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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

IA PART 16

PART _____

Index Number : 100952/2010
BRODER, AARON J.
vs.
RITCH, ROBERT
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent of severing and dismissing all claims related to events that preceded September 24, 2007 on behalf of all the remaining defendants.

FILED

FEB 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: FEB 06 2014

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------X

AARON J. BRODER and ALICE BRODER,

Plaintiffs,

-against-

ROBERT RITCH, M.D., NATHAN RADCLIFFE, M.D., GLAUCOMA ASSOCIATES OF NEW YORK, URI SHABTO, M.D., RETINA CONSULTANTS OF NEW YORK, NEW YORK EYE AND EAR INFIRMARY and CONTINUUM HEALTH PARTNERS,

Defendants.

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Index No. 100952/10
Mot. Seq. Nos. 008 & 009

SCHLESINGER, J.:

This is a medical malpractice case where the plaintiff Aaron Broder, a patient of defendant Dr. Robert Ritch, claims that because of the actions and inactions of Dr. Ritch and his Fellow, defendant Nathan Radcliffe, he lost the sight in his left eye. What is interesting about the summary judgment motions before me brought by all the remaining named defendants is that despite the fact that all the papers contain affidavits or affirmations from credentialed experts opining on the medicine and surgery involved, ultimately the resolution of the issues gets down to a question of "who do you believe." That is why with regard to certain of the claims that occurred on September 24, 2007, the motions for summary judgment will be denied.[1]

Mr. Broder had been a patient of Dr. Ritch since 2004. At that time he was diagnosed with open-angle glaucoma. In fact, later that year in October 2004, Dr. Ritch performed a trabeculectomy of his right eye. A trabeculectomy is a frequently performed surgery to try to regulate the intraocular pressure of the eye. The doctor

[1] The action was discontinued against Dr. Shabto and his professional corporation s/h/a Retina Consultants of New York by Stipulation dated May 16, 2012.

makes a small hole in the eye so the fluid can be directed to the outside of the eye, thus relieving pressure. The tissue that forms a fluid reservoir over this surgically created hole is called a bleb.

Mr. Broder continued to see Dr. Ritch in 2007. However, it was observed by Dr. Ritch that between April 2007 and September 2007 the pressure in the left eye was fluctuating from 12 mmHg to 23, with worsening vision. Dr. Ritch advised Mr. Broder to undergo a trabeculectomy now in his left eye.

The plaintiff agreed and the surgery occurred on September 5, 2007. Dr. Radcliffe, who was working with Dr. Ritch at the time, assisted at the operation, which was uneventful. After the surgery, the patient came to the doctor's office frequently. Specifically, Mr. Broder saw Dr. Ritch on the day after surgery, September 6, and on September 7, 10, 13, 18, and 21, 2007. On all of these visits, Dr. Ritch took some kind of action vis-a-vis the left eye in order to lower its intraocular pressure ("IOP").

Dr. Ritch's procedure was to take two readings of the IOP at each visit. The first one inevitably was higher. Then Dr. Ritch would administer the treatment, such as injecting lidocaine or massaging the eye; then the pressure would be tested again and it would be substantially reduced. For example, on September 6th, the IOP was 23 before any treatment, and after the treatment it was 10. On the following day, September 7th, the IOP was 26 at the first testing and then after treatment it went down to 12.

At this time, plaintiff does not dispute any of the treatment before the surgery, during the surgery, or during the post-operative period through September 21, 2007. However, on Monday, September 24, 2007, the versions of what happened, as told by

each of the three principals, are wildly different. All do seem to acknowledge that there was in fact a visit on that day. After that, the accounts no longer coincide.

Dr. Radcliffe states that he made notations on that date and examined Mr. Broder. Dr. Ritch acknowledges, as does Dr. Radcliffe, that Mr. Broder's IOP in his left eye was 1, an extraordinarily low number. However, Dr. Ritch states that this reading was not particularly alarming and that he allowed Mr. Broder to return home without any special instructions. He refers to only one pressure reading on that day, suggesting that Mr. Broder came in with that IOP reading. But Mr. Broder says that in fact there were two pressure readings taken by Dr. Ritch. He was told by Dr. Ritch that the IOP on the first reading was 16 "or in the teens". Then Dr. Ritch performed a "needling" procedure (twice), which he says was very painful, and then the pressure was taken, resulting in the reading of 1. So all agree that Mr. Broder came to the office on September 24, and all agree that when he left, the IOP in his left eye was 1.

Mr. Broder went home by car and arrived at approximately noon. He states that he left the office with a mild pain in his left eye but that the pain had become much more severe by the time he reached home. This pain got significantly worse as the afternoon went by. Because of this increasing pain, he and his wife began calling Dr. Ritch's office. They made many calls. One call was made at 9:00 p.m. to New York Eye and Ear Infirmary ("NYEEI"). But the ones to Dr. Ritch were made at 1:49 p.m., 7:24 p.m., 7:27 p.m., 8:40 p.m., and finally 11:13 p.m. (The reason that these telephone calls are so precisely timed is that the Verizon records were obtained for Mr. Broder's home phone).

Dr. Ritch never called back. However, Dr. Radcliffe did. Dr. Radcliffe returned the calls either two or three times. Mr. Broder only remembers receiving two calls back.

During the first and perhaps the second call back by Dr. Radcliffe, the response was that there was no need to come back until the next morning and that it was probably the suture that had been put in on September 21 that was causing the pain. Dr. Radcliffe also says that during these calls, Mr. Broder never complained of intense pain. He says that Mr. Broder rather kept referring to the eye as simply being tender.

Finally, at 11:15 p.m. Mr. Broder called and stated that he was in "horrific pain" and that it was so excruciating that he pleaded to come to the hospital to be examined. Dr. Radcliffe agrees that at the last call back at 11:16 p.m. there was a description of more intense pain. Then he directed Mr. Broder to go to the hospital. Mr. Broder, with his wife, called for a taxi, which took them to NYEEI. However, according to Mr. Broder, about half way to the hospital, the vision in his left eye began to disappear and by the end of the drive, his vision was gone. After arrival at the hospital, he was seen by Dr. Radcliffe, who informed Mr. Broder that he had suffered a choroidal hemorrhage and admitted him to the hospital where he remained for nine days.

The defendants' support their motions with affirmations from two ophthalmologists. In the first instance, supporting Dr. Ritch and his professional entity Glaucoma Associates of New York, there is an affirmation from Dr. Thomas R. Kuhns. Dr. Kuhns is a board certified ophthalmologist who graduated from Harvard Medical School and did a Fellowship in Neuro-Ophthalmology at NYU Medical Center. He has reviewed all of the records and opines that all of the treatment that Dr. Ritch provided to Mr. Broder met acceptable standards of ophthalmological care.

Dr. Kuhns states that the trabeculectomy was appropriate in the first instance. The plaintiff does not dispute this assertion. Dr. Kuhns states that the post-operative treatment was also appropriate. As stated before, the adequacy of care was not refuted

until the September 24, 2007 visit. Dr. Kuhns interestingly says nothing about any needling procedure on September 24. All he says about the low IOP was that "over the weekend, the eye pressure dropped so that the IOP was 1". The records seem to indicate, however, that the IOP at the second reading on September 21, the Friday preceding the September 24 visit, was 8. At that visit, Dr. Ritch had cut a single suture in the left eye.

Dr. Kuhns says that Dr. Ritch's decision to send the patient home with an IOP of 1 on the 24th was an appropriate exercise of medical judgment. He explains that because the anterior chamber of the left eye was deep and quiet with no evidence of choroidal infusion, there was no immediate concern for a hemorrhage.

Finally, Dr. Kuhns says that a hemorrhage is a known complication of a trabeculectomy and that Dr. Ritch's response to that event here was appropriate in all ways. He notes in this regard that Mr. Broder was admitted to the hospital and that the doctor then reached out to a retinal specialist, Dr. Shabto, to aid in his patient's care. As to any alleged departure with regard to aspirin that Mr. Broder was taking during the time after the surgery, Dr. Kuhns says this had no medical significance.

The motion by Dr. Radcliffe and NYEEI, the institution where Dr. Radcliffe was employed, is supported by an affidavit from Dr. Stanley Berke, who is Board Certified in Ophthalmology and specializes in the treatment of glaucoma and cataract surgery. Dr. Berke's opinion is that not only did Dr. Radcliffe not depart from any accepted standards of eye care, but that nothing that Dr. Radcliffe did or did not do had any effect on the injury, the hemorrhage leading to the lost vision in the left eye. He also reviewed all of the records and depositions. He elects to base his opinions on Dr. Radcliffe's account of September 24.

In that regard, Dr. Berke states that Dr. Radcliffe appreciated Mr. Broder's complaints and responded appropriately. He opines that Dr. Radcliffe properly exercised his medical judgment in weighing the risks of someone with a very low IOP traveling "to get back to the hospital", particularly where there were no new complaints and the patient had an appointment the following morning. However, once Dr. Radcliffe heard of a significant increase in pain, it was right to advise Mr. Broder then to return to the hospital. As suggested above, this opinion by Dr. Berke relies exclusively on Dr. Radcliffe's testimony that it was only at the last call that Mr. Broder first complained of intense pain. Mr. Broder's testimony and affidavit, which he submits in support of his opposition, state that all through the day into the evening his pain was severe and getting worse and that this fact was communicated.

In a stronger argument regarding causation, Dr. Berke urges that the hemorrhage in all probability had already occurred either before the car ride back to the hospital or during it. He states that earlier treatment by Dr. Radcliffe would not have changed anything.

As stated earlier, the plaintiff opposes the motions with his own affidavit, but more significantly, with an affidavit from a board certified ophthalmologist who practices in California. Similar to what the defendants' experts did in relying on the defendants' account of the events of September 24, this California physician relies instead on Mr. Broder's account. Therefore, when he sets out his opinions as to the departures (and he says there were departures by each of the defendants), he begins with a departure by Dr. Ritch that allegedly occurred on September 24, when according to Broder, Dr. Ritch performed a needling procedure. This was done even though Mr. Broder was told that his IOP was at the time 16 or "in the teens".

A needling procedure attempts to break up the scar tissue that can cover the drainage hole made by the trabeculectomy. If that happens, the process of draining of the excess fluid is frustrated. Mr. Broder states in detail that Dr. Ritch performed this procedure and that it caused him so much pain that he involuntary jerked his head back. He then says Dr. Ritch called somebody from outside the room to come and hold the patient's head in place while he did this procedure a second time. According to Mr. Broder, Dr. Ritch then measured the IOP again and that is when the pressure went down to 1. Mr. Broder then says that he was sent home by Dr. Ritch with no special instructions.

The California doctor states that this procedure done by Dr. Ritch that day was a deviation from accepted standards of care because needling should not have been done in response to an IOP of 16. Here he points out that the right eye, which had a successful trabeculectomy three years earlier, regularly had an IOP of 16. Therefore, the experience in the right eye showed that this reading was an acceptable one and should have been left alone.

The second departure discussed in opposition by the expert is that Mr. Broder was sent home from the September 24 visit with an extremely low IOP of 1 without being given specific instructions as to protecting that eye. The doctor says that an IOP of 1 is a risk factor for a choroidal hemorrhage occurring. He also points out here that Mr. Broder had many other risk factors at the time, including his advanced age, his hypertension, his history of glaucoma, and aspirin use.

Therefore, the expert opines that there was a departure by Dr. Ritch in not giving this patient adequate and specific instructions with regard to not jarring the eye in any way, such as coughing and even bowel movements. Also, he should have advised him

to protect his eye by using a shield day and night. Up to that point, Mr. Broder had been instructed to wear a protective eye shield over his eye only at night. This doctor additionally says that Mr. Broder should have been told to report any changes in his vision or his pain level immediately.

The third departure was not directing Mr. Broder to discontinue the daily aspirin he was taking at that time. This physician explains that because of the increased risk of hemorrhage due to an extremely low IOP, aspirin was contraindicated.

With regard to Dr. Radcliffe, this California doctor bases his opinion not only on the medical records but also on the subpoenaed Verizon phone records. He believes that Dr. Radcliffe departed from accepted standards of eye care in failing to act appropriately in response to Mr. Broder's increasingly frantic phone calls complaining of "horrific" pain that began in the afternoon, at 1:49 p.m, then in the early evening, and finally after 11:00 at night.

This doctor further opines that with Dr. Radcliffe's knowledge of Mr. Broder's abnormally low IOP of 1 that day, together with the patient's complaints of severe eye pain, he should have considered that this presentation showed a beginning choroidal hemorrhage. Therefore, this doctor states that it was a departure by Dr. Radcliffe to not advise Mr. Broder to return to the office after Broder's first call at 1:49 p.m. By 11:16 p.m. that night, when Dr. Radcliffe returned Broder's 11:13 p.m. call and told him to come to the hospital, this doctor says that it was too late.

Finally, this doctor disagrees with Dr. Berke that the bumpy taxi ride caused the hemorrhage. His opinion is that the hemorrhage began at the time the pain increased in severity before the trip back to the hospital. Loss of vision, he continues, is a

consequence of the progressing hemorrhage. This doctor believes that earlier intervention would have, more likely than not, prevented the lost vision in the eye.

In Reply, counsel for the defendants first argues that all other accusations made against their clients, except for the events on September 24, should be dismissed. They are right. Therefore, any and all claims with regard to the advice to have the trabeculectomy, the informed consent by Broder before having it, the performance of the surgery itself, and the post-operative days through September 21, 2007, are all dismissed with prejudice. The plaintiff's expert makes it clear that he has no argument with any thing these defendants did up until September 24, 2007.

Also, and it is an argument commonly made by defense counsel in Reply Affirmations, defendants contend that the affidavit from plaintiff's expert is conclusory and speculative. I find that the opposition affidavit is no more or less conclusory than the affirmations from Dr. Kuhns and Dr. Berke.

However, Dr. Radcliffe's argument on causation is more troublesome to the plaintiff. Counsel here accuses the opposition of not having explained what earlier intervention would have consisted of and how it would have made a difference. But the California doctor does say that the hemorrhage was a process and that stopping it in some way hours earlier would have prevented the complete loss of vision that Mr. Broder suffered. Dr. Radcliffe had testified that he believed that the earlier complaints of pain on September 24 with no change in vision were probably due to a compression of nerves from a low IOP and not an impending hemorrhage, but again the California doctor disagrees and opines that the complaints of pain were a signal that the hemorrhage was beginning.

As I stated earlier in this decision, credibility is at the forefront of this controversy and is controlling on its resolution. As an example, none of the defendants, nor their experts, deals with any specificity with the office visit of September 24. From their vantage point, the IOP tested out as 1, an exceedingly low number, but one not brought on by needling or anything else that anyone did. Yet as related above, Mr. Broder gives a detailed account of the events of that day which include the needling procedure twice, the extreme pain that it caused him, and finally the second IOP testing that showed the very low reading of 1. Broder's expert states that in his opinion, this needling was the first departure committed by Dr. Ritch as it was contraindicated. Obviously, whichever version the jury accepts will have a large part to do with how they resolve this part of the case.

Additionally, as to the phone calls and Dr. Radcliffe's response to them, the verdict on that departure will most likely turn on whether the jury believes Mr. Broder's account of having reported extraordinary pain or Dr. Radcliffe's recollection that Broder only complained of tenderness. Deciding issues of credibility is exclusively a jury function, as it falls into the realm of facts, which is what the jury decides.

Finally on the causation question, while more specificity from the California doctor would have been better, I do find that there is enough here to convince me that there is an issue. I base this conclusion on the doctor's opinion that the hemorrhage started hours earlier and should have been attended to hours earlier, and if that had occurred, the outcome for Mr. Broder would have been much better. Therefore, with regard to the argument made by Dr. Radcliffe's counsel that the opposition is insufficient in this area of causation, I disagree.

In sum, as discussed above, anything to do with the events that preceded September 24, 2007 is dismissed, but the other issues must await a trial for resolution.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants Robert Ritch, M.D., and Glaucoma Associates of New York (mot seq 008) and the motion for summary judgment by defendants Nathan Radcliffe, M.D., New York Eye and Ear Infirmary and Continuum Health Partners (mot seq 009) are granted to the extent of severing and dismissing all claims related to events that preceded September 24, 2007, and the motions are otherwise denied; and it is further

ORDERED that counsel shall appear in Room 222 for a pre-trial conference on Wednesday, April 23, 2014 at 9:30 a.m. to discuss settlement and select a firm trial date. Should counsel wish to appear before that date, counsel may advance the conference on consent by contacting the Part Clerk upon receipt of this decision and order.

Dated: February 6, 2014

FEB 06 2014

FILED

FEB 10 2014

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
ALICE SCHLESINGER