Crespo v Francini
2023 NY Slip Op 35076(U)
August 30, 2023
Supreme Court, Bronx County
Docket Number: Index No. 21281/13
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

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ANGEL CRESPO,

Plaintiff,

- against -

THOMAS FRANCINI, D.P.M., JOHN DEBELLO, D.P.M., NEW YORK FOOTCARE OF THE BRONX, PLLC, and CONCOURSE FOOTCARE, P.C.,

Defendants.

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JOHN DEBELLO, D.P.M., and NEW YORK FOOTCARE SERVICES, PLLC, s/h/a NEW YORK FOOTCARE OF THE BRONX, P.C.,

Third-Party Plaintiffs,

- against -

THOMAS FRANCHINI, D.P.M.,

Third-Party Defendant.

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Index #: **21281/13**
DECISION/ORDER

Present:
Hon. Joseph E. Capella
J.S.C.

The following papers numbered 1 to 4 read on this motion dated November 21, 2022.

PAPERS	NUMBERED
NOTICE OF MOTION & AFFIRMATION	**1**
ANSWERING AFFIRMATION	**2**
REPLY AFFIRMATION	**3**

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

Motion by defendants, John DeBello, D.P.M., and New York Footcare Services, PLLC (NY Foot Care), for summary judgment (CPLR 3212) and dismissal of plaintiff's

complaint is granted in part.[1] A summary judgment motion recently made by third-party defendant, Thomas Franchini, D.P.M., was granted in part by this Court, and in its decision dated August 29, 2023, the allegations made by plaintiff in his complaint and bill of particulars were discussed. In sum, it appears that plaintiff alleges the following six causes of action: negligence, malpractice, gross negligence, vicarious liability, lack of informed consent, and negligent hiring/supervision. Primarily this action sounds in podiatric malpractice, specifically plaintiff alleges that NY Foot Care, Dr. DeBello and Dr. Franchini departed from the standard of care in their pre/post operative care and their performance of a surgery on March 9, 2011, to remove a neauroma from the interspace between plaintiff's 4th and 5th toes. According to plaintiff, the departures resulted in a recurrent/stump neuroma, altered gait, elevation, numbness/stiffness of toes 2-5, and injury to the knee and shoulder. As Dr. Franchini was not an employee of NY Foot Care, but worked there as an independent contractor, NY Foot Care and Dr. DeBello commenced a third-party action against Dr. Franchini asserting claims of contribution and indemnification.

On March 28, 2013, plaintiff was examined by Dr. David Plotkin, an expert retained by plaintiff who performed x-rays and ultrasound studies, and found a "[m]ass on the ultrasound, consistent with neurofibrous lesion consistent with pain on palpation." Dr. Franchini never received the x-rays and ultrasound, and on August 23, 2022, his

[1] Plaintiff failed to properly and timely serve Dr. Franchini; therefore, plaintiff's direct claims against Dr. Franchini were dismissed by Order dated December 23, 2014.

spoliation motion was granted to the extent that this Court found that Dr. Plotkin had negligently disposed of said diagnostic images. Plaintiff was precluded from producing said images either at trial or in support of a summary judgment motion, and an adverse inference (i.e., that the ultrasound did not reveal a neurofibrous lesion) was ordered to be drawn. The initial burden is on defendants to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If they do, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

In support of the motion is an expert affidavit by Edwin Wolf, D.P.M., who opines that defendants and Dr. Franchini complied with the applicable standards of podiatric medical and surgical care in their pre-operative, surgical and post-operative management of plaintiff. Dr. Wolf notes that Dr. DeBello did not perform or assist with the neuroma excision surgery performed by Dr. Franchini on March 9, and his care and treatment was limited to the post-surgical period. According to Dr. Wolf, Dr. Franchini is not only an independent contractor (*Kleeman v Rheingold*, 81 NY2d 270 [1993]), he is licensed by the State of New York to practice podiatric medicine and surgery, is Board Certified, and more than qualified to perform the surgery in question. On the issue of informed consent, Dr. Franchini testified that he discussed the risks, benefits and alternatives before and

again on the day of the surgery. (*Orphan v Pilnik*, 66 AD3d 543 [1st Dept 2009].) In addition, Dr. Franchini testified that Dr. DeBello and NY Foot Care did not exercise any control over the care and treatment he provided. (*Santella v Andrews*, 266 AD2d 62 [1st Dept 1999].) As noted by Dr. Wolf, plaintiff presented to Dr. DeBello with pain in the foot and difficulty walking. Dr. Wolf opines that Dr. DeBello timely and appropriately recommended injection of medication and physical therapy, which plaintiff refused. Dr. DeBello ordered a post-surgical MRI, which was performed on July 10, 2012, and showed no evidence of a neruoma or stump neuroma. Lastly, Dr. Wolf opines that even if plaintiff developed a stump neuroma, a stump neuroma is a risk of the procedure. Based on the aforementioned, the Court is satisfied that defendants have met their burden for summary judgment (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff.

In opposition, plaintiff provides an expert affidavit by David Plotkin, D.P.M., who does not specifically opine to a reasonable degree of medical certainty that Dr. DeBello departed from the standard of care (*Canter v Mulnick*, 93 AD2d 751 [1st Dept 1983]), *and* (emphasis added) that such departure was a proximate cause of plaintiff's injuries. (*Mortensen v Memorial*, 105 AD2d 151 [1st Dept 1984].) Dr. Plotkin's opinions as to specific departures focus primarily on Dr. Franchini. He states that conservative treatment with sclerosing alcohol injections to relieve inflamation and harden or deactivate the nerve is the standard first treatment, and has a high success rate, with

invasive excision surgery being the last resort when non-surgical intervention fails. Dr. Plotkin opines that instead of receiving a steroid injection and then proceeding directly to surgery, plaintiff should have received three sclerosing alcohol injections over a three-week period to see if this relieved inflamation, deactivated the nerve, and eliminated pain, so that surgical intervention might not be necessary. He also opines that Dr. Franchini's omission of necessary information (e.g., location and size of neuroma) in the operative report was a departure from good and accepted practice; however, he does not explain how this omission caused any of plaintiff's injuries.

Dr. Plotkin opines that Dr. Franchini departed from good and accepted practice in using the plantar surgical approach (i.e., cutting through the sole of the foot) because there are more sensory nerves on the sole, and a surgical wound closed with sutures on the sole will require more non-weight bearing time, will be more prone to dehiscence and infection and will have more difficulty healing. According to Dr. Plotkin, a dorsal approach (i.e., from the top of the foot) allows the use of a spreader to widen the interspace and fully visualize and explore both branches of the nerve with a hemostat or surgical forceps, where he believes there were "most likely two neuromas." Dr. Plotkin also states that he examined plaintiff on April 4, 2013, and "plapated what he believes to be an unexcised neuroma in the third interspace."

Dr. Plotkin alleges that there were two neuromas in the 3rd interspace of plaintiff's left foot on March 9, 2011, and that only one was excised by Dr. Franchini. However,

plaintiff's bill of particulars only alleged that defendants failed to completely excise the neuroma, and that a stump or recurrent neuroma developed. The bill of particulars does not allege that defendants failed to remove one of two neuromas, and plaintiff cannot create issues of fact by alleging this new theory of liability for the first time in opposition to a summary judgment motion. (*Stewart v Dunkleman*, 128 AD3d 1338 [4th Dept 2015].) In addition, Dr. Plotkin does not address the fact that the MRI from July 10, 2012, revealed no evidence of a neuroma. Lastly, as previously mentioned, there is an adverse inference that the ultrasound from March 28, 2013, did not reveal a neurofibrous lesion. So not only does the allegation by Dr. Plotkin that there existed two neuromas on March 9 not appear in plaintiff's bill of particulars (*Vega v Kirschenbaum*, 209 AD3d 458 [1st Dept 2022]), it cannot be reconciled with the 2012 MRI or the ultrasound adverse inference, and it is essentially speculative.

Dr. Plotkin further opines that Dr. Franchini departed from good and accepted practice in not placing the severed nerve ending in the belly of the interserrous muscle and securing it with a vicryl stitch so that any further nerve growth is directed away from the interspace and harmlessly into the muscle. He states that this is a prophylactic measure to prevent the formation of a 'stump' neuroma at the severed end of the nerve, and it is not acceptable practice to omit this step. Lastly, he opines that plaintiff's post-operative care was inadequate as it consisted of one appointment five days after surgery and another four months; however, Dr. Plotkin does not provide any specificity as to what

would have been more appropriate.

In sum, the Court is satisfied that plaintiff has raised issues of fact as to three departures. First, that Dr. Franchini departed from good and accepted practice in not administering three sclerosing alcohol injections over a three-week period to relieve inflamation, deactivate the nerve and eliminate pain, and avoid surgical intervention. Second, in using the plantar surgical approach that requires more non-weight bearing time, is more prone to dehiscence and infection, and results in more difficulty in healing. Third, in not placing the severed nerve ending in the belly of the interserrous muscle and securing it with a vicryl stitch so that any further nerve growth is directed away from the interspace and harmlessly into the muscle.

As for informed consent, plaintiff argues that defendants' failure to produce a signed consent form creates an issue of fact on this issue. However, in addition to the arguments raised by Dr. Franchini regarding informed consent, plaintiff testified that he did not recall the details of the surgical discussion, but conceded that Dr. Franchini explained the procedure and post-op instructions. There is also the operative report which notes that "risks, benefits and alternatives to the procedure were discussed." Therefore, the mere lack of a written consent form, in and of itself, does not create an issue of fact on this issue. There still remains the issue of vicarious liability, and on this issue, it should be noted that Dr. DeBello is the owner of NY Foot Care. According to plaintiff's attorney, plaintiff could have reasonably believed based on the surrounding circumstances

that Dr. Franchini was provided to him by NY Foot Care, or was otherwise acting on behalf of NY Foot Care. Hence, NY Foot Care and Dr. DeBello may be held vicariously liable on the theory of agency/control in fact, or in the alternative theory of apparent/ostensible agency (*Hill v St. Clare's*, 67 NY2d 72 [1986]).

As previously mentioned, Dr. Franchini testified that he was an independent contractor, and that Dr. DeBello and NY Foot Care did not exercise any control over the care and treatment he provided. (*Santella*, 266 AD2d 62.) This eliminates vicarious liability on the theory of agency/control in fact (*Kleeman*, 81 NY2d 270), and plaintiff's reference to Dr. DeBello's name appearing on the operative report, in and of itself, does not overcome this finding. On the other hand, where control is absent, then liability may still exist under the theory of apparent/ostensible agency, which focuses on whether plaintiff could have reasonably believed based upon the surrounding circumstances that Dr. Franchini was provided to him by NY Foot Care or Dr. DeBello, or was otherwise acting on their behalf. *(Thurman v United*, 39 AD3d 934 [3d Dept 2007].) The parties have come forward with very little evidence on this issue, except for a few statements from plaintiff's deposition.

At his deposition, plaintiff was asked the following: "The foot doctor, on Grand Concourse, Dr. DeBello and Dr. Franchini, their office is called New York Foot Care, that is the name of their office." And plaintiff answered: "I don't know the name." Later plaintiff was asked: "Did someone refer you to Dr. Franchini and Dr. DeBello?" And he

answered: "My wife." On this brief line of questioning it does not appear that plaintiff intended to go specifically to NY Foot Care. And while it is clear that he intended to see Dr. Franchini and Dr. DeBello, we do not know what was plaintiff's belief as to the relationship between these two doctors. In other words, if plaintiff believed that Dr. Franchini was employed by Dr. DeBello, then he has a good argument to support a claim for vicarious liability under a theory of apparent/ostensible agency. This issue of fact warrants denial of summary judgment regarding same.

Given the aforementioned, that portion of defendants' motion for summary judgment which seeks dismissal of all direct claims against Dr. DeBello and NY Foot Care, except for vicarious liability, is granted. Defendants are directed to serve a copy of this decision with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

___8/30/23_____ Hon. _____
Dated Joseph E. Capella, J.S.C.