

Genshaft v Shapiro

2010 NY Slip Op 31386(U)

May 28, 2010

Supreme Court, New York County

Docket Number: 114834/08

Judge: Joan B. Lobis

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

PRESENT: Sean B. Lohis

PART 6

Index Number : 114834/2008

GENSHAFT, LAUREN

vs
SHAPIRO, STACEY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/18/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-6

7-13

14

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/28/10

[Signature]
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

LAUREN GENSHAFT

Plaintiff,

-against-

STACY SHAPIRO, M.D. and MARY ELLEN
RENNA, M.D., DESIREE SACHSE, M.D., and
STACY SHAPIRO, M.D., P.C.

Respondents.

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

FILED
JUN 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Index No. 114834/08

Decision and Order

Defendants Stacy Shapiro, M.D., Mary Ellen Renna, M.D., Desiree Sachse, M.D., and Stacy Shapiro, M.D., P.C. move, pursuant to C.P.L.R. Rule 3212, for an order granting them summary judgment and dismissing the complaint against them in its entirety. For the reasons set forth below, the motion is denied.

This action, sounding in medical malpractice and lack of informed consent, arises out of the administration of a "booster" vaccination that plaintiff received on May 6, 2008. At the time, plaintiff was 22 years old and a graduate student. As part of an externship program in which plaintiff was participating at a facility owned by what plaintiffs refer to as Einstein Hospital, she had to submit a Student Health Requirements Checklist. The checklist required vaccinations for measles, mumps, rubella, varicella, hepatitis B surface antigen, and hepatitis B surface antibody, as well as a tuberculosis skin test. On May 6, 2008, Dr. Shapiro saw plaintiff and advised her that she was due for a tetanus booster in seven months and that she had no immunity to pertussis (whooping cough). Dr. Shapiro asserts that the CDC recommends immunization for pertussis for anyone working in a health care related facility. According to Dr. Shapiro, she decided to give plaintiff an inoculation of the Adacel vaccine to immunize her against pertussis. Adacel is a tetanus, diphtheria, and pertussis booster. Plaintiff did not need an immunization for diphtheria or tetanus as of the May 6, 2008 visit. According to Dr. Shapiro's testimony at her

examination before trial (“EBT”), she had a conversation with plaintiff regarding the nature of the Adacel immunization that she planned to administer and the possible side effects. Dr. Shapiro further testified that it is her general practice to give patients written information about the vaccine. According to plaintiff’s EBT testimony, she believed that she was getting a tetanus booster that she had been given before. Plaintiff denies that she was told that she was getting a tetanus booster with a pertussis component.

The next day, May 7, plaintiff experienced pain in the area of her arm where she had been inoculated. The following morning she awoke with extreme nausea, vomiting, and a severe headache. She was taken by ambulance to Bellevue Hospital’s emergency room (“Bellevue”). CT scans of her head revealed a closed head trauma, brain contusion, subarachnoid hemorrhage, and temporal bone fracture. Her physicians concluded that a seizure had led her to strike her head on a bedside table, although it cannot be conclusively determined whether the seizure led to the head trauma or the head trauma led to the seizure. Saran Jonas, M.D., the treating neurologist at Bellevue, concluded in his report dated May 20, 2008, that plaintiff “had a violent seizure in bed and hit her head on [a] desk edge.” Dr. Jonas further noted that plaintiff had never had a seizure before and that it was possible that the booster shot had caused the seizure. On May 27, 2008, Dr. Shapiro completed a Vaccine Adverse Event Reporting System (“VAERS”) form. On the form, Dr. Shapiro identified a vaccine called Daptacel, and not Adacel, as the vaccine administered to plaintiff and noted that plaintiff had three previous doses. In a separate part of VAERS form, however, Dr. Shapiro stated that Adacel was given to the patient.

On or about November 5, 2008, plaintiff commenced this lawsuit alleging lack of informed consent and that the seizure, head trauma, resulting neurological injuries, and other sequelae were proximately caused by the negligent administration of the inoculation. Defendants now seek summary judgment on the issue of medical malpractice and lack of informed consent.

In support of their motion, defendants rely on an affirmation from Stephanie Citerman, M.D., a board certified pediatrician. Dr. Citerman maintains that Adacel was the vaccine that plaintiff received. She sets forth that the Adacel vaccine was appropriate given plaintiff's age, vaccination history, and upcoming graduate course of study. Dr. Citerman opines that there is no support in medical literature that seizures are a known risk of Adacel vaccination. Therefore, there is no definitive evidence that Adacel caused the seizure.

In response, plaintiff relies on an affirmation from a board certified pediatrician, whose name has been redacted. Plaintiff's expert's opinion cites to the VAERS form and is, therefore, based on a different factual premise. The expert believes that Daptacel, and not Adacel, was administered to plaintiff, and sets forth that Daptacel is given to children between the ages of three months and seven years. The expert maintains that it would be a departure to administer this vaccination to someone plaintiff's age. Plaintiff's expert further opines, to within a reasonable degree of medical certainty, that based on plaintiff's prior history and her condition upon arrival at Bellevue, the administration of Daptacel was a substantial factor in causing plaintiff to suffer the seizure, which in turn caused her to strike her head with resulting head injuries.

The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 2010 N.Y. Slip Op. 3177, ___ A.D.3d ___ (1st Dep't April 20, 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice

actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. *Id.* If the movant makes a prima facie showing, however, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, at 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted). Plaintiff's expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant's prima facie showing. *Id.*

Here, the sharp material dispute of fact over what injection plaintiff received goes to the heart of both the medical malpractice cause of action and the informed consent cause of action. The dispute can only be resolved by submitting the case to a jury. Therefore, the motion is denied.

The parties shall appear for a pre-trial conference on July 13, 2010 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: May 28, 2010

FILED
 JUN 02 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

JBL

 JOAN B. LOBIS, J.S.C.