

**Barker v Laser Surgery Care, LLC**

2012 NY Slip Op 32413(U)

September 14, 2012

Supreme Court, New York County

Docket Number: 106714/08

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

BANKER, ROBERT

INDEX NO. 106714/08

MOTION DATE 6-26-12

- v -

LASER SURGERY CARE, LLC,  
ET AL.

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 20 were read on this motion to for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1-17

SEE MS.002: 22-24

18-20

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

SEP 20 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/14/12

JOAN B. LOBIS 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  
NEW YORK COUNTY: IAS PART 6**

-----X  
ROBERT BARKER,

Plaintiff,

Index No. 106714/08

-against-

**Decision and Order**

LASER SURGERY CARE, LLC, STEPHEN E.  
GOLDSTONE, M.D., BRIAN A. GOLDWEBER, M.D.,  
and ABBE J. CARNI, M.D.,

Defendants.  
-----X

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

**FILED**

**SEP 20 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

In Motion Sequence Numbers 002 and 003, defendants Abbe J. Carni, M.D., Stephen

E. Goldstone, M.D., and Laser Surgery Care s/h/a Laser Surgery Care, LLC ("Laser Surgery"),  
respectively, move, by order to show cause, for summary judgment pursuant to C.P.L.R. Rule 3212.

Plaintiff Robert Barker opposes the motions.

This case is one of a number of lawsuits commenced by patients of co-defendant Brian A. Goldweber, M.D.,<sup>1</sup> a former anesthesiologist. In 2007, Dr. Goldweber became the focus of a New York City Department of Health ("NYCDOH") investigation after a number of his patients were discovered to have contracted hepatitis B and C viruses after their treatment with him. The NYCDOH eventually determined that the manner in which Dr. Goldweber administered anesthesia caused a hepatitis outbreak among these patients; the hepatitis outbreaks involved some patients who were administered anesthesia by Dr. Goldweber on June 3, 2005 or August 14-15, 2006.

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<sup>1</sup> Co-defendant Brian A. Goldweber, M.D., has not appeared in this action and the claims against him were discharged in bankruptcy.

Plaintiff was Dr. Goldstone's patient. On April 25, 2007, Dr. Goldstone performed a procedure in which he ablated areas of high-grade dysplasia in plaintiff's anorectal canal, and Dr. Goldweber administered the anesthesia for that procedure, including intravenous propofol. According to Dr. Goldstone's deposition testimony, in early June 2007, NYCDOH informed him that it was investigating whether Dr. Goldweber had exposed patients to hepatitis. Dr. Goldstone then told plaintiff that he needed to be tested for hepatitis. On June 8, 2007, plaintiff presented to Dr. Goldstone's office for hepatitis testing. In a report dated June 12, 2007, the laboratory that tested plaintiff's blood reported that plaintiff had a positive hepatitis C virus ("HCV") signal-to-cutoff ("s/co") ratio of 5.87 and that plaintiff's blood was reactive for HCV antibodies. According to the laboratory report, it was noted that the patient's HCV s/co ratio was "low" (greater than 1.00 and less than 8.00), and that the Centers for Disease Control recommends supplemental testing such as recombinant immunoblot assay or nucleic acid amplified testing for confirmation of HCV. After the initial test results, Dr. Goldstone referred plaintiff to a liver specialist, Douglas Dieterich, M.D., who ordered further blood tests on June 18, 2007. The results from an HCV ribonucleic acid ("RNA") quantitative test, which measures the quantity of HCV in the blood, were that plaintiff's blood had less than 600 IU/mL of HCV, and the laboratory noted that the HCV RNA test's detectable lower limit is 600 IU/mL. The laboratory reported that it was unable to obtain results for HCV genotype testing due to insufficient or mutated virus or the presence of polymerase chain reaction ("PCR") inhibitors. On July 2, 2007, plaintiff returned to Dr. Dieterich. At his deposition, plaintiff testified that Dr. Dieterich told him that he had no clinical manifestations of HCV, there was no liver damage, and there was nothing to worry about at that time. On June 25, 2007, Dr. Goldstone noted in plaintiff's chart that he had spoken with Dr. Dieterich and that plaintiff's PCR results were negative

for hepatitis B and C. Dr. Goldstone noted that plaintiff probably had an old HCV infection, of an unknown age, that he cleared, or that plaintiff had a false positive for HCV. Dr. Goldstone testified at his deposition that none of the other patients treated before or after plaintiff on April 25, 2007, tested positive for HCV, except for one patient who had been previously diagnosed with HCV. Plaintiff did not receive any HCV treatment.

Plaintiff contends that defendants are liable for his having contracted HCV via Dr. Goldweber's administration of intravenous propofol during the April 25, 2007 procedure. On or about May 14, 2008, plaintiff commenced this lawsuit against Dr. Goldweber, Dr. Goldstone, and Laser Surgery, alleging claims sounding in medical malpractice, lack of informed consent, and negligent hiring. On or about August 5, 2009, plaintiff commenced a separate lawsuit against Dr. Carni, alleging similar claims (Dr. Goldweber had a contract with Dr. Carni's professional corporation to administer anesthesia to clients of Dr. Carni's professional corporation). The two actions were consolidated under the instant index number on or about July 28, 2011.

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. "Failure to make such prima facie showing requires a denial of the

motion, regardless of the sufficiency of the opposing papers.” Alvarez, 68 N.Y.2d at 324, citing Winegrad, 64 N.Y.2d at 853. “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez at 324, citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Expert opinion evidence is essential in a medical malpractice case to establish either the absence of or the presence of material issues of fact.

Defendants’ primary argument in favor of summary judgment is that plaintiff did not contract HCV on April 25, 2007; without evidence that he contracted HCV on April 25, 2007, defendants argue that plaintiff cannot establish departure or proximate cause. In support of his motion, Dr. Carni submits an affirmation from Alan Pollock, M.D., who affirms that he is a physician duly licensed to practice medicine in New York and board certified in internal medicine with a sub-speciality in infectious disease. Dr. Pollock states that he reviewed, inter alia, plaintiff’s pleadings; the pertinent medical records and laboratory records; NYCDOH’s final report; and the parties’ deposition testimony. With respect to the issue of whether or not plaintiff could have contracted HCV on April 25, 2007, Dr. Pollock opines that there is no medical evidence that plaintiff contracted HCV during the April 25, 2007 procedure. Dr. Pollock opines that plaintiff contracted HCV prior to the April 25, 2007 procedure, and most likely cleared it spontaneously some time before June 18, 2007. Dr. Pollock sets forth that HCV antibodies require six to eight weeks to develop after exposure to HCV. He sets forth that plaintiff’s low s/co ratio from the June 8, 2007 blood screening test required supplemental testing using a more sensitive method, such as

recombinant immunoblot assay to determine if the screening test was accurate and polymerase chain receptor (“PCR”) testing to determine whether the actual virus was still in the blood. Dr. Pollock sets forth that the PCR test results of the June 18, 2007 blood sample revealed no evidence of detectable virus in the blood, and that plaintiff never subsequently tested positive for HCV. Dr. Pollock opines that the presence of antibodies, together with the absence of a detectable virus, indicates that plaintiff was infected with HCV in the past but spontaneously cleared the virus without the need for antiviral therapy. Dr. Pollock sets forth that once a patient is exposed to HCV, two events occur: (1) the virus multiplies in large amounts in the blood within one to four weeks after exposure, and (2) antibodies develop within six to eight weeks and persist indefinitely. He asserts that while most patients infected with HCV will have a persistent virus unless they are treated successfully with antiviral medications, a small percentage of patients may spontaneously clear the virus and thus eradicate the infection without treatment. Dr. Pollock maintains that spontaneous clearing of HCV can occur over a period of several months to as long as three years. Therefore, he avers, the minimum period of time between contracting and subsequently clearing the virus from the blood (and thus curing the infection) is approximately fourteen (14) weeks—six (6) weeks to develop antibodies plus several months to clear the virus. Based on plaintiff’s June 18, 2007 blood test results, which showed a negative PCR and therefore no virus in the blood, Dr. Pollock opines that, at a minimum, plaintiff contracted HCV no later than fourteen (14) weeks before the April 25, 2007 procedure. Dr. Pollock thus opines that plaintiff could not have contracted HCV through any malpractice by Dr. Goldweber on April 25, 2007.

Dr. Goldstone and Laser Surgery offer an affirmation from H. Alan Schnall, M.D., who sets forth that he is board certified in internal medicine with a sub-certification in

gastroenterology. Dr. Schnall sets forth that he reviewed the pertinent medical records, the bills of particulars, the deposition transcripts, and the NYCDOH report. With respect to the issue of whether or not plaintiff could have contracted HCV on April 25, 2007, Dr. Schnall's opinion largely echoes Dr. Pollock's opinion, in that he opines that plaintiff's HCV RNA results mean that his blood sample tested negative for HCV. Dr. Schnall opines that the HCV RNA test results mean either that plaintiff's HCV antibodies tested on June 12, 2007, were a false positive, or that plaintiff contracted HCV before April 25, 2007, and spontaneously cleared it on his own. Dr. Schnall opines that if plaintiff had contracted HCV on April 25, 2007, his HCV RNA levels should have been detectable and higher when tested in June 2007.

In opposition, plaintiff points out that as recently as April 4, 2011, and May 14, 2012, his HCV antibody tests have come back as "reactive." He argues that Dr. Goldweber's failure to follow proper medical protocols was a departure from the standard of care, thereby increasing the harm to him and creating a circumstance for the transmission of HCV. Plaintiff submits an affidavit from a physician (name redacted) board certified in anesthesiology, who sets forth that he or she has reviewed plaintiff's medical records; Dr. Goldweber's and Dr. Goldstone's deposition transcripts; and the NYCDOH report of the investigation into Dr. Goldweber. Plaintiff's expert opines that Dr. Goldweber departed from accepted medical standards in the methods he used to administer propofol, and that this departure was a substantial contributing factor to and a proximate cause of plaintiff's injuries and contamination with HCV.



In reply, defendants point out that plaintiff's expert fails to address their experts' opinions that, based on the PCR testing and the presence of HCV antibodies in June 2007, plaintiff had to have contracted HCV much earlier than April 25, 2007. They argue that plaintiff's expert's statement regarding proximate cause is conclusory and unrelated to the facts of the case.

The expert opinion testimony submitted by defendants is sufficient to demonstrate that plaintiff could not have acquired HCV on April 25, 2007—but rather had to have acquired HCV much earlier—as evidenced by the presence of antibodies and PCR blood test results in June 2007. Plaintiff failed to rebut defendants' showing and establish that a material fact does exist as to whether plaintiff could have acquired HCV on April 25, 2007. The fact that plaintiff's blood continues to test as "reactive" in HCV antibody tests does not create an issue of fact as to whether he could have acquired HCV during Dr. Goldweber's administration of anesthesia. Defendants are entitled to summary judgment because, when confronted with defendants' prima facie showing, plaintiff failed to proffer medical evidence or expert opinion testimony raising the true existence of a material issue of fact about whether plaintiff's blood test results show that he could have acquired HCV on April 25, 2007.

Given plaintiff's failure to rebut defendants' showing that plaintiff could not have acquired HCV on April 25, 2007, there is no need to address defendants' remaining arguments regarding lack of informed consent, vicarious liability, or negligent hiring. Unless a material issue of fact has been raised as to plaintiff's injury and proximate cause, these other claims cannot survive summary judgment.

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment (Motion Sequence Numbers 002 and 003) are granted for the reasons stated above, and the complaint is dismissed against defendants Abbe J. Carni, M.D., Stephen E. Goldstone, M.D., and Laser Surgery Care s/h/a Laser Surgery Care, LLC; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: September 14, 2012

ENTER:

  
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JOAN B. LOBIS, J.S.C.

**FILED**

**SEP 20 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**