Leslie v Bekker
2010 NY Slip Op 33314(U)
November 19, 2010
Supreme Court, New York County
Docket Number: 100215/08
Judge: Alice Schlesinger
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SCANNED ON 11/23/2010

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 100215/2008

LESLIE, BONITA

VS

BEKKER, ALEX

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
NOV 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by various defendants for summary judgment is granted with respect to Erich Anderer and New York University Medical Center and is otherwise denied in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment in favor of Erich Anderer and New York University Medical Center dismissing all claims against those defendants.

Dated: NOV 19 2010

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BONITA LESLIE and EDWARD LESLIE,

Plaintiffs,

Index No. 100215/08
Motion Seq. No. 001

-against-

ALEX BEKKER, ERICH ANDERER, ANTHONY FREMPONG-BOADU, and NEW YORK UNIVERSITY MEDICAL CENTER,

Defendants.

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SCHLESINGER, J.:

This is an action that sounds in medical malpractice, specifically as it relates to surgery on Bonita Leslie's lumbar spine on August 15, 2007. The surgeon who performed the operation was Dr. Anthony Frempong-Boadu. He was assisted by Dr. Erich Anderer a resident. The attending anesthesiologist was Dr. Alex Bekker. The surgery occurred at New York University Medical Center. The action against Dr. Bekker was, at an earlier time discontinued. All of the other defendants are now moving for summary judgment.

Dr. Frempong-Boadu had recommended surgery to Mrs. Leslie because, by the time she first met him, many other forms of treatment to deal with the unrelenting pain in her lower back had failed. The operation that Dr. Frempong-Boadu was to perform involved the decompression of the discs at the L4-L5 level. During the procedure an latrogenic injury, one caused by a physician, occurred. Specifically, it was an injury to the plaintiff's left common iliac artery. During the operation, Dr. Frempong-Boadu saw a flash of blood which he believed had to be looked into immediately. Therefore, he first checked with Dr. Bekker to see if the patient was hemo-dynamically stable and, finding out that she was,

he asked the nurse to bring in Dr. Patrick Lamparello, a vascular surgeon who was nearby. Dr. Lamparello, while exploring the area, found a pseudoaneurysm of the medial aspect of the left common iliac artery (which is a hematoma that forms as a result of a leaking hole in an artery), which represented extravasation of bleeding from the artery injury. He placed a stent graft across this area which resolved both the pseudoaneurysm and the bleeding.

Before getting to the substance of the motion, I believe it is relevant to discuss the difficult and complicated recovery that followed Mrs. Leslie's surgery. She developed a left peritoneal hematoma, a left common iliac vein non-occlusive thrombosis, as well as aspiration pneumonia. She remained at the hospital until September 7, 2007 when she was sent for rehabilitation to Rusk Institute, where she stayed until September 17, 2007. She was then referred to her treating physician Dr. Slavinski for continued Coumadin therapy.

However, more problems developed. A few days after she was sent home with a Visiting Nurse Service provided, she complained of flank pain extending to one leg. Dr. Slavinski ordered an MRI on September 26, 2007 which showed that there were post-surgical changes including fluid extending along the L5 spinous process and midline posterior surgical incision. On September 28, 2007, Mrs. Leslie was readmitted to NYU for aspiration of a paraspinal collection. The reason for this is that several days earlier, she had developed fever, chills and pain radiating to her left foot, as well as generalized weakness. On October 2, 2007, she was given antibiotics empirically as no culture had grown out of the fluid which had been aspirated.

On October 3, 2007, Dr. Frempong-Boadu re-operated on Mrs. Leslie for open irrigation and debridement of the wound. More drainage was sent to pathology, but again

no culture grew out. She was discharged from the hospital on October 15, 2007, and an MRI taken on November 30, 2007 showed a resolution of the post-operative collection of fluid.

She continued treatment with Dr. Slavinski who ordered another MRI on April 10, 2008, which revealed surgical defects in the right lamina at L4-L5. There were other positive findings as well. Mrs. Leslie then was referred to a neurologist in Massachusetts, Dr. James Lehrich. She complained of the same pain that she had before the surgery, as well as numbness and weakness of the left leg. However, a December 9, 2008, MRI showed no new abnormalities. Because of the injury to the iliac artery and the thrombosis that had occurred in its aftermath, she continues to this day to be on anticoagulant therapy.

The moving papers include an affidavit from Dr. Douglas Cohen who identifies himself as a board certified neurosurgeon, the same specialty as the defendant doctor. His opinion is that all the care rendered by all of the defendants was within accepted standards of neurosurgical practice.

He then proceeds to elaborate on this opinion. First, he points out that Dr. Frempong-Boadu, who was a private treating surgeon, took a detailed history from Mrs. Leslie which included an MRI and a review of two prior lumbar MRI's. He then appropriately discussed with the patient options, risks, benefits and alternatives to the surgery and recorded this discussion with Mrs. Leslie in a note in her chart. Dr. Fempong-Boadu's recommendation for surgery was indicated, according to Dr. Cohen, because medication and epidural therapy had failed to relieve Mrs. Leslie's pain.

As to the surgery itself, despite the injury to the iliac artery, this neurosurgeon says that the surgery was properly performed and that all the things that Dr. Frempong-Boadu had done, including the removal of disc fragments, had been done well.

Further, during the surgery, Dr. Frempong-Boadu took appropriate precautions such as using gradation of his instruments and fluoroscopy guidance throughout the procedure. Despite these precautions an undesirable event did occur and upon seeing a flash of blood, he appropriately acted by first checking on Mrs. Leslie's status and then immediately calling in a vascular surgeon.

Perhaps the most important part of his opinion was the part that indicated that the injury to the common iliac artery, which according to Dr. Cohen bificurates at around L4-L5 and sits opposed to the L4-L5 space, is a well-known and well-documented risk of this procedure. Therefore, he urges that there was no negligence by anyone. Further, none of the injuries suffered by Mrs. Leslie was proximately caused by any negligence.

The affirmation by Dr. Cohen does succeed in establishing a prima facie case of entitlement to summary judgment. Therefore, the burden shifts to the plaintiff to see if she can show that issues of fact, with regard to negligence and proximate cause, exist. The plaintiff attempts to do this by the submission of an affidavit from an unnamed board certified orthopedic surgeon. He is a well-credentialed physician, as he states that he is an Associate Professor of Orthopedics and Neurosurgery with John Hopkins University Hospital in Maryland. He also says that he has done this procedure about a thousand times and is familiar with the applicable national standard of care, whether the surgery is performed by an orthopedic surgeon or a neurosurgeon.

The plaintiff's expert has reviewed the extensive records involved here and concludes that the standard of care was definitely breached by Dr. Frempong-Boadu during the August 15, 2007 surgery and further that this breach was a substantial factor in causing Mrs. Leslie's vascular injury and its sequella. Specifically, this surgeon says that Dr. Frempong-Boadu deviated from appropriate surgical standards by "losing control of the instruments". This allowed for a violation of the Anterior Longitudinal Ligament or "ALL", which is the entrance to the retroperitoneal cavity which, according to this doctor, is where the left common iliac artery lives.

This physician does provide the Court with a very clear explanation of the various anatomical structures in and near the surgical site. Thus, in this regard, he explains that the left and right common iliac arteries are retroperitoneal structures that are contained within the retroperitoneal space. He also points out that in a pre-surgical MRI, Mrs. Leslie was shown to have no vascular anomalies.

The ALL is the closest ligament to the abdominal viscera and blood vessels found in the retroperitoneum. When a patient is prone, lying on her stomach, the surgeon, here Dr. Frempong-Boadu, goes through the Posterior Longitudal Ligament in order to enter the disc space. The most anterior portion of the disc space is defined by the ALL. Beyond the ALL is the retroperitoneal space where, again, one would find the iliac arteries.

Therefore, this expert continues, to cause an injury to the iliac artery in the retroperitoneal space, the surgeon must penetrate the ALL. This physician notes that precautions to avoid this kind of injury were taken. Specifically the surgical instruments used have depth markings on them and fluoroscopy guidance was used throughout the operation. However, despite these precautions, the surgeon was negligent because he

was in the retroperitoneal space where he should not have been. The expert further explains that in patients, such as Mrs. Leslie, who had no vascular or abdominal abnormalities, there is no acceptable reason why the retroperitoneal space should be entered during the performance of a routine posterior microsdiscectomy or standard discompressive posterior lumbar procedure.

Also pointed out by this physician, who states that he had read the defendant's deposition, is that Dr. Frempong-Boadu agreed that, for this injury to have occurred, the surgeon would have had to have violate both the annulus, which is the hard posterior part of the disc, as well as the ALL. He also points to Dr. Frempong-Boadu's answer in his deposition to the question what caused the injury. The defendant said "I don't know. I think that obviously we had a violation of the annulus and obviously we damaged the vessel...." Dr. Frempong-Boadu also acknowledged that the injury was caused by a surgical instrument.

The expert concludes his statement with a discussion of the aftermath of the surgery and the repair of the artery. Mrs. Leslie developed a left iliac vein thrombosis and as stated earlier remained hospitalized in acute care until September 7, 2007. During this time, she experienced a great deal of pain for which she was seriously medicated, multiple blood transfusions, antibiotics and anticoagulation and antispasmodics therapy. He also points out that the anticoagulant therapy is permanent. Finally, he opines that since the surgery did not successfully deal with this patient's pain, normally a second surgery with an anterior approach would be considered. However, that would be contraindicated here because of the previous vascular injury.

In reply, defense counsel urges the Court to grant the motion to dismiss with regard to the other defendants still remaining in this case, Dr. Anderer and the Hospital. Here she points out that the plaintiff's expert in no way implicates them in any of the malpractice. That is true and therefore those other defendants are entitled to a dismissal of the claims against them.

As to Dr. Frempong-Boadu, counsel argues that his motion should also be granted, as there is no evidence anywhere to suggest that he "lost control" of his instruments, as was discussed by the plaintiff's expert. However, I could not disagree more with this evaluation.

The basic and critical difference between Dr Cohen's view and that of the Maryland physician is whether or not the injury to the common left iliac artery was truly a risk of this procedure. Dr. Cohen says that it was. But the plaintiff's expert says that it was certainly not, since for the injury to have occurred, the surgeon, here Dr. Frempong-Boadu, had to have entered into a space, the retroperitoneal cavity, where he had no reason to be. Therefore, the cutting of the artery was outside the immediate surgical site. Not only that, there was also a barrier between the structures found in the retroperitoneal cavity and the surgical site, the annulus and most important the ALL.

I find that the plaintiff has successfully sustained her burden in showing that issues exist as to whether or not Dr. Frempong-Boadu's performance of this surgery was within acceptable standards. If it was not, then it is obvious that such a deviation was a proximate cause of the injury and its sequella.

Accordingly, the motion for summary judgment is granted with respect to defendants Erich Anderer and New York University Medical Center, and the Clerk is directed to sever

all claims against those defendants and enter judgment in their favor; and it is further

ORDERED that the motion for summary judgment by defendant Anthony Fremong-Boadu is in all respects denied.

Counsel shall appear in Room 222 for a pre-trial conference on December 8, 2010 at 11:00 a.m.

Dated: November 19, 2010

NOV 19 2010

J.S.C.

ALICE SCHLESINGER

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