

Ettman v Sharan

2022 NY Slip Op 34980(U)

December 6, 2022

Supreme Court, Bronx County

Docket Number: Index No. 30632/18

Judge: Joseph E. Capella

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 23

C
ETH004

ETTMAN, ALAN

Index No. 30632/2018E

-against-

Hon. JOSEPH E. CAPELLA

SHARAN, M.D., ALOK

Justice Supreme Court

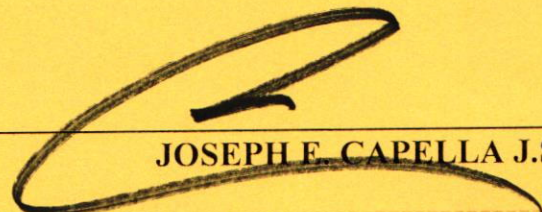
The following papers numbered 1 to (3) were read on this motion (Seq. No. 004)
for SUMMARY JUDGMENT noticed on 2/28/2022.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). <u>(1)</u>
Answering Affidavit and Exhibits	No(s). <u>(2)</u>
Replying Affidavit and Exhibits	No(s). <u>(3)</u>

Upon the foregoing papers, it is ordered that this motion is *granted in part and denied in part as per decision dated 10/6/22.*

Motion is Respectfully Referred to Justice:
Dated:

Dated: 10/6/22

Hon. 
JOSEPH E. CAPELLA J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

C
ET#004

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23**

-----X
ALAN ETTMAN,

Index #: **30632/18**
DECISION/ORDER

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

**ALOK SHARAN, M.D., ADAM CADAN, P.A.,
RUCHSHINDA HAMEEDI, M.D., BORIS CHULPAYEV,
M.D., WESTMED MEDICAL GROUP, ST. JOHN'S
RIVERSIDE HOSPITAL, and RIVERSIDE HEALTH
CARE SYSTEMS, INC.,**

Defendants.

-----X
The following papers numbered 1 to 3 read on this motion submitted on June 10, 2022.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION AND AFFIRMATION	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIRMATION	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Motion by defendants, Alok Sharan, M.D., and Westmed Medical Group (WestMed), for summary judgment and dismissal of plaintiff's complaint, which alleges medical malpractice, lack of informed consent, and negligent hiring/supervision, is granted in part and denied in part. Plaintiff presented to Dr. Sharan on June 14, 2016, for surgical evaluation of his chronic low back pain and lumbar radiculopathy. Dr. Sharan reviewed an MRI from August 7, 2015, determined that the L4-L5 level was contributing to plaintiff's symptoms, and on July 7, performed a microscopic lumbar laminectomy. Post-operatively plaintiff developed incisional pain, the collection of epidural hematoma/fluid, and left foot weakness. The bill of particulars alleges, in general, that

defendants failed to obtain pre-operative imaging, testing, and physical exam, failed to heed plaintiff's complaints, did not perform the appropriate surgery, and negligently performed the L4-L5 laminectomy. It also alleges that post-operatively defendants failed to timely heed and treat plaintiff's conditions, exacerbated or caused said conditions, and caused the need for subsequent surgery.

The initial burden is on the movants, Dr. Sharan and WestMed, to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If they do, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment. In support of the motion is an expert affirmation by Andrew C. Hecht, M.D., a board certified orthopedic surgeon, who provides a detailed opinion regarding Dr. Sharan's care and treatment. In sum, Dr. Hecht opines that Dr. Sharan appropriately obtained consent, selected and performed an indicated surgery on July 7, 2016, and employed appropriate techniques in the performance of the surgery to address plaintiff's lumbar issue. According to Dr. Hecht, regardless of whether Dr. Sharan departed from the standard of care with regard to the timely post-operative diagnosis and treatment of plaintiff's post-operative hematoma and weakness of the left foot, he opines that none of the treatment rendered in connection with the lumbar surgery was a proximate cause of those injuries - rather they were a known risk of the procedure

despite appropriate surgical technique and in the absence of negligence.

Dr. Hecht notes that the only additional surgery plaintiff has had is a cervical laminectomy and fusion; however, this was occasioned by the new onset of symptomology of plaintiff's occult cervical myelopathy following plaintiff's lumbar surgery, and not due to any negligence by Dr. Sharan. He opines that Dr. Sharan timely and appropriately evaluated plaintiff's post-operative complaints, which included, *inter alia*, pain, right leg shaking, and balance problems, and that no act/omission by Dr. Sharan caused or exacerbated plaintiff's degenerative cervical stenosis. Dr. Hecht also opines that although plaintiff did have degenerative joint disc disease of the lumbar and cervical spine upon presentation to Dr. Sharan, plaintiff had neurological/radicular symptoms of lumbar stenosis only. He states that plaintiff did not have any signs of cervical stenosis or myelopathy either by history, or by review of the physical exams. Lastly, defendants argue that plaintiff's claims of negligent hiring and supervision must be dismissed because Dr. Sharan was acting within the scope of his employment at WestMed. (*Ashley v City of New York*, 7 AD3d 742 [2nd Dept 2004].) Based on the aforementioned, the court is satisfied that Dr. Sharan and WestMed have met their burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist regarding same.

In opposition, plaintiff does not oppose that portion of defendants' motion which

seeks dismissal of the claims for lack of informed consent and negligent hiring. On the other hand, plaintiff does provide an expert affirmation from Dr. Jacob Rachlin, a board certified neurological surgeon, who opines that Dr. Sharan failed to sufficiently investigate plaintiff's preoperative complaints, a laminectomy at L4-L5 was unnecessary, and Dr. Sharan failed to properly treat plaintiff post-operatively. According to Dr. Rachlin, over a year before the surgery, plaintiff was complaining more of his neck than his back. An MRI of plaintiff's cervical spine should have been ordered prior to any surgical intervention, and had one been done, it would have revealed significant cervical spinal stenosis warranting cervical surgery instead of or concurrently with lumbar surgery. Dr. Rachlin states that based on plaintiff's long-standing complaints, the prior x-ray done at WestMed at his very first visit, and the documentation of treatments to his spine, plaintiff had multi-level degenerative disc disease and cervical spinal stenosis. He opines that the lumbar surgery caused a CSF leak that exacerbated plaintiff's cervical issues.

Dr. Rachlin also opines that Dr. Sharan departed from good and accepted medical practice in performing the laminectomy because the MRI indicated that plaintiff did not have lumbar spinal stenosis at L4-L5 requiring surgical repair. He notes that the MRI report specifically stated that at L4-L5 there was no evidence of disc herniation or central canal stenosis. The performance of this surgery lead to postoperative complications and a delay in the performance of cervical surgery, resulting in permanent neurological damage.

Lastly, Dr. Rachin notes that plaintiff called WestMed four days after the surgery with specific complaints of weakness and difficulty walking, and was experiencing leakage at the area of incision. He states that it “is clearly documented in the records that as of the day of admission, [plaintiff’s] surgical incision had developed ‘fullness’ and oozing, which is a sign of surgical complication.” According to Dr. Rachin, had a lower extremity examination been performed by Dr. Sharan during the early post-operative visits, a foot drop would have been diagnosed. And had Dr. Sharan examined plaintiff on his subsequent admission to St. John’s Hospital, he would have noted the abnormal appearance of the incision, and ordered an MRI to determine the nature of plaintiff’s complaints. Dr. Rachin opines that had plaintiff been treated appropriately, the post-operative complications would have been discovered sooner, and plaintiff would have made a better neurological recovery.

Viewing the evidence in a light most favorable to plaintiff, (*O’Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), there are material issues of fact regarding plaintiff’s claim that Dr. Sharan failed to sufficiently investigate the preoperative complaints, that a laminectomy at L4-L5 was unnecessary, and that Dr. Sharan failed to properly treat plaintiff post-operatively – issues must be resolved by the trier of fact. (*Barnett v Fashakin*, 85 AD3d 832; *Frye v Montefiore*, 70 AD3d 15 [1st Dept 2009].) The trier of fact will hear from the plaintiff’s expert, including the evidence relied upon in forming the basis for the opinion, and in turn they will evaluate the weight and credibility

of the testimony. (*Cassano v Hagstrom*, 5 NY2d 643 [1959]; *State v Marks*, 87 AD3d 73 [3rd Dept 2011].) Therefore, that portion of defendants' motion seeking dismissal of the aforementioned alleged departures is denied. The balance of defendants' motion is granted, and the remaining causes of action are dismissed. Dr. Sharan and WestMed are directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

12/6/22

Dated

Hon.


Joseph E. Capella, J.S.C.