or the subsequent PCI). But rather, that decision would have, and was in fact here, made by the interventional cardiologist SINGH who ultimately performed the procedure."

Dr. Phillips elaborated that "The appropriateness of FARHI's recommendation for a possible coronary angiogram/catheterization and plan for further evaluation by the interventional cardiologist is further supported by (1) the recommendation by non-party Dr. Peters for a possible coronary angiogram/catheterization, after he identified a greater than 75% occlusion of the LAD on the CTA, (2) the recommendation by the interventional cardiologist SINGH for the performance of the coronary angiogram/catheterization, and (3) the finding of what turned out to be a 95% occlusion of the LAD upon the performance of the coronary angiogram/catheterization."

As to Dr. Farhi's responsibilities after making the recommendation to Dr. Singh, Dr. Phillips opined that "The records and testimony support the finding that FARHI spoke to the patient regarding possible coronary angiogram/catheterization -- and that the interventional cardiologist SINGH would evaluate him and make his own recommendations. With this, it was reasonable and acceptable for FARHI to rely upon SINGH (as the interventionalist to perform the procedure) to have a detailed informed consent discussion (which would include the risks of the procedure) with the patient, if and when he were to recommend the coronary angiogram/catheterization, and/or further, a PCI. Similarly, it was reasonable and acceptable for FARHI to rely upon SINGH (and non-party cardiologist Dr. Raifman) to order and effectuate the performance of any pre-operative testing that may be necessary prior to the coronary angiogram/catheterization -- which was done by the interventional team during the patient's hospitalization."

Dr. Phillips concluded that, "Importantly, the decedent did not sustain and/or suffer any injuries as a result of FARHI's physical examinations, or the tests that she performed. But rather, the tests (specifically, the exercise stress test and EKGs) revealed findings that were concerning for severe coronary artery disease, and that warranted further testing on an urgent basis. With this, FARHI ordered, and facilitated the scheduling of another test (i.e. a cardiac CTA), which was performed at non-party Carnegie Hill Radiology later that same day...the CTA revealed findings that, in essence, confirmed severe coronary artery disease, and that warranted the performance of further testing (i.e. a coronary angiogram/catheterization) on urgent basis. With this, FARHI called the patient and advised him of the findings, and directed him to go to the hospital immediately, so that he may be evaluated by the interventional cardiologist SINGH for a possible coronary angiogram/catheterization."

In support of Defendants Dr. Singh and Lenox Hill Hospital's motion, Dr. Fox opined, "that DR. SINGH appropriately recommended the performance of a cardiac catheterization in light of how the decedent was only able to complete two minutes of a stress test at DR. FARHI's office and a CT angiogram revealed that at the LAD there was a focus of mixed plaque causing greater than 75% stenosis and there was suspicion of an obstructing lesion."

Dr. Fox concluded "that the moving defendants timely and properly rendered neuro-physiological care and timely treated the decedent's stroke. The record notes that a neuro-interventional radiologist, Dr. Raphael Ortiz performed a cerebral angiogram at 2:24 p.m. in the catheterization suite. A cerebral angiogram can potentially find blockages of blood flow in the blood vessels in the brain. It is significant that the decedent was not transferred outside of this area to undergo a CT scan; such a transfer would have taken up significant time. Thus, no time was wasted in performing the cerebral angiogram. Moreover, as per DR. SINGH'S testimony, Dr. Ortiz was the Director of Neuro-Intervention. Accordingly, the neuro-physiological care was timely and was rendered by a high-skilled clinician."

In support of Defendants Dr. Singh and Lenox Hill Hospital's motion, Dr. Segal opined, "that the appropriate medications, including anti-platelets, statins, and anticoagulants were used to help prevent a stroke. It is my opinion that there was an appropriate balance of preventing a stroke with the risk of bleeding during the procedure and that it is imperative to achieve the right balance between these two risks, as was done in this case."

Dr. Segal further opined, "that the moving defendants took the appropriate measures to mitigate the risk of a stroke occurring with the use of statins, Plavix, Aspirin, and Heparin. It is also my opinion that the decedent was appropriately given Heparin in connection to the cardiac catheterization and after the stroke since it can be helpful in preventing the formation of

additional clots. As discussed, I believe the stroke was caused by plaque, not a blood clot. Accordingly, if TPA had been administered, it would have been ineffective in treating the decedent. However, assuming arguendo, that the stroke was caused by a blood clot, I do not believe the decedent was a candidate for TPA because he had been given Heparin in connection to the catheterization. It is dangerous to give a patient TPA when they have been anticoagulated since this could cause bleeding.”

Finally, Dr. Segal concluded, “that DR. SINGH timely and properly recognized that the decedent had experienced a stroke and obtained a timely consult by a neuro-interventionist, Dr. Raphael Ortiz, who had performed a neuro-angiogram at the cardiac catheterization suite (he did not transfer the decedent outside the catheterization lab for this study and as such no time was wasted in performing this neuro-angiogram). The decedent was also given Heparin after the stroke. Overall, I believe that the care that was rendered to treat the decedent’s stroke fully met standard of care.”

The Court notes that a Supplemental Affirmation from Dr. Segal was submitted on Reply. It is not proper to submit new evidence on reply, and this Court did not give permission for any supplemental affirmations, so the Court did not consider that Supplemental Affirmation in deciding these motions.

“Once this showing has been made [by Defendant], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden.” *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff, “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 v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff, “submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... 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[‘s]... summary judgment motion.” *Id.*

“A plaintiff’s expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *See also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiffs submitted Affirmations from an Interventional Cardiologist and from a Neurologist in Opposition to Defendants’ motions.

In opposition to Defendants’ motions, Plaintiffs’ Interventional Cardiologist opined “that Mr. Trachtenberg lost the opportunity to make an informed decision on whether or not to undergo the PCI because he was not advised that there was a risk of stroke, and that coronary artery disease could have been treated by medicine. It is my opinion to a reasonable degree of medical certainty that had Mr. Trachtenberg been properly advised of the risks and alternatives to the PCI and decided to pursue medical therapy, he would have avoided the stroke suffered

during the catheterization especially since he was performing his activities of daily living, including being active.”

Plaintiffs’ Interventional Cardiologist elaborated that, “Mrs. Trachtenberg specifically testified (at pp. 110, 119-120) that neither Dr. Singh nor any of his staff discussed any risks of the procedure, nor did they discuss what the consequences would be if the procedure was not performed. This is consistent with plaintiff’s testimony that they were not told of any risks. It is my opinion to a reasonable degree of medical certainty that Dr. Singh deviated from the good and accepted medical practice by failing to advise the plaintiffs of the risks of the procedure, especially the risk of stroke, that is what ultimately befell Mr. Trachtenberg and that Dr. Singh admitted (at p. 23) is a known complication of this type of procedure. It is also my opinion to a reasonable degree of medical certainty that Mr. Trachtenberg lost the opportunity to make an informed decision on whether or not to undergo the PCI because he was not advised that there was a risk of stroke, and that coronary artery disease could have been treated by medicine, which according to the COURAGE trial is equally, if not more effective for treating coronary artery disease as a catheterization.”

In opposition to Defendants’ motions, Plaintiffs’ Neurologist opined, “that Lenox Hill Hospital, its agents, servants, and/or employees, deviated from the good and accepted medical practice by failing to timely treat embolic stroke on June 1, 2015. Initially, I disagree with defense expert Dr. Segal that the stroke in this case was caused solely by plaque. It is my opinion to a reasonable degree of medical certainty that the left thalamic infarct, which represents a critical area of Mr. Trachtenberg's brain, which was permanently damaged by the stroke, was caused by fragmentation of micro-emboli and not calcified plaque. As such, it is my opinion to a

reasonable degree of medical certainty that thrombolytic therapy (tPA) was appropriate and was the standard of care for treatment of Mr. Trachtenberg's stroke.”

Plaintiffs’ Neurologist further opined, “that defendants deviated from the good and accepted medical practice by failing to use Protamine to reverse the effects of heparin and request the appropriate testing to determine if tPA could have been administered within the therapeutic window of 4.5 hours. It is my opinion to a reasonable degree of medical certainty that had defendants used Protamine to reverse the effects of heparin, they could have timely administered tPA, which would have prevented further injury to Mr. Trachtenberg's brain and avoided the devastating lifetime physical and cognitive impairments he suffered, rather than taking no action here whatsoever to treat the ongoing stroke.”

Plaintiffs’ Neurologist elaborated, “that tPA was appropriate in this case. I disagree with defense expert Dr. Segal (at 48) that the stroke that Mr. Trachtenberg incurred was completely and totally due to calcified plaque that embolized and that it could not be dissolved by the administration of thrombolytic therapy (tPA). It is my opinion to a reasonable degree of medical certainty that the left thalamic infarct, which represents the most critical area of Mr. Trachtenberg's brain, which was permanently damaged by the stroke, was caused by fragmentation of micro-emboli and not calcified plaque. A CT scan can detect and reveal calcific plaque fragments as hyperdense foci scattered within the hypodense infarct. I have personally reviewed the radiological imaging taken during Mr. Trachtenberg's hospitalization at Lenox Hill Hospital and it is my opinion to a reasonable degree of medical certainty that the June 1, 2015, 3:10pm, CT scan does not show plaque fragments. While it is acknowledged that downstream embolization of atheromatous material from plaque contains a mixture of both hard calcified material and thrombus, I disagree with defense expert Dr. Segal that hard

calcified plaque was obstructing the vessel, giving rise to infarction in this case as this is not seen in any of the CT slides obtained immediately after the cerebral angiogram. It is my opinion to a reasonable degree of medical certainty that the CT scan did not reveal any punctate high-density foci, and as such, there was no evidence for fragments of calcified plaque as opined by defense expert Dr. Segal.”

The Court finds no merit to remainder of Plaintiffs’ arguments in opposition to the motions.

“In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017); See also *Hernandez v. Eachempati*, 190 A.D.3d 552, 140 N.Y.S.3d 225 (N.Y.A.D. 1st Dept. 2021).

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020); See also *Castro v. Yakobashvilli*, 187 A.D.3d 403, 129 N.Y.S.3d 763 (N.Y.A.D. 1st Dept. 2020).

Plaintiffs’ Experts have created questions of fact regarding Plaintiffs’ allegations related to a lack of informed consent and the treatment of Mr. Trachtenberg following the June 1, 2015 coronary angiogram/catheterization, when Dr. Singh proceeded with the percutaneous coronary intervention and Mr. Trachtenberg suffered a stroke. The remainder of Plaintiffs’ allegations, for which Defendants’ Experts opined, were not addressed by Plaintiffs’ Experts, and therefor must be dismissed.

However, although Plaintiffs' Experts fault Defendant Dr. Farhi for failing to obtain informed consent, Plaintiffs have provided no basis to conclude that Dr. Farhi was under a duty to obtain informed consent for the procedure performed by Dr. Singh. Dr. Farhi advised Plaintiffs to go to the Emergency Room so that Plaintiff Decedent could be evaluated by Dr. Singh and the Emergency Room staff at Lenox Hill Hospital. Consequently, Plaintiffs' allegations related to a lack of informed consent against Dr. Farhi must be dismissed. "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that *the person providing the professional treatment* failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment..." *Pirri-Logan v. Pearl*, 192 A.D.3d 1149, 145 N.Y.S.3d 545 (N.Y.A.D. 2nd Dept. 2021). Allegations of a lack of informed consent are only applicable to the individual providing the professional treatment, which in this case was not Dr. Farhi.

ORDERED that Defendant Jane Farhi, M.D.'s motion (sequence # 001), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendant, is granted; and it is further

ORDERED that all of Plaintiffs' allegations as against Defendant Dr. Farhi are severed and dismissed; and it is further

ORDERED that Defendants Varinder Singh, M.D. and Lenox Hill Hospital's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendants, is denied as to Plaintiffs' allegations related to a lack of informed consent and the care and treatment of Decedent Morton Trachtenberg following the coronary angiogram/catheterization when Mr. Trachtenberg suffered a stroke; and it is further

ORDERED that Defendants Varinder Singh, M.D. and Lenox Hill Hospital's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendants, is also denied as to Defendants' claim that Plaintiffs lack capacity to sue; and it is further

ORDERED that the remainder Defendants Varinder Singh, M.D. and Lenox Hill Hospital's motion (sequence # 002), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against said Defendants is granted; and it is further

ORDERED that all of Plaintiff's allegations other than a lack of informed consent and the care and treatment of Decedent Morton Trachtenberg following the coronary angiogram/catheterization when Mr. Trachtenberg suffered a stroke are severed and dismissed; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on March 23, 2022 at 3:30 pm; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

12/21/2021
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

Hon. Judith N. McMahon
J.S.C.