

King v Bitan

2023 NY Slip Op 31321(U)

April 20, 2023

Supreme Court, New York County

Docket Number: Index No. 805255/2019

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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DONNA KING and ROY KING,

Plaintiffs,

- v -

FABIEN BITAN, M.D., VICKEN PAMOUKIAN, M.D.,
MANHATTAN ORTHOPEDIC SPINE, PLLC, LENOX HILL
HOSPITAL, and NORTHWELL HEALTH,

Defendants.

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INDEX NO. 805255/2019

MOTION DATE 02/15/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 163, 165, 167, 172

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and vicarious liability, the defendants Vicken Pamoukian, M.D., Lenox Hill Hospital, and Northwell Health (collectively the Lenox Hill defendants) together move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiffs oppose the motion. The motion is granted to the extent that the Lenox Hill defendants are awarded summary judgment dismissing, insofar as asserted against them, the lack of informed consent cause of action, and so much of the medical malpractice cause of action as was premised on (a) any alleged delay by Pamoukian in recognizing, responding to, or diagnosing a thrombosis in left leg of the plaintiff Donna King (the patient), (b) the manner in which the thrombectomy was performed and (c) any claim to recover for the patient's ongoing lower-back problems. The motion is otherwise denied, inasmuch as there are triable issues of fact as to whether Pamoukian departed from good and accepted practice in the manner in which he employed hand-held retractors the move the

patient's blood vessels in the course of a spinal procedure, monitoring the intra-operative use and placement of the retractors, and monitoring the intra-operative blood flow to the patient's left leg. In addition, there are triable issue of fact as to whether the patient's development of thrombosis in her left leg during the spinal surgery was caused by those departures and whether she developed an infection, sepsis, and permanent weakening of her left leg and foot as a consequence of the thrombosis and concomitant thrombectomy.

The facts of this dispute are set forth in great detail in this court's April 20, 2023 order deciding Motion Sequence 004, as is the law applicable to summary judgment motions in actions alleging medical malpractice and lack of informed consent. In that order, this court awarded partial summary judgment to the defendant orthopedic surgeon Fabien Bitan, M.D., and his practice, the defendant Manhattan Orthopedic Spine, PLLC (MOS). As relevant to this motion, the plaintiffs alleged that Pamoukian, a vascular surgeon who assisted Bitan in performing a discectomy, spinal fusion, and artificial disc replacement procedure upon the patient, improperly employed hand-held retractors to move the patient's blood vessels aside to permit Bitan to gain access to the surgical sites on the patient's spine. They alleged that this improper usage constituted a deviation from the standard of care, and that this deviation caused the patient to suffer a left-leg thrombosis, and the concomitant need for otherwise unnecessary exploratory surgery and a thrombectomy, all of which caused or contributed to permanent left-leg and foot damage and weakness.

The Lenox Hill defendants established their prima facie entitlement to judgment as a matter of law by submitting or relying upon the same documentation as Bitan and MOS submitted in connection with Motion Sequence 004. The Lenox Hill defendants also submitted and relied upon the affirmation of vascular surgeon Todd Berland, M.D., who asserted that Pamoukian did not depart from good and established medical practice in the manner in which he dissected the patient's blood vessels, employed hand-held retractors to move the vessels out of the way so that Bitan could access the patient's spine at the L4-L5 and L5-S1 levels to

perform the discectomies, spinal fusion, and artificial disc replacement procedure, monitored any intra-operative issues with the placement of the retractors and blood flow, and emergently performed exploratory surgery and a thrombectomy after the patient reported post-operative complaints of lower-leg numbness and pain.

Although the plaintiffs did not specifically designate their opposition papers as referable to the Lenox Hill defendants' motion under Motion Sequence 005, the papers that the plaintiffs submitted in opposition to Motion Sequence 004 did, in fact, address the contentions that the Lenox Hill defendants made in the instant motion.

For the same reasons as the court explained in deciding the summary judgment submitted by Bitan and MOS under Motion Sequence 004, the Lenox Hill defendants must be awarded summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them, and so much of the medical malpractice cause of action against them as was premised on (a) any alleged delay by Pamoukian in recognizing, responding to, or diagnosing a thrombosis in the patient's left leg, or in performing the emergent exploratory surgery and thrombectomy, (b) the manner in which the thrombectomy was performed, and (c) any claim to recover for the patient's ongoing lower-back problems. The motion is otherwise denied for the reasons explained above.

Contrary to the Lenox Hill defendants' contention, as set forth in their reply papers, the plaintiffs' expert is qualified to render an opinion on whether Pamoukian departed from good and accepted practice in the manner in which he employed hand-held retractors and monitored both the retractors and blood flow over the course of the spinal surgery. It is of no moment that the plaintiffs' expert was not a vascular surgeon. The courts of this State repeatedly have rejected the concept that only a specialist practicing in a defendant's particular specialty is competent to testify that another specialist departed from accepted practice in the specialty (see *Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247, 1248 [4th Dept 2008]; *Julien v Physician's*

Hosp., 231 AD2d 678, 680 [2d Dept 1996]; *Matter of Enu v Sobol*, 171 AD2d 302, 304 [3d Dept 1991]; *Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 355 [1st Dept 1990]). Where, as here, the expert asserted that he or she possessed the necessary knowledge and training in the relevant specialty, explained how he or she came to it, and articulated the standard of care that allegedly was violated (see *Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]), the expert is qualified to render the opinion. Inasmuch as an orthopedic surgeon, by training and experience, has knowledge of the proper manner of deploying and monitoring retractors in the course of orthopedic surgery, the plaintiffs' expert is qualified to opine whether Pamoukian departed from the standard of care and whether that departure caused or contributed to the patient's left-leg and foot conditions.

Accordingly, it is

ORDERED that the motion of the defendants Vicken Pamoukian, M.D., Lenox Hill Hospital, and Northwell Health for summary judgment dismissing the complaint insofar as asserted against them is granted to the extent that they are awarded summary judgment dismissing, insofar as asserted against them, the lack of informed consent cause of action, and so much of the medical malpractice cause of action as was premised on

- (a) any alleged delay by the defendant Vicken Pamoukian, M.D., in recognizing, ordering tests to ascertain the presence of, calling in specialists to consult on, and diagnosing a thrombosis in the left leg of Donna King, and in performing exploratory surgery and a thrombectomy,
- (b) the manner in which the thrombectomy was performed, and
- (c) any claims asserted against Lenox Hill Hospital and Northwell Health that are premised upon these alleged departures by Vicken Pamoukian, M.D., and
- (d) any claim to recover for ongoing lower-back problems alleged by Donna King,

and those claims are dismissed insofar as asserted against Vicken Pamoukian, M.D., Lenox Hill Hospital, and Northwell Health, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a pretrial settlement conference on June 7, 2023 at 10:00 a.m.

This constitutes the Decision and Order of the court.

4/20/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: