

Neenan v O'Malley

2022 NY Slip Op 33057(U)

September 8, 2022

Supreme Court, New York County

Docket Number: Index No. 805199/2013

Judge: Erika M. Edwards

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

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

-----X

JOHN NEENAN,

Plaintiff,

- v -

MARTIN J. O'MALLEY, M.D., FOOT AND ANKLE
ORTHOPAEDIC SURGERY, P.C. and HOSPITAL FOR
SPECIAL SURGERY,

Defendants.

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INDEX NO. 805199/2013

MOTION DATE 02/04/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 84

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the court grants Defendants Martin J. O'Malley, M.D.'s ("Dr. O'Malley") and Foot and Ankle Orthopaedic Surgery, P.C.'s ("Foot and Ankle") summary judgment motion to dismiss Plaintiff John Neenan's ("Plaintiff") complaint as against them, without opposition.

Plaintiff previously discontinued the action against Defendant Hospital for Special Surgery on November 20, 2014 (NYSCEF Doc. No. 24).

Plaintiff filed this medical malpractice and lack of informed consent action against Defendants regarding the care and treatment of his left foot injuries, which allegedly resulted in a post-operative infection, additional surgeries and other injuries. Plaintiff injured his left foot in 2007, which required fusion surgery. He was initially treated by Dr. O'Malley at Foot and Ankle on September 3, 2009, because of his continued pain. Dr. O'Malley treated Plaintiff for the next two years, including the performance of multiple surgeries and various types of treatment. On November 23, 2009, Dr. O'Malley performed a revision fusion surgery and bone graft with

removal of the hardware from the first surgery. On September 27, 2010, he performed a removal of hardware and fusion revision because of Plaintiff's complaint of pain in his foot and because of a possible tearing of the peroneus brevis tendon. On January 4, 2011, Dr. O'Malley performed a left exploration and repair of the peroneal tendon with a left synovectomy of the subtalar joint. Plaintiff ultimately discontinued his treatment with Dr. O'Malley and had an additional ankle surgery, which included a resection, by another surgeon.

Defendants now move under motion sequence 003 for summary judgment dismissal of Plaintiff's complaint. Defendants argue in substance that Defendants did not depart from good and accepted medical practice, that Plaintiff did not have an infection, that Plaintiff's alleged injuries were known and accepted risks of Plaintiff's surgeries and injuries, that Defendants did not proximately cause or contribute to Plaintiff's alleged injuries, and that Dr. O'Malley obtained Plaintiff's informed consent after properly advising Plaintiff of such risks.

Defendants rely on the expert affirmation of Dr. George Burak, who opined in substance that although there was no objective, tangible evidence that Plaintiff had an infection, infections are a known and accepted risk of Plaintiff's surgeries. He also stated that nonunion is a known and accepted risk of any fusion surgery in people like Plaintiff, who smoked and had prior fusion surgeries, and that Plaintiff's alleged tendon injury is also a well-known sequella of Plaintiff's original foot injury.

Plaintiff failed to oppose the motion, nor file an expert affirmation challenging any of Defendants' claims.

Defendants filed the instant motion on February 4, 2022, over seven (7) months ago. The parties stipulated to adjourn the motion two times so Plaintiff's opposition papers were due on or before April 15, 2022 and May 6, 2022. However, instead of responding to the motion,

Plaintiff's counsel moved to withdraw as counsel on May 6, 2022. The court granted the motion on June 21, 2022 (NYSCEF Doc. No.83).¹ In the Decision and Order the court stayed the action until August 5, 2022, directed Plaintiff to appoint a substitute attorney or advise the court that he wished to proceed *pro se* by on or before August 5, 2022, and the court denied Defendants' motion to grant their summary judgment motion on default. In an Interim Decision and Order on this motion, dated June 21, 2022 (NYSCEF Doc. No. 84), the court extended the deadline for Plaintiff to file opposition to Defendants' summary judgment motion to August 22, 2022, to permit time for new counsel to appear, and the court directed the parties to appear before the court in person for oral argument on September 7, 2022, at 12:00 p.m.

Plaintiff failed to comply with either of the court's orders. To date, Plaintiff failed to retain counsel or advise the court as to whether he was proceeding *pro se* and he failed to oppose the motion. Additionally, Plaintiff failed to request additional time to comply with any of the directives in the court orders.

Furthermore, Plaintiff emailed the court on September 6, 2022, the day before the oral argument, and advised the court in substance that he was in Florida and could not appear in court. When the court's part clerk asked Plaintiff in substance whether he retained new counsel or was appearing *pro se*, Plaintiff failed to respond. Since the motion had been pending for seven (7) months, it was marked fully-submitted with no opposition, and Plaintiff failed to comply with the court orders or request additional time to do so, the court canceled the oral argument and advised the parties that it would decide the motion on the papers.

¹ The court previously permitted Plaintiff's first attorney to withdraw on March 20, 2014 (NYSCEF Doc. No. 18) and Plaintiff's recent outgoing counsel subsequently substituted as Plaintiff's counsel.

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]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307

AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

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]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207).

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]).

For a plaintiff to prevail on a lack of informed consent claim, "a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff's) injuries" (*see Public Health*

Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

Here, the court finds that Defendants demonstrated their entitlement to summary judgment in their favor as a matter of law. Defendants demonstrated that there was no departure from good and accepted medical practice, that the evidence did not support Plaintiff's claim that he had an infection, that Plaintiff's alleged injuries were known and accepted risks of the fusion surgery and Plaintiff's injuries and that Defendants' actions did not proximately cause or contribute to Plaintiff's alleged injuries. Additionally, Defendants demonstrated that Dr. O'Malley fully advised Plaintiff of the material risks of the procedure, which included Plaintiff's alleged injuries, and that Plaintiff consented to the procedure in writing and confirmed that he had discussed such risks with Dr. O'Malley.

Since Plaintiff failed to oppose the motion or offer an expert affirmation challenging Defendants' expert's claims, after given ample opportunity to do so, Plaintiff failed to demonstrate any disputed issues of fact required to defeat this motion. Additionally, as to his lack of informed consent claim, since Plaintiff failed to oppose the motion, Plaintiff failed to assert that a reasonably prudent person in his circumstances, having been informed of the risks, benefits and alternatives to the procedure, would not have undergone such procedure.

Therefore, the court grants Defendants' summary judgment motion and dismisses Plaintiff's complaint against Defendants.

As such, it is hereby

ORDERED that the court grants Defendants Martin J. O'Malley, M.D.'s and Foot and Ankle Orthopaedic Surgery, P.C.'s summary judgment motion, filed under motion sequence 003, without opposition, and the court dismisses Plaintiff John Neenan's complaint as against

Defendants Martin J. O'Malley, M.D. and Foot and Ankle Orthopaedic Surgery, P.C.; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendants Martin J. O'Malley, M.D. and Foot and Ankle Orthopaedic Surgery, P.C. as against Plaintiff John Neenan, without costs to any party.

This constitutes the decision and order of the court.


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9/8/2022
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE