

Suleiman v Dowd

2024 NY Slip Op 34966(U)

September 11, 2024

Supreme Court, Bronx County

Docket Number: Index No. 34507/2019E

Judge: Michael A. Frishman

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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 34

-----X
YOLANDA Y. SULEIMAN,

Index No. 34507/2019E

Plaintiff,

- against -

Hon. MICHAEL A. FRISHMAN
Justice of the Supreme Court

ANDREW J. DOWD, M.D., IGOR AMIGUD, M.D., C.
CLEMENTS, C.R.N.A., FIFTH AVENUE SURGERY
CENTER, LLC, UNITED PHYSICIANS, PLLC and
IGOR AMIGUD PHYSICIAN, P.C.,

Defendants.

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The following papers numbered 63-80, 67-72, and 73-75 were read on this Motion for Summary Judgment (Seq. No. 004).

Sequence No. 004	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support, Statement of Material Facts – Exhibits and Affirmations Annexed	63-80
Affirmation in Opposition, Response to Statement of Material Facts, Statement of Material Facts - Exhibits and Affirmations Annexed	83-86
Reply Affirmation	87

The motion of defendant ANDREW J. DOWD, M.D. (hereinafter “defendant” or “Dr. Dowd”) seeking summary judgment dismissing the Complaint against them is hereby denied in part and granted in part for the reasons discussed infra.

Plaintiff commenced this medical malpractice action alleging that Dr. Dowd’s negligent use of the wand utilized during his performance of her August 16, 2018 left shoulder arthroscopy surgery subsequent to a motor vehicle accident caused injury to plaintiff’s left hand, to wit, some kind of burn which resulted in cellulitis, scarring; disfigurement; need for future surgeries and/or treatment; emotional distress; and pain and suffering.¹ Plaintiff also asserts a cause of action for lack of informed consent.

In opposition, plaintiff argues that defendant has failed to make a *prima facie* showing as defendant’s expert opinions rely upon disputed facts, unsupported statements, an incomplete reading of the record, an interpretation of the evidence which is not in the light most favorable to the non-moving party, and material issues of fact exist that defendant departed from the accepted standard of care during plaintiff’s shoulder arthroscopy thereby causing injury to her left hand necessitating denial of defendant’s motion.

¹ Plaintiff does not assert injuries related to the performance of the actual shoulder surgery itself.

In reply, defendant argues, *inter alia*, that plaintiff's opposition relies on an impermissible new theory of liability. Defendant additionally argues that even if this new theory is considered by the Court, plaintiff's new theory of liability, to wit, that Dr. Dowd performed plaintiff's shoulder arthroscopy using radiofrequency ablation which utilizes high heat fluid during the procedure, plaintiff's opposition fails as her experts fail to opine as to Dr. Dowd's use of an ArthroCare wand with coblation, or cold ablation, which was the actual procedure used in plaintiff's shoulder arthroscopy, and which is different from RFA that relies on high heat fluid.

The court's function on a motion for summary judgment is issue finding rather than issue determination. The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . [f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . [o]nce this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007][internal citation omitted]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

Proximate cause is almost invariably a factual issue (*see Turturro v City of New York*, 28 NY3d 469, 485 [2016]; *Kriz v Schum*, 75 NY2d 25, 33-34 [1989]; *Eiseman v State of New York*, 70 NY2d 175 [1987]; Restatement [Second] of Torts § 433B, Comment *b*). Ordinarily, it is for the trier of fact to determine the issue of proximate cause (*see Howard v Poseidon Pools*, 72 NY2d 972, 974 [1988]). However, the issue of proximate cause may be decided as a matter of law " 'where only one conclusion may be drawn from the established facts' " (*id.* at 974, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Additionally, it is the jury's function to assess conflicting evidence and determine the credibility of the witnesses and the weight to be accorded expert testimony (*see e.g. Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 180 [1st Dept 1974], *aff'd* 37 NY2d 719 [1975]).

It appears undisputed from defendant's submission and records, that plaintiff's shoulder arthroscopy was indicated despite the allegations to the contrary in plaintiff's Bill of Particulars. It also appears undisputed that it is unknown for certain how plaintiff sustained an injury to her left hand that

allegedly appeared following her shoulder arthroscopy during which defendant utilized an arthroscopic shaver and an ArthroCare wand where defendant performed arthroscopic debridement of partial rotator cuff tear, arthroscopic debridement of labral tear, arthroscopic synovectomy, arthroscopic lysis of subacromial adhesions, and arthroscopic subacromial decompression. The issue in this case surrounds the cause of skin injury to plaintiff's left hand following her August 16, 2018 shoulder arthroscopy performed by Dr. Dowd.

The Court finds that defendant's submission contains conflicting evidence that has not eliminated issues of fact and requiring denying dismissal of some of the medical malpractice claims as asserted in Dr. Dowd's motion for summary judgment (*see e.g. Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144 [1st Dept 2017]). Specifically, there are triable issues of fact as to whether plaintiff sustained a skin injury to the dorsum of her left hand during Dr. Dowd's performance of her arthroscopy where it cannot be known how plaintiff sustained the visible skin injury. The Court acknowledges that defendant's experts state that plaintiff's injury is not a burn, but rather dermatitis, and that plaintiff never suffered cellulitis to her hand since she never received antibiotics. The Court also acknowledges that defendant's experts further assert that even if plaintiff's description of the alleged injury as a burn is accepted, none of the care or treatment by Dr. Dowd would have caused a burn to her dorsum because defendant utilized coblation, or cold ablation with the ArthroCare wand and not high heat fluid. However, defendant's experts fail to acknowledge or discuss that the August 17, 2018 records from plaintiff's Montefiore Medical Center Emergency Department's ("MMC") presentation and admission, which defendant attached as an exhibit, contain numerous references to plaintiff's injury as a burn with a diagnosis of cellulitis and upon physical examinations further notations indicate a left hand dorsal second degree burn like lesion with cellulitis, a positive left dorsal hand with fluid filled blisters which appears like first degree burn, as well as a discharge notation of a left hand irregular shaped skin erosion, typical of first degree burn with no purulence, no tenderness.

Additionally, MMC's records contain no mention, diagnosis or otherwise, that plaintiff's condition was dermatitis, and the records indicate plaintiff was given an antibiotic during this brief post-arthroscopy MMC admission. Furthermore, while defendant's experts base their opinions, *inter alia*, on the deposition testimony of Dr. Dowd and Dr. Dowd's records, including his operative report which contains no indications of complications during plaintiff's arthroscopy,² these records present questions of credibility, all of which must properly be weighed by a jury. Moreover, defendant's expert surgeon refers to the ArthroCare wand as a type of radiofrequency ablation wand, but that it is a type referred to as cold or controlled ablation and that coblation devices direct radiofrequency energy, rupturing cells, and disintegrating molecules with minimal heat production. Even accepting that this wand produces "minimal heat production" as true, that does not eliminate questions of fact and credibility (*see e.g. Roques*, 73 AD3d 204, 206 ["With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence"]). Consequently, defendant's motion for summary judgment must be denied in part.

² The operative report contains no references or notations of coblation, cold ablation, heat, heated fluid, radiofrequency ablation, or what specific technique was used other than an arthroscope was inserted; arthroscopic shaver was used; and the ArthroCare wand was used in place with the shaver.

In contrast, there has been no evidence presented that plaintiff's shoulder arthroscopy itself was contraindicated or that defendant failed to obtain plaintiff's informed consent for performance of the shoulder arthroscopy and any such claims must be dismissed.

We have considered the parties' remaining arguments and find them unavailing.

Accordingly, it is hereby,

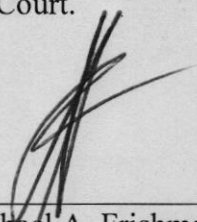
ORDERED that the portion of defendants' motion seeking summary judgment is granted only to the extent that all claims asserting that plaintiff's shoulder arthroscopy was contraindicated and lack of informed consent are dismissed; And it is further

ORDERED that the motion is otherwise denied; And it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry on all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: September 11, 2024



Hon. Michael A. Frishman, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER