

Wilson v Laucella

2009 NY Slip Op 32975(U)

December 15, 2009

Supreme Court, Suffolk County

Docket Number: 08-3366

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

P R E S E N T :

001

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 8-13-09
ADJ. DATE 8-21-09
Mot. Seq. # 001 - MG
002 - XMG
003 - XMG

-----X
DAVID WILSON and ETHEL WILSON, :
 :
 :
 Plaintiffs, :
 :
 - against - :
 :
 MICHAEL LAUCELLA, MEDICAL ARTS :
 RADIOLOGY, MEDICAL ARTS :
 RADIOLOGICAL GROUP, P.C. and SHALINI :
 PATCHA, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 84 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 41 - 58; 63 - 68; Answering Affidavits and supporting papers 22 - 33; 59 - 60; 69 - 76; Replying Affidavits and supporting papers 34 - 40; 61 - 62; 77 - 84; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs is granted; and it is further

ORDERED that the cross motion by defendant Shalini Patcha is granted; and it is further

ORDERED that the cross motion by plaintiffs is granted.

Plaintiffs David Wilson (“plaintiff”) and Ethel Wilson move for an order granting summary judgment on the issue of medical malpractice as to treatment rendered to plaintiff by Michael Laucella MD (“Laucella”) and Medical Arts Radiology Group, PC (collectively “defendants”) and setting the matter down for trial solely on the issue of damages. In support, plaintiffs have provided copies of the

pleadings, Laucella's pretrial deposition testimony, the pretrial deposition testimony of defendant Shalini Patcha ("Patcha"), plaintiff's medical records, and an affidavit by James B. Naidich, MD ("Naidich"). Laucella opposes and submits certain medical records and plaintiff's pretrial deposition testimony, and plaintiff has replied. Patcha cross-moves for summary judgment and submits the pleadings, plaintiff's medical records, her own and Laucella's deposition testimony, and an affidavit by Joseph S. Jeret, MD ("Jeret"). Laucella opposes the cross motion, and Patcha has replied. Plaintiffs also cross-move for an order striking the affirmative defenses of Article 19 contained in the answer by Laucella as it relates to Patcha. Laucella opposes and plaintiff has replied.

The underlying complaint is an action for medical practice for the alleged failure by Laucella, a radiologist, to timely diagnose plaintiff's nasopharyngeal carcinoma, which thereafter progressed to Stage IV cancer. According to plaintiff's testimony, he began experiencing daily headaches in 1999 or 2000. He testified that he initially sought treatment from his primary care doctors, but was referred to Patcha, a neurologist. Plaintiff was unable to recall much of his subsequent treatment during his deposition. He did recall seeing other physicians and undergoing MRIs. Plaintiff also testified to experiencing numbness in his left leg. He testified that he continued treatment with Patcha through 2004, and that the intensity of his headaches increased over that time. Plaintiff testified that during that time he took both over-the-counter and prescription medications to relieve the symptoms. Plaintiff testified that he experienced periodic nosebleeds beginning in the latter part of 2004 which continued into 2005. He also testified that he experienced facial pain related to his headaches and episodes of blurred vision.

In preparing his affidavit, Naidich, a radiologist, relied upon plaintiff's medical records, including an MRI performed on plaintiff's brain on September 19, 2005 and the report by Laucella interpreting the MRI findings; medical records prepared by Patcha; an MRI examination of plaintiff's brain performed at Huntington Hospital on November 28, 2006 and the report and an addendum report by Sara Schweitzer MD interpreting the Huntington Hospital MRI findings; CT examinations of plaintiff's head and sinuses performed at Huntington Hospital on January 6, 2007 and the report of Steven Losik, MD, the interpreting radiologist; a CT examination of plaintiff's neck performed on January 4, 2007 interpreted by Tamara Mohuchy, MD; and the pathology report of a biopsy of the nasopharynx dated January 12, 2007. Naidich also reviewed excerpts from the depositions of Laucella and Patcha.

It is Naidich's conclusion that the medical care rendered by Laucella was not in accord with accepted standards of medical care and that plaintiff was injured as a result of such care. Naidich found that a misreading of an MRI of plaintiff's brain on September 19, 2005 caused the aggravation and exacerbation of his nasal pharyngeal carcinoma, permitting it to grow and develop into a Stage IV cancer. Specifically, Naidich noted that Laucella reported the results of the September 19, 2005 MRI as normal. Naidich also pointed to an excerpt of Laucella's testimony in which he acknowledged that when he reviewed the MRI on a "second occasion" he found the results were "different." Naidich also found significant Laucella's answer, in the affirmative, to the question: "Would it be fair to say [the report you issued as to the MRI conducted on September 19, 2005] was substandard, beneath the standard of care?" Naidich concurred with Laucella's assessment and found that the MRI showed "an abnormality in the nasopharynx affecting the clivus, the adjacent bone." Naidich also pointed to an excerpt of Patcha's

testimony during which she noted she relied upon the information reported by Laucella and that it affected her potential differential diagnosis and final diagnosis as to plaintiff. Naidich also noted Patch's testimony that had she received the correct information she would have done "a scan for nasopharyngeal area, [and sent] him to an ENT for surgical evaluation." Naidich opined that had Patcha received an accurate report, there would have been a reasonable expectation that a further evaluation would have been conducted of the abnormality which was present on the September 19, 2005 films and that a correct diagnosis would have been made a year earlier. Naidich notes that the MRI done at Huntington Hospital on November 28, 2006 revealed a nasopharyngeal mass which had grown significantly from September 19, 2005 and involved the clivus. Naidich opined, based upon plaintiff's various hospital records, that plaintiff did not have Stage IV cancer on September 19, 2005 "but rather a less advanced disease, and that the stage of cancer progressed adversely from September 19, 2005 until the day it was ultimately diagnosed."

By his opposition, Laucella contends that plaintiff has failed to establish a prima facie case as to his alleged malpractice in part due to the lack of certified medical records. He also argues Naidich's affidavit is insufficient to meet plaintiffs' burden on the motion, because Naidich's opinion as to the cause of plaintiff's cancer is beyond his expertise inasmuch as he is a radiologist and not an oncologist or a neuroradiologist. Further, as to the latter point, Laucella contends that Naidich failed to provide a foundational scientific basis for his opinions as to the progression of a nasopharyngeal carcinoma. Laucella notes that Naidich did not articulate the plaintiff's condition on September 19, 2005 primarily because he was not qualified to do so and that it is impossible, therefore, to render an opinion as to the manner in which his alleged malpractice contributed to the progression of plaintiff's disease. Laucella argues that Naidich's affidavit is "grossly ambiguous and vague, rendering it of no probative value." He also contends that plaintiff's reliance on his own deposition is misplaced because, he alleges, he did not testify that his interpretation of the September 19, 2005 study constituted a departure or deviation from the standard of care. Laucella also notes that Naidich did not articulate any independent acts of negligence as to Medical Arts Radiology or Medical Arts Radiological Group, PC. Finally, Laucella argues that there is an issue of fact as to whether plaintiff's failure to provide defendants with full and complete information regarding his complaints contributed to Laucella's interpretation of the MRI. In support, Laucella points to plaintiff's patient questionnaire which reports only "headaches" and the failure to note other complaints.

In reply, plaintiff points to Jeret's affidavit submitted in support of Patcha's motion in which he opines that the delay in treating plaintiff's cancer was solely attributable to Laucella's misreading of the September 19, 2005 MRI. Plaintiff also points to Laucella's deposition testimony, particularly the following: [Inquiry]: "Doctor, in your opinion, based upon a reasonable degree of medical certainty, was it a departure from accepted standards of good medical practice existing on September 19, 2005 for a board-certified radiologist with subspecialty qualifications in neuroradiology, not to have diagnosed a soft tissue prominence in the nasopharynx evident on Images 10 and II on September 19, 2005." [Laucella]: "I don't know." [Inquiry] Why is it that you don't know, Doctor? What information do you lack that prevents you from . . ." [Laucella]: "The definition of departure I suppose." [Inquiry]: Well Doctor you're familiar with what the standard of care was for a Board certified radiologist with a special qualification in neuroradiology in 2005 was; correct? We can agree that there was a standard of care . . ." [Laucella]: "Yes." [Inquiry]: "That was expected of specialists?" [Laucella]: "Yes." [Inquiry]: "Such

as yourself with qualifications?” [Laucella]: “Yes.” [Inquiry]: “Did the report you issued on September 19, 2005 conform to that standard of care?” [Laucella]: “No.” [Inquiry]: “Would it be fair to say that it was substandard, beneath the standard of care?” [Laucella]: “Yes.”

Plaintiff also contends that his expert was competent to offer an opinion as to the growth of his cancer between the lesions which appeared on the September 19, 2005 MRI and later MRI examinations. As to Laucella’s allegation that the records upon which the motion is based are uncertified, plaintiff notes that the pertinent records were authenticated by Patcha during her deposition, including the September 19, 2005 MRI and the MRI performed a year later at Huntington Hospital. Specifically, plaintiff contends that it was within Naidich’s expertise, as a board-certified radiologist, to opine that the nasal pharyngeal mass which was not reported by Laucella eventually grew into a mass involving the clivus by November 28, 2006. As to the allegation that plaintiff failed to show a relationship between Laucella and Medical Arts Radiological Group, PC, plaintiff notes, simply, that in their answer defendants admitted that Laucella was a partner in Medical Arts Radiology and Medical Arts Radiological Group, PC and the plaintiff was a patient of Medical Arts Radiological Group, PC. As to the allegation that there is an issue of comparative negligence premised upon plaintiff’s failure to articulate a complete recitation of his various complaints at the time the MRI was conducted, plaintiff contends that Laucella did not provide any competent evidence to support such claim.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement as a matter of law by proffering sufficient evidence to eliminate any material issue of fact from the case. In making a determination as to whether to grant such relief, it must be clear that no triable issue of fact has been presented (*see Sillman v Twentieth Century-Fox Corporation*, 3 NY2d 395 [1957]). The movant bears the initial burden of proving entitlement to judgment (*see Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]). Failure to make such showing mandates dismissal of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v NYU, supra*). Upon such showing, however, the burden shifts to the opposing party who, in order to defeat the motion, must proffer evidence, in admissible form, which demonstrates facts sufficient to require a trial on any material issue of fact (CPLR 3212; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The requisite elements of proof in a medical malpractice action are: (1) a deviation or departure from accepted practice and (2) evidence that such deviation or departure was the proximate cause of plaintiff’s injury or damage (*see Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [1998]). To establish a prima facie case of medical malpractice, a plaintiff must show that defendant’s negligence was a substantial factor in producing the alleged injury (*see Fiore v Galang*, 64 NY2d 999 [1985]). Except as to matters within the ken of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care (*see Lyons v McCauley*, 252 AD2d 516 [1998]).

Here, plaintiff has established that Laucella deviated from accepted practice both by Naidich’s affidavit and by his own testimony. The reports interpreting the various MRI’s including Laucella’s, were authenticated by Patcha and relied upon by Naidich in preparing his affidavit. Further Naidich, as a board-certified radiologist was competent to compare the MRI examination conducted on September 19, 2005 and the report prepared by Laucella with the MRI examination on November 28, 2006 and to note the increase in the size of the mass overlooked by Laucella. It was also within Naidich’s expertise to

observe that an accurate reading of the September 19, 2005 MRI would have disclosed “an abnormality in the nasopharynx affecting the clivus, the adjacent bone.” Plaintiff has established through Naidich a deviation by Laucella from accepted practice and an injury which was proximately caused by that deviation. Although Laucella contends that Naidich is unqualified to render an opinion as to the whether Laucella’s omission was the proximate cause of plaintiff’s injury, it is clear that an abnormality which existed on September 19, 2005 progressed and increased in size over time until November 28, 2006. It was within Naidich’s province, as a radiologist to opine that such progression took place and to state that such injury was caused by Laucella’s failure to provide an accurate report.

Plaintiff’s motion for summary judgment is granted and this matter, as against Laucella and Medical Arts Radiology Group, PC, shall be set down for trial solely on the issue of damages.

Patcha asks that summary judgment be granted to her based upon the foregoing submissions, including her deposition. According to Patcha’s testimony, she first saw plaintiff on January 27, 1999. At that time, plaintiff’s chief complaint was headache. At that time Patcha directed plaintiff to undergo an MRI to rule out metabolic causes for his headaches and neuropathy. Ultimately, Patcha received a report on February 9, 1999 for an MRI which was conducted on February 2. That report, according to Patcha, was normal as to plaintiff’s brain. According to Patcha’s testimony, on a visit on November 22, 2005, plaintiffs complained of neck pain and pain radiating down into the head and back toward the head. Patcha testified that plaintiff indicated that he had not experienced that pain before. Patcha testified that she found plaintiff’s complaint significant because he was not “a complainer.” Patcha requested an MRI scan requested by another doctor on September 19, 2005, be faxed to her office. According to Patcha, her differential diagnosis for plaintiff, on November 22, 2005, was an acute cervical spasm with radiculitis. Patcha testified that she did not consider any type of pathology on plaintiffs’ brain at that time, because his brain MRI “reported negative.” Patcha testified that she next saw plaintiff on December 22, 2005 for a scheduled appointment at which time she noted he was still experiencing neck pain. She testified that she again saw plaintiff on March 16, 2006 and that she referred him to two other physicians, because he indicated that he was still experiencing neck pain and was having nosebleeds. She again saw him on November 21, 2006 when he again complained of neck pain and headaches, as well as a new complaint, dizziness. On November 24, according to Patcha, plaintiff went to Huntington Hospital and was released that day with a prescription for pain medication. An MRI was ordered by Patcha on the 21st which was done on the 28th. Patcha received the report as to that MRI on November 30th. The MRI report indicated, according to Patcha, that the finding as to plaintiff’s brain was “unremarkable.” Patcha testified that on January 2, 2007, plaintiff’s wife called to say that plaintiff had experienced a severe nosebleed the day before. Plaintiff was thereafter taken to Huntington Hospital where, Patcha testified, she saw him on the evening of the 2nd. Thereafter, according to Patcha, she met with a radiologist at Huntington Hospital, who indicated that MRI’s done in November had been incorrectly read and that “[b]ecause of the way the destruction of the clivus bone and surrounding tissues, [the radiologist] thinks more tending towards the metastatic rather than clivus primary tumor, but still [the radiologist] cannot rule it out, because clivus tumors tend to be metastatic, very destructive tumors. But because Mr. Wilson doesn’t have any other findings with him, because usually they ataxic very unsteady balance issues. He doesn’t have any of that. So, it could be metastatic disease nasopharyngeal, something else. We need biopsy.” Patcha testified that she ultimately learned the results of plaintiff’s biopsy, which revealed a history of “stage 4 undetectable nasopharyngeal

carcinoma.”

In support of her motion for summary judgment, Patcha relies, in part on Jeret’s affidavit. In his affidavit, Jeret, neurologist, opined that Laucella’s misreading of plaintiff’s MRI resulted in a failure to diagnose a nasopharyngeal carcinoma, which was the proximate cause of plaintiff’s ultimate diagnosis of Stage IV of that disease in January 2007. Jeret noted that Laucella’s misreading of the MRI is not an issue in the case inasmuch as Laucella admitted his report did not conform with the standard of care for a board-certified radiologist with special qualifications in neuroradiology in 2005. It is on that basis that Jeret opines that any delay in treating plaintiff’s cancer is solely attributable to Laucella’s actions and, based upon the report, Patcha was within the standard of care in not considering brain pathology. Jeret noted Patcha’s testimony during which she observed that had she been privy to accurate information, it would have affected her potential and final diagnosis of plaintiff’s condition.

Laucella, in opposition, relies on the arguments raised in his affirmation in opposition to plaintiff’s motion for summary judgment and asks that any determination as to the instant motion preserve and reserve his rights pursuant to CPLR Articles 14 and 16 and New York General Obligations Law 15-108. In reply, Patcha notes the failure by Laucella to provide an expert affidavit in response to her request for a summary determination as to her claim that her treatment of plaintiff did not deviate from the accepted standard of medical care. Indeed, she underscores the point that Laucella’s opposition did not make any reference at all as to her treatment nor of Jeret’s conclusions. In short, Patcha contends that Laucella has failed to raise an issue of fact.

Patcha has made a prima facie case for entitlement to a summary determination in her favor and Laucella has failed to demonstrate the existence of any material fact which would warrant a trial. Patcha’s motion, therefore, is granted.

Plaintiff, by his cross motion, asks that the CPLR Article 16 defenses contained in Laucella’s answer be stricken as it relates to Patcha. Essentially, by this motion, plaintiff concedes that, based on information obtained during the discovery phase of this action, he will be unable to establish liability on the part of Patcha. Plaintiff seeks the relief granted in *Drooker v South Nassau Community Hospital*, 175 Misc2d 181 [1998], wherein plaintiffs stipulated to discontinue an action in a medical malpractice action on the condition that the remaining defendants would waive any Article 16 defenses as they related to the discontinued defendants. The remaining defendants in *Drooker* objected to the stipulation and contended that their Article 16 rights remain viable until trial. The court determined that inasmuch as a motion for summary judgment is the functional equivalent of a trial, the remaining defendants were obligated to articulate their proof or forfeit such rights.

Laucella, in opposition, questions the precedential value of *Drooker* and contends that plaintiff is mistaken in seeking a ruling that defendants are obligated to articulate the liability or apportionment as to Patcha. Specifically, it is claimed that since the defendants have not asserted cross claims as to one another, neither has standing to oppose a summary judgment motion made by the other.

Here, the court has granted summary judgment as to plaintiff and Patcha and, in doing so, has essentially determined that there are no material issues of fact as to liability to be tried by a jury. Since

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Laucella has failed to satisfy the burden which shifted to him in the context of those motions, he has forfeited the rights accorded to him to limit liability under Article 16 (*see Drooker v South Nassau, supra*). Plaintiff's cross motion, therefore, is granted.

Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Calendar for the next available date.

Dated: 12.15.09



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION