Weinger v Simonson
2024 NY Slip Op 35219(U)
January 5, 2024
Supreme Court, Queens County
Docket Number: Index No. 702683/2020
Judge: Tracy Catapano-Fox
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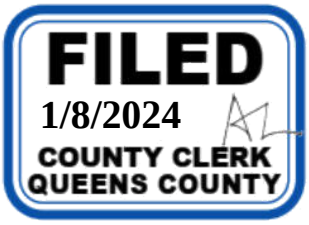
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



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ILEENE WEINGER and MARK WEINGER, Index No. 702683/2020

Plaintiffs, Part MDP

-against- Motion Date: December 20, 2023

BARRY G. SIMONSON, M.D., Calendar No. 26

Defendant. Sequence No. 1

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The following papers numbered EF-16 to EF-46 read on this motion by defendant BARRY G. SIMONSON, M.D. for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF16-EF37
Affirmation in Opposition, Exhibits……...	EF39-EF43
Reply Affirmation, Exhibits……...	EF44-EF46

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Barry G. Simonson, M.D.'s motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted, as Dr. Simonson eliminated all triable issues of fact with respect to whether he departed from good and accepted standards of care and whether he caused or contributed to plaintiff's injuries. (*See generally Perez v. NES Med. Servs. of N.Y., P.C.*, 203 A.D.3d 1089 [2d Dept. 2022].)

Plaintiffs commenced this medical malpractice and lack of informed consent action arising out of defendant Dr. Barry Simonson's performance of right knee replacement surgery on August 17, 2017. Plaintiffs filed the Summons and Complaint on February 14, 2020 and issue was joined via service of defendant Dr. Simonson's Verified Answer on March 11, 2020.

Defendant Dr. Simonson argued that summary judgment should be granted and presents the pleadings, deposition testimony, plaintiff's medical records, and expert affirmation of Edward Adler, M.D. in support of his motion. Defendant argued that the evidence shows he did not depart from acceptable standards of care that caused or contributed to plaintiff Ileene Weinger's injuries. He argued that the total knee replacement surgery was necessary to address plaintiff's complaints

of pain that were unresolved through conservative care. Defendant further argued that the risk of avulsion injury is so remote that it did not warrant the patient's informed consent prior to surgery.

Defendant Dr. Simonson presented the expert affirmation of Dr. Edward Adler, a physician who is licensed in New York and board certified in orthopedic surgery. Dr. Adler affirmed that he reviewed plaintiff's medical records and Bill of Particulars, as well as the deposition testimony in rendering his opinions. Dr. Adler opined within a reasonable degree of medical certainty that Dr. Simonson rendered care and treatment in accordance with good and accepted medical practice, and his acts or omissions did not cause or contribute to plaintiff's injuries.

Dr. Adler reviewed plaintiff's medical records, which showed that in 2006, plaintiff presented to defendant's practice with knee pain, and was seen by Dr. Ehrlinger and Dr. Nathan. Plaintiff was treated with conservative care until April 18, 2016, when she presented to defendant Dr. Simonson with a follow-up visit for her right knee pain. Dr. Adler opined that Dr. Simonson properly assessed plaintiff in accordance with the standard of care and made a timely, proper determination regarding a total knee replacement, after plaintiff exhausted most effective non-surgical options and given her prior treatments, underlying arthritis and bone disease. He opined that Dr. Simonson properly determined plaintiff was a good candidate for the total knee replacement surgery at the time it was performed. Dr. Adler also opined that Dr. Simonson properly obtained informed consent from plaintiff, as the medical records show Dr. Simonson reviewed the risks, benefits and alternatives to surgery with plaintiff.

Dr. Adler opined that Dr. Simonson properly performed the knee replacement surgery on August 15, 2017, during which an avulsion fracture was noted and repaired without complications. He opined that an avulsion fracture is a rare, but known and accepted complication of total knee replacement surgery, because the surgery involves the application of stress. Dr. Adler reasoned that an avulsion fracture is not a risk that needs to be disclosed to a prospective surgical candidate, as its likelihood of occurrence is limited to 0.1% and the risk is too minimal to warrant disclosure. Further, Dr. Adler opined that none of defendant's acts or omissions proximately caused plaintiff's injuries, as plaintiff's medical records show her range of motion in the right knee improved after the surgery. Based upon the foregoing, defendant Dr. Simonson argues that summary judgment is warranted, as he adhered to good and accepted standards of care and did not cause or contribute to plaintiff's injuries.

Plaintiffs opposed defendant Dr. Simonson's motion and argued that he failed to eliminate all triable issues of fact with respect to whether defendant adhered to good and accepted standards of care and whether he proximately caused or contributed to plaintiff Ileene Weinger's injuries. Plaintiffs presented an affidavit of merit from plaintiff Ileene Weinger, the operative report and the expert affirmation of Kenneth Fine, M.D., in support of their opposition. Plaintiffs argue that there are sharp issues of fact in dispute between the experts, and therefore summary judgment is

not warranted. In plaintiff Ileene Weinger's affidavit of merit, she attested that Dr. Simonson did not inform her that her osteoporosis and gender would impact the risk of an intra-operative fracture and did not send her for bone health testing prior to the surgery. She also attested that she had seen Dr. Simonson for pain in her left knee, not her right knee, but Dr. Simonson insisted she needed right knee total replacement surgery. Plaintiff further attested that had she known of these risks, she would not have undergone the surgery, and she continues to suffer pain from the fracture caused by the surgery.

Dr. Fine affirmed he is a physician licensed to practice medicine in Maryland and the District of Columbia and is board certified in orthopedic surgery. Dr. Fine further affirmed that he reviewed plaintiff's medical records and affidavit, the deposition testimony, and defendant's motion in rendering his opinions. Dr. Fine opined within a reasonable degree of medical certainty that it was incumbent upon Dr. Simonson to discuss the risk of fracture with plaintiff given her gender and medical history of osteoporosis. Dr. Fine further opined within a reasonable degree of medical certainty that Dr. Simonson departed from standards of good and accepted medical practice by failing to properly assess plaintiff Ileene Weinger's state of function before embarking on the total knee replacement, and by failing to advise her of the risk of intra-operative fracture considering her history of osteoporosis. He argued that plaintiff's rehabilitation was delayed and complicated by the avulsion fractures and the need to allow the repair to be healed. Based upon the foregoing, plaintiffs argue that defendant's motion should be denied.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff

is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

Defendant Dr. Simonson established a prima facie entitlement to summary judgment through the medical records, deposition testimony and expert affirmation by Dr. Adler. Dr. Simonson demonstrated that he did not depart from accepted standards of medical care and did not proximately cause or contribute to plaintiff Ileene Weinger's injuries. Dr. Simonson further demonstrated that plaintiff Ileene Weinger was treated with conservative methods over a period of approximately ten years and when the conservative non-surgical treatment was no longer a viable option, Dr. Simonson properly recommended surgery in light of her complaints of pain and ongoing osteoporosis. Dr. Simonson further demonstrated that he properly obtained informed consent from plaintiff prior to performing the surgery, and performed the surgery appropriately. Defendant established through Dr. Adler's expert affirmation that Dr. Simonson did not need to inform plaintiff of the potential for an avulsion fracture because it is a rare risk associated with the procedure and the chances of it occurring are only 0.1%. Dr. Adler also demonstrated that defendant's actions or omissions were not the proximate cause of plaintiff's injuries, as the medical records show her range of motion in the right knee improved after the surgery. Based upon the foregoing, defendant Dr. Simonson established a prima facie entitlement to summary judgment.

Plaintiffs failed to raise a triable issue of fact in dispute. Plaintiffs' affirmation by Dr. Fine was insufficient to raise a triable issue of fact in dispute. It is noted that Dr. Fine submitted an affirmation, not an affidavit, but appears not to be licensed to practice medicine in New York. He affirmed that he has been previously admitted to practice in New York, but as it is unclear whether he is a licensed physician in New York, Dr. Fine should have submitted an affidavit sworn to under the penalties of perjury. Nevertheless, plaintiff failed to present sufficient evidence to raise a triable issue of fact, as Dr. Fine's affirmation was speculative and conclusory. (*See Nelson v. Lighter*, 179 A.D.3d 933 [2d Dept. 2020]; *see also Longhi v. Lewit*, 187 A.D.3d 873, 878 [2d Dept. 2020]["In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record"].) Dr. Fine presented conclusory and general opinions that Dr. Simonson departed from the standard of care, but did not articulate what the standard of care was in 2017. He failed to refute Dr. Adler's claim that the risk of an avulsion fracture is rare, and failed to substantiate why the risk is one that must be presented to plaintiff prior to surgery. Dr. Fine also failed to demonstrate that there was any causal connection between Dr. Simonson's alleged departures and plaintiff's injuries, and did not refute the medical findings that plaintiff's range of motion improved after the surgery. (*See generally Tsitrin v. New York Community Hosp.*, 154 A.D.3d 994 [2d Dept. 2017].) As plaintiffs' expert

affirmation was conclusory and not supported by the evidence, it was insufficient to raise a triable issue of fact in dispute. (*See Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

Accordingly, defendant Barry G. Simonson, M.D.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Plaintiff's Complaint is hereby dismissed.

This constitutes the decision and Order of the Court.

Dated: January 5, 2024

Hon. Tracy Catapano-Fox, J.S.C.