

Ragone v Schreiber

2014 NY Slip Op 32798(U)

June 3, 2014

Sup Ct, Westchester County

Docket Number: 50206/11

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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TARA A. RAGONE,

Plaintiff,

-against-

Index No. 50206/11
DECISION & ORDER
Motion Sequence 1,2 & 3

MICHAEL E. SCHREIBER, M.D., SINDY G. SOLOMON, M.D., COMMUNITY HOSPITAL AT DOBBS FERRY, DOBBS FERRY PAVILION OF ST. JOHN'S RIVERSIDE HOSPITAL, ST JOHN'S RIVERSIDE HOSPITAL and RIVERSIDE HEALTH CARE SYSTEM, INC.,

Defendants.

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The following papers numbered 1 through 33 were received and considered in connection with the above-captioned matter:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-Z	1-28
Affirmation in Opposition/Exhibits A	29-30
Reply Affirmation/Exhibits A-B	31-33

Defendant, MICHAEL E. SCHREIBER, M.D. moves by Notice of Motion for an Order seeking summary judgment pursuant to CPLR § 3212 dismissing all claims of medical malpractice against him; directing the entry of a judgment in his favor; and amending the caption to delete defendant MICHAEL E. SCHREIBER, M.D.

This action was commenced by the filing of a Summons and Verified Complaint

for medical malpractice on March 11, 2011. The Plaintiff is alleging lack of informed consent and that Defendant MICHAEL E. SCHREIBER, M.D. negligently prescribed steroids medication causing avascular necrosis of her hips and knees. On or about July 14, 2011, Plaintiff served a Supplemental Summons and Amended Verified Complaint. Issue was joined by Defendant, MICHAEL E. SCHREIBER, M.D. on July 29, 2011 by service of an Amended Answer. Plaintiff served Verified Bill of Particulars as to MICHAEL E. SCHREIBER, M.D. on September 19, 2011. Depositions were then conducted to include Deposition of MICHAEL E. SCHREIBER, M.D. on September 19, 2011 and of Tara Ragone on March 2, 2012, July 23, 2012 and completed on August 13, 2012. Plaintiff filed a Note of Issue and Certificate of Readiness for Trial on July 10, 2013.

It should be noted that the only remaining Defendant in this case is MICHAEL E. SCHREIBER, M.D. and that the Plaintiff has voluntarily discontinued her action as to the other Defendants. The Court will therefore, only address the summary judgment motion brought by MICHAEL E. SCHREIBER, M.D.

The Plaintiff is a single, white female without children who has been on disability since 2003 for severe pain secondary to interstitial cystitis. Plaintiff has a long history, as early as 1989, showing her being treated for asthma. Her pediatric records shows frequent visits to the doctor for chest tightness and cough and cold as far back as 1995. Her pediatric records also show that she has been taking Prednisone and other steroids since September 1999. The Plaintiff was also hospitalized on more than one occasion as far back as 1999 complaining of asthma exacerbation or exhibited other asthma related symptoms and was prescribed steroids in one form or another. It is undisputed

that the Plaintiff had been prescribed steroids in one form or another for years prior to being presented to the Defendant on January 5, 2007.

The Defendant testified that when the Plaintiff complained of bone pain, back in March 2007, the Defendant attributed the bone pain to steroid withdrawal and not a side effect of the use of steroids. The Plaintiff specifically associated the bone pain with the reduction of steroids because her pain was generalized. Though the Plaintiff was to return to see the Defendant in April 2007, she did not return until September 2008, approximately a year and a half later. During this period it is also undisputed that the Plaintiff was taking steroids which she received from other sources. When she came to see the defendant on September 16, 2008, she noted that she was taking 20 mg of Prednisone for the two days preceding the visit. The Defendant recommenced treating the Plaintiff and prescribed steroids at various strengths, tapering and otherwise, in an attempt to treat her symptoms. The Plaintiff was also hospitalized for her asthma on several occasions.

The Plaintiff made her first complaint of generalized body pain and weakness on November 14, 2008 which resulted in her hospitalization. The Defendant believed that the weakness and pain may have been secondary to either of the medications she was on so he discontinued the medications. However, he maintained her on oral Prednisone through November 17, 2008. By this time her respiratory status had improved but her body aches and pain continued with unknown etiology. Since the Plaintiff continued to complain of severe pain in her legs, arms and weakness, the Defendant asked for a pain consult and a rheumatology consult. Both consultants diagnosed the Plaintiff as suffering from steroid myopathy and recommended physical therapy. By this time the Plaintiff was being administered Morphine for her pain. On November 21, 2008, the

Defendant wrote that the Plaintiff was improving and her pain had decreased. Her bronchial asthma was stable and she continued to have steroid withdrawals, etiology unknown and her myalgia was improving. She was released from the hospital and was to follow up with the Defendant in his office in ten days. The Defendant never cared for the Plaintiff again.

Plaintiff began treatment with Dr. Chin Yip, a Pulmonologist at Columbia Presbyterian in February 2009. Dr. Yip diagnosed the Plaintiff with mild exacerbation of her asthma and he prescribed her steroid medication. By October 2013 her condition became acute despite increased inhaled steroids, and Dr. Yip started the Plaintiff on tapering doses of Prednisone. From October 13, 2009 until November 13, 2009, Dr. Yip kept the Plaintiff on Prednisone. In July and August of 2010, an MRI of the Plaintiff's right knee and both hips showed evidence of vascular necrosis and on November 20, 2010 the Plaintiff underwent bilateral core decompression of the hip with an injection of bone marrow from the iliac crest.

It is the opinion of the Defendant's expert that to a reasonable degree of medical certainty the Defendant's use of steroids in the Plaintiff's case was acceptable. He further opined that the record shows a long-standing use of steroid medication by the Plaintiff before and after the Defendant's care and to single out the Defendant's prescription of steroids as a cause of the Plaintiff's injury is to engage in speculation and should not be permitted. The Defendant argues that he has made out a prima facie case and is therefore entitled to summary judgment.

It is the Plaintiff's contention that Defendant diagnosed her as suffering from asthma exacerbation and then proceeded to prescribe and administer steroids which increased her risk for developing avascular necrosis ("AVN"). Plaintiff seeks to recover

for personal injuries sustained as a result of the Defendant's failure to properly diagnose, manage, and/or treat her respiratory symptoms and/or asthma from on or about June 1, 2006 to about November 16, 2008 and thereafter. Plaintiff alleges that as a result of Defendant's failure to properly diagnose, manage, and/or treat her asthma and/or properly prescribe and/or administer steroids she developed AVN. Plaintiff in her bills of particulars alleges that Defendant was negligent and departed from good and accepted standards of medical care and practice resulting in her developing AVN, steroid myopathy, and peripheral neuropathy. She further alleges that this resulted in her having to undergo bone marrow and stem cell transplant and bone decompression to her hips. It is further anticipated that as a result of the Defendant's action she will require bilateral hip and knee replacement surgeries as the result of AVN and/or its exacerbation.

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718(1980). Furthermore, "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 demonstrate the absence of any material issues of fact," *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324(1986). To demonstrate its entitlement to relief the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact. *McDonald v. Mauss*, 38 A.D.3d 727, 728 (2d Dept. 2007). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. See, e.g., *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851,

853 (1985).

[I]n a medical malpractice action, this Court, relying on *Alvarez*, has repeatedly stated that a defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and, in opposition, "a plaintiff must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact," *Stukas v. Streiter*, 83 A.D.3d 18 (2nd Dept. 2011) citing *Alvarez at 68 N.Y.2d 320 (1986)*. Typically, the moving party's prima facie case is established by affidavits or affirmations submitted by expert medical professionals and the opposing party can only show genuine issues of material facts by offering their own expert medical testimony countering that of the moving party, *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 496 (1997).

In support of his motion for summary judgment, Defendant offered the opinion of Dr. Prisco, a Pulmonologist who stated that the Plaintiff received steroids by injection or through inhalers on numerous occasions prior to and during her care with the Defendant and going as far back as 2003. He also stated that any steroid use can cause avascular necrosis or increase the risk of avascular necrosis and it can be asymptomatic in the early stages. He further opined that since there are no radiological images prior to July 2010, it is impossible to determine when the avascular necrosis first developed. He further stated that knowing that the Plaintiff received steroids from other sources both before and after her treatment by the Defendant which included treatment for her interstitial cystitis, it is not possible to isolate the steroid prescribed by the Defendant as a substantial contributing factor in the Plaintiff's development of AVN.

Defendant further argues that the Plaintiff's expert does not definitively state that Plaintiff did not have AVN before she saw the Defendant because the onset of the AVN cannot be determined and any attempt to do so would be conclusory and speculative. Further, since AVN is asymptomatic neither expert can establish with any degree of certainty when it actually developed. Moreover, the Plaintiff received significant dosages of steroids prior to being under the Defendant's care. The Defendant saw the Plaintiff last in November 2008 and the Plaintiff was diagnosed with AVN in July 2010 and during this period the Plaintiff received large doses of steroids. Therefore, there is no way to determine when before July 2010 the Plaintiff developed AVN and pinpoint the source of the steroids.

Furthermore, the Plaintiff's expert did not even address the possible effects of all of the other steroids received by the Plaintiff before, during and after her care by the Defendant. Plaintiff's expert simply stated that the steroids prescribed by the Defendant was the proximate cause of the Plaintiff's AVN. Arriving at this conclusion without addressing the steroids prescribed by others is insufficient and renders the Plaintiff's expert opinion conclusory. Moreover, [g]eneral allegations that are conclusory and unsupported are insufficient to defeat summary judgment, *Keevan v. Rifkin*, 41 A.D.3d 661, 662 (2d Dept. 2007) citing *Alvarez*, 68 NY2d 320, 324. All the doctors who treated the Plaintiff prior to, during and subsequent to being treated by the Defendant prescribed steroids at varying levels in one form or another. Dr. Moldwin's records describe bladder installations of steroids weekly to monthly. Therefore, to conclude that the Plaintiff's prescriptions of steroids were a departure from good and accepted medical practice and the proximate cause of the Plaintiff's injury is highly conclusory

and speculative and not supported by the record. The Defendant has made out a prima facie case for his entitlement to summary judgment. The burden now shifts to the Plaintiff to submit evidentiary facts or materials to rebut the Defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact.

In opposition to the Defendant's motion, the Plaintiff offered the expertise of an unnamed Physician who is licensed, board certified in pediatrics, allergy and immunology and pediatric pulmonology. Plaintiff's expert opined that the Defendant departed from good and accepted standards of care in failing to properly diagnose, manage, and/or treat and control the Plaintiff's asthma. The Plaintiff contends that the Defendant failed to obtain and maintain control of Plaintiff's respiratory symptoms and improperly prescribed excessive doses of IV steroids which increased the Plaintiff's risk of developing AVN. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, *Di Menna & Sons v. City of New York*, 301 N. Y. 118. This drastic remedy should not be granted where there is any doubt as to the existence of such issues or where the issue is "arguable," *Barrett v. Jacobs*, 255 N. Y. 520, 522; and "issue-finding, rather than issue-determination, is the key to the procedure, and the evidence should be scrutinized carefully in the light most favorable to the party opposing the motion," *Sillman v Twentieth Century-Fox Film Corp.* 3 N.Y.2d 395, 165 N.Y.S.2d 498 N.Y. 1957.

The elements of proof in an action to recover damages for medical malpractice are (1) deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage, *Lyons v. McCauley* 252 A.D.2d 516, 675 N.Y.S.2d 375 (2nd Dept. 1998). The Plaintiff argues that even though the

Defendant alleges that his care of the Plaintiff was in accordance with the accepted standard, he failed to present evidence of what the accepted standard is. While the Defendant's expert detailed the treatment provided by the Defendant, at no time did his expert state the standard of care that was required of the Defendant. Dr. Prisco, the Defendant's expert, simply asserts that steroids are proper, but failed to set forth what the standard of care requires in terms of dosage and if the Defendant's use of high dosages was in accordance with that standard of care. Dr. Prisco simply states that the Plaintiff presented to the Defendant with a history of being hospitalized for asthma, had received IV steroids for asthma control in the past and received medications which included inhaled steroids with no benefits at that time.

There are two questions which must be addressed by the Court in determining the existence of questions of fact. The first question is whether or not the Defendant departed from good and accepted standard of care and the second is, if departure is found, whether such departure resulted in the Plaintiff developing AVN. It is clear from the record that the Plaintiff was prescribed steroids before, during and after being treated by the Defendant. However, the question is whether the treatment plan followed by the Defendant departed from good and accepted standard. Avascular Necrosis is a known side effect of treatment with steroids. It is unclear from the record whether or not Plaintiff was advised of the side effects. Furthermore, Knowledge of Plaintiff's mother is not the same as knowledge to Plaintiff.

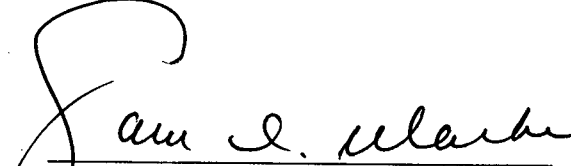
Though it seems from the records that the use of steroids was a critical factor in controlling the Plaintiff's asthma, there is nothing in the record to illustrate what is the good and accepted practice in administering steroids. Moreover, the records show that the Plaintiff responded more favorably to IV induced steroids at certain times and at the

same time the Plaintiff claims that its use was a major contributing factor in her developing AVN. Even Dr. Yip who treated the Plaintiff after she stopped seeing the Defendant had to resort to steroids (Prednisone) to control her asthma. Without knowing the accepted standard of care, the Court cannot make a determination as to whether or not there was a departure on the part of the Defendant from good and accepted practice and that the departure was a contributing factor in the Plaintiff developing AVN. When the evidence is scrutinized carefully in the light most favorable to the party opposing the motion, the Court finds that there exists questions of fact for the jury to determine.

On the question of proximate cause, a determination has to be made as to whether or not the Defendant's departed from good and accepted practice. Once that determination is made, then the question of proximate cause can be determined by the trier of fact. The Plaintiff has raised sufficient questions of fact for jury determination. The Defendant's motion is denied.

The parties are directed to appear before the Settlement Conference Part, 914-824-5350 on _____ 2014 at 9:30 am in Courtroom 1600. To the extent any relief requested in Motion Sequence 1, 2 & 3 were not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 3, 2014


HON. SAM D. WALKER, J.S.C.