

**Ratnavel v Meyers**

2023 NY Slip Op 32107(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805243/2019

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

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PETER RATNAVEL, ANTONEETA RATNAVAL,
Plaintiff,

INDEX NO. 805243/2019

MOTION DATE 06/12/2023

MOTION SEQ. NO. 001

- v -

PHILIP MEYERS, JASON CARROLL, THE NEW YORK
AND PRESBYTERIAN HOSPITAL

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

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

Upon the foregoing documents, the motion for summary judgment of the defendants Philip M. Meyers, M.D. and The New York and Presbyterian Hospital (hereinafter "NYPH")<sup>1</sup> is granted to the extent that: (1) the complaint is severed and dismissed as against NYPH; (2) plaintiffs' claims for negligent treatment rendered prior to and not including March 29, 2017, are severed and dismissed, and (3) plaintiffs' "Third Cause of Action" for lack of informed consent is severed and dismissed.<sup>2</sup> The balance of the motion is denied.

This medical malpractice action involves an embolic stroke suffered by forty-four-year-old certified public accountant, Peter Ratnavel, following a March 29, 2017, cerebral arteriogram

1 A Stipulation of Discontinuance was executed in favor of defendant Jason Carroll, M.D. (see NYSCEF Doc. No. 52) on March 20, 2023.

2 During oral argument of the motion, plaintiffs' counsel withdrew the cause of action for lack of informed consent, as well as all of plaintiffs' claims pre-dating March 29, 2017, and all independent claims asserted against NYPH.

with transcatheter embolization and occlusion of the dural arteriovenous fistula (“DAVF”) performed by Dr. Meyers at NYPH.

It appears undisputed that in August of 2016 plaintiff suffered an episode of global amnesia when he “blacked out” while shopping. An MRI performed on August 29, 2016, revealed a vascular malformation, and plaintiff was subsequently found to have a DAVF (*i.e.*, an abnormal connection between the arteries and veins in the tissue surrounding the brain and spinal cord), causing the blood to shunt from the higher-pressure arteries to the lower pressure veins. Ultimately, plaintiff presented to Dr. Meyers, who recommended treatment for the “high risk” DAVF by way of an endovascular embolization (a procedure where the DAVF is penetrated with Onyx, a liquid embolic material). Dr. Meyers performed the first attempted embolization of the fistula on December 12, 2016, and succeeded in embolizing certain of the arteries, but did not achieve a therapeutic embolization of the DAVF which persisted and required further treatment.

At issue is Dr. Meyers’ second surgery and attempted embolization of the DAVF, which he performed on March 29, 2017, using a Scepter-C balloon catheter with Metronic Onyx to embolize the remaining portion of the DAVF. During administration of the Onyx, the doctor recognized unintended retrograde flow around the tip of the microcatheter and immediately stopped administration of the Onyx and terminated the procedure. It was noted that there was occlusion of the left superior cerebellar dural branch accompanied by small adjacent left superior cerebellar branch vessels.

Plaintiff was taken to PACU where a CT scan and MRI of the brain were performed when he was slow to wake up. A stroke with mild midbrain involvement was identified, along with extensive artifact from the DAVF embolization material.

Plaintiffs claim that Dr. Meyers departed from good and accepted standards of medical and Interventional and Diagnostic Neuroradiology care and treatment during the second endovascular embolization surgery by using the Scepter-C balloon catheter instead of the Marathon, Apollo, or Headway Duo<sup>3</sup> microcatheters, and that this departure was a direct and substantial cause of the occlusion of normal blood vessel branches supplying blood to the cerebellum, midbrain and brainstem, resulting in plaintiff's stroke. Defendants maintain, *inter alia*, that use of multiple microcatheters including the Scepter-C were compatible and within the standard of care, and that the choice of which catheter to use was solely Dr. Meyers' decision.

To prevail on a motion for summary judgment, the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch*, 91 AD3d 147 [1<sup>st</sup> Dept. 2012]).

In support of the motion, defendant submits the expert affirmation of Mary E. Jensen, M.D. (*see* NYSCEF Doc. No. 38) who opines to a reasonable degree of medical certainty that: the December 12, 2016 stage I cerebral arteriogram with transcatheter embolization and occlusion of the AV fistula procedure performed by Dr. Meyers was indicated and properly performed; (2) the March 29, 2017 stage II cerebral arteriogram with transcatheter embolization and occlusion of the AV fistula procedure was indicated and properly performed; (3) Dr. Meyers

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<sup>3</sup> These catheters are smaller in diameter and more flexible than the Scepter-C balloon catheter.

appropriately used a Scepter-C balloon microcatheter during the embolization procedures; (4) the standard of care does not require that microcatheters such as the Marathon, Apollo or Headway Duo microcatheter be used for embolization; (5) retrograde flow of Onyx and occlusion of an unintended vessel with resulting stroke is a known and accepted risk of these endovascular procedures, and can occur regardless of the type of delivery method or delivery catheter used, and (6) plaintiff was appropriately advised of the risks of the procedure (*id.*, para 5).

“The affirmation of defendants’ expert was sufficient to meet defendants’ *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff’s alleged injuries” (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1<sup>st</sup> Dept. 2018]). “An expert’s opinion must be based on facts in the record or personally known to the witness, and in the absence of such record support, an expert’s opinion is without probative force” (*Pascocello v. Jibone*, 161 AD3d 516 at 516 [1<sup>st</sup> Dept. 2018]; [*internal citations omitted*]).

“Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1<sup>st</sup> Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1<sup>st</sup> Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1<sup>st</sup> Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition to the motion, plaintiff submits the redacted affirmation of an interventional and diagnostic neuroradiologist (*see* NYSCEF Doc. No. 55) who opines to a reasonable degree

of medical certainty that Dr. Meyers departed from the standard of care by: (1) using the Scepter-C balloon catheter, “a comparatively large and inflexible catheter not capable of safely navigating close to the target [DAVF] before discharging the Onyx” (*id.*, para 3[a]); (2) injecting the Onyx within 5 millimeters of normal branches that arose from the dural branch, occluding the normal branches and causing plaintiff’s stroke; (3) injecting the Onyx 3 to 4 centimeters away from the target fistula, “an inappropriately long distance from the DAVF, thereby promoting reflux of Onyx into the normal blood vessel branches that feed the cerebellum, midbrain and brainstem” and causing plaintiff’s stroke (*id.*, para 3[c]); (4) relying on the Scepter-C catheter’s balloon to shield the proximal normal branches that supplied blood to the midbrain and brainstem, “despite known limitations of the Scepter-C balloon in preventing Onyx inflow into unintended blood vessel branches and in light of the precariously short distance between the Scepter-C balloon tip and the normal blood vessel branches” (*id.*, para 3[d]); (5) failing to remain vigilant during the injection of Onyx and immediately discontinuing its injection once retrograde flow began, and (6) failing to employ the smaller diameter and more flexible Marathon, Headway Duo, or Apollo microcatheters which were capable of being advanced close to the target DAVF and which “most likely would have achieved a therapeutic embolization of the fistula and would have spared the normal branches which supply blood to the midbrain and brainstem and thereby avoided plaintiff’s stroke” (*id.*, para 3[f]).

Plaintiffs’ expert is unequivocal that it was a deviation from good and acceptable standards of interventional and diagnostic neuroradiology care and treatment for Dr. Meyers to have utilized the Scepter-C microcatheter instead of the smaller diameter and far more flexible Marathon, or Apollo, or Headway Duo microcatheters: “Under the circumstances of this [plaintiff’s] vascular anatomy, the choice of a Scepter-C catheter instead of one of the Marathon

or Apollo or Headway Duo microcatheters was not a matter of physician discretion or medical judgment; it was, in fact, a departure from good and accepted standards of care...[since the Scepter-C balloon catheter] could not safely be advanced within the loop at the origin of the dural branch and through the remainder of the dural branch...closer to the target DAVF such that Onyx reflux would not have reached and entered the pial branches” (*id.*, para 31). The expert concludes, *inter alia*, that plaintiff’s stroke “was not the result of an unavoidable risk of the procedure but rather the direct result of [Dr. Meyers’] departures from good and accepted standards of care and treatment in failing to take all indicated and necessary precautions to have avoided the stroke” (*id.*, para 37).

The foregoing expert affirmation raises clear questions of fact sufficient to defeat summary judgment. “The medical experts’ conflicting opinions...raise issues of fact that must be resolved at trial” (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477, 478 [1<sup>st</sup> Dept. 2018]). As such, the motion for summary judgment by the defendants to dismiss plaintiffs’ complaint is denied.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendant The New York and Presbyterian Hospital to dismiss plaintiff’s complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that plaintiffs’ cause of action for lack of informed consent is severed and dismissed together with all of plaintiffs’ claims for negligent treatment rendered prior to March 29, 2017; and it is further

ORDERED the balance of the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of The New York and Presbyterian Hospital dismissing the Complaint; and it is further

ORDERED that the parties shall appear for a virtual pre-trial conference via Microsoft Teams on **July 27, 2023, at 11:30 a.m.**

6/21/2023  
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 DATE

CHECK ONE:  CASE DISPOSED  DENIED

APPLICATION:  GRANTED  SETTLE ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

OTHER  
 REFERENCE

Hon. Judith N. McMahon  
 J.S.C.

