

Tong Chin v Genden

2009 NY Slip Op 30465(U)

March 2, 2009

Supreme Court, New York County

Docket Number: 104316/07

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 29

TONG CHIN and PING CHIN,

INDEX NO. 104316/07

Plaintiffs,

Motion Sequence No.: 2

-v-

ERIC GENDEN, and MT. SINAI SCHOOL
OF MEDICINE OTOLARYNGOLOGY-HEAD
AND NECK ASSOCIATES,

Defendants.

The following papers, 1- 28, were read on this motion by defendants Eric Genden and Mt. Sinai School of Medicine of New York University s/h/a Mt. Sinai School of Medicine Otolaryngology-Head and Neck Associates for summary judgment dismissing the complaint.

Notice of Motion - Affidavits - Exhibits
Affirmation in Opposition - Affidavits Exhibits
Replying Affirmation -

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COUNTY CLERK'S OFFICE
NEW YORK

Papers Numbered	
1-12	_____
13-21	_____
28	_____

Cross-Motion: Yes No

Plaintiffs commenced the instant medical malpractice action against defendants, Eric Genden (hereinafter "Dr. Genden") and Mt. Sinai School of Medicine of New York University s/h/a Mt. Sinai School of Medicine Otolaryngology-Head and Neck Associates (hereinafter "Mt. Sinai"), with the filing of a summons and complaint on or about March 30, 2007. Plaintiffs allege that Dr. Genden was negligent in his treatment of injured plaintiff, Tong Chin, in failing to timely diagnose and treat nasopharyngeal cancer.¹ The complaint also contains a derivative cause of action for loss of services, asserted by Mr. Chin's wife, Ping Chin. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants presently move for summary judgment dismissing the complaint, pursuant to CPLR §3212.

¹ Plaintiffs allege that Mt. Sinai is vicariously liable for the acts of Dr. Genden, because he treated Mr. Chin as an agent of the facility.

"[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]. Initially, "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." Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]. A failure by the movant in demonstrating, prima facie, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers. See Alvarez v. Prospect, *supra*; Winegrad v. New York Univ. Med. Center, *supra*. Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action. See Alvarez v. Prospect, *supra*; Zuckerman v. City of New York, *supra*.

Defendants move for summary judgment dismissing the complaint, arguing that the care and treatment rendered to plaintiff by Dr. Genden was within the standard of care, and such care and treatment was not the proximate cause of any injury allegedly sustained by Mr. Chin. In support of their motion, defendants rely upon, *inter alia*, the expert affidavit of a physician, who is board certified in the field of otolaryngology. Based upon a review of Mr. Chin's medical records, as well as plaintiffs' bill of particulars and the deposition testimony in this action, defendants' expert opined that there was no failure to diagnose cancer, or delay in diagnosis of cancer, on the part of Dr. Genden. Defendants' expert further opines that no alleged departure on the part of Dr. Genden caused or contributed to the injuries alleged to have been sustained by Mr. Chin. Defendants' expert initially discusses the medical evaluations of Mr. Chin performed by Dr. Howard Berg at St. Barnabas Medical Center in an effort to rule out a deep lobe parotid neoplasm.² Dr. Berg performed a fiber optic examination on November 19, 2004, which revealed a clear nasopharynx. Dr. Berg ordered a CT Scan of Mr. Chin's neck, which was performed on November 30, 2004. The CT Scan revealed a large right-sided parapharyngeal mass and soft tissue swelling in the right nasopharynx which was believed to represent either a primary nasopharyngeal carcinoma or a further extension of the large right-sided parapharyngeal mass. On December 7, 2004, three biopsies were performed - one of the right parapharyngeal mass and two of the right nasopharynx. On pathology, all three specimens were found to be benign.

Defendants' expert next discusses Mr. Chin's treatment by Dr. Genden, stating that on December 7, 2004, Mr. Chin presented to Dr. Genden for the first time, and that his first impression of Mr. Chin was of likely nasopharyngeal carcinoma. Dr. Genden sought to have the CT films and pathology slides re-reviewed at Mt. Sinai. The review of the pathology slides by Mt. Sinai confirmed that the three biopsy specimens were benign. A review of the CT of the neck was performed and again the large right-sided parapharyngeal mass, which was believed to be a non-cancerous tumor known as a pleomorphic adenoma, was noted, as was the soft tissue mass (swelling) in the right side of the nasopharynx. The soft tissue mass in the right side of the nasopharynx was believed to possibly represent nasopharyngeal cancer. After the re-review of the CT films and pathology slides, Dr. Genden presented the case to the multidisciplinary tumor board at Mt. Sinai, and in accordance with their recommendation, performed surgery - a deep lobe parotidectomy and infratemporal fossa dissection - on January 11, 2005. According to defendants'

² Mr. Chin presented to Dr. Berg with complaints of a right sided neck mass, right sided nasal obstruction and a feeling of right ear clogging.

expert additional pre-operative testing was not warranted or necessary." The expert states that "[g]iven that in the few weeks before surgery, plaintiff had a CT Scan, a fiber optic evaluation, two negative biopsies of the right nasopharynx, a second review of the CT films and pathology slides at Mount Sinai Hospital, it is my opinion that further preoperative biopsies and/or further diagnostic testing was not indicated or necessary."

Defendant's expert sets forth that Dr. Genden performed a deep lobe parotidectomy and infratemporal fossa dissection on Mr. Chin, on January 11, 2005, without complication. The expert explains that during the surgery, Dr. Genden noted that the two masses described in the CT report were actually only one mass consisting of pleomorphic adenoma originating in the salivary gland and extending up into the nasopharynx. Dr. Genden removed the mass in its entirety, and, upon inspection, there was no residual tumor tissue left in the nasopharyngeal area following surgery. According to the expert, a biopsy was performed on the right nasopharynx. On pathology, the pleomorphic adenoma and the biopsy specimen from the nasopharynx were found to be benign. Defendants' expert opined "that the surgery performed by Dr. Genden was performed appropriately, completely and in full accordance with the standard of care. Dr. Genden resected the entirety of the mass en bloc and further took a third biopsy specimen from the right nasopharynx."

Defendant's expert next addresses Mr. Chin's care and treatment by Dr. Genden following the surgery of January 11, 2005. The expert states that Mr. Chin presented for routine post-operative visits on January 20, 2005 and March 17, 2005. A fiber optic endoscopic examination was performed during the March 17, 2005, and was normal. At that time, the plan was for Mr. Chin to return for a follow-up MRI in twelve months. However, on September 29, 2005, Mr. Chin returned to Dr. Genden with complaints of a nasal obstruction. The expert sets forth that "[a] fiber optic examination showed a mass in the right lateral aspect of the nose, with friable tissue at the level of the attachment of the middle turbinate. This was in an area significantly more anterior to the area of concern in the prior CT of November 30, 2004." A CT Scan that was performed on September 29, 2005, showing a large nasopharyngeal tumor extending down into the oropharynx. A biopsy was performed on October 12, 2005, and was consistent with non-keratinizing nasopharyngeal carcinoma. As a result of such findings, plaintiff underwent a combination of chemotherapy and radiotherapy.

Defendants' expert opines that the post-operative care provided to Mr. Chin by Dr. Genden was in accordance with good and accepted medical practice, as was his treatment of Mr. Chin when he presented in September of 2005 with complaints of a nasal obstruction. According to the expert, "Dr. Genden ordered the appropriate tests and made the appropriate referral for consultations, resulting in the appropriate combination therapy received by [Mr. Chin]. Defendants' expert further opines that Mr. Chin's nasopharyngeal cancer that was diagnosed in September/October of 2005 was a new cancer. This cancer was not present as of Dr. Genden's treatment of plaintiff on March 17, 2005. As the expert explains, "[n]asopharyngeal cancer is very aggressive cancer that could have developed during the six months following [Mr. Chin's] March 17, 2005 visit with Dr. Genden." The expert adds that there is a possibility that there were microscopic cancer cells present on or before March 17, 2005, however, such cells would have been incapable of detection.

In opposition to defendants' motion, plaintiff submitted, *inter alia*, the expert affidavit of a physician, who is board certified in otolaryngology. Plaintiffs' expert based the opinions contained in the affidavit upon a review of Mr. Chin's medical records and the deposition testimony of the parties. According to plaintiffs' expert, despite the CT Scan of November 30, 2004, revealing two separate and distinct masses, one mass on the right parapharyngeal space and another on the

nasopharyngeal space, Dr. Genden failed to make any notation of, or reference to, the nasopharyngeal mass in connection with his pre-operative findings. The expert further sets forth that no discussion with respect to the nasopharyngeal mass, or the surgical evaluation and biopsy of that mass, was had when Dr. Genden presented Mr. Chin's case to the tumor board at Mt. Sinai. The surgery performed by Dr. Genden on January 11, 2005, solely related to the deep lobe right parotid mass of the parapharyngeal space. Plaintiffs' expert states that "[t]here is absolutely no evidence that the nasopharyngeal mass was at all evaluated, examined or biopsied during Dr. Genden's surgery." According to plaintiffs' expert, nowhere in Dr. Genden's operative report is there any evidence to support defendants' claim that the parapharyngeal mass and the nasopharyngeal mass were one tumor. The expert sets forth that "a review of the pathology report issued confirms that the only mass that was removed, was the benign parapharyngeal mass that was proven to be a pleomorphic adenoma." The expert further notes that Mr. Chin's discharge summary only lists the excision of a deep right parotid tumor. With respect to defendants' expert's opinion that a biopsy was performed on the right nasopharynx intra-operatively, plaintiff's expert states that the pathology report does not indicate that the specimen removed during the surgery included nasopharyngeal mass. The expert opines that Dr. Genden's failure to perform a biopsy of the nasopharyngeal mass, as well as evaluate and monitor this mass, was a departure on the part of Dr. Genden.

Plaintiffs' expert further states that during Mr. Chin's post-operative visits immediately following the surgery of January 11, 2005, Dr. Genden failed to perform indicated and necessary examinations to rule out nasopharyngeal cancer, despite showing "all the classic warning signs³ and increased risk factors for this disease." Plaintiffs' expert states that the performance of a fiber optic endoscopy, which was performed by Dr. Genden on March 17, 2005, does not rule out nasopharyngeal cancer, as nasopharyngeal masses are often times under the surface and not visible; and Dr. Genden's plan to do a 12 month follow up scan was insufficient. The expert sets forth that "[t]he failure to perform a CT Scan of the neck shortly after the January 11, 2005 surgery was a departure from good and accepted medical practices." Adding that "[a]lthough I wholly disagree that the nasopharyngeal mass was removed and biopsied, assuming that Dr. Genden thought he removed the nasopharyngeal mass, a follow up CT Scan was required after surgery to confirm that belief." According to this expert, if a CT Scan had been performed shortly after the surgery, Dr. Genden would have been aware that the suspicious nasopharyngeal mass was still present.

With respect to causation, plaintiffs' expert opines that as a result of the aforementioned departures, Mr. Chin's diagnosis of nasopharyngeal cancer was delayed for nine months, and was allowed to grow, spread and metastasize to lymph nodes. According to the expert, the delay in diagnosis caused Mr. Chin's cancer to advance a stage, and has caused a significant loss of chance for survival, as well as a increased risk of reoccurrence. Plaintiffs' expert also addresses defendants' expert's theory that Mr. Chin's cancer may have been microscopic on or before March 17, 2005, stating that this theory fails because the CT Scan from November 30, 2004 shows the exact same nasopharyngeal mass present in the CT Scan of September 29, 2009; but the mass as it appears on CT Scan of September 29, 2009 is larger and associated with metastatic lymph

³ According to plaintiffs' expert during the post-surgical follow-up visits of January 20, 2005 and March 17, 2005, Mr. Chin made complaints of right hearing loss and right nasal stuffiness. Although the medical records indicate that such complaints were made pre-operatively and again during Mr. Chin's September 29, 2005 visit to Dr. Genden, references to such complaints do not appear in the records relating to Mr. Chin's earlier post-operative visits.

nodes.

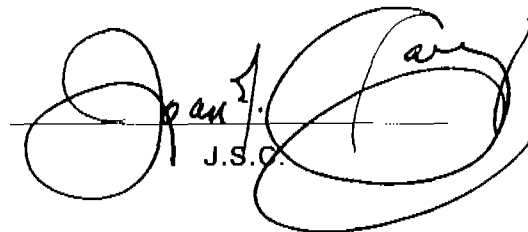
Based upon the conflicting expert affidavits submitted by the parties, issues of fact and credibility exist in connection with whether Dr. Genden departed from good and accepted medical practice in the treatment of plaintiff, and whether such departures were a substantial factor in causing injury to plaintiff. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v Lenox Hill Hosp., 232 AD2d 184 [1996]). Accordingly, defendants' motion for summary judgment is denied.

Based on the foregoing, it is hereby

ORDERED that defendants Eric Genden and Mt. Sinai School of Medicine of New York University s/h/a Mt. Sinai School of Medicine Otolaryngology-Head and Neck Associates' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on April 2, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for jury selection.

Dated: 3/2/2009


J.S.C.

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REFERENCE

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