

Hall v Lev

2023 NY Slip Op 34959(U)

February 23, 2023

Supreme Court, Queens County

Docket Number: Index No. 710487/2019

Judge: Peter J. O'Donoghue

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New YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART MD
Justice



MICHAEL HALL,

Plaintiff,

Index No.: 710487/2019

ERAN LEV, a/k/a RON LEV, RONALD LEV MD P.C.,

d/b/a ADVANCED VARICOSE VEIN TREATMENTS OF

MANHATTAN

Motion Date: 10/12/2022

Defendants.

Seq. Nos.: 2 and 3

Motions bearing sequence numbers 2 and 3 of 10/12/2022 are hereby consolidated for disposition. The following papers numbered as set forth below read on this motion (seq. 2) by defendant for an order (1) Pursuant to CPLR § 3212 granting complete summary judgment on behalf of defendants, ERAN LEV, a/k/a RON LEV, RONALD LEV MD P.C., d/b/a ADVANCED VARICOSE VEIN TREATMENTS OF MANHATTAN's, dismissing them as defendants with prejudice and severing them from this action; and (2) for such other, further, and different relief as this Court deems just and proper; and O.S.C. (Seq. 3) by defendants for an order (a) pursuant to CPLR §2001 permitting defendants to withdraw their current motion for summary judgment and be deemed resubmitted nunc pro tunc to correct law office error resulting in an exhibit not being included in original motion papers and applicable facts not being disclosed in statement of facts; and (b) for such other and further relief as the Court may deem just and proper.

PAPERS NUMBERED

Seq. No. 2

N.M.-Affidavits-Exhibits.....	35-44
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Upon the foregoing papers it is ordered that the within O.S.C. (Seq 3) by defendants for an order (a) pursuant to CPLR §2001 permitting defendants to withdraw their current motion for summary judgment and be deemed resubmitted nunc pro tunc to correct law office error resulting in an exhibit not being included in original motion papers and applicable facts not being disclosed in statement of facts is denied.

In this case, movants e-filed their original motion for summary judgment, statement of material facts and exhibits (seq 2; docs. 35-44) on 06/15/2022. Plaintiff e-filed opposition papers, statement of material facts and exhibits (docs. 45-49) on 09/13/2022 and 09/14/2022. Plaintiff's opposition arguments were based upon the contents of the original moving papers. On 10/11/2022, movants e-filed the within O.S.C. (Seq 3; docs. 52-59) which included a document (NOT included as part of the original moving papers) identified as "Abdominal Venous Duplex" with a date of examination of "04/10/18" and annexed as Exhibit H (doc. 53); and a new set of summary judgment motion papers which included the incorporation of the April 2018 abdominal venous duplex study into the expert affirmation, attorney affirmation and statement of undisputed material facts and annexed as Exhibit J. CPLR §2001 states: "At any stage of an action, ... the court may permit a mistake, omission, defect or irregularity, ... to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid". The movant characterizes the omission of the 04/10/18 abdominal venous duplex study from the original moving papers as an "inadvertent failure" which does not result in "surprise" or "prejudice" to the plaintiff. The Court disagrees. Plaintiff opposed the initial moving papers before movant filed the within O.S.C.. The fact that the "04/10/18" "abdominal venous duplex study" was exchanged with plaintiff on February 7, 2022 prior to Dr. Lev's deposition and prior to the serving and filing of the original summary judgment motion does not ameliorate the surprise or prejudice to plaintiff. Plaintiff was justified in relying on the arguments contained in the original moving papers, which did not contain reference to the 04/10/2018 study. It would be unjust to require plaintiff to submit "new" opposition papers to a "new" summary judgment motion.

The within motion by defendant for an order pursuant to CPLR § 3212 granting complete summary judgment on behalf of defendant, ERAN LEV, a/k/a RON LEV, RONALD LEV MD P.C., d/b/a ADVANCED VARICOSE VEIN TREATMENTS OF MANHATTAN (seq 2) is denied. Movant failed to establish *prima facie* entitlement to summary judgment. Movant's expert, Larry A. Scher, M.D., failed to discuss and render an opinion with respect to the care and treatment rendered to plaintiff during the 12/14/17 and 01/24/18 visits and the failure to promptly perform proper imaging studies or to refer plaintiff for proper imaging studies to investigate the reason for the inability to fully visualize the stent following each of these visits.

Even if movant had established *prima facie* entitlement to a summary judgment award through the submission of the expert affirmation of Larry A. Scher, M.D., the within motion would be denied. Plaintiff submitted an expert affirmation containing opinions that contradict the opinions of Dr. Scher. Plaintiff's expert opines "within a reasonable degree of medical certainty that Dr. Lev departed from the standards for good and accepted medical practice in failing to perform follow up studies upon the inability to completely view the right stent, and his failure to do so caused Plaintiff's heart perforation, and resultant surgery and hospitalization." These conflicting expert opinions raise questions of fact with respect to this allegation of medical malpractice sufficient to defeat the motion. However, plaintiff's expert failed to raise a question of fact with respect to the claims that the stent was improperly placed and whether the proper size stent was used. Additionally plaintiff failed to establish the elements required to apply the doctrine of *res ipsa loquitur*. Finally, plaintiff did not plead a cause of action for lack of informed consent.

Dated: February 23, 2023



 Hon. Peter J. O'Donoghue, J.S.C.

