Pratt v NYU Hosp. Ctr.

2013 NY Slip Op 30052(U)

January 10, 2013

Sup Ct, New York County

Docket Number: 117740/09

Judge: Joan B. Lobis

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[* 1] SCANNED ON 1/15/2013

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

PRESENT: LOBIS, Justice PART 6

PRATT, PHILLIP, ET AL.

- v -

NYU HOSPITALS CENTER, ET AL.

INDEX NO. 117740/09

MOTION DATE 9-25-12

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 39 were read on this motion to/for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-21
Answering Affidavits — Exhibits	22-36
Replying Affidavits	37-39

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 14 2013
COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/10/13

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.

[* 2]

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

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PHILLIP PRATT and INDIA NORTHROP PRATT,

Plaintiffs,

Index No. 117740/09

-against-

Decision and Order

NYU HOSPITALS CENTER a/k/a NEW YORK UNIVERSITY LANGONE MEDICAL CENTER, ANTHONY K. FREMPONG-BOADU and MARY ELLEN COSTA,

Defendants.

---X

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

Defendants NYU Hospitals Center a/k/a New York University Langone Medical Center ("NYU"), Anthony K. Frempong-Boadu ("Dr. Frempong"), and Mary Ellen Costa move pursuant to C.P.L.R. Rule 3212 for summary judgment. Plaintiffs Phillip Pratt and India Northrop Pratt oppose the motion. For the reasons set forth below, the motion is granted.

This medical malpractice action arises out of the treatment that Mr. Pratt received at NYU. Mr. Pratt initially presented to Dr. Frempong on May 10, 2007, with complaints of back pain and leg weakness. After discussing treatment with Dr. Frempong, Mr. Pratt scheduled surgery on July 9, 2007. With the assistance of non-party Dr. Anderer, Dr. Frempong performed a "right L5-S1hemilaminotomy, medial facetomy and microdiscectomy" (spinal surgery) on Mr. Pratt. Both Plaintiffs and Defendants agree that the risks, benefits, and alternatives of this procedure were discussed, and that the risks included infection. Following the surgery, Mr. Pratt was discharged home.

According to Plaintiffs, Mr. Pratt experienced severe back pain approximately two weeks following surgery. Ms. Pratt testified that she called Dr. Frempong's office on July 30, 2007, but received no answer. On August 1, 2007, Mr. Pratt started physical therapy with Randi Cherill and complained of stabbing pain, cramping in the legs, and inability to walk. Ms. Cherill found Mr. Pratt's presentation to be "concerning" and called Dr. Frempong's office. Ms. Cherill testified that she spoke to a physician's assistant or a nurse, communicated her impressions of Mr. Pratt, and recommended that Mr. Pratt be scheduled for a follow up appointment. It was Ms. Cherill's impression that a follow up examination and MRI would be performed soon. According to Plaintiffs, sometime between August 5-7, 2007, someone from Dr. Frempong's office was made aware of Mr. Pratt's symptoms of pain, seizures, and fatigue, and nurse practitioner Mary Ellen Costa prescribed Naproxen, a muscle relaxer, and Flexiral, pain medication.

Plaintiffs state that it was only after they complained numerous times that an MRI was scheduled. On August 17, 2007, Mr. Pratt underwent an MRI and X-Ray of his lumbar spine. The results of the tests indicated that there was an infection. According to Dr. Frempong's notes, the MRI showed that Mr. Pratt had an "enhanced fluid collection in the epidural space . . . consistent with a wound abscess." On August 21, 2007, Mr. Pratt was readmitted to the hospital. He had a C-Reactive Protein ("CRP") level of 25 and Erythrocyte Sedimentation Rate ("ESR") of 35. Starting from that moment, Mr. Pratt was followed by infectious disease physician, Dr. Alexander McMeeking, a private attending physician and a non-party to this action. On August 22, 2007, Dr. Frempong performed a repeat discectomy and open abridement to drain Mr. Pratt's wound. During the procedure, Dr. Frempong encountered a "non-turbid serosanguineous fluid" and "purulent fluid" at the surgical location, which were cultured and sent to pathology. The results of these cultures

were negative for bacteria and fungus. Drs. Frempong's and McMeeking's impression was that he encountered seroma, which is a sterile fluid collection that can occur after surgery, and that there was no infection.

Dr. Frempong stated that he deferred to Dr. McMeeking for the infectious disease management of Mr. Pratt's care after August 21, 2007. Dr. McMeeking followed Mr. Pratt's white blood cell count, his CRP, and ESR levels, all of which are markers for inflammation and infection. On August 23, 2007, Mr. Pratt was started on intravenous antibiotics, Vancomycin and Ciprofloxacin. On August 28, after determining that there was no osteomyelitis and that the fluid was not infected, Dr. McMeeking discharged him home with orders to take Ciprofloxacin orally.

Approximately one week later, Mr. Pratt complained to Ms. Costa about his increased muscle spasms in the back and hip area, independent of the muscle pain that prompted surgery. Ms. Costa adjusted Mr. Pratt's antispasmodic medication. Plaintiffs complained of ongoing muscle spasms on September 11, 2007, and Dr. Frempong set up home physical therapy for the following day. On September 12, 2007, Mr. Pratt's blood tests showed his ESR and CRP level to be elevated (ESR from 41 to 56 and CRP from 2.9 to 6.3). Mr. Pratt did not show any signs of fever, but had completed his 7-day antibiotics prescription. Dr. McMeeking recommended that a repeat blood test be ordered in one week, as the ESP and CRP levels can be affected by a cold. No additional antibiotics were ordered at this time.

On September 17, 2007, Mr. Pratt was hospitalized at NYU. He underwent additional MRIs, which showed a progression of two abscesses, as well as compression on the nerves and

continued bone and disc destruction. Mr. Pratt developed osteomyelitis (infection of the bone) and a wound culture examined on October 9, 2007, revealed that Mr. Pratt had Aspergillus, a fungal infection. On October 12, Dr. Frempong performed a surgical washout of the infection with debridement of the bone.

Plaintiffs commenced this case on or about January 5, 2010, alleging that Defendants failed to properly diagnose and treat the abscess and post-operative infection of the Aspergillus fungus. Plaintiffs allege that Defendants ignored their postoperative complaints in late July and early August 2007, and delayed in examining Mr. Pratt until August 21, 2007. Plaintiffs assert that had Defendants evaluated Mr. Pratt earlier, and evaluated him for an infection at that time, the Aspergillus infection that Mr. Pratt developed would have been prevented or lessened. Further, they assert that Defendants prescribed medications that masked Plaintiff's true condition before August 21, 2007.

Defendants seek summary judgment on the grounds that there are no triable issues of fact as to causation prior to August 21, 2007. Defendants aver that even had Mr. Pratt been admitted for evaluation prior to August 21, 2007, it would not have led to an earlier diagnosis of his Aspergillus infection and would not have led to a reduced severity of the infection. The cultures taken from the lumbar wound on August 22 were negative for both bacterial and fungal infections. Therefore, any cultures taken prior to August 22, 2007, would have also been negative. As to the infectious disease management from August 22 onwards, Defendants argue that Dr. Frempong deferred all decisions as to the diagnosis and treatment of the infectious process to Dr. McMeeking; thus, any delay in diagnosis of the post-operative infection after the hospital admittance on August

21, 2007, or procedure on August 22, 2007, would have been the responsibility of Dr. McMeeking.

In support of their summary judgment motion, Defendants submit the affirmation of Peter Angevine, M.D., who states that he is licensed in New York and certified in neurosurgery. After reviewing the relevant medical records and deposition transcripts of Plaintiffs, Dr. Frempong, Dr. McMeeking, Ms. Costa, and Ms. Cherill, he opines that the treatment of Mr. Pratt was at all times within the standard of medical care and that even had defendants departed from the accepted standards of care, the departures had no effect on Mr. Pratt's prognosis. He states that Dr. Frempong's performance of the July 9 surgery was proper. He also states that the discharge instructions were proper, as the standard of care is to instruct the patient to schedule a follow up appointment four to six weeks after surgery. With regard to Ms. Cherill's recommendation in early August that an evaluation and MRI be scheduled, he opines that even had Defendants evaluated Plaintiff in early August, it would not have led to an earlier diagnosis of the Aspergillus infection. Dr. Angevine states that the cultures from the fluid collected during the August 22 procedure returned negative for both bacterial and fungal infections. He explains that fungal infections such as Aspergillus can only be identified from a positive culture, and therefore, any cultures taken prior to August 22 would have also been negative. Additionally, Dr. McMeeking reviewed Mr. Pratt's sedimentation rates, visually inspected the site, and reviewed the MRI of his lumbar spine, and was still unable to make a definitive diagnosis of any infection. As to Plaintiffs' allegation that prescription medications— anti-inflammatories, muscle relaxers, and pain killers— masked plaintiff's infectious condition between July 9, 2007, and August 17, 2007, Dr. Angevine opines that the infection would have still cultured negative for Aspergillus had he been tested earlier than August 22, 2007. As for the treatment of the fungal infection, Dr. Angevine states that no

medication would have reduced the severity of Mr. Pratt's infection prior to August 22, because Voriconazole is the only effective medication that treats this type of fungal infection. He states that Aspergillus is extremely rare, and it would have been a deviation to have prescribed this medication without a definitive diagnosis of the infection. Further, Voriconazole has extensive side effects and cannot be prescribed prophylactically absent a diagnosis. He also states that Dr. Frempong properly deferred all decisions with respect to the diagnosis and treatment of any infectious process to Dr. McMeeking.

In opposition, Plaintiffs argue that summary judgment should be denied as there exist issues of fact. In support, they submit the affidavits of Ms. Pratt and two experts. Ms. Pratt states that she maintained a diary during the relevant time period, and that there exist inaccuracies as to what transpired after the July 9 operation. She states that Dr. Frempong incorrectly remembers when Mr. Pratt began to experience pain– Dr. Frempong stated it to be July 19, when she believes it to be actually a week later. She also states that the hospital records do not reflect all of her communications with Dr. Frempong's office. She avers that due to the lack of records of her and her husband's complaints, Dr. Frempong was unaware of her husband's symptoms. She also states that she recalls Dr. Frempong telling her that he only cultured the fluids on August 22 for bacteria.

Plaintiffs' first expert states that s/he is licensed to practice medicine in Pennsylvania and Maryland, is a fellow of the American College of Surgeons and Diplomate of the American Board of Neurological Surgery, and a Clinical Associate Professor of Neurosurgery. After reviewing the deposition transcripts and hospital records, Plaintiffs' first expert opines to a reasonable degree of medical and neurosurgical certainty that Defendants deviated from the standard of care when they

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failed to evaluate and examine Mr. Pratt in the first week of August 2007, when Mr. Pratt, his wife, and Ms. Cherill communicated symptoms of recurrent pain, muscle spasms, cramping, and decreased level of function. The expert states that the patient's complaints were consistent with an underlying infection, among other possible diagnoses. Had Mr. Pratt been examined sooner, by way of MRI and other diagnostic testing, as well as admission to the hospital, it would have led to an earlier diagnosis of the abscess and infection, which would have resulted in a reduced severity of the Aspergillus infection, because there would have been an earlier intervention of the infectious process. The expert opines that the MRI findings were consistent with infection, even though the tissue specimen cultured were reported to be sterile, because sterile tissue cultures (non-diagnostic) are commonly seen in patients whose infections have been partially treated with antibiotics. She or he additionally avers that the October 12, 2007, surgery to drain the abscess and debride the infection should have occurred earlier. The expert states that Defendants deviated from the standard by failing to immediately re-evaluate the patient when he complained of muscle spasms and inability to get out of bed earlier in September, and that Defendants should have recommended physical therapy instead of waiting and seeing if the sedimentation rates increased.

Plaintiffs submit the affidavit of a second expert who is licensed to practice medicine in New York and certified in internal medicine and infectious diseases. This expert reviewed hospital records and deposition testimony in the case and opines that Defendants' failure to evaluate the patient in early August constituted a departure from good and accepted medical practice, and caused a delay of approximately 3 weeks, which allowed the Aspergillus infection to progressively worsen. She or he states that when a patient presents by telephone with complaints of severe cramping and pain in lower back and lower extremities during the third post-operative week, an

examination for an infection is indicated. She or he adds that the results of the August 17, 2007 MRI examination were consistent with possible discitis and osteomyelitis. The expert states that while the wound cultures were negative for fungal and bacterial infections, the hospital records contain no report of the fluid that was removed and sent for culture by Dr. Frempong. She or he opines that the delay in examination, diagnosis, and treatment, in addition to empirical aggressive antibiotic treatment, caused a progression of the infection to the point where both massive soft tissue and bone destruction occurred in the patient.

In reply, Defendants reiterate their position that there exist no issues as to proximate cause. They also state that Plaintiffs are mistaken when they argued that the fluids from the August 22, 2007, surgery were not cultured. They point out that the "non-turbid serosanguineous fluid" and the "purulent fluid" were cultured and are labeled in the records as "lumbar wound and L5 5 Disc."

"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). 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. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). 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.

Defendants base their argument on whether an Aspergillus infection was identifiable from the cultures taken during the August 22, 2007 procedure and whether any earlier examination would not have identified a fungal infection. This argument, however, does not remove all contentions that Mr. Pratt's Aspergillus infection identified on October 9, 2007, could have been identified earlier than October. First, Plaintiffs assert that there were various communications to Dr. Frempong's office, which are not reflected in the patient's records, alerting Dr. Frempong and his employees to Mr. Pratt's symptoms of pain. Defendants' expert's affidavit, however, is silent as to whether Defendants acted within the standard of care with regard to the Defendants' responsiveness to Plaintiffs' complaints in early August. Second, Plaintiffs allege that Defendants failed to timely explore the infection site in early August, and that this delay caused a delay in the ultimate diagnosis of Aspergillus in October. Defendants do not dispute the presence of a post-operative abscess, which was the subject of the August 22 surgery. Defendants' expert's opinion that an earlier diagnosis was improbable based on the negative fungus results for the culture taken during the August 22 surgery does little to discredit any possible correlation between the time of treatment of Mr. Pratt's abscess and the diagnosis of the fungal infection in October. In addition, Plaintiffs' experts state that an earlier intervention would have led to a diagnosis and treatment of the Aspergillus infection earlier than October 9. Since Plaintiffs' experts and Defendants' expert disagree, competing expert opinions are matters best left for the jury. Rojas v. Palese, 94 A.D.3d 557, 558 (1st Dep't 2012). As there remain issues of fact whether Defendants' responsiveness to Plaintiffs' complaints were proper and whether an earlier exploration of Mr. Pratt's wound abscess

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would have led to an earlier diagnosis and treatment of his Aspergillus infection, summary judgment must be denied. Accordingly, it is

ORDERED that the motion of NYU Hospitals Center a/k/a New York University Langone Medical Center, Anthony K. Frempong-Boadu, and Mary Ellen Costa for summary judgment is denied; it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, February 19, 2013, at 9:30 a.m.

Dated: January 10, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

FILED

JAN 14 2013

COUNTY CLERK'S OFFICE
NEW YORK