Baudille v Shiau
2022 NY Slip Op 34571(U)
March 2, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151087-2018
Judge: Judith N. McMahon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOSEPH BAUDILLE,

Plaintiffs,

- against –

JOHN SHIAU, M.D., ADVANCED SPINE SURGERY CENTER and HEALTHCARE ASSOCIATES IN MEDICINE, P.C.,

Defendants.

_____x

IAS PART 6

ORDER

Index Number: 151087-2018

Hon. Justice
Judith N. McMahon

Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion (sequence 004), pursuant to CPLR §3212, dismissing all claims against said Defendants is granted in part and denied in part as detailed herein.

This action claims medical malpractice related to Mr. Baudille's lower back surgery on February 2, 2017. Mr. Baudille's prior medical history was significant for injuries to his head, shoulders, knees, neck, wrists, and lower back, all resulting from a May 16, 2009 work accident in which plaintiff fell down 20 steps at the World Trade Center construction site. Subsequent to his fall, Mr. Baudille experienced low back pain radiating to his buttocks and left leg. He underwent arthroscopic surgery to his right shoulder on November 30, 2009; arthroscopic ACL reconstruction on the left knee on August 30, 2010; and arthroscopic surgery to his left shoulder on June 13, 2011. Mr. Baudille has been disabled from work since the May 16, 2009 accident. Between May 14, 2012 and December 12, 2016, plaintiff treated with Dr. Shiau for long-standing lower back pain. These visits are not at issue per plaintiff's bill of particulars.

Plaintiff's allegations concern an L5-S1 interbody fusion with facet screw fixation surgery performed on February 2, 2017, by Defendant Shiau at Advanced Spine Surgical Center, and the post-operative care provided to Plaintiff thereafter.

Defendants now move for summary judgment to dismiss Plaintiff's case as against them.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C. established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Martin Zonenshayn. S*ee Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion, Dr. Zonenshayn opined that "Intraoperatively, when Dr. Shiau encountered a slightly larger, more bulbous coccyx that made it difficult for him to insert the L5-S1 Trans-S1AxiaLIF screw via a perfectly midline trajectory, he appropriately adapted to the patient's anatomy, and utilized a slightly left-to-right trajectory. This was the appropriate use of clinical judgment where, as here, fluoroscopy and constant SSEP and EMG monitoring was used as an extra safeguard to ensure that no neural structures were violated… Plaintiff's allegations that Defendants negligently caused a non-fusion/nonunion during and after the February 2, 2017 procedure and failed to take timely notice that the vertebra did not properly fuse are equally

spurious. A non-fusion/nonunion is a well-known and accepted complication of the surgery and, as here, can occur despite appropriate placement of the Trans-S1 AxiaLIF screw within the vertebral bodies, spanning L5-S1. Here, appropriate placement of the Trans-S1 AxiaLIF and facet screws was confirmed via intraoperative fluoroscopy, neuromonitoring and post-operative imaging."

As to post-operative care, Dr. Zonenshayn opined that, "Plaintiff's claims that Defendants failed to timely order post-operative MRI and revise S1 nerve root damage are also without merit, as the intraoperative neuromonitoring and fluoroscopy showed no direct nerve damage or hardware misplacement. Further, Defendants appropriately ordered a lumbar CT on February 13, 2017, which showed no impingement of the S1 neural foramen. In light of Defendants reasonable post-operative differential diagnosis that plaintiff's left lower extremity complaints were the result of a stretched nerve or post-operative blood and/or debris, no emergent surgical intervention was indicated as often these symptoms improve over time. Even had Defendants ordered MRI at that time, the management of the patient would not have been altered. Notably, plaintiff's subsequent surgeon at HSS also did not recommend removal or modification of the Trans-S1 AxiaLIF screw."

Dr. Zonenshayn further opined that "Plaintiff's allegation that Defendants failed to refer plaintiff for a neurological consult immediately following the February 2, 2017 fails to rise to the level of a deviation and had no impact on plaintiff's alleged injury or post-operative management. Dr. Shiau, as a board-certified neurosurgeon, was better qualified to manage plaintiff's post-operative care. Dr. Shiau appropriately prescribed Lyrica, ordered appropriate post-operative imaging, and referred the plaintiff for pain management. When plaintiff saw Erin

Manning, M.D., a neurologist at HSS, on April 20, 2017, no surgical intervention was recommended and his management did not significantly change."

Finally, as to Plaintiff's claims of a lack of informed consent, Dr. Zonenshayn opined that, "Finally, plaintiff's allegation that Defendants failed to discuss with plaintiff the increased risk of performing the procedure on February 2, 2017, lacks specificity and is not supported by the evidence. Dr. Shiau discussed the risks and benefits of the proposed lumbar fusion with plaintiff throughout his multi-year preoperative treatment."

"Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden." *Reid v. Soults*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiff "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.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... 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 defendant['s]... summary judgment motion." *Id.*

"A plaintiff's expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

Plaintiff submitted an Affirmation from Dr. Stephen M. Bloomfield in Opposition to Defendants' motions.

In opposition to Defendants' motion, Dr. Bloomfield opined that "While Dr. Zonenshayn's statement of facts notes that prior to the subject surgery, [Plaintiff] 'had painful pressure in his lower back, radiating to his hips and down his left leg into his hamstring; and numbness, tingling, and pressure around the groin area and buttock' (Zonenshayn at 7), these symptoms should not be confused with the newfound symptoms that [Plaintiff] complained about postoperatively which are decidedly novel and evidently relate to the failed surgery of February 2, 2017."

Dr. Bloomfield elaborated that, "Far from appropriately addressing Plaintiff Joseph's complaints, which would have involved examining him and ordering a stat MRI, Defendants ignored Plaintiff's complaints of new onset neurologic symptoms, which should have served as red flags alerting Defendants that something was not right… Instead of conducting diagnostic testing to decipher the exact reason for [Plaintiff] Joseph's new onset pain, Defendants dismissed it, reasoning incorrectly that since a large amount of Marcaine had been injected intraoperatively, 'this is likely the reason for some of his postoperative numbness'. This justification is, however, unpersuasive since four (4) days had passed since the surgery and Marcaine could not, therefore, explain [Plaintiff] Joseph's numbness."

Dr. Bloomfield concluded, "that new and unexpected symptoms including numbness, burning, weakness or tingling, or changes in bowel or bladder function which develop postoperatively require immediate evaluation and follow up so as to decipher their cause and address same. Here, Defendant Shiau failed to heed [Plaintiff] Joseph's complaints including burning and numbness on his left side and did nothing. The fact that [Plaintiff] Joseph complained of newfound neurological symptoms immediately after the February 2, 2017 surgery required Defendant Shiau to conduct a thorough investigation to decipher the source of Plaintiff's pain. Failure to do so is a patent breach of the standard of care. It is my opinion to a reasonable degree of medical certainty that Defendants' failure to do so was negligent. Similarly, it is my opinion to a reasonable degree of medical certainty that Defendants' failure to timely revise S1nerve root damage and refer [Plaintiff] Joseph to another neurosurgeon for a neurological consult if he was himself unwilling to treat Plaintiff further, was likewise a departure from the standard of care."

Dr. Bloomfield did not offer an opinion as to Plaintiff's claims of a lack of informed consent, so the portion of Defendants' motion seeking to dismiss those claims must be granted.

Additionally, Dr. Bloomfield's opinions did not delineate any breach of the standard of care related to the performance of the February 2, 2017 surgery, so the portion of Defendants' motion seeking to dismiss Plaintiff's claims related to the performance of the February 2, 2017 surgery are likewise granted.

Lastly, there was no opposition or mention at oral argument on the motion regarding Plaintiff's third cause of action arising from negligent hiring, so that cause of action is dismissed.

As to the remainder of Defendants' motion, concerning the post-operative care of Plaintiff, "In opposition, Plaintiff raised a triable issue of fact by submitting an expert affirmation

from a physician, who opined with a reasonable degree of medical certainty that Defendant[s] departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

On Reply to the motion, Defendants argued that Plaintiff's Opposition as to the post-operative care of Plaintiff are new allegations and that per Plaintiff's Bills of Particular, the period of alleged negligence is confined to February 2, 2017, the date of Plaintiff's surgery with Dr. Shiau. However, Plaintiff's Bills of Particular state the dates of negligence as "On or about February 2, 2017." Additionally, the Bills of Particular does describe post-operative care as included in the allegations against Defendants, and Defendants' Expert discussed the propriety post-operative care at length in their Affirmation.

There are questions of fact including, but not limited to, the post-operative care Plaintiff received from Defendants.

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020).

ORDERED Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion (sequence 004), pursuant to CPLR §3212, dismissing all claims against said Defendants is granted as to Plaintiff's claims related to a lack of informed consent; and it is further

ORDERED that Plaintiff's claims against Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C., related to a lack of informed consent are severed and dismissed; and it is further

ORDERED Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion (sequence 004), pursuant to CPLR §3212, dismissing all claims against said Defendants

is granted as to Plaintiff's claims for any care prior to and including the performance of the February 2, 2017 surgery; and it is further

ORDERED that Plaintiff's claims against Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C., for any care prior to and including the performance of the February 2, 2017 surgery are severed and dismissed; and it is further

ORDERED Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion (sequence 004), pursuant to CPLR §3212, dismissing all claims against said Defendants is granted as to Plaintiff's third cause of action arising from negligent hiring; and it is further

ORDERED that Plaintiff's third cause of action arising from negligent hiring is severed and dismissed; and it is further

ORDERED that the remainder of Defendants John Shiau, M.D. and Healthcare Associates in Medicine, P.C.'s motion (sequence 004), pursuant to CPLR §3212, dismissing all claims against said Defendants is denied; and it is further

ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on April 25, 2022, at 2:30 PM; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: March 2, 2022

So Ordered.

ENTER:_____
J.S.C

Hon. Judith N. McMahon
J.S.C.