

J.S. v Goldweber

2012 NY Slip Op 31020(U)

April 17, 2012

Supreme Court, New York County

Docket Number: 106897/08

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

J.S.

INDEX NO. 106897/08

Plaintiff,

MOTION DATE 2/7/12

- v -

MOTION SEQ. NO. 003

BRIAN GOLDWEBER, M.D., ET. AL.

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to 27, were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion / Order to Show Cause - Affidavits - Exhibits _____

1-15

Answering Affidavits - Exhibits _____

16-24

Replying Affidavits _____

25-27

Cross-Motion: [] Yes [X] No

This motion is decided in accordance with the accompanying memorandum decision and order.

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/17/12

JBL
JOAN B. LOBIS, J.S.C.

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
J.S.,

Plaintiff,

Index No. 106897/08

-against-

Decision and Order

BRIAN GOLDWEBER, M.D., BRIAN GOLDWEBER,
M.D., LLC, ABBE J. CARNI, M.D., ABBE J. CARNI,
M.D., P.C., EDWARD GOLDBERG, M.D., and
EDWARD GOLDBERG, M.D., P.C.,

Defendants.
-----X

JOAN B. LOBIS, J.S.C.:

FILED

APR 18 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

In Motion Sequence Number 003, defendants¹ Edward Goldberg, M.D., and Edward Goldberg, M.D., P.C. (the "Goldberg Defendants") move, by order to show cause, for an order, pursuant to C.P.L.R. Rule 3212, granting them summary judgment on the basis that plaintiff's causes of action against them have no merit and that no triable issue of fact remains, or in the alternative, granting them partial summary judgment dismissal of plaintiff's claims for punitive damages. In Motion Sequence Number 004, defendants Abbe J. Carni, M.D., and Abbe J. Carni, M.D., P.C. (the "Carni Defendants") also move for summary judgment. Plaintiff opposes defendants' motions on the grounds that the motions are insufficient to foreclose all theories of negligence and causation.

This case is one of a number of lawsuits commenced by patients of defendant Brian A. Goldweber, M.D., a former anesthesiologist. In 2007, Dr. Goldweber became the focus of a New

¹ Defendants Brian Goldweber, M.D., and Brian A. Goldweber, M.D., LLC, have been discharged in bankruptcy and have not appeared in this action.

York City Department of Health ("NYCDOH") investigation after a number of his patients were discovered to have contracted hepatitis B and C viruses after their treatment with him. The NYCDOH eventually determined that the manner in which Dr. Goldweber administered anesthesia caused a hepatitis outbreak among these patients; the hepatitis outbreaks involved some patients who were administered anesthesia by Dr. Goldweber on June 3, 2005 or August 14-15, 2006.

Plaintiff was Dr. Goldberg's patient. He saw Dr. Goldberg for various abdominal symptoms and complaints, including abdominal discomfort, pain, nausea, vomiting, and diarrhea, beginning in 2001. Plaintiff had been diagnosed with human immunodeficiency virus ("HIV") in 1994 and was on anti-viral treatment during the time he treated with Dr. Goldberg. In April 2003, Dr. Goldberg performed hepatitis A, B, and C testing on plaintiff; he tested positive for antibodies against hepatitis A and B, indicating prior exposure, but tested negative for antibodies against hepatitis C, indicating that he had not previously been exposed to hepatitis C ("HCV").

On March 21 and April 6, 2006, respectively, Dr. Goldberg performed a colonoscopy and an upper endoscopy on plaintiff, at his office, while Dr. Goldweber administered intravenous anesthesia using propofol. The procedures themselves were uneventful. On April 24, 2006, and January 9, 2007, plaintiff's blood tested negative for antibodies against HCV. However, in May 2007, plaintiff was diagnosed with HCV and underwent antiviral treatment for same. Testing of plaintiff's blood after completion of the antiviral therapy indicated that his body was clear of HCV.

Plaintiff was not included in NYCDOH's final investigative report. Dr. Goldberg testified that when he was served with plaintiff's lawsuit, he looked into his records to see if there

were any known source patients with HCV who were administered anaesthesia by Dr. Goldweber before plaintiff was administered anaesthesia by Dr. Goldweber. He testified that his review did not indicate that there was a known source patient who was administered anesthesia prior to plaintiff, but that not all of his patients had been tested.

On or about May 19, 2008, plaintiff commenced this lawsuit. His complaint raises causes of action sounding in negligence, medical malpractice, and lack of informed consent against all of the defendants for causing him to contract HCV on April 6, 2006, through Dr. Goldweber's use of vials of propofol contaminated with the virus. As against the Goldberg and Carni Defendants, plaintiff brings claims sounding in vicarious liability, negligent hiring, and negligent retention. He also asserts a claim for punitive damages.

The Goldberg and Carni Defendants maintain that plaintiff did not contract HCV on either March 21 or April 6, 2006, and as such, his claims must fail. In support of their motion, the Goldberg Defendants offer an expert affirmation from H. Alan Schnall, M.D. Dr. Schnall sets forth that he is a physician licensed to practice medicine in the State of New York and board certified in internal medicine with a sub-certification in gastroenterology. Dr. Schnall sets forth that he reviewed plaintiff's medical records as maintained by Dr. Goldberg; the bills of particulars; the deposition transcripts of plaintiff, Dr. Goldberg, Dr. Carni, and Dr. Goldweber; plaintiff's medical records from Dr. Gambarin, Jewish Guild for the Blind, and Dr. Montana; and NYCDOH's final report regarding its investigation into Dr. Goldweber's medical practices. Based on this review, Dr. Schnall opines that there is no evidence that plaintiff contracted HCV through Dr. Goldweber's acts or omissions on either March 21 or April 6, 2006. Dr. Schnall avers that the incubation period (the time from

exposure to detection) for HCV ranges from two weeks to six months, and is most commonly six to nine weeks. He maintains that this is corroborated by the statement on the laboratory reports indicating that HCV antibodies are typically not detected until approximately fourteen (14) weeks after exposure. Dr. Schnall asserts that the timing of plaintiff's positive result for HCV indicates that he contracted it some months after Dr. Goldweber administered anesthesia to him; because plaintiff tested negative for HCV in January 2007, and positive in May 2007, Dr. Schnall theorizes that he contracted HCV between October 2006 and April 2007. Dr. Schnall asserts that plaintiff may have contracted HCV during a knee arthroscopy in February 2007 or during his participation in a study utilizing human growth hormone injections from July 2006 through October 2006, during which he received injections, intravenous treatment, and multiple blood draws. Dr. Schnall also contends that plaintiff was at a high risk for HCV and other blood-borne diseases as evidenced by the serial and frequent HCV testing ordered prior to NYCDOH's investigation. Dr. Schnall opines that had plaintiff been infected with HCV on March 21 or April 6, 2006, HCV antibodies would have been present nine months later when he was tested in January 2007, but they were not present at that time. Further, according to Dr. Schnall, the fact that plaintiff tested positive for HCV antibodies more than one year after his last procedure by Dr. Goldberg is not proof that plaintiff contracted HCV during Dr. Goldberg's procedures. Dr. Schnall adds that the NYCDOH report does not raise any suspicion that NYCDOH found any patients who contracted hepatitis from anesthesia administered by Dr. Goldweber at Dr. Goldberg's practice on March 21 or April 6, 2006.

In support of the Carni Defendants' argument that there is no medical evidence supporting plaintiff's claim that he contracted HCV through Dr. Goldweber's acts or omissions on March 21 or April 6, 2006, they submit an affirmation from Alan Pollock, M.D., who affirms that

he is a physician duly licensed to practice medicine in New York and board certified in internal medicine with a sub-specialty in infectious disease. Dr. Pollock states that he reviewed, amongst other things, plaintiff's pleadings; the pertinent medical records and laboratory records; NYCDOH's final report; and the parties' deposition testimony. Based on this review, Dr. Pollock opines that there is no medical evidence that plaintiff contracted HCV during either the colonoscopy or the upper endoscopy. First, he points out that there is no indication in NYCDOH's final report that any patient who underwent a procedure at Dr. Goldberg's office on March 21 or April 6, 2006, carried a highly-related genetic strain of the HCV that plaintiff contracted. Dr. Pollock maintains that without evidence that a prior patient carried a strain of HCV that was highly related to the strain that plaintiff carries, there is no way to determine that plaintiff contracted HCV during either procedure. He contends that plaintiff contracted HCV after the procedures, based on plaintiff's medical treatments in 2006 and 2007 and plaintiff's sexual behavior. Dr. Pollock states that the incubation period of HCV is six to ten weeks, with an average of seven weeks. He opines that if plaintiff had been exposed to HCV in March or April 2006, his blood work between April 2006 and January 2007 would have shown elevated liver function levels. Dr. Pollock states that plaintiff's liver function was normal and he tested negative for HCV antibodies as late as January 9, 2007, but on April 19, 2007, his liver function levels were elevated, indicating an acute infection of HCV during April and May 2007. Dr. Pollock opines that an acute infection in April/May 2007 indicates exposure approximately six to ten weeks prior, or between February and March 2007, not March or April 2006.

In opposition, plaintiff maintains that defendants' papers are insufficient to foreclose all theories of negligence and causation if plaintiff is given the benefit of all possible inferences.

Plaintiff submits an expert affidavit from Louis A. Schenfeld, M.D., who states that he is a physician licensed to practice medicine in Pennsylvania and board certified in internal medicine and infectious diseases. Dr. Schenfeld states that he reviewed plaintiff's blood testing records; NYCDOH's final report; defendants' attorneys' and experts' affirmations in support of their motions for summary judgment; and select portions of defendants' deposition transcripts. Based on his review of these documents, Dr. Schenfeld opines, with a reasonable degree of medical certainty, that defendants' experts' opinions as to causation are incomplete. Dr. Schenfeld states that defendants failed to perform a test for HCV RNA (viral genetic material), which would have conclusively established whether plaintiff was infected with HCV as of July 2006. He states that he is informed that defendants knew of the existence of blood collected from plaintiff in July 2006, which is within the normal incubation period for HCV, but chose instead to base their motion solely on plaintiff's antibody test results. Dr. Schenfeld believes that this renders defendants' experts' opinions incomplete. He states that false negative HCV antibody testing has been documented in peer-reviewed studies in individuals infected with HIV, as plaintiff is. He states that he reviewed an article² that he believes to be accurate with sound research methodology. Based on the article, he states that false negatives in HCV testing can, in certain delineated circumstances, be caused by the depressed immune response caused by HIV's action on the body's immune system. Dr. Schenfeld states that the current standard of care in the United States as to HCV testing is to test for the presence of antibodies made in response to the presence of HCV; if that test is negative but HCV infection is still suspected, an HCV RNA assay could be run, which measures the amount of virus actually present in the blood. Dr. Schenfeld states that samples of plaintiff's blood were taken in

² Thio, Chloe L. et al., Screening for Hepatitis C in Human Immunodeficiency Virus-Infected Individuals, 38(2) J. CLINICAL MICROBIOLOGY 575 (2000).

July 2006 and preserved for later use; he is informed that the samples still exist and are available for testing. He states that an accurate way to establish whether HCV was in plaintiff's blood within the normal HCV incubation period from April 2006 is to run an HCV RNA assay on the blood sample from July 2006. Dr. Schenfeld states that if the HCV RNA assay on the July 2006 specimen is negative, then plaintiff has no case and cannot prove causation, and in such a situation, he would be compelled to opine that causation could not be established and in fact would then be conclusively shown to be otherwise.

In reply, defendants take issue with Dr. Schenfeld's description of their experts' affirmations as "incomplete." The Goldberg Defendants aver that in April 2011, they became aware of the existence of plaintiff's July 2006 blood tests. During discovery, they made a demand for the results of this blood test and for access to the blood samples in order to test the samples for HCV. There are three court orders dated April 5, 2011, May 3, 2011, and July 17, 2011, directing plaintiff to provide defendants with authorizations for the blood samples. The Goldberg Defendants maintain that plaintiff never provided them access to the blood samples and never sent them the results of any testing performed on these samples. The Goldberg Defendants argue that plaintiff cannot now claim that he is in need of further evidence, as he could have himself performed the testing that he now claims is crucial to proving his case; even if more discovery were needed, plaintiff's own inaction should not serve to defeat their summary judgment motion. Further, they argue that Dr. Schenfeld's opinion that the possibility that the July 2006 samples might, if tested, reveal information that might be relevant to their expert's analysis is speculative, unsubstantiated, and insufficient to defeat their motion for summary judgment. Moreover, the Goldberg Defendants maintain that the article cited

by Dr. Schenfeld actually undermines Dr. Schenfeld's argument because it concludes that even the "infrequent occurrence of false-negative results" by tests for HCV antibodies was attributed not to HIV infection but to a "window of seronegativity" following acute HCV.³ The Goldberg Defendants maintain that if plaintiff were exposed to HCV in March or April 2006, the "window of seronegativity" following an acute HCV infection would have certainly expired by the time his blood was tested in January 2007.

The Carni Defendants argue that the court should reject Dr. Schenfeld's affidavit because it was executed in Pennsylvania and there is no certificate of conformity as required by C.P.L.R. § 2309 and Real Property Law § 299-a; because neither Dr. Schenfeld nor the notary actually signed the affidavit; and because there is no notary stamp. The Carni Defendants maintain that these deficiencies render the affidavit inadmissible. Regardless, they argue that Dr. Schenfeld's opinion completely fails to address Dr. Pollock's opinion that plaintiff could not have contracted HCV while treating with Dr. Goldberg or Dr. Goldweber because no patient who had treated with Dr. Goldberg prior to this period carried the HCV strain that plaintiff had. The Carni Defendants point out that other than generally stating that performing an HCV RNA test on the blood sample from July 2006 would be more reliable, Dr. Schenfeld fails to explain or specify how plaintiff's blood tests taken on the other dates were unreliable. The Carni Defendants also assert that plaintiff failed to provide defendants with authorizations for the July 2006 blood samples during the discovery period. They complain that plaintiff is now relying on the July 2006 blood samples as both a sword and a shield; they argue that plaintiff cannot claim that defendants should have tested and

³ Thio, supra note 2, at 576.

reviewed the July 2006 blood sample when plaintiff denied defendants access to them. They argue that plaintiff failed to meet his burden in rebutting defendants' entitlement to summary judgment.

As established by the Court of Appeals in Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) and Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and as has recently been reiterated by the First Department, it is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad, 64 N.Y.2d at 853. "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez, 68 N.Y.2d at 324, citing Winegrad, 64 N.Y.2d at 853. "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 at 324, citing Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

The parties agree that there is no case if plaintiff did not acquire HCV on March 21 or April 6, 2006. The expert opinion testimony submitted by defendants is amply sufficient to demonstrate that plaintiff could not have acquired HCV on either March 21 or April 6, 2006, as evidenced by the negative results from HCV antibody tests and the normal results from liver function tests through January 2007. There is no real dispute regarding the incubation period for HCV; even taking into consideration both Dr. Schnall's and Dr. Pollock's statements, the shortest incubation

period is two weeks and the longest is six months, and plaintiff's expert says nothing to the contrary. Plaintiff failed to rebut defendants' showing and establish that a material fact does exist as to whether plaintiff acquired HCV on either March 21 or April 6, 2006. Dr. Schenfeld's opinion that defendants' experts' affirmations are incomplete because an HCV RNA test of plaintiff's July 2006 blood sample could show that plaintiff contract HCV in April 2006 is speculative and fails to rebut defendants' prima facie showing. Additionally, Dr. Schenfeld fails to address the other marker for HCV in this case, the liver function tests, which defendants' experts opined yielded normal results until April 19, 2007, when plaintiff's liver function levels were elevated, indicating an acute infection of HCV during April and May 2007. Defendants are entitled to summary judgment because, when confronted with defendants' prima facie showing, plaintiff failed to proffer medical evidence or expert opinion testimony raising the true existence of a material issue of fact as to whether plaintiff acquired HCV on March 21 or April 6, 2006.

Given the disposition of the issue above, there is no need to address defendants' remaining contentions, except to note that defendants raise additional substantive and comprehensive arguments in support of their motion for summary judgment. The Goldberg Defendants argue that no claim for lack of informed consent is available under these circumstances; that the elements required for a claim of negligent hiring and retention against the Goldberg Defendants are not present; and that there is no legal basis for plaintiff's claim for punitive damages. The Carni Defendants argue that neither Dr. Carni nor his professional corporation are vicariously liable for the acts of Dr. Goldweber under theories of actual or apparent agency; that the elements required for a claim of negligent hiring and retention against the Goldberg Defendants are not present; and that

there is no legal basis fo plaintiff's claim for punitive damages. Plaintiff utterly fails to address any of these issues except to argue that the outcome of this decision as to vicarious liability should be the same as other cases involving Dr. Goldweber. Even if defendants had not prevailed on the issue discussed above, plaintiff's opposition would not have been sufficient to rebut defendants' showing that they are entitled to summary judgment on plaintiff's remaining claims.

Accordingly, it is hereby

ORDERED that defendants' motions for summary judgment in Motion Sequence Numbers 003 and 004 are granted, and the complaint is dismissed against Abbe J. Carni, M.D.; Abbe J. Carni, M.D., P.C.; Edward S. Goldberg, M.D.; and Edward S. Goldberg, M.D., P.C.; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: April 17, 2012

ENTER:



JOAN E. LOBIS, J.S.C.

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