

Hennegan v Marashi

2023 NY Slip Op 32270(U)

June 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 505004/2015

Judge: Consuelo Mallafre Melendez

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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS:

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LEDONNA HENNEGAN,

Plaintiff,

DECISION AND ORDER

Index No. 505004/2015

-against-

Motion Sequences: 7 & 8

AMIR MARASHI MD AND PBGS, LLC,

Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 115, 116-134; 155-158; 165-166; 135-150; 159-162; 163-164.

Defendants AMIR MARASHI, M.D. and PBGS, LLC each move this court for an Order pursuant to CPLR § 3212, granting summary judgment in favor of AMIR MARASHI, M.D. and PBGS, LLC dismissing the complaint in its entirety. Plaintiff submitted opposition to these motions. In this case, Plaintiff claims that the dispersive pad was not properly attached to the patient’s thigh prior to a dilation and curettage procedure causing a second-degree burn and permanent scarring. Defendants argue that this is not accurate because the safeguard mechanism in the machine would not have allowed it to work if the pad was not properly attached.

Defendants also argue that the pad used here was later recalled by the manufacturer and so patient’s burn was due to the defective pad rather than malpractice on the part of the defendants.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries.” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no departure or that any departure

was not a proximate cause of the plaintiff's injuries.” *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. “When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant PBGS, LLC's expert, Roderick Santos, M.D., a physician board-certified in Obstetrics and Gynecology and staff attending physician in Obstetrics and Gynecology at Montefiore Medical Center established that they are qualified to opine as to the care and treatment the plaintiff received in this case. Defendant Dr. Marashi's expert, Wendy Fried, M.D., a physician board-certified in Obstetrics and Gynecology established that they are qualified to opine as to the care and treatment rendered to the plaintiff in this case. Plaintiff's expert Vadim Morozov, M.D., a physician board-certified in Obstetrics and Gynecology established their expertise to opine as to the care and treatment rendered in this case.

In support of their motion, Defendant PBGS, LLC's expert, Roderick Santos, M.D., opines that Nurse Guyla, an employee of PBGS, LLC, acted within the standard of care by properly attaching the subject pad to Ms. Hennegan's thigh, prior to surgery. Dr. Santos states

that Nurse Guyla prepared the plaintiff's thigh with an alcohol swab, peeled off the peel-away part from the bottom of the pad and placed it on the patient's thigh. Both defense experts opine that if the pad is not attached to the patient's skin correctly a safeguard in the machine used for this surgery would prevent the machine from working and therefore this could not be the cause of the burn.

In opposition, Plaintiff's expert agrees that the machine included a safeguard. However, Plaintiff's expert opines that the safeguard would stop the machine from working only when the dispersive pad is not making any contact with the patient's skin, but not if the pad was partially attached to the patient. Plaintiff's expert opines that the heat from the current must be dissipated by the pad. The expert further opines that when the pad is only partially attached to the patient, as in the instant matter, the high-power density will accumulate where the pad is in contact with the patient's skin resulting in a burn to the patient. On this basis, it is Plaintiff's expert opinion that the dispersive pad was not properly attached to Ms. Hennegan, causing the plaintiff's injuries, which was a deviation from the standard of care. Through their submissions, Plaintiff's expert raises an issue of fact as to whether Nurse Guyla properly attached the pad to the patient, requiring denial of summary judgment as to claims against PBGS, LLC.

Plaintiff also claims that Defendant Dr. Marashi failed to ensure that the pad was securely attached to Plaintiff's thigh before proceeding with the surgery, resulting in the plaintiff's injuries. Defendant Dr. Marashi's expert, Wendy Fried, M.D., opines that Dr. Marashi had nothing to do with the placement of the pad onto the patient and therefore nothing Dr. Marashi did or allegedly did not do was the proximate cause of the plaintiff's injuries. In opposition, Plaintiff's expert opines that Defendant Dr. Marashi deviated from the standard of care by failing to ensure that the dispersive pad was properly attached to Ms. Hennegan prior to performing the

surgery, over which he was in full control. Plaintiff's expert opines that it was a deviation from the standard of care for Dr. Marashi to rely on built-in safety features and on the nurse rather than ensuring the pad was securely attached to the patient. In their reply, Dr. Fried opines that it is not the responsibility of the surgeon to ensure that the grounding pad is properly secured.

Contrary to Dr. Fried's opinion, in *Mack v. Ludia E. Hall Hosp.*, 121 AD2d 431, 432 [2d Dept. 1986] the Second Department stated that at trial "it was established that when an electrocoagulator is used, the accepted surgical practice is for the surgeon to know whether the pad was in full contact with the patient's skin since, if it is not, it could present a burn hazard to the patient." Similar to the facts in the instant case, the plaintiff in *Mack* sustained third degree burns on side of her thigh during a surgical procedure for treatment of rectal cancer, while under anesthesia. Here, the possibility of the pad not being properly attached to the patient would pose a similar risk of burning the patient as it did in *Mack*. Therefore, Plaintiff's expert raises an issue of fact as to whether Dr. Marashi deviated from the standard of care by failing to ensure proper placement of the pad prior to performing the surgery, resulting in the plaintiff's injuries.

Accordingly, summary judgement is denied as to Dr. Marashi.

The court considered each of the defendants' arguments that the pad used in this case was later recalled by the manufacturer. The recall letter indicates that the subject pad was recalled due to its incompatibility with some generators and not for being defective on its own. In the recall letter, there is a list of generators that the manufacturer indicates are safe to use in conjunction with the pad used in this case. Based on the evidence submitted, it is not clear whether the machine used when the patient was burned is on that list. Indeed, there is no evidence that the machine used in conjunction with the pad when the plaintiff was burned was incompatible with the pad. At best, there remains a question of fact as to whether the pad was

used with an incompatible machine at the time the patient was burned. Thus, summary judgment is denied as to the claims against each moving defendant.

As to Plaintiff's claim of Lack of Informed Consent, Defendant Dr. Marashi's expert, Wendy Fried, M.D., opines that Dr. Marashi appropriately discussed the risks and complications with the patient and that "it was not the standard of care to advise plaintiff of the possibility of a burn from the grounding pad due to a malfunction of the grounding pad, or any reason, as that was extremely rare." Dr. Fried further opines that, a reasonable person in Plaintiff's position would not have withheld from having the procedure done in view of such information. In opposition, Plaintiff's expert opines that "it is standard of care for healthcare providers to adhere to compliance directives and ensure that the equipment used functions properly." Thus, Plaintiff's expert does not identify what if any information was not conveyed to the patient to obtain the patient's consent. Therefore, Plaintiff's expert fails to raise an issue of fact as to the claim of Lack of Informed Consent as it relates to Dr. Marashi. Accordingly, summary judgment is granted as to that claim, and the Lack of Informed Consent claim related to AMIR MARASHI, M.D is dismissed.

In conclusion, Defendants' motion for summary judgment is GRANTED to the extent that the claim of Lack of Informed Consent related to AMIR MARASHI, M.D. is dismissed; and DENIED as to all remaining claims against AMIR MARASHI, M.D.; and DENIED as to all claims relating to PBGS, LLC.

This is the decision and order of the court.

Dated: June 21, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.