

Tsang v Deiner

2023 NY Slip Op 32552(U)

July 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 507693/2019

Judge: Consuelo Mallafre Melendez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MELISSA TSANG

Plaintiff(s),
-against-

DECISION & ORDER

Index No.: 507693/2019
Mo. Seq.: 004

STACIE DEINER, M.D., WILLIAM TYSON, M.D.,
J. DUFFY MOCCO, M.D., CHRISTOPHER P.
KELLNER, M.D., JUSTIN MASCITELLI, M.D.,
and MT SINAI HOSPITA

Defendants,

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 107-127, 130-33; 134-139, 142; 149-150.

Defendants STACIE DEINER, M.D., WILLIAM TYSON, M.D. and THE MOUNT SINAI HOSPITAL s/h/a MT. SINAI HOSPITAL move this court for an Order pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint with prejudice against the moving defendants or in the alternative, an Order pursuant to CPLR § 3212(e) and (g) granting partial summary judgment and limitation of the facts for trial of this action against the moving defendants to only the issues raised by plaintiffs expert. Plaintiff submitted opposition to this motion.

Plaintiff does not oppose that portion of Defendants’ motion seeking dismissal of claims relating to resident William Tyson, M.D. Accordingly, summary judgment is granted as to this defendant and all claims against William Tyson, M.D. are dismissed, as unopposed by the plaintiff. The court notes that the parties have set forth the same arguments as to defendant Stacie Deiner, M.D. and defendant The Mount Sinai Hospital and for this reason the court’s decision applies to both defendants. The professional relationship between Stacie Deiner, M.D. and The Mount Sinai Hospital has not been disclosed to the court.

In the instant matter, Plaintiff claims the inadequate administration of anesthesia by Stacie Deiner, M.D. and The Mount Sinai Hospital resulted in multiple increases in the patient's blood pressure during a craniotomy. Plaintiff further claims that the increases in blood pressure caused the patient's arteriovenous malformation ("AVM") to rupture, leading to a hemorrhagic stroke. The court finds that Defendants have met their prima facie burden for summary judgment. However, Plaintiff has raised issues of fact in opposition.

“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 [internal citations omitted].” *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].

Defendants’ expert, Marc Bloom, M.D., a physician board-certified in anesthesiology, established that they are qualified to opine as to the care and treatment rendered by Stacie Deiner, M.D. and The Mount Sinai Hospital. Plaintiff’s expert, Brian McAlary, M.D., a physician board-certified in anesthesiology, established that they are qualified to opine as to the care and treatment rendered to the plaintiff by Stacie Deiner, M.D. and The Mount Sinai Hospital. Plaintiff’s expert Guy Rordorf, M.D., a physician board-certified in psychiatry and neurology, also established their expertise to opine as to the care and treatment rendered by Stacie Deiner, M.D., and The Mount Sinai Hospital in this case.

Defendants’ expert opines that Defendants did not deviate from the standard of care in anesthetizing the patient and that there is no proximate cause between the anesthesia provided to the patient and the patient’s AVM rupture. Defendants argue that “[t]here is NO evidence within the contemporaneous anesthesiology record of a hypertensive crisis immediately following intubation.” Defendants’ expert opines that the first increase in the patient’s blood pressure occurred prior to intubation and therefore could not have been caused by inadequate anesthetization.

Additionally, Defendants’ expert further opines that “[i]ntraoperative AVM rupture can be spontaneous” and, among other causes, it can also be due to “venous blood flow including from surgical stress . . . and/or positioning which causes psychologic change.” Defendants’ expert states that, “AVMs are known to spontaneously rupture, in the range of 2-4% annually, because of pressure and damage to the blood vessels.” Defendants’ expert further opines that intraoperative rupture of a patient’s AVM is a known risk of surgery, that in the instant matter it

cannot be stated with medical certainty what caused the patient's AVM rupture, and that any opinion to the contrary is pure speculation. This is refuted by Plaintiff's expert anesthesiologist.

In discussing the cause of the AVM rupture, Plaintiff argues that the patient was intubated before the medication used for anesthetization had sufficiently sedated the patient. Specifically, Plaintiff's expert neurologist, Dr. Rordorf, opines that the hypertensive crisis was "directly caused by the negligent intubation of this patient before the medications used for induction had sufficiently anesthetized the patient" which was "a gross departure from the standard of care and was totally preventable." Dr. Rordorf explains that systolic blood pressure (SBP) over 180 mm Hg and/or diastolic over 120 is a "hypertensive crisis" putting the patient at serious risk of AVM rupture. The expert opines that the patient's catastrophic AVM rupture and consequent hemorrhagic stroke was caused by the precipitous rise in her blood pressure to 185-190 during intubation for surgery and was further aggravated by blood pressure spikes associated with positioning and at the start of surgery. Plaintiff's expert further explains that "[a] patient that is inadequately anesthetized during intubation will have a stress reaction manifested by an elevated blood pressure." Dr. Rordorf states that it is not a coincidence that "(t)he blood pressure spike to 185-190 is virtually contemporaneous with the intubation." Dr. Rordorf opines that "the hypertensive crisis caused by the anesthesiologists' negligence was sufficient to cause the rupture of this patient's AVM and more probably than not, was a substantial factor in causing this patient's hemorrhagic stroke."

Plaintiff's expert anesthesiologist, Brian McAlary, M.D., directly refutes Dr. Bloom's assertion that any opinion as to the cause of the subject AVM rupture is "pure speculation." Plaintiff's expert opines that, considering that the "inadequate anesthesia for intubation and a blood pressure spike into hypertensive crisis territory" were nearly concurrent, together with "the

known causal connection between hypertension and AVM rupture, it is certainly more probable than not that this patient's hemorrhagic stroke was directly related to negligent intubation and aggravated by substandard anesthetic management of positioning." Plaintiff's expert further opines that because AVMs spontaneously rupture at only 2-4% annually, there is no moment-to-moment risk of spontaneous rupture, making the risk negligible. Plaintiff's expert further opines that spontaneous rupture of Ms. Tsang's AVM at almost the same time that her blood pressure increased in response to intubation, is "so highly improbable as to be without persuasive weight," since she was a "young healthy patient, with a negligible risk of AVM rupture, who had undergone multiple procedures in the hospital prior to intubation" While Defendants' expert points to several possible causes for the rupture of the patient's AVM, this clearly remains an issue of fact. Specifically, through their submissions, Plaintiff's expert raises an issue of fact as to whether the AVM rupture was due to inadequate anesthetization leading to an increase in the patient's blood pressure.

In opposition to Defendants' argument that the medical record indicates the patient's first rise in blood pressure happened prior to intubation, and therefore could not have been caused by intubation, Plaintiff claims that the record does not clearly indicate whether the increase in blood pressure occurred prior to or during intubation. Plaintiff's expert neurologist, Dr. Rordorf, summarizing the deposition testimony of Dr. Tyson, states that some entries in the medical record reflecting what occurred during surgery are manually entered into the system and automatically time stamped at the time of entry. At oral argument, Plaintiff argued the entry in the record indicating that the time of intubation was 12:59 reflects the time that the entry was made, which is not necessarily the time intubation began. As Dr. Tyson testified and conceded in his deposition, it is possible that the entry was made while the intubation was happening.

Therefore, as to the claim that inadequate sedation caused the rupture, although the record may indicate that the increase in the patient's blood pressure occurred just prior to the start of intubation, an issue of fact is raised as to whether intubation was occurring at the time of such increase in blood pressure.

As to the experts' opinions, case law is clear that "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment." *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d dept. 2010]. Considering the foregoing conflicting opinions, which are detailed and not speculative, summary judgment is denied as to all claims sounding in medical malpractice relating to Stacie Deiner, M.D. and The Mount Sinai Hospital. *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

To the extent that the affidavit of Dr. Deiner, submitted as part of the Defendants' reply, seeks to supplement the affirmation of Defendants' expert Marc Bloom, M.D., it is rejected as it was improperly submitted in a reply. As to issues of fact that Plaintiff raised in opposition and which Dr. Deiner seeks to counter in her reply affirmation, these nevertheless remain issues of fact for the jury to decide. Once issues of fact are raised in opposition in a detailed and non-speculative manner, they remain issues of fact for the jury.

Plaintiff has affirmatively withdrawn its Lack of Informed Consent Claim in their opposition. Accordingly, this claim is dismissed.

In conclusion, Defendants' motion for summary judgment is DENIED as to all claims sounding in medical malpractice relating to Stacie Deiner, M.D. and The Mount Sinai Hospital; and

GRANTED as to all claims against William Tyson, M.D.

The Clerk is directed to enter judgment accordingly as to this defendant.

This constitutes the decision and order of the court.

Dated: July 25, 2023

ENTER.



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