

Wainer v Greenberg

2008 NY Slip Op 30459(U)

February 11, 2008

Supreme Court, Nassau County

Docket Number: 0268-05/

Judge: Thomas P. Phelan

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

CHRISTINA WAINER,

Plaintiff,

ORIGINAL RETURN DATE: 11/12/07
SUBMISSION DATE: 01/09/08
INDEX NO. ~~14989/04~~ 20268/05

-against-

STEVEN M. GREENBERG, M.D., CARO
McCARTHY, M.D. and ANDREAS SIDERIDIS,
M.D.,

MOTION SEQUENCE #s 1, 2

Defendants.

The following papers read on this motion:

Notice of Motion.....	1,2
Answering Papers.....	3,4
Reply.....	5,6

Motion [sequence #1] by defendant, Steven M. Greenberg, M.D. ("Dr. Greenberg"), and motion [sequence #2] by defendants, Caro McCarthy, M.D. and Andreas Sideridis, M.D. (collectively "Drs. McCarthy and Sideridis," or individually "Dr. McCarthy" or "Dr. Sideridis"), each seeking an order pursuant to CPLR 3212 awarding them summary judgment dismissing plaintiff's complaint are granted.

Plaintiff commenced the within personal injury action sounding in medical malpractice on or about December 20, 2005. Issue was thereafter joined upon the interposition of verified answers from each defendant in or about February 2006 and March 2006.

Plaintiff suffered from a congenital cardiac condition which ultimately required a pacemaker. On October 26, 2004, Dr. Greenberg replaced the pacemaker generator at St. Francis Hospital and ordered the administration of antibiotics to prevent infection. Plaintiff was discharged from the hospital the same day and returned to Dr. Greenberg's office for a follow up visit on November 4, 2004, "[c]omplaining of fever, sweats, myalgia" (Harbert Aff. Ex. M, Greenberg dep., at 13). Dr. Greenberg testified that after examination, it was his "impression . . . that it was a viral syndrome" and that the incision "looked appropriate and normal" (Id. at 19). Thereafter, and on November 15,

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2004, plaintiff returned to Dr. Greenberg's office to have the sutures removed. Dr. Greenberg testified that when the sutures were removed, the incision site and area around it was normal.

In between the November 4 and 15 visits, plaintiff was seen by her pediatricians, Drs. McCarthy and Sideridis. On November 5, 2004, plaintiff complained to Dr. Sideridis that she had been experiencing nausea, dizziness and body aches for three days. Upon physical examination, Dr. Sideridis' "impression was that the patient had an upper respiratory infection" (Littman Aff. ¶14). The doctor ordered blood work and a urinalysis which were within normal limits, except that the "CBC revealed a slightly elevated white count and an abnormal differential" (Id.). Dr. Sideridis prescribed an antibiotic and Flonase spray. Three days later, on November 8, 2004, plaintiff was seen by Dr. McCarthy, who noted, upon physical examination, "that the site of surgery was indurated, tender and somewhat inflamed and erythematous" (Id. ¶15). Blood work was again ordered. Dr. McCarthy concluded that it was possible that the plaintiff had "cellulitis involving the incision" (Id.). The antibiotics were changed, and plaintiff was instructed to see her cardiologist.

Plaintiff still had complaints of dizziness, chills and vomiting when she again saw Dr. Sideridis on November 22, 2004, and was again referred to her cardiologist regarding her complaints of feeling winded at times. Dr. McCarthy was contacted that evening and referred plaintiff to the emergency room. On November 23, 2004, plaintiff was admitted to Long Island Jewish Medical Center. An "echocardiogram revealed a large vegetation on the pacemaker wires" and antibiotics were prescribed pending surgery, which ultimately took place on December 3, 2004 (Littman Aff. ¶18).

As amplified in plaintiffs' verified bill of particulars, plaintiff alleges the following with respect to Dr. Greenberg: Dr. Greenberg was negligent (1) in failing to take and record a full and complete history and interval history; (2) in failing to timely and properly order laboratory and related tests; (3) in failing to heed record and act upon signs and symptoms of infection; (4) in failing to do echo cardiograms, electrocardiograms and blood smears and to heed signs and symptoms of SBE, bacteremia; (5) in failing to maintain a sterile preoperative, intra-operative and post-operative field in and about the surgical situs; (6) in prescribing inadequate and inappropriate antibiotic therapy without proper and timely laboratory studies; (7) in failing to completely and properly remove all foreign objects in plaintiff's cardiac area and replace same with new and sterile products; (8) in failing to timely and properly maintain prophylactic antibiotic coverage preoperatively, intra-operatively and post-operatively; (9) in failing to timely and properly supervise, train and assist others involved with the pre-surgical, surgical and post-surgical procedure; in failing to record and monitor the plaintiff's condition all during the period October 22, 2004, through and including November 2004.

With regard to Drs. McCarthy and Sideridis, plaintiff alleges the following: Drs. McCarthy and Sideridis were negligent (1) in failing to timely and properly evaluate the plaintiff's presenting physical symptoms and medical condition; (2) in failing to do a proper physical examination; (3) in failing to take and record a full and complete history and interval history; (4) in failing to order and evaluate laboratory and related tests; (5) in failing to heed record and act upon signs and symptoms of infection; (6) in failing to do echo cardiograms, electrocardiograms and blood smears and to heed

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signs and symptoms of SBE, bacteremia; (7) in prescribing inadequate and inappropriate antibiotic therapy without proper and timely laboratory studies; and (8) in failing to properly perform wound care and cultures in and around the situs of the surgical area.

It is submitted that plaintiff's claims against Dr. Greenberg are without merit. In support of his application, Dr. Greenberg provides the affirmation of Malcolm C. Phillips, M.D., who states that he is board certified in internal medicine with a subspecialty board certification in cardiovascular diseases. Dr. Phillips reviewed plaintiff's bill of particulars, amended bill of particulars, medical records and testimony and, predicated upon that review, avers that to a reasonable degree of medical certainty the care afforded plaintiff by Dr. Greenberg was in accord with accepted medical standards (Harbert Aff. Ex. Z, Phillips Aff.). It is the opinion of Dr. Phillips that the pacemaker generator change performed by Dr. Greenberg was uneventful and that antibiotics were appropriately ordered and administered during the ambulatory surgery admission (Id.).

Moreover, it is Dr. Phillips' "opinion, within a reasonable degree of medical certainty, that Dr. Greenberg appropriately saw and treated the patient in post-operative follow-up, specifically, on November 4, 2004 and November 15, 2004" (Id. ¶4) contrary to plaintiff's allegations that Dr. Greenberg failed to diagnose pacemaker infection during this period. Dr. Phillips further states that "there is no vaccination and/or no immunization for haemophilus parainfluenza" and opines that "no vaccination and/or immunization would have and/or could have changed the patient's course" (Id. ¶12). It is Dr. Phillips' opinion, within a reasonable degree of medical certainty, that on November 4, 2004, "Dr. Greenberg examined the surgical incision site and documented its appearance was pristine" and "properly attributed the patient's complaints of diffuse myalgias and fever of one day duration to a viral syndrome" (Id. ¶11). Dr. Phillips further opines, within a reasonable degree of medical certainty, that plaintiff's "presentation on November 15, 2004, was not consistent with pacemaker pocket infection, skin organism infection and/or pacemaker battery infection and that there was no reason to suspect a diagnosis of pacemaker infection and/or no basis for a diagnosis of pacemaker infection on November 15, 2004" (Id. ¶19). According to Dr. Phillips the tests plaintiff claims Dr. Greenberg failed to order or perform were not warranted under the circumstances. Dr. Phillips contends that Dr. Greenberg did not depart from good and accepted medical practice and was not negligent in the care of plaintiff.

Drs. McCarthy and Sideridis provide the affirmation of Paul E. Harnick, M.D., who states that he is board certified in internal medicine and cardiovascular disease. Dr. Harnick reviewed plaintiff's bill of particulars, amended bill of particulars, medical records and testimony and, predicated upon that review, avers that to a reasonable degree of medical certainty the care afforded plaintiff by Drs. McCarthy and Sideridis was in accord with accepted medical standards (Littman Aff. Ex. C, Harnick Aff.). Dr. Harnick states that on November 5, 2004, Dr. Sideridis "appropriately evaluated the plaintiff, appropriately performed a physical examination and responded appropriately to plaintiff's complaints, the physical examination findings, and the information the patient who at the time was a physician's assistant provided to him" and "timely and appropriately ordered diagnostic testing to further evaluate the patient" (Id. ¶14). It was noted that the blood work ordered by Dr. McCarthy, "revealed that the CBC with differential was within normal limits" (Id. ¶9). It is the opinion of Dr.

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Harnick, within a reasonable degree of medical certainty, "that the care and treatment rendered by Dr. McCarthy was reasonable, appropriate, and met all relevant standards of medical care and did not constitute a deviation" (Id. ¶15).

Dr. Harnick notes that when Dr. McCarthy saw plaintiff on November 8, 2004, plaintiff was referred back to her cardiologist, Dr. Greenberg. The documents submitted by the defendants reveal that plaintiff did not return to Dr. Greenberg until her follow up visit of November 15, 2004, which was the last time Dr. Greenberg saw plaintiff, although plaintiff had again been referred back to him by Dr. Sideridis on November 22, 2004.

Defendants additionally reference various portions of the deposition testimony of defendants, as well as that of plaintiff. Dr. Greenberg testified that he had no recollection of ever being contacted by co-defendant doctors nor did he receive any laboratory results from them. Further testimony of Dr. Greenberg reveals that some time after November 15, 2004, he did speak with plaintiff's mother, who informed Dr. Greenberg that the plaintiff was in the hospital and would not be returning for a follow-up. (Harbert Aff. Ex. M pp.24-27).

Within the particular context of a medical malpractice action, a plaintiff opposing a defendant doctor's motion for summary judgment is required to proffer evidentiary facts sufficient to rebut the doctor's *prima facie* showing that he or she was not negligent when rendering medical care to plaintiff in order to show the existence of a triable issue of fact (*Pierson v Good Samaritan Hosp.*, 208 AD2d 513 [2d Dept. 1994]). Allegations of a general and conclusory nature which are not supported by competent and admissible evidence and which do not demonstrate the essential elements of a medical malpractice action are not sufficient to defeat a motion for summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The essential elements of a medical malpractice action are comprised of the following: (1) a deviation or departure from accepted medical practice and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358 [2d Dept. 1998]).

With regard to the scope of a physician's duty, the general duty of care owed by physicians to their patients may be limited to those medical functions undertaken by the physician and relied upon by the patient. (*Boone v North Shore University Hosp. at Forest Hills*, 12 AD3d 338 [2d Dept. 2004] quoting *Wasserman v Staten Island Radiological Associates*, 2 AD3d 713 [2d Dept. 2003]).

The affirmations of defendants' experts are competent evidence that defendants did not depart from good and accepted medical practice when they treated plaintiff. In the matter *sub judice*, based upon the heretofore referenced deposition testimony coupled with the Phillips and Harnick affirmations and the averments therein contained, defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law thereby shifting the burden to plaintiff to submit competent evidence showing a departure from accepted medical practice and a nexus between the alleged medical malpractice and plaintiff's injury (*Alvarez v Prospect Hosp.*, *supra*).

In opposition to defendants' application, plaintiff submits the affirmation of an expert, who is board

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certified in pediatrics and asserts that Dr. Greenberg "did nothing more than a visual inspection and he found the wound healed externally" when he examined the patient on November 15, 2004 (Pl.'s Expert Aff.) At the same time, however, plaintiff's expert submits that when the patient was seen by the surgeon she was "was under the prescribed antibiotic therapy which masked her symptoms" (Id.). Plaintiff's expert posits that in "this post surgical period the differential diagnosis must include deep wound infection and appropriate tests taken" and that "one would hope and expect that steps would be taken to rule out internal wound infection and the possible likely avoidance of the endocarditis which tragically ensued" (Id.). This assertion is speculative. Plaintiff's expert states that Dr. Greenberg found the "external wound healed but the patient still complaining" (Id.) Dr. Greenberg testified, however, that the plaintiff "had no complaints whatsoever" (Harbert Aff., Ex. M, p. 30).

"It is well settled that an expert's opinion must be based upon facts in the record or personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusions [citations omitted]" (*Erbstein v Savasatit*, 274 AD2d 445, 446 [2d Dept. 2000]). The judgment espoused by the particular expert must, considered in totality, indicate a particular level of certitude so as to be admissible. (*Gross v Friedman*, 138 AD2d 571 [2d Dept. 1988]).

Viewing the evidence in a light most favorable to plaintiff as is required when deciding a motion for summary judgment, the court concludes that the expert affirmation submitted by plaintiff has failed to raise a triable issue of fact.

Defendant. Dr. Sussman, is accordingly awarded summary judgment dismissing plaintiff's claims against them.

Turning to the motion by Drs. Sideridis and McCarthy, the court notes preliminarily that the opposition interposed by plaintiff was apparently not properly served upon counsel for Drs. Sideridis and McCarthy. Plaintiffs' counsel alleges that "the papers that were received via e-mail were not properly executed" and "are defective" (Littman Aff. ¶6). The court is in possession of an original executed affirmation by plaintiff's expert. Inasmuch as defendants do not appear to have suffered any prejudice thereby, the Court will afford due consideration to the opposition interposed by plaintiff.

Plaintiff's expert opines that Dr. Sideridis, being aware of the surgery that was performed on October 26, 2004, departed from good and accepted practice by failing to refer the plaintiff back to her cardiologist immediately and by not calling Dr. Greenberg to inform him of such referral (Pl.'s Expert Aff.). He further states that "Dr. Sideridis's diagnosis of urinary tract infection did not comport with the symptoms presented" (Pl.'s Expert Aff.).

As to the contention espoused by plaintiff's expert that Dr. Sideridis diagnosed a urinary tract infection, same is unsupported by the record. As adduced from the affirmation of Dr. Harnick referenced above, the urinalysis and urine culture were within normal limits, and it was Dr. Sideridis'

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diagnosis that plaintiff had an upper respiratory infection not a urinary tract infection.

Another contention posited by plaintiffs' expert is that when the results of the lab tests ordered by Drs. Sideridis and McCarthy showed elevated white blood count and elevated neurophils, which are "consistent, compatible and confirmatory of infection of a presumptive bacterial nature," the doctors should have recalled the patient and not waited three days until plaintiff was next seen (Gordon Aff.). He further contends that it was a further departure for Dr. McCarthy not to have informed the surgeon of the lab results. Plaintiff's testimony reveals, however, that between the two visits she was informed of an elevated white count (Littman Aff. Ex. M, p. 73). The assertions by plaintiff's expert are devoid of evidence in the record.

Applying the aforesaid legal principles to the expert affirmation offered by plaintiff, the Court finds that such is both insufficient to rebut the affidavit submitted by defendants and to raise a triable issue of fact.

Defendants, Drs. Sideridis and McCarthy, are accordingly awarded summary judgment as well.

Plaintiffs' complaint is dismissed. Dismissal is without costs.

This decision constitutes the order of the court.

Dated: February 11, 2008

HON THOMAS P. PHELAN

~~THOMAS P. PHELAN, J.S.C.~~

ENTERED

FEB 15 2008

NASSAU COUNTY
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RE: WAINER v. GREENBERG

SHARON CERELLE KONITS, ESQ.
Attorneys for Plaintiff
998c Old Country Road #333
Plainview, New York 11803

GEISLER & GABRIELE, LLP
Attorneys for Defendant
STEVEN M. GREENBERG, M.D.
100 Quentin Roosevelt Boulevard.
P. O. Box 8022
Garden City, NY 11530

LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendants
CARO McCARTHY, M.D. and
ANDREAS SIDERIDIS, M.D.
425 Broad Hollow Road
Melville, NY 11747