

Candрева v Eynon
2012 NY Slip Op 33096(U)
December 19, 2012
Supreme Court, Suffolk County
Docket Number: 08-12632
Judge: Arthur G. Pitts
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-30-12
ADJ. DATE 11-15-12
Mot. Seq. # 003 - MG
004 - MG; CASEDISP

-----X
EDWARD CANDREVA and ANN
CANDREVA,

Plaintiffs,

- against -

KAREN EYNON, M.D., STEVEN WEST, M.D.,
and BROOKHAVEN MEMORIAL HOSPITAL
MEDICAL CENTER,

Defendants.
-----X
KAREN JENKENS, M.D. FKA KAREN
EYNON, M.D., and BROOKHAVEN
MEMORIAL HOSPITAL MEDICAL CENTER,

Third-Party Plaintiffs,
- against -

JENNIFER BRYANT, M.D. and IMAGING ON
CALL,

Third-Party Defendants.
-----X

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Upon the following papers numbered 1 to 64 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 -26; (004) 27-56; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 57-59; Replying Affidavits and supporting papers 60-62 with no affidavit of service; 63-64; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (003) by third-party defendants Jennifer Bryant, M.D. and Imaging On Call pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint of Karen Eynon, M.D., Steven West, M.D., and Brookhaven Memorial Hospital, is granted and the third-party complaint is dismissed; and it is further

ORDERED that motion (004) by defendants/third-party plaintiffs, Karen Eynon, M.D. and Brookhaven Memorial pursuant to CPLR 3212 for summary judgment dismissing the complaint by plaintiffs, Edward Candрева and Ann Candрева, is granted and the complaint is dismissed with prejudice.

In this medical malpractice action, the plaintiffs, Edward Candрева and Ann Candрева, seek damages personally and derivatively premised upon the alleged departures from good and accepted standards of medical care and treatment rendered to Edward Candрева commencing on or about October 5, 2005. It is alleged that while the plaintiff was a patient at Brookhaven Memorial Hospital Medical Center from October 5, 2005 through October 6, 2005, the hospital, by its employees, nursing and medical staff, failed to diagnose the plaintiff's pituitary tumor and bleeding from said tumor, in that they failed to properly read and interpret the diagnostic films of the plaintiff's brain, and further failed to notice the presence of blood products to timely enable surgical intervention. As a result of the alleged departures, Edward Candрева alleges he has suffered injuries consisting of cognitive impairment in attention/executive functioning; cognitive impairment in information processing; severe depression; sleep disorder, apnea, and insomnia; hormonal dysregulation; poor arousal/wakening; difficulty with balance; chronic headaches; neck pain; tonic/clonic seizures which aggravate spinal injuries resulting in the necessity for surgery; aggravation of cervical facet syndrome; C4,C5,C6, and C7 medial branch blocks; hot flashes; urinary hesitancy and retention; poor memory; and extreme fatigue.

In the third-party complaint, the defendants/third-party plaintiffs, Karen Jenkins, M.D. f/k/a Karen Eynon, M.D., and Brookhaven Memorial Hospital Medical Center, allege that on October 6, 2005, the third-party defendant, Jennifer Bryant, M.D., departed from the standard of care in negligently and insufficiently, improperly, and carelessly interpreting a CT scan of the plaintiff's brain. They seek judgment over, and an apportionment of responsibility with the third-party defendants, as well as indemnification from them.

In motion (003), the third-party defendants, Jennifer Bryant, M.D. and Imaging On Call, seek summary judgment dismissing the third-party complaint brought by the third-party plaintiffs, Karen Eynon, M.D., Steven West, M.D., and Brookhaven Memorial Hospital, on the basis that the third-party plaintiffs cannot demonstrate any departures by defendants Bryant or Imaging On Call which proximately caused the plaintiff's injuries.

In motion (004), the defendants/third-party plaintiffs, Karen Jenkins, M.D. f/k/a Karen Eynon, M.D., and Brookhaven Memorial Hospital Medical Center, seek summary judgment on the basis that there is no proximate cause between the claimed injuries and any departures by them in that there was no interval change in the hemorrhage between October 5, 2005 and the date of surgery on October 18, 2005.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary

judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of application (003), the moving third-party defendants have submitted, inter alia, an attorney’s affirmation; the affirmations of their experts Mihai Dimanescu, M.D., Loren Wissner Greene, M.D., and Caren Jahre, M.D.; copies of the pleadings, answers, and bills of particulars; unsigned, certified copies of the transcripts of the examinations before trial of Edward Candрева, Ann Candрева, Jennifer Bryant, M.D., Steven West, M.D., Matthew Candрева, and non-party witness Catherine Dwyer; the signed transcript of non-party witness Cora Ettore; uncertified copies of the plaintiff’s hospital records for the admissions of October 10, 2005 at John T. Mather Memorial Hospital, of October 14, 2005 at Stony Brook University Hospital, and October 5, 2005 at Brookhaven Memorial Hospital Medical Center, and medical records. The unsigned, non-party transcript of Catherine Dwyer, unaccompanied by an affidavit or proof of service pursuant to CPLR 3116, is not in admissible form and is not considered (*see* **Martinez v 123-16 Liberty Ave. Realty Corp.**, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; **McDonald v Maus**, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; **Pina v Flik Intl. Corp.**, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). The remainder of the unsigned, but certified transcripts are considered (*see* **Zalot v Zieba**, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). It is noted that the third-party plaintiff has submitted a certified copy of the Brookhaven Memorial Hospital record which is considered.

In support of motion (004), the defendants/third-party plaintiffs have submitted, inter alia, an attorney’s affirmation; affirmation of Mark Henry, M.D.; copies of the pleadings, answers, and bill of particulars; signed and certified copies of the transcripts of the examinations before trial of Edward Candрева (August 23, 2011, October 21, 2011, and June 16, 2009), Ann Candрева, Karen Elizabeth Jenkins, M.D., Catherine Dwyer; unsigned but certified copies of the transcripts of the examinations before trial of Steven West, M.D., Jennifer Bryant, M.D., Edward Candрева and Ann Candрева; certified copy of the Brookhaven Memorial Medical Center Hospital record of October 5, 2005; the uncertified hospital record from Stony Brook University Hospital dated October 10, 2005; and the expert affirmations of Mihai Dimanescu, M.D., Loren Wissner Greene, M.D., and Caren Jahre, M.D., with their respective curriculum vitae annexed.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (**Holton v Sprain Brook Manor Nursing Home**, 253 AD2d 852, 678 NYS2d 503 [2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (*see* **Derdiarian v Felix Contracting Corp.**, 51 NY2d 308, 434 NYS2d 166 [1980]; **Prete v Rafla-Demetrious**, 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff’s injury (*see* **Fiore v Galang**, 64 NY2d 999, 489 NYS2d 47 [1985]; **Lyons v McCauley**, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; **Bloom v City of New York**, 202 AD2d 465, 609 NYS2d 45 [2d Dept 1994]).

It is noted in the Brookhaven Memorial Hospital record that the plaintiff, a forty-nine year old male, had complained of a headache upon presentation to the emergency room and was seen by Karen Jenkins, M.D., whose clinical impression was hydrocarbon exposure and headache related to his recently spraying Cabot stain. The aftercare contact sheet dated October 7, 2005, indicates that the CT scan of the plaintiff's head showed a mass. When they contacted the plaintiff's wife, it was ascertained that the plaintiff still had a headache. The CT scan report of the plaintiff's head, dictated on October 6, 2005 by Steven West, M.D. at 4:15 p.m., revealed a history of headaches and vomiting. A mass and intracranial hemorrhage were to be ruled out. Dr. West's impression was that of "[m]ild involutional changes, midline posterior fossa arachnoid cyst. Findings suspicious for a mass in the sella/suprasellar region. An MRI of the brain with and without IV contrast with attention to the pituitary gland is recommended for further workup."

It is noted that Dr. Jennifer Bryant testified that when she read the CT films on October 5, 2005, she was employed by Imaging On Call, and that she interpreted the films as revealing no acute findings. Having reviewed the films prior to her testimony, she testified that she no longer agreed with her prior findings, and stated that she felt the sella was slightly enlarged with a soft tissue density in the sella. This she stated, meant that the sella, an osseous portion of the skull, is slightly big and that the soft tissue density is likely pituitary and something else, possibly a neoplasm or aneurysm. Without further imaging, she stated that she could not make a diagnosis.

Dr. Steven West testified to the extent that he was employed by S&D Medical which provided radiological coverage through Brookhaven Hospital. While at Brookhaven Hospital on October 6, 2005, he reviewed the plaintiff's CT scan films on the PAC system which permitted him to change windows and to compare films side by side. There was a discrepancy between the preliminary report and his findings in that he saw a mass involving the sella and suprasella region which was not mentioned in the preliminary report by Dr. Bryant from Imaging On Call. He did not see any blood products on the film. He recommended a follow up MRI study and communicated his findings and recommendation to the ER Aftercare at Brookhaven Hospital by both telephone and fax.

Mahai Dimanescu, M.D. affirms to be a physician licensed to practice medicine in New York State and certified in neurosurgery. The accompanying curriculum vitae does not demonstrate employment in the medical profession since 2003, and Dr. Dimanescu does not set forth familiarity with the standards of care and practice in neurosurgery in 2005. Dr. Dimanescu submitted the affirmation in support of the third-party defendants, Jennifer Bryant, M.D. and Imaging On Call, and opined with a reasonable degree of medical certainty that there is nothing that the third-party defendants did or did not do which was the proximate cause of the plaintiff's injury, and that any delay in allegedly diagnosing the pituitary lesion did not affect Mr. Candрева's course of treatment, and did not cause any injury to him. He continued that even if the pituitary tumor were diagnosed earlier, the course of treatment would have been the same.

Dr. Dimanescu set forth that the plaintiff presented to Brookhaven Memorial Hospital on October 5, 2005 with the complaint of headaches, which he had been experiencing for a significant amount of time preceding this date, and which were caused by the presence of the pituitary lesion which had been present for well over a year. When the plaintiff presented to Brookhaven Hospital emergency room, he complained of headaches, nausea and vomiting, and was evaluated by the emergency room physician, Karen Eynon, M.D. A spinal tap was performed and interpreted as normal. A CT scan of the brain was interpreted by Jennifer Bryant, M.D., an employee of Imaging On Call, an outside radiology practice which interprets

hospital diagnostic films during the night. Dr. Bryant interpreted the film as showing no evidence of an intraparenchymal hemorrhage, mass effect, or extra axial process, with no acute findings. The plaintiff was discharged from the emergency room at Brookhaven on October 6, 2005 at 5:30 a.m. Thereafter, Dr. Steven West, a radiologist at Brookhaven Memorial Hospital, re-read the films which he interpreted as being suspicious for a mass in the sella/suprasella region. Dr. West recommended an MRI of the brain with contrast with attention to the pituitary gland. Dr. West dictated his note at 4:15 p.m. on October 6, 2005, which was then transcribed at 8:54 p.m. The plaintiff was not notified of the discrepancy in the radiology reports until October 7, 2005; however, said MRI could not be performed that date due to the Columbus Day weekend.

Dr. Dimanescu stated that the plaintiff was thereafter admitted to Mather Hospital on October 10, 2005 for intractable headache, vomiting for three days, and nausea for five days. An MRI of the brain was obtained on October 11, 2005 and revealed a 2.5 cm x 2.0 cm x 1.5 cm hemorrhagic sella mass with suprasella extension and compression of the optic chiasm centrally, as well as mild extension into the cavernous sinuses bilaterally. Following a neurosurgery consultation, the plaintiff was transferred to Stony Brook Medical Center to the service of Raphael Davis, M.D., a neurosurgeon. An MRI at Stony Brook on October 16, 2005 revealed a sellar lesion measuring 1.7 x 1.8 x 2.32 cm. Dr. Davis performed a transphenoidal (intranasally) removal of the pituitary macroadenoma on October 18, 2005.

Dr. Dimanescu opined that any potential delay in diagnosing the pituitary brain tumor was not a substantial factor causing the plaintiff any long-term sequelae, thus demonstrating no proximate cause for the injuries as the plaintiff was not operated on until October 18, 2005. He opined that the tumor existed for well over one year. Dr. Dimanescu continued that the tumor did not substantially change in size from October 5, 2005 until the surgery on October 18, 2005, and thus, any alleged delay did not affect the subsequent surgery. Dr. Dimanescu continued the tumor had already bled by the time the plaintiff presented to Brookhaven Hospital emergency room, as the CT scan obtained thereat revealed the presence of a "streak" in the pituitary gland, which was present on the Mather and Stony Brook MRIs taken subsequent thereto. Thus, opined Dr. Dimanescu, the delay in diagnosis did not result in the tumor suddenly bleeding, and that the "area of blood did not change substantially from the time of presentation until the time of surgery."

Dr. Dimanescu stated that the sella of the brain is like a cup within which the pituitary gland sits. The stalk of the pituitary is connected to the dura, and as the tumor and sella grow, it pushes up on the dura, and that it is the pressure on the dura that caused the plaintiff to suffer headaches. Dr. Dimanescu continued that pressure exerted on the dura is not an indication to perform an expedited surgery, and the mere fact that Dr. Davis did not operate on the patient immediately after the plaintiff was evaluated by him proves that the plaintiff's condition was not a medical emergency. Dr. Dimanescu continued that in reviewing the films, there was no evidence of any mass effect or compression on the brain proper or brain tissue. Dr. Dimanescu continued that the bleeding into the pituitary did not cause any destruction of the brain tissue of the temporal or lateral brain, and that the bleeding does not have any affect on the parenchyma itself.

Dr. Dimanescu continued that the plaintiff's memory loss and/or cognitive problems were not caused by the delay in diagnosing and treating the tumor in that, on May 11, 2010. He continued that a PET scan noted the presence of mildly increased uptake in the bilateral temporal lobe regions, visually worse on the left, possibly representing early neurodegenerative disease such as Alzheimer's Disease. Additionally, Dr. Dimanescu opined that the seizures suffered by the plaintiff were not related to the alleged malpractice in

this action, but instead, were due to electrolyte abnormality and low sodium levels from which he suffered postoperatively after the October 18th surgery. Dr. Dimanescu further opined that the plaintiff's cervical disc problems, treated with C4-C7 medial branch blocks by Dr. Raanan, and later discectomies, osteophyptectomy and arthrodesis and allograft and autologous bone by Dr. Davis, were not proximately related to the failure to diagnose the pituitary tumor, but were instead related to longstanding degenerative changes noted on various cervical films.

Dr. Loren Wissner Greene, M.D. set forth that she is a physician licensed to practice medicine in New York and is board certified in internal medicine with a sub-specialty in endocrinology and metabolism. Dr. Greene opined with a reasonable degree of medical certainty that there is nothing that the third-party defendants did or did not do which was the proximate cause of any injury to the plaintiff. She continued that the numerous medical conditions and problems which the plaintiff suffered from were due to the complications associated with removal of the pituitary tumor, regardless of when this macroadenoma was diagnosed. Dr. Greene stated that the plaintiff experienced severe headaches prior to surgical removal of the pituitary tumor due to the mass effects of the tumor itself, and that such headaches are common in patients with pituitary tumors, and can continue postoperatively from the residual effects of the tumor, and not from the alleged delay in diagnosing said tumor.

Dr. Greene continued that the development of diabetes insipidus is due to the deficiency of vasopressin, anginine vasopressin, known as ADH or the antidiuretic hormone. This condition, opined Dr. Greene, was due to the consequence of the removal of the pituitary tumor, and damage to the hypothalamus and/or posterior pituitary, and not due to the failure to diagnose the pituitary lesions. Dr. Greene further opined that the plaintiff developed hypothyroidism as a consequence of the pituitary removal, as he cannot produce a thyroid-stimulating hormone, TSH. Symptoms of hypothyroidism include, inter alia, constipation, depression/fatigue or feeling slowed down, joint or muscle pain, paleness or dry skin, thin or brittle hair or fingernails, and weakness. She continued that the need for the plaintiff to take hydrocortisone or cortisone acetate is due to a deficiency of ACTH, which is produced and secreted by the anterior pituitary gland. The removal of the pituitary tumor caused a lack of ACTH, and not by the failure to diagnose the pituitary tumor. The plaintiff's lack of energy and fatigue are due to the hormone insufficiencies attributable to removal of the pituitary tumor.

Dr. Greene continued that depression is not unusual with post-pituitary removal, and that the medical records revealed that the plaintiff became increasingly depressed after the tumor was removed. The plaintiff's claim of sleep apnea followed an episode of aspiration pneumonia and was not caused by the failure to diagnose the pituitary tumor. Hyponatremia, or low salt levels are the consequence of removal of the tumor and not the failure to diagnose the tumor, and developed after resection of the tumor.

Dr. Caren Jahre, M.D. affirmed to being a physician licensed to practice medicine in New York and certified in radiology and sub-certified in neuroradiology. It is her opinion within a reasonable degree of medical certainty that there is nothing that Jennifer Bryant, M.D. and Imaging On Call did or did not do which proximately caused the injuries claimed by the plaintiff. She continued that, based upon a review of the radiological studies, the CT scan film at issue was performed close to midnight on October 5, 2005, and the patient was operated on October 18, 2005, and the time frame involved did not have any affect on the growth of the tumor.

Dr. Jahre continued that, in her opinion, upon review of the CT scan films from Brookhaven Hospital, that there was a rounded hyperdensity in the pituitary gland on images 5 and 6, somewhat amorphous in shape, consistent with a hemorrhage. In comparing that CT scan with the MRI performed at Mather Hospital on October 11, 2005, the latter clearly demonstrated the presence of hemorrhage, corresponding to the area of hyperdensity in the Brookhaven CT scan. She continued that a CT scan is not the best modality for interpreting the presence of pituitary hemorrhage. Dr. Jahre continued that the hemorrhage in the plaintiff's pituitary must have occurred prior to his presentation to Brookhaven Hospital on October 5, 2005. Thus, any potential delay in diagnosing the tumor did not affect the amount of hemorrhage relative to the lesion, which remained essentially stable until the time of the MRI taken on October 11, 2005. The suprasella extension of the tumor predated his presentation to Brookhaven. Any compression on the optic chiasm had already been present prior to the plaintiff's presentation to Brookhaven. Thereafter, the tumor did not grow to any appreciable degree, and there was no additional suprasella extension during the time from October 5, through October 16, 2005, nor was there any additional compression on the optic chiasm, or on the brain resulting from the initial failure to diagnose the tumor. Any changes which did occur during that time frame represented the aging effect of blood in the brain and how blood is perceived radiographically, and such aging would not affect the patient in any degree. Dr. Jahre concluded that any delay would not have affected the plaintiff's memory or cause cognitive problems, as there is no evidence of brain damage on the films. Dr. Jahre stated that the PET scan of May 11, 2010, taken at Stony Brook Hospital, which was suggestive of Alzheimer's disease, was not related to any delay in diagnosis of the pituitary tumor, and it showed an abnormality in a totally different area of the brain than the prior location of the pituitary lesion and bleed.

Based upon the foregoing, it has been demonstrated by the third-party defendants that although there may have been a misreading, by Dr. Jennifer Bryant and Imaging On Call, of the CT films taken at Brookhaven Memorial Hospital on October 5, 2005, such misreading was not the proximate cause of the injuries claimed by the plaintiff. The supporting evidentiary submissions establish prima facie that the defendant had already experienced bleeding in the pituitary prior to his admission to Brookhaven Hospital; that said tumor was present for an extended period of time prior to his presentation to Brookhaven Memorial Hospital; that there was no significant change in the presentation of the pituitary in the diagnostic studies conducted thereafter at Mather Hospital and Stony Brook Hospital; and that the surgery to treat this condition was not performed until October 18, 2005 at Stony Brook Hospital by Dr. Davis, who first saw the plaintiff on October 11, 2005, establishing that the surgery was not an emergency. Thus, any delay in treatment did not establish that the injuries claimed by the plaintiff were the result of misreading of the film, but by the nature of the bleeding into the pituitary prior to any treatment at Brookhaven Hospital.

In support of motion (004) by the defendants/third-party plaintiffs, Karen Eynon Jenkins, M.D. and Brookhaven Memorial Hospital, have submitted the affirmation of their expert, Dr. Mark Henry, who affirms that he is licensed to practice medicine in New York and is board certified in emergency medicine. Dr. Henry has not submitted a copy of his curriculum vitae and demonstrated his work experience and training to qualify as an expert on behalf of these moving parties. Thus, even if the court was not to consider Dr. Henry's affirmation, it is concluded, based upon the expert testimony in motion (003), that even if there were departures from the standard of care while the plaintiff was a patient at Brookhaven Memorial Hospital, and even if there was a delay of several days in obtaining the MRI studies at Mather Memorial and transfer to the care of Dr. Davis at Stony Brook, that based upon the expert testimonies of Dr. Jahre, Dr. Greene, and Dr. Dimanescu, such delays in treatment were not the proximate cause of the plaintiffs' claimed injuries.

Dr. Henry set forth in his affirmation, the plaintiff's condition upon presentation to the emergency room at Brookhaven Memorial Hospital, and his subsequent care and treatment, including surgery on October 18, 2005 by Dr. Davis at Stony Brook Hospital. Dr. Henry opined within a reasonable degree of medical certainty that the staff at Brookhaven Hospital obtained an appropriate history and came to a proper differential diagnosis based upon the plaintiff's complaints and physical examination. They provided the proper treatment to the plaintiff, who was properly released with instructions to follow up with his private medical doctor. Appropriate studies consisting of a lumbar puncture and CT scan of the head were obtained. Dr. Henry continued that Karen Jenkins (Eynon), M.D. properly appreciated all the complaints offered by the plaintiff, took an appropriate history and examination, and provided proper discharge instructions. Thereafter, the hospital staff advised the plaintiff of the difference between the initial read of the CT scan by Imaging On Call, and the subsequent read by Dr. West at Brookhaven, and the plaintiff contacted his primary care physician and no longer sought treatment from Brookhaven Hospital. Dr. Henry continued that the primary goal of the emergency department is to provide emergency medical care and treatment to stabilize the patient, which was done, and there was no need to obtain any further consultation while the plaintiff was at Brookhaven Hospital. Dr. Henry concluded that it is his further opinion that no act or omission on the part of Brookhaven Memorial Hospital Medical Center and Dr. Jenkins (Eynon) was the proximate cause of any injury claimed by the plaintiff in that all care and treatment by the staff at Brookhaven was appropriate.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see *Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

The plaintiffs have opposed the motions for dismissal of the complaint by submitting the affirmation of their expert physician who states that he is licensed to practice medicine in New York and is board certified in neurology and oncology. The plaintiff's expert has not set forth his work experience and training and has not qualified himself as an expert as the basis for his opinions. Assuming arguendo that the plaintiffs' expert is qualified to offer his opinions, it is determined that defendant's expert has failed to raise a factual issue to preclude summary judgment in this matter.

Although the plaintiff's expert set forth that he disagrees with the third-party defendants' expert opinions, he does not establish which injuries, if any, were caused by the initial delay in diagnosing and treating the plaintiff. Nor does the plaintiffs' expert reconcile the fact that Raphael Davis, M.D. did not perform surgery on the plaintiff until October 18, 2005, and how this delay contributed to any alleged injuries. The plaintiff had been admitted to Mather Hospital on October 10, 2005, and an MRI of the brain was obtained on October 11, 2005, revealing hemorrhagic sella mass with suprasella extension and compression of the optic chiasm centrally, as well as mild extension into the cavernous sinuses bilaterally. Following a neurosurgery consultation, the plaintiff was thereafter transferred to Stony Brook Medical Center to the service of Raphael Davis, M.D., a neurosurgeon. An MRI at Stony Brook on October 16, 2005 revealed a sella lesion. It was not until October 18, 2005 that Dr. Davis performed a transphenoidal

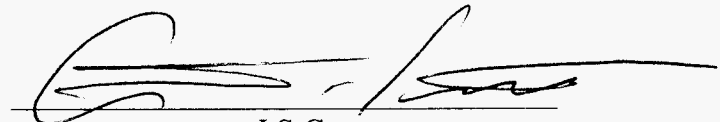
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(intranasal) removal of the pituitary macroadenoma. Although the plaintiffs' expert opined that each hour the tumor bled would result in a worse final condition of the plaintiff, he has not established that there was continued bleeding, an increase in cranial pressure, or compromise of blood supply to the brain tissue. The plaintiffs' expert opined that the more bleeding there is results in a larger surgical incision, however, he has not established that there was an increase in the bleeding, or that the surgical incision was larger than it would have been if surgery had been performed earlier. The plaintiffs' expert opinions are based upon speculation and conclusory statements, unsupported by evidentiary proof in the record.

In that proximate cause between the alleged departures by the various defendants/third-party plaintiffs and third-party defendants, has not been established, it is determined, based upon the record, that the plaintiff failed to establish prima facie that any alleged departures from the accepted standard of care by the defendants/third-party defendants, were the proximate cause of the plaintiff's alleged injuries, and were not due to the bleeding and plaintiff's condition prior to treatment at Brookhaven Memorial Hospital.

Accordingly, motions (003) and (004) are granted and the complaint is dismissed in its entirety.

Dated: December 19, 2012



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION