Nasta v Koutsoumbelis
2025 NY Slip Op 35437(U)
February 3, 2025
Supreme Court, Nassau County
Docket Number: Index No. 611171/2020
Judge: Catherine Rizzo
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SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

DANIEL NASTA AND KATHLEEN NASTA,

Plaintiffs,

-against-

STELIOS KOUTSOUMBELIS, M.D., STEPHEN ONESTI, M.D., DAVID LI, M.D., MICHAEL B. SCHNEIDER, MEGAN L. BROWER, D.C., SOUTH NASSAU COMMUNITIES HOSPITAL D/B/A MOUNT SINAI SOUTH NASSAU, THE CENTRAL ORTHOPEDIC GROUP, LLP, NEUROLOGICAL SURGERY, P.C., RADIOLOGICAL ASSOCIATES OF LONG ISLAND P.C., AND SOUTH NASSAU RADIOLOGY, P.C.,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY

INDEX NO.: 611171/2020

MOTION SUBMISSION DATE: 11/19/2024

MOTION SEQUENCE NOS.: 005, 006, 007, 008 009, 010

The following e-filed documents for Motion Sequence 005, 006, 007, 008, 009 and 010 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 005

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... X
Memorandum of Law in Opposition..... X
Reply Affidavit/Affirmation..... N/A

Motion Sequence 006

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... X
Memorandum of Law in Opposition..... X
Reply Affidavit/Affirmation..... X

Motion Sequence 007

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... X
Memorandum of Law in Opposition..... X
Reply Affidavit/Affirmation..... X

Motion Sequence 008

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... N/A
Reply Affidavit/Affirmation..... N/A

Motion Sequence 009

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... N/A
Reply Affidavit/Affirmation..... N/A

Motion Sequence 010

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... N/A
Reply Affidavit/Affirmation..... N/A

Background

The plaintiffs initiated this action sounding in medical malpractice, lack of informed consent, and loss of services. The plaintiffs allege that plaintiff Daniel Nasta ("Nasta") underwent a lumbar laminectomy and fusion surgery on September 25, 2019, which was performed by defendants Stephen Onesti, MD ("Dr. Onesti") and Stelios Koutsoumbelis, MD ("Dr. Koutsoumbelis") at defendant Mount Sinai South Nassau's ("Mount Sinai") hospital facility. Nasta alleges that the two screws that were intended to be placed in Nasta's L4 and L5 pedicles were negligently placed and breached Nasta's spinal canal causing an impingement upon the nerve roots resulting in numbness and pain Nasta's left leg that progressed to a left drop foot. As a result, Nasta underwent two revision surgeries.

MOTION SEQUENCES 005 and 006

Dr. Onesti and defendant Neurological Surgery PC move this Court for an order granting them summary judgment and dismissing Nasta's complaint and directing the Clerk of the Court to enter judgment accordingly (Motion Sequence 005). Nasta opposes the motion. No reply was submitted.

Dr. Koutsoumbelis and defendant The Central Orthopedic Group, LLP move this Court for an order granting them summary judgment pursuant to CPLR §3212 (Motion Sequence 006). The plaintiff opposes the motion. Dr. Koutsoumbelis submits a reply.

The moving defendants submit the affidavit of a Board Certified Neurological Surgical expert. The moving defendants' neurological surgical expert states that he reviewed Nasta's medical records including Nasta's admission to the hospital, surgical records, radiologic imaging, intra-operative neuro-monitoring reports, prior and subsequent treating providers, the Bills of Particulars, and the deposition testimony of the parties.

The moving defendants' neurological surgical expert opines that the moving defendants utilized appropriate methods to minimize the screw malposition including neurophysiological monitoring and intraoperative fluoroscopy, neither one of which was outside the range of normal and was performed using both AP and lateral views. Specifically, the moving defendants' neurological surgical expert states that there were no complications during surgery as confirmed by the operative report, which provides that pedicle screw holes of 40 mm in depth were created to accept the 6.5 x 45-mm screws. These sizes and depths are within the standard of care and entirely appropriate. The hardware inserted was proper, and there was no apparent evidence at the time of surgery, either neurophysiologically or via fluoroscopy, that the L4-L5 screws were misplaced to any significant degree. Additional safeguards employed by the moving defendants included stimulation of the pedicle screws, which revealed that there were no alerts and all findings were normal during the procedure. The moving defendants' neurological surgical expert opines that the moving defendants used all reasonable safeguards available to avoid misalignment or any intraoperative complications considering the normal intraoperative fluoroscopy, the normal neuromonitoring readings, and no signs of any dural leak and, as so, the technical aspects of Nasta's lumbar laminectomy with hardware implantation were performed entirely within the standard of care.

The moving defendants' neurological surgical expert states that the care provided by the moving defendants post operatively was also within the standard of care since Nasta did not exhibit any symptoms of a foot drop while he was at Mount Sinai after the surgery and that the removal of the left L4 and L5 pedicle screws during the revision surgery was appropriate. In particular, Nasta was walking at least 200 feet, moving around on an independent basis, and, on multiple occasions, denied any numbness and tingling in his lower extremities. Nasta's chief complaint was of lower back pain, which is an "extremely common complaint" and is not indicative of post-operative complications. Nasta exhibited intact sensation and motor strength in his lower extremities and no symptoms of a foot drop when he was discharged from Mount Sinai. Rather Nasta began to experience these symptoms after his discharge when he presented to Mount Sinai's Emergency Department

Moreover, the moving defendants' neurological surgical expert opines that Nasta signed a consent form indicating that he had been provided with the necessary information regarding the lumbar laminectomy including possible risks, side effects, complications and alternatives associated with the surgery. Dr. Onsetsi testified that it is his custom and practice to discuss all

risks of surgery with Nasta including weakness and the need to have additional surgery for hardware malfunction. The moving defendants' neurological surgical expert states that despite being made aware of the risks, Nasta gave consent to proceed with surgery.

Based on the foregoing, the moving defendants' neurological surgical expert concluded within a reasonable degree of medical certainty that the moving defendants performed the laminectomy and fusion properly, and the appropriate safeguards were taken to minimize complications and, as so, the moving defendants did not deviate from the standard of care.

Nasta, in opposition, submits an affidavit by a doctor, who is board certified in neurosurgery. Nasta's neurological surgical expert reviewed copies of the summons and verified complaint, the verified bill of particulars, supplemental verified bill of particulars as to the moving defendants and Mount Sinai, the parties' deposition transcripts, and Nasta's medical records. Nasta's neurological surgical expert claims that the breaches of Nasta's spinal canal occurred during the surgery and were not the result of the hardware shifting as pedicle screws do "not spontaneously shift over a matter of five days, and there is no indication deviated screw tracks or that Nasta sustained a fall trauma that would cause the hardware to shift. In addition, the fact that two pedicle screws breached the spinal canal on the left side at different levels establishes that the trajectories of those screws deviated from acceptable ranges of insertion. Nasta's neurological surgical expert opines that when the pedicle screws began to impinge on Nasta's nerve roots, it damaged the nerves and manifested in numbness and radiating pain that progressed to a left drop foot.

Nasta's neurological surgical expert further opines that the moving defendants failed to properly and timely recognize the onset of Nasta's new complaints of numbness and radiating pain in the left leg after the surgery were signs and symptoms of the left-sided canal breaches that occurred during the surgery, which caused a delay intervention and management of the breaches. The standard of care required the moving defendants to, among other things, order imaging studies such as CT or MRI scans, of Nasta's lumbar spine to verify the positioning of the pedicle screws and to rule out a breach prior to Nasta's discharge. In addition, Nasta's neurological surgical expert states that a drop foot would not necessarily be the first or only symptom of a pedicle screw breach and, as so, Nasta's drop foot occurring after his discharge does not obviate the moving defendants failure to investigate the pain and numbness he was experiencing prior to discharge. Nasta's neurological surgical expert concludes that within a reasonable degree of medical certainty that the moving defendants deviated from good and accepted practice by causing the pedicle screws to breach Nasta's spinal canal during surgery, by failing to recognize and act upon the signs and symptoms of the spinal breach that Nasta was experience post-operatively. The plaintiff's expert further concludes that these departures were a substantial factor in the development and worsening of Nasta's injures and deprived him of a better outcome.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). 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*, 413 NYS2d 141). Thus, when the

existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opines as such credibility issues can only be resolved by a jury. (*Roca v. Perel*, 51 AD3d 757). The submission by the parties of conflicting medical opinions necessarily presents an issue of fact requiring the denial of the motion. (*Viti v. Franklin General Hospital*, 190 AD2d 790; *Zimmer v. Phelps Memorial Hospital*, 140 AD2d 436). The existence of conflicting expert opinions in a medical malpractice action creates a triable issue of fact. (*Wallenquest v. Brookhaven Mem. Hosp. Med. Ctr.*, 28 AD3d 538).

In determining whether a plaintiff had made out a *prima facie* case thereby precluding judgment to the defendant as a matter of law, plaintiff's evidence must be accepted as true and plaintiff is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence. (*Corvino v. Mt. Pleasant Central School District*, 305 AD2d 364; *Mosheyev v. Pilevsky*, 283 AD2d 469; *Akseizer v. Kramer*, 265 AD2d 356; and *Hughes v. New York Hospital - Cornell Medical Center*, 195 AD2d 442). In the context of a medical malpractice action, it has been held that all reasonable inferences are drawn from the alleged departures from acceptable medical practice and the injury from the affirmation of Nasta's expert. (*Wallenquest, supra; Baez v. Lockridge*, 259 AD2d 573).

Here, the moving defendants made a *prima facie* showing of entitlement to summary judgment. However, Nasta, in opposition, has raised a triable issue of fact to warrant denial of this summary judgment motion with regarding to Nasta's claims sounding in medical malpractice. The opinions set forth by Nasta's neurological surgical expert directly conflict with the opinions set forth by the moving defendants' expert. The moving defendants' expert provides that they used all reasonable safeguards available to avoid misalignment or any intraoperative complications during the surgery considering the normal intraoperative fluoroscopy, the normal neuromonitoring readings, and there were no signs of any dural leak and, as so, the lumbar laminectomy with hardware implantation was performed entirely within the standard of care. Additionally, Nasta's neurological surgical expert found that Nasta exhibited intact sensation and motor strength in his lower extremities and no symptoms of a foot drop when he was discharged from Mount Sinai and only began to experience these symptoms after his discharge. However, Nasta's neurological surgical expert provides that the breaches of Nasta's spinal canal occurred during the surgery and were not the result of the hardware shifting as pedicle screws do "not spontaneously shift over a matter of five days. Nasta's neurological surgical expert also found that there was no indication of deviated screw tracks to support the allegations that the hardware shifted. As to post-operative care, Nasta's neurological surgical expert found that he exhibited new numbness and pain before discharge and further imaging studies such as CT or MRI scans of Nasta's lumbar spine to verify the positioning of the pedicle screws and to rule out a breach should have been performed.

With respect to Nasta's claim of lack of informed consent, the moving defendants have not established *prima facie* entitlement to summary judgment. As argued by the plaintiffs in opposition, The moving defendants' neurological surgical expert's opined that Nasta signed a consent form and Dr. Onesti testified that it is his custom and practice to discuss all risks of surgery and did so with Nasta. However, The moving defendants' neurological surgical expert not address how the subject informed consent forms complied with the prevailing standards or whether a reasonably prudent person in Nasta's position would not have declined to undergo surgery if fully informed. As such, a finding of summary judgment in favor of the moving defendants is not warranted under these circumstances.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein and, as so, any relief not specifically addressed is denied.

MOTION SEQUENCE 007

Defendants Mount Sinai moves this Court for an order granting them summary judgment and dismissing the Verified Complaint pursuant to CPLR §3212. Nasta opposes the motion. Mount Sinai submits a reply.

At the outset, Mount Sinai relies on the expert opinions of The moving defendants' neurological surgical expert, submitted in support of Dr. Onesti's and Dr. Koutsoumbelis' motions for summary judgment. As discussed above, Nasta's neurological surgical expert raised a question of fact regarding whether the pedicle screws breached Nasta's spinal canal during the surgery and whether additional imaging studies should have been performed prior to Nasta's discharged based upon his new complaints of numbness and pain in the left leg. Moreover, The moving defendants' neurological surgical expert fails to establish *prima facie* entitlement to summary judgment regarding informed consent as his expert opinion does not address how the subject informed consent forms complied with the prevailing standards or whether a reasonably prudent person in Nasta's position would not have declined to undergo surgery if fully informed.

Mount Sinai also argues that it cannot be held vicariously liable for the alleged medical malpractice or negligent care or treatment provided by Dr. Onesti and Dr. Koutsoumbelis on the grounds that they were are not employed by Mount Sinai but rather had private attending privileges at Mount Sinai. Specifically, Mount Sinai asserts that, according to Nasta's deposition testimony, Nasta knew that Dr. Koutsoumbelis was the doctor "on call" at Mount Sinai and that Dr. Onesti would be the co-surgeon. Nasta testified that his discharge papers instructed him to follow-up with Dr. Koutsoumbelis in his office and that Nasta saw Dr. Onesti in his private office. In addition, Dr. Koutsoumbelis testified that he is employed by defendant The Central Orthopedic Group and Dr. Onesti testified that he is employed by defendant Neurological Surgery PC. Mount Sinai also submits the affirmation of Marie Elena Gambale ("Gambale"), Risk Manager for Mount Sinai. Gambale states that on the dates Nasta alleges the negligence occurred, Dr. Onesti and Dr. Koutsoumbelis were private attending physicians and were not employed by Mount Sinai.

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself. However, an exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing. Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee and that the exception to the general rule did not apply." (*Fuessel v. Chin*, 179 AD3d 899, 901).

Here, while Mount Sinai established that Dr. Onesti and Dr. Koutsoumbelis were not employed by Mount Sinai but rather had private attending privileges, Mount Sinai has not demonstrated that the exception to the general rule regarding vicarious liability does not apply. (*Id.*). Specifically, it is undisputed that Nasta presented to Mount Sinai's Emergency Room and sought treatment from Mount Sinai rather than a physician of his own choosing. As noted by Mount Sinai's moving papers Nasta testified that he was informed that Dr. Koutsoumbelis was the doctor "on call" and the Dr. Onesti would be the co-surgeon. In addition, as argued by the plaintiff in opposition, Nasta also testified that he had never met with Dr. Koutsoumbelis prior to presenting to Mount Sinai's Emergency Room. Accordingly, Mount Sinai has not established *prima facie* entitlement to summary judgment as a matter of law regarding vicarious liability. Accordingly, a finding of summary judgment in favor of Mount Sinai is not warranted under these circumstances.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein and, as so, any relief not specifically addressed is denied.

MOTION SEQUENCES 008, 009 and 010

Defendants David Li, M.D. ("Dr. Li") (Motion Sequence 008), Megan L. Brower, D. C. ("Dr. Brower") (Motion Sequence 009), Michael B. Schneider, Radiological Associates of Long Island PC and South Nassau Radiology PC (collectively, "South Nassau") (Motion Sequence 010) move this Court unopposed for an order discontinuing the instant action with prejudice against him pursuant to CPLR §3217(b) and §3212, endorsing the annexed stipulation of discontinuance as "so ordered" and permitting it to be filed with the County Clerk, and deleting Dr. Li from the caption.

"The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR [§]3217(b) rests within the sound discretion of the court. Generally such motions should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results. Factors militating against discontinuance include prejudice to an opposing party as well as the imposition of one or more counterclaims." (*Haughey v.*

Kindschuh, 176 AD3d 785, 786).

As there is no opposition to the respective motions, Nasta and the remaining defendants have not established that they will be wither prejudiced by discontinuing the instant action with prejudice against Dr. Li, Dr. Brower or South Nassau or that counterclaims have been imposed. (*Id.*). Accordingly, the instant action as and against Dr. Li, Dr. Brower and South Nassau should be discontinued with prejudice and the caption should be amended accordingly.

In light of the foregoing, it is hereby

ORDERED, that the motion by defendants Stephen Onesti, MD and Neurological Surgery PC for an order granting them summary judgment (Motion Sequence 005) is denied, and it is further

ORDERED, that the motion by defendants Stelios Koutsoumbelis, MD and The Central Orthopedic Group, LLP for an order granting them summary judgment (Motion Sequence 006) is denied, and it is further

ORDERED, that the motion by defendant Mount Sinai South Nassau for an order granting them summary judgment (Motion Sequence 007) is denied, and it is further

ORDERED, that the unopposed motion by defendant David Li, M.D. for an order discontinuing the instant action against him with prejudice, "so-ordering" the annexed stipulation of discontinuance and removing him from the caption (Motion Sequence 008) is granted, and it is further

ORDERED, that the unopposed motion by defendant Megan L. Brower, D. C. for an order discontinuing the instant action against her with prejudice, "so-ordering" the annexed stipulation of discontinuance and removing her from the caption (Motion Sequence 009) is granted, and it is further

ORDERED, that the unopposed motion by defendants Michael B. Schneider, Radiological Associates of Long Island PC and South Nassau Radiology PC for an order discontinuing the instant action against them, "so-ordering" the annexed stipulation of discontinuance and removing them from the caption (Motion Sequence 010) is granted, and it is further

ORDERED, that the caption in this proceeding here by amended and shall read as follows:

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Daniel Nasa and Kathleen Nasta,

Plaintiffs,

-against-

Stelios Koutsoumbelis, M.D., Stephen Onesti, M.D., South Nassau Communities Hospital d/b/a Mount Sinai South Nassau, The Central Orthopedic Group, LLP, Neurological Surgery, PC,

Defendants.

----------X.

This hereby constitutes the decision and order of this Court.

ENTER:

HON. CATHERINE RIZZO, A.J.S.C.

Dated: February 3, 2025

ENTERED
Feb 07 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE