

Lawler v Mount Sinai Med. Ctr., Inc.

2012 NY Slip Op 32997(U)

December 17, 2012

Supreme Court, New York County

Docket Number: 115959/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

ESTATE OF FLORENCE M. LAWLER

INDEX NO. 115959/09

MOTION DATE 8-21-12

- v -
THE MOUNT SINAI MEDICAL CENTER, INC.,
ET AL.

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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	
1-10	_____
11-17	_____
18-19	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 18 2012

NEW YORK
COUNTY CLERKS OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
& ORDER

Dated: 12/17/12

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
ESTATE OF FLORENCE M. LAWLER, BY ITS
ADMINISTRATOR, JOHN E. LAWLER,

Plaintiff,

Index No. 115959/09

-against-

THE MOUNT SINAI MEDICAL CENTER, INC., and
THE MOUNT SINAI HOSPITAL,

Decision and Order

Defendants.

-----X

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

Defendant The Mount Sinai Medical Center (sued here as The Mount Sinai Medical Center, Inc., and The Mount Sinai Hospital) ("Mount Sinai") moves for summary judgment pursuant to C.P.L.R. Rule 3212. Plaintiff John E. Lawler, as Administrator of the Estate of Florence M. Lawler, proceeding pro se, opposes the motion. For the reasons set forth below, the motion is denied.

FILED

DEC 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

On May 1, 2007, decedent Florence M. Lawler, then 70 years old, suffered a brain hemorrhage. She was taken to St. Johns Riverside Hospital in Yonkers, New York, and transferred to Mount Sinai, where she was treated in its Neurosurgical Intensive Care Unit ("NSICU"). She had previously had a mitral valve replacement ("MVR") in 1990, and was on anticoagulant therapy. Upon her admission to Mount Sinai, she was taken off of her anticoagulants to stop the bleeding and was given medication to help prevent brain damage caused by reduced blood flow. Neurosurgeon Aman Patel placed an intraventricular drain into her brain to relieve pressure, which was later removed on May 6, 2007. Unable to swallow, she was given nutrition through a nasogastric tube. On May 2, 2007, a stroke evaluation revealed that her Glasgow Coma Scale was 8 out of 15 and that

her temperature was 101 degrees Fahrenheit. She was given Vancomycin, an antibiotic. On May 4, Mrs. Lawler was started on a Heparin infusion to help prevent an MVR clot. On May 8, 2007, Mrs. Lawler's physician, Jennifer Frontera, requested that Mrs. Lawler undergo a percutaneous endoscopic gastronomy procedure, ("PEG"), since she was not receiving sufficient nutrition, which was negatively impacting her immune system. No action was taken, and on May 9, she requested it "asap." Plaintiff, Mrs. Lawler's husband, signed a consent form on May 10, 2007. The standard consent form that he signed was blank, except for the word, "PEG," which he word he testifies he did not recognize. He further relates that the doctor described it as a procedure to increase his wife's nutrition by putting a feeding tube into her stomach. In signing the form, he indicated that he wanted to discuss the procedure with the physician who would perform it. No one contacted him to explain the procedure, however, and Mr. Lawler found out that the procedure had been performed after it was done. Had the procedure been explained to him, Mr. Lawler states, he would have asked that Mrs. Lawler be given antibiotics one hour before the procedure due to her prosthetic mitral valve. She had been instructed at the valve's placement in January 1990 to protect it from infection by getting an antibiotic one hour before any procedure, even for a teeth cleaning. Mr. Lawyer states that they were diligent about this protection over the 17 ensuing years.

As Mrs. Lawler's condition improved she was transferred from ICU to a general floor bed. On May 13, 2007, Dr. Patel requested that Mrs. Lawler be evaluated for the proposed PEG procedure. Dr. Leon Kavalier, a gatroenterologist, submitted an evaluation.

The PEG procedure was performed on May 14, 2007, five days after Mrs. Lawler's physician's "asap" request. Dr. Kavalier performed the procedure. He was assisted by Dr. Palmon

and two nurses also assisted. His notes claim that it was performed after discussion with Mrs. Lawler's family. They further indicate that Mrs. Lawler received ampicillin and gentamycin before the procedure. Medical records show, however, that Mrs. Lawler received ampicillin at 16:20, and gentamycin at 17:00; the procedure ended at 16:40.

On May 16, Mrs. Lawler was re-started on anticoagulants. Late that evening she showed a fever. The next day, when bacteria was found in her urine, she was discontinued from her catheter and given an antibiotic. On May 18, her blood cultures showed the presence of Methicillin Resistant Staphylococcus Aureus infection ("MRSA"), and she was given Vancomycin through an IV and Cefepime. On May 19, she was feverish, hypotensive, had increased shortness of breath, and a worsened mental state. She was transferred back to NSICU and was intubated. Two days later, vegetation, bacteria and clots, was found on her MVR. Before surgery could be performed to replace it, on May 22, a CT scan revealed multiple strokes; her mental status was poor; and the cardiac surgeon indicated that surgery would not have been beneficial. The next day, she went into acute renal failure and was on a ventilator. On June 4, a CT scan revealed another stroke, and on June 6, 2007, Mrs. Lawler died.

Plaintiff, John Lawler, began this medical malpractice and wrongful death action on or about June 3, 2009, on behalf of his wife. He alleges among other things that Mount Sinai and its employees and agents negligently treated her during her stay, including during the PEG procedure on May 14, 2007, and failed to prevent and treat his wife's MRSA infection.

Mount Sinai moves for summary judgment, claiming that no material issues of fact

exist and that Mrs. Lawler's treatment was at all times within the standard of care. In support of its motion, Defendant submits the expert opinion of Bruce E. Hirsch, M.D., who states that he is board certified in internal medicine, geriatric medicine, and infectious disease, and is licensed to practice in New York. Hirsch reviewed the pleadings, deposition transcripts, and Mrs. Lawler's medical records. He opines that the medical staff at Mount Sinai did not negligently monitor and treat Mrs. Lawler during her hospitalization. He notes that Mrs. Lawler came to Mount Sinai with pre-existing conditions, including an implanted MVR, which is an artificial valve inserted into the heart to replace a diseased valve, atrial fibrillation, and was on blood thinning therapy for a number of years. Dr. Hirsch notes that heart valves control the flow of blood to and from the heart. A patient with a mechanical valve is at a high risk of thrombus (solid clot) on the mechanical valve's surface, which can break off and cause a stroke, and, therefore, requires constant anticoagulants to prevent clot formation. Long term use of anticoagulants coupled with high blood pressure, however, puts the patient at an increased risk for brain hemorrhage. If a patient has a brain hemorrhage, the patient will be taken off anticoagulants to stop the brain bleed, despite the risk of clots forming at the MVR.

Dr. Hirsch opines that the PEG placement was done with proper protocol because Mrs. Lawler was given Ampicillin and Gentamicin, prophylactic antibiotics, purportedly prior to the insertion, and the skin was prepped with Betadine swabs and Chloroprep. He further opines that her treatment was appropriate, as Mrs. Lawler was given Vancomycin earlier in her admission, which he attests is the best way to prevent MRSA, as well as Vancomycin through an IV upon diagnosis of the MRSA infection, which is the standard of care. He opines that it is unlikely that the MRSA infection came from the PEG and that Ms. Lawler was susceptible to an MRSA infection given her compromised health conditions. He states that Plaintiff and his family were kept informed

and that Ms. Lawler was placed in NSICU when her prognosis upon admission was guarded. She was transferred to the general floor when she stabilized and was transferred back to NSICU when she was diagnosed with MRSA.

Plaintiff opposes the motion for summary judgment. In support, he submits his own affirmation and an affidavit of Gregory J. Lawler, M.D., decedent's son. Plaintiff disputes that he gave informed consent for the PEG procedure. In his expert opinion, Dr. Lawler relates that he is licensed and has been admitted to practice medicine in New York since 1996, and in Connecticut since 2004. He is a neuroradiologist and has been board certified in radiology since 1998. His office is in Ridgfield, Connecticut. In preparation for his opinion he reviewed the hospital record and file. He opines that decedent contracted the MRSA infection during the PEG procedure because of inadequate skin preparation and administration of antibiotics. Dr. Lawler relates that his mother had had an artificial mitral valve since 1990. She protected it by taking Coumadin and by taking penicillin before any procedure, even a teeth cleaning. These preventative measures were designed to protect "against the danger that bacteria could enter [Mrs. Lawler's] blood, contaminate her [artificial] valve and cause her heart to embolize clots to her brain and body."

Plaintiff's expert notes that Dr. Kavalier, the gastroenterologist who performed the PEG procedure, used an endoscopy kit, which included disinfecting agents. Dr. Kavalier did not use any additional disinfecting agents. Plaintiff's expert points out that Dr. Kavalier's notes that he administered the antibiotics prior to the procedure conflict with the medical records that indicate that ampicillin was given at 16:20; the gentamycin was given at 17:00, and the procedure ended at 16:40. He opines that the standard of care is to administer antibiotic prophylaxis one hour prior to the

procedure because “that is about when peak antibiotic bacterial efficacy is reached.” Based on the times indicated in Mount Sinai’s medical records, the Ampicillin reached its peak efficacy forty minutes after the procedure ended, and the gentamycin, 80 minutes after. Thus, decedent’s blood was “unnecessarily” exposed to infection prior to the antibiotics’ peak efficacy time. Dr. Lawler opined with a reasonable degree of medical certainty that his mother contracted the MRSA infection during the PEG procedure. He opines that the bacteria infected her blood at the incision site, contaminated her MVR causing infective endocarditis with vegetation, brain embolisms and ultimately fatal strokes.

In reply, Mount Sinai argues that Plaintiff fails to raise a triable issue of fact because Plaintiff’s expert is a neuroradiologist and lacks the requisite qualifications to opine in this case involving infectious diseases. Dr. Hirsch suggests that because Mrs. Lawler was not diagnosed until three days after the PEG insertion, “it is uncertain exactly how [Mrs. Lawler] contracted the [MRSA] infection.” He further points out that she had required various IV lines for medication prior to contracting the infection. Moreover, he contends that the Vancomycin provided to Mrs. Lawler was “the most important prophylactic antibiotic” administered and that Plaintiff’s expert failed to “acknowledge, as I noted in my affidavit, that [the drugs administered in the PEG procedure] do not have an effect on MRSA.”

“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 eliminate any material issues of fact from the case.” Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the

defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Expert medical testimony is required for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause. Roques, 73 A.D. at 206. If the movant makes a prima facie showing, the burden then shifts to the party opposing the motion "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 v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to treatment and its reasonably foreseeable risks and benefits and "that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]" Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1).

In this case, Mount Sinai establishes a prima facie showing that it is entitled to summary judgment through its medical expert opinion. The record shows that Dr. Hirsch is board certified in infectious disease and is licensed to practice in New York. He reviewed the relevant documents in preparing his opinion. He opines that there was no deviation from proper standards of care.

Even though Mount Sinai has made a prima facie showing that it is entitled to summary judgment, this Court finds that Plaintiff has rebutted that showing. This Court first considers Defendant's challenge to the qualifications of Plaintiff's expert. Defendant claims that Dr. Lawler fails to establish a foundation to opine in this case and cites, among other authorities, Browder v. New York City Health & Hosps. Corp., 37 A.D.3d 375 (1st Dep't 2007).

Defendant's challenge is unwarranted. The First Department recently reaffirmed that once an expert professes requisite knowledge necessary to make a determination on the issues presented the issue of an expert's qualification to render an opinion must be left to trial. Limmer v. Rosenfeld, 92 A.D.3d 609, 609 (1st Dep't 2012)(citing Joswick v. Lenox Hill Hosp., 161 A.D.2d 352, 355 (1st Dep't 1990)). The Court declined to follow its precedent in Browder to the extent that case could be construed as imposing a stricter standard. 92 A.D.3d at 609. It is beyond peradventure that a physician does not need to be a specialist in a particular field to testify as an expert if he possesses the requisite knowledge to make a determination on the issues presented. Id. In this case, there is ample evidence that Plaintiff's expert possessed requisite knowledge. Dr. Lawler has over 16 years of medical experience. In addition, his practice is in neuroradiology, and Mrs. Lawler's hospitalization arises from brain bleeding. Moreover, he has first-hand knowledge of his mother's efforts over many years to protect herself against bacterial infection from invasive procedures, from which she is at a greater risk due to her MVR.

As for informed consent, this Court finds that a genuine issue of material fact remains. For example, the parties dispute whether the physician's notes accurately reflect that the procedure was discussed with the family. The record contains Plaintiff's signature on a standard form that is largely incomplete. Accordingly, it is

ORDERED that the summary judgment motion is denied.

ORDERED that the parties shall appear for a pre-trial conference on January 8, 2013.

Dated: December 17, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

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