

Barnes v Mount Sinai Hosp.

2024 NY Slip Op 34973(U)

December 3, 2024

Supreme Court, Bronx County

Docket Number: Index No. 29544/2020E

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

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JOHN BARNES,

Index No. 29544/2020E

Plaintiffs,

- against -

Hon. MICHAEL A. FRISHMAN
Justice of the Supreme Court

MOUNT SINAI HOSPITAL, ELIAS KAMPTON,
D.O. and DAVID B. CHESSIN, M.D.,

Defendants.

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The following papers numbered 33-53, 56-57 and 60-65 were read on this Motion for Summary Judgment (Seq. No. 001).

Sequence No. 001	NYSCEF Doc. Nos.
Notice of Motion, Affirmation in Support – Exhibits and Affirmations Annexed	33-53
Affirmation in Opposition – Affirmation Annexed	56-57
Reply Affirmation – Exhibits and Affirmations Annexed	60-65

The motion of defendants MOUNT SINAI HOSPITAL and DAVID B. CHESSIN, M.D.¹ (hereinafter collectively as “defendants,” or individually as “MSH” or “Dr. Chessin”) seeking summary judgment dismissing the Complaint against them is hereby denied in part and granted in part.

Plaintiff commenced this action to recover damages for medical malpractice and lack of informed consent alleging that defendants negligently and prematurely discharged plaintiff after undergoing a hemicolectomy procedure negligently performed by Dr. Chessin at Mount Sinai on October 22, 2019 and improperly handling his postoperative care resulting in plaintiff’s purported injuries. Specifically, plaintiff asserts, *inter alia*, that Dr. Chessin negligently performed this procedure and left a defect or hole at the anastomosis site which caused the anastomosis to fail and that defendants failed to properly monitor plaintiff’s post operative hematologic indices resulting in his premature discharge without further investigation and subsequent emergency admission to Montefiore Medical Center and delayed repair surgery thereat causing a litany of injuries that plaintiff endures to present which would have been avoided and/or diminished if properly identified and corrected by defendants.

Defendants initially assert that the evidence and the opinion of their Board Certified Colorectal Surgeon expert, Dr. Feingold, establishes their *prima facie* entitlement to summary judgment because it

¹ Although the moving papers originally included defendant ELIAS KAMPTON, D.O., the matter as against this defendant was discontinued pursuant to the Stipulation of Discontinuance with Prejudice dated November 21, 2024 and signed by the parties (*see* NYSCEF Doc. No. 66). Consequently, opinions as to this defendant were not considered by the Court.

shows that defendants obtained plaintiff's informed consent; did not negligently perform the October 22, 2019 hemicolectomy; and did not fail to diagnose and treat an anastomotic leak, an occult bleed and infection.

Plaintiff opposes defendants' motion and submits the expert affirmation of their Board Certified Colorectal Surgeon, Dr. Mayer, who opines in direct contradiction to defendants' expert.

Defendants' main argument in reply surrounds an assertion that plaintiff's expert incorrectly bases his opinion that there was a defect, to wit, an anastomotic leak, present at the time of surgery based upon MMC's pathologist findings and laboratory study values. Specifically, defendants state that a "well-circumscribed" description of the defect in the October 29, 2018 MMC report does not prove that such was present at the time of the MSH admission. In addition, defendants assert that Dr. Chessin properly performed the surgery; intraoperatively observed an intact anastomosis with good tension and vascularization before closure; and had such a defect been present, plaintiff would have become seriously ill prior to discharge. Defendants submit an additional expert affirmation from Dr. Feingold as well as a new affirmation from a Board Certified Anatomic Pathologist to their reply.

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]). In a medical malpractice action, a defendant establishes prima facie entitlement to summary judgment by showing either (i) that in treating the plaintiff there was no departure from good and accepted medical practice, or (ii) that any departure was not the proximate cause of the injuries alleged (*Bahnyuk v Reed*, 174 AD3d 481, 482 [1st Dept 2019]). "Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish prima facie entitlement to summary judgment as a matter of law" (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Once a defendant meets his or her burden, the plaintiff must rebut defendant's *prima facie* showing (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). "A plaintiff is only required to raise a triable issue of fact as to causation where the defendant makes a *prima facie* showing that a claimed departure was not a proximate cause of the plaintiff's injuries" (*see Barry v Lee*, 180 AD3d 103, 106 [1st Dept 2019], *affd*, 35 NY3d 1050 [2020]). 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]). "Summary judgment is not authorized in a medical malpractice action where the parties adduce conflicting opinions of medical experts" (*Severino v Weller*, 148 AD3d 272, 273 [1st Dept 2017]).

"Summary judgment is a drastic remedy which should not be granted if there is a material and triable issue of fact presented" (*see DuLuc v Resnick*, 224 AD2d 210, 211 [1st Dept 1996][*citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY3d 395, 404 [1957]). "If there is any doubt as to the existence of such an issue, or if the issue is 'arguable,' a motion for summary judgment should be denied" (*id.* at 211). "Where causation is disputed, summary judgment is not appropriate unless only one conclusion may

be drawn from the established facts” (*Speller v. Sears, Roebuck & Co.*, 100 NY2d 38, 44 [2003] [internal quotation marks omitted]).

Although, defendants met their *prima facie* burden as to plaintiff’s claims, plaintiff’s expert has raised triable issues of fact as to plaintiff’s medical malpractice claims. Specifically, while plaintiff’s expert agrees that an anastomotic failure is a known complication that can occur, there are triable issues of fact as to whether Dr. Chessin performed plaintiff’s procedure correctly resulting in an undiagnosed hole at the anastomosis site which caused the anastomosis to fail and resulting in plaintiff’s injuries. Although the Court recognizes defendants’ experts’ opinions that the well circumscribed description in MMC’s records is not proof that plaintiff’s defect was present at the time of plaintiff’s surgery and MSH admission, plaintiff’s expert does not base his opinion solely upon the finding of a well circumscribed defect in MMC’s pathology report, but rather also upon plaintiff’s significant post-operative decline in his hemoglobin, hematocrit, and RBC levels² across the entirety of plaintiff’s MSH admission, including the date of his discharge on October 26, 2019, as contained in the records.

Additionally, although defendants’ assert that plaintiff was feeling great on the day of discharge as their expert asserts was stated to Dr. Chessin, plaintiff testified that he did not recall speaking with anyone about leaving the hospital or how he was feeling that day. While the Court is cognizant that plaintiff also testified that he had no complaints before he left the hospital, the testimony relied upon and the evidence in the record not only raise questions of fact but also raise issues of credibility, all of which must also properly be weighed by a jury. Consequently, defendants’ motion for summary judgment as to plaintiff’s medical malpractice claims must be denied.

In contrast, defendants have presented sufficient evidence warranting dismissal of plaintiff’s lack of informed consent claim, and plaintiff has failed to raise an issue of fact. To the contrary, plaintiff’s expert agrees that a reasonable person in plaintiff’s position would have consented to the surgery at issue here, and therefore this claim must be dismissed.

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

[This part of the decision is intentionally left blank.]

² Plaintiff’s expert used plaintiff’s pre-operative levels as of October 14, 2019 as baseline.

Accordingly, it is hereby,

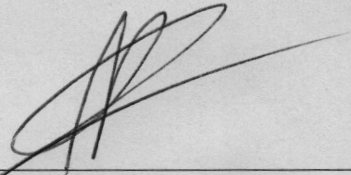
ORDERED that the portion of remaining defendants' motion seeking summary judgment is granted only to the extent that plaintiff's claim of lack of informed consent is dismissed; And it is further

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

ORDERED that counsel for defendants 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: December 3, 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