

Friedman v Meed

2011 NY Slip Op 31588(U)

June 13, 2011

Sup Ct, NY County

Docket Number: 100562/10

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

PRESENT: _____
Justice

IA PART 16

Index Number : 100562/2010
FRIEDMAN, VICTOR
 VS.
MEED, STEVE M.D
 SEQUENCE NUMBER : 003
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

n this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

FILED
 PAPERS NUMBERED _____
 JUN 14 2011

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Dr. Meed is granted to the extent of severing and dismissing all claims regarding treatment in 2005 and is otherwise denied, and the motion for summary judgment by defendant Dr. Brodherson is denied, in accordance with the accompanying memorandum decision.

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

Dated: JUN 13 2011
June 13, 2011

Alice Schlesinger

 J.S.C.

Check one: FINAL DISPOSITION **ALICE SCHLESINGER**
 NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

-----X
VICTOR FRIEDMAN and VICTORIA SCHONFELD,

Plaintiff,

-against-

Index No. 100562/10
Motion Seq. No. 003

STEVEN MEED, M.D., and
MICHAEL BRODHERSON, M.D.,

FILED

Defendants.

JUN 14 2011

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SCHLESINGER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This medical malpractice action was commenced on the basis of plaintiff's claims that both Dr. Steven Meed and Dr. Michael Brodherson, an internist and an urologist respectively, were negligent in their failure to diagnose bladder cancer earlier than September 2009, when this condition was diagnosed by Dr. Steven Kaplan. When the diagnosis was made, it was a diagnosis of metastatic and evasive stage four bladder cancer.

The motion before this Court is for relief for each of the defendants, but in different ways. As to Dr. Meed, who was Mr. Friedman's primary care physician since 2002, the motion, supported by an affirmation from Dr. Peter Pasley, argues that Dr. Meed met all standards of medical care and did not commit malpractice. With regard to Dr. Brodherson, the defense argues that all treatment provided by this urologist before December 2007 is barred by the two and one-half year Statute of Limitations. Specifically, they argue that the record clearly shows that there was a gap in Dr. Brodherson's treatment of Mr. Friedman between June 2005 and May 2009 and that the treatment was not continuous. Since the

action was not commenced until January 8, 2010, and should have been commenced no later than December 16, 2007, two and one-half years after June 16, 2005, the action with regard to the care and treatment in 2005 is precluded pursuant to §214-a of the CPLR.

In the plaintiff's opposition papers, counsel does not take issue with this second argument. Therefore, the action is dismissed against Dr. Brodherson to the extent that it discusses any treatment by him as being deficient in 2005. However, as Dr. Brodherson did see Mr. Friedman again in May 2009, allegations with regard to any deficiency in treatment stemming from that care are still viable.

The remainder of this decision will exclusively discuss the allegations against Dr. Meed. Dr. Meed, as noted earlier, is an internist who specializes in rheumatology. He became Mr. Friedman's primary care physician in 2002 and continued in that capacity until August 12, 2009. Under Mr. Friedman's health insurance policy with Oxford, he did need a referral by a doctor to see a specialist. This case is about Dr. Meed's alleged failure to make such a referral to an urologist, specifically in October 2007.

When Mr. Friedman became Dr. Meed's patient, he had already been diagnosed with chronic hematuria and had been treated by two urologists. Hematuria refers to blood in the urine and it can be caused by a variety of things. But it also should be noted that it is a presenting feature in about 90% of the patients who are ultimately diagnosed with bladder cancer.¹ Dr. Meed did refer Mr. Friedman to Dr. Brodherson in the Spring of 2005. The reason for this was that at an April 27, 2005 examination, Dr. Meed had done a

¹This information was provided by an urologist who provided an expert affirmation on behalf of the plaintiff in opposition to defendant's motion on behalf of Dr. Meed.

complete urinalysis and had found "3 plus" microscopic hematuria. Dr. Meed also found an enlarged prostate but because of the urine analysis findings, he felt an examination by an urologist was necessary.

On June 6, 2005, plaintiff saw Dr. Brodherson who examined him, took a urine sample and performed a urine cytology. He also referred Mr. Friedman for a CT scan of his abdomen and pelvis. The urine culture was negative but the urine cytology revealed rare atypical urothelial cells. The scan found that the bladder wall was diffusely thickened due to hypertrophy with a small enhancing left anterior bladder wall nodular lesion at the dome of the bladder, which measured 0.9 cm x 9.7 cm. As to this finding, the radiologist noted in his report that it was suspicious for "transitional cell bladder carcinoma". Since Mr. Friedman's prostate was extremely large, together with these other findings, Dr. Brodherson also did a cystoscopy in his office to rule out bladder cancer on June 16, 2005. No bladder tumor was found and Dr. Brodherson made a diagnosis of benign prostate hyperplasia. This doctor also believed that the hematuria was caused by the markedly enlarged benign prostate.

Mr. Friedman was told to return in six months, but did not. Dr. Brodherson also wrote a letter to Dr. Meed with regard to his consultation and findings. He said in his letter that Mr. Friedman should see him (Dr. Brodherson) on a regular basis.

Mr. Friedman continued to see Dr. Meed in 2006 on a number of occasions, not only for urologic problems, but for issues involving his knees and his hypertension. He also saw him on a number of occasions in 2007. Significantly, in the course of a complete physical examination on October 1, 2007, urine analysis showed 2 plus micro hematuria. Mr. Friedman continued to see Dr. Meed in 2008 and 2009.

On May 4, 2009, Dr. Meed once again referred Mr. Friedman to Dr. Broderson pursuant to recent findings, specifically blood in his urine. Dr. Broderson then arranged for a CT scan and urine culture. He also did a cystoscopy and again noted marked enlargement of the prostate. He also made other findings involving the bladder, but again saw no tumor. On May 27, 2009, Mr. Friedman once again saw Dr. Meed to discuss his urinary problems and then on June 5, 2009 saw Dr. Broderson for the last time. On that date, Dr. Broderson did a urine cytology, finding no malignant cells. Dr. Meed continued to see Mr. Friedman in June and July 2009 pursuant to certain complaints that Mr. Friedman was making. In this regard, Dr. Meed did want Mr. Friedman to see Dr. Broderson again.

However, on August 6, 2009, Mr. Friedman decided to get a second opinion and instead went to see Dr. Steven Kaplan, another urologist. He had been referred to him by an internist Dr. Richard Cohen. Dr. Kaplan did an urine analysis, urine cytology and urine culture and recommended urodynamic testing. Finally, via a CT scan on September 3, 2009, Dr. Kaplan diagnosed an evasive small cell bladder carcinoma with metastasis to the lymph nodes, liver and possibly the kidney.

It is on this record that Dr. Pasley submits a lengthy affirmation in support of Dr. Meed's treatment of Mr. Friedman. In a general way he opines that Dr. Meed's care and treatment was at all times within proper medical standards. It should be noted that Dr. Pasley is board certified in Internal Medicine. Specifically, Dr. Pasley states that Dr. Meed made proper referrals to an urologist, Dr. Broderson, when necessary. He points out in this regard that Dr. Broderson through June 2009 reported back to Dr. Meed that Mr. Friedman's condition was benign.

Dr. Pasley says that Dr. Meed had every right to rely on Dr. Brodherson's expert diagnosis in treating hematuria and a potential bladder cancer. He also says that it was appropriate for Dr. Meed to not refer plaintiff for a urologic consult following urine analysis results for 2006, 2007, and 2008. Specifically, with regard to the October 2009 findings of 2 plus blood in the urine, it was not necessary to make such a referral then because the finding was less than the 3 plus finding found in the 2005 urine analysis and thus, he had a right to believe that Mr. Friedman's urologic condition remained stable in 2007. However, he adds, when in May 2009 there were complaints of gross hematuria, blood actually seen in the urine, Dr. Meed appropriately referred Dr. Friedman to Dr. Brodherson for a second urologic consult.

Further, Dr. Pasley points out that from May 2009 through August 2009, Mr. Friedman's hematuria was managed by Dr. Brodherson and Dr. Kaplan, both urologists. Finally, Dr. Meed was not negligent in allegedly ignoring CT scan reports indicating the presence of a bladder mass because Dr. Brodherson had followed up with additional tests in 2005 and 2009 and had found the condition secondary to benign prostate hypertrophy and again Dr. Meed had a right to rely on these findings and opinions. Dr. Pasley ends his affirmation with the opinion that there was no indication that Dr. Friedman's bladder cancer could have been diagnosed before September 2009.

This comprehensive affirmation by Dr. Pasley does establish a prima facie case in favor of Dr. Meed, shifting the burden to the plaintiff to attempt to show the existence of issues. Plaintiff rises to this challenge by submitting a redacted affirmation from a board certified urologist who opines the opposite of what Dr. Pasley states.

Specifically, plaintiff's expert opines that there was a departure by Dr. Meed, an internist, in failing to refer plaintiff to an urologist in October 2007 when Mr. Friedman was found to have 2 plus blood in his urine. He discusses why an earlier benign finding, such as the one here in 2005, cannot be used to assume that in 2007 a hematuria finding also had a benign etiology. He opines that any blood in the urine is abnormal. He adds that a distinction between 2 plus and 3 plus blood in the urine is of limited value because such a distinction, particularly based on urine analysis done in a doctor's office as was done here in 2007, is both subjective and random.

This expert states emphatically that Mr. Friedman "as a man in his 70's" and as a smoker was at a high risk of developing bladder cancer and that any such finding, as Dr. Meed found in October 2007 of a 2 plus finding of blood in the urine, necessitated a consultation with an urologist. This expert also opines that a full and complete work-up in October 2007 by an urologist would have resulted in an earlier diagnosis of bladder cancer and would have afforded Mr. Friedman an excellent chance for a cure. This urologist also believes, after reviewing the actual CT scan films from 2005 and 2009, that there was a connection in the findings, in other words, that it was the same mass that was seen in both films, but the mass was much larger in the 2009 film.

Counsel for the plaintiff also points to deposition testimony by Dr. Meed, wherein he acknowledges that a showing of a significant amount of blood in the urine, and 2 plus is significant, always requires a new investigation and that a doctor could not rely on a benign finding from the past. A new investigation is always required.

I find that the plaintiff has sustained his burden. The urologist's affirmation on behalf of Mr. Friedman, who does state that his opinion as to the standard of care by an

internist is the same standard of care as there would be for an urologist, convinces me that there are legitimate issues of fact as to whether Dr. Meed should have made a referral to an urologist in October 2007 based on the findings of his urine analysis. Therefore, the motion for summary judgment vis-a-vis Dr. Meed is denied.

Accordingly, it is hereby

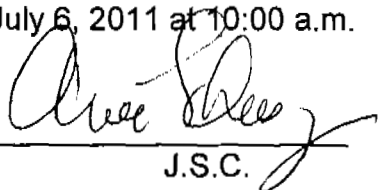
ORDERED that the motion for summary judgment by defendant Steven Meed, M.D., is granted to the extent of severing and dismissing all claims against Dr. Meed relating to care and treatment provided in 2005 and is otherwise denied; and it is further

ORDERED that the motion for summary judgment by defendant Michael Brodherson, M.D., is denied.

Counsel shall appear for a final pre-trial conference on July 6, 2011 at 10:00 a.m.

Dated: June 13, 2011

JUN 13 2011



J.S.C.

ALICE SCHLESINGER

FILED

JUN 14 2011

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