

Mashack v Vincentic
2021 NY Slip Op 33034(U)
November 5, 2021
Supreme Court, Bronx County
Docket Number: Index No. 22568/17
Judge: Joseph E. Capella
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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23**

Case Disposed
Settle Order
Schedule Appearance

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

-----X
CHERYL MASHACK,

Index #: **22568/17**
DECISION/ORDER

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

ANTO VINCENTIC, D.P.M.,

Defendant.

-----X
The following papers numbered 1 to 3 read on this motion.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AND DENIED IN PART AS FOLLOWS:

Defendant seeks summary judgment (CPLR 3212) and dismissal of the instant podiatric malpractice action in which plaintiff alleges that defendant was negligent on various dates from February 4 through April 8, 2015, in failing to timely diagnose and treat osteomyelitis of the left foot following two injections. The complaint also includes a cause of action for negligence (second cause of action), informed consent (third) and res ipsa loquitur (fourth), and alleges that defendant's conduct was wilful and wanton to warrant punitive damages. As the movant for summary judgment, defendant must make a *prima facie* showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320

[1986].) In other words, defendant must provide evidentiary proof in the form of expert opinions and/or factual evidence that establishes that it did not deviate from accepted standards of care and practice, and as such, its conduct was not a proximate cause of plaintiff's injuries. (*Fileccia v Massapequa*, 99 AD2d 796 [2nd Dept 1984]; *affirmed* 63 NY2d 639 [1984].) If he does, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to both create issues of fact for a trial (*Alvarez*, 68 NY2d 320), and warrant denial of summary judgment.

According to defendant's expert, Dr. Edwin Wolf, who is board certified in podiatric medicine and surgery, defendant did not depart from good and accepted podiatric care in causing or failing to treat the infection/osteomyelitis. He opines that based on the lapse of time between the subject injections, the onset of plaintiff's abscess and subsequent osteomyelitis, and the lack of findings on an MRI from March 11, 2015, the two injections administered by defendant on February 13 and 23, 2015, could not have caused plaintiff's injuries. He notes that plaintiff did not have subjective signs or symptoms of infection in the days following the injections, and there was no finding of infection, abscess or osteomyelitis on the MRI of March 11, 2015. Dr. Wolf opines that the care and treatment rendered by defendant cannot be the cause of any injury to plaintiff. Lastly, Dr. Wolf opines that defendant obtained the appropriate informed consent by discussing the risks, benefits and alternatives to the treatment rendered.

According to the bill of particulars, plaintiff suffered, *inter alia*, abscess of left

foot, fragments of focally necrotic fibrous tissue and methicillin-susceptible staphylococcus aureus. It is well settled that an action for injuries sustained while under the care of a medical practitioner may proceed on a theory of simple negligence or the more particularized theory of medical malpractice. (*Hale v State of NY*, 53 AD2d 1025 [4th Dept 1976].) Simple negligence is restricted to those cases where the alleged negligent act is readily determinable by the trier of fact based upon common knowledge, whereas malpractice involves issues regarding treatment/care that more often than not requires expert testimony. (*Id.*) And Dr. Wolf's opinion clearly established a lack of causation, which applies equally to both simple negligence and medical malpractice. Overall, given the alleged conduct and injuries, this action does not qualify as one for simple negligence, but in fact is one that falls exclusively within the medical malpractice realm.

As for the complaint's allegation that defendant's conduct was sufficiently wilful and wanton to warrant punitive damages, plaintiff's claims center around the alleged failure to timely diagnose and treat osteomyelitis of the left foot following two injections. While these alleged facts may demonstrate medical malpractice, they do not rise to the level of willful conduct that evidences a high degree of moral culpability. (*Rey v Park*, 262 AD2d [2nd Dept 1999].) In addition, the complaint does not allege a foreign body or injury occurring at an operative site while plaintiff was anesthetized, (*Mack v Hall*, 121 AD2d 431 [2nd Dept 1986; *Pipers v Rosenow*, 39 AD2d 240 [2nd Dept 1972]), that would

warrant a res ipsa loquitor claim. Based on the aforementioned, the court is satisfied that defendant has met his burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist to warrant a trial.

In opposition, plaintiff provides an expert affidavit from Dr. Steven L. Goldman, a board certified podiatrist duly authorized to practice in the State of New York.¹ The affidavit is not notarized, nor does not indicate where it was executed; however, as Dr. Goldman's curriculum vitae states that he lives in Virginia, it is fair to say that it was executed in Virginia. As the affidavit lacks a notary stamp and a certificate of conformity, it is not in admissible form. (CPLR § 2309(c).) Giving Dr. Goldman the benefit of the doubt that this was an oversight, plaintiff shall have 30 days from receipt of this decision to serve and file a corrected affidavit by Dr. Goldman with the appropriate notary stamp and certificate of conformity. Failure to do so timely shall result in its preclusion as opposition to defendants' motion, thereby warranting a renewal motion (CPLR 2221(e)) by defendant. Setting this issue aside for now, a review of Dr. Goldman's affidavit reveals that given plaintiff's testimony, it is his opinion that defendant's "failure to disinfect his hands, maintain the injection supplies sterile and failure to perform any skin preparation, coupled with the risk of the use of steroids, deviated from the standard" of care and caused the resulting abscess.

¹ Plaintiff served an untimely "Supplemental Affirmation in Opposition" dated May 27, 2020; therefore, it is not being considered in review of this motion.

Dr. Goldman also notes that the MRI performed on March 11, 2015, “demonstrated a presence of fluid in the peroneal tendon sheath, consistent with a finding in the presence of infection.” And in response to Dr. Wolf’s contention that an infection would have been evident three to five days after the injections, Dr. Goldman states that incubation periods can be as long as 10 days, and this coupled with the MRI “should have raised the suspicion that an infection was indeed brewing deep within” plaintiff’s heel. He opines that defendant’s failure to timely notice the infection was a deviation from the standard of care. Dr. Goldman further opines that defendant’s “failure to administer the injections on the side of the heel and failure to provide any post-procedure guidance to [plaintiff], such as to avoid exposing the injection site, was a deviation from the standard of care and undoubtedly contributed to the development of the infection.” Dr. Goldman does not address plaintiff’s claim for lack of informed consent and *res ipsa loquitur*.

Viewing the evidence in a light most favorable to plaintiff, (*O’Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), these experts disagree on material issues of fact regarding whether there was a departure and proximate cause (*Alvarez v Prospect*, 68 NY2d 320 [1986]) – issues must be resolved by the trier of fact. (*Barnett v Fashakin*, 85 AD3d 832 [2nd Dept 2011]; *Frye v Montefiore*, 70 AD3d 15 [1st Dept 2009]). The trier of fact will hear from these experts, including the evidence that each one relies upon in forming the basis for their expert opinion, and in turn they will evaluate the weight and credibility of the testimony of these experts. (*Cassano v Hagstrom*, 5 NY2d 643 [1959]);

State v Marks, 87 AD3d 73 [3rd Dept 2011].) Given the aforementioned, plaintiff has demonstrated that issues of fact exist to warrant a trial on her medical malpractice claim. Therefore, defendant's motion is granted only to the extent of dismissing plaintiff's claims for negligence, lack of informed consent, res ipsa loquitur, wilful and wanton conduct and punitive damages. As previously noted, however, if plaintiff fails to serve and file within 30 days of receipt of this decision, a corrected affidavit by Dr. Goldman with the appropriate notary stamp and certificate of conformity, then defendant may renew the instant motion (CPLR 2221(e)). Defendant is directed to serve a copy of this decision with notice of entry by first class mail upon plaintiff within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

11/5/21

Dated

Hon.

Joseph E. Capella, J.S.C.