

Tom v Holzman

2012 NY Slip Op 31408(U)

May 18, 2012

Supreme Court, New York County

Docket Number: 117208/2006

Judge: Alice Schlesinger

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

IA PART. 16

PRESENT: ALICE SCHLESINGER
Justice

PART _____

Index Number : 117208/2006
TOM, EDWARD
vs.
HOLZMAN, ROBERT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *for summary judgment by defendant Narayan Sundaresan is denied in accordance with the accompanying memorandum decision.*

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

FILED

MAY 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

MAY 18 2012

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
EDWARD TOM,

Plaintiff,

Index No. 117208/06
Motion Seq. No. 003

-against-

ROBERT HOLZMAN, CABRINI MEDICAL CENTER,
NARAYAN SUNDARESAN and LENOX HILL
HOSPITAL,

Defendants.

FILED

MAY 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
SCHLESINGER, J.:

This is an action that sounds in medical malpractice and specifically involves a condition known as Cauda Equina Syndrome ("CES"). This syndrome is named after the cauda equina nerve roots. These nerve roots are in a bundle and are located at the tail end of the spinal cord and resemble the strands of hair that make up a horse's tail. Those nerves are very important because they control a good part of one's bowel, bladder and sexual function. They could also affect lower extremity function including ambulation.

In the early part of April 2005, plaintiff Edward Tom began experiencing symptoms involving his pelvic and back area. He first went to the emergency room at Beth Israel Medical Center on April 2. He was examined and given a diagnosis of neural muscular abdominal pain and was released. Six days later on April 8, Mr. Tom went to the office of family practitioner, Dr. Steven Jacobs. At that time he made complaints of lower back pain and lower abdominal pain. After Dr. Jacobs performed an examination and noted that Mr. Tom was unable to sit because of pain in the area of L5-S1, as well as other symptoms, he diagnosed Mr. Tom with lower back pain, high cholesterol and nocturia,

which involves frequent urination at night and fatigue. He prescribed a muscle relaxant and an anti-inflammatory. He also suggested other tests and scheduled a follow-up visit for April 15.

However, Mr. Tom's condition seriously deteriorated by the following day, April 9. On that day, at approximately 1:30 p.m., he appeared in the emergency room at Cabrini Medical Center. He arrived there via an ambulance because his complaints of pain in his lower back were so severe that he had trouble walking. He also complained of bladder dysfunction. He was examined that afternoon and was found to have a decreased range of motion in his back as well as decreased rectal tone. A CT scan of his lower spine was ordered and this revealed severe spinal stenosis. A diagnosis of CES was noted. Because of these findings, the hospital contacted defendant Dr. Robert Holzman, a neurosurgeon associated with Cabrini. After a discussion with Dr. Holzman, although not an examination by him, Mr. Tom was admitted to his service at 6:31 p.m. that Saturday night.

Dr. Holzman did come to the hospital the following day, Sunday, April 10, and he did perform an examination on Mr. Tom. His impression was that Mr. Tom was suffering from lumbar spinal stenosis, neurogenic bladder and CES. Dr. Holzman believed that an MRI of the brain and spine was necessary. However, because Cabrini did not have the capacity to perform MRI's on the weekend, no MRI could be given to Mr. Tom that day. Therefore, Dr. Holzman decided that he would immediately arrange to transfer Mr. Tom to Lenox Hill Hospital where such tests could be performed.

That evening, significant to the motion now before this Court, Dr. Holzman contacted moving defendant Dr. Narayan Sundaesan, also a neurosurgeon. They had a brief

conversation wherein Dr. Holzman described Mr. Tom's condition and indicated that he might well need surgery and informed Dr. Sundaresan of the imminent transfer of the patient to Lenox Hill Hospital, where Dr. Sundaresan was an attending surgeon. Both defendant doctors were questioned about this telephone call when they were deposed during the course of discovery. Both doctors recall that CES was specifically mentioned as Mr. Tom's diagnosis, in addition to Mr. Tom being an achondroplastic dwarf. Both doctors believed that this latter condition made an otherwise complex syndrome even more complicated. The doctors also agreed that the call was made by Dr. Holzman to give Dr. Sundaresan a "heads up" as to a need for surgery. It should be noted here that Dr. Holzman in his deposition talked about working with Dr. Sundaresan in the past on a number of surgical cases and that if surgery were to be performed here, Dr. Holzman indicated that Dr. Sundaresan would be the primary surgeon.

Dr. Holzman specifically said (p. 165, l. 12-14) that: "WE BOTH felt an MRI was very important ..." (emphasis added) Dr. Sundaresan testified also that Dr. Holzman wanted him to keep some operating time free in the near future so that Mr. Tom's situation could be expeditiously assessed and acted upon.

The transfer to Lenox Hill Hospital was made on Sunday night, April 10. By some time around noon on Monday, April 11, an MRI of the plaintiff's spine had been completed. Soon after that, in the area of the operating room, Dr. Holzman and Dr. Sundaresan discussed the results of the MRI and what Dr. Holzman planned on doing with regard to further tests. As stated earlier, Dr. Holzman definitely wanted an MRI of Mr. Tom's brain before proceeding to surgery.

By 9:00 p.m. on April 11, after all tests were done and there was no medical condition preventing surgery, it was decided that a decompression surgery was called for. However, since it was nighttime and both doctors believed that this would be a lengthy, complicated procedure, it was decided that the surgery should wait until the next morning, Tuesday, April 12. The surgery did occur at that time.

After the surgery, Mr. Tom was left in a severely compromised way. He then spent a lengthy time in the hospital and rehabilitation. Through the ensuing years, he has managed to get back some limited function.

The motion for summary judgment by Dr. Sundaresan was supported by a somewhat sparse affirmation from Dr. John K. Houten, a board certified neurosurgeon with very good credentials. His relatively short statement, consisting of 4 ½ pages and 13 paragraphs, opines that Dr. Sundaresan at all times acted in accordance with accepted standards of good medical practice.

It should be noted here that the plaintiff accuses both doctors of committing malpractice in their failure to timely treat Mr. Tom's CES and to intervene surgically at a much earlier time. It is the plaintiff's position, as elaborated by their own expert neurosurgeon in opposition to the motion, that in a situation such as this, with a diagnosis of CES, particularly one caused by spinal compression, it is critical to decompress the patient's spine as early as possible. Further, the plaintiff's expert states that as more time goes by, there is a greater chance of permanent loss of function to the patient. Therefore, that expert concludes that ideally surgery should have been done here on April 9. In other words, that it was wrong to admit Mr. Tom to a hospital with limited facilities such as Cabrini. He also opines that the surgery should have been performed on April 10 at a

different hospital, or certainly in the morning hours or early afternoon of April 11, or if that was not possible, the surgery should have happened some time during the evening of April 11. This expert believes that any one of those times would, in all probability, have resulted in a better outcome for Mr. Tom.

However, Dr. Houten only addresses the postponed surgery of April 11 at 9:00 p.m. Why is this? Because in his opinion Dr. Sundaresan had no professional responsibilities to Mr. Tom before that time. Needless to say, counsel for the plaintiff as well as his expert vigorously disagree with this opinion. It is their belief, supported by a number of cases, that Dr. Sundaresan's obligations to Mr. Tom began with the Sunday night phone call that Dr. Holzman made to him. And if fact finders feel that this time was too early, then plaintiff argues that certainly the obligation of Dr. Sundaresan to Mr. Tom began no later than 12:30 to 1:00 on Monday, April 11.

However, as pointed out earlier, Dr. Houten does not even discuss any time period before 9:00 p.m. on April 11. Since he does not talk about the night of April 10 or the afternoon of April 11, the only opinion he offers is his belief that there was irreparable damage to Mr. Tom by 9:00 p.m. on April 11. In other words, this Court is given no information by Dr. Houten as to what he believed was Mr. Tom's condition before 9:00 p.m. of that night.

Further, as pointed out by the plaintiff and his expert, Dr. Houten never even discusses the mechanism of injury. Dr. Sundaresan suggested in his deposition that it could have been vascular. However, according to plaintiff's expert, it was the continuing spinal compression mechanism that caused injury and thus plaintiff would have benefitted from an earlier decompression procedure.

Additionally, Dr. Houten never explains how he arrives at his conclusion that irreparable injury had occurred by 9:00 p.m. on April 11. Therefore, since there is no discussion of any earlier time before 9:00 p.m. by this expert, since there is no discussion by this expert as to the mechanism of injury, and finally since there is no discussion by this expert as to why he concludes that irreparable injury did occur by 9:00 p.m. on April 11, I must conclude that the moving defendant has not made out a prima facie case entitling him to dismissal in this case.

As stated earlier, Dr. Houten merely says that he believes the moving defendant at all times acted in accordance with accepted standards of good medical malpractice vis-a-vis the plaintiff. He says this in just this way in ¶5. Then, from ¶6 through ¶9, Dr. Houten discusses the events that were occurring beginning with the April 2 contact with Beth Israel's emergency room. At the end of ¶9, Dr. Houten states that it was "entirely appropriate" for the two doctors to perform the surgery on April 12 rather than April 11 in the evening. However, it is not until ¶10 that he gives his opinion about the irreparable injury that had occurred by 9:00 p.m. on Monday, April 11, again with no explanation at all as to why he comes to this conclusion. He then concludes his affirmation with his statement that the surgery was properly performed, he repeats that it was proper to wait until April 12, and again repeats that Mr. Tom's current condition

is not related to deferring the surgery from the evening of Monday, April 11, 2005, to the morning of Tuesday, April 12, 2005, as his nerves were irreparably damaged by the time Dr. Sundaresan became involved in making decisions regarding plaintiff's care on Monday, April 11, 2005, at approximately 9:00 p.m.

Therefore, in addition to finding that the defendant has failed to make out a prima facie

case, I find the affirmation submitted both repetitive and insufficient.

Despite this finding I still believe that it would be useful to discuss the opposition and to explain why I believe that the facts in this case as well as relevant case law support the position that there are legitimate factual issues here as to when Dr. Sundaresan's medical/surgical obligations to Mr. Tom first began.

As stated above, plaintiff's neurosurgeon expert who submitted a much more comprehensive affirmation opposing this motion than Dr. Houten, explains in some detail why he concludes that Mr. Tom's CES was a result of compression of the lumbar spine and why it was so critical to relieve that compression as early as possible. He states that he bases this position on his own experience with CES and also the fact that Mr. Tom appeared to have recovered at least some of his ambulatory abilities after the surgery. He elaborates on this opinion also by reviewing the history that was given to Dr. Jacobs on April 8. He also gives his opinion that Dr. Sundaresan's decision, together with Dr. Holzman, of putting off the surgery until April 12, prolonged the severe compression of Mr. Tom's nerve roots. While he acknowledges that an MRI is the standard of care in determining whether compression is causing or contributing to the CES symptoms, it is his position that if an MRI confirms the compression, as it did here, together with symptoms of bowel and/or bladder involvement, the absolute standard is urgent decompression surgery. He speaks of immediate surgery, or if that is not possible for a medically compelling reason, that the surgery should occur within a 24 hour window period.

According to this expert's opinion, which he bases on designated deposition testimony, Dr. Sundaresan "undertook responsibility as co-surgeon for Mr. Tom during the evening of April 10". For this opinion he relies on the content of the phone call, the fact

that these two neurosurgeons had a longstanding practice of performing surgery together, that Dr. Holzman believed that Dr. Sundaresan had accepted the role of chief surgeon on the case, that Dr. Sundaresan testified that he was told not only about Mr. Tom's bowel and bladder dysfunction, but also that he was an achondroplastic dwarf. All of these statements by Dr. Holzman and Dr. Sundaresan are referenced to their sworn testimony given at their depositions.

The expert then goes on to enumerate what he believes were the various departures by Dr. Sundaresan, which he states occurred on April 10 and all throughout the day on April 11. As noted earlier by the Court, and noted as well by this expert, Dr. Houten provides no discussion or opinion with regard to any time earlier than 9:00 p.m. on April 11. In giving his reasons for why he believes Dr. Sundaresan committed malpractice as the co-surgeon by deciding to defer the surgery, this expert unlike Dr. Houten, specifically refers to the testimony given by the doctors as well as his opinions as to what they said. An example of this is when Dr. Sundaresan was asked whether he told Dr. Holzman around 1:00 on April 11 after the results of the MRI had been obtained that surgery should not be deferred any longer and that it should not be put off so as to have a brain MRI and additional cardiology studies, Dr. Sundaresan stated, "I have never told Dr. Holzman, in all the years that I have known him, not to do a diagnostic study and I may add also, in this medical - legal environment." (Dr. Sundaresan's EBT, p. 116) But plaintiff's expert finds that answer insufficient to discharge his responsibilities as co-surgeon. He argues that by this time, both defendant surgeons had a confirmatory MRI of acute CES. Therefore, there was no good reason to delay surgery at that point.

With regard to various times that surgery could have occurred and the implications of what would have resulted from those surgeries, this expert states that "while optimal outcomes are achieved by decompression surgery in 24 hours from onset of CES, at least some improvement is usually seen with surgeries within 48 hours of onset of a complete lesion including onset of pronounced bowel and bladder function". (p. 80)

This neurosurgeon then discusses in detail Mr. Tom's documented medical history, starting with Dr. Jacobs' examination of April 8. He does this in order to opine as to when the actual onset of these symptoms truly occurred. He concludes this discussion by opining that even if surgery had not occurred until the night of April 11, it still would have likely improved Mr. Tom's residual condition. (p. 93)

Therefore, it is clear to me that the plaintiff's opposition based on this expert's statements succeeds in showing that Dr. Sundaresan, acting with Dr. Holzman, may well have improperly concurred with delaying this surgery and that the delay in fact made a real difference.

As far as applicable law, defense counsel primarily relies on one Second Department case, *Lee v. City of New York*, 162 AD2d 34 (1990). There, a physician employed by the City had performed a medical examination on Joseph Lee, as part of a Fire Department pre-employment screening process. After Mr. Lee was hired and trained, which was three months after this examination, he died of a major heart attack. The court found that under these circumstances, summary judgment should be granted to the City because plaintiff had failed to demonstrate that the decedent and this doctor had either an expressed or implied physician-patient relationship.

That case has virtually nothing to do with the facts in the case now before this Court. That was a one time examination for a particular purpose by the doctor in question. Nothing suggested there that there was any ongoing responsibility that this doctor had assumed vis-a-vis the care of the decedent.

But here, in cases such as *Florio v. Kosimar*, 79 AD3d 625 (1st Dep't 2010), a case involving an ENT consultant, the court found that there was a factual issue as to whether the doctor had obligations to the patient in addition to dealing with one specific item, an interrupted airway. Also, in *Cregan v. Sachs*, 65 AD3d 101 (1st Dep't 2009), an anesthesiologist was kept in a case for care that he was allegedly responsible for, despite the fact that the events in question leading to the death of the patient had occurred the day after the anesthesiologist had provided services. The court found that the defendant's duty of care clearly extended past the immediacy of the procedure. Finally, in a well-reasoned opinion, *Quirk v. Zuckerman*, 196 Misc2d 496 (Sup. Ct., Nassau Co., 2003), the court found that an emergency room doctor who had conferred with a nurse practitioner and had given some advice to her which she used in treating the plaintiff/patient, was enough to create a question of fact as to whether an implied physician-patient relationship between Dr. Zuckerman and the patient existed, despite the fact that the moving defendant had never met the patient. This is precisely what I believe is the situation here.

As stated earlier, Dr. Houten does not even opine, from a factual basis, why he believes Dr. Sundaresan's professional obligations only began on the evening of April 11. But, it is interesting to note that in the Reply papers submitted by the defendant, counsel seems to acknowledge that the relationship of physician-patient between Dr. Sundaresan and Mr. Tom actually began at an earlier time around 12:00 to 1:00 during the afternoon

of April 11, near the operating theatre when the defendant doctors discussed the result of the spinal MRI. Apparently the opposition papers convinced her of this. However, despite this concession, and without any authority whatsoever, counsel opines that irreparable injury to the nerve roots had occurred by that time, 1:00 p.m. I have no idea where this comes from.

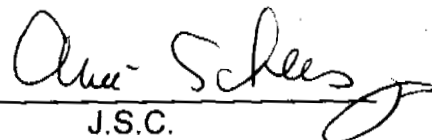
Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Narayan Sundaresan, M.D., is denied; and it is further

ORDERED that counsel shall appear in Room 222 for a pre-trial conference on July 11, 2012 at 10:00 a.m. prepared to discuss settlement and select a firm trial date.

Dated: May 18, 2012

MAY 18 2012
MAY 18 2012



J.S.C.

ALICE SCHLESINGER

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