UmeJei v Community Hosp. at Dobbs Ferry
2011 NY Slip Op 32097(U)
July 29, 2011
Supreme Court, New York County
Docket Number: 103668/2008
Judge: Alice Schlesinger
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SCANNED ON 8/1/2011

[* 1]

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

PRESENT: ALICE SCHLESINGER

IA PART 16

Index Number : 103668/2008

UMEJEI, CHIEDU

VS.

COMMUNITY HOSPITAL AT DOBBS

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendants Joshua Stillman, M.D. and Dobbs Ferry Emergency Medicine, P.C. is denied in accordance with the accompanying memorandum decision.

FILED

AUG 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: JUL 29 2011

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.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
CHIEDU UMEJEI,

Index No. 103668/08
Motion Seq. Nos. 003 & 004

Plaintiff,

-against-

COMMUNITY HOSPITAL AT DOBBS FERRY, NEW YORK PRESBYTERIAN HOSPITAL/COLUMBIA PRESBYTERIAN CENTER, JOSHUA I. STILLMAN, M.D., DOBBS FERRY EMERGENCY MEDICINE, P.C., MITCHELL S. ELKIND, M.D., RIVERSIDE HEALTH CARE SYSTEM, INC., DOE 1 AND DOE 2,

FILED
AUG 01 2011
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.
--X
SCHLESINGER, J.:

When discovery was completed in this medical malpractice action, all of the defendants moved for summary judgment. New York Presbyterian Hospital and the physician practicing there, Mitchell S. Elkind, were able to convince the plaintiff that they were entitled to such relief. Therefore, the action was discontinued against those two defendants. The issue that moving counsel for the hospital was able to convince the plaintiff on was whether or not it was appropriate to give tPA, an accepted clot buster, to Mr. Umejei on the morning of Monday, March 27, 2006.

Before getting into the details, and there are many such details, certain things are agreed upon by all parties. The first is that there are basically two types or origins of strokes, hemorrhagic and ischemic. Ischemic strokes are far more prevalent than hemorrhagic ones. After the formulation of elaborate protocols for the administration of tPA (tissue plasminogen activator), it was accepted in the medical

community that this was a very effective agent for lessening the effects of an ischemic stroke. However, all agreed that it only could be used for ischemic strokes because if it was used for a hemorrhagic stroke, it could have lethal consequences. Also, the protocols said that tPA was best administered within a three-hour window period from the onset of symptoms. This action is all about the care and treatment that should have been given to Mr. Umejei after it became apparent that he was, in fact, displaying the beginning signs of a left-sided stroke.

All parties here further agree on a general outline of what occurred on the morning of March 27, 2006. The plaintiff Umejei worked at defendant Community Hospital at Dobbs Ferry (Dobbs Ferry) as a lab technician. At about 6:15 that morning he encountered defendant Dr. Joshua I. Stillman, who was a physician assigned to the Emergency Department at the hospital. When the encounter occurred outside the ICU on the second floor, Mr. Umejei had just begun experiencing a heaviness in his left arm and leg and he was limping. Each party remembers that encounter, and another outside the elevator, differently, but both agree that Dr. Stillman told Mr. Umejei that he wished to examine him in the Emergency Room. Dr. Stillman's shift was to end at 7:00 a.m. that morning. Precisely what time Dr. Stillman examined Mr. Umejei in the Emergency Room is unclear, but it is acknowledged that the examination was not extensive. However, from what Dr. Stillman could discern, he told Mr. Umejei that he believed that he was having a stroke.

It is important to know here that Dobbs Ferry did have tPA available and also had a CT scan machine. In fact, there was testimony that a nurse asked Dr. Stillman if he wanted tPA. But the hospital did not have at that time of the morning, between 6:00 and 7:00 a.m., a technician to operate the CT scan machine or a radiologist to read the report of a scan or a neurologist to consult with the radiologist about a scan. They did have a protocol. The protocol, which was posted in the Emergency Room, contained directions for contacting specific individuals who were on call to come to the hospital at any time in cases of emergency so as to operate the CT scan machine, read its results and confer on those results.

However, Dr. Stillman did not initiate this protocol. Nor did the hospital. Instead, Dr. Stillman suggested to Mr. Umejei that since he, the doctor, was leaving Dobbs Ferry to begin a shift in the Emergency Department at New York Presbyterian Hospital/Columbia Presbyterian Center at 8:00 a.m., it would be a good idea for Mr. Umejei to go with him in his car to this New York City hospital. The plaintiff agreed, so the two left in Dr. Stillman's car at about 7:00 a.m., or perhaps as late as 7:15 a.m., to go there. Dr. Stillman, continuing to act the role of a Good Samaritan, called ahead to his colleagues at New York Presbyterian to tell them that they should be available to treat a patient he was bringing in who appeared to be suffering from the onset of a stroke.[1]

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[1] The events that occurred at Dobbs Ferry before the two left are of utmost importance, and the plaintiff, Dr. Stillman, and the Emergency Room Nurse Mary Kielar all testified about them. However, not surprisingly, each one's recollections of those events, including who said what to whom, vary significantly. But the log at the Emergency Room does indicate Mr. Umejei was never registered there.

All agree that the drive, thankfully, was uneventful and that the two arrived at New York Presbyterian Hospital at about 7:45 a.m. All agree that Mr. Umejei's status remained stable and may also have improved by the time he arrived. He was able to get onto a stretcher unaided. At the Emergency Room at Columbia Presbyterian, Mr. Umejei was examined by Dr. Rebecca Wolf, a resident in Neurology (now known as Rebecca Gilbert) and Dr. Lee Birnbaum, a stroke Fellow. Dr. Wolf testified that she arrived at the Emergency Room between 7:30 and 8:00 a.m. and began her examination of Mr. Umejei shortly thereafter; Dr. Birnbaum also participated in this exam. The precise times of these examinations are unclear because, pursuant to procedures at New York Presbyterian, the data making up the patient's chart was not entered into the computer until the emergency room treatment ended at approximately 9:40 a.m.

However, we do know that the patient had a CT scan at approximately 8:09 a.m., which concluded at 8:17 a.m. and showed no signs of hemorrhage. This meant that some time after 8:17 a.m. and before 9:00 a.m., while still in the window period for administering tPA, the doctors at the Hospital could have administered it if they felt it would be beneficial. However, they did not, pursuant to a decision by Drs. Wolf and Birnbaum, together with their knowledge of the applicable protocol for administering tPA, that if an individual's symptoms were rapidly improving, it would be contraindicated to give it. Here, both doctors agree that the plaintiff's symptoms

were rapidly improving.[2]

It is on these facts that in the first instance Dr. Stillman and his P.C., Dobbs Ferry Emergency Medicine, P.C., moved for summary judgment. The motion was supported by affirmations from an Emergency Room doctor, Dr. Gregory Mazarin, who is an attending physician in the Department of Emergency Medicine at Montefiore Medical Center. He first details his understanding of the various departures alleged against Dr. Stillman and then opines that nothing that Dr. Stillman did or did not do caused any injury to Mr. Umejei. In other words, none of the alleged departures proximately caused any harm. The reason for this opinion is that Dr. Mazarin believes that the plaintiff was never a candidate for tPA.

Dr. Mazarin discusses the time line on the morning of March 22 and points out, as was discussed earlier, that he would never give tPA without a scan to rule out a hemorrhagic stroke. Dobbs Ferry did not have the capability early that morning to perform a scan or provide treatment to Mr. Umejei, and therefore he opines that Dr. Stillman made the best possible decision to take Mr. Umejei to a dedicated stroke center, New York Presbyterian Hospital. The decision there with regard to the use of tPA was still within the three-hour period and was, he believes, correct. Dr. Mazarin also opines that there is every reason to believe that if the plaintiff had

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[2]Although not found in the lengthy papers presented to the Court, at oral argument I did learn that Mr. Umejei was admitted to New York Presbyterian Hospital and that later that night into the earlier morning hours of March 28, he suffered a serious left-sided stroke that has left him disabled today.

remained in Dobbs Ferry, a different decision would not have been reached, since in all likelihood Mr Umejei's symptoms would have improved in the same manner as they did at New York Presbyterian.

Dobbs Ferry made a similar motion for summary judgment, responding to the claims plaintiff made against it, such as the failure to perform a scan of plaintiff's head and the failure to timely obtain neurological and radiological consults. They attempted to do this with an affirmation from Dr. Thomas Kwiatkowski, who is board certified in both Internal Medicine and Emergency Medicine and is now Medical Director for North Shore Long Island Jewish Center for Emergency Medical Services. He also participated in a Special Writing Group for the American Heart Association that developed guidelines and protocols for the use of thrombolytic agents.

Dr. Kwiatkowski's opinion is similar to that of Dr. Mazarin. He opines that the plaintiff was simply never a candidate for tPA therapy. Therefore, the transport of him to New York Presbyterian Hospital, as opposed to attempting to provide treatment for him at Dobbs Ferry, was not a proximate cause of any of Mr. Umejei's injuries. In this regard, he points out the events earlier mentioned, emphasizing that the plaintiff started improving while he was still at Dobbs Ferry. He also alludes to the fact that Mr. Umejei could get in and out of Dr. Stillman's car without assistance and that there was no change in his symptoms during the drive to the hospital. He also points out that during his triage in the Emergency Room at New York Presbyterian, his symptoms were minor, as he says they were at Dobbs Ferry.

Therefore, he opines that the decision by Dr. Wolf and Dr. Birnbaum not to administer tPA within the three-hour time frame was absolutely the right decision. In other words, tPA was simply not called for in light of all the circumstances at both hospitals. Such being the case, any of the enumerated departures against the hospital were all immaterial on the issue of causation.

Pursuant to the thorough and detailed affirmations by knowledgeable physicians, I find in the first instance that the moving defendants have made out a prima facie case for summary judgment. Therefore, the plaintiff must take on the burden of showing that there are in fact issues to be tried. The shorthand answer is that they succeed in carrying this burden. They do this by effectively presenting an alternative view with regard to the administration of tPA, as well as the obligations of a hospital when it encounters an individual who displays symptoms of a stroke in the manner in which Mr. Umejei presented.

The plaintiff provides two affirmations; the first is from Dr. Deborah J. White, who is board certified in Emergency Medicine and is also affiliated, as is Dr. Mazarin, with Montefiore Medical Center. The other affirmation is from a highly experienced and knowledgeable physician, Dr. Steven R. Levine, a board certified neurologist with a sub-specialty in Vascular Neurology. He has been a principal investigator in numerous clinical research projects in cerebrovascular disease and stroke, including one that involved a trial for the use of tPA for stroke victims that led to the FDA's approval of tPA in 1996, and has written approximately 150 peer review articles and 60 book chapters in this area of stroke and cerebrovascular disease.

Both of these physicians give convincing accounts of why they believe departures occurred here by Dr. Stillman and the hospital, departures which materially affected the health and welfare of Mr. Umejei. Counsel for the plaintiff argues that defendants' view that tPA was contraindicated later on at New York Presbyterian Hospital, an opinion he and his experts agree with, should not be conclusive on whether tPA should have been utilized earlier that morning while Mr. Umejei was still at Dobbs Ferry Community Hospital. Counsel takes this position because he urges that the Dobbs Ferry defendants were faced with an entirely different presentation and set of circumstances than those that existed later on at New York Presbyterian Hospital.

Counsel for the plaintiff then goes through his own time line as to what occurred at Dobbs Ferry based on depositions given by various witnesses in the Emergency Room early that morning and the records. Here it is pointed out that Dr. Stillman probably examined Mr. Umejei at about 6:30 a.m. and at about that time Nurse Mona Barth, assigned to the Emergency Room, asked Dr. Stillman if he needed tPA for Mr. Umejei. She was told no. It is also pointed out that as early as 7:00 a.m. Nurse Kreler came on her shift. She relates that plaintiff literally bumped into her chair because his left arm seemed to be hanging and he was limping with his left leg. She has testified that Mr. Umejei was not registered as a patient in the Emergency Room when Dr. Stillman and Mr. Umejei were there, at about 7:00 a.m.

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Counsel also discusses the three inclusion criteria for the administration of tPA at Dobbs Ferry: (1) the individual must be 18 years or older; (2) there must be a clinical diagnosis of an ischemic stroke causing a measurable neurological deficit presumed to be due to a cerebral ischemia after a CT scan has excluded hemorrhage; and (3) the time of onset must be less than 180 minutes before the treatment has begun. Counsel argues that clearly here, Mr. Umejei met the first and third criteria and needed a clinical diagnosis of an ischemic stroke to be made as soon as possible. If a hemorrhagic stroke could be ruled out, the criteria would be met for the administration of tPA.

Dr. White and Dr. Levine together emphasize that the time line here is at the heart of this case and further that time is of the essence in dealing with a potential stroke. In other words, although three hours may be the window for administering tPA, according to Dr. Levine, "the sooner within the three-hour window tPA is given, the greater the chance the patient has to benefit from the medicine." Dr. Levine also refers to the phrase that "time is brain," which means that the importance of a prompt assessment of a potential stroke patient cannot be overstated. This is so, he says, because it has been shown that in strokes caused by blockages by blood clots, the sooner those clots can be lysed or dissolved by the timely administration of an agent like tPA, the sooner an improving prognosis occurs in a substantial number of cases.

Dr. White also agrees that speed in treating a stroke is essential. Therefore, it is a departure from accepted standards of emergency medicine to allow a patient,

such as Mr. Umejei, to go from 6:20 a.m. to 6:30 a.m. to 7:45 a.m. before being seriously evaluated for a stroke. She goes on to say that accepted practice would have required Dr. Stillman to initiate a Stroke Page as soon as possible. In other words, he should have used the protocol that the Hospital had in place, which meant that simultaneous calls would be made to a CT scan technician, a radiologist and a neurologist. These names and phone numbers were posted in the Emergency Room for exactly this purpose. Dr. White believes that if this had been done, the necessary individuals would have been there by about 7:30 a.m. and a CT scan then could have been done to rule out a hemorrhage. This could have been completed approximately 45 minutes to an hour before it was completed at New York Presbyterian Hospital.

Dr. White also enumerates other departures which include Dr. Stillman's failure to do a thorough examination, his failure to call an ambulance, the Hospital's failure not to document Mr. Umejei's presence in the Emergency Room or to triage him there, and finally the failure to put into effect the hospital's stroke protocol. As to whether this would have made a difference, she says that she believes that it would have. Her position is that at no time until the completion of the work-up at Presbyterian Hospital was there enough information to exclude plaintiff at that time from receiving the tPA. She adds that if Mr. Umejei had stayed at Dobbs Ferry and the protocol had been utilized, then in all probability he would have and should have been given tPA at about 7:30 a.m.

As discussed earlier, Dr. Levine makes it clear that every minute here made a difference. He says that whereas the decision made at New York Presbyterian not to administer tPA was within accepted medical practice, the situation facing Dr. Stillman and Dobbs Ferry Community Hospital was very different. He believes, like Dr. White, that if Mr. Umejei had stayed at Dobbs Ferry, the tPA could have been given one hour earlier between 7:30 and 8:00 a.m. when there was nothing to show that his symptoms were rapidly improving. Finally, Dr. Levine says that research shows that patients treated with tPA within the first hour after the onset of stroke symptoms are reportedly two to four times more likely to recover with minimal or no disability than those treated at the three-hour mark.

In reply, both defense counsel take issue with plaintiff's reading of the time line at Dobbs Ferry. Counsel suggests that Mr. Umejei's condition between 7:30 a.m. and 8:00 a.m. would have been the same at Dobbs Ferry as it was at New York Presbyterian. However, no one really knows that, and it would be speculative to assume it because there are many discrepancies as to what occurred and when and also because there is no precise documentation of what precise symptoms Mr. Umejei was experiencing at precise times at either hospital. All we really know is that his symptoms were beginning to improve from the time he arrived at New York Presbyterian.

Contrary to what defense counsel say, pointing to Dr. Kwiatkowski's opinion that Mr. Umejei's symptoms were only minor while at Dobbs Ferry, plaintiff's counsel

says the evidence does not necessarily reflect that. The fact is that Mr. Umejei did not remain at Dobbs Ferry and the Hospital's protocol was never utilized. We do know that between 7:00 and 7:15 a.m., while still in the Emergency Room at Dobbs Ferry, Mr. Umejei had a left leg limp and his left arm and hand were hanging heavily.

Counsel for Dobbs Ferry also cites two cases which she says are relevant and support the defendants' position. However, I do not agree. The main one, *Myers v. Ferrara*, 56 AD3d 78 (2nd Dep't 2008), involves a complicated fact pattern. The court found there that the opinions offered by the plaintiff's experts simply did not deal with the actual happenings as testified to by the doctors who were present during the various procedures that were done on the decedent before he became brain dead. The court found there that the plaintiff's experts were merely speculating and, more significantly, that their speculation ran contrary to the facts.

Myers concerned the tragic death of a man stemming from meat that had become impacted in his esophagus, which probably caused a perforation there that could not be located by the surgeon who had done an esophagoscopy to look for a perforation. The court opined that this failure could not be attributed to an earlier pulmonologist (and moving defendant) who had suspected this diagnosis but who had been unable to talk to the surgeon, who was in another hospital. The appellate court reasoned that any discussion before the esophagoscopy was done was irrelevant because the surgeon performing it had said it would have made no difference in what he did and his ultimate inability to find a perforation.

However, that is not the situation here. Here, both sides have legitimate interpretations of the relevant time lines, each one supported by some combination of sworn testimony, medical records, and expert opinions. Thus, it is not speculative to say here, as do the plaintiff's experts, that the probability is such that earlier action by Dr. Stillman and Dobbs Ferry could have led to a much earlier administration of tPA, which would then have resulted in an outcome far more favorable to the plaintiff. Those experts differ in their opinions from those given by the defendants' experts, which was that no different treatment would have been given if the patient had remained at Dobbs Ferry. This is a legitimate issue to be resolved at trial, whether or not Mr. Umejei was a candidate for tPA if he had remained at Dobbs Ferry. In other words, issues exist relating to what precisely were Mr. Umejei's symptoms while at Dobbs Ferry, how might they have changed, and would it have been more likely than not that if he had remained there he would have been administered medication that could have avoided the much more serious stroke that occurred about 24 hours later.

In a second case cited by counsel for Dobbs Ferry, *Sawczyn v. Red Roof Inns, Inc.*, 15 AD3d 851 (4th Dep't, 2005), *lv denied* 5 NY3d 710, there is a superficial similarity to the facts here in that both cases involve the administration of tPA therapy for a stroke. However, the significant distinguishing factor that led the court in *Sawczyn* to conclude that the plaintiff's expert opinion was speculative was that it was unknown when the stroke began. Since there was the three-hour window

period to factor in, no one could say without speculation whether the administration of an anticoagulant would have made any difference. Here, there is no doubt in anyone's mind when Mr. Umejei's symptoms began and what the three-hour window period was. So whatever speculation there is here is shared in by the experts for all sides, and it concerns what Mr. Umejei's symptoms actually were at Dobbs Ferry before leaving for New York City (which is not really speculative but rather interpretative of the evidence) and what his symptoms would have been and what would have been the treatment for those symptoms if he had not left the first facility.

All the experts here are opining as to what might have occurred. Therefore, the motions for summary judgment made by the various defendants are all denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Joshua I. Stillman, M.D., and Dobbs Ferry Emergency Medicine, P.C. (mot. seq. 003) is denied; and it is further

ORDERED that the motion for summary judgment by defendants Riverside Health Care System, Inc. and the Dobbs Ferry Hospital Association s/h/a Community Hospital at Dobbs Ferry (mot. seq. 004) is denied; and it is further

ORDERED that all counsel shall appear for a pre-trial conference on Wednesday, October 5, 2011 at 11:00 am prepared to discuss settlement and select a firm trial date.

FILED
AUG 01 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 29, 2011

JUL 29 2011

J.S.C.

ALICE SCHLESINGER