

Sheffield v North Shore-Long Is. Jewish Sys., Inc.

2010 NY Slip Op 32578(U)

September 17, 2010

Sup Ct, NY County

Docket Number: 100239/07

Judge: Alice Schlesinger

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ALICE SCHLESINGER

IA PART 16

PRESENT: *Seth S. Wilson*
Justice

PART 16

GRAHAM SHEFFELD

INDEX NO. 100239/07

MOTION DATE _____

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

*NORTH SHORE - CONG ISLAND JEWISH
HOSPITAL SYSTEM*

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

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*by defendant
Dr. Chang to preclude expert testimony
based on certain portions of plaintiff's
3101(d) Expert Witness Disclosure
dated August 3, 2010 is denied in
accordance with the accompanying
memorandum decision*

FILED

SEP. 21 2010

Dated: _____

SEP 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

Alice Sch
ALICE SCHLESINGER *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
GRAHAM SHEFFIELD, as Administrator of the
ESTATE OF CAROLYN SHEFFIELD, deceased,
and GRAHAM SHEFFIELD, individually,

Plaintiffs,

- against -

Index No. 100239/07
Motion Seq. No. 004

NORTH SHORE-LONG ISLAND JEWISH HEALTH
SYSTEM, INC., FRANKLIN HOSPITAL MEDICAL
CENTER, PETER CHANG, M.D., SCOTT KESCHNER,
M.D., JOSEPH & DESROCHES, M.D., P.C, LIONEL
DESROCHES, M.D. and ANTONIO JOSEPH, M.D.,

Defendants.

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

This is an action that sounds in wrongful death. A trial has been scheduled to commence on November 1, 2010. What is before the Court now is a motion brought by the main defendant Dr. Peter Chang to preclude the plaintiff from asserting three theories of liability against him. I say that Dr. Chang is the main defendant here because the action is being discontinued against two other named defendant doctors and the action against the sole remaining defendant, Franklin Hospital Medical Center, is based solely on the theory of vicarious liability for the actions of Dr. Chang.

Dr. Chang specifically points to three items in plaintiff's 3101(d) statement which his counsel argues are new theories of liability and because of the late notice of them, he is being prejudiced. The three items are as follows: The first is the plaintiff's allegation that perforations of the left pulmonary artery were caused by "a large, rigid introducer dilator". The second item relates to issues of anemia. The third is the defendant's alleged failure to do a venography as a proximate cause of Carolyn Sheffield's death.

The decedent, Carolyn Sheffield was a long-sufferer of kidney disease. For this condition, she was treated by defendants Dr. Joseph Desroches and Dr. Antonio Joseph. She also had been on dialysis. On July 3, 2005, Mrs. Sheffield was admitted to Franklin Hospital through its emergency room. Dr. Chang, a vascular surgeon, was then called in as a consultant.

Mrs. Sheffield died on July 17, 2005, while undergoing a catheterization procedure performed by Dr. Chang. Soon after the death, an autopsy was performed and the Medical Examiner performing it opined that perforations of the left pulmonary artery caused Mrs. Sheffield's death. Therefore, from that time on, the theory of liability espoused by the plaintiff has always been that Dr. Chang was negligent in his performance of the catheterization procedure.

There has been extensive discovery here which included a deposition of the Medical Examiner who performed the autopsy. He was questioned at length as to the basis for his opinion and the specifics of what he believed occurred on July 17 leading to Mrs. Sheffield's demise.

The thrust of Dr. Chang's motion, which is supported by affirmations from three medical experts, Dr. Malcolm Charles Phillips, an internist with a sub-specialty in Cardio-Vascular Disease, Dr. Stephen Factor, a Pathologist, and Dr. Anthony Tortolaini, a Thoracic Surgeon, is that the assertion in the 3101(d) by the plaintiff that the left pulmonary artery was perforated by a large rigid introducer dilator is simply not supported by any evidence.

Without going into too much detail here, counsel argues that this dilator, according to Dr. Chang's operative report, was only inserted into the jugular vein to a length of 8

centimeters. Therefore, anatomically and for other reasons, it was impossible for that instrument to have caused any perforation.

However, both in the opposition papers and at oral argument, counsel for the plaintiff pointed out that pursuant to information that he and his expert were relying upon, as well as the Medical Examiner, that there was a deflection of this dilator which then took another route outside the jugular vein and caused the perforation.

With regard to the venography, plaintiff acknowledges that while that particular word may not have been used earlier, it has always been their claim that studies of the veins should have been ordered in the days leading up to July 17 and that fluoroscopy was not done but should have been during the July 17 procedure itself. With regard to anemia, plaintiff's counsel seems to be dealing with that issue in a more or less defensive posture.

It should be noted here that Dr. Chang has never moved for summary judgment and it is absolutely clear that if he were to move for this relief at this time, the motion would be denied as untimely, among other reasons. Despite that, moving counsel does seem to be doing precisely that; i.e., moving for dispositive relief but in the guise of this motion to preclude plaintiff's expert from testifying to the before-mentioned items.

I do not find that any of these assertions are new to the defendant or prejudicial to him. Plaintiff's position has always been that Dr. Chang was careless in the way in which he performed his catheterization procedure. The fact that his expert is now focusing in on which actual instrument caused the perforation should be welcomed by defense counsel as a clarification of plaintiff's position before trial. All that the physician's affirmations, submitted in support of the motion, do is state a different theory for the cause of death.

The other two items will also be permitted to be argued because, in the course of discovery, as well as in the Bill of Particulars, counsel for the plaintiff has enumerated various insufficiencies by Dr. Chang, which include these alleged failures, not only during the procedure itself but in the days leading up to it.

Therefore, the motion by defendant Dr. Chang to preclude evidence based on any part of the plaintiff's 3101(d) statement is denied. The trial will go forward on November 1, 2010. There are clearly issues here that can only be resolved in that forum.

This constitutes the decision and order of the Court.

Dated: September 17, 2010
SEP 17 2010

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER

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SEP. 21 2010

**NEW YORK
COUNTY CLERK'S OFFICE**