

**Kershaw v Hospital for Special Surgery**

2012 NY Slip Op 31849(U)

July 9, 2012

Supreme Court, New York County

Docket Number: 150416/2007

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
*Justice*

**IA** PART 16

Index Number : 150416/2007  
KERSHAW, BRUCE  
vs.  
HOSPITAL FOR SPECIAL SURGERY  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

**FILED**

JUL 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 9, 2012

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

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

-----X  
BRUCE KERSHAW,

Plaintiff,

Index No. 150416/07  
Motion Seq. No. 002

-against-

HOSPITAL FOR SPECIAL SURGERY, PETER  
FRELINGHUYSEN, FEDERICO PABLO GIRARDI,  
NEW YORK UNIVERSITY MEDICAL CENTER  
HOSPITAL FOR JOINT DISEASES, and  
JOSHUA STEINVURZEL,

Defendants.

**FILED**

JUL 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
SCHLESINGER, J.:

Bruce Kershaw, the plaintiff in this medical malpractice action, has sued two hospitals for what he alleges is inaction by both, leading to injury. His counsel filed a note of issue on August 24, 2011, and Judge Lobis, who had this matter before this Court, extended the time to move for dispositive relief to November 14, 2011. The motion here made by NYU Hospital Centers s/h/a New York University Medical Center Hospital for Joint Diseases (NYU) was timely made three days short of the deadline, on November 11, 2011.

Some history of the plaintiff's neck and spine condition should be discussed here. In 1994 Mr. Kershaw had surgery on his cervical spine at co-defendant Hospital for Special Surgery (HSS). In 2003 Mr. Kershaw went back to HSS through 2004, but that hospital declined to do further surgery.

It was not until February 2005 that the plaintiff sought a second opinion from NYU. Specifically, on February 11, 2005, Mr. Kershaw was seen by nonparty Fellow Dr. Anthony Petrizzo, who made a diagnosis of cervical myelopathy and advised the plaintiff that he was not a candidate for further spine surgery. Instead, Dr. Petrizzo recommended conservative treatment and referred Mr. Kershaw to NYU's Pain Management, Neurology

and Hand Clinics. The idea behind these referrals was to try to restore some function through modalities less risky than surgery.

Not happy with this kind of treatment, plaintiff went for a third opinion to Mt. Sinai Hospital on April 21, 2005. Finally, a doctor there, Dr. Andrew Hecht, agreed to perform additional cervical spine surgery. The procedures were performed in December 2005 in two stages.

According to the moving defendant NYU, Mr. Kershaw claims that NYU should have offered surgery to him, a discectomy or surgical removal of a herniated disc and instrumented fusion, among other procedures. He further claims that if NYU had performed these procedures when he first appeared there, his spinal stenosis would have improved. Specifically, Mr. Kershaw says that NYU's failure to treat him surgically led to atrophy of his arm and shoulder muscles and weakness and numbness in his hands and upper extremities. Additionally, he alleges that NYU failed to order appropriate EMG studies, myelograms, MRI's and x-rays or to coordinate with the other clinics so as to obtain all of his relevant records.

In support of its motion NYU submits an Affirmation from Dr. John Olsewski, a Board Certified Orthopedic Surgeon since 1996 (Exh M to motion). Dr. Olsewski is also an Oral Examiner for the American Board of Orthopedic Surgery and is in active practice today. He states that he has reviewed all the records from the various hospitals and all the deposition testimony. His opinion, based on a reasonable degree of medical certainty, is that the care and treatment rendered to Mr. Kershaw by NYU was at all times in accordance with good and accepted medical, orthopedic and spinal surgery practices. Further, this doctor opines that nothing that NYU did or did not do caused any injury to Mr. Kershaw.

In his Affirmation, Dr. Olsewski details the various records and discusses them in some depth. His overall opinion is that Mr. Kershaw had a very high risk of permanent paralysis from further cervical surgery. He believes that all the treating doctors at NYU "appropriately worked up the patient, took appropriate medical and surgical histories, performed complete and thorough physical examinations, and considered all possibilities including surgery, conducted over an extended course of clinic visits spanning several months and made a reasonable and informed judgment call not to offer the patient further spinal surgery given the severity of his cervical spine disease and the high likelihood that surgery would make matters worse, not better." (¶4).

As stated above, Dr. Olsewski analyzes this case in a very detailed manner. He discusses at some length the surgical and other treatment that Mr. Kershaw received from HSS before going to NYU. He also discusses the subsequent surgery performed at Mt. Sinai Hospital by Dr. Hecht. Dr. Hecht performed his surgery in two stages; stage 1 on December 6, 2005, was an anterior cervical discectomy and fusion, and stage 2 on December 8, 2005, consisted of a posterior cervical laminectomy and fusion.

Dr. Olsewski states that the fact that Dr. Hecht was willing to offer surgery to this patient despite the significant risks, which Dr. Hecht acknowledged, does not mean that any other surgeon who chose not to act as aggressively committed medical malpractice. Elsewhere in the motion, counsel points out that Dr. Hecht's records do not show that Mr. Kershaw regained any significant strength or function after the December 2005 surgery.

Finally, on the issue of causation, this surgeon notes that Mr. Kershaw was only a patient at NYU for about two months before seeking a third opinion from Mt. Sinai, and Mt. Sinai did not operate for an additional eight months. Based on these facts, Dr. Olsewski

opines that the plaintiff suffered no identifiable injury of any kind between February 2005 when he first presented to NYU and April 2005 when he pursued further options at Mt. Sinai.

The motion is further supported by reference to an examination before trial of the defendant Dr. Federico Pablo Girardi. Dr. Girardi, an orthopedic surgeon at HSS, explained why surgery was not indicated when he saw Mr. Kershaw in late 2004. He had reviewed the MRI's taken both before and after the plaintiff's 1994 surgery for severe cord compression, and he stated that additional films taken in 2005 showed no further changes.

I find, without any doubt, that NYU's moving papers, primarily through the thorough opinions expressed by Dr. Olsewski, make out a prima facie case for the relief sought.

I also have a cross-motion by the defendants HSS and Drs. Peter Frélinghuysen and Federico Girardi. It must be noted at the outset that this cross-motion was made on January 10, 2012, well beyond the November 14, 2011 extended deadline allowed by Judge Lobis. The defendants provide no reason whatsoever for their two-month delay in moving. However, they do seek to have their motion treated as timely pursuant to an exception in *Brill v. City of New York*, 2 NY3d 648 (2004), by arguing that the issues presented in their motion are the same as those presented in the motion by NYU. They also argue that, pursuant to CPLR §3211(a)(7), no valid cause of action for lack of informed consent has been asserted pursuant to Public Health Law §2805-d(2) because there was no invasion of the body nor any affirmative violation of the patient's physical integrity.

This cross-motion is supported by a thirteen-page Affidavit from the defendant Dr. Girardi (Exh A). This doctor is from Argentina, where he went to medical school and

completed his Residency. He completed Fellowships in Spinal Surgery here at HSS, at Memorial Sloan Kettering, and at New York Presbyterian Hospital at Weill Cornell Medical Center in the late 90's. Presently he is an Associate Professor of Orthopedic Surgery at Weill Medical College and an Associate Attending Orthopedic Surgeon at HSS.

At the outset, Dr. Girardi attempts to take full responsibility for any decisions vis-a-vis the plaintiff. He states in paragraph 20 of his Affidavit that the decision not to offer Mr. Kershaw a surgical option to address his symptoms was his alone in that he was the attending physician responsible for this patient at HSS during the period 2002-2004. He states that he saw and examined Mr. Kershaw on one occasion in October 2004 in the Spine Clinic and reviewed films with Dr. Frelinghuysen in late 2004.

Dr. Girardi states that Mr. Kershaw was suffering from myelomalacia, which in his case meant a morbid softening or necrosis of those parts of the spinal cord that control the shoulder muscles. He also had longstanding cord compression that affected his vascular supply, which led to the development of scar tissue in his cervical spine. Mr. Kershaw was also extremely weak with atrophied musculature.

Dr. Girardi explains that the cord compression was not a result of any condition that could be alleviated by further surgery. He states specifically that the June 25, 2004 films indicated that the cervical cord at the levels that controlled the shoulder muscle function was permanently scarred; therefore, no amount of surgery on the nerve root or cord compression from discs or narrowing foraminal spaces would improve his function. He asserts that in addition to all of this, since the plaintiff was not experiencing any pain or numbness, there was nothing to be gained from surgery. Finally, Dr. Girardi adopts all the opinions expressed in the main motion by Dr. Olsewski.

The opposition primarily relies on an Affidavit from Dr. Michael Murphy, a practicing Orthopedic Surgeon from Connecticut. Dr. Murphy has been board certified in this field since 1981 and has published over 20 articles in the field of spinal surgery, including the cervical spine. From 1984 until today he has been Co-Director of the Spine Surgery Service at Yale New Haven Hospital.

Dr. Murphy's opinions are somewhat conclusory. Also, he lumps together all the treatment given to the plaintiff beginning in 2002 at HSS and continuing to 2005 at Mt. Sinai with NYU in between. Further, he does not address the details of Mr. Kershaw's compromised anatomy, nor the physiology of his problems. In this regard, Dr. Girardi had explained clearly that he believed that the cord was so damaged that the surgery would not have improved anything. Even Dr. Hecht, who did do the surgery, seems to acknowledge that from an objective point of view he did not see any substantial neurological improvement, although he felt that subjectively Mr. Kershaw did feel better.

However, Dr. Murphy does clearly opine that surgery was necessary here, not so much to improve the plaintiff's condition, but rather to prevent a worsening of it. His opinion, to a reasonable degree of medical certainty, was that surgery for Mr. Kershaw was indicated as early as June 2003 when the diagnosis of cervical spondylitic myelopathy was made. Dr. Murphy also points out that at the HSS Spine Clinic, as far back as October 2004, the doctors recognized both the progressive nature of the patient's condition and that surgical intervention was necessary to prevent further deterioration.

Counsel for the plaintiff argues that Dr. Murphy's opinions are consistent with the treatment plan at HSS and the follow-through at Mt. Sinai. She also points out that even though Mr. Kershaw went to Mt. Sinai for a third opinion in April 2005, he still remained a



patient at NYU until September of that year. With respect to HSS, plaintiff's counsel argues that the cross-motion is clearly untimely and that the issues are certainly not identical to those raised by NYU because the two hospitals treated plaintiff at different times.

I have Replies from both the movant NYU and the cross-movants. NYU's papers are the most convincing. Counsel argues that the most Dr. Murphy is able to say against that hospital is that its failure to perform surgery was merely a disagreement between the patient and the physicians as to whether surgery was advisable. In other words, the decision by the physicians not to perform surgery was an exercise of judgment, not malpractice.

I find that NYU is entitled to summary judgment. Dr. Olsewski clearly opines that the doctors at NYU appropriately weighed all their options during the short period of time that they treated Mr. Kershaw and appropriately came to a judgment that the risks of surgical intervention outweighed any possible benefits. Since Dr. Murphy on behalf of the plaintiff never specifically separates the claims against NYU from those against HSS and, more significantly, never takes issue with the arguments regarding causation made by Dr. Olsewski, I find that the plaintiff has failed to present a sufficient challenge to the prima facie case made out by NYU. In other words, after NYU made out a clear prima facie case, the plaintiff in its opposition papers failed to carry its burden of establishing legitimate triable issues as to either malpractice or causation.

The question remains whether HSS should remain a viable defendant in this case. The answer is yes. First of all, under the authority of *Brill*, *supra*, the cross-motion was clearly untimely without any explanation, and counsel is simply wrong when he argues that

the cross-motion raises the same issues as the motion timely made by NYU. Differences necessarily exist because Mr. Kershaw was a patient at HSS for an extended time before he came to NYU. At NYU he was a patient from only February 2005 to September 2005, and he was also a patient at Mt. Sinai for much of that time. Therefore, the motion must be denied as untimely.

Even if the cross-motion were timely, it would still fail in that Dr. Murphy's opinions and counsel's arguments do create issues of fact with regard to the care and treatment given by the defendant doctors who treated the plaintiff at defendant HSS. Specifically in this regard, there are notations in the HSS records which indicate that Mr. Kershaw was being recommended for surgery and that concrete steps were being taken to arrange that surgery, including obtaining medical clearance for it. These facts certainly suggest that the HSS doctors did believe that surgery was appropriate. There are also pages from the HSS Pain Management Clinic from December 2004 which indicate that surgery was being scheduled to prevent further deterioration in Mr. Kershaw's cervical spine.

Therefore, I find that there is enough here with regard to the HSS defendants to create issues of fact as to whether surgery was advisable in 2003 and 2004 for the purpose of preventing the plaintiff's condition from worsening. Thus, in addition to finding the cross-motion untimely, I am also finding that issues exist as to the advisability of surgery that are sufficient to defeat the motion for summary judgment on the merits. However, as the plaintiff makes no effort whatsoever to support the claim for lack of informed consent in response to the cross-motion, that claim must be dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by NYU Hospital Centers s/h/a New York University Medical Center Hospital for Joint Diseases is granted and the Clerk is directed to sever and dismiss all claims against that defendant; and it is further

ORDERED that the Clerk is directed to sever and dismiss the cause of action sounding in lack of informed consent; and it is further

ORDERED that the cross-motion by defendants Hospital for Special Surgery, Dr. Peter Frelinghuysen, and Dr. Federico Pablo Girardi for summary judgment is otherwise denied; and it is further

ORDERED that counsel shall appear in Room 222 on August 8, 2012 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: July 9, 2012

**FILED**

**JUL 16 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

  
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J.S.C.  
**ALICE SCHLESINGER**