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

PRESENT: LOBIS Justice

PART 6

JAMES ROEMER
- v -
CHARLES MICLON, M.D.

INDEX NO. 114351 / 114351/01

MOTION DATE 1/20/09

MOTION SEQ. NO. 4

MOTION CAL. NO.

The following papers, numbered 1 to 24 were read on this motion to/for Summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-12
Answering Affidavits — Exhibits	13-21
Replying Affidavits	22-24

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/18/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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JAMES ROEMER,

Plaintiff,

-against-

CHARLES MILLER, M.D., SUKRU EMRE, M.D., DR. A. GILL, MOUNT SINAI HOSPITAL, and MOUNT SINAI MEDICAL,

Defendants.

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Index No. 114351/01

Decision and Order

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

Defendants Charles Miller, M.D., Sukru Emre, M.D., Avtar Gill, M.D. (s/h/a Dr. A. Gill), The Mount Sinai Hospital (s/h/a Mount Sinai Hospital) and Mount Sinai Surgical Associates (s/h/a Mount Sinai Medical) (collectively, "Defendants") move, by order to show cause, for an order granting them summary judgment pursuant to C.P.L.R. Rule 3212.

As an initial matter, plaintiff argues in his opposition papers to this motion that Defendants' motion for summary judgment is untimely. The preliminary conference order for this action sets forth that "[m]otions for summary judgment shall be made . . . no later than 60 days from the date the Note of Issue is filed . . . ." Plaintiff filed his note of issue on October 21, 2008. The order to show cause for this motion was filed in the county clerk's office on December 18, 2008, and signed by this court on December 19, 2008, which was within sixty (60) days of the date on which plaintiff filed the note of issue; thus, the motion was timely brought. Plaintiff further argues that the order to show cause and underlying papers were not served pursuant to the terms of the order to show cause, which directed service on plaintiff "on or before December 23, 2008." Plaintiff annexes the envelope which contained the order to show cause and points out that it was date-stamped by the

post office on December 24, 2008. However, Defendants reply that they served by mail an unsigned copy of the order to show on December 19, 2008, and submit an affidavit of service to that effect. Because Defendants timely filed the order to show cause and plaintiff was served with an unsigned courtesy copy of the order to show cause within the time frame prescribed by the court in the order to show cause, and was served with a signed copy only slightly later, this court deems the summary judgment application timely.

Plaintiff commenced this action sounding in medical malpractice and lack of informed consent on or about July 23, 2001. He brings this action for personal injuries that he allegedly suffered during a left hepatectomy and cholecystectomy (surgical donation of his left liver lobe for transplantation to a friend) in January 1999. Post-operatively, plaintiff experienced left shoulder pain and numbness in his fingers. Plaintiff alleges, *inter alia*, that Defendants failed to properly position and monitor his arms during the course of the surgery, causing him to suffer a nerve injury to his left shoulder and arm. Plaintiff presently continues to complain of a left upper extremity nerve injury which causes him pain and numbness in his shoulder and arm.

The surgery to remove a portion of plaintiff's liver was performed on January 29, 1999. The surgery was performed at The Mount Sinai Surgical Hospital ("Mt. Sinai") by Charles Miller, M.D., and Sukru Emre, M.D.; Drs. Miller and Emre were assisted by Dr. Ben-Haim. The attending anesthesiologist was Dr. Gabrielson, and the resident anesthesiologist was Avtar Gill, M.D. In preparation for the surgery, plaintiff was placed in a supine position (lying down with face up) with both arms on arm boards extended less than ninety degrees. The anesthesia was begun at 10:38 a.m., the surgery started at 11:38 a.m., the procedure ended at 5:11 p.m., and the anesthesia ended

at 5:47 p.m. The hospital records indicate that the surgery itself was completed without complication. However, immediately after the surgery, plaintiff complained of left shoulder pain; an x-ray was ordered, but the films did not show any dislocation. Plaintiff also complained of numbness in all fingers bilaterally. The pain service noted that plaintiff had a weak hand grip bilaterally at 8:00 p.m.; when tested again at 8:45 p.m., plaintiff had regained normal strength in the right hand, although the left hand still had decreased strength. By January 30, 1999, plaintiff was still experiencing numbness in his left hand and arm. It was noted that plaintiff's complaints of numbness were possibly due to positioning during the surgery. The symptoms appeared to have improved over the next few days that plaintiff remained in the hospital. By February 3, 1999, plaintiff's discharge date, the hospital records reflect that plaintiff's post-operative shoulder pain due to "retractor injury" had resolved, and that there was no neurological damage. Plaintiff was discharged in stable condition and instructed to follow-up in the hepato-biliary clinic.

On February 18, 1999, plaintiff consulted with neurologist David Bronster, M.D., complaining of pain in his left shoulder, numbness into his hand, occasional pain in his left tricep, and numbness in his thumb and first two fingers. Dr. Bronster's notes indicate that plaintiff's hand was weak, and his impression was brachial plexus versus cervical radiculopathy. An electromyography study ("EMG") was performed on that date, and the findings as reported by Mark Sivak, M.D., were consistent with left-sided carpel tunnel syndrome.

Plaintiff returned to Dr. Bronster on February 23, 1999. Dr. Bronster's impression was that plaintiff had possible compression neuropathy and he ordered non-steroidal anti-

inflammatories, a brace, and follow-up in ten days. At the follow-up on March 2, Dr. Bronster noted no improvement. Dr. Bronster also referred plaintiff for an MRI of his cervical spine.

Plaintiff first saw Richard Magill, M.D., an orthopedic surgeon, on April 20, 1999. Examination of plaintiff's left hand revealed some limitations in motion and pain during certain tests. Dr. Magill's impression was that plaintiff was most likely suffering from left median neuropathy secondary to surgery. Under plan, Dr. Magill's report reads: "[Plaintiff] may or may not have carpal tunnel and this may resolve over time. It seems to be related to his surgical procedure and probably is a positional event or depending on how they tied his arm down, a traction event." A few weeks later, on May 4, plaintiff continued to experience numbness, pain, limited motion of the thumb and first two fingers, and some swelling in the fingers. Dr. Magill's impression on May 4 was "[l]eft upper extremity neuropathy" and index finger arthritity. On May 20, plaintiff reported that the numbness in his hand was improving, but that he still had index finger pain and tenderness. Dr. Magill's impression was essentially the same.

Plaintiff's next appointment with Dr. Magill was not until over four years later, on June 10, 2003. Dr. Magill's notes indicate that plaintiff informed him that most of the numbness from his injury in 1999 had resolved. His major complaint on June 10 was shooting pain down the back of his shoulder and neck to his arm, which occurred while driving or while climbing a ladder at work. X-rays of plaintiff's shoulder revealed degenerative changes in the acromioclavicular joint ("AC joint") and some evidence of an "os acromionale" [*sic* - possibly "os acromiale"].[1] Dr.

[1] "Os acromiale" is when the point of the shoulder "is joined to the scapular spine by fibrous rather than by bony union." STEDMAN'S MEDICAL DICTIONARY 1384; 19 (28th ed. 2006).

Magill's impression was that plaintiff had "left shoulder pain either from a partial rotator cuff tear or impingement, rotator cuff tendinosus from an AC joint hypertrophy." Plaintiff did not have an MRI until December 17, 2003. The findings from the MRI indicated a superior labral tear; a small articular side versus intrasubstance tear of the anterior supraspinous tendon; and, os acromiale, which is noted to be a "common cause of underlying rotator cuff impingement." When plaintiff returned to Dr. Magill on January 15, 2004, Dr. Magill noted that the MRI confirmed plaintiff's os acromiale and documented a partial rotator cuff tear. Dr. Magill's impression was that plaintiff was suffering from "rotator cuff tendinosus, os acromionale, possible labral tear based on the MRI but not on history and exam." Plaintiff received a cortisone and Zylocaine injection, which alleviated his impingement. On that same date, Dr. Magill authorized a claim form for plaintiff to receive disability benefits; the disability was listed as "complication of surgery at Mt Sinai Hospital", but the date of the disability was listed as December 17, 2003.

On January 22, 2004, plaintiff underwent a series of nerve tests on his left arm by T.V. Seshan, M.D., to whom plaintiff was referred by Dr. Magill. Dr. Seshan's findings were "[m]ild left carpal tunnel syndrome affecting sensory and motor components predominantly demyelinating in nautre", and "[m]ild left ulnar nerve entrapment at the Guyon's canal and at the elbow." Dr. Seshan noted that his tests "did not reveal any evidence of cervical radiculopathy or brachial plexopathy", and recommended an MRI of the cervical spine to rule out pathology.

Plaintiff was incarcerated for approximately two years, and was released at some point in 2006. His next records are from Jerald Vizzone, D.O., an orthopedist, who saw plaintiff on August 8, 2008. He presented with complaints of left shoulder pain radiating to the left upper

extremity with numbness and tingling. Plaintiff reported to Dr. Vizzone that the symptoms related to the liver donation surgery in 1999. Examination revealed a paravertebral muscle spasm of the cervical spine, pain upon rotating the left shoulder, and pain to palpation. An x-ray revealed an acromial spur in plaintiff's left shoulder. Dr. Vizzone's impression was cervical strain/sprain, cervical radiculopathy, and a left shoulder labral tear or possible rotator cuff tear. Plaintiff had an MRI of his left shoulder on August 18, 2008, which revealed "partial tendinopathy or tear of supraspinatus tendon" and "os acromiale and mild bony spurring of acromioclavicular joint, abut the supraspinatus myotendon." An MRI of the cervical spine the same day revealed a bulging disc at the C3-C4 level, and straightening, which indicates a muscle spasm. Plaintiff next saw Dr. Vizzone on September 5, 2008 to review the MRIs; his complaints and physical examination were unchanged. Dr. Vizzone noted that he was recommending surgery.

On September 25, 2008, plaintiff saw Joseph Willner, M.D., at the request of his attorney. Dr. Willner conducted an EMG and concluded that plaintiff had bilateral, moderately severe carpal tunnel syndrome, left somewhat worse than right, and left ulnar neuropathy at the elbow (cubital tunnel syndrome).

Defendants assert that the treatment rendered to plaintiff was at all times within well-accepted standards of medical practice, and that there is no causal connection between the treatment at Mt. Sinai and plaintiff's current complaints. As such, Defendants assert that they are entitled to summary judgment as a matter of law. In support of Defendants' motion, they submit an expert affirmation by Richard Magill, M.D., who also provided treatment to plaintiff after the January 1999 surgery. He asserts that he is a physician duly licensed to practice in the State of New York and

board certified in orthopedic surgery. Dr. Magill states that he reviewed plaintiff's allegations in the bills of particulars, and plaintiff's medical records from Mt. Sinai, Dr. Bronster, Dr. Vizzone, and Dr. Willner; he also reviewed his own records of plaintiff's treatment. Dr. Magill opines that Defendants adhered to the standard of care; that the neuropathy plaintiff experienced after the surgery was not a result of improper positioning during the surgery and eventually resolved; and, that the Defendants' treatment was not the proximate cause of plaintiff's current complaints.

Dr. Magill avers that the positioning of plaintiff during the surgery was proper and within the standard of care, and states that "[e]ven with the best positioning, a patient can develop temporary neurological injuries following a lengthy surgery such as the procedure [plaintiff] underwent." Dr. Magill sets forth that such injuries are rare, are usually transient, are a known risk of lengthy operative procedures, and can occur in the absence of negligence. He states that "[t]ransient perioperative carpal tunnel occurs in up to 1% of patients and is unrelated to positioning during a procedure."

Dr. Magill opines that plaintiff's post-operative injury was not permanent in nature; he avers that the injury was temporary and resolved by 2003, at the latest. He claims that the type of neuropathy plaintiff suffered from does not result in late deterioration, or chronic pain. Dr. Magill further opines that plaintiff's current complaints are unrelated to the 1999 surgery. Rather, he states that other physical findings are more consistent with plaintiff's current complaints. Specifically, he believes that plaintiff's current complaints are related to rotator cuff tendinosus, congenital os acromionialc, and AC joint arthritis, and recommends an arthrosporic debridement of plaintiff's cuff to resolve plaintiff's complaints. Dr. Magill believes that plaintiff's current condition is more likely

related to congenital os acromioniale, arthritic changes, and degenerative changes as a result of aging.

In substantive opposition to Defendants' motion, plaintiff argues that there are inconsistencies between Dr. Magill's treatment records for plaintiff and his affirmation on this case. In Dr. Magill's affirmation, he asserts that a patient can develop temporary neuropathy following a lengthy surgery, but states that the injury is transient and "unrelated to positioning." Plaintiff argues that this statement conflicts with Dr. Magill's own report from April 1999 which states: "[Plaintiff] may or may not have carpal tunnel and this may resolve over time. It seems to be related to his surgical procedure and probably is a positional event or depending on how they tied his arm down, a traction event." Plaintiff also points out that Mt. Sinai's records state that plaintiff's complaints of numbness were possibly due to positioning during the surgery, but that Dr. Magill does not address this statement in his affidavit. Plaintiff asserts that Dr. Magill's statement that the positioning of plaintiff during the surgery was proper and within the standard of care is conclusory, in that Dr. Magill does not reference the actual records of the surgery or texts.

As set forth in Alvarez v. Prospect Hosp.,

> 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 demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.

68 N.Y.2d 320, 324 (1986) (internal citations omitted). Defendants have not met their burden on this summary judgment motion of demonstrating the absence of any material issues of fact. Contradictions between Dr. Magill's affirmation and plaintiff's medical records demonstrate that

issues of fact remain as to whether plaintiff's injuries were caused by positioning during the surgery, and whether plaintiff's initial injury was temporary. There is no question that plaintiff reported pain and numbness in his left shoulder, arm, and hand immediately after surgery on January 29, 1999. Plaintiff's medical records from February 1999, April 1999, January 2004, and September 2008 consistently indicate left-sided carpal tunnel syndrome, which in April 1999, Dr. Magill noted to possibly be related to plaintiff's surgery. While Dr. Magill affirms that plaintiff's complaints had "completely resolved" by 2003, his treatment records for plaintiff in June 2003 actually indicate that "most" of plaintiff's complaints had resolved, and that a "baseline low level numbness" remained that worsened in certain positions. Further, although Dr. Magill asserts that even with the best positioning, patients can develop neuropathy after a lengthy surgery, he fails to address any aspect of the positioning beyond his statement that positioning of plaintiff during the surgery was proper. Finally, Dr. Magill states that neuropathy, unrelated to positioning, can occur after a lengthy surgery, but does not explain why neuropathy would occur absent improper positioning. Clearly, issues of fact remain.

Defendants' motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: February 18, 2009

JOAN B. LOBIS, J.S.C.