

Paluch v Rudick

2011 NY Slip Op 31967(U)

July 13, 2011

Sup Ct, NY County

Docket Number: 800152/10

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16
PART _____

Index Number : 800152/2010

PALUCH, SLAWOMIR

vs

RUDICK, ALBERT J.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 plaintiff for summary judgment is denied in accordance with the accompanying memorandum decision

FILED

JUL 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

JUL 13 2011

Dated: July 13, 2011

Alice Schlesinger
ALICE SCHLESINGER J.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

-----X
SLAWOMIR PALUCH,

Plaintiff,

-against-

ALBERT J. RUDICK, M.D., and
ASSOCIATE OPHTHALMOLOGISTS, P.C.,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 800152/10
Motion Seq. No. 001

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Ordinarily, in a medical malpractice action, when a dispositive motion is made, it is made at the completion of discovery and it is made by the defendant. This is that unusual case where before any real discovery has occurred, it is the plaintiff who has moved for summary judgment. Before this motion was brought, the defense argued that it was premature and that they believed it was improper for the motion to be brought. I told the defense that they should argue this if it was the argument they wished to make, but that after I read all the papers, I would decide whether a substantive opposition by the defendant should be forthcoming. Then I read plaintiff's moving papers, which included an affirmation from Dr. David Krebs¹, a Board Certified Ophthalmologist from Michigan, and an affidavit from Slawomir Paluch, the plaintiff. Since I then believed that these papers as a whole, which also contained medical records, did make out a prima facie case of departures by the defendant causing injuries, I directed the defendant to file substantive opposition.

¹Actually, plaintiff's expert's name was not originally provided. However, since the plaintiff was asking for affirmative relief, I directed that his name be provided. It was.

This action had its origin in an accident involving a 31 year-old man, the plaintiff Slawomir Paluch, which occurred while he was engaged in his occupation as a jewelry setter. He was struck with a piece of metal in his right eye on October 22, 2008. After the accident, he went immediately to the emergency room at New York Downtown Hospital. A diagnosis of hyphema was made. Hyphema is blood in the anterior chamber of the eye. There was also a small laceration to his eye lid. He was treated and released by the hospital, but was told by the doctors there to see a private ophthalmologist for follow-up care.

He did that six days later. On October 28, 2008, Mr. Paluch went to see the defendant in this action, an ophthalmologist, Dr. Albert Rudick. Dr. Rudick then proceeded to treat the plaintiff on a regular basis until his final visit on September 23, 2009. In fact, the defendant saw the plaintiff seven times in the short time frame of November 5, 2008 through and December 19, 2008.

When Mr. Paluch first saw Dr. Rudick, the doctor did not administer a vision acuity test (on the next visit he did); six days earlier Mr. Paluch had been given such a test at the hospital and his right eye showed 20/20 vision. On September 25, 2009, two days after Mr. Paluch's last visit with the defendant, during a visit and examination by Dr. C. Michael Samson, someone to whom Dr. Rudick had referred the patient, his visual acuity was 20/400 in that same eye, a reading which qualifies one as legally blind. After seeing Dr. Samson, Mr. Paluch then saw Dr. Ronald Gentile, who performed two surgeries on him. However, there was no real improvement and Mr. Paluch is still considered to be legally blind in his right eye, now a permanent condition. Since it is clear that he cannot perform jewelry repair work, he is collecting worker's compensation.

It is based on the above facts that Dr. Krebs opines in general terms on behalf of the plaintiff, after reviewing all the records including the emergency room records, all of Dr. Rudick's records and the records from Dr. Samson and Dr. Gentile, that "there is no question whatsoever" that Dr. Rudick departed from good and accepted practice in the care and treatment that he rendered to Mr. Paluch, and also that there is "no question that Dr. Rudick's departure from good and accepted practice caused Mr. Paluch to suffer damages that he would not have suffered otherwise".

Dr. Krebs then goes on in considerable detail to discuss most, if not all, of the many visits that Mr. Paluch had with Dr. Rudick and specifies when and how Dr. Rudick departed from accepted standards of ophthalmology care. In the first visit on October 28, 2008, Dr. Rudick prescribed Timoptic to reduce the pressure in Mr. Paluch's eye based on his diagnosis of edema in the right eye as well as hyphema. He was given a visual field test which was within normal limits.

Then from November 5, 2008 through December 19, 2008, seven visits, the patient complained of blurry vision and pain in his right eye. During this time, Dr. Rudick noted in his records increased intra-ocular pressure and retinal edema. Dr. Krebs says that while it was appropriate to give medication for pressure, Dr. Rudick took no steps to evaluate the retinal edema. Dr. Krebs says this was a departure in failing to take steps to evaluate the retina by further examination or referral to another ophthalmologist.

However, it is at the February 9, 2009 visit that Dr. Krebs finds serious fault with the treatment that Dr. Rudick provided or failed to provide. In the latter regard, Dr. Rudick seemed to have done nothing with regard to a retinal examination. Most important, he performed a second vision field test which was noted to be abnormal. Dr. Krebs, upon

reviewing the results of this test, agreed that it was abnormal in that Mr. Paluch could only see 50% of the visual field. This was a significant deterioration in the visual field as compared to the first test done on October 28, 2008. Dr. Krebs says that the standard of care required an immediate investigation by Dr. Rudick, with an end goal of preserving Mr. Paluch's vision. Dr. Krebs opines that the defendant should have done a much better work-up that included a dilated retinal examination or referred the patient to someone who specialized in the retina. Instead, Dr. Rudick merely told Mr. Paluch to come back in a month for a repeat visual field test.

On April 6, 2009, Mr. Paluch did come back, but the doctor did not do a visual field test. On this visit, Dr. Rudick wrote "Angle Recession", which according to Dr. Krebs is considered a sequela of blunt eye trauma which occurs when the ciliary muscle is torn between longitudinal and circular layers and can lead to glaucoma, damage to the optic nerve and permanent vision loss. But according to Dr. Krebs, Dr. Rudick did nothing meaningful except to tell his patient to return.

On July 7, 2009, the plaintiff did come back for a follow-up appointment. The doctor wrote "C&F". Dr. Krebs says that this means cell and flare and indicates inflammatory cells and protein in the anterior chamber of the eye, which is a sign of continuing inflammation that must be addressed. According to Dr. Krebs, it was not. Nor was there a test of Mr. Paluch's visual acuity. However, Dr. Rudick did do a third visual field test which was extremely abnormal, much worse than before, and in Dr. Krebs' opinion this indicated that Mr. Paluch had no functional vision in his right eye. "Incredibly, Dr. Rudick did absolutely nothing in light of this extremely abnormal test result and well documented worsening of Mr. Paluch's vision". (Page 4, ¶8). It was an "egregious departure" to fail at that time to

refer the patient to a retina specialist. Dr. Krebs believed that if that referral had occurred, some of Mr. Paluch's vision could have been recouped.

On August 26, 2009, the plaintiff was given a different medication, Lotemax, a topical steroid to treat the inflammation. Angle Recession Glaucoma was now diagnosed, according to Dr. Krebs. However, Dr. Krebs notes that there was no examination of Mr. Paluch's visual acuity, nor was there any attempt by Dr. Rudick to explain his patients's continuing inflammation and deteriorating visual fields. It was a departure at this time not to address this worsening and ongoing condition.

On September 16, 2009, Mr. Paluch was given a Heidelberg Retina Tomograph ("HRT") of the right eye which revealed advanced optic nerve damage to that eye that was far worse than previous HRT's done on November 5, 2008 and April 6, 2009. Dr. Rudick failed to take any step of medical significance to address this serious condition. Dr. Krebs notes that at this visit the patient was not given a visual acuity test, which he says should be done at every visit.

Finally, at the last visit, September 23, 2009, Mr. Paluch was noted to have severally increased intra-ocular pressure and he was finally referred to Dr. Samson, who Dr. Krebs described as a retina specialist. On September 25, as stated earlier, Dr. Samson performed a visual acuity test which showed 20/400 in the right eye and noted damage to the plaintiff's retinal tissue and wrote "chronic serious retinal detachment". He then referred Mr. Paluch to the surgeon Dr. Gentile.

It was on these facts that Dr. Krebs concluded that the defendant had deviated in multiple ways from the standard of care of an ophthalmologist and that these deviations were a substantial factor in causing the plaintiff's permanent loss of vision in his right eye.

As mentioned earlier, this Court believed that it was appropriate for the defendant to respond to this motion on the merits as the plaintiff had put forth a prima facie case sounding in malpractice. I felt it was not prejudicial because, despite the fact that no depositions had yet occurred, both parties had all of the applicable records at their disposal.

The defendant did respond on the merits, but in a surprising way. The sole opposition consisted of a lengthy affidavit from Dr. Rudick. In other words, there was no affidavit/affirmation from another, one might say objective, board certified ophthalmologist. Dr. Rudick's affidavit would not automatically qualify as an adequate response. It would depend on its content. However, other courts, particularly in the Second Department have awarded defendants summary judgment dismissing the actions based solely on the defendant's own affidavit of merit. See *Gargiulo v. Geiss*, 40 AD3d 811 (2nd Dept 2007) and *Zito v. Jastremski*, 84 AD3d 1069 (2nd Dept 2011) In other words, in both of those cases, the defense had moved for summary judgment supported by affidavits by the named defendants and summary judgment was granted, in *Gargiulo* by the Appellate Division and in *Zito* by the trial court with an affirmance on appeal.

So the question here is whether Dr. Rudick's response addressing the care and treatment that he provided to Mr. Paluch is sufficient to defeat the motion, which is a lesser standard than one would have in moving for summary judgment. In other words, does he succeed in merely raising a triable issue of fact?

What Dr. Rudick does is discuss every visit that the plaintiff made to him and point out what was done for his patient and why it was done. He also gives his opinion as to why

things may have turned out the way they did. For example, his bottom line position as to why and when plaintiff lost vision in his right eye was that it happened between the last visit that Mr. Paluch had with him on September 23, 2009, when he had an intra-ocular pressure of 40, and the next visit on September 25, 2009 with Dr. Samson, where the intra-ocular pressure was noted to be 2 and there was the latter's concurrent finding that Mr. Paluch's vision in his right eye was 20/400. In other words, Dr. Rudick is saying based on this fact as well as other facts that he had no advance warning with regard to Mr. Paluch's retina and his optic nerve so as to require his referral to a retina specialist before September 23rd.

As stated above, Dr. Rudick discusses every one of the multiple visits that the plaintiff had with him. I will attempt to point to those which are the most significant. The defendant also discusses the diagnosis by the hospital physicians on October 22, 2008. On October 28, 2008, the first visit, Dr. Rudick explains why he did not do a visual acuity test on that day. He states that this test was done at the hospital only six days before and the reading was 20/20 and later on, at the visit of November 5, 2008 when he did do a visual acuity test, the reading was still 20/20. Also regarding the first visit, the doctor mentions that the intra-ocular pressure was 24, a figure above a normal reading of between 10-20. This was secondary to his diagnosis of iritis, trauma, hyphema, and edema of the inferior quadrant. A visual field test was given and was normal. His plan was to control his patient's inflammation with two medications and see him in one week. His diagnosis on that initial visit also included resultant angle recession that he believed the initial injury had caused. (¶ 9).

At the next appointment on November 5, 2008, Dr. Rudick used a slit lamp to examine Mr. Paluch's eye and found a +1 cell/flare in his anterior chamber. He also noted

residual hyphema. He dilated the retina for an examination which revealed "resolving retina edema in the inferior temple quadrant without any evidence of retina holes, tears or detachment". (§11). Dr. Rudick adjusted the medication at this visit and told Mr. Paluch to return in one week. That appointment was canceled by the plaintiff.

On November 21, 2008, Mr. Paluch complained of blurry vision and pain in his right eye. It was noted that his intra-ocular pressure was severally elevated at 40. The defendant states that he gave him eye drops and made Mr. Paluch stay in his office until the pressure dropped to a proper number. He also, on that date, did another dilated retinal examination which showed a resolution of the retinal edema and again no evidence of holes, tears or detachment. Therefore, Dr. Rudick says that at this point he believed that his patient's retina had returned to normal.

The next visit of importance occurred on December 1, 2008, where the intra-ocular pressure was again 40. Mr. Paluch admitted on that date that he was not using the Timoptic eye drops which had been prescribed. Dr. Rudick characterizes this as non-compliance and opines with a reasonable degree of medical certainty that Mr. Paluch's non-compliance was causing the increased intra-ocular pressure and damage to his optic nerve. Further on this date, Dr. Rudick states that since the retina had healed, there was no need for him to do any further retinal examinations in the absence of complaints.

On the two visits of December 4 and December 12, 2008, the pressure was below 20 and Dr. Rudick states that there was no need to do a visual acuity test on either day because there were no complaints of visual changes or blurry vision, floaters and flashes. On December 19, 2008, the pressure had risen to 22, but again Mr. Paluch admitted that for two days he had not used the Timoptic eye drops.

Plaintiff cancelled his next appointment for January 5, 2009, and Dr. Rudick did not see him again until February 9, 2009. At this visit, the doctor noted some loss of visual field and his intra-ocular pressure was 16. Dr. Rudick attributes the loss of visual field again, within a reasonable degree of medical certainty, to damage caused to the optic nerve by increased periods of intra-ocular pressure during the times when Mr. Paluch was allegedly noncompliant. This is the visit where Dr. Krebs says that the results of the visual field test were such that referral to a retina specialist was necessary. However, the defendant says that he did not do this because there was no retinal detachment and because the elevation in the intra-ocular pressure, caused by his patient's non-compliance, was also a cause of the loss in the periphery of his visual field.

Dr. Rudick also explains that he believed a referral was not necessary on that day, nor a further retinal examination, because Mr. Paluch had made no complaints of floaters and flashing lights. Further Dr. Rudick states that a fundus photograph showed a completely normal macula, an indication of no retinal detachment. He prescribed Timoptic drops and planned to see him in one month. But Mr. Paluch canceled both the March 9 appointment and the April 2 appointment. He returned on April 6, 2009. On this date, the defendant found his patient's right eye to be normal, that the intra-ocular pressure was 14 and that the optic nerve nomogram showed a normal appearing macula. Also, the patient had no complaints. Therefore, there was no reason to refer him to a specialist or to do a visual acuity test.

Dr. Rudick does acknowledge that problems were persistent for iritis as well as angle recession glaucoma. But he disagrees with Dr. Krebs as to when the angle recession first appeared. He says that he believes that this occurred at the same time as the injury suffered by Mr. Paluch, not after the trauma as Dr. Krebs said.

On July 7, 2009, the pressure was normal. The doctor did do a visual field test on that day which he concedes was abnormal. However, he explains this by noting that Mr. Paluch had a 19/22 fixation loss which indicated that the patient was moving his eye excessively, making the reliability of the test poor. Because of this, Dr. Rudick explains that there was no point in repeating the test and no basis to refer him to a specialist.

The patient saw Dr. Rudick again on August 26, 2009. The doctor did not do a visual acuity test or any other testing that day or refer his patient to a specialist because he says Mr. Paluch did not make complaints of any visual changes, blurry vision or floaters or flashers. However, he still had diagnosis of angle recession glaucoma.

On the penultimate visit of September 16, 2009, the intra-ocular pressure was 14, normal. Dr. Rudick gave his patient an HRT test. Here, the defendant states his disagreement with the plaintiff's expert as to what the results of that test indicated. Dr. Rudick does not believe that the HRT "revealed advanced optic nerve damage", as stated by Dr. Krebs. In this regard, he states that comparing this result with one obtained from an HRT of November 5, 2008, showed that the central cup remained unchanged. The defendant says this is significant because it showed that the optic nerve had remained the same. So again the defendant says that his patient's condition was not continuing to deteriorate. Therefore, there was no need to do further testing because once again there were no complaints of visual changes, blurry vision, floaters or flashers.

On September 23, 2009, as stated earlier, the pressure was 40. The defendant states that he reduced it in the office to a 28 and referred him to Dr. Samson. As to this referral, Dr. Rudick states that he understands Dr. Samson to be a "aviates" specialist not a retina specialist. He states that this referral was to address the chronic inflammation in the right eye as well as the elevated intra-ocular pressure.

In reply, the plaintiff points out certain omissions in the exhibits referred to by the defendant and points out the obvious, that there was no affidavit from an objective, independent expert.

After reviewing all the papers, I find that Dr. Rudick does succeed in raising issues of fact deserving of a trial. He does this in his thorough discussion of the care and treatment he provided at each visit where he opines as to what he believes are the reasons for the very poor results to his patient. These include Mr. Paluch's alleged noncompliance. With regard to why he made no referral to a specialist, he opines that the visual field test was unreliable because of Mr. Paluch's inability to focus and most important, he says that there were no complaints of floaters, flashers or blurriness. He also points to the normal macula and his opinion that the earlier visual field test which showed peripheral loss in the visual field was caused by the glaucoma. In fact, Dr. Rudick seems to have answers for everything. Whether those answers ultimately have value or credibility must be answered on a different day. Suffice it to say, on this day he has been successful in defeating plaintiff's motion for summary judgment.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and counsel shall appear in Room 222 for a discovery conference on September 14, 2011 at 9:30 a.m.

Dated: July 13, 2011

FILED

JUL 13 2011

JUL 14 2011


J.S.C.

ALICE SCHLESINGER

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