Cuenca-Perez v New York City Health & Hosps. Corp.
2018 NY Slip Op 32050(U)
August 21, 2018
Supreme Court, New York County
Docket Number: 805087/2014
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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GISEL CUENCA-PEREZ Index №.: 805087/2014

-against- **Hon. GEORGE J. SILVER**

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION Justice Supreme Court

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The following papers numbered 1 to 3 were read on this motion for (Seq. No.: 003) for **PRECLUDE**

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1
Answering Affidavit and Exhibits	No(s).	2
Replying Affidavit and Exhibits	No(s).	3

Motion is Respectfully Referred to Justice: _____
Dated: _____

In this medical malpractice action, defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("defendant") moves for an order precluding plaintiff GISEL CUENCA-PEREZ's ("plaintiff") expert from testifying that in 2013, when plaintiff suffered the injuries alleged in this lawsuit, or the present, the relevant medical standards of acceptable care required that antibiotics be administered to treat nontyphoidal *Salmonella* ("NTS"). In addition, defendant moves for an order precluding plaintiff's expert from testifying that plaintiff's small bowel perforation was proximately caused by NTS rather than plaintiff's ingestion of ingestion of sharp, jagged pieces of plastic. In the absence of admissible causation evidence from a medical professional, defendant asks that plaintiff's complaint be dismissed with prejudice. In the alternative, defendant asks that this court grant a hearing pursuant to *Frye v. U .S.*, 293 F. 1013 (D.C. Cir. 1923) and *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 446-47 (2006), requiring plaintiff to establish the medical and scientific validity of her liability and causation theories.

BACKGROUND

This action involves allegations that plaintiff suffered a small bowel perforation due to salmonellosis. As is relevant to this motion, defendant challenges plaintiff's claim that defendant failed to timely diagnose and treat her salmonellosis by prescribing her with antibiotics, and further failed to keep plaintiff in the hospital for continued evaluation rather than discharging her. Plaintiff claims that defendant's negligence was a substantial factor in causing, among other things, plaintiff's small bowel perforation, and resulting need for surgery, and a subsequent two-month hospitalization. In support of the instant motion, defendant annexes the supporting affirmation of Alan Pollock, M.D ("Dr. Pollock") , who opines that plaintiff's allegations lack merit because it is generally accepted in the medical and scientific communities that antibiotics should not be used routinely to treat NTS. Moreover, it is not generally accepted in the medical and scientific communities that NTS, the type of *Salmonella* that plaintiff had, causes the injuries that plaintiff has alleged in this lawsuit. Moreover, defendant contends that plaintiff's expert ignores that plaintiff's small bowel perforation was caused by plaintiff's ingestion of sharp, jagged pieces of plastic rather than by defendant's failure to prescribe antibiotics or monitor her more closely.

In opposition, plaintiff contends that defendant's request for a *Frye* hearing has no basis because plaintiff's expert's competing opinion from that espoused by Dr. Pollock does not provide a foundation for a *Frye* hearing. Rather, such competing opinions raise issues of fact for a jury to resolve. In addition, plaintiff argues that plaintiff's expert is actually in agreement with the literature cited by defendant. But unlike defendant, plaintiff's expert states that the literature has been misapplied to the facts of this case. Therefore, plaintiff contends that she is not applying any "novel" medical theories, but is applying the very same medical theories found in the defendant's literature as explained by plaintiff's expert in the expert's affirmation. In plaintiff's view, defendant has misleadingly argued that plaintiff has an opinion unsupported by the medical literature because a normal healthy person would not be susceptible to an intestinal perforation caused by *Salmonella*. Plaintiff's expert states that plaintiff does not disagree with that supposition, but rather contends that defendant has misleadingly ignored the fact that plaintiff suffered from serious weight loss, thereby placing her well under 100 pounds and within the fifth percentile of weight for her 5'2" height. By definition, as explained by the plaintiff's expert, a person with such a weight loss is an immune compromised person. As such, per defendant's own literature, plaintiff argues that an immunosuppressed individual and an individual who has suffered great weight loss, is susceptible to intestinal perforation due to infection. Plaintiff further argues that it is the defendant's glaring sidestep of this crucial fact that has enabled defendant to reach the false and insupportable conclusion that plaintiff could not have suffered an abdominal perforation due to infection. Contrary to defendant's claim, plaintiff contends that an emaciated immunosuppressed person such as plaintiff can suffer from intestinal perforation caused by *Salmonella*. It is plaintiff's contention that defendant ignored plaintiff's unique presentation by failing to administer antibiotics and closely monitor plaintiff, thereby proximately causing plaintiff's injuries. Accordingly, plaintiff argues that defendant's requests to preclude her expert from testifying, and to dismiss this case in the absence of admissible causation evidence from a medical professional, should be denied. In addition, plaintiff contends that defendant's alternative request for a *Frye* hearing should be denied in light of the fact that plaintiff's expert is not relying on a "novel" medical theory that would necessitate such a hearing.

In reply, defendant reiterates defendant's position that it is entitled to dismissal of plaintiff's lawsuit. If this court is disinclined to issue an order dismissing the case, defendant renews its request for a *Frye* hearing in order to reconcile the "novel" theories espoused by plaintiff's expert.

DISCUSSION

In deciding the instant motion, the court will consider defendant's application for a Frye hearing prior to addressing the merits of defendant's simultaneous request for dismissal.

A. *Frye* Hearing

With respect to the test for admissibility of expert testimony derived from *Frye v. U.S.*, *supra*, (the "*Frye* test"), the New York Court of Appeals has held:

> [t]he introduction of novel scientific evidence calls for a determination of its reliability. Thus, the Frye test asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.' ... Frye holds that 'while courts will go a long way in

> admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' ... It 'emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion.' " (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 446-47 [2006]).

There is a distinction between the *Frye* test for novel scientific evidence and the test for determining the "adequacy of the specific procedures used to generate the particular evidence to be admitted," or the foundation for the evidence (*see People v. Wesley*, 83 NY2d 417, 422 [1994]).

Here, although defendant may have a basis for challenging plaintiff's expert opinion at trial, a pre-trial *Frye* hearing will not be granted at this time. "The law does not support subjecting experts' views to pretrial hearings in every situation to ensure that they are based on sufficiently established principles; such a hearing should be held only if the basis for the expert's conclusions is novel" (*Marsh v. Smyth*, A.D3d 307, 308 [1st Dept. 2004]). Here, the record before the court does not support the position that plaintiff's expert is relying on novel science or a "newly minted procedure or test" (*Marsh v. Smyth, supra*, at 311). Rather, as plaintiff highlights in her opposition, much of the medical literature defendant cites is unchallenged by plaintiff's expert. Instead, plaintiff's expert has simply reached a different conclusion based on the same literature, especially in light of plaintiff's immunosuppressed condition occasioned by her weight loss. To the extent that defendant takes issue with the specific reliability of the procedures and methodology employed by plaintiff's expert, defendant's challenges "are actually matters going to trial foundation or the weight of the evidence, both matters not properly addressed in the pretrial *Frye* proceeding" (*People v. Wesley*, 83 NY2d at 426, *supra*). Accordingly, defendant's challenges merely raise issues of credibility, and are insufficient to warrant a *Frye* hearing.

B. Summary Judgment

To prevail on summary judgment in a medical malpractice case, a hospital and the physicians therein must demonstrate that they did not depart from accepted standards of practice or that, even if they did, they did not proximately cause the patient's injury (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept. 2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207). The expert cannot make conclusions by assuming material facts which lack evidentiary support (*id.*). The defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept. 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept. 2003]).

Once a *prima facie* showing is made, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To meet that burden, a plaintiff must submit an expert affidavit attesting that a defendant departed from accepted medical practice and that the departure proximately caused the injuries alleged (*see Roques*, 73 AD3d at 207, supra). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical

expert opinions" (*Elmes v. Yelon*, 140 A.D.3d 1009 [2nd Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*).

Here, defendant set forth a *prima facie* showing in favor of dismissal. In particular, Dr. Pollack, opined that the treatment of plaintiff's condition with antibiotics was unwarranted, and that further observation of plaintiff would not have yielded a different result. Accordingly, Dr. Pollack concluded, based on ample evidence within the record, that defendant's actions comported with appropriate standards of care, and that defendant did not proximately cause plaintiff's injuries. As Dr. Pollack's opinions are detailed and predicated upon support within the record, defendant has made *prima facie* showing, thus shifting the burden to plaintiff.

In opposition, contrary to defendant's assertions, plaintiff has submitted an admissible expert affirmation that raises triable issues of fact with respect to whether defendant's treatment comported with accepted standards of care. To be sure, plaintiff's expert highlights that plaintiff is actually in agreement with the literature cited by defendant as to the appropriate standard of care. Rather than espousing a "novel" legal theory that could possibly warrant a *Frye* hearing, plaintiff merely contends that while a normal, healthy person, would not be susceptible to an intestinal perforation caused by *Salmonella*, because plaintiff suffered from serious weight loss, thereby placing her well under 100 pounds and within the fifth percentile of weight for her 5'2" height, plaintiff contends that defendant should have subjected her to additional safeguards, including frequent monitoring and the administration of antibiotics. Because defendant cannot unequivocally rule out the possibility that additional care would have yielded a different result in light of plaintiff's unique presentation, sufficient issues of fact have been raised to defeat defendant's *prima facie* showing. Defendant's challenges to the expertise of plaintiff's expert have no merit, as such attacks merely raise credibility issues that this court cannot decide as a matter of law (*see Elmes*, 140 AD3d at 1011, *supra*).

Viewing all the facts in a light most favorable to plaintiff, the court finds that there are questions of fact raised in the instant matter that warrant denial of defendants' collective applications for dismissal, preclusion of plaintiff's expert from testifying, and a *Frye* hearing. Consequently, considering the foregoing, it is hereby

ORDERED, that defendant's motion seeking to preclude plaintiff's expert from testifying, or in the alternative, granting a hearing pursuant to *Frye v. U .S.*, 293 F. 1013 (D.C. Cir. 1923) and *Parker v. Mobil Oil Corp.*, 7 NY3d 434, 446-47 (2006), is denied; and it is further,

ORDERED that defendant's motion seeking summary judgment, and dismissal of plaintiff's complaint, is denied; and it is further

ORDERED that the parties are directed to appear for a conference on October 2, 2018 at 111 Centre Street, Room 1227, New York, New York at 9:30 AM.

This constitutes the decision and order of the court.

Dated: August 21, 2018

Hon. George J. Silver

GEORGE J. SILVER, J.S.C.

GEORGE J. SILVER

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☑ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED	☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT