SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

SHIRLEY ROMEO a/k/a SHIRLEY COLE
and JOHN COLE,

Plaintiffs,

INDEX No. 008205/05

MOTION DATE: Aug. 28, 2007
Motion Sequence # 002, 004

-against-

SANDRO S. FEMIA, D.C., individually
and d/b/a FAMILY CHIROPRACTIC CENTER,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... XX
Reply Affirmation XX

This motion, by the defendants, for an order:

a. Pursuant to CPLR §3212 dismissing the plaintiff's Complaint against defendant, Sandro S. Femia, D.C., individually and d/b/a Family Chiropractic Center, in its entirety with prejudice and granting summary judgment upon the grounds that there are no triable issues of fact against Sandro S. Femia, D.C., individually and d/b/a Family Chiropractic Center;

b. Directing the Clerk of the Court to enter judgment accordingly; and

c. For such other, further and different relief as this Court deems just and proper,

and a cross-motion, by plaintiffs, for an order:

(a) Pursuant to CPLR 3124 compelling the defendant, Sandro S. Femia, D.C., to appear for a further deposition pursuant to the prior order of this court dated March 15, 2007; and

(b) For such other and further relief as this Court may deem just and proper,

are **both** determined as hereinafter set forth.

FACTS

This is an action in which the plaintiff alleges that Sandro S. Femia, D.C. ("Femia"), as a doctor of chiropractic, rendered such care to the plaintiff Shirley Romeo ("Romeo"), in a negligent and careless manner.

The plaintiff Romeo first presented to Femia on July 11, 1998 with complaints of severe lower back pain after slipping and falling in the shower, and sets forth a course of treatment through November 2000, and again in March 2003, when she complained of severe lower back pain to the knees with numbness to the leg. The plaintiff reported that she missed the last step while walking down the stairs and the pain was slight initially and progressively worsened. Femia took X-rays and noted rotational malposition and right antalgia . A lateral view revealed osteoformanial encroachment and increased lordosis. He also noted an old tailbone injury and degenerative joint disease, and the defendant performed further chiropractic treatment until April 9, 2003, when he noted that symptoms were the same and he was unable to adjust her. Femia recommended a surgical consultation. This was the last time Femia treated Romeo.

Subsequently, the plaintiff claimed that her lower back pain had worsened and by the middle of the night she could not walk due to severe pain down to the leg. A

neurological consult was ordered and the resulting impression was a herniated disc with paraspinal muscle spasms and decreased sensation.

An MRI on April 10, 2003 revealed a large extruded disc at L5-S1 and desiccated L4-L5 disc with bulge. A surgical consult was performed by Dr. Dimancescu and surgery was recommended. On April 11, 2003, the plaintiff underwent a left L5-S1 disectomy performed by Dr. Brisman.

DEFENDANT'S CONTENTIONS

The defendants contend that Summary Judgment should be granted in this case because there is no genuine, triable issue of fact and no legal merit to the plaintiff's cause of action. The defendants assert that the affirmations of Dr. Stephen Marcus, ("Marcus") board certified in orthopedic surgery, and chiropractor, Dr. Scott Surasky, ("Surasky") the medical records, and the deposition testimony, have made a **prima facie** showing of entitlement to judgment as a matter of law, thereby shifting the burden to the plaintiff to come forward with evidentiary proof sufficient to raise a triable issue of fact.

Furthermore, it is Surasky's opinion, within the reasonable degree of chiropractic certainty, that it was appropriate for Femia to treat the plaintiff with conservative chiropractic treatment before referring her for a surgical, neurological or orthopedic consultation. Surasky points out that Femia's care was within the standard of chiropractic care, was very conservative and Femia's recommendation for a surgical consult after two weeks was well within the standard of chiropractic care.

Dr. Marcus asserts that the care and treatment rendered by Femia was done in accordance with good and accepted practice and did not proximately cause any of the plaintiff's alleged injuries.

The defendant asserts that Summary Judgment should be granted in his favor on the grounds of lack of causation; and the plaintiff is required to demonstrate that her injuries resulted from the defendant not following the required standard of care. Counsel for the defendant argues that the plaintiff must produce some competent evidence from which a jury could rationally find that the alleged departures were linked to the medical outcome suffered by the plaintiff; and that there is an absence of any triable issues of fact demonstrating a causal nexus between his care of the plaintiff and the plaintiff's alleged injuries.

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PLAINTIFF'S CONTENTIONS

The plaintiffs assert that the defendant's treatment, rendered from March 25, 2003 to April 8, 2003, was the cause of severe personal injuries sustained by the plaintiff including but not limited to a herniated disc at L5-S1 which required a surgical discectomy performed under general anesthesia on April 11, 2003. The plaintiffs contend that the defendant's motion fails to make a **prima facie** showing which would entitle him to summary judgment, and that the defendant's expert's affidavits make broad statements that are not supported by the defendant's office chart or the defendant Femia's deposition testimony.

The plaintiffs have also submitted the affidavit of their chiropractic expert who reviewed all relevant records and the deposition transcripts of the parties, and raises several questions of fact; it also states that the defendant's records are unclear as to the treatment rendered to the plaintiff Romeo, especially in March and April 2003. The plaintiffs' expert's affidavit states that there was no indication of a herniated disc at L5-S1 prior to April 10, 2003, and avers that Romeo's complaints made to the ambulance, Emergency Room and other personnel also indicate new complaints by the plaintiff, including the inability to move the left side of her body which is clearly related by the plaintiff to the chiropractic treatment. The expert affidavit also states that there is no indication in either the defendant's records or testimony that Romeo had a herniated disc. The plaintiff's expert states that, based on his review of the records and testimony that the defendant's treatment was the sole cause and/or substantial contributing factor in plaintiff's injury and surgery.

The plaintiff asserts that a motion for summary judgment is a drastic remedy which should be granted only when there is no clear triable issue of fact presented. Even the color of a triable issue forecloses the remedy, and the evidence must be construed in the light most favorable to the party opposing the motion.

The plaintiff contends that summary judgment should also be denied because discovery has not been completed, and cross-moves for the further deposition of the defendant, Femia. This was previously granted by the court but, due to serious illness, the plaintiff's counsel was unable to conduct the deposition by the end of June. The deposition concerns records and treatment which occurred on April 9, 2003, the date of the alleged malpractice, which were not discovered until after the defendant's deposition

testimony was taken. The treatment concerns the nerve conduction study (NCV) performed on that date in the defendant 's office. The plaintiff has been denied the opportunity to question the defendant about his April 8, 2003 requisition for the NCV and the NCV report itself. Both would show that Romeo did not have a herniated disc at L5-S1 at the time in question.

DEFENDANT'S REPLY

The defendant asserts that the plaintiff has failed to raise any departures on the part of Femia that caused the plaintiff's injuries; and the plaintiffs' Expert Affidavit is based on pure conjecture. While the plaintiff's expert raised mere conclusory allegations that Femia's adjustments were inappropriate, it is not stated which adjustments or treatments were inappropriate. The plaintiffs' Expert Affidavit is not supported by the evidence, did not contradict the Affidavits of the defendant's experts, and fails to note what the standard of care in this case was and whether or not it was met.

The defendant contends that the evidence is overwhelming that Femia never provided a chiropractic adjustment. The plaintiff's expert blatantly mischaracterizes the testimony of the plaintiff by indicating that Femia performed a "vigorous" stretching on her lower back.

The plaintiffs attempt to argue that there are inconsistencies in Femia's records, and that the plaintiffs' mischaracterize of Femia's testimony regarding his note of April 9, 2003 indicated "unable to adjust as of today".

The defendant also asserts that the plaintiff has failed to show any causation between Femia's treatment and the plaintiff's alleged injuries, in that the plaintiffs have failed to provide expert opinion regarding the proximate cause between Femia's treatment and the plaintiff's alleged injuries. The plaintiffs' Expert Affidavit indicates that the plaintiff did not have a disc herniation at L5-S1 prior to April 9, 2003, in complete contrast to the medical evidence which already indicates that the plaintiff has had a herniated disc at L5-S1 since 1999, and the defense expert Marcus opines that the plaintiff had a history of a pre-existing lower lumbar spinal injury and leg weakness, which are the classic signs of a herniation at L5-S1.

The defendant contends that the plaintiff's Expert Affidavit is insufficient because it offers opinions outside the expert's field of specialty, in that it offers opinions reserved for a medical expert such as Marcus. As an orthopedic surgeon, Marcus has experience in diagnosing herniated discs and interpreting MRI films. Therefore, the opinions of the plaintiff's expert, a chiropractor, have no validity, and cites to pertinent case law in support of his position.

The defendant emphasizes the fact that the plaintiff submitted an Affidavit with the blank name and no signature. The plaintiff's expert is at least required to note their qualifications to support their expert opinion, and the defendant asserts that this Court obtain a fully executed Expert Affidavit.

The defendant also asserts that the discovery in this matter is complete. The Court has decided the matter for Femia's further deposition, and is irrelevant to the issues at bar, as the plaintiff's disc herniation was diagnosed by

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572;

Zuckerman v City of New York, supra, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

In applying the above legal principles to the facts of the case at bar, this Court has thoroughly examined the entire record, as presented, in the context of the applicable case law and statutory law. Even construing the evidence in the light most favorable to the plaintiff (**Museums at Stony Brook v Village of Patchogue Fire Department**, 146 AD2d 572, 536 NYS2d 177, 2nd Dept., 1989), summary judgment herein is warranted.

The defendant has presented Expert Affidavits of Dr. Marcus, a board certified orthopedic surgeon and Dr. Surasky, a chiropractor, which established that the care and treatment rendered by the defendant was done in accordance with good and accepted chiropractic standards in the treatment of the plaintiff. These experts agree that the defendant's treatment did not proximately cause any of the plaintiff's alleged injuries, and in fact, that the plaintiff had a herniated disc at L5-S1 prior to seeking treatment with the defendant. This injury was revealed in an MRI of the plaintiff performed on September 27, 1999. Therefore, if the plaintiff had a herniated disc that was documented in 1999, then causation could not have occurred in 2003. The defendant's experts have also demonstrated that the defendant did not depart from the accepted standards of chiropractic practice.

The plaintiffs contend that the defendant's office chart reveals that more than conservative treatments were used, as demonstrated by a discrepancy in two entries. Such argument is de minimus and does not create a factual issue to require a trial. Furthermore, the plaintiff herself testified that on April 9th the defendant did not perform an adjustment, he only stretched her back.

The plaintiff also submitted an "expert" affidavit who stated that the defendant's treatment was the sole cause and/or substantial contributing factor in the plaintiff's record and that the plaintiff had no indication of a herniated disc at L5-S1 prior to April 10, 2003. Leaving aside the issue of the identification of the expert and the qualifications of that witness (**Hofmann v Toys "R" Us**, 272 AD2d 296, 707 NYS2d 641, 2nd Dept., 2000), the plaintiff's expert offers no specific departures on the part of the defendant from accepted standards of chiropractic practice nor does the expert suggest what the actual standard of care is or what the proper procedure should have been. These mere conclusory allegations that the defendant failed to properly treat the plaintiff are insufficient to defeat a **prima facie** showing for summary judgment (**Witt v Agin** , 112

AD2d 64, 490 NYS2d 778, affd, 67 NY2d 919, 501 NYS2d 816, 1986). Furthermore, bare conclusory allegations are insufficient to raise a triable issue of fact where the expert affidavit failed to point out the symptoms that were not recognized and the procedures that would have recognized the condition earlier (**Bumbaca v Bonanno**, 39 AD3d 577, 834 NYS2d 276, 2nd Dept., 2007).

In order to prove a cause of action, the plaintiff is required to demonstrate that "his or her injuries proximately resulted from the defendant's departure from the required standard of performance" (**Tonetti v Peekskill Community Hosp.**, 148 AD2d 525, 538 NYS2d 860, 2nd Dept., 1989). Thus, to establish a **prima facie** case, the plaintiff must produce some competent evidence from which a jury could rationally find that the alleged departures were linked to the medical outcome suffered by the plaintiff.

The law in the State of New York is exceptionally well settled that an expert's affidavit is required in opposition to a summary judgment motion in a medical malpractice action, (**Kane v City of New York,** 137 AD2d 658, 524 NYS2d 751, 2nd Dept., 1988). Moreover, the affidavit must be competent; that is, it must be based on facts in the record or on facts personally known to the witness, (**Glorioso v Schnabel,** 253 AD2d 787, 677 NYS2d 604, 2nd Dept., 1998). When an expert fails to lay the requisite foundation for his asserted familiarity with the applicable standards of care and the specialty he is attempting to criticize, his affidavit is of no probative value (**Behar v Coren**, 21 AD3d, 1045, 1046, 803 NYS2d 629, 630, 2nd Dept., 2005).

With respect to the plaintiffs' contention regarding the completeness of discovery, the discovery that plaintiff claims is outstanding would not change the facts of this case. The defendant never treated the plaintiff based on this NCV study and an NCV study is not the diagnostic tool for herniated discs. It should be noted that "allegations of mere hope that the discovery will reveal something helpful to... [the moving party's] ease provide no basis for postponing the determination of the plaintiff's motion"(**Bryan v City of New York** , 206 AD2d 448, 614 NYS2d 554, 555 2nd Dept., 1994). In addition, the Court acknowledges the accuracy of the statement made at the conference between the parties in which the plaintiff's counsel was explicitly told that if the further deposition of the defendant was not completed by June 30, 2007 then the deposition would be waived. When the plaintiff did not complete this deposition, plaintiff's counsel was told by the Court in a telephone conference that the deposition was in fact, waived.

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Accordingly, the motion for summary judgment by the defendant is **granted** and the plaintiff's motion for further deposition of the defendant is **denied**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated OCT 17 2007

XXX J.S.C.

ENTERED

OCT 19 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE