

Tardi v Casler-Bladek

2021 NY Slip Op 34204(U)

July 13, 2021

Supreme Court, Albany County

Docket Number: Index No. 906808-18

Judge: Susan M. Kushner

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This opinion is uncorrected and not selected for official publication.

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

GISSELA TARDI,

Plaintiff,

**DECISION AND
ORDER**

Index No. 906808-18

-against-

SUSAN CASLER-BLADEK, N.P., TIMOTHY
HARRIGAN, P.A., MELISSA SHAH, M.D.,
JEFFREY HNATH, M.D., CASEY MCGOWAN, M.D.,
ST. MARY'S HEALTHCARE AND ALBANY
MEDICAL CENTER HOPSITAL,

Defendants.

APPEARANCES:

For Plaintiff:

**Jacob D. Fuchsberg Law Firm, LLP (Neal
Bhushan, of Counsel)**

For Defendant Timothy Harrigan, P.A.:

**Phelan, Phelan & Danek, LLP (Timothy S.
Brennan, of Counsel)**

Plaintiff, Gissela Tardi, commenced this Medical Malpractice Action by filing a Summons and Complaint on November 5, 2018. Initially, there were six individual Defendants and two hospital Defendants. Subsequently, on or about August 7, 2020, Plaintiff voluntarily consented to discontinue the Action against Craig Todd M.D. Since then unopposed Motions for Summary Judgment were granted by this Court to Susan Casler-Bladek, N.P., Casey McGowan, M.D. and Albany Medical Center Hospital. Defendant St. Mary's Healthcare also moved for Summary Judgment, but that motion remains pending.

Before the Court is a Motion for Summary Judgment filed by Defendant, Timothy Harrigan, P.A. on March 31, 2021. Plaintiff filed opposition papers on April 30, 2021 and Reply papers were filed on May 7, 2021.

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 demonstrate the absence of any material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Defendant Harrigan has the burden to demonstrate, that he “did not deviate from the accepted standards of practice in treating [Plaintiff] or, if [he] did so, that such deviation was not the proximate cause of [Plaintiff’s] injuries.” *Launt v Lopasic*, 189 AD3d 1740, 1742 (Third Dept., 2020) citing *Furman v. DeSimone*, 180 AD3d 1310, 1311 (Third Dept., 2020). In the absence of such prima facie showing, the Court must deny the motion. *Alvarez v. Prospect Hosp.*, at 324.

Once a prima facie showing is made, “the burden shifts to the party opposing the motion for summary judgment 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.*, at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). More specifically, in Medical Malpractice Actions, the burden shifts to the Plaintiff “to come forward with proof that could establish a deviation from accepted medical practice and that such alleged deviation was the proximate cause of [Plaintiff’s] injuries, so as to demonstrate the existence of a triable issue of fact.” *Launt v Lopasic*, at 1742, citing *Yerich v. Bassett Healthcare Network*, 176 AD3d 1359, 1361 (Third Dept., 2019).

In the instant case, Plaintiff presented with a complaint of lower back pain radiating into her extremities on February 17, 2018 in the Emergency Department of St. Mary’s Hospital. (NYSCEF #104 Casler-Bladek EBT page 13-14). After examination, testing and x-rays, Plaintiff was discharged with a diagnosis of lower back pain and advised to follow up with her primary physician. (NYSCEF #104 Casler-Bladek EBT page 27, NYSCEF # 105, Medical Records, pages 15, 16).

Plaintiff returned to the St. Mary’s Emergency Department on February 19, 2018. (NYSCEF # 105, St. Mary’s Healthcare Records, page 19). Upon her return. Plaintiff was treated by Defendant Harrigan, who testified that he was in charge of her care and that while Craig Todd, M.D. was the attending physician in the Emergency Department at that time, Defendant Harrigan was not required to consult with him on Plaintiff’s or any other case. (NYSCEF # 106

Harrigan EBT pages 22-23). Defendant Harrigan was aware Plaintiff had been seen in the Emergency Department 2 days prior. (NYSCEF # 106 Harrigan EBT page 19).

Plaintiff complained of worsening symptoms, including a swollen left leg, greater lower back pain radiating into her lower extremities, aggravated when transitioning from sitting to standing and discolored skin on her left leg, sometimes purplish. (NYSCEF # 105, St. Mary's Healthcare Records, page 27). On examination, Defendant Harrigan found Plaintiff's back to be tender to palpation in the left lumbar musculature. Defendant found Plaintiff's left leg to have significant +1 edema without tenderness to palpation. (NYSCEF # 105, St. Mary's Healthcare Records, page 29).

Defendant Harrigan was aware of the Plaintiff's risk of deep venous thrombosis (DVT) and followed the Well's Criteria to stratify her risk. (NYSCEF # 106 Harrigan EBT pages 46-47). Where the Well's criteria shows moderate to high risk, he testified the appropriate step is to order a D-dimer test. (NYSCEF # 106 Harrigan EBT page 47). Where the D-dimer result is elevated, the next step is to order a duplex venous ultrasound; however, due to Defendant Harrigan's concerns for DVT, he skipped the D-dimer test and ordered the ultrasound. (NYSCEF # 106 Harrigan EBT page 48). The results of the ultrasound (NYSCEF # 105, St. Mary's Healthcare Records, page 30) found "No evidence of deep venous thrombosis". Based upon this radiology report, Defendant Harrigan discharged Plaintiff home with a diagnosis of lumbar radicular pain with a secondary impression of leg swelling. (NYSCEF # 105, St. Mary's Healthcare Records, page 31).

Plaintiff presented at the Ellis Hospital Emergency Department the next day, February 20, 2018, where, this time, a duplex venous ultrasound revealed a significant DVT. Plaintiff was transferred to Albany Medical Center Hospital where she underwent multiple surgeries and treatments due to the DVT and ensuing complications arising therefrom.

In support of his Motion for Summary Judgment, Defendant Harrigan proffers the expert Affirmation of Saul Melman, M.D., a physician Board Certified in Emergency Medicine. (NYSCEF # 109). Doctor Melman opined that Defendant did not deviate from accepted medical practice. Specifically, he states, "the most appropriate test to assess for a blood clot in an extremity is a duplex venous ultrasound". (NYSCEF # 109, ¶13). Melman further maintains that it is the most commonly used test in the emergency department setting for determining

whether a patient has a DVT, (NYSCEF # 109, ¶13, ¶14), and that it is entirely within the standards of care in the emergency department to rely on the technician using proper technique to obtain the ultrasound images as well as to rely on the radiologist's interpretation of those images. (NYSCEF # 109, ¶23-5). Melman also states, without detail, that Plaintiff's medical history and examination placed her at low to moderate risk for DVT. (NYSCEF # 109, ¶20). Finally, in Melman's expert opinion, there was no need to consult with a vascular surgeon based upon the completed examination and negative ultrasound and that for the same stated reasons, Defendant Harrigan complied with the proper standards of care in discharging Plaintiff home. Therefore, according to Melman, Defendant Harrigan "in no way caused or contributed to any injury of the [Plaintiff]". (NYSCEF # 109, ¶31).

In evaluating the instant Motion, the Court must first determine whether Defendant Harrigan made a prima facie showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp., supra*. Plaintiff's Bill of Particulars (NYSCEF # 101), Amended Bill of Particulars (NYSCEF # 102) and Supplemental Bill of Particulars (NYSCEF # 176), specified a number of ways Defendant Harrigan departed from the accepted standards of care. These are:

- (1) he failed to appreciate the significance of the patient's vital signs, complaints and symptoms;
- (2) failed to appreciate the significance and timely treat this patient's emergency complaints of low back pain, leg swelling, numbness, lumbar radicular pain, weakness, increased leg pain, left leg numbness, left lower extremity DVT, radiating hip pain extending to the left calf and other vascular complaints including 8/10 sharp pain and really swollen extremity, warm leg, left leg bruising to anterior thigh, diffuse lower back pain radiating into the left lower extremity;
- (3) failed to admit the patient to adequately treat her medical problems and medical conditions when in the emergency room on February 19, 2018 with worsening complaints;
- (4) failed to appreciate that this patient's signs, symptoms and complaints, including low back pain, leg swelling, numbness, lumbar radicular pain, and weakness were consistent with DVT, thrombosis, blood clots and compression of the vein;
- (5) negligently discharging the patient on February 19, 2018;

- (6) failed to order and perform and/or timely order and perform necessary and indicated laboratory tests, scans, and imaging in order to diagnose DVT, such as an ultrasound, blood tests, and CT scans with contrast of the leg swelling;
- (7) failed to admit the patient on February 19, 2018;
- (8) failed to timely and properly appreciate, recognize, take into account, and/or act on the significance of the patient's signs, symptoms and complaints consistent with left lower extremity DVT;
- (9) failed to recommend a CT scan with contrast;
- (10) failed to appreciate that the ultrasound tech did not use the proper technique during imaging on February 19, 2018;
- (11) failed to perform a D-dimer test;
- (12) failed to perform a duplex ultrasound;
- (13) failed to recommend a venography;
- (14) failed to recommend an MRI;
- (15) failed to timely and properly recommend a vascular surgeon treat the patient while in the emergency room;
- (16) failed to timely and properly diagnose, take into account, act on, and treat the patient's constant pain, low back pain, leg swelling, numbness, lumbar radicular pain, and weakness;
- (17) failed to consider and appreciate that the patient's leg was purple and very swollen, as well as failed to evaluate pulses in her leg;
- (18) failed to consider a differential diagnosis in light of the patient's symptoms of pain, inability to walk and purple swelling;
- (19) failed to order a follow up CT scan with contrast of the patient's leg;
- (20) failed to discuss the patient's symptoms with a neurologist and/or vascular doctor;
- (21) failed to provide an explanation for the patient's considerable leg swelling and purple discoloration;
- (22) failed to diagnose patient's leg swelling and clots; failed to learn and/or adhere to the policies, procedures, guidelines and protocols of St. Mary's Healthcare, if applicable, which pertain to treating DVT in the emergency room;

(23) and proximately causing the patient's injuries and damages herein.

The Court appreciates that many of the alleged departures from accepted standards of care are redundant. Plaintiff's primary complaints of Defendant Harrigan are:

- (a) Failure to appreciate the significance of Plaintiff's combination of symptoms;
- (b) Failure to order additional testing, including radiology exams, after the duplex venous ultrasound results were negative;
- (c) Failure to admit Plaintiff to the Hospital for closer monitoring in light of the progression of symptoms from February 17, 2018 to February 19, 2018;
- (d) Failure to realize the ultrasound technician did not properly conduct Plaintiff's ultrasound study; and
- (e) Failure to seek a consultation with a vascular surgeon while Plaintiff was in the Emergency Department.

Defendant Harrigan's expert establishes that he complied with the accepted standards of care when he ordered the duplex venous ultrasound test and bypassed the D-dimer test. He also establishes that Defendant Harrigan had no duty to oversee the ultrasound technician and acted according to the accepted standards of practice when he relied upon the ultrasound results as interpreted by a radiologist, referring to the ultrasound as the "Gold Standard" test for determining the presence of DVTs in the Emergency Department. Dr. Melman's conclusory response to the need to conduct a CT scan with contrast or consulting with a vascular surgeon, was, "Based on the completed examination and the negative ultrasound, no further treatment or consultation were required". (NYSCEF #109, ¶30)

The Court finds that Defendant Harrigan's expert fails to address Plaintiff's worsening symptoms from the time she was seen in the Emergency Department on February 17 to the time Defendant Harrigan saw her on February 19. Moreover, he fails to address whether these changing symptoms affected the accepted standards of care due Plaintiff. For example, Dr. Melman fails to address whether these changes warranted additional testing beyond the ultrasound or Plaintiff's admission to the hospital to monitor her continued worsening condition. More specifically, he fails to articulate whether the accepted standards of care due Plaintiff given her constellation of symptoms required Defendant Harrigan to investigate further. The Court

finds that Defendant Harrigan has failed to meet his burden to demonstrate a prima facie case for Summary Judgment.

Moreover, Plaintiff has demonstrated there are material issues of fact requiring a trial. Plaintiff provides the Affirmations of two medical experts: a Board-Certified Emergency Room Physician and a Vascular Surgeon. In the opinion of both of Plaintiff's experts, Defendant Harrigan departed from accepted standards of emergency medical care in that he failed to appreciate Plaintiff's symptoms that were consistent with DVT and failed to recognize that the negative ultrasound test warranted further testing in light of those symptoms. Plaintiff's experts also opined regarding the risks involved in failing to promptly diagnose a DVT and in failing to promptly and properly treat it. (NYSCEF # 174, ¶16).

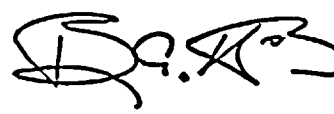
Now, therefore, it is hereby

ORDERED that Defendant Harrigan's Motion for Summary Judgment is denied.

DATED: July 13, 2021


SUSAN M. KUSHNER, A.J.S.C.

ENTERED



07/13/2021

Papers considered

- (1) Summons and Complaint filed November 5, 2018*
- (2) Motion for Summary Judgment by Defendant Harrigan (Motion #3) filed March 31, 2021 with Supporting Papers*
- (3) Affidavit in Opposition to Motion with Supporting Papers filed April 30, 2021*
- (4) Affirmation in Reply with a Memorandum of Law in Reply filed May 7, 2021*