

<b>Katz v Sen</b>
2012 NY Slip Op 31508(U)
June 1, 2012
Sup Ct, NY County
Docket Number: 115075/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS  
*Justice*

PART 6

KATZ, ILENE

- v -

SEN, CHANDRA DATH, M.D.

INDEX NO. 115075/07

MOTION DATE 3-12-12

MOTION SEQ. NO. 002

The following papers, numbered 1 to 26, were read on this motion to for Summary judgment

Notice of Motion / Order to Show Cause – Affidavits – Exhibits \_\_\_\_\_

No(s). 1-19

Answering Affidavits – Exhibits \_\_\_\_\_

No(s). 20-24

Replying Affidavits \_\_\_\_\_

No(s). 25-26

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

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

**FILED**

JUN 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/1/12

*[Signature]*  
JOAN B. LOBIS, J.S.C.

1. CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
2. CHECK AS APPROPRIATE: MOTION IS  GRANTED  DENIED  GRANTED IN PART  OTHER  
3. CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  
                           DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6

-X

ILENE KATZ,

Plaintiff,

Index No. 115075/07

-against-

Decision and Order

CHANDRANATH SEN, M.D., PETER CONSTANTINO,  
M.D., ALAN JACOBS, M.D., WEILL CORNELL, MRI  
and JOHN DOES #1-5,

F I L E D

Defendants.

JUN 07 2012

-X

JOAN B. LOBIS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 001, 002, and 003 are hereby consolidated for disposition.

Defendants Alan Jacobs, M.D. (Motion Sequence Number 001); Chandranath Sen, M.D., and Peter Costantino, M.D. s/h/a Peter Constantino, M.D. (Motion Sequence Number 002); and New York and Presbyterian Hospital ("NYPH") s/h/a Weill Cornell, MRI (Motion Sequence Number 003) move, by orders to show cause, for orders granting them summary judgment dismissal of the complaint against them pursuant to C.P.L.R. Rule 3212.

This medical malpractice case arises out of the diagnosis of a tumor on plaintiff's pituitary gland and the subsequent procedure performed to remove the tumor. In the summer of 2005, plaintiff—a middle-aged nurse who had undergone a hysterectomy at age 38—was referred to Dr. Jacobs, an endocrinologist, by her psychiatrist, Stuart Adelson, M.D., due to a history of depression and recent blood work indicating that she might have a pituitary gland abnormality. The pituitary gland produces and regulates some hormones, including the thyroid gland, and is located at the base of the skull behind the nasal cavity. Plaintiff saw Dr. Jacobs in July and August 2005. Dr. Jacobs suspected that plaintiff had a pituitary tumor based on her clinical presentation and

laboratory test results. Dr. Jacobs ordered a magnetic resonance imaging (“MRI”) examination of plaintiff’s brain. Plaintiff had the MRI at an NYPH radiology facility. Robert Zimmerman, M.D., a radiologist, interpreted the MRI. Dr. Zimmerman saw a 5 millimeter focus in the right side of the pituitary gland. His findings in the MRI report were that plaintiff had an area of hypointensity that was most typical for pituitary microadenoma (a tumor less than 10 millimeters in diameter), but he noted that a small area of pituitary hemorrhage without tumor was not excluded. Dr. Jacobs reviewed the MRI with plaintiff and referred her to a neurosurgeon for possible surgical treatment of the tumor.

On August 22, 2005, plaintiff saw Dr. Sen, a neurosurgeon. Dr. Sen discussed the MRI findings with plaintiff and the options of removing the tumor, starting thyroid medication, and/or observing and monitoring the tumor. Dr. Sen advised plaintiff that the tumor may be difficult to find during the surgery due to its small size. Dr. Sen’s notes reflect that he also explained other risks of surgical intervention, including hyperpituitarism, cerebral spinal fluid leak, and hemorrhage. Dr. Sen suggested that plaintiff take some time to think about the surgery. Dr. Sen and Dr. Jacobs had a conversation over the telephone, while plaintiff was present before Dr. Sen; after that conversation, Dr. Sen again reiterated that plaintiff may want to consider nonsurgical intervention. Plaintiff decided that she wanted the surgery to remove the tumor while it was still small.

Also on August 22, 2005, plaintiff saw Dr. Costantino, an ear nose and throat surgeon who was consulted to assist Dr. Sen during the surgery. Dr. Costantino explained the methods of how the surgery could be performed in order to get to the area of the pituitary gland. He testified that the two approaches are endoscopic (through one nostril) or sublabial (open), and that he explained

the risks and benefits of each approach to plaintiff. Dr. Costantino testified that one of the components of the endoscopic procedure is that, due to the removal of the middle turbinate during the procedure, the patient has to come in to the office approximately once a week for three to six weeks after the surgery to have the area examined and cleaned, so that the patient does not have scarring and sinus infection problems in the future. Plaintiff opted for the endoscopic approach.

On September 21, 2005, Drs. Sen and Costantino performed the surgery to remove the tumor from plaintiff's pituitary gland. They did not find a tumor during the surgery. Some tissue that appeared abnormal was removed during the procedure and was biopsied; the biopsy report was negative for a tumor. On September 25, 2005, plaintiff had a repeat MRI, and no tumor was shown. Dr. Sen testified at his deposition that the suctioning used during surgery to maintain proper visualization of the surgical field could have inadvertently removed the tumor, given its small size.

On September 27, 2005, plaintiff followed up with Drs. Sen and Costantino; Dr. Costantino debrided the area of the surgical incision. Plaintiff testified that Dr. Costantino told her that Dr. Sen never believed that plaintiff had a tumor. She testified that when she later questioned Dr. Sen, he told her that he felt that the misdiagnosis of the tumor was due to the radiology facility where her MRI had been performed. Plaintiff continued to follow up at Dr. Costantino's office on October 4, 2005; November 8, 2005; December 13, 2005; and December 15, 2005. At some point, plaintiff developed some scar tissue within the nasal cavity, which required removal and treatment with a gel foam dressing. On November 7, 2011, plaintiff saw an endocrinologist, Pamela Freda, who was recommended to her by Dr. Sen. Dr. Freda's notes from that day indicate that she spoke with Dr. Sen, who told her that, in retrospect, he never should have agreed to perform the surgery

because he had felt that plaintiff's findings were negative for a tumor but he had felt pressured to perform the procedure. On December 24, 2005, plaintiff telephoned Dr. Costantino's office and complained of symptoms consistent with a sinus infection; she was prescribed antibiotics and instructed to return to Dr. Costantino on January 10, 2006, but she failed to do so.

In February 2006, plaintiff had sinus surgery by Stacy Silvers, M.D., to correct an area of her sinuses that had been blocked off by scar tissue. Plaintiff testified that she developed hemicrania migraines, which her physician believed had been caused by trauma during the procedure to remove the suspected pituitary tumor. She further testified that her depression worsened after the September 21, 2005 procedure, to the point where in May 2006, she was admitted to the hospital for two weeks for electroconvulsive therapy. Plaintiff testified that she continues to take Prozac.

Plaintiff's complaint alleges that either the procedure for the MRI was flawed, the images themselves were flawed, or defendants' reading of the MRI was flawed. She alleges that as a result of defendants' negligence, she underwent unnecessary surgery and was damaged thereby. In plaintiff's bills of particulars, she alleges that defendants misdiagnosed a pituitary tumor and failed to treat her persistent sinus infection and pain; that NYPH and those administering the MRI failed to follow "pituitary protocol" when taking the MRI; that prior to the surgical procedure, Dr. Sen never mentioned to plaintiff that he had concerns about the pre-operative MRI or that the MRI did not show an adenoma; and that Dr. Jacobs neglected her post-surgical endocrinology care by not returning her telephone calls and not ordering necessary blood tests. She contends that Dr. Sen should have ordered a repeat pre-operative MRI prior to performing the procedure to remove the tumor. Plaintiff alleges that her unnecessary surgery resulted in severe headaches; lingering

headaches; continuing depression; hot flashes; cold sweats; feeling faint and shaky; and hemicrania continua (migraines).

Defendants now move for summary judgment. As established by the Court of Appeals in Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) and Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and as has recently been reiterated by the First Department, it is “a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law.” Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep’t 2012), citing Winegrad, 64 N.Y.2d at 853. In a malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

Dr. Jacobs submits an affirmation from Leon Zacharowicz, M.D., a board-certified neurologist. Dr. Zacharowicz opines that, given plaintiff’s blood work results, list of medications, medical history, and presenting complaints, Dr. Jacobs appropriately considered that hypopituitarism might be contributing to plaintiff’s symptom complex and ordered further blood work. Once Dr.

Jacobs received the results of the blood work, he properly determined the results to be consistent with a lesion in the pituitary gland and referred plaintiff for an MRI. Then, once the results of the MRI and plaintiff's blood work were consistent for a mass in her pituitary gland, Dr. Jacobs properly recommended that plaintiff see a neurosurgeon for evaluation of the mass. Dr. Zacharowicz opines that Dr. Jacobs' and Dr. Sen's impression that plaintiff had a microadenoma was not a "misdiagnosis," and that Dr. Sen's inability to locate the mass in no way excludes the possibility that it existed. He opines that Dr. Jacobs would have committed medical negligence had he not suggested that plaintiff undergo a neurosurgical evaluation when confronted with radiological, hormonal, and clinical evidence consistent with a pituitary mass. Dr. Zacharowicz opines that Dr. Jacobs' role in plaintiff's care was quite limited; that his work-up was appropriate; and that his impressions and plan were more than reasonable. Further, the medical notes reflect that both Drs. Jacobs and Sen offered plaintiff nonsurgical options. Dr. Zacharowicz maintains that the standard of care required that the surgical options be presented to plaintiff. He opines that plaintiff's allegations that Dr. Jacobs failed to order necessary postoperative blood tests or return her phone calls are not correlated with any alleged injury. In summary, Dr. Zacharowicz opines that Dr. Jacobs' treatment neither departed from the standard of care nor caused plaintiff's alleged injuries; rather, he appropriately referred her for a neurosurgical evaluation for what appeared to be a pituitary mass lesion that could conceivably affect both her pituitary gland and brain if it continued to grow.

In opposition to Dr. Jacobs' motion (and indeed to all three motions for summary judgment) plaintiff submits no expert testimony. Plaintiff's attorney argues that Dr. Jacobs knew, or should have known, that a tumor may not exist and should have so-advised plaintiff. Plaintiff's attorney asserts that Dr. Jacob "helped induce" plaintiff to decide on options for surgery by failing

to advise her of the possibility that no tumor existed and by indicating to her that the tumor was something that would eventually necessitate removal. Plaintiff's attorney argues that expert testimony is not required to prosecute a claim for lack of informed consent. He contends that the record demonstrates that there was a reasonable chance that no tumor existed; that this information was known to defendants and not disclosed to plaintiff; and that had plaintiff known this information, she would not have undergone the procedure. Plaintiff submits her own affidavit, in which she states that Dr. Jacobs never informed her of the possibility that there was no tumor, and that the only question was when she would have the surgery, not if she would have the surgery. She states that had she been advised that a tumor was not necessarily present, she never would have had the surgery but would have waited and had additional studies done.

In reply, inter alia, Dr. Jacobs points out that in neither the complaint nor the bill of particulars as to Dr. Jacobs has plaintiff ever asserted a cause of action sounding in lack of informed consent.

Dr. Jacobs has made out a prima facie case for summary judgment in his favor by proffering expert medical opinion evidence that he neither departed from the standard of care nor proximately caused any of plaintiff's alleged injuries. Plaintiff has failed to rebut this showing. Her purported claim against Dr. Jacobs sounding in lack of informed consent has not been properly pled. See Jolly v. Russell, 203 A.D.2d 527, 528 (2d Dep't 1994) ("[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence.") (citations omitted). Further, the court notes that Dr. Jacobs did not perform a "procedure which involved invasion or disruption of the integrity of the body." Pub. Health L. §

2805-d(2). Assuming, arguendo, that plaintiff had properly raised a claim for lack of informed consent against Dr. Jacobs, the claim as stated in her opposition papers is unsupported by any credible medical evidence. See Orphan v. Pilnik, 15 N.Y.3d 907, 908 (2010), Evart v. Park Ave. Chiropractic, P.C., 86 A.D.3d 442, 443 (1st Dep’t), appeal denied, 17 N.Y.3d 922 (2011). Accordingly, Dr. Jacobs is entitled to summary judgment dismissing the complaint against him.

Drs. Sen and Costantino submit an expert affidavit from Robert Carter, M.D., a board-certified neurosurgeon. Dr. Carter maintains that it was within the standard of care for Dr. Sen to rely on Dr. Jacobs’ findings and the MRI results, both of which were consistent with a pituitary microadenoma, and that the standard of care did not require a further MRI study. Further, he opines that Dr. Sen properly explained to plaintiff how the surgery would be performed and the risks and benefits of the surgery and not performing the surgery. He opines that Dr. Sen provided plaintiff with informed consent as to her treatment options, as Dr. Sen specifically advised plaintiff that she could wait and observe the tumor as an alternative to surgery, which plaintiff so-acknowledged. Dr. Carter further opines that Dr. Costantino appropriately advised plaintiff that there are two approaches to pituitary surgery and properly informed her of the risks and benefits of each, which comported with the standard of care. Dr. Carter opines that plaintiff’s claim that Drs. Sen and Costantino provided improper treatment is without merit, as she presented with findings consistent with a pituitary microadenoma on August 22, 2005. He opines that the two physicians’ surgical technique was in keeping with the standard of care, and that removal of a tumor via suctioning can and does occur with extremely small tumors and does not represent a departure from the standard of care. Dr. Carter concludes that it is his opinion that Dr. Sen’s and Costantino’s treatment was in accordance

with accepted standards of medical practice and that nothing that they did or did not do proximately caused plaintiff's alleged injuries.

In opposition, plaintiff's attorney argues that Drs. Sen and Costantino knew that there was a risk that the tumor did not exist and failed to disclose that information to plaintiff, and that this failure rendered plaintiff unable to make a knowledgeable evaluation concerning the surgery. In her own affidavit, plaintiff sets forth that neither physician informed plaintiff that there was a possibility that her tumor did not exist, and again, that had plaintiff been advised that a tumor was not necessarily present, she never would have had the surgery but would have waited and had more studies done.

In reply, Drs. Sen and Costantino submit a supplemental affidavit from Dr. Carter, in which he opines that based on plaintiff's preoperative clinical presentation and her diagnostic and radiological studies, it would not have been within the standard of care for Dr. Sen or Costantino to advise plaintiff of the possibility that no tumor was present, as there was no basis for such a finding prior to the surgery.

Again, the court notes that plaintiff's complaint does not raise a separate cause of action sounding in lack of informed consent against Drs. Sen or Costantino; therefore, plaintiff's contention that she has a meritorious cause of action sounding in lack of informed consent is quite dubious. Even assuming, arguendo, that plaintiff had pled a cause of action sounding in lack of informed consent, she has not submitted expert opinion evidence on the issue of the sufficiency of the information disclosed to her, which is a requirement for maintaining such a cause of action in

the face of defendants' expert opining that Drs. Sen and Costantino provided plaintiff with sufficient information to satisfy the requirements of informed consent. Moreover, she has not submitted expert opinion evidence on the issue of whether there was, in fact, no tumor. Plaintiff has failed to rebut these defendants' showing of entitlement to summary judgment on the cause of action sounding in medical malpractice; accordingly, Drs. Sen and Costantino are entitled to summary judgment dismissal of the complaint against them.

Plaintiff's brain MRI was performed at NYPH and interpreted by radiologist Dr. Zimmerman. NYPH argues that the MRI brain study conformed in all respects with good and accepted neuroradiology practice. NYPH submits an affirmation from Thomas P. Naidich, M.D., a board-certified diagnostic radiologist. In addressing plaintiff's allegation that Dr. Zimmerman failed to follow proper pituitary MRI study protocols, having reviewed the MRI study, Dr. Naidich opines that the spacing that Dr. Zimmerman employed between the images, the thickness of the images taken, the timing of the contrast, the pixel resolution, and the tilting of the images collectively establish that proper pituitary MRI study protocols were followed. With regard to the contrast, specifically, Dr. Naidich sets forth that Dr. Zimmerman used "Dynamic Imaging," which means that contrast was passed through the pituitary gland to capture sequential imaging of the pituitary stalk, the center of the pituitary gland, the right and left lateral lobes of the pituitary gland, and the entire pituitary gland. Dr. Naidich opines that the Dynamic Imaging technique permitted Dr. Zimmerman to obtain clearly delineated images of each section of the pituitary gland, which conformed with good and accepted medical practice. Further, Dr. Naidich opines that Dr. Zimmerman's interpretation of the MRI conformed with good and accepted practice, in that the sequential images show a 5 millimeter zone of abnormal intensity and enhancement, which is

properly interpreted as a microadenoma. He opines that Dr. Zimmerman properly reported that the findings were "most typical" for pituitary microadenoma, while also noting the possibility of a pituitary hemorrhage. Dr. Naidich opines that nothing Dr. Zimmerman did or did not do proximately caused any injury to plaintiff.

Plaintiff's attorney sets forth that plaintiff has no objection to NYPH being dismissed as a defendant, as long as the other defendants are precluded "from pointing any fingers" at NYPH. Given the above decision with respect to the other defendants, and especially given plaintiff's failure to rebut NYPH's prima facie showing that there was no departure from the standard of care nor any proximate cause with respect to the MRI study performed by Dr. Zimmerman, NYPH is entitled to summary judgment dismissal of the complaint against it. Accordingly, it is hereby

ORDERED that defendants' respective motions (Motion Sequence Numbers 001, 002, and 003) for summary judgment are granted in their entirety; the complaint is dismissed against Alan Jacobs, M.D., Chandranath Sen, M.D., Peter Costantino, M.D. s/h/a Peter Constantino, M.D., and New York and Presbyterian Hospital ("NYPH") s/h/a Weill Cornell, MRI, and as such, there are no named defendants remaining in this action; and the clerk is directed to enter judgment accordingly.

Dated: June / , 2012

**FILED**

ENTER:

JUN 07 2012

  
**JOAN E. LOBIS, J.S.C.** NEW YORK  
COUNTY CLERK'S OFFICE