

Cron v Dhawan
2022 NY Slip Op 35142(U)
April 27, 2022
Supreme Court, Orange County
Docket Number: Index No. EF004408-2016
Judge: Craig Stephen Brown
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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EVA CRON,

Plaintiff,

-against-

DECISION & ORDER

SUSHIL K. DHAWAN, M.D., D.P.M.,
ELLENVILLE REGIONAL HOSPITAL
FOUNDATION, INC. d/b/a ELLENVILLE
REGIONAL HOSPITAL, JOHN S. JULIANO, M.D.,
and CRYSTAL RUN HEALTHCARE, L.L.P.,

Index No. EF04408-2016

Defendants.
-----X

Defendants John S. Juliano, M.D. and Crystal Run Healthcare, L.L.P. move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and any cross-claims against them.

Defendants Sushil K. Dhawan, M.D., D.P.M. and Ellenville Regional Hospital Foundation, Inc. d/b/a Ellenville Regional Hospital move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint against them.

The following papers were read:

Notice of Motion - Affirmation in Support - Affidavit in Support - 1 - 5
Statement of Material Facts - Exhibits

Notice of Motion - Memorandum of Law in Support - Affirmation 6 - 12
in Support - Affirmation in Support - Statement of Material
Facts - Affirmation in Support - Exhibits

Affirmation in Opposition to Motion - Annexed Exhibits - 13 - 16
Statement of Material Facts - Memorandum of Law

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Reply Affirmation - Response to Statement of Material Facts	21 - 22
Reply Affirmation - Reply Affidavit - Exhibits	23 - 25

Upon the foregoing papers it is hereby ORDERED that the defendants' motions for summary judgment are denied. All other requested relief is denied.

In the instant medical malpractice action, moving defendants John S. Juliano, M.D. and Crystal Run Healthcare, L.L.P. have submitted an affidavit from defendant Juliano in support of their motion for summary judgment. Defendant Dr. Juliano, who is board certified in orthopedic surgery, states in his affidavit, *inter alia*, that, "It is my opinion, to a reasonable degree of medical certainty, that I did not depart from accepted orthopedic practice in my treatment of plaintiff from December 8, 2014 to April 2, 2015. Moreover, my treatment was not the proximate cause of the AVN [avascular necrosis], which first became evident on the x-rays taken on April 2, 2015. Nothing I did or did not do delayed the diagnosis of the AVN" (Affidavit of John S. Juliano, M.D., paragraph 24).

Defendants Sushil K. Dhawan, M.D., D.P.M. and Ellenville Regional Hospital Foundation, Inc. d/b/a Ellenville Regional Hospital have submitted affirmations from Jeffrey Lozman, M.D. and Richard P. Fried, M.D. in support of their motion for summary judgment. Dr. Lozman is board certified in orthopedic surgery and states in his affirmation, *inter alia*, that, "It is my opinion, to a reasonable degree of medical

certainty, that Dr. Dhawan did not deviate from accepted standards of care in her treatment of the patient Eva Cron, and there were no departures from accepted standards of medical care that were proximately or causally related to the patient's alleged injuries. Furthermore, it is my opinion, to a reasonable degree of medical certainty, that treatment rendered to the patient by the staff and providers at ERH [Ellenville Regional Hospital] did not deviate from accepted standards of care, and that there were no departures from accepted standards of medical care that were proximately or causally related to the patient's alleged injuries" (Affirmation of Jeffrey Lozman, M.D., paragraph 4). In addition, Dr. Fried, who is board certified in internal medicine, states in his affirmation, *inter alia*, that, "It is my opinion, to a reasonable degree of medical certainty, that the care and treatment rendered to the patient by Dr. Dhawan and the staff and providers at ERH complied with the standard of care, there was no other intervention or treatment that they should have ordered or performed, and in no way did their care cause harm to the patient" (Affirmation of Richard P. Fried, M.D., paragraph 57).

However, plaintiff has submitted an affirmation from Hervey S. Sicherman, M.D. in opposition to defendants' motions. Dr. Sicherman, who is board certified in orthopedic surgery, states that on December 8, 2014, January 6, 2015, and February 12, 2015, "defendant Dr. Juliano negligently failed to make a proper and full inquiry and only performed at best a limited and perfunctory examination of the plaintiff which was a deviation of the standard of care" (Affirmation of Hervey S. Sicherman, M.D.,

paragraphs 86-88). Dr. Sicherman further states, "That on January 6, 2015, the defendant Dr. Juliano negligently failed to take notice that the x-rays indicated *"moderate narrowing"* of the right hip joint space. That on February 12, 2015 the defendant Dr. Juliano negligently failed to take notice that the x-rays indicated greater changes: *"marked narrowing of the L right hip"*. That in the face of these findings, defendant Juliano did nothing and merely scheduled plaintiff for a follow up appointment on April 2, 2015... That defendant Dr. Juliano was grossly negligent in failing to review defendant Dr. Dhawan's No Fault follow up report and the various clinical reports from defendant Ellenville including the Quick Notes... That defendant Dr. Juliano was grossly negligent in ignoring that plaintiff had recurring infections at defendant Ellenville" (Affirmation of Hervey S. Sicherman, M.D., paragraphs 89-94). Dr. Sicherman affirms that, "It is my opinion to a medical certainty that defendant Dr. Juliano's failure to perform anything more than a rudimentary exam and x-ray was grossly negligent... It is my opinion to a medical certainty that plaintiff's ongoing infection compromised the healing process of her right hip. Dr. Shah performed surgery on plaintiff on April 25, 2015. His report indicated that the femoral head... 'was partially dislocated...there was minimal posterior wall remaining.' It is my opinion to a medical certainty that but for the negligent failures of defendant Dr. Juliano, plaintiff would not have suffered the severe degeneration of her initial hip repair" (Affirmation of Hervey S. Sicherman, M.D., paragraphs 104, 106).

In addition, Dr. Sicherman states that, "It is my opinion to a medical certainty

that defendants' failures to adhere to the standard of care were the proximate cause of the hastened and untimely degeneration of plaintiff's initial hip repair. That as a result of the defendants' negligent failures, the plaintiff suffered the permanent loss of hip bone and joint integrity and was forced to endure a two-step-revision surgery... It is my opinion to a medical certainty that Dr. Shah's initial surgery was necessitated by defendants' negligent failure to diagnose and appropriate [sic] treat plaintiff's infections, the signs of which were present as of October 26, 2014. Defendants negligently failed to order, follow, evaluate inflammatory marker baseline, negligently failed to acknowledge that [sic] plaintiff's persisting infection; negligently failed to acknowledge that oral antibiotics were ineffective in treating a deep infection; negligently failed to administer intravenous antibiotics; negligently failed to order an MRI to establish whether AVN was developing. All of these negligent failures were departures from the standard of care and were the proximate cause of plaintiff's injuries... It is my medical opinion to a certainty that defendants' negligent failure to administer MRI (s) or to take any measures toward earlier detection were the proximate cause of plaintiff's injuries" (Affirmation of Hervey S. Sicherman, M.D., paragraphs 112, 113, 117, and 119).

Dr. Sicherman concludes that, "It is my opinion to a medical certainty based on my years of clinical orthopedic experience that earlier detection would have resulted in non-surgical options being available to plaintiff. Further, defendants negligently allowed infection to fester in plaintiff, destroying bone and allowed the AVN to progress until the damage was irrevocable. That it is my opinion to a medical certainty that the

aforementioned failures by defendants to take care given her obesity, age, and injury and to be vigilant for infection and administer the appropriate testing and intravenous antibiotics were a departure from the standard of care and contributed to and/or were the proximate cause of the life altering injuries that the plaintiff experienced. That it is my opinion to a medical certainty that the aforementioned failures by defendants constituted a negligent failure to properly assess and diagnose the plaintiff such that she was caused to suffer extreme and unnecessary pain, destruction of hip bone, a major two-step revision surgery, and the resulting life altering injuries" (Affirmation of Hervey S. Sicherman, M.D., paragraphs 122-124).

The plaintiff has also submitted an affidavit from Ira Gurland, M.D. in opposition to the defendants' motions. Dr. Gurland, who is board certified in internal medicine and infectious diseases, opines that, "Defendants negligently failed to administer intravenous antibiotics to plaintiff who was showing obvious persistent and recurring infection which was not responding to oral antibiotics; persistent serious drainage, yellow exudate, cellulitis, wound dehiscence... The standard of care with a patient such as plaintiff, obese, elderly, substantial surgery with elevated white blood cell count upon admission, would have been for defendants to order blood tests indicating inflammatory markers as a baseline. Defendants negligently failed to obtain such markers though it was apparent she had wound problems. Defendants' negligent failure to order blood tests such as inflammatory markers when plaintiff was at Ellenville... was a departure from the standard of care" (Affidavit of Ira Gurland, M.D., paragraphs 78, 80, and 81).

Dr. Gurland further opines that, "Defendant Dhawan did not consider the implications of persistent cellulitis (continuing more than a week) with drainage of an infected wound. He [sic] did not appropriately consider obtaining inflammatory markers, he [sic] did not formulate a plan to debride the wound, explore the area, and order the proper antibiotics, all of which were deviations and departures from the standard of care... Defendants' negligent failure to call in an infectious disease expert to consult when plaintiff's wound was obviously not healing and indicating persistent recurring infection which was not responding to oral antibiotics was a departure from the standard of care... It is my opinion with a reasonable degree of medical certainty that the defendants were careless and negligent and deviated and departed from the standard of care in failing to properly and timely diagnose and treat the plaintiff's infection allowing it to progress to the point where she had to undergo two large surgical procedures resulting [in] life altering injuries. Further, the defendants were careless and negligent and deviated and departed from the standard of care in failing to call in an infectious disease specialist; in failing to obtain inflammatory markers and images of the hip, including CT or MRI scans; in delaying earlier surgical and antibiotic treatment which caused and contributed to this obviously infected prosthetic hip. These deviations and departures were the proximate cause of the plaintiff's extreme and unnecessary pain, suffering, permanent and progressive personal injuries and disabilities" (Affidavit of Ira Gurland, M.D., paragraphs 83, 85, and 113).

The defendants' medical experts' opinions are "contradicted by the plaintiff's

medical experts, leaving a conflict of medical opinion that should be resolved by a finder of fact" (*Viti v. Franklin General Hospital*, 190 AD2d 790 [2nd Dept., 1993] citing *Taype v. City of New York*, 82 AD2d 648; *Kallenberg v. Beth Israel Hospital*, 45 AD2d 177, *aff'd* 37 NY2d 719). Accordingly, the defendants' motions for summary judgment must be denied.

This matter is scheduled for a conference on May 9, 2022 at 11:45 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 27, 2022
Goshen, New York



HON. CRAIG STEPHEN BROWN
Acting Supreme Court Justice

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