

Connolly v Nahm

2021 NY Slip Op 32953(U)

December 27, 2021

Supreme Court, New York County

Docket Number: Index No. 805363/2015

Judge: Deborah A. Kaplan

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

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BRIAN CONNOLLY,

Plaintiff,

-against-

**Index №. 805363/2015
Decision and Order
Mot Seq Nos 004, 005**

**EDMUND NAHM, M.D., KAYLENE MILLARD, PA-C,
ABE BERGER, M.D., BETH ISREAL MEDICAL
CENTER, MOUNT SINAI HOSPITALS GROUP, AND
MOUNT SINAI HEALTH SYSTEM INC.,**

Defendants.

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HON. DEBORAH A. KAPLAN:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence 004, defendant EDMUND NAHM, M.D. (“Dr. Nahm”), pursuant to CPLR 3212, moves for summary judgment dismissing the complaint of plaintiff BRIAN CONNOLLY (“plaintiff”) and any cross claims as against him. In motion sequence 005, defendants KAYLENE MILLARD, PA-C (P.A. Millard), ABE BERGER, M.D (Dr. Berger), and BETH ISREAL MEDICAL CENTER (“Mt. Sinai defendants”) move for the same relief. Plaintiff opposes both applications.

BACKGROUND AND ARGUMENTS

This is an action for medical malpractice that arises from the alleged improper evaluation and treatment of plaintiff during an emergency department presentation at Mt. Sinai on July 9, 2014 and on July 12, 2014. Plaintiff alleges that he presented with acute left-sided sensorineural hearing loss, which defendants purportedly failed to properly evaluate with an audiogram and empirically treat with steroids. Plaintiff claims the foregoing resulted in profound deafness in the left ear.

In support of his motion, Dr. Nahm annexes an affirmation of board-certified otolaryngologist Alvin Katz, M.D. (“Dr. Katz”), who opines that the care and treatment rendered to plaintiff was, at all times, appropriate and in accordance with good and accepted medical practice, and did not cause or contribute to the plaintiff’s alleged injuries including, but not limited to, deafness of the left ear. Dr. Katz states, within a reasonable degree of medical certainty, that the pleadings, medical records, and deposition testimony demonstrate that Dr. Nahm is entitled to summary judgment, as there are no triable issues of fact that would preclude Dr. Nahm from establishing a prima facie showing of entitlement to judgment as a matter of law.

In support of their motion, the Mt. Sinai defendants annex the expert affirmations of Saul Melman, M.D. (“Dr. Melham”), an emergency medicine physician, and Sean McMenemy, M.D. (“Dr. McMenemy”), an otolaryngology/ear nose and throat (“ENT”) expert. Both experts opine that these defendants appropriately evaluated plaintiff in the emergency department and appropriately referred him for timely audiometric testing and follow-up evaluation. Based on an evaluation of the records, the experts state that Dr. Berger and P.A. Millard ordered an ENT consultation, which was performed by Dr. Nahm in the emergency department. A thorough evaluation was provided to assess plaintiff’s complaints of left-sided decreased hearing on July 9, 2014. The experts state that plaintiff was appropriately referred for further ENT workup, including an audiogram to be performed as soon as possible. They further emphasize that plaintiff was appropriately advised that he could undergo this test at the New York Eye and Ear Institute. In his affirmation, Dr. McMenemy explains that thereafter steroidal treatment was timely initiated, and that all appropriate treatment was provided despite plaintiff’s initial noncompliance with defendants’ instructions. Dr. McMenemy opines that plaintiff’s alleged hearing loss cannot be attributed to any alleged delay in treatment, because all treatment was timely and appropriately provided, and some patients do not recover hearing even when provided timely treatment.

Based on the foregoing, the Mt. Sinai defendants state that they are entitled to summary judgment because the treatment provided to plaintiff was well within the standard of care and it did not cause or contribute to plaintiff’s alleged injuries. The Mt. Sinai defendants further contend that they appropriately examined plaintiff, obtained an appropriate consultation, and recommended appropriate follow up testing and evaluation by specialists. Further, they state that plaintiff was timely prescribed steroidal treatment. In the Mt. Sinai defendants’ estimation, plaintiff cannot demonstrate any departure from the standard of care, and cannot establish that any alleged departure caused or contributed to plaintiff’s alleged injuries. Accordingly, the Mt. Sinai defendants ask that the action be dismissed as against them as a matter of law.

In opposition, plaintiff argues that while defendants have met their initial burden of proof with respect to the balance of plaintiff’s malpractice claims, plaintiff has raised questions of fact on all claims through the submission of expert evidence. Plaintiff submits the expert affirmations of Barry Benjamin, M.D. (“Dr. Benjamin”), an expert otolaryngologist (“ENT”), and Amesh Adalja, M.D. (“Dr. Adalja”), an expert Emergency Department (“ED”) physician. Together, plaintiff’s experts contend that defendants failed to appreciate the urgent nature of plaintiff’s condition, and emphasize that a STAT audiogram order could have prevented plaintiff’s hearing loss.

In reply, Dr. Nahm and the Mt. Sinai defendants both reiterate that plaintiff was treated appropriately, and that no actions on their part proximately caused the injuries alleged.

DISCUSSION

The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing the absence of triable issues of fact as to whether the defendant physician was negligent (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In response, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*). However, “general allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment” (*id.* at 325).

Here, based on the evidence submitted, including medical records, deposition transcripts, and expert affirmations based upon the same, the court finds that Dr. Nahm and the Mt. Sinai defendants have both established a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). Defendants’ experts opine that the care and treatment rendered comported with good and accepted medical practice and that nothing that they did, or did not do, was the proximate cause of the alleged injuries.

In response to that prima facie showing, however, plaintiff has submitted evidence raising triable issues of fact that must be resolved by a jury. For instance, plaintiff’s experts opine that Dr. Nahm could have changed his orders or insured that the audiogram was performed within one day. Dr. Benjamin also opines that the treatment provided to plaintiff on July 12, 2014 departed from the standard of care because emergency department staff still failed to ensure that plaintiff underwent a STAT audiogram. Dr. Benjamin also counters the opinions offered by defendants’ experts by emphasizing that the standard of care does not permit an ENT to disregard acute hearing loss for three days and do nothing. Plaintiffs’ experts further state that Dr. Nahm departed from the standard of care by failing to perform a clinical exam that included a neurological exam, and form or workup a differential diagnosis. Cumulatively, plaintiff’s experts’ affirmations conflict with those submitted by defendants insofar as plaintiff’s experts emphasize that defendants more likely than not deprived plaintiff of a chance at a better outcome (*see Allcea v Ligouri*, 54 AD3d 784, 786 [2d Dept 2008]). As the plaintiff’s experts opinions conflict with the opinion offered by defendants’ experts, summary judgment is inappropriate. To be sure, “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Bengston v Wang*, 41 AD3d 625, 626 [2d Dept 2007]).

These conflicting opinions raise issues of fact as to whether defendants departed from the standard of care (*Forbose v Weiner*, 19 AD3d 258 [1st Dept 2005]). Conflicting affidavits by expert witnesses, with sufficient evidence of medical malpractice, create “a classic conflict between experts,” thus precluding a summary judgment motion in a medical malpractice case (*Santiago v Brandeis*, 309 AD2d 621, 622 [1st Dept 2003]).

Accordingly, it is hereby

ORDERED that the instant motions for summary judgment, in motion sequence numbers 004 and 005, are denied.

This constitutes the decision and order of the court.

Dated: 12/27/2021
New York, New York

ENTER: _____


DEBORAH A. KAPLAN, J.S.C.

Hon. Deborah A. Kaplan
J.S.C.