

Hough v Ayoub
2023 NY Slip Op 35140(U)
February 23, 2023
Supreme Court, Bronx County
Docket Number: Index No. 33383/18
Judge: Joseph E. Capella
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

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CHARLIE HOUGH,

Index #: 33383/18
DECISION/ORDER

Plaintiff,

- against -

Present:

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

JOANNA AYOUB, D.P.M., BRONX LEBANON
HOSPITAL CENTER and BRONX HEALTH
SYSTEM,

Defendants.

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The following papers numbered 1 to 4 read on this motion dated January 28, 2022.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION & MEMO OF LAW	1 - 2
ANSWERING AFFIRMATION	3
REPLY AFFIRMATION	4

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

Motion by defendants for summary judgment (CPLR 3212) and dismissal of plaintiff's complaint, which alleges medical malpractice, lack of informed consent and negligent hiring and supervision, is granted in part and denied in part. Although not plead in the complaint, the bill of particulars (BP), which should only be an amplification of the complaint (*Paterra v Arc*, 136 AD3d 474 [1st Dept 2016]), added the claims of *res ipsa loquitor* and punitive damages.¹ Overall, the crux of plaintiff's claim is that defendants improperly, carelessly and unnecessarily transected the anterior/dorsalis pedis artery and

¹ A BP may not add additional claims (*Paterra*, 136 AD3d 474); however, it does not appear that defendants objected to the inclusion of these additional claims, and actually addressed them in their motion.

tibial vein during a left ankle arthroscopic surgery. 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 Dr. Michael J. Trepal, who is board certified in podiatry, and opines that Dr. Ayoub properly evaluated plaintiff's ankle injury and initiated a course of conservative treatment, including physical therapy and an injection. He opines that when conservative treatment failed, Dr. Ayoub appropriately recommended surgical intervention, and performed a left ankle arthroscopy on June 6, 2018, in accordance with the standard of care. Dr. Trepal notes that at the end of the procedure, following the debridement of synovitis, and upon removal of the camera from the left lateral port, pulsatile bleeding was noted to be coming from the lateral port. According to Dr. Trepal, Dr. Ayoub gently and gingerly removed the camera, in accordance with the standard of care, and there is no evidence that Dr. Ayoub failed to properly handle, utilize or manipulate the surgical instrumentation. Dr. Andrea Hendrzak, a vascular surgeon, was immediately called, and she noted that the artery had been severed. Dr. Trepal states that Dr. Hendrzak repaired the artery with no complications, and there was adequate hemostasis and good pulse in the artery.

Dr. Trepal opines that the artery was injured inadvertently and without ability to prevent it when Dr. Ayoub removed the camera instrument, and this was “not a substantial causal factor” of plaintiff’s alleged neuropathy. He states that plaintiff was complaining of decreased light touch sensation, and experiencing diabetic peripheral neuropathy well before the surgery. According to Dr. Trepal, a severed artery in the ankle does not cause permanent numbness in the toe, unless the artery was not or could not be repaired. On the issue of consent, Dr. Trepal notes that in addition to plaintiff signing a consent form, Dr. Ayoub discussed with plaintiff his condition, treatment options, and the risks and benefits. As for negligent hiring and supervision, Dr. Trepal opines that Dr. Aroub was and is a well-qualified podiatrist who was perfectly capable of performing the left ankle arthroscopy procedure.

As for plaintiff’s punitive damages claim, in order to state a cause of action for same, the complaint must allege *facts* (emphasis added) that demonstrate and/or rise to the level of willful or wanton negligence or recklessness. (*Rosenberg v Mallilo*, 39 AD3d 335 [1st Dept 2007]; *Mancuso v Rubin*, 52 AD3d 580 [2nd Dept 2008].) As noted by defendants, plaintiff’s claims center around defendants improperly, carelessly and unnecessarily transecting the anterior/dorsalis pedis artery and tibial vein during a left ankle arthroscopic surgery. While these alleged facts may demonstrate negligence, they do not rise to the level of willful conduct that evidences a high degree of moral culpability. (*Rey v Park*, 262 AD2d [2nd Dept 1999].) Lastly, as for plaintiff’s *res ipsa*

loquitor claim, one of the *prima facie* elements for this claim is that the event is of the kind that ordinarily does not occur in the absence of someone's negligence. (*Pagano v Cohen*, 164 AD3d 516 [2nd Dept 2018].) However, according to Dr. Trepal, the injury sustained by plaintiff is a known risk of left ankle arthroscopy which can, and did here, occur in the absence of any negligence. 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 to demonstrate that issues of fact exist to warrant a trial on this issue.

In opposition, plaintiffs provide a detailed expert affirmation by a board certified podiatric physician and surgeon, who opines that the following departures occurred: (1) Dr. Ayoub's complete and improper transection of the anterior/dorsalis pedis artery and the tibial vein, (2) failing to place the lateral port in the correct anterior lateral arthroscopy, (3) improperly placing the portal close to the midline of the ankle, at or near the area of where the anterior central portal was located, (4) improperly putting the anterior tibial/dorsalis pedis artery, tibial vein and deep peroneal nerve at the increased risk for injury, (5) placing the instruments into the ankle at the incorrect location leading to the transection of the anterior tibial/dorsalis pedis artery and tibial vein and likely the deep peroneal nerve, and (6) improperly placing the instrumentation through the incorrectly placed lateral portal. According to plaintiff's expert, while injury to an artery

is a known risk, the type of injury that is known is the rare formation of a pseudoaneurysm, and not a complete transection of the anterior tibial/dorsalis pedis artery and the tibial vein. In addition, the opinion by plaintiff's expert that Dr. Ayoub placed the instrumentation into the incorrect position is based on, *inter alia*, a photo of plaintiff's ankle scars, the fact that the vascular surgeon was able to clearly reach and identify the pedis vessel from the incision, and that pulsatile bleeding was apparent from the lateral port.

It does not appear that the photo in question was exchanged during the discovery period of this litigation, and therefore, the Court will disregard the expert's reference to same. In addition, defendants argue that the opinion by plaintiff's expert that Dr. Ayoub placed the anterior lateral portal in the wrong position is a new theory not included in the BP. However, a review of the BP reveals that its reference to, *inter alia*, Dr. Ayoub's negligence in tearing plaintiff's artery during surgery, his failure to properly manipulate surgical instrumentation, and failure to ensure adequate monitoring and visualization of the anatomical structure prior to surgery, are sufficiently broad to include this particular departure. Viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the Court is satisfied that the aforementioned departures raised by plaintiff's expert creates issues of fact regarding plaintiffs' medical malpractice claim sufficient to warrant a trial. The trier of fact will hear from these experts, including the evidence that each one relies upon in forming the

basis for their expert opinion, and in turn they will evaluate the weight and credibility of the testimony of these experts. (*Cassano v Hagstrom*, 5 NY2d 643 [1959]; *State v Marks*, 87 AD3d 73 [3rd Dept 2011].) On the other hand, it should be noted that the opposition papers do not address informed consent, negligent hiring and supervision, *res ipsa loquitor* and punitive damages.

Therefore, that portion of defendants' summary judgment motion seeking dismissal of the aforementioned departure alleged by plaintiff's expert is denied, and that portion seeking dismissal of all other alleged departures, and plaintiff's lack of informed consent, negligent hiring and supervision, *res ipsa loquitor* and punitive damages, 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.

2/23/23
Dated

Hon. _____
Joseph E. Capella, J.S.C.

