

Fischella v Saint Luke's Cornwall Hosp.

2021 NY Slip Op 33307(U)

February 24, 2021

Supreme Court, Ulster County

Docket Number: Index No. EF2016-0095

Judge: James P. Gilpatric

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT****ULSTER COUNTY****MICHAEL FISHELLA,****DECISION & ORDER****Plaintiff,****Index No.: EF2016-0095****- against -****SAINT LUKE'S CORNWALL HOSPITAL,****Defendant.**

Supreme Court, Ulster County**R.J.I. No.: 52-17-00447****Present: James P. Gilpatric, J.S.C.****Appearances:**

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Gilpatric, J.:

The defendant moves pursuant to CPLR 3212 for an Order granting summary judgment dismissing the plaintiff's complaint. The plaintiff opposes the motion.

This medical malpractice action arises from care and treatment provided to the plaintiff at Saint Luke's Cornwall Hospital on or about September 14, 2013. The plaintiff presented to the defendant facility on the evening of September 14, 2013 from Shawangunk Correctional Facility for severe pain in his left groin and testicle. The plaintiff alleges that the defendant failed to timely diagnose and treat his left testicular torsion that resulted in his left testicle being removed during a surgery performed in the early morning hours on September 15, 2013 at defendant facility. More specifically, the plaintiff alleges that the defendant was negligent: 1) in its failure to use reasonable

or proper skills in the efforts to care and treat plaintiff; 2) failing to timely exercise the skills which it should have possessed and exercised in the care and treatment of plaintiff; 3) failing to timely follow accepted medical practice in the care and treatment of plaintiff; 4) maintaining improper, unsafe and inadequate medical care and treatment of the defendant's facility; 5) failing to properly, adequately and timely obtain the necessary medical care and treatment for plaintiff; 6) in creating, allowing and permitting an unsafe and improper medical condition to remain and exist in defendant's facility; 7) failing to recognize plaintiff's condition and provide required medical care and treatment in a timely fashion; 8) in allowing plaintiff to suffer in extreme pain while defendant failed timely provide and perform necessary surgery; 9) in causing plaintiff to lose is left testicle, and; 10) in acting with reckless disregard for the wellbeing of plaintiff, which caused plaintiff to sustain sever, painful and permanent injuries.

To obtain summary judgment, a movant must establish his or her position "sufficiently to warrant the court as a matter of law in directing judgment" in his or her favor (*see Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). The 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 eliminate any genuine material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In a medical malpractice action, once a defendant physician makes a *prima facie* showing that there was no departure from good and accepted medical practice and/or that any departure that may have occurred was not a proximate accepted medical practice and/or that any departure that may have occurred was not a proximate cause of the plaintiff's injuries, the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to the departure element and/or the causation element (*see Stukas v Streiter*, 83 AD3d 18 [2011]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). 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 the defendant's summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied.

In support of their motion, the defendant submits, *inter alia*, a copy of the pleadings, copies

of the deposition testimonies of the plaintiff, a copy of the deposition testimony of Deborah Kaval, Shawangunk Nurse Administrator, a copy of the Ambulatory Progress Note, dated September 14, 2013, a copy of the Itinerary Authorization from Shawangunk Correctional Facility to St. Luke's Cornwall Hospital, a copy of the deposition testimony of Michael T. Bertone, Correction Captain at Shawangunk Correctional Facility, a copy of the plaintiff's medical records and the Affidavit of Gary Weiss, M.D. Ph.D, dated April 16, 2020.

The defendant argues that the care of the plaintiff comported with good medical practice at St. Luke's Cornwall Hospital and, at all times, the plaintiff was appropriately and promptly evaluated and treated in the ER. Here, the defendant submits the plaintiff's deposition testimony that stated that he began experiencing pain in his left testicle that radiated down his left leg between 3:00 p.m. and 4:00 p.m. on September 14, 2013 (Defendant's Exhibit "G", p 21, lines 12-19). Additionally, the plaintiff testified that he notified a corrections officer of his pain and was escorted to the infirmary at approximately 5:30 p.m. (Defendant's Exhibit "G", p 35-36). In addition, the defendant submits the deposition testimony of Deborah Kaval, Shawangunk Nurse Administrator, to establish that the plaintiff was first seen at 8:00 p.m. for his pain and was followed up by a telemedicine visit with Dr. Snyder of the Erie County Medical Center that evening (Defendant's Exhibit "I", p 17-18). The defendant also submits a copy of the State of New York Department of Correctional Services Itinerary Authorization to show that arrangements were made by the Shawangunk Correctional Facility to transfer the plaintiff to St. Luke's Cornwall Hospital that evening (Defendant's Exhibit "J"). The defendant submits the deposition testimony of Officer Bertone who testified that clearance for prisoner transfer from the correctional facility to St. Luke's required clearance from the Command Center in Albany prior to travel (Defendant's Exhibit "K", p 10). According to the defendant, the plaintiff was then transported by a correctional van at 9:25 p.m. after correctional clearance was received and arrived at the hospital at 9:55 p.m. (Defendant's Exhibit "J").

The defendant further submits a copy of the plaintiff's medical records to establish that the plaintiff arrived at the Emergency Room at 9:56 p.m., received an initial assessment at 10:03 p.m. and a physical examination was then performed (Defendant's Exhibit "L"). The defendant submits that the medical records show that at 10:30 a urinalysis was requested and, although the plaintiff was unable to urinate at this time, an IV was started, blood work was drawn and sent to the lab, and an IV morphine was administered while an ultrasound was pending (Defendant's

Exhibit "L"). The defendant submits that the medical records show the ultrasound was performed on the plaintiff's testicle/scrotum at 11:34 p.m. and that Dr. Robert Magrill, a radiologist, discussed the findings with Dr. Brandon at 12:10 a.m. (Defendant's Exhibit "L"). The defendant further submits that the plaintiff's medical records establish that at 12:13 a.m., Dr. Praneeth Vemulapalli, a urologist, was consulted and came to the hospital to evaluate the plaintiff (Defendant's Exhibit "L"). The defendant asserts that Dr. Vemulapalli's medical note showed that at 1:00 a.m., Dr. Vemulapalli performed a consultation in the ER and reviewed the findings of the plaintiff's left testes torsion with the plaintiff, including a bell-clapper deformity, which is a congenital malformation making it more susceptible to induced twisting of the cord and its vessels (Defendant's Exhibit "M"). He also noted the ultrasound report and discussed with the plaintiff that there is typically a six-hour window for preservation of the testis viability (Defendant's Exhibit "M"). The defendant asserts and Dr. Vemulapalli's note indicates that he discussed with the plaintiff that he was outside of this six-hour window, given that the plaintiff had said the pain began at 3:00 or 4:00 and that the plaintiff wished to proceed with scrotal exploration (Defendant's Exhibit "M"). Dr. Vemulapalli's note further indicated that the plaintiff understood that there may be a possible orchiectomy [removal of the testes] versus fixation depending on findings and viability during this procedure (Defendant's Exhibit "M"). The defendant further submits that Dr. Vemulapalli's Operative Report established that the surgery was performed at 1:44 a.m. and ended at 2:56 a.m. and that the surgery fixated the right testicle and removed the left testicle after finding it did not show any viability (Defendant's Exhibit "N"). The defendant also submits the pathology report stemming from the surgery that showed evidence of an advanced testicular torsion with massive hemorrhage and ischemic changes (Defendant's Exhibit "O").

Additionally, the defendant submits the sworn affidavit of Gary Weiss, M.D.Ph.D. to support its argument that the care of the defendant did not depart from good practice in the care of the plaintiff. Dr. Weiss averred that he reviewed the defendant's summary judgment motion and exhibits, including the pleadings, the plaintiff's medical records and the deposition testimonies (Weiss Affidavit). He further averred that after reviewing the above mentioned submissions, the care rendered by the defendant was in accord with good medical practice and the care rendered by the defendant was not the proximate cause of the plaintiff's injuries (Weiss Affidavit). Rather, Dr. Weiss noted that the plaintiff suffered from an advanced testicular torsion

and that his testicle was not viable upon arrival to the hospital (Weiss Affidavit). Reviewing all of this evidence, the Court determines that the defendant has met its burden of establishing *prima facie* entitlement to judgment in its favor as a matter of law, and shifting the burden to the plaintiff to demonstrate a triable question of fact (*see* Martino v Miller, 97 AD3d 1009, 1010 [3rd Dept 2012]; Derusha v Sellig, 92 AD3d 1193, 1194 [3rd Dept 2012]).

In opposition to the motion, the plaintiff submits, *inter alia*, the sworn affirmation of Elias Saul Hyams, M.D., dated November 3, 2020, copies of the written records of Shawangunk Correctional Facility Tour and Saint Luke's Cornwall Hospital, along with a copy of deposition testimony of Christopher Hildebrand, Correction Officer, a copy of the deposition testimony of Deborah Kaval, Shawangunk Nurse Administrator, and a copy of plaintiff Michael Fischella's deposition testimonies on August 3, 2016 and December 11, 2017.

The plaintiff argues that the care rendered to the plaintiff deviated from accepted medical practice and deprived him of a chance of his testicle being salvaged. Notably, the plaintiff submits that the affirmation of Elias Saul Hyams, M.D., a Board-Certified Urologist, to establish that the defendant deviated from accepted medical practice in the care of the plaintiff (Hyams Affirmation). In his affirmation, Dr. Hyams averred that he reviewed the plaintiff's relevant medical records and the timeline of the events of September 14, 2013 created by the defendant's attorney in making his report (Hyams Affirmation, ¶ 5). Dr. Hyams averred that a patient with a history and a physical examination with results of suspicious testicular torsion should have surgery immediately (Hyams Affirmation, ¶ 4). Dr. Hyams stated that the likelihood of salvage of the testis is directly related to the time between the onset and detorsion and salvage is almost 100% if accomplished within six hours or less (Hyams Affirmation, ¶ 4). He further averred that salvage between six and twelve hours is about 50% (Hyams Affirmation, ¶ 4). Dr. Hyams also averred that a patient presenting with suspected testicular torsion, history and physical examination, like the plaintiff did on this action, are sufficient to make an accurate diagnosis (Hyams Affirmation, ¶ 4). Dr. Hyams stated that it was a deviation from accepted medical practice for the defendant facility to have ordered an ultrasound on the plaintiff since the delay created a two-hour delay in surgery that may have decreased the likelihood of saving the plaintiff's testicle (Hyams Affirmation, ¶ 7). Dr. Hyams concluded that in his opinion, based upon the timeline of the plaintiff's care and medical records, that there may have been a chance that the plaintiff's left testicle could have been salvaged had there not been the unnecessary delays at the defendant hospital and that said medical care provided was a proximate

cause of the decreased chance of salvaging the plaintiff's testicle (Hyams Affirmation, ¶ 8).

Viewing the evidence in a light most favorable to the plaintiff, the non-moving party, the Court finds that the affirmation of the plaintiff's expert Dr. Hyam is sufficient to demonstrate the existence of triable issue of fact as to whether the actions of the defendant hospital departed from the appropriate standard of care and was the proximate cause of the plaintiff's injury. Since, the plaintiff's expert refutes defendant's expert testimony, the jury is the sole arbiter of conflicting expert testimony (*see Shaw v Binghamton Lodge No. 852, B.P.O. Elks Home, Inc.*, 155 AD2d 805 [1989]). Otherwise, the Court has considered the parties' remaining arguments and finds them either unavailing or unnecessary to reach, and as such, the defendant's motion for summary judgment is denied.

Accordingly, it is

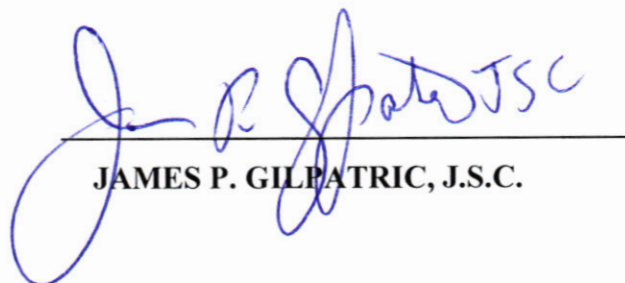
ORDERED that the defendant's motion for summary judgment is denied.

This shall constitute the decision of the Court. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED!

Dated: February 24, 2021
Kingston, New York

ENTER,



JAMES P. GILPATRIC, J.S.C.

Papers considered:

- 1.) Notice of Motion for Summary Judgment, dated May 29, 2020;
- 2.) Affirmation of Craig A. Burgess, Esq., dated May 29, 2020, with annexed exhibits;
- 3.) Affidavit of Gary Weiss, M.D. Ph.D., dated April 16, 2020;
- 4.) Affirmation in Opposition of Mark J. Metzger, Esq. dated November 3, 2020;
- 5.) Affirmation of Elias S. Hyams, M.D., dated November 3, 2020, with annexed exhibits;
- 6.) Reply Affirmation of Craig A. Burgess, Esq., dated January 8, 2021.