

Matos v Schwartz

2011 NY Slip Op 31436(U)

May 31, 2011

Sup Ct, Suffolk County

Docket Number: 07-4875

Judge: Denise F. Molia

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SHORT FORM ORDER

COPY

INDEX No. 07-4875

CAL. No. 10-015800T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 12-20-10 (#001)

MOTION DATE 1-7-11 (#002 & #003)

ADJ. DATE 3-25-11

Mot. Seq. # 001 - MotD

002 - MG

003 - MD

-----X
KEITH MATOS and DEIRDRE E. MATOS, :

Plaintiffs, :

- against -

ARNOLD SCHWARTZ, M.D., PAUL ALONGI, :
M.D., MICHAEL LESLIE, D.O., WILLIAM :
MARTIN, M.D., ORTHOPEDIC SPINE CARE :
OF L.I., P.C., and HUNTINGTON HOSPITAL :

Defendants. :

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Upon the following papers numbered 1 to 21 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; 9 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 15; Replying Affidavits and supporting papers 16 - 18; 19 - 21; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (001, 002, and 003) are consolidated for the purpose of this determination; and it is further

ORDERED that the portion of the motion (001) by defendant Paul Alongi, M.D., for summary judgment dismissing the complaint as against him is granted; and it is further

ORDERED, that the portion of the motion by defendant Orthopedic Spine Care of L.I., P.C., for summary judgment dismissing the complaint as against it, is granted to the extent that plaintiffs' claims as

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asserted against said defendant alleging vicarious liability for the acts of defendant Alongi are dismissed, and is otherwise denied; and it is further

ORDERED, that the portion of the motion (001) by defendant Arnold Schwartz, M.D., for summary judgment dismissing the complaint as against him is denied; and it is further

ORDERED that the motion (002) by defendant Michael Leslie, D.O., for summary judgment dismissing the complaint as asserted against him is granted; and it is further

ORDERED that the motion (003) by defendant William Martin, M.D., for summary judgment dismissing the complaint as asserted against him is denied.

In this medical malpractice action, plaintiffs Keith Matos and Deirdre Matos seek damages personally and derivatively, for alleged departures in accepted medical practice in the care and treatment of Keith Matos (hereinafter "plaintiff") from May 20, 2005 through October 19, 2005. Plaintiff was a patient at defendant Huntington Hospital from July 7, 2005 through July 17, 2005.

The record reveals that after trying conservative therapy with other providers to relieve his low back pain, plaintiff was referred to defendant Arnold Schwartz, M.D., an orthopedic surgeon and a member of defendant Orthopedic Spine Care of L.I., P.C. ("Orthopedic Spine Care"), to discuss possible spinal surgery. Schwartz suggested an anterior lumbar interbody fusion ("ALIF") and discectomy at L5/S1 which included a bone fusion and the insertion of hardware, to be performed anteriorly, as well as a procedure to be performed posteriorly. Schwartz referred plaintiff to defendant William Martin, M.D., a general and vascular surgeon who would assist Schwartz, to discuss the actual surgery and the risks involved. The surgery was performed at defendant Huntington Hospital on July 7, 2005, by Schwartz, with Martin and defendant Michael Leslie, D.O., a surgical resident, assisting. Plaintiff duly executed a surgical consent form on the morning of the surgery. Martin began the surgery and made certain that the abdominal organs and vasculature were retracted so that Schwartz could perform the orthopedic surgery. After the orthopedic hardware was inserted and secured, Schwartz and Martin noticed brisk bleeding from the left iliac vein. Martin tried, without success, to repair the torn left iliac vein and finally tied it off. Defendant Paul Alongi, M.D., an orthopedic surgeon and member of Orthopedic Spine Care, entered the operating room and offered to assist after he heard that a blood vessel had been injured. He scrubbed in and suctioned the operative field. Once the vein was ligated, Alongi scrubbed out. When the surgery was complete, plaintiff was transferred to the recovery room and then, to intensive care. Plaintiff experienced post-operative swelling in the left leg and a deep vein thrombosis, which was treated with blood thinners. After he was discharged from the hospital on July 17, 2005, plaintiff experienced retrograde ejaculation and was referred to a urologist and a fertility specialist, who told him that he was infertile.

By way of the bill of particulars, plaintiffs allege that defendants departed from accepted medical practice by, *inter alia*, lacerating plaintiff's left common iliac vein; by failing to repair the left common iliac vein, by failing to perform pre-operative tests and studies, by failing to consult specialists, by carelessly performing surgery, by failing to obtain informed consent, performing unnecessary surgery, causing iatrogenic injury, by failing to perform a proper work-up and physical examination of plaintiff, and by failing to take standard and accepted precautions to avoid plaintiff's injuries. Plaintiffs also allege that they are relying on the theory of *res ipsa loquitur*.

Schwartz, Alongi, and Orthopedic Spine Care now move for summary dismissing the complaint as asserted against them. Martin and Leslie also move separately for summary judgment dismissing the complaint as asserted against them.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988], *Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]). The 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2nd Dept 2004]). A resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (*Soto v Andaz*, 8 AD3d 470, 779 NYS2d 104 [2d Dept 2004]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]); *Stukas v Streiter*, ___ AD3d ___, 918 NYS2d 176 [2d Dept 2011]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1989]).

In support of their motion for summary judgment, Schwartz, Alongi and Orthopedic Spine Care ("the Schwartz defendants") submit, *inter alia*, the pleadings, the bill of particulars, Schwartz's office records, plaintiff's Huntington Hospital medical records, transcripts of the deposition testimony of Schwartz and Alongi, and the affirmation of John K. Houten, M.D. Schwartz's office records reveal that plaintiff presented to his office for the first time on May 20, 2005, and returned for treatment on June 1, June 20, June 24, July 1, August 5, September 7, and October 19, 2005. The office records show plaintiff advised Schwartz he had tried conservative therapy, consisting of nerve root blocks and physical therapy and chiropractic care with no relief, and that his chief complaint was back pain that radiated to both legs, more right sided. An MRI of the lumbar spine, performed on November 18, 2004, revealed a herniated disc at L5/S1 with degenerative changes. An MRI of the lumbar spine, performed on March 22, 2005, revealed no interval change from the prior MRI. An MRI of the lumbar spine, performed on June 7, 2005, revealed no interval change compared with the prior study. A CT scan of the lumbar spine, performed in June 8, 2005, revealed a lateral disc herniation at L4/5 and a central and right-sided disc herniation at L5/S1 which touches the right S1 nerve root and is associated with calcification and/or a bone spur.

Schwartz's office records further reveal that at the June 20, 2005 visit, Schwartz advised plaintiff that he would need a laminectomy at L5/S1, as well as an ALIF. Schwartz wrote that he discussed the risks of the procedure to include problems from anesthesia, infection, neurovascular compromise and failure of the

procedure. Schwartz also discussed a procedure which would be performed posteriorly. On June 29, 2005, the record reveals a letter from Kip L. Bodi, M.D., a urologist, who states that, due to the upcoming spine surgery, he advised plaintiff to store sperm preoperatively. Schwartz met with plaintiff on July 1, 2005 to review preoperative instructions and to discuss the expected outcome and risks of the procedure, to include retrograde ejaculation. The operative note from Huntington Hospital, as dictated by Schwartz, reveals that the surgery was progressing satisfactorily until the distraction tube was removed, at which time plaintiff began bleeding.

At the post-operative office visit on August 5, 2005, Schwartz spoke with plaintiff and informed him of a known complication, the tearing of the left iliac vein and the actions that were taken surgically. The examination revealed that plaintiff's left leg had good circulation and was neurologically intact. At the office visit on October 19, 2005, Schwartz noted that plaintiff's left leg was neurologically intact with some swelling. Plaintiff related his problems with retrograde ejaculation and was referred to a urologist who specialized in fertility. X-rays showed excellent early healing. Schwartz encouraged plaintiff to increase his activity level. On December 23, 2005 and March 20, 2006, Schwartz wrote that he left messages for plaintiff at home to make follow up appointments.

A progress note by Lawrence E. Mermelstein, M.D. dated December 20, 2005, four months after the surgery, reveals an initial evaluation of plaintiff, who complained of back pain, left leg pain and swelling. Dr. Mermelstein wrote that plaintiff's post-operative retrograde ejaculation had not returned at all. Dr. Mermelstein advised plaintiff to hold off further physical therapy until radiographic healing of the operative site was established. He also stated that he would expect more healing to take place, and that bone is not seen in fusions until at least six or seven months post operatively.

Schwartz testified to the effect that he first saw plaintiff on June 1, 2005. He stated that he asked Martin to assist him in the operation and sent plaintiff to Martin's office before the surgery to discuss the surgery from Martin's point of view. Schwartz testified that he discussed his plan with plaintiff and why he felt plaintiff needed to have the disc at L5/S1 removed, and that he also discussed the risks of surgery on two occasions with plaintiff. Schwartz stated he performed the surgery on July 7, 2005, with Martin and Leslie assisting but could not recall whether Alongi was present during the entire procedure. Schwartz testified that he performed the orthopedic portion of the surgery after Martin opened the abdominal cavity and retracted all the necessary blood vessels and organs and that he first noticed brisk bleeding as he was removing a distractor tube. According to Schwartz, he and Martin identified the bleeding from the left iliac vein, and after several attempts to repair the vessel, due to severe blood loss, they decided to ligate, or tie off, the vein. He stated he decided to forego the planned posterior disc surgery. The surgery was completed and the plaintiff was transferred to the recovery room. Schwartz testified plaintiff developed a deep vein thrombosis and was placed on heparin and coumadin after the surgery. On July 13, 2005, Schwartz went on vacation, leaving Alongi to cover the plaintiff until his discharge on July 17, 2005. Schwartz saw plaintiff in his office on four more occasions. Plaintiff complained of left leg swelling and retrograde ejaculation. Schwartz referred plaintiff to a urologist who specialized in fertility. The last time Schwartz saw plaintiff was on October 19, 2005. Although he made two calls to plaintiff's home for follow up thereafter, he did not hear from plaintiff.

Defendant Leslie testified that he is duly licensed to practice medicine in the State of New York and specializes in orthopedic surgery. At the time of the alleged malpractice, he was a first-year surgical resident at defendant Huntington Hospital. He stated that his residency had begun on July 1, 2005. His duties were to provide patient care on the floors and work in the operating room under the supervision of attending surgeons.

On the date of plaintiff's surgery, per custom and practice, he stated that he would have followed any orders by Schwartz and held a retractor which had been placed by Schwartz. He did not recall when defendant Alongi entered the operating room. He did not recall when he left the operating room. He stated that he did not assist in placing any of the hardware during the surgery. Leslie saw plaintiff on rounds on July 9 and 10, 2005, and wrote in the progress notes in the hospital chart. He had no further contact with plaintiff after July 10, 2005.

Martin testified to the effect that he is duly licensed to practice medicine in State of New York and is board certified in general and vascular surgery. In July of 2005, he was an employee of North Shore Medical Group of the Mount Sinai School of Medicine, and had admitting privileges at Huntington Hospital. He stated that he first met plaintiff, who was referred by Schwartz, on June 29, 2005, at which time he discussed the surgery and risks, including bleeding, infection, retrograde ejaculation, and the risk to the organs that needed to be mobilized to access the spinal cord for the surgery. He stated that he told plaintiff that he would assist Schwartz during surgery, and that he had performed such surgeries with Schwartz at least one hundred times before. Martin testified that his role during the surgery was to provide access to the L5/S1 disk space, assist in mobilization of the vessels and abdominal organs, help to provide retraction during the orthopedic portion of the procedure, and to assist with closure of the abdomen.

Martin further testified that he began the surgery by making the initial incision and retracting the organs and blood vessels in order to give Schwartz a clear surgical field, and that the surgery went well until after the hardware was secured. He explained that after a distractor was removed, he and Schwartz noticed bleeding from the left iliac vein. He tried to mobilize it so that he could see the posterior side and suture it closed. He tried multiple times for almost an hour to suture the vein, but couldn't. He and Schwartz decided together to ligate the left iliac vein due to the blood loss. He did not have an opinion as to what caused the injury to the left iliac vein. He followed the plaintiff post operatively. On July 10, he ordered heparin to prevent clots. On July 11, he ordered "ted" support stockings, in addition to the "flotron" stockings that plaintiff was wearing preoperatively. He noted that the left lower extremity was positive for a deep vein thrombosis by doppler exam on July 11, 2005. He discharged the plaintiff from the hospital on July 17, 2005. He saw plaintiff in his office on Sept 13, 2005 and charted that he observed left foot swelling. The plaintiff did not return to the office after that time.

Alongi testified that he is duly licensed to practice medicine in the State of New York and is an orthopedic surgeon. He is a member of Orthopedic Spine Care. He stated that he was not involved with office visits with plaintiff. On the date of plaintiff's surgery, he was standing outside the operating room and heard that the plaintiff was bleeding. He entered the operating room, retracted the soft tissue, and he suctioned blood from the operative field. He stayed until the bleeding was controlled, and left the operating room shortly thereafter. He states that he covered Schwartz from July 14 until July 17, 2005. In addition, a physician's assistant evaluated plaintiff each day and notified Alongi of any problems. He had no further contact with plaintiff after his discharge on July 17, 2005.

John K. Houten, M.D. affirms that he is duly licensed to practice medicine in the State of New York and is board certified in neurological surgery. Based upon plaintiff's history, clinical examination, complaints of pain, and imaging studies, he opines that defendant Schwartz appropriately proposed surgical intervention. The surgery recommended was and continues to be a recognized and accepted option by the orthopedic and neurosurgical community. The procedure which plaintiff underwent is a type of spinal fusion that uses an anterior approach to fuse the lumbar spine bones together. It is Dr. Houten's opinion, within a reasonable

degree of medical certainty, that surgery was indicated, that plaintiff had no specific contraindications to the surgery and it offered plaintiff a reasonable likelihood of success to alleviate his symptoms, treat the underlying condition and return plaintiff to his usual activities of daily living. The records of defendant Schwartz, and Huntington Hospital substantiate plaintiff's and Schwartz' testimony that the risks and complications associated with the surgery were properly explained. Defendant Martin, the general and vascular surgeon, also discussed the risks of surgery. The record reveals that plaintiff appeared to understand the risks and complications of surgery, and executed a consent form evidencing that agreement.

Dr. Houten avers that the complications which occurred, the injury to the left common iliac vein and retrograde ejaculation are not common, but are known and accepted complications associated with this type of surgery and are known to occur in the absence of negligence based upon the nature of this surgery. Once the injury to the iliac vein occurred, it was immediately identified. Attempts were made to repair the vessel, but were unsuccessful, necessitating ligation of the vein. When defendant Schwartz learned of plaintiff's complaints of retrograde ejaculation, he appropriately referred plaintiff to a urologist.

Dr. Houten further states that with respect to defendant Alongi, he was called into surgery to assist once the injury to the iliac vein was identified. He made no independent decisions with respect to the surgery. Postoperatively, he saw plaintiff on several occasions in the capacity of a covering orthopedic surgery attending while defendant Schwartz was unavailable. In any event, there are no specific claims regarding the postoperative management by defendant Alongi. Therefore, it is Dr. Houten's opinion, within a reasonable degree of medical certainty, that there was no departure from the standard of care on the part of defendants Schwartz, Alongi, or Orthopedic Spine Care in the treatment of the plaintiff. The complications that did occur were known and accepted risks and can occur despite the exercise of due care.

In support of his motion for summary judgment, defendant Martin submits, *inter alia*, an affirmation by Amit V. Patel, M.D., who affirms that he is a physician duly licensed to practice medicine in the State of New York and is board certified in vascular surgery. Dr. Patel opines, within a reasonable degree of medical certainty, that the care defendant Martin provided to plaintiff was within acceptable standards of medical practice and was not the proximate cause of his injuries. He states that at the appointment on June 29, 2005, Martin appropriately reviewed the risks of the procedure, which included possible injury to a vessel and also recommended to plaintiff that he consider harvesting his sperm because of the risk of retrograde ejaculation associated with the procedure. Dr. Patel states there were no indications that plaintiff was not a candidate for the surgery proposed by Schwartz. It is Dr. Patel's opinion, within a reasonable degree of medical certainty, that Martin appropriately performed his portion of the anterior lumbar discectomy, anterior interbody fusion at L5/S1, and that the injury to the iliac vein occurred when Schwartz was performing his part of the procedure. Dr. Patel states plaintiff's injury likely occurred when a vessel slipped under the distractor tube and it was not immediately recognized. Plaintiff's injury occurred absent any departure from the standard of care, and that it was a foreseeable risk of the procedure. According to Dr. Patel, management of the bleeding was impeccable, since the surgeons recognized the problem and reacted accordingly in prompt order.

In support of his motion, Leslie submits, *inter alia*, an affirmation by Philip A. Robbins, M.D. Dr. Robbins affirms that he is a physician duly licensed to practice medicine in the State of New York and is board certified in orthopedic surgery. He opines, within a reasonable degree of medical certainty that it is clear that Leslie was at all times acting under the direction and supervision of Schwartz, the plaintiff's attending surgeon, and at no time did he exercise any independent medical judgment with respect to the plaintiff's care and

treatment. Schwartz testified to being the primary surgeon throughout the entire surgery and that he supervised Leslie during his involvement in the procedure. Both Schwartz and Leslie testified that Leslie's participation in the surgery was limited to holding retractors that had been positioned by Schwartz. During the post-operative period, the only contact Leslie had with the plaintiff was in the course of attending daily rounds with the other surgical residents and he did not issue any orders. Therefore, it is Dr. Robbins' opinion, within a reasonable degree of medical certainty, that the care and treatment rendered by Leslie was in accordance with the standards of good and accepted medical practice. According to Dr. Robbins, there is no evidence that Leslie did otherwise, or that he exercised any independent medical judgment in his treatment of plaintiff. In addition, Dr. Robbins opines, within a reasonable degree of medical certainty, that plaintiff's claim of lack of informed consent is inapplicable to Leslie, because obtaining informed consent is the responsibility of the person who provides the professional treatment, which would be Schwartz.

The Schwartz defendants, Martin, and Leslie have established their entitlement to judgment as a matter of law by demonstrating that they did not depart from accepted medical practice (*see, Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]; *Whalen v Victory Memorial Hosp.*, 187 AD2d 503, 589 NYS2d 590 [2d Dept 1992]). Thus, the burden shifted to plaintiffs to respond with rebutting medical evidence demonstrating a departure from accepted medical procedures (*see, Baez v Lockridge*, 259 AD2d 573, 686 NYS2d 496 [2d Dept 1999]).

In opposition, plaintiffs' counsel affirms that they do not oppose the applications for summary judgment made by Leslie and Alongi. In opposition to the remainder of the motions, plaintiff submits, *inter alia*, the affirmation of his expert,¹ whose name has been redacted in accordance with *Carrasquillo v Rosencrans*, 208 AD2d 488, 617 NYS2d 51 (2d Dept 1994). The original unredacted affidavit has been submitted to the court for inspection under separate cover. The expert states that he is a physician duly licensed to practice medicine in the State of New York and is board certified in general and thoracic surgery. He opines that defendants Schwartz and Martin departed from good and accepted medical practice in their performance of the July 7, 2005 anterior lumbar interbody fusion on plaintiff and in causing and/or allowing his left common iliac vein to be torn, lacerated and/or otherwise injured, and the consequences of the inability to control the bleed.

The expert states that it is clear from the operative reports and deposition testimony that the injury occurred when defendant Schwartz removed the distraction tube from the left side of the L5/S1 disc space. He further opines that it was a departure from good and accepted medical practice for Martin to fail to sufficiently retract the vasculature, and, in particular, the left common iliac vein, so as to provide Schwartz with sufficient access to the anterior spine to perform the orthopedic portion of the procedure. In addition, plaintiff's expert asserts it was a departure from good and accepted medical practice for defendant Schwartz, having determined that the iliac space was tight, to continue with this non-emergent, elective orthopedic surgery in the face of insufficient access to the anterior aspect of the lumbar spine, which compromised his ability to adequately manipulate surgical instruments and hardware as required to perform the orthopedic portion of the surgery.

¹The Court has conducted an in-camera inspection of the original unredacted affirmation and finds it to be identical in every way to the redacted affirmation in plaintiff's opposition papers with the exception of the redacted expert's name. In addition, the Court has returned the unredacted affirmation to the plaintiff's attorney.

Plaintiffs' expert also states that good and accepted medical practice required that Schwartz direct Martin to retract and/or dissect more extensively so as to provide better access to the surgical field or terminate the procedure. The expert explains Schwartz caused extensive bleeding and a potentially fatal situation by proceeding to place and remove hardware without sufficient access, and caused a tear to the left common iliac vein. According to plaintiffs' expert, the departures from good and accepted medical practice by Schwartz and Martin were a proximate cause of the permanent and irreversible injuries sustained by plaintiff, including tear to the left common iliac vein requiring ligation, prolonged and complicated hospitalization, deep vein thrombosis of the left lower extremity requiring lifelong anticoagulation therapy, permanent, progressive swelling and pain to the left lower extremity, retrograde ejaculation and consequential infertility. This conflicting opinion precludes a finding of summary judgment (*Viti v Franklin General Hospital*, 190 AD2d 790, 593 NYS2d 840 [2d Dept 1993]).

Accordingly, the motions by defendants Alongi and Leslie for summary judgment dismissing the Complaint as against them are granted. The motion by defendant, Orthopedic Spine Care of L.I., P.C., is granted to the extent that the claims for its alleged vicarious liability for the acts of defendant Alongi, are dismissed. The plaintiff's claims against defendants Schwartz, Martin, and Huntington Hospital, shall continue. The plaintiff's claims against Orthopedic Spine Care of L.I., P.C., for its alleged vicarious liability for the acts of the defendant Schwartz, shall also continue.

Dated: May 31, 2011

DENISE F. MOLIA

J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION