

Kassan v McPartland
2013 NY Slip Op 31639(U)
July 16, 2013
Sup Ct, Suffolk County
Docket Number: 09-37514
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-20-12
ADJ. DATE 2-1913
Mot. Seq. # 003 - MD

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Plaintiff,	:		:	1370 RXR Plaza, West Tower, 13 th Floor
	:		:	Uniondale, New York 11556
- against -	:		:	
	:		:	CATALANO GALLARDO &
KEVIN MICHAEL McPARTLAND, D.C. and	:		:	PETROPOULOS, LLP
NESCONSET PLAZA CHIROPRACTIC OFFICE,	:		:	Attorneys for Defendants
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Defendants.	:		:	Jericho, New York 11753
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19 - 28; Replying Affidavits and supporting papers 29 - 30; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Kevin McPartland, D.C., and Nesconset Plaza Chiropractic Office, PLLC, seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Keith Kassan commenced this action against defendants Kevin McPartland, D.C., and Nesconset Plaza Chiropractic Office, PLLC, to recover damages for injuries he allegedly sustained as a result of chiropractic malpractice and lack of informed consent. By his complaint, plaintiff alleges that on May 23, 2008, Dr. McPartland rendered chiropractic treatment and adjustments to his neck in a negligent manner, causing him to suffer a compression fracture and osteomyelitis, which resulted in his subsequent paralysis. The gravaman of the complaint alleges that Dr. McPartland failed to perform a complete examination of plaintiff; failed to correctly diagnosis plaintiff's problem; failed to perform a radiological examination of plaintiff; failed to advise plaintiff of the risks associated with performing manual adjustments and manipulations; and performed manual adjustments and manipulations to plaintiff's neck contrary to the warning signs.

Plaintiff began receiving treatment for diabetic foot ulcers and other associated ailments in 1998. In October 2003, plaintiff began treating with Dr. Marjorie Ravitz, a podiatrist, who diagnosed him with peripheral vascular disease, nonpalpable pulses of the leg and feet, and a necrotic left hallux with cellulitis. On March 8, 2004, plaintiff underwent a debridement for an infected ulcer on his right foot with a central area of necrosis. Following that debridement, plaintiff underwent additional debridements and treatment with John T. Mather Memorial Hospital's Wound Care Center for ulcers and gangrene of his right foot during 2004 through 2005. Plaintiff was admitted into John T. Mather Memorial Hospital on May 16, 2005, where he underwent several surgical procedures, including total osteotomies of the bones of the tibia and fibula, and the tarsal and metatarsal. From 2005 through 2007, plaintiff was in and out of the hospital, and underwent several debridements and surgical procedures on his feet. A magnetic resonance imaging ("MRI") examination performed on plaintiff during his April 2005 admission to John T. Mather Memorial Hospital revealed findings consistent with osteomyelitis. In April 2007, plaintiff was diagnosed with acute osteomyelitis, foot ulcers, and a bacterial infection due to staphylococcus aureus, and underwent two surgeries at John T. Mather Memorial Hospital. Throughout the years, plaintiff continued to treat with Dr. Ravitz, and he received monthly debridements after his discharge from John T. Mather Memorial Hospital in June 2007.

In May 2008, plaintiff began experiencing severe pain in his neck, for which he sought treatment from Dr. McPartland on May 23, 2008. Plaintiff indicated on his intake sheet that his chief complaint was neck and upper back pain, that he had a pacemaker, that he was taking insulin and pain medication, that he had diabetic leg problems and that he had an infected left foot. Plaintiff did not state on his intake form that he had a history of chronic osteomyelitis. However, Dr. McPartland noted on his "travel card" during his consultation with plaintiff that he suffered from diabetic foot ulcers and infections of the left foot, and that he was undergoing pain management for his legs and feet. Following the intake process, Dr. McPartland performed a comprehensive physical examination of plaintiff, including range of motion testing, forminal compression and cervical distraction testing, and took X-rays of plaintiff's cervical spine. After Dr. McPartland reviewed the X-rays, he suspected that plaintiff had a possible compression fracture of the C6 vertebrae. Based upon his suspicions, Dr. McPartland scheduled a computed tomography ("CT scan") of plaintiff's cervical spine with Suffolk Magnetic Resonance Imaging for May 27, 2008 at 3:00 p.m., since plaintiff was unable to undergo an MRI test due to the pacemaker and defibrillator implanted in his chest. Thereafter, Dr. McPartland performed soft tissue work and heat treatment, including myofascial trigger point work, on plaintiff. Following the session, plaintiff did not return to Dr. McPartland's office. On May 29, 2008, plaintiff, suffering from paralysis from the neck down, was rushed to St. Catherine's of Siena Medical Center by ambulance. Following a CT scan of plaintiff's cervical spine, he was diagnosed with osteomyelitis and discitis at level C5-C6 with a fracture, spinal canal compression and spinal cord compression. Based upon the CT scan results, Dr. Ramin Rak performed a cervical corpectomy at level C5-C6, decompression of the spinal cord and nerve roots, removal of the discs at levels C4 through C7, and placement of an anterior cervical plate at level C4 through C7. Plaintiff was discharged from St. Catherine's of Siena Medical Center approximately one month later and, on July 16, 2008, he was placed in John J. Foley Skilled Nursing Facility to receive rehabilitation to help him relearn to use his muscles, where he remained for over a year. During his stay at John J. Foley Skilled Nursing Facility, plaintiff regained strength in his upper right extremity and some sensory improvement in his lower extremities. However, since his discharge, his legs have been amputated due to complications associated with his diabetic condition.

Defendants now move for summary judgment on the basis that Dr. McPartland did not deviate or depart from good and acceptable chiropractic practice when he rendered treatment to plaintiff. Defendants further assert that plaintiff's cancellation of the appointment for a CT scan of his cervical spine to determine if he was suffering from a compression fracture at C6 vertebrae was the cause of the delay in him receiving proper treatment. Defendants, in support of the motion, submit copies of the pleadings, the parties' deposition transcripts, uncertified copies of plaintiff's medical records, the sworn medical report of their neurological expert, Dr. Douglas Cohen, and the affidavit of their chiropractic expert, Dr. David Kartzman. Plaintiff opposes the motion on the grounds that there are triable issues of fact as to whether Dr. McPartland deviated from the applicable chiropractic standard of care in rendering treatment to him, and whether that deviation was the proximate cause of his spinal cord compression, which resulted in his paralysis. Plaintiff, in opposition to the motion, submits uncertified copies of his medical records, a redacted copy of his neurological expert's affirmation, the affidavit of his chiropractic expert, Dr. Fred Rudin, and an excerpt from the American Medical Association's Current Procedural Terminology codebook.

On a motion for summary judgment in a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured by such departure (*see Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 872 NYS2d 199 [2d Dept 2009], *lv denied* 18 NY3d 880, 939 NYS2d 293 [2012]; *Germaine v Yu*, 49 AD3d 685, 854 NYS2d 730 [2d Dept 2008]; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]). A physician may establish that he or she did not depart or deviate from accepted medical practice in his or her treatment of the patient, and that he or she was not the proximate cause of the plaintiff's injuries through the submission of medical records and competent expert affidavits (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]; *Deutsch v Chaglassian*, 71 AD3d 718, 896 NYS2d 431 [2d Dept 2010]; *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]). However, a doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (*see Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). If the defendant doctor sustains this burden, in order to defeat summary judgment, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant doctor's omissions or departures were a competent producing cause of the injury" (*Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 282, 660 NYS2d 739 [2d Dept 1997]; *see Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; *Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Johnson v Queens-Long Is. Group*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; *Dellacone v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]). General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see Arkin v Resnick, supra*; *Dolan v Halpern*, 73 AD3d 1117, 902 NYS2d 585 [2d Dept 2010]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Here, defendants have established their entitlement to judgment as a matter of law through the

submissions of plaintiff's medical records, the parties' deposition testimony, and their experts' reports that Dr. McPartland did not deviate or depart from acceptable standards of chiropractic care during his treatment of plaintiff on May 23, 2008 (see *Lampach v Univ. Hosp. at Stony Brook*, 62 AD3d 839, 879 NYS2d 192 [2d Dept 2009]; *Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2d Dept 2005]; cf. *Ives v Allard Chiropractic Office P.C.*, 274 AD2d 910, 711 NYS2d 85 [3d Dept 2000]). Defendants' experts, Dr. Cohen and Dr. Kartzman, each opined to a reasonable degree of medical certainty that Dr. McPartland did not deviate from good and accepted standards of medical care during the treatment he rendered to plaintiff and that, in any event, Dr. McPartland's treatment of plaintiff was not a proximate cause of any of the injuries sustained by plaintiff (see *Forrest v Tierney*, 91 AD3d 707, 936 NYS2d 295 [2d Dept 2012]; *Graziano v Cooling*, 79 AD3d 803, 913 NYS2d 302 [2d Dept 2010]). Dr. Kartzman, who is a licensed chiropractor in the State of New York, states that plaintiff's compression fracture was present prior to Dr. McPartland providing any treatment to him, as evidenced by the X-rays that were taken by Dr. McPartland, and that plaintiff's failure to inform Dr. McPartland of his history of osteomyelitis, foot debridements and amputations, as well as his failure to comply with Dr. McPartland's order to appear for a scheduled cervical spine CT scan on May 27, 2008, were the proximate cause of his resulting injuries, not any treatment rendered by Dr. McPartland. Dr. Kartzman explains that since plaintiff was not forthcoming about his history of osteomyelitis and debridements, Dr. McPartland was unable to formulate a differential diagnosis that may have included compression fracture post-osteomyelitis. Thus, without such knowledge, Dr. Kartzman asserts that the symptoms as described by plaintiff suggested to Dr. McPartland that he simply was suffering from degenerative disc disease with possible progression of the disease, which is the most common presentation for chiropractic care. Dr. Kartzman states that Dr. McPartland's performance of a soft tissue massage was an appropriate palliative treatment for a patient suffering from a "plus four" spasm of the cervical spine and a possible compression fracture at C5/C6 vertebrae. He states that the massage did not place plaintiff's cervical spine in a compromising position, nor did it aggravate or cause plaintiff's spinal osteomyelitis/discitis. Furthermore, Dr. Kartzman states that Dr. McPartland's physical examination of plaintiff did not cause plaintiff's compression fracture, and that any alleged manipulation or chiropractic adjustment performed by Dr. McPartland could not have caused a compression fracture at C5/C6 vertebrae and osteomyelitis. Dr. Kartzman further states that Dr. McPartland, upon recognizing the abnormal findings on the X-ray of plaintiff's cervical spine, which suggested that a fracture may be present, appropriately referred him for further testing by CT imaging of the cervical spine, since plaintiff was unable to undergo an MRI due to his pacemaker and defibrillator.

Likewise, Dr. Cohen, a licensed physician and a board certified neurologist in the State of New York, states that, within a reasonable degree of medical certainty, plaintiff's chronic osteomyelitis caused his compression fracture and resulting paralysis. Dr. Cohen states that plaintiff's uncontrolled diabetes also played a part in his condition, because diabetes, which destroys the vascular flow, inhibited plaintiff's ability to fight off infection and bacteria. Dr. Cohen states that the osteomyelitis already had traveled to plaintiff's cervical spine and formed an abscess, which caused the pain that led plaintiff to seek treatment from Dr. McPartland. Dr. Cohen further states that the soft tissue massage performed by Dr. McPartland was appropriate and was not contraindicated despite the presence of the compression fracture at C5/C6, because the soft tissue massage was performed in areas unconnected to the C5/C6 vertebrae. Lastly, Dr. Cohen states that Dr. McPartland properly referred plaintiff for a CT scan to confirm the presence of a compression fracture, and that the infection would have been detected and

surgery would have been performed to prevent plaintiff's subsequent paralysis, if plaintiff had attended the scheduled CT scan.

Initially, the Court notes that plaintiff served an unsigned, unsworn and redacted copy of his neurological medical expert's "affirmation." Although it is beyond cavil that a party may successfully oppose a summary judgment motion without disclosing the name of his or her expert witness (*see Marano v Mercy Hosp.*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]), an unredacted original of said party's medical expert's report must be provided to the court for its in camera inspection (*see Grad v Hafliger*, 68 AD3d 543, 889 NYS2d 459 [1st Dept 2009]; *Cerny v Williams*, 32 AD2d 881, 882 NYS2d 548 [2d Dept 2006]; *Rose v Horton Med. Ctr.*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]); *see also* CPLR 3101[d][1][i]). Redacted affirmations lack evidentiary value since the court cannot be assured of the medical expert's existence (*see McCarty v Community Hosp.*, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]). Here, plaintiff has offered no explanation for the failure to identify this particular expert by name or the failure to offer an unredacted and signed affirmation for the court's in camera review (*see Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]; *Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565, 644 NYS2d 325 [2d Dept 1996]). Accordingly, plaintiff's neurological medical expert's report is not in admissible form and is insufficient to raise a triable issue of fact as to Dr. McPartland's alleged malpractice (*see Rose v Horton Med. Ctr.*, *supra*).

However, plaintiff has raised triable issues of fact as to whether Dr. McPartland performed contraindicated chiropractic treatment that contributed to his injury with the submission of his chiropractic expert's affidavit (*see Udell v Naghavi*, 82 AD3d 960, 919 NYS2d 79 [2d Dept 2011]; *Colao v St. Vincent's Med. Ctr.*, 65 AD3d 660, 885 NYS2d 306 [2d Dept 2009]; *Tolpygina v Teper*, 44 AD3d 747, 842 NYS2d 913 [2d Dept 2007]). Dr. Rudin, a chiropractor licensed in the State of New York, states, within a reasonable degree of chiropractic certainty, that Dr. McPartland deviated from the accepted standard of chiropractic care in his treatment of plaintiff. Dr. Rudin states that based upon plaintiff's history of diabetic foot ulcers and diabetic leg problems, Dr. McPartland's chiropractic evaluation and examination, and the suspected appearance of a compression fracture at C5/C6 vertebrae, Dr. McPartland was mandated under the chiropractic standard of care to seek an immediate determination via the performance of a "stat" cervical CT scan as to whether plaintiff indeed was suffering from a compression fracture. Dr. Rudin states that it was a departure from the standard of care to wait until May 27, 2008 to have a CT scan performed of plaintiff's cervical spine based upon Dr. McPartland's suspicions. He states that if Dr. McPartland was unable to schedule a CT scan immediately then he should have referred plaintiff to an orthopedist or the nearest hospital's emergency room. Dr. Rudin explains that an immediate determination and timely referral is required when a patient is suspected of suffering from a compression fracture in order to prevent further injury and destruction to the cervical spinal cord, and that, had Dr. McPartland made a timely referral, the fracture in plaintiff's cervical spine would have been given time to heal or the proper surgical intervention would have prevented plaintiff's subsequent paralysis. Dr. Rudin also states that it was a departure from the accepted standard of medical care for Dr. McPartland to perform soft tissue work on plaintiff, since he suspected that plaintiff was suffering from a compression fracture at C5/C6 vertebrae. He states that Dr. McPartland, prior to performing a soft tissue massage on plaintiff, did not determine the extent of the compression fracture or if a compression fracture actually existed, and that regardless of the acuity of the fracture on the X-ray, Dr. McPartland failed to stabilize plaintiff's cervical spine to prevent further

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injury. Moreover, Dr. Rudin states that based upon plaintiff's history of diabetes, diabetic foot ulcers, infection of the left foot, and insulin dependency, Dr. McPartland should have sought a medical consultation prior to performing any chiropractic procedures on plaintiff, including soft tissue work and myofascial trigger release.

In light of the conflicting opinions by the medical experts, a credibility question has been presented which requires a jury's resolution (*see Monsels v Sinclair*, 52 AD3d 487, 859 NYS2d 686 [2d Dept 2008] *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2d Dept 2004]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.*, 282 AD2d 650, 724 NYS2d 432 [2d Dept 2001]). Furthermore, summary judgment may not be awarded in a medical malpractice case where the parties adduce conflicting medical expert opinions (*see Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 760 [2d Dept 2003]; *Fotinas v Westchester County Med. Ctr.*, 300 AD2d 437, 752 NYS2d 90 [2d Dept 2002]). Contrary to defendants' contentions, the opinions of Dr. Rudin were based upon facts in evidence, and were not conclusory or otherwise insufficient.

Finally, to succeed on a cause of action based on lack of informed consent, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see Public Health Law § 2805-d; Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Smith v Fields*, 268 AD2d 579, 702 NYS2d 364 [2d Dept 2000]; *Innucci v Bauersachs*, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]). Here, the record demonstrates that there are triable issues of fact as to whether the information that Dr. McPartland provided to plaintiff prior to performing the soft tissue work was qualitatively sufficient for him to make an informed decision (*see Dehaarte v Ramenovsky*, 67 AD3d 724, 889 NYS2d 68 [2d Dept 2009]; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Sarwan v Portnoy*, 51 AD3d 655, 857 NYS2d 667 [2d Dept 2008], *lv denied* 11 NY3d 705, 866 NYS2d 609 [2008]).

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied.

Dated: July 16, 2013

W. Grand Ailer
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION