

Roberts v Dayan

2023 NY Slip Op 31259(U)

April 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 507751/2020

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 13th day of April, 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

FREDERICK ROBERTS,

Index No. 507751/2020

Plaintiff,

-against-

ALAN J. DAYAN, M.D. and
ALAN J. DAYAN, M.D., P.C.,

Defendants.

The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Motion and Affidavits (Affirmations) and Exhibits.....	31-57
Answering Affidavit (Affirmation) and Exhibits.....	58-68
Reply Affidavit (Affirmation) and Exhibits.....	69-71

In an action to recover damages for medical malpractice, defendant Alan J. Dayan, M.D. (“Dr. Dayan”) moved, in motion sequence # 1, for summary judgment dismissing all claims, crossclaims, and counterclaims against him and to dismiss the complaint against defendant Alan J. Dayan, Physician, M.D., P.C. (“Dayan P.C.”) since more than one year passed since Dayan P.C. defaulted in serving an answer and plaintiff failed to seek a judgment against it. Dr. Dayan also sought to amend the caption. Plaintiff Frederick Roberts opposed the motion.

Facts

Plaintiff received treatment from Dr. Dayan over several years for multiple orthopedic issues. Dayan PC is Dr. Dayan's orthopedic surgery practice where plaintiff received treatment. On July 19, 2018, plaintiff presented to Dr. Dayan with complaints of right ankle, right knee, and right shoulder pain. Dr. Dayan examined plaintiff and performed a Thompson Test to determine whether plaintiff's Achilles tendon had ruptured. That test result was negative. Dr. Dayan diagnosed plaintiff with Achilles tendonitis and advised him to keep his foot in a plantar flexed position at ninety degrees in a CAM walker boot to rest his ankle and Achilles tendon.

On August 23, 2018, during a follow-up visit, plaintiff complained of continued right ankle pain. Dr. Dayan examined the ankle and noted that plaintiff had an antalgic gait, a negative Thompson Test, and tenderness over the distal Achilles tendon. His impression was Achilles tendinopathy. He instructed plaintiff to wear a lace-up ankle brace and to get an MRI, to rule out an Achilles tendon tear.

Plaintiff underwent an MRI on September 1, 2018. The radiologist's impression was a "focal low-grade tear in the midportion of the Achilles tendon," but the tendon appeared normal otherwise. On September 5, 2018, plaintiff twisted his right ankle at work. He was not wearing the lace-up ankle brace. On September 7, 2018, Dr. Dayan called plaintiff to discuss the MRI results. He advised plaintiff to rest, modify his activities, continue wearing the lace-up ankle brace, and follow up with another appointment. Dr. Dayan also explained to plaintiff that the "tear" could be an inflammatory process that appeared on the MRI. Plaintiff did not inform Dr. Dayan of the September 5, 2018 workplace injury.

Plaintiff had another follow-up visit with Dr. Dayan on September 27, 2018. He mentioned an unrelated hip issue and continued pain in his right ankle. Plaintiff also informed

Dr. Dayan that he was uncomfortable using the lace-up ankle brace and was using an Ace wrap instead. Dr. Dayan performed another Thompson Test, which remained negative. His impression was that plaintiff had Achilles tendinopathy with an MRI diagnosis of a low-grade focal tear, meaning plaintiff had an inflammation of the Achilles tendon. Dr. Dayan planned to address plaintiff's right ankle issues with physical therapy, stretching, and continued immobilization with an Ace wrap.

Plaintiff's next visit to Dr. Dayan was on October 3, 2018. Dr. Dayan alleged that this was the first time plaintiff informed him about the workplace right ankle injury. According to Dr. Dayan, plaintiff told him the injury occurred on September 28, 2018 and he was having severe pain and swelling in his right ankle. When Dr. Dayan performed the Thompson Test, the result was positive for the first time.

Dr. Dayan ordered another MRI of plaintiff's right ankle. On October 8, 2018, the MRI showed that plaintiff's Achilles tendonitis had progressed to a full rupture of the Achilles tendon with focal edema, hematoma, and underlying severe tendinosis. Dr. Dayan was unsure but thought it was "probably less likely" that the tear was over four weeks old. On plaintiff's next visit on October 12, 2018, Dr. Dayan's impression was that plaintiff had a "complete rupture of the Achilles tendon requiring surgical management." He explained plaintiff's operative and non-operative treatment options, planned to get Workers' Compensation authorization for plaintiff's surgery, and discussed putting plaintiff in a short leg cast in plantarflexion or a CAM walker boot with wedges. He noted that plaintiff declined to move forward with surgery at that time. Plaintiff indicated that he brought the Workers' Compensation accident report to Dr. Dayan during this visit. The report was prepared on October 11, 2018.

Plaintiff returned on October 30, 2018. On this visit, plaintiff informed Dr. Dayan that his workplace injury occurred on September 5, 2018, and not September 28, 2018, the date plaintiff initially reported. Plaintiff's Workers' Compensation application also listed September 5, 2018, as the date of the injury. At this point, over three to four weeks had passed. Dr. Dayan indicated at his deposition that plaintiff's injury was now considered "chronic." He was unsure whether plaintiff was a candidate for primary closure of the rupture or whether a tendon transfer grafting procedure would need to be performed. He also indicated that plaintiff elected not to undergo surgery. Plaintiff testified to the contrary.

Plaintiff saw Dr. Dayan again on November 26, 2018, and December 26, 2018, where Dr. Dayan noted that plaintiff was "100% impaired from prior level of activity" and he was awaiting authorization to address the ruptured Achilles tendon surgically. Dr. Dayan also noted that he discussed the surgery, risks, benefits, limitations, and complications with plaintiff. Plaintiff denied Dr. Dayan discussed nonsurgical treatment options. Plaintiff was instructed to follow up again in one month.

The Workers' Compensation application was approved on December 17, 2018, between the November and December visits. The only request for surgery in the Workers' Compensation file with the provider's signature is dated December 14, 2018, though Dr. Dayan repeatedly indicated that he was awaiting authorization,

On January 4, 2019, Dr. Dayan noted plaintiff's Achilles tendon rupture had healed in an elongated position. He referred plaintiff to Dr. Steven Sheskier, a foot and ankle surgery specialist. On a January 8, 2019 visit, Dr. Sheskier confirmed that if plaintiff wanted surgery, he would require a tendon transfer surgery. Plaintiff had additional follow-up appointments with

defendant until July 2019 but did not undergo surgery on his Achilles tendon with Dr. Dayan or Dr. Sheskier.

Summary Judgment

A physician [who moves] for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of plaintiff's injuries." *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018) quoting *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017). See *McAlwee v. Westchester Health Associates, PLLC*, 163 A.D.3d 549, 80 N.Y.S.3d 401 (2d Dept. 2018). To sustain the burden, the physician "must address and rebut any specific allegations of malpractice set forth in [a] plaintiff's bill of particulars." *Mackauer*, 148 A.D.3d 873. If the moving party fails to establish a prima facie entitlement to judgment, the motion should be denied regardless of the sufficiency of plaintiff's opposing papers. See *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). In opposition, plaintiff must "submit an affidavit of an expert physician attesting to a departure from good and accepted practice and stating the physician's opinion that the alleged departure was a component producing cause of plaintiff's injuries." *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). See *Burns v. Goyal*, 145 A.D.3d 952, 44 N.Y.S.3d 180 (2d Dept. 2016).

Here, Dr. Dayan proffered an expert affirmation from Justin Greisberg, M.D., board-certified in orthopedic surgery and a specialist in foot and ankle reconstruction treatment and complex musculoskeletal trauma, who stated that Dr. Dayan did not depart from accepted standards of medical care. Dr. Greisberg opined that Dr. Dayan's management of plaintiff's Achilles tendonitis was proper and that it was impossible to prevent an Achilles tendon from

rupturing. The Achilles rupture can be managed by bracing and permitting the Achilles tendon to heal without surgery, or a patient could undergo surgery. Dr. Greisberg further opined that at least three to four weeks had passed, whether plaintiff's injury occurred on September 5, 2018, or September 28, 2018. Thus, the Achilles tendon rupture was now chronic, and the window for a successful primary repair was significantly diminished. Moreover, plaintiff likely would have needed a tendon transfer if he had undergone a surgical repair, regardless of whether the surgery was done during the acute phase of his injury or the chronic phase, given that plaintiff's Achilles tendon healed in an elongated fashion and often patients who undergo surgery within four weeks of injury require a tendon graft despite the injury not becoming chronic. Finally, Dr. Greisberg opined that it is typically the function of administrative personnel, not a physician, to obtain Workers' Compensation authorization for surgery and that it is exceedingly difficult to obtain rapid approval. He also indicated that plaintiff wanted to obtain treatment for his injury through Workers' Compensation and did not open a Workers' Compensation case until the right ankle injury was several weeks old and chronic.

In opposition, plaintiff's expert opined that based on plaintiff's history and the clinical findings at the October 3, 2018 visit, the complete rupture of plaintiff's Achilles tendon occurred on September 28, 2018, giving Dr. Dayan ample time to repair the injury surgically. The expert also opined that Dr. Dayan departed from good and accepted standards of medical practice in failing to place plaintiff in a cast or immediately scheduling plaintiff for surgery to repair plaintiff's Achilles tendon once he confirmed a complete rupture; in waiting for authorization for surgery from the plaintiff's Workers Compensation carrier; in failing to see that the authorization was obtained in a timely manner, as this responsibility was ultimately Dr. Dayan's and even when the surgery was approved, he still noted that he was "awaiting authorization for surgery;"

in failing to treat the partial tear with a cast; and in treating the fully ruptured Achilles tendon with a Cam Walker, which was not the proper treatment. These departures eventually resulted in the progression of the tear, plaintiff not having surgery, and the Achilles tendon healing in an elongated and compromised state. The conflicting opinions of both experts raised credibility issues that the factfinder must resolve at trial. *See Elmes v. Yelon*, 140 A.D.3d 1009, 34 N.Y.S.3d 470 (2d Dept. 2016) quoting *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 (2d Dept. 2005) (“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.”); *Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022).

Dismiss

Dr. Dayan sought dismissal of the complaint against Dayan, P.C., an uninsured and non-jural entity, because plaintiff failed to seek a default judgment within one year of the entity’s default. In opposition, plaintiff argued that Dr. Dayan’s attorneys lacked standing to bring the application because the firm never appeared on behalf of Dayan, P.C. “If [a] plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, *upon its own initiative or on motion* [emphasis added], unless sufficient cause is shown why the complaint should not be dismissed.” CPLR 3215(c); *US Bank N.A. v. Juliano*, 184 A.D.3d 597, 125 N.Y.S.3d 126 (2d Dept. 2020). Plaintiff has not moved for entry of a default judgment as against Dayan P.C.

Conclusion

Accordingly, summary judgment in favor of defendant Alan J. Dayan, M.D. is denied.

The amended complaint against Alan J. Dayan, M.D., P.C. is dismissed as abandoned. The caption is amended as follows:

FREDERICK ROBERTS,

Plaintiff,

-against-

ALAN J. DAYAN, M.D.,

Defendant.

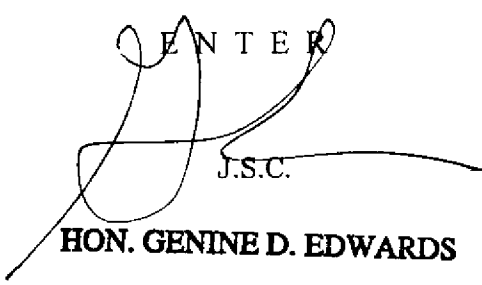
The parties shall appear for an Alternative Dispute Resolution conference on July 11, 2023, at 12:00PM.

For Clerks use only

MG__

MD__

Motion Seq.#: 1


ENTER
J.S.C.
HON. GENINE D. EDWARDS