SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

KELVIN VALERIO and DONNA VALERIO,

Plaintiffs,

-against-

ASMIA CHANDRY, M.D., MATTHEW A.T. CLARKE, M.D. and CENTRAL MEDICAL SERVICES OF WESTBROCK, P.C.,

Defendants.

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509847/2015

Index No.: ~~522851/2016~~

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.

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).....	

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

Defendant, Asima Chaudhry, D.P.M. s/h/a Asmia Chandry, M.D. ("Dr. Chaudhry"), has moved (seq. 3), pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of plaintiff's complaint upon the grounds that the doctor did not depart from accepted medical practice in the care and treatment that was rendered to the plaintiff Kelvin Valerio ("Mr. Valerio") and that any alleged departure was not the proximate cause of the alleged injuries. In addition, Dr. Chaudhry moves for a dismissal of plaintiff's cause of action for lack of informed consent as the plaintiff was

fully informed of the risks, benefits and alternatives of surgery and consent was properly obtained.

Counsel for the plaintiffs has opposed the motion for summary judgment and a dismissal of plaintiffs' complaint upon the grounds that there are material issues of fact with regard to the causes of action that have been pled by the plaintiffs, as against this defendant, for negligence, medical and podiatric malpractice, and whether the departure from good and accepted practice through their alleged acts and omissions was a proximate cause of Mr. Valerio's injuries.

Background:

The within action sounding in medical and podiatric malpractice was commenced on behalf of the plaintiffs by the filing of a summons and complaint with the Clerk of this Court, on or about August 11, 2015. Issue was joined, on or about September 21, 2015, by the service of the verified answer of defendant Dr. Matthew Clarke ("Dr. Clarke"). Thereafter, defendant Central Medical Services of Westbrock ("Central Medical Services") interposed a verified answer on or about October 6, 2015 and Dr. Chaudhry filed a verified answer on or about December 10, 2015.

The plaintiff alleges that Dr. Chaudhry was negligent in the podiatric and surgical care and treatment that was rendered to Mr. Valerio's right ankle from January 24th to September 5, 2014, which resulted in a subsequent surgery as well as permanent injuries.

A deposition was conducted of the plaintiff, Mr. Valerio on October 10th and on November 30, 2019. Co-plaintiff Donna Valerio, the spouse of Mr. Valerio was deposed on January 10th and on March 19, 2019. The EBT of Dr. Chaudhry was held on June 20, 2019. Deposition of the other named defendants were waived.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiffs on or about January 30, 2020.

Facts:

On or about October 18, 2013, the plaintiff was involved in a work-related motor vehicle accident[1] in which the plaintiff sustained injuries to his lower back, neck, shoulders and right hip. At the time of the accident, the plaintiff was removed from the scene on a longboard, given a cervical collar and brought to Brooklyn Hospital Center. After an exam and evaluation, the plaintiff was discharged and advised to follow up with his own physician.

When the pain did not improve, the plaintiff presented to Dr. Clarke at Central Medical Services on January 16, 2014, wherein the plaintiff stated that he was involved in accident three months prior which resulted in a number of injuries and he continues to have pain in his neck, back, right shoulder, right knee and right ankle. After examination, Dr. Clarke found anterior joint tenderness on palpation of the right ankle and anterior talofibular ligament ("ATFL").

At the plaintiff's next appointment at Central Medical Services on January 24, 2014, the plaintiff was seen by Dr. Chaudhry to address complaints pertaining to his foot/ankle. The plaintiff complained that the pain to his right ankle was worse when going up and down stairs and that he hears a clicking. Upon exam, pain was noticeable when palpating on the ATFL and the anterior ankle joint on the right. Dr. Chaudhry's impression was that the plaintiff sustained a grade 2 right ankle sprain and that his course of action was to treat the patient conservatively by the use of injections, physical therapy, padding/strapping and orthotics. The plaintiff was instructed to continue with anti-inflammatories, return in two weeks and was referred for a right ankle x-ray and air cast.

At the appointment on February 7th with Dr. Chaudhry, the plaintiff reported pain on a scale of 5/10. The plaintiff was placed in a soft cast for his right ankle with a compression dressing on that ankle and was given a referral for an MRI of the right ankle. The plaintiff was instructed to continue with the air cast and anti-inflammatories.

On February 14, 2014, the plaintiff presented to Lenox Hill Radiology for an MRI of the right ankle. The MRI revealed a high grade partial tear of the ATFL particularly at

[1] The plaintiff was employed by the New York City Department of Sanitation.

the fibular attachment; mild peroneus longus and brevis tenosynovitis; mild tibialis posterior tendinosis; small tibiotalar joint effusion; mild Achilles tendinosis and low grade plantar fasciitis.

On February 21, 2014, the plaintiff returned to Dr. Chaudhry where he reported the same level of pain but that the ankle felt better with the soft cast. Dr. Chaudhry informed the plaintiff of the MRI results and recommended surgery to repair the tear. There was allegedly a discussion of the risk and benefits of surgery and until there was medical clearance, the plan was for the plaintiff to continue with his air cast and anti-inflammatories. There were two further appointments with Dr. Chaudhry on March 25th (where the plaintiff reported 7/10 pain) and on either May 13th or June 13th[2] while they were awaiting medical clearance for surgery which was provided on July 2, 2014 by Dr. Gary Jean Baptiste.

On July 8, 2014, the plaintiff presented to Advanced Surgery Center for a "modified Brostrom Gould Procedure, right foot, repair of anterior talofibular ligament and calcaneal fibular ligament right foot," which was performed by Dr. Chaudhry. According to the defendant, the surgery was performed without complication and the plaintiff was discharged with a posterior splint, crutches, and was to be non-weight bearing. The post-operative instructions for the plaintiff included keeping the foot elevated to prevent swelling, icing the anterior aspect to the ankle and to follow up in a week. However, two days later (July 10), the plaintiff presented to the emergency room at Maimonides Medical Center with complaints of having numbness from his right knee downwards. Upon exam, no focal neurological deficiencies were found. The plaintiff was given a synthetic and posterior short leg splint and discharged.

The post-surgery follow-up with Dr. Chaudhry was on July 11th. Upon exam, no abnormalities were observed. The plan was for the plaintiff to remain non-weight bearing with cast immobilization and to continue on anti-inflammatories. The plaintiff was advised that the pain in the ankle he was experiencing was normal and consistent

[2] There are differing accounts on when this appointment took place.

with the procedure that was performed. However, five days later (July 16th), the plaintiff once again went to the emergency room at Maimonides Medical Center with complaints of worsening right calf pain for the prior three days. The plaintiff underwent a venous duplex study which revealed an acute occlusive thrombosis in the peroneal veins. The plaintiff was given Xarelto (a blood thinner) and upon discharge advised to follow-up with his personal physician.

The next appointment with Dr. Chaudhry was on July 25th, in which the plaintiff claims he advised the doctor that he was not taking the prescribed Xarelto due to financial issues. Upon exam, no abnormalities were noted, the plaintiff was placed in a below the knee cast and Percocet was prescribed. Six weeks later (September 5), the plaintiff returned to Dr. Chaudhry, where he was walking with a cane. There were no abnormalities found, the sutures were removed and the plan was for the plaintiff to start physical therapy (3 times per week) and to utilize a cam walker for his right ankle.

At the medical appointments on September 18th and December 10th at Central Medical Services, the plaintiff was seen by Dr. Geoffrey Phillips, an orthopedic surgeon, rather than Dr. Chaudhry. The plaintiff complained of headache, neck and back pain. Upon exam, Dr. Phillips noted that the surgical incision was healing well and the plan was for plaintiff to continue with the ankle brace.

On November 20, 2015, plaintiff presented to Dr. Gianni Persich with complaints of ongoing ankle pain and instability. The exam revealed moderate swelling, tenderness to palpation and limited range of motion at the right ankle.

On December 15, 2015, the plaintiff underwent an MRI of the right ankle. The MRI revealed a suspected chronic tear of the ATFL; peroneal tenosynovitis, mild posterior tibial tenosynovitis which condition had worsened; mild ankle and mild to moderate posterior subtalar synovitis which condition remained unchanged; and chronic spurring at the dorsal talonicular margins reflects residua of remote allusive stress.

On December 7, 2016, the plaintiff had a follow-up appointment with Dr. Persich with complaints of ongoing ankle pain and instability. While the exam revealed no changes from the visit of November 2015, Dr. Persich noted that the prior intervention

had failed. It was his recommendation that the plaintiff undergo a right ankle arthroscopy with lateral ankle stabilization through the use of Arthrex Internal Brace.

On February 28, 2017, the plaintiff presented to Health East Ambulatory Surgical Center where he underwent right ankle surgery. Intraoperatively, the doctor found thick synovium with several large synovial fragments containing capillaries in clusters. Small fragments of cartilage with extensive synovitis and meniscoid fragments were removed and/or debrided. The inflammatory synovium was found to be impinging on the lateral gutter as well as in the syndesmosis, which too was debrided and/or abated. The ATFL region was found to be scarred and torn with no attachment to the distal fibula along with a portion of the capsule. The following month, the plaintiff had a post-operative follow-up with Dr. Persich. The ankle was found to be stable with minimal swelling, the sutures were removed and the plaintiff was placed in a fiberglass posterior splint. At a visit in April 2017, the plaintiff reported an increase in pain in his lower extremity and he was advised to follow-up with a back specialist.

The plaintiff maintains that he had two other appointments with Dr. Persich in 2017 (May and August). At the May appointment, the plaintiff was instructed to progress from partial weight bearing to full weight bearing if tolerable and was prescribed a right ankle continuous passive motion machine to dynamize the ankle joint. At both appointments, the plaintiff was instructed to undergo physical therapy.

In May and August 2018, the plaintiff had a neurological consultation with Dr. Ranga Krishna, having complained of neck and lower back pain. The doctor noted that plaintiff appeared to have chronic cervical and lumbar radiculopathy with neuropathic pain syndrome.

In August and October 2018, the plaintiff had appointments with Dr. Persich where the plaintiff reported having intermittent pain as well as numbness and burning in his right ankle. The plaintiff further reported that he required the use of an ankle brace to ambulate.

In 2019, the plaintiff relocated to Florida.

Parties' Contentions:

Here, the Court is presented with the issue as to whether the defendants departed from accepted medical practice in failing to properly diagnose and treat plaintiff's right ankle injury, and if so, whether that departure from accepted medical practice was the proximate cause of the plaintiff's alleged injuries, related pain, and the need for future surgery to place a synthetic ligament.

In support of the motion for summary judgment by Dr. Chaudhry, and a dismissal of plaintiff's cause of action against said defendant, counsel offers the affirmation of Joseph Allen Larsen, D.P.M., M.S., ("Dr. Larsen"), who opines that Dr. Chaudhry's care and treatment of plaintiff was timely, appropriate and within good and accepted standards of podiatric care, and that such care was neither a proximate cause of, nor a contributing factor to, any of the plaintiff's alleged injuries.

Plaintiff, by their attorney, opposes the defendant's motion for summary judgment, arguing that issues of fact exist with regard to the defendant's care and treatment of plaintiff's right ankle, including surgery. In support, plaintiff offers the affirmation of Lawrence P. Horl, D.P.M., who opines that Dr. Chaudhry departed from the standard of medical care by failing to properly inspect the talar dome during surgery to rule out and/or detect loose particles in the right anterior joint and surrounding areas, failing to properly "prophylax" and treat plaintiff for symptoms of developing DVT, failing to perform a modified Brostrom Gould Procedure, and failing to repair the anterior talofibular ligament and calcaneal fibular ligament of the right ankle.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that defendant Dr. Chaudhry has presented evidence sufficient to meet this burden, including an expert affirmation. Dr. Larsen opines that plaintiff's complaints, signs, and symptoms were timely and appropriately evaluated, which led Dr. Chaudhry to examine plaintiff's right lower extremity and discover that pain was elicited upon palpating the ATFL and the right anterior ankle joint. Dr. Larsen asserts that the recommendation to obtain an MRI to further evaluate the right ankle was appropriate, and no evidence exists to suggest that Dr. Chaudhry misinterpreted this MRI or made an incorrect diagnosis with respect to plaintiff's right ankle pain. Dr. Larsen states that the standard of care with respect to the diagnosis of a tear of the ATFL includes performance of a surgical repair, as a tear of the ATFL will not improve, heal or resolve with other methods of treatment. As such, Dr. Larsen claims that the surgery performed by Dr. Chaudhury was appropriate and performed in accordance with good and accepted medical/podiatric/surgical practice. Dr. Larsen asserts that any surgeries performed after the surgery of July 8th were not a result of Dr. Chaudhury's podiatric/surgical care or treatment in that the operative report states the repair of the tear of the ATFL was completed, and the "failure" of such a surgery is a known and ordinary risk of the procedure.

In addressing plaintiff's allegation concerning the intraoperative application of the thigh tourniquet, Dr. Larsen argues that nothing in the records suggests the plaintiff had reported any conditions or circumstances that placed plaintiff at an increased risk for developing a blood clot and asserts that the application of a thigh tourniquet would not have caused a blood clot absent other factors elevating the patient's risk levels. Dr. Larsen opines that any complications, including the development of deep vein thrombosis ("DVT"), that arose after the surgery on July 8, 2014 were not caused by the care or treatment rendered by Dr. Chaudhury. Dr. Larsen argues that if DVT were present during the plaintiff's Emergency Department visit two days post-surgery, plaintiff's symptoms would not have abated by simply removing the dressing, as was reported in the record. Dr. Larsen also argues that if the tourniquet pressure from the July 8, 2014 surgery had

been the catalyst for the DVT to develop, signs of it would have been present when plaintiff was in the ER on July 10th or when he followed up with Dr. Chaudhury on July 11th, yet Dr. Chaudhury's notes from that follow-up document a full examination and confirm plaintiff showed no signs of DVT. Dr. Larsen claims that any subsequent complications relative to plaintiff's DVT or blood clots were likely caused by plaintiff not taking the Xarelto (blood thinner) as prescribed.

Defendant also asserts that the plaintiff's derivative cause of action should be dismissed because these claims are unsupported, and the claim of recklessness/carelessness should also be dismissed because there is no evidence that Dr. Chaudhury acted with reckless disregard for plaintiff, or that Dr. Chaudhury engaged in the care of plaintiff with improper motives, was vindictive, or engaged in outrageous or oppressive intentional misconduct.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical malpractice, "expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause." Nicholas v Stammer, 49 AD3d 832-833 [2008].

Here, the plaintiff's expert has pointed to several possible departures by the defendant Dr. Chaudhury. Dr. Horl opines that upon learning plaintiff was experiencing "clicking sounds" and continued anterior joint pain, Dr. Chaudhury failed to perform an inspection of the entire talar dome in order to rule out osteochondral defect, synovitis

and/or loose particles of any kind in the joint. Dr. Horl states that Dr. Chaudhury should have performed either a CT to detect the fragments or an anthroscopy to determine if debridement and shaving was necessary. Dr. Horl asserts that although Dr. Chaudhry testified during her deposition that she could inspect the entire talar dome for loose particles from the lateral aspect, Dr. Horl claims this is impossible because if the incision was on the outside of the right foot (as noted in the Operative Report, annexed to Plaintiff's Opposition as Exhibit I) the tibia would be in the way of any visualization of the medial aspect. As such, Dr. Horl argues Dr. Chaudhry departed from the standard of care by performing a procedure that would not have allowed her to inspect the entire talar dome, despite suspecting foreign bodies might be present in the joint space with no prior CT scan. Had a proper and complete inspection of the talar dome been performed, Dr. Horl opines that the loose material would not have remained in plaintiff's joint space for two and a half (2.5) years. Dr. Horl also opines that the loose material in plaintiff's joint space can create further substantial pain, discomfort, and functional issues.

With respect to plaintiff's alleged development of DVT, Dr. Horl opines that Dr. Chaudhry failed to provide prophylactic measures to prevent plaintiff from developing blood clots on three separate occasions. Dr. Horl asserts that plaintiff's status as a smoker was indicated in three separate record entries prior to the July 8th surgery, and that Dr. Chaudhry failed to appreciate this information and recommend blood thinners post-surgically, as the standard of care dictates. Dr. Horl also claims that Dr. Chaudhry failed to instruct the plaintiff to take blood thinners or aspirin at the July 11th post-surgical follow-up visit, as well as the July 25th visit, during which plaintiff advised Dr. Chaudhry he was not taking the Xarelto (blood thinner) due to financial issues.

With respect to the surgery, Dr. Horl opines that Dr. Chaudhry failed to properly perform the Brostom Gould Procedure, as the December 15, 2015 MRI revealed a chronic tear of the AFTL. Dr. Horl states that while failure is a known complication, the failure in this instance was due to an improperly performed procedure, due to the small incision size and inability to fully visualize the operative field, as well as the lack of

assistance for a complicated procedure Dr. Chaudhry had only previously performed seven (7) to eight (8) times. In addition to improperly performing the procedure, Dr. Horl asserts that Dr. Chaudhry routinely failed to examine plaintiff's sutures, did not notice the splint and dressing had been changed by the hospital three days after she put it on after surgery, and failed to update her notes throughout multiple visits.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). The Court finds that there are issues of fact as to the surgery that was performed by Dr. Chaudhry as well as the post-surgical course of treatment. As such, the defendant's motion for summary judgment dismissing plaintiff's medical malpractice claim is denied.

As to the informed consent claim, a plaintiff must prove (1) 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, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury. See Zapata v Buitriago, 107 AD3d 977, 979, 969 NYS2d 79 [2d Dept 2013]; Spano v Bertocci, 299 AD2d 335, 749 NYS2d 275 [2d Dept 2002].

Defendant argues that the records, testimony, and affirmation of Dr. Larsen reveal that informed consent was properly obtained, in that plaintiff was fully informed of what the surgery entailed, the risks and benefits of the surgery, as well as the possibility the

surgery may not be successful in relieving his pain and/or symptoms. Dr. Larsen opines that a reasonable person in plaintiff's position, having been fully informed of the risks, benefits, and alternatives, would have consented to the procedure. Further, defendant asserts that consent for all procedures was properly obtained and each consent bears plaintiff's signature. As plaintiff did not offer argument in opposition to the merits of this cause of action, this Court finds that the plaintiff's claim for lack of informed consent is dismissed as against Dr. Chaudhry.

Conclusion:

While the defendant has met her burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met his burden to offer admissible evidence raising a question of fact as to whether the defendant departed from good and accepted medical practice in treatment rendered to plaintiff. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motion by the defendant for summary judgment and a dismissal of plaintiff's complaint, pursuant to CPLR §3212, is granted only with respect to the informed consent cause of action as against Dr. Chaudhry, and said motion is otherwise denied.

This shall constitute the decision and order of this Court.

Dated: January 11, 2021
Brooklyn, NY

ENTER

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

HON. BERNARD J. GRAHAM

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