MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Vance L. Moore and Donna Moore,

Plaintiffs,

-against-

Prempal Singh, M.D., Irwin Ingwer, M.D., Vandana Soni, M.D., Queens Long Island Medical Group, P.C., North Shore University Hospital at Plainview, Yaseen A. Hashish, M.D., Syed Asad, M.D., Huntington Artificial Kidney Center, Ltd., Harvey Levine, M.D., and Sanjiv Sharma, M.D.,

Defendants.

Motion Sequence No.: 006; MOT. D
Motion Date: 10/30/07
Submitted: 5/14/08

Index No.: 14112/2004

Attorneys [See Rider Annexed]

In an action for damages for medical malpractice, the defendant Prempal Singh, M.D., moves for summary judgment. Plaintiffs oppose the motion.

This action was commenced on June 15, 2004. Issue was joined by the defendant Singh interposing his answer on or about September 20, 2004. Plaintiffs' bill of particulars in response to the defendant Singh's demand therefore was served in January, 2005. The medical malpractice alleged as against Singh is claimed to have occurred during the plaintiff Vance L. Moore's (hereinafter "plaintiff") admission to defendant North Shore University Hospital at Plainview (hereinafter "North Shore") on March 16, 2002 and from April 14, 2002 through April 25, 2002 (see bill of particulars, exhibit "D" annexed to affirmation of Taryn M. Fitzgerald, Esq.). The plaintiff claims that Singh and the other defendants failed to adequately and properly monitor and treat his catheter line infection and sepsis with appropriate antibiotics ultimately causing recurrence of infection and osteomyelitis of the thoracic spine requiring extensive hospitalization and multiple surgical procedures.

As recently observed by the Appellate Division, Second Department, in Thompson v. Orner, 36 AD3d 791 [2nd Dept. 2007]):

> The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage" [citation omitted]. "[O]n a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby"[citation omitted]. In opposition, "a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of injury" [citation omitted]; General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment" [citation omitted];

(see, also, Anderson v. Lamante, 306 AD2d 232 [2nd Dept., 2003]; Salmeri v. Beth Israel Medical Center - Kings Highway Division, 39 AD3d 841 [2nd Dept., 2007]).

In support of this motion for summary judgment, the defendant Singh submits copies of the pleadings, the transcript of his own deposition herein and plaintiff's medical records relating to his admissions at North Shore for March 16, 2002, March 27, 2002 and April 14, 2002 (through April 25, 2002). Singh also submits the affirmation of Lionel Barrau, M.D., a physician Board Certified in internal medicine with a subcertification in nephrology.

Dr. Singh testified in pertinent part and in substance as follows. He treated plaintiff during plaintiff's April 14, 2002 to April 25, 2002 admission to North Shore. He was attending physician in the emergency room on April 14, 2002 when plaintiff was admitted. Plaintiff presented that day with fever and cough, headache and diarrhea. The 38 year old plaintiff was morbidly obese and suffered from chronic renal failure with diabetes myelitis. Plaintiff had a hemodialysis catheter on left side of his neck (subclavian) and forearm. Singh's diagnosis and plan included the notation to rule out septicemia and he prescribed antibiotics, Levequin and Vancomycin, and called for a nephrology consult. Plaintiff received Levequin each day from April 14, 2002 through April 22, 2002. Singh ordered the initial dose of Vancomycin given to plaintiff on April 14, 2002; a second dose was administered on April 17, 2002 during dialysis (but not ordered by Singh). Singh asserted that he deferred to Dr. Ingwer, an infectious disease specialist, with respect to the administration of the Vancomycin. He also deferred to a vascular surgeon as to plaintiff's catheter. Singh acknowledged that the plaintiff's white blood cell count from April 14, 2002 might indicate catheter line infection. Blood cultures returned on April 16, 2002 showed staph aureus, a bacteria which he stated could relate to the dialysis catheter. Singh saw plaintiff each day during his April 14, 2002 to April 25, 2002 admission ordering several tests including an MRI of plaintiff's spine-thoracic to lumbosacral - (based on plaintiff's lower back pain and right leg numbness and concern about possible epidural abscess or infection).

Singh recommended on April 17, 2002 that the neck catheter be removed and it was removed by the vascular surgeon on April 20, 2002. Plaintiff showed improvement clinically by April 18, 2002 according to Singh and Singh attributed progress to Levequin.

Dr. Singh's April 24, 2002 assessment entry included an order "[c]ontinue Vancomycin as per infectious diseases".

Singh testified that his April 25, 2002 discharge notes reference to "antibiotics" was meant to include Vancomycin. A written discharge instruction sheet Singh wrote referred to Vancomycin one gram for six weeks (among other medications).

The affidavit of Dr. Singh's expert, Lionel Barrau, M.D., sworn to September 24, 2007 asserted it was based on a review of the pleadings, deposition transcripts and medical records Barrau averred that it is his opinion within a reasonable degree of medical certainty that no action or inaction on the part of Dr. Singh was the proximate cause of any injury to plaintiff and that the care and treatment rendered by Singh to plaintiff was within good and accepted medical practice. Barrau discussed the treatment rendered and orders and diagnoses stated by Singh, through a summary of each day of plaintiff's April 14 to April 25 confinement; he further detailed certain treatment plaintiff received prior to and following the subject April 14 to April 25 confinement (the only one involving Singh) concluding, in relevant part, as follows:

> "4. On March 16, 2002, the plaintiff presented to the Emergency Department of North Shore University Hospital at Plainview in congestive heart failure. He was admitted and responded with oxygen, diuretics, and an angiotension receptive blocker medication. An echocardiogram was performed and revealed a mildly depressed ejection fraction and enlarged left ventricle. A renal consult was called and the consulting nephrologist recommended that a catheter be placed until a previously placed fistula was matured. The plaintiff was discharged on March 20, 2002 before the catheter was placed, and was to be readmitted for placement of the catheter. The plaintiff was stable at the time of discharge.
> 5. The plaintiff was readmitted to North Shore University Hospital at Plainview on March 27, 2002 for placement of the catheter to allow access for hemodialysis. The catheter was placed on March 27, 2002, and the plaintiff began dialysis the following day. He was discharged on April 8, 2002, and was in stable condition upon discharge.
> 21. The plaintiff eventually returned to North Shore University Hospital at Plainview with complaints of low back pain on June 12, 2002. X-rays were taken and a question of compression fracture at T8-T9 was raised. The plaintiff was discharged on analgesics and instructions were given to the Emergency Room if there was no relief. The plaintiff also advised to follow-up with his primary care

physician.
22. The plaintiff returned to the Emergency Room of North Shore University Hospital at Plainview on June 19, 2002, with complaints of worsening back pain and constipation. He was admitted, and was ultimately diagnosed with osteomyelitis/diskitis.
23. It is my opinion, with a reasonable degree of medical certainty, that the care and treatment rendered to the plaintiff, VANCE MOORE, by Dr. Singh was at all times within good and accepted medical practice.
24. It is my opinion, within a reasonable degree of medical certainty, that Dr. Singh called for the appropriate consults through the duration of the plaintiff's April 14, 2002 admission. Dr. Singh's only involvement with the plaintiff was during his April 14, 2002 admission. Dr. Singh acted appropriately in timely calling for an Infectious Disease consult for the plaintiff's possible septicemia. Dr. Singh acted appropriately in timely calling for a Nephrology consult for the plaintiff's renal failure and need for dialysis. Dr. Singh acted appropriately in timely calling for a Vascular Surgery consult to appropriately treat the plaintiff's catheter. Dr. Singh acted appropriately in timely calling for Orthopedic and Neurologic consults for the plaintiff's complaints of pain."

Based on the proof adduced Singh demonstrated prima facie his entitlement to judgment as a matter of law (see, Ramsay v. Good Samaritan Hospital, 24 AD3d 645 [2nd Dept., 2005]; Rebozo v. Wilen, 41 AD3d 457 [2nd Dept., 2007]. Thus, the burden shifted to plaintiffs, requiring them to demonstrate the existence of a triable issue of fact (see, Hernandez-Vega v. Zwanger-Pesiri Radiology Group, 39 AD3d 710 [2nd Dept., 2007]).

The plaintiffs submitted the redacted affirmation of their unnamed expert (see, Graham v. Mitchell, 37 AD3d 408 [2nd Dept., 2007]), who is Board Certified by the American Board of Internal Medicine in the specialty of Internal Medicine and the subspecialty of Infectious Diseases and whose practice is limited to the latter. Plaintiff's expert stated he had reviewed, for purposes of giving his opinion, the records of plaintiff's April 14, 2002 to April 25, 2002 confinement, Singh's deposition testimony, Barrau's affidavit, Dr. Singh's bill of particulars, and records of treatment of plaintiff subsequent to the subject confinement at North Shore. Plaintiff's expert stated his opinion, in relevant part, as follows:

It is my professional opinion with reasonable medical certainty that Dr. Singh departed from good and accepted medical practice in his care and treatment of plaintiff VANCE MOORE during his hospitalization at North Shore University Hospital from April 14, 2002 through April 25, 2002 in the following respects:
a. In failing to timely and properly follow-up and make sure that plaintiff received his third dose of IV Vancomycin 1 gram as recommended and ordered

prior to discharging the plaintiff from the hospital on April 25, 2002;
b. In failing to timely obtain repeat blood counts and differential prior to discharging the plaintiff from the hospital on April 25, 2002;
c. In failing to timely and properly monitor the therapeutic effectiveness of the IV Vancomycin treatment by obtaining a second Vancomycin trough prior to discharging the plaintiff on April 25, 2002; and
d. In failing to recommend and charge plaintiff's IV antibiotic treatment prior to discharge.

4. It is my further opinion with reasonable medical certainty that each of the aforesaid departures from good and accepted medical practice on the part of defendant PREMPAL SINGH, M.D. were substantial factor(s) in causing and/or a proximate cause of the plaintiff's injuries and damages including osteomyelitis of the thoracic spine and resulting surgery(ies) and extended hospitalizations required for the care and treatment of this condition alleged in the plaintiffs' Verified Bill of Particulars and supported by the aforedescribed hospital and medical records.

5. The plaintiff VANCE MOORE was hospitalized on April 14, 2002 under the care and treatment of defendant PREMPAL SINGH, M.D. as the primary Attending Physician who was overall in charge of the diagnosis and treatment of plaintiff during this hospitalization. The plaintiff, age 39, presented to the Emergency Department on April 14 with recent history of fever and chills and end stage renal disease and Type II diabetes and obesity. He recently had a tesio catheter line inserted in March, 2002 for hemodialysis access pending harvesting of arteriovenous fistula of the arm. Defendant PREMPAL SINGH, M.D. properly diagnosed sepsis and ordered that plaintiff be started on IV Vancomycin 1 gram and IV Levaquin 250 grams pending the results of blood cultures. He also consulted various medical specialists including defendant IRWIN INGWER, M.D. Infectious Disease, who concurred with his treatment plan. Blood cultures reported on April 17, 2002 were positive for methicillin sensitive staphylococcus aureus (MSSA). The defendant PREMPAL SINGH, M.D. and IRWIN INGWER, M.D. diagnosed the plaintiff with presumptive tesio catheter line infection. Defendant PREMPAL SINGH, M.D. also gave consideration to the possible diagnosis of osteomyelitis.

6. Pursuant to the recommendations and orders for defendant IRWIN INGWER, M.D., the plaintiff was to continue to receive IV Vancomycin 1 gram weekly for six (6) weeks. Defendant PREMPAL SINGH, M.D. concurred in this recommendation and as plaintiff's Attending Physician was ultimately responsible for making sure this plan as implemented and followed. The hospital records document that plaintiff received IV Vancomycin 1 gram as ordered on April 14, 2002 and then a second dose on April 17, 2002. According to the

Progress Notes and Orders, Dr. Singh was aware that the plaintiff was to continue IV Vancomycin treatment and receive a third dose was to be administered on April 23 or 24 during hemodialysis treatment in the hospital. Both defendants Dr. Singh and Dr. Ingwar document in their Progress Notes that the plaintiff was to continue on weekly IV Vancomycin 1 gram for a total of six (6) weeks. There is an Order from Dr. Kumar, Renal specialist on April 20 for a dose of IV Vancomycin 1 gram to be given with hemodialysis. The plaintiff underwent hemodialysis in the hospital on multiple occasions including April 15, April 17, April 19, April 22 and April 24 and did not receive this necessary third dose of IV Vancomycin treatment. Notwithstanding, defendant PREMPAL SINGH, M.D. prematurely discharged the patient on April 25, 2002 knowing that the patient did not receive this necessary treatment and writing the transfer orders to the Huntington Artificial Kidney Center, Ltd. where plaintiff was to be transferred for hemodialysis stating that the patient was to receive a total of six (6) weekly treatments of IV Vancomycin, 1 gram. Therefore, the failure of defendant PREMPAL SINGH, M.D. to make sure that plaintiff received this necessary IV Vancomycin treatment prior to discharge from the hospital was a departure from good and accepted medical practice.

7. Upon admission on April 14, 2002, the patient's white cell blood count was 20,600 indicative of infection and sepsis although subsequent blood counts eventually decreased to 11,100 on April 16 the white blood cell count subsequently began to rise again to 14,800 on April 19, and 14,600 on April 22. Dr. Singh failed to order and obtain a repeat complete blood count and differential prior to discharging the patient on April 25, 2002. A white blood cell count subsequently taken after discharge on April 26, 2002, at defendant HUNTINGTON ARTIFICIAL KIDNEY CENTER, LTD. was further elevated to 17,000 indicative of worsening infection. Therefore, had defendant PREMPAL SINGH, M.D. timely and properly repeated this blood test prior to discharging the plaintiff on April 25, 2002, it would have indicated this further increase in the white blood cell count indicative of the need to consider changing the dosage and/or type of antibiotics to more effectively treat the MSSA infection. There were other antibiotics available to specifically treat this bacteria including Nafcillin or Ceftriaxone that were not done.

8. In order to monitor the therapeutic effect of IV Vancomycin, a Vancomycin trough was obtained and reported on April 15, 2002 as 7 which is within therapeutic range. However, even though the third dose of Vancomycin was not given as ordered, the Vancomycin trough was not repeated prior to discharging the patient and when first done on April 26, 2002 at defendant HUNTINGTON ARTIFICIAL KIDNEY CENTER LTD. was reported as less than 5 which is non-therapeutic.

9. In my opinion with reasonable medical certainty the plaintiff was not receiving adequate antibiotic treatment at the time he was discharged from the hospital on April 25, 2002 and that defendants PREMPAL SINGH, M.D. and IRWIN INGWER, M.D. should have considered increasing the dosage and/or type of antibiotics to be administered to plaintiff. Had the Vancomycin trough been timely repeated by defendant PREMPAL SINGH, M.D., he would have known plaintiff was not receiving adequate treatment and that adjustment was necessary in the patient's antibiotic treatment such as to increase the Vancomycin dose and/or change antibiotics to those more effective in treating MSSA infection, such as Nafcilin or Ceftriaxone.
THEREFORE, it is my professional medical opinion with reasonable medical certainty that the aforesaid departures from good and accepted medical practice by defendant PREMPAL SINGH, M.D. were each a substantial factor(s) and/or a proximate cause(s) of plaintiff's thoracic osteomyelitis subsequently diagnosed during his June 19, 2002 hospitalization and resulting surgeries and injuries caused by the defendants' inadequate treatment and monitoring of his infectious condition.

The Court concludes that the proof offered by the plaintiff in opposition to Singh's motion demonstrates the existence of an issue of fact as to whether, in this case, there was a departure from good and accepted medical practice by Dr. Singh and, if so, whether any such departure was a substantial factor in causing plaintiff's claimed injury (see, Anderson v. Lamaute, 306 AD2d 232 [2nd Dept., 2003]; Wiands v. Albany Med. Ctr., 29 AD3d 982 [2nd Dept., 2006]; Graham v. Mitchell, 37 AD3d 408 [2nd Dept., 2007] (" . . . The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted medical practice and evidence that such departure was a proximate cause of injury or damage. 'Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions'"); cf, Thompson v. Orner, 36 AD3d 791 [2nd Dept., 2007]; Wager v. Hainline, 29 AD3d 569 [2nd Dept., 2006]).

Accordingly, the motion by Singh for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: July 25, 2008

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

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