

Miller v Bostrom

2022 NY Slip Op 32284(U)

July 13, 2022

Supreme Court, New York County

Docket Number: Index No. 805160/2019

Judge: Erika M. Edwards

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

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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MARCIA MILLER and MICHAEL MILLER,

Plaintiffs,

INDEX NO. 805160/2019MOTION DATE 08/21/2020MOTION SEQ. NO. 002

- v -

MATHIAS P. BOSTROM, M.D., RICHARD J. HERZOG,
M.D., GAYLE RUDOFSKY SALAMA, M.D., ROBERT
SCHNEIDER, M.D. and HOSPITAL FOR SPECIAL
SURGERY,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 57, 58, 59, 60, 61, 74, 75, 76, 77, 78, 79

were read on this motion to/for

SUMMARY JUDGMENT.

Upon the foregoing documents, the court grants Defendant Richard J. Herzog, M.D.'s ("Dr. Herzog") motion for summary judgment dismissal of Plaintiff Marcia Miller's ("Plaintiff") complaint and to amend the caption to remove his name as a defendant in this action.

Plaintiffs Marcia Miller and Michael Miller brought this action sounding in medical malpractice, negligence and lack of informed consent against Defendants Mathias P. Bostrom, M.D. ("Dr. Bostrom"), Dr. Herzog, Gayle Rudofsky Salama, M.D. ("Dr. Salama"), Robert Schneider, M.D. ("Dr. Schneider") and Hospital for Special Surgery ("HSS") (collectively, "Defendants"). Plaintiff Michael Miller subsequently discontinued the action against all defendants.

Plaintiff Marcia Miller alleges in substance that on November 21, 2016, Defendants negligently performed a fluoroscopic-guided aspiration of her left hip at HSS causing her alleged injuries. The procedure was needed so that Dr. Bostrom could perform hip revision surgery on

Plaintiff to remove the metal components of her left hip implant, which caused metal buildup and debris to lodge into Plaintiff's soft tissues, and to replace the metal components with ceramic components. Plaintiff further alleges in substance that Defendants deviated from accepted standards of medical practice by making multiple attempts to perform the aspiration using the same contaminated needle without changing gloves and sterilizing themselves with they left the room and returned. Plaintiff alleges that Dr. Herzog was present in the procedure room, supervised others, spoke to her and participated in the procedure.

Dr. Herzog now moves under motion sequence 002 for summary judgment dismissal of Plaintiff's complaint and for amendment of the caption to remove his name as a defendant in this action. The issue in this matter is whether Dr. Herzog was present and participated in this procedure or whether Plaintiff was mistaken. Dr. Herzog argues in substance that he is a radiologist specializing in reviewing, interpreting and reporting on spine MRI studies at HSS, he does not perform procedures on patients and he does not treat or interact with patients. He argues that he was not present in the procedure room during Plaintiff's procedure, that he did not observe, supervise or participate in the procedure, that he was not involved in treating Plaintiff and that he has never even observed, performed or participated in a hip injection or aspiration at HSS, nor has he ever used fluoroscopic equipment.

Dr. Herzog further alleges that on the day of Plaintiff's procedure, he gave a presentation to HSS Spine Fellows, made rounds with psychiatry physicians in training and reviewed, interpreted and reported on 18 MRI studies. At the time of Plaintiff's procedure, Dr. Herzog argues that he was in the office interpreting and reporting on spine MRI's which was located on another floor than where Plaintiff was located. Dr. Herzog provided evidentiary support for his claims, including Plaintiff's medical records and charts, which did not include his name or any

entries made by him, sworn testimony that he was not present and not involved in the procedure and details of his schedule and employment agreement with HSS, which only includes reviewing and interpreting MRI studies and not performing procedures on patients.

Plaintiff opposes the motion and argues in substance that the court should deny Dr. Herzog's motion because a material issue of fact exists. Plaintiff argues in substance that the question of whether or not Dr. Herzog was present and participated in the procedure is a credibility issue between Plaintiff and Dr. Herzog which must be decided by a jury and not by the court on summary judgment. Plaintiff argues in substance that she is certain that Dr. Herzog was the individual in the room with her because he introduced himself to her, she recalls what he said to her, how he appeared, what he wore and she confirmed it was him based on his photograph on the HSS website.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Dr. Herzog demonstrated his entitlement to summary judgment in his favor and Plaintiff failed to raise a triable issue of fact. Although Plaintiff believes that she is certain that Dr. Herzog was the individual in the room at the time of her procedure and that he was involved in performing her hip aspiration, such belief is unsupported by and directly contradicted by the evidence in the case.

Dr. Herzog demonstrated that he is a Board-Certified Radiologist who specializes in interpretation of musculoskeletal/spine radiology interpretation at HSS and that he has never observed, supervised, participated in, or performed a needle injection or hip aspiration since he started working at HSS in 2000. The court finds that Plaintiff failed to rebut Dr. Herzog’s evidentiary support for his claims that he was not involved in Plaintiff’s procedure, which include the entries in Plaintiff’s medical records and chart, the sworn testimony and his schedule on the date of the procedure. The evidence supports Dr. Herzog’s argument that at the time of the procedure, he was interpreting and reporting on MRI studies at another location.

Additionally, the details of Dr. Herzog’s employment contract with HSS and his training, experience, duties and responsibilities at HSS support his arguments that his job was to interpret

MRI studies and not to perform aspirations on patients, nor have any direct interaction with patients. Additionally, he has never even used fluoroscopic equipment. Plaintiff failed to point to any evidence to dispute Dr. Herzog's claims or to contradict the evidentiary support for his arguments, except to continue to state that she recalls that Dr. Herzog was in the room with her.

Based upon the foregoing, the court finds that Plaintiff's purported material issue of fact is contradicted by the record and that Plaintiff failed to raise a material issue of fact requiring a trial in this matter. Therefore, the court grants Dr. Herzog's summary judgment motion, dismisses Plaintiff's complaint as against him and amends the caption to remove Dr. Herzog's name as a defendant in this action. Additionally, since Plaintiff Michael Miller previously discontinued the action against all defendants, the court also amends the caption to remove his name as a Plaintiff.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein, and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant Richard J. Herzog, M.D.'s motion for summary judgment dismissal of Plaintiff's Marcia Miller's complaint and to amend the caption to remove his name as a defendant in this action under motion sequence 002; and it is further

ORDERED that since Plaintiff Michael Miller previously discontinued the action against all Defendants, the court amends the caption to remove his name as a Plaintiff in this action; and it is further

ORDERED that the court dismisses Plaintiff's Marcia Miller's complaint as against Defendant Richard J. Herzog, M.D. only and directs the Clerk of the Court to enter judgment in

