

Obasogie v Schubert
2015 NY Slip Op 32383(U)
November 19, 2015
Supreme Court, Bronx County
Docket Number: 303601/11
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A

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FRANCIS OBASOGIE and
EUNICE OBASOGIE,

Plaintiff(s)

- against -

INDEX NO: 303601/11

ULRICH SCHUBERT, M.D., NICHELLE
SIMMONS, M.D., NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION and
JACOBI MEDICAL CENTER,

DECISION/ORDER

Defendant(s)

-----X
HON. DOUGLAS E. MCKEON

Defendants have moved for summary judgment dismissing the case in its entirety or, alternatively, for an order dismissing all dates of treatment prior to June 2, 2010 for failure to file a timely Notice of Claim as to those dates of treatment and failure to move for an extension of time to do so. Alternatively, they move for an order dismissing all dates of treatment up to December 11, 2007 for failing to file a timely Notice of Claim as to those dates of treatment and failing to timely move for an extension to do so. Alternatively, they move for an order dismissing all dates of treatment prior to December 11, 2007, as barred by the statute of limitations or for summary judgment as to defendant Simmons or, alternatively, for an order dismissing the only date of treatment by Dr. Simmons, December 6, 2007 because plaintiff failed to file a timely Notice of Claim as to this date of treatment and because the time to do so has expired. The motion is decided as follows.

Plaintiff filed a Notice of Claim in this matter on December 23, 2010 alleging that medical malpractice was committed beginning on January 16, 2007 and continuing. The Notice of Claim states that the claim was ongoing through the present and continuing including all dates of care, treatment, and monitoring at Jacobi Medical Center, its clinics and departments. The Summons and Complaint was filed on March 3, 2011. Again, plaintiff asserted allegations from on or before January, 2007 to the present and continuing.

Plaintiff started receiving regular medical treatment at Jacobi Medical Center in 2000. He states in his examination before trial that he never saw a fixed doctor but was seen by "one doctor today, another doctor tomorrow and a medical student". He described multiple areas of care and medication received at Jacobi for diabetes, high blood pressure, hypertension, angina, cardiology, cholesterol and prostate. In 2007 he began to have issues with his throat including pain, hoarseness and difficulty swallowing. He described the pain as occurring on both sides of his neck. Plaintiff stated that he would go for general medical visits in 2007 and complain about his throat issues. He described receiving Motrin for the pain and that the pain of swallowing was continuous throughout 2007. At some point in 2007, towards the end of the year, he described a doctor feeling his neck and telling him he had some nodules and was going to have a biopsy. Three months later he was scheduled for a biopsy at Jacobi. He underwent a fine needle biopsy in 2007 and continued making complaints to the doctors about the throat pain with swallowing. He was never told the results of the biopsy or for a need to do additional biopsies. In his

examination before trial, he described continuing visits to Jacobi in 2008 and continuing symptoms of pain swallowing and hoarseness which were getting worse. He states that he always made the same complaint about his throat. According to his deposition testimony, he made complaints about his throat on every single visit. He further stated that he continued to make these complaints at every single visit in 2009, and that on every visit, regardless of the reason he went to Jacobi, he complained about his neck. Eventually, plaintiff was referred for a thyroid ultrasound on December 11, 2009. He had a January 26, 2010 biopsy postponed until March 16, 2010. He was referred for a surgical consultation on May 18, 2010 and was medically cleared for surgery at Jacobi on June 2, 2010. He had a thyroidectomy at New York Presbyterian Hospital on July 29, 2010. He testified on January 22, 2013 that he continued care regularly at Jacobi and that his last visit at that time was January 14, 2013.

Movants argue that the record shows that defendants did not commit medical malpractice and are entitled to summary judgment. If the Court does not dismiss the case on those grounds, defendants have also moved for summary judgment and dismissal on several other grounds all of which are related to failure to timely file a Notice of Claim, failure to timely move for an extension to do so and failure to timely file a complaint before the expiration of the statute of limitations. In contrast to plaintiff's opposition, movants argue that on December 11, 2007 Dr. Schubart, the doctor who was the Director of the Endocrinology Clinic, and saw the plaintiff after the fine needle aspiration, told him that the specimen obtained was insufficient and

that he needed another one to determine whether there was cancer. Despite this, according to Dr. Schubart's deposition, plaintiff refused another fine needle aspiration and then failed to return to the defendants for thyroid treatment until almost two years later on October 20, 2009. Jacobi has provided the Court with proof that it sent plaintiff multiple missed appointment letters during this time to which plaintiff did not respond. Plaintiff did present to other clinics including cardiology and podiatry during the two year gap in his visits to the endocrinology clinic but he did not undergo any treatment for thyroid issues. Two years after he last saw Dr. Schubart, plaintiff returned to the endocrinology clinic on October 20, 2009. He again saw Dr. Schubart who referred him for a thyroid ultrasound that was done on December 11, 2009. When he returned on January 12, 2010 he was told of the ultrasound results and that he should have a fine needle aspiration. When plaintiff returned on January 26th the fine needle aspiration could not be done because plaintiff had a fever and a respiratory infection. It was completed on March 16, 2010 and the results were noted to be suspicious for papillary thyroid carcinoma. Plaintiff was told that the surgical removal of the thyroid was necessary because there was a high likelihood that he had cancer of the thyroid. He was scheduled for surgery with Dr. Barker on June 17, 2010. Although plaintiff presented to the medical clinic at Jacobi for medical clearance for the surgery and received clearance, he had the surgery done on his own by New York Presbyterian. Plaintiff had a thyroidectomy at New York Presbyterian on July 29, 2010. He did not undergo any other treatment. While plaintiff has had treatment at Jacobi for other

conditions, he has not had any thyroid treatment there since June 2, 2010. As plaintiff's Notice of Claim was filed on December 23, 2010, well beyond the 90 days since the last date of treatment for his thyroid, and years after the break in continuous treatment that occurred on December 11, 2007 when plaintiff was told he needed another fine needle aspiration biopsy but did not follow defendant's recommendations, defendant claims the matter should be dismissed.

Defendant argues that it is entitled to summary judgment and has provided the expert affirmation of Dr. Bernstein in support. Dr. Bernstein states that Dr. Simmons, whose only involvement with plaintiff was reviewing the specimens from the fine needle aspiration on December 11, 2007 and preparing a pathology report stating that the specimen was insufficient, did not depart from accepted standards of medical practice and was not the cause of any alleged damages. Dr. Bernstein also opines that Dr. Schubart, the endocrinologist who saw plaintiff during many of his visits and the other clinics at Jacobi where plaintiff was treated for unrelated conditions did not depart from accepted standards of medical practice. Dr. Bernstein opines within a reasonable degree of medical certainty that plaintiff would have required the same exact treatment for his thyroid cancer (surgical removal of the thyroid) even if it was diagnosed on January 16, 2007, the first date of any alleged malpractice according to plaintiff's complaint, and his prognosis would have been the same. Defendants also state that they are entitled to dismissal of the informed consent cause of action because plaintiff has failed to claim or specify any procedure that was done that required an informed consent. Plaintiff's allegations are for failure

to timely diagnose and treat thyroid cancer.

Initially, the claim for informed consent is dismissed.

Plaintiff argues that Dr. Bernstein's affirmation should be discredited as conclusory and erroneous. Plaintiff argues that the expert fails to address plaintiff's claims that after the fine needle biopsy he continued treatment complaining about the throat pain and was never told about the results or the need to do more biopsies. Plaintiff also argues that defendants are trying to separate plaintiff's continued care at multiple Jacobi clinics from his treatment at the endocrinology clinic to diffuse the depiction of regular continuous care by all physicians at Jacobi. They claim that Dr. Bernstein is incorrect in his opinion that plaintiff ended his treatment with defendants for his thyroid and endocrinology issues on December 11, 2007 and failed to return to them for thyroid and endocrinology issues until two years later on October 20, 2009. Plaintiff argues that the care he received at Jacobi was collective and consistent from 2007 to 2013 and continuing. Plaintiff points to the one hospital chart to demonstrate the continuous and collective medical care records. Plaintiff points to various errors in the expert affirmation of Dr. Bernstein. For example, Dr. Bernstein states that plaintiff was told by Dr. Schubart that the specimen was insufficient to make a diagnosis. According to plaintiff this is false and there is no evidence that Dr. Schubart spoke with plaintiff at that time. As confirmed by testimony of Dr. Schubart, plaintiff was seen by Dr. Huang and not Dr. Schubart on that occasion. Furthermore, there is no evidence to demonstrate that plaintiff was told about the insufficiency of the biopsy by Dr. Schubart. As such, there is a clear

issue of fact as to whether plaintiff was told that the biopsy was insufficient and he needed to do it again. Dr. Bernstein asserts that when plaintiff returned to the endocrinology clinic almost two years later he was seen by Dr. Schubart. This is inaccurate as Dr. Schubart testified that plaintiff was actually seen by Ella Rosenbloom.

Defendants argue that plaintiff's last date of treatment for thyroid cancer with them was June 2, 2010 at which time plaintiff was aware of the cancer diagnosis and was seeking medical clearance for surgery. Plaintiff then made a conscious decision to have his thyroid treated elsewhere and have the surgery at New York Presbyterian Hospital. Therefore, defendants argue that the time to file a Notice of Claim began on June 2, 2010 and expired 90 days later on September 2, 2010, six months before the Notice of Claim was filed. As such, defendants argue the Court should dismiss all dates of treatment prior to and including June 2nd because of the failure to timely file a Notice of Claim and the failure to move to do so before the time expired on September 2, 2011. Upon dismissal of those dates there are no remaining dates at issue so the Court should dismiss the case.

Defendant's motion is granted. The court notes that plaintiff has failed to show that a triable issue in fact exist in that plaintiff has not submitted a affidavit of a medical expert to refute Dr. Bernstein's expert affidavit. Here, Dr. Bernstein, in support of defendant's motion for summary judgment, has addressed all aspects of plaintiff's treatment and opined that defendant's did not depart from good and accepted medical practice. He further opines that any alleged departures did not

cause any damages because plaintiff's treatment would have been the same even if the cancer was diagnosed earlier which would have been the removal of the thyroid. Because movant's have shown that any alleged departures did not cause any damages as the treatment would have been the same had the thyroid cancer been diagnosed earlier, the motion is granted. The court notes that plaintiff has not offered an expert affidavit to oppose any of movant's alternative arguments for dismissal including that the notice of claim was untimely or that the dates of treatment should be dismissed as bared by the statue of limitations. As such, even accepting that plaintiff has demonstrated questions of fact regarding whether Dr. Schubart saw plaintiff on various occasions and whether plaintiff was told about the insufficiency of the biopsy plaintiff has failed to raise an issue of fact as to whether any departures caused any damages herein. Defendant's have established their entitlement to summary judgment.

So Ordered.

Dated: 11/19/15



Douglas E. McKeon, J.S.C.