

Poutrain v Mallya

2009 NY Slip Op 30116(U)

January 5, 2009

Supreme Court, Suffolk County

Docket Number: 99-21724

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 5 - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-17-08
ADJ. DATE 12-3-08
Mot. Seq. # 001 - MG

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JEAN POUTRAIN and RENEE POUTRAIN, :
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Plaintiffs, :
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: :
- against - :
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KASARGOD B. MALLYA, M.D., PRATRAP P. :
PATEL, M.D., LONG ISLAND BRAIN & SPINE: :
SURGERY, P.C. and BROOKHAVEN :
MEMORIAL HOSPITAL MEDICAL CENTER, :
: :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers) 1-29; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 30-37; Replying Affidavits and supporting papers 38-40; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the defendant Brookhaven Memorial Hospital Medical Center for an order pursuant to CPLR 3212 granting summary judgment on the issue that it bears no liability in this action and that it did not proximately cause the plaintiff's injuries is granted and the complaint of this action is dismissed as to Brookhaven Memorial Hospital.

This is an action premised upon the alleged medical malpractice by defendants in the failure to properly diagnose and treat the plaintiff, Jean Poutrain, lack of informed consent, and

a derivative claim asserted on behalf of the plaintiff's spouse, Renee Poutrain. It is asserted that Jean Poutrain was admitted to Brookhaven Memorial Hospital (Brookhaven) from February 8 1999 to February 11, 1999 for surgery consisting of a L4-5, L5-S1 hemilaminectomy and decompression of lateral stenosis related to the plaintiff's complaints of low back pain radiating down his left leg, foot numbness, cold feet and urinary urgency. Jean Poutrain's surgeon was Kenneth Mallya, M.D. It is claimed that during the plaintiff's admission to Brookhaven from February 8 to February 11, 1999, that he manifested signs and symptoms of a meningocele, and on March 2, 1999, upon Jean Poutrain presenting to Dr. Mallya with a bad headache and photophobia, he was diagnosed with a pseudomeningocele for which surgical repair was necessary, requiring the plaintiff to be readmitted to Brookhaven from March 2, 1999 to March 6, 1999.

The defendant Brookhaven Memorial Hospital seeks an order granting summary judgment, arguing that the care and treatment rendered to the plaintiff during those two admissions by the hospital nurses, physical therapists and staff was not the proximate cause of plaintiff's injuries and that they were not negligent in the care and treatment of the plaintiff.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3rd Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof

in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

In support of motion (001), the defendant Brookhaven has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; copies of the answers of defendant Brookhaven, Kasargod Mallya, M.D., Pratap Patel, M.D., and Long Island Brain & Spine Surgery, P.C.; copies of the verified bill of particulars relating to each defendant; supplemental bills of particulars; copies of the deposition transcripts of Jean Poutrain and Renee Poutrain, Madeleine Marx, Kasargod Mallya, M.D., and Pratap Patel, M.D., plaintiff's medical records, a copy of a curriculum vitae of Douglas Stephen Cohen and the affirmation of Dr. Cohen; and the affidavit of Karin A. Atanaky.

Karin A. Atanaky sets forth in her supporting affidavit that she is a duly licensed registered nurse and duly licensed nurse practitioner in family health and has reviewed the medical records of Jean Poutrain including those pertaining to the care of Jean Poutrain from February 8 to February 11, 1999 and March 2 to March 6, 1999 at Brookhaven hospital, the deposition transcripts of Jean Poutrain, Renee Poutrain, Kasargod Mallya, M.D., Pratap Patel M.D. and Madeline Marx, R.N. as well as various pleadings. It is nurse Atanaky's opinion with a reasonable degree of medical certainty that the care rendered by the nurses, physical therapists and staff at Brookhaven was at all time in accordance with the standards of good and accepted nursing practice.

Nurse Atanaky states that the patient was admitted to Brookhaven Hospital from February 8 to 11, 1999 for an L4-5, L5-S1 hemilaminectomy decompression of lateral stenosis. He presented with complaints of low back pain radiating down his left leg, numbness of the left foot, cold feet and urinary urgency. He executed informed consents for admission to the hospital, testing and treatments, administration of anesthesia and for surgery. She states that during this admission, Jean Poutrain manifested no significant signs or symptoms of meningocele. When he was discharged at 4 p.m. on February 11, 1999, he had decreased pain and was ambulating on his own, his dressing was dry, there were no indications regarding swelling or fever, pain medication provided relief, there was no wound problem, there was no indication of a gross leak, he was not significantly febrile, and had no headache or other complaint or symptom indicating a possible meningocele. On March 2, 1999, Mr. Poutrain saw Dr. Mallya and reported he had a bad headache and photophobia. It was Dr. Mallya's impression that Mr. Poutrain had a pseudomeningocele and arranged for a surgical repair for which he was readmitted to Brookhaven from March 2, 1999 to March 6, 1999. During the operation, no source of a leak was identified and the collection of cerebrospinal fluid was repaired, the wound was clean and there was no redness, increased temperature or drainage, he was mobile with a walker achieving full weight bearing. Nurse Anatoly states there was no departure from a nursing perspective which caused the meningocele and there was no failure to respond to any observation by the staff of Brookhaven that may have indicated a meningocele, and that the care and treatment rendered by the staff at Brookhaven did not proximately cause the plaintiff's alleged injuries.

The bill of particulars does not set forth any departures by the staff of the defendant Brookhaven Hospital but claims that the plaintiff's back condition was exacerbated and aggravated, there was a failure to properly treat the impingement of the nerve roots at the L4 and L-5 levels, and claims that the cerebrospinal fluid leak was caused by a nick, tear or rip to the spine and/or dura.

Mr. Poutrain testified to a prior back injury in about 1996 for which he treated with various physicians, and that an MRI revealed he had herniated discs with nerve impingement involving his sciatic nerve. In addition to his complaints of back pain and pain shooting down his leg, he began experiencing bladder complaints involving frequency of urination. He was referred to the defendant Dr. Mallya who advised him he could be treated with surgery for the herniated discs and that the bone could be scraped to free the nerve from the impingement. He was thereafter admitted to Brookhaven Memorial Hospital on February 8, 1999 where the surgical procedure was performed. He stated his back was very swollen after the surgery, it was a big incision with a lot of staples, and he was seen by the defendant Dr. Patel. He stated that it was not until the third day that he was able to get out of bed, with help holding onto a walker which he was ultimately discharged with. When he presented to Dr. Mallya about ten days later, he had swelling on his back, was black and blue, and had pain in his back radiating down his left leg, worse than before the surgery. He again saw Dr. Mallya about a week later on an emergency visit and complained of severe headaches. He testified that he had complained of headaches while he was still in the hospital. He was also experiencing photophobia and vomiting with the light which started after his last visit with Dr. Mallya. He was then admitted again to Brookhaven Hospital for what he was told by Dr. Mallya was a diphyletic tear for which surgery was performed on March 3, 1999.

Madeleine Marx testified that she is currently a primary care nurse in hospice at Brookhaven Hospital, and in 1999 was a full time registered nurse working at Brookhaven. Mr. Poutrain was a patient on the medical/surgical unit where she was working. When she first saw Mr. Poutrain on February 9, 1999, he was complaining of itching for which she called the P.A. who ordered Benadryl. He was noted to be alert and oriented, verbalization was clear and his behavior was appropriate to the situation. He had no complaints of pain, he had been medicated for pain with Percocet on February 9, 1999 as his PCA (Patient Controlled Analgesics) had been discontinued, and was out of bed ambulating with weight bearing with a walker with a steady gait for bathroom privileges. His back dressing was dry and intact and he was noted to be neurologically stable. On February 10, 1999 Mr. Poutrain was assigned to her again as her patient and he was noted to be alert and oriented, he had a steady gait with assistance and weight bearing. His incision and wound were noted to be dry and intact. He was given, inter alia, Percocet for pain and Restoril for sleep. On February 11, 1999, Mr. Poutrain was discharged pursuant to the discharge order. A discharge instruction sheet was given to him along with a discharge wheelchair, he was not to shower or bathe, and could drive a car and operate machinery as tolerated, walk and climb as tolerated but no running.

Dr. Mallya testified that he worked for a number of years in India as a physician and then went to Canada. Before he retired his medical license, he was a board certified neurosurgeon, but was not considered a neurosurgeon in Indian and had no specialty in India. He went to Canada in

about 1980 for higher education and began working as a demonstrator of anatomy at the University of Ottawa, then entered masters of anatomy program, but left it after six months to pursue a neuropathology program which he completed. He then went into a general surgery program from 1983 to 1984 and received a certificate and also received a certificate in neuropathology, but did not have to take a test for either certificate. He then took a six month program in neurology, and from 1984 to 1985 took a neurosurgery program (residency) for which he received a certificate but was never allowed to practice as a neurosurgeon. He then went to the University of Saskatchewan in Canada for neurosurgery from 1985 to 1987 and passed the American Board of Neurological Surgery, but it did not give him any credentials to practice in Canada or America. He then did a fellowship at Memorial Sloane Kettering in New York in neurosurgical oncology from 1987 to 1991 and took his boards in 1997. In 1993, he went out on his own and became affiliated with Brookhaven Hospital, became chief of neurosurgery, and eventually hired the defendant, Dr. Pratap Patel as his employee. Mr. Poutrain was referred to him by Dr. Flores on September 15, 1998. He saw Mr. Poutrain who had complaints of back pain from an injury at work on April 18, 1998, and a prior back injury in 1996, with pain in both extremities but more in his left than right. He also presented with bladder problems which were present since 1996. Mr. Poutrain presented with an MRI which Dr. Mallya stated revealed narrowing of the neural foramina causing compression of the nerve causing the low back pain and pain radiating to his left lower extremity. Examination revealed weakness in his left foot with decreased sensation in the L5 S1 nerve distribution with depression of the left ankle reflexes. He advised Mr. Poutrain of the need for surgery and explained the risks involved, including a possible tear in the membrane that covers the nerve which would cause a spinal fluid leak which, if it occurred and were noticed at the time of surgery, would be repaired then, and if evident later on, further management would be discussed. Surgery was performed on February 8, 1999 with the defendant Dr. Patel, his employee, as his assistant. Subsequent to the surgery, he determined that Mr. Poutrain had a dura leak, which Dr. Mallya opined occurred during the surgery and that he had no recollection how it happened or where the leak was. Prior to the closing, he did not observe a cerebrospinal fluid leak which would normally be apparent when they increase the intracranial pressure, as would be his custom and practice. Dr. Mallya stated that Mr. Poutrain was a private compensation patient who came to see him. The postoperative note of February 9th indicates that Dr. Mallya wrote that Mr. Poutrain is doing well, out of bed, tolerating well, sensation back in left foot. On February 10th and 11th, the dressing was noted to be dry and intact and the nurses are instructed to report a fluid leak on the sheets or anywhere. Dr. Mullins, also a neurosurgeon employed by Dr. Mallya, saw Mr. Poutrain on February 10th and discharged him on February 11th. Dr. Mallya states he next saw Mr. Poutrain on February 16th at which time his leg was doing well but Mr. Poutrain thought he had a sinus infection with severe headache for which he was going to the emergency room. Thereafter, Mr. Poutrain was admitted to Brookhaven Hospital as set forth above on March 2, 1999.

Dr. Pratap Patel testified at his examination before trial that he assisted with the surgery on Mr. Poutrain, and that all decisions concerning the surgery were made by Dr. Mallya. After the surgery was performed, he assisted in determining if there was a cut, nick or injury to the dura by looking, inspection (visual and with the microscope), and utilizing the Valsalva maneuver. He did not see Mr. Poutrain after the surgery.

Douglas S. Cohen, M.D. has set forth in his supporting affidavit that he is a physician licensed to practice medicine in the State of New York and is certified in Neurosurgery. It is his opinion with a reasonable degree of medical certainty after reviewing the records of Brookhaven Memorial Hospital that the care rendered by the nurses, physical therapists and staff at Brookhaven Hospital was at all times in accordance with the standards of good and accepted medical practice. Dr. Cohen sets forth that the records do not manifest any signs and symptoms presented by the plaintiff for a meningocele. Postoperatively, it is recorded that Mr. Poutrain had decreased pain, was ambulating on his own, his dressing was dry, there were no indications of swelling or fever, pain medications gave relief, there was no wound problem, he had no headache or other significant complaint or symptom indicating a possibility of a meningocele. On March 2, 1999, Mr. Poutrain indicated to Dr. Mallya that he had a bad headache with photophobia which was subsequently diagnosed as a meningocele and repaired on March 2, 1999. During this second admission, the patient's wound was clean with no redness, increased temperature or drainage, he was mobile and out of bed with a walker, fully weight bearing, and upon discharge had no fever and the wound was benign. Dr. Cohen further states that the care and treatment rendered by the staff at Brookhaven Memorial Hospital did not proximately cause the injuries complained of by Mr. Poutrain.

Based upon the foregoing, it is determined that the defendant, Brookhaven Memorial Hospital, has demonstrated prima facie entitlement to summary judgment dismissing the complaint as it has been established that the staff at Brookhaven Memorial Hospital did not depart from good and accepted standards of medical care in their care and treatment of the plaintiff and there is nothing that they did or did not do that proximately caused the injuries complained of, and that the records demonstrate that Mr. Poutrain did not present with signs and symptoms of a meningocele during his admission of February 1999, prior to its diagnosis.

In opposing this motion, the plaintiff has submitted an attorney's affirmation; a redacted copy of a physician's affirmation; and copies of various medical records, but has not provided an unredacted copy of the expert's opinion to this court's in camera review.

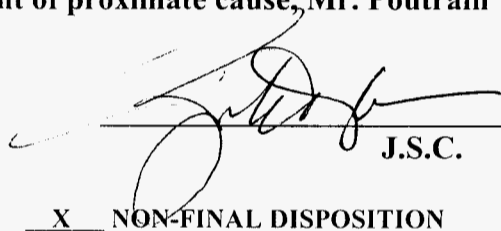
To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Plaintiff's expert sets forth that the medical chart of Brookhaven Memorial Hospital was reviewed as well as the records of various treating physicians and hospitals, the sworn testimonies of the parties and the defendant Brookhaven's expert witnesses. The plaintiff's expert sets forth that during the operative procedure on February 8, 1999, that Mr. Poutrain sustained a cerebrospinal fluid leak. Plaintiff's expert, based upon the testimony of Mr. Poutrain, sets forth that Mr. Poutrain complained of headaches during his February admission and was discharged despite the headaches. It is the plaintiff's expert's opinion that the staff at Brookhaven Memorial

Hospital deviated from accepted standards of medical care and practice in failing to timely diagnose that Mr. Poutrain sustained a cerebrospinal leak during his back surgery performed on February 8, 1999 in that they failed to document complaints of headaches and failed to communicate the complaints to the doctors in charge of his care. The plaintiff's expert also states that Brookhaven permitted the surgery to be performed upon Mr. Poutrain without a proper workup, evaluation and testing, and an outdated MRI. The plaintiff's experts further states that Brookhaven failed to properly train and supervise its nurses and staff, and failed to issue proper rules and regulations regarding the observation and documentation of a patient's complaints and symptoms.

Based upon the foregoing, even if the plaintiff would have provided an unredacted copy of the plaintiff's expert report to this court for its in camera review (*Marano v Mercy Hospital et al*, 241 AD2d 48, 670 NYS2d 570 [2nd Dept 1998]), it is determined that the plaintiff's expert has failed to raise a factual issue to preclude granting summary judgment to Brookhaven Memorial Hospital. The expert's assertion that Mr. Poutrain suffered from headaches in the hospital is not supported by the record which indicates that Mr. Poutrain exhibited no signs and symptoms of a cerebrospinal fluid leak. The plaintiff's experts' opinions that Brookhaven permitted Dr. Mallya to perform surgery upon Mr. Poutrain without a proper workup and that the staff was not properly trained and were not issued proper rules and regulations regarding observation and documentation of a patient's complaints and symptoms is unsupported except for conclusory assertions by the expert. Plaintiff's expert has not set forth what the proper standards should be and has not demonstrated that Brookhaven Hospital was responsible for Dr. Mallya's decisions concerning his private patient. More importantly, the plaintiff's expert has failed to demonstrate how any acts or alleged omissions by the staff of Brookhaven Memorial Hospital proximately caused the plaintiff's claimed injuries. With only unsupported conclusory assertions of departures, and without sustaining the element of proximate cause, Mr. Poutrain's claims against Brookhaven Hospital cannot be maintained.

Dated: JANUARY 5, 2009



 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION