

Rivera v Bhuiyan
2022 NY Slip Op 35189(U)
October 3, 2022
Supreme Court, Bronx County
Docket Number: Index No. 25912/15
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

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ENNIGIER RIVERA,

Index #: 25912/15
DECISION/ORDER

Plaintiff,

- against -

Present:

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

MD. LR. BHUIYAN, MARGARET RIVERA, and
PARK WEST EXECUTIVE SERVICES, INC., NING
LIN, M.D., JAIME NIETO, M.D., ELAN GOLDWYN,
M.D., LIONEL LAZARO, M.D., BENJAMIN RICCIARDI,
M.D., MARGARET CHIU, M.D., and NEW YORK
HOSPITAL QUEENS,

Defendants.

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The following papers numbered 1 to 6 read on this motion dated September 28, 2021, and duly submitted on December 27, 2021.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION	1
ANSWERING AFFIDAVIT AND MEMO OF LAW	2 - 5
REPLY AFFIDAVIT AND EXHIBITS	6

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

Motion by defendant, Ning Lin, M.D., for summary judgment (CPLR 3212) is granted in part and denied in part. The instant action is actually a consolidation of two actions, one involving a motor vehicle accident and the other for medical malpractice. In the medical malpractice action, plaintiff alleges that defendants failed to properly treat plaintiff for the injuries (e.g., unstable spinal fractures) he sustained in the motor vehicle accident on October 31, 2014, resulting in spinal cord damage, paraplegia and diminished sensation at or about the T4 vertebral level. The initial burden is on Dr. Lin as the movant for summary judgment to make a *prima facie* showing of an entitlement to same

as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If Dr. Lin does, 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.

Plaintiff's bill of particulars alleges, *inter alia*, that Dr. Lin failed to properly perform a T5-6 laminectomy, T3-7 posterior fusion, repair thoracic dura, employ proper care in treating and managing plaintiff, and to take effective steps to prevent adverse consequences. In support of the motion is an expert affirmation by Dr. Ziya L. Gokaslan, a board certified neurosurgeon. According to Dr. Gokaslan, during the initial consultation after admission on October 31, 2014, Dr. Lin performed a comprehensive examination, appropriately reviewed the relevant radiological studies, and then formulated an appropriate plan. He opines that Dr. Lin appropriately determined that an urgent thoracic posterior decompression and fusion surgery was indicated for the following morning to prevent further damage and permit the maximum chance at recovery. In the interim, log roll and movement precautions, keeping systolic blood pressure at greater than 120 to ensure spinal cord perfusion, and neuro checks of the lower extremities Q1H were appropriately maintained.

Dr. Gokaslan further opines that Dr. Lin appropriately performed the spinal procedures on November 1, which included a T5-6 laminectomy, a T3-7 posterior fusion, repair the thoracic dura with primary closure, collagen dura graft and fibrin glue, and

exercising appropriate surgical technique within good and accepted standards. He further opines that when the plaintiff was discovered to have lost sensation in his lower extremities the following day, November 2, Dr. Lin appropriately explored the wound, discovered a moderate amount of CSF below the fascia. Dr. Gokaslan opines that the CSF leak was not the result of any negligent act/omission by Dr. Lin, but a known risk of spinal procedures. Dr. Lin appropriately took plaintiff back to the OR on November 13, for additional wound exploration as well as a washout for suspected CSF leak. Plaintiff had three follow-up visits with Dr. Lin on January 21, April 8, and September 24, 2015, and Dr. Gokaslan opines that Dr. Lin conducted appropriate and thorough examinations.

As of September 24, plaintiff was still unable to move his lower extremities and had no sensation, at which point Dr. Lin explained to plaintiff that the prospect of any meaningful function of his legs was quite small. According to Dr. Gokaslan, Dr. Lin appropriately discussed the risks, benefits and alternatives of each surgery, and it is his opinion that the injury plaintiff sustained was the result of trauma caused by the motorcycle accident, and not the result of any act by Dr. Lin. Given the aforementioned, the court is satisfied that Dr. Lin met the 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 provides an expert affidavit from a physician licensed to practice in the District of Columbia who is board certified in neurological surgery. Co-defendants,

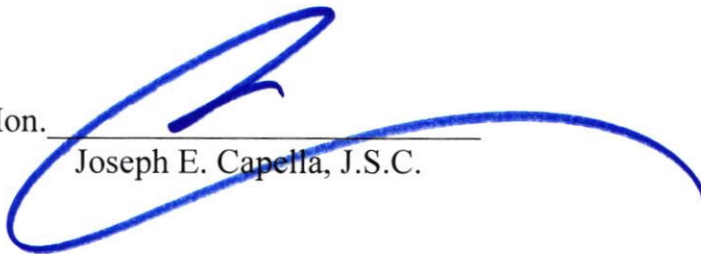
Margaret Rivera, Md. Lr. Bhuiyan and Park West Executive Services, Inc., have joined in plaintiff's opposition, but have not submitted their own expert, and instead have adopted the opinions of plaintiff's expert. Plaintiff's expert only proffered alleged departures pertaining to the care and treatment Dr. Lin rendered on November 1. Therefore, as the opinions by Dr. Gokaslan regarding the care and treatment rendered by Dr. Lin before and after November 1 are not being challenged, Dr. Lin is granted summary judgment as to these claims.

According to plaintiff's expert, on November 1, Dr. Lin (1) improperly decided to perform the orthopedic surgery before the spinal surgery, (2) failed to obtain informed consent beforehand, and (3) applied excessive force during the spinal surgery. Plaintiff's expert also alleges that Dr. Lin (4) failed to utilize a "modular table system" to assist in moving plaintiff from supine to prone position between the surgeries, or in the alternative, failed to awaken plaintiff from general anesthesia before moving him from supine to prone position between the surgeries. According to plaintiff's expert, plaintiff's orthopedic condition on November 1, a right open medial subtalar dislocation, was drastically less severe and did not require immediate intervention. Performing the surgeries in the sequence chosen by Dr. Lin represented a danger to plaintiff as he was caused to have his unstable spinal fractures left untreated for a greater period of time while continuing to pose a risk of causing permanent spinal cord damage. Plaintiff's expert also opines that plaintiff was never informed of the risks of proceeding with

surgery as performed, or the available alternatives including proceeding with spinal surgery before the orthopedic surgery. This expert also opines that the spine damage could only have been caused as a result of excessive force applied when plaintiff was improperly rolled from supine to prone position in the operating room or during the course of the surgery itself. According to plaintiff's expert, these departures resulted in irreversible damage to plaintiff's spinal cord at or about the T4 vertebral level.

Viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the Court is satisfied that plaintiff has established material issues of fact regarding the aforementioned alleged departures and proximate cause. (*Alvarez*, 68 NY2d 320.) As for the allegations by plaintiff's expert regarding the alleged failure to utilize a "modular table system" or awaken plaintiff from general anesthesia before moving him from supine to prone position between the surgeries, these departures cannot be considered as they are not raised in the complaint or bill of particulars. (*Abalola v Flower*, 44 AD3d 522 [1st Dept 2007].) Given the aforementioned, Dr. Lin's motion for summary judgment is denied, and plaintiff is directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 20 days of receipt of copy of same. This constitutes the decision and order of this court.

____ 10/3/22 ____
Dated

Hon. 

Joseph E. Capella, J.S.C.