

Ferraro v Fleetwood Family Chiropractic

2012 NY Slip Op 33397(U)

March 13, 2012

Sup Ct, Bronx County

Docket Number: 23750/2005

Judge: Betty Owen Stinson

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NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

-----X
LOUISE FERRARO,

Plaintiff,

INDEX No. 23750/2005

-against-

FLEETWOOD FAMILY CHIROPRACTIC and
ROBIN LUCIA,

Defendants.

Present:

HON. BETTY OWEN STINSON

-----X

J.S.C.

The following papers numbered 1 to 4 read on this motion for summary judgment
Noticed on 10-12-2010 and submitted as No. on the Calendar of 03-21-2011

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Order to Show Cause.....	
Answering Affidavits and Exhibits.....	2
Reply Affidavits and Exhibits.....	3
Stipulations.....	
Memorandum of Law.....	4

Upon the foregoing papers this motion is decided per annexed memorandum decision.

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MAR 16 2012

Dated: March 13, 2012
Bronx, New York

Betty Owen Stinson
BETTY OWEN STINSON, J. S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

-----X
LOUISE FERRARO,

Plaintiff,

INDEX № 23750/2005

-against-

DECISION/ORDER

FLEETWOOD FAMILY CHIROPRACTIC and ROBIN
LUCIA, D.C.,

Defendants.

-----X

HON. BETTY OWEN STINSON:

This motion by defendants for summary judgment dismissing the plaintiff's complaint is granted.

On May 17, 2003, plaintiff, who was 73 years old at the time, visited defendant Fleetwood Family Chiropractic complaining of achy soreness in her neck and right shoulder as she had on many previous occasions. She was treated by defendant Robin Lucia, D.C., ("Dr. Lucia") with the same techniques used on plaintiff to treat that condition on the prior occasions. Two and one-half years later, plaintiff sued the defendants alleging that the particular treatment she underwent on the subject date caused herniated discs at C3-4 and at C5-6, both compressing the spinal cord; bulging discs at C4-5 and C6-7; cervical radiculopathy and sprain and strain of her cervical spine. After certain discovery was completed, defendants made the instant motion for summary judgment dismissing plaintiff's complaint for her failure to show a causal connection between the treatment at issue and the alleged injuries to her neck.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at

trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]).

To make a *prima facie* case of medical malpractice, a plaintiff must prove that the healthcare provider departed from accepted standards of practice, thereby breaching a duty owed to the patient, and must prove that the departure alleged was a proximate cause of injury (*Stanski v Ezersky*, 228 AD2d 311 [1st Dept], *lv to app. denied*, 89 NY2d 805 [1996]).

Despite its self-serving nature, it is sufficient for a defendant medical provider to rely on his own affidavit to the effect that he did not deviate from acceptable standards in order to establish that summary judgment is warranted, as long as the affidavit is specific and factual in nature (*Mackey v Sangani*, 238 AD2d 919 [4th Dept 1997]; *see also Machac v Anderson*, 261 AD2d 811 [3rd Dept 1999]).

In support of the motion, defendants offered copies of the pleadings; the bill of particulars; medical records from Our Lady of Mercy Hospital ("OLM Hospital"); an MRI report by Dr. Farid Abda; an MRI report by Dr. Marc Rozansky; a letter from Dr. Ma'an M. Rabadi, D.C.; a letter by Dr. Arnold B. Wilson; a follow-up report by Dr. Wilson; the plaintiff's deposition testimony and the affirmation of Dr. Lucia. Plaintiff's bill of particulars alleged the neck injuries set forth above and alleged plaintiff was confined to her bed for two months following her treatment on May 17,

2003.

An MRI of plaintiff's lumbar spine performed by Dr. Rozansky on March 30, 2000 showed mild desiccation of the L4-5 and L5-S1 intervertebral discs. There were mild degenerative changes to facet joints at the L4-5 and L5-S1 disc levels and diffuse disc bulging without herniation.

A doctor's note from the emergency department of OLM Hospital dated May 21, 2003 gave plaintiff permission to return to work on May 27, 2003. An MRI performed by Dr. Abda on May 29, 2003 to rule out cervical radiculopathy showed a disc protrusion at C3-4 without evidence of impingement or compression, bulging discs at C4-5 and C6-7 without evidence of impingement or compression and a disc protrusion at C5-6 reaching the anterior surface of the cervical cord with narrowing of the right neural foramen. Height, alignment of the vertebrae and signal intensity were unremarkable.

A letter from Dr. Rabadi at Bainbridge Chiropractic, P.C. dated February 15, 2005 answered in the negative plaintiff's question as to whether the manipulation by Dr. Lucia could have caused the multiple disc disease in her cervical spine. Dr. Rabadi said, however, that cervical manipulation may have aggravated the patient's pre-existing condition.

The note by Dr. Wilson, plaintiff's treating orthopedic physician, documented his evaluation of plaintiff's neck and right shoulder pain on November 15, 2006. Dr. Wilson noted that x-rays showed diffuse degenerative changes in her cervical spine. Her primary orthopedic problem was right shoulder impingement with a component of cervical radiculopathy. Shoulder strength was intact. Physical therapy was recommended.

A follow-up note by Dr. Wilson dated July 26, 2007 reported that plaintiff "admitted" to

an incident in which she injured her neck 30 years ago and that she has had intermittent periods of neck pain ever since. An examination of plaintiff's cervical spine showed minimal tenderness, "stable range of motion" and pain expressed with forward flexion. She demonstrated full range of motion of both arms. Dr. Wilson's assessment was 77-year-old woman with cervical degenerative disc disease.

Plaintiff testified that she retired from teaching in August 2006 (deposition, November 18, 2008 at 20). She has had pain in her neck a "long time", at least 10 years (*id.* at 46). She used to see Dr. Russell at Fleetwood Family Chiropractic once every three months and she would always feel better (*id.* at 57). She never had a problem with her treatments by Dr. Russell (*id.* at 65). Plaintiff only treated with Dr. Lucia there once or twice or maybe more (*id.* at 58-60). The chiropractors would go up and down her spine with their hands and move her arms and legs and then "twist" her neck (*id.* at 61). She received the same kind of treatment by Dr. Lucia on the day in question (*id.* at 62). Within an hour of the treatment, plaintiff "felt funny" (*id.* at 74). "Something was not right" (*id.*). Dr. Lucia was "rough" on her neck (*id.* at 75, 77). That night and the next day plaintiff felt pain in her right arm (*id.* at 76). Now her right arm does not feel like her left arm; it is not as strong (*id.* at 125). The day after her treatment by Dr. Lucia plaintiff also had a "terrible" headache. She had never had headaches before; now she has them about once a month. She hasn't mentioned them to doctors because she takes Tylenol for them and it takes the headaches away. (*Id.* at 171).

Plaintiff believes the cervical adjustment by Dr. Lucia caused her constant leg pain as well as the pain in her neck, shoulder and right arm (*id.* at 119, 124-125, 127). Her back also hurts (*id.* at 118). Sometimes she has sharp pains in her neck as well as a constant dull ache in that area (*id.*

at 119, 126). Plaintiff was out of work from May 21, 2003 until the end of June. She went back half-time and then did not work at summer school that summer and did not get her vacation because she had to spend her time in physical therapy. (*Id.* at 128-129, 133).

She remembered being in two or three motor vehicle accidents in which she may have injured her neck and back (142). She received a settlement for at least one car accident, perhaps more (149, 150, 153-154). She injured “mostly” her back when a cabinet fell on her (145). Plaintiff’s family doctor told her she does not have arthritis (*id.* at 170).

Dr. Lucia affirmed on September 14, 2010, within a reasonable degree of chiropractic certainty, that the care she gave plaintiff was in accord with good and accepted chiropractic practice. Plaintiff had been treated routinely at Fleetwood Family Chiropractic since 1983, except for a period of 6 years between 1993 and 1999. Plaintiff first came to the practice in 1983 when a cabinet fell on her and she complained of right arm, shoulder and neck pain. Since then she has been treated with the “dorsal cervical diversified” technique for her neck. Numerous injuries were reported by plaintiff during the years she was treated by the practice. In 1988, plaintiff was hit in the back of the head with a 30-pound book bag for which she filed a Workers Compensation report. In 1990 she reported a neck and back injury when pushed against the blackboard by a student. In 1991 she injured her neck and back in a motor vehicle accident. In 1993, a metal cabinet fell on her. In 1999, she injured her neck in a motor vehicle accident. She applied for no-fault benefits after that accident. Her x-rays showed degeneration and rotation of her C4, C5 and C6 vertebrae.

Plaintiff routinely presented with complaints of “achy soreness” in her neck and shoulder and, the majority of times, was treated with cervical manipulation. On May 17, 2003, plaintiff

presented with achy soreness in her neck and shoulder pain. She complained of stress related to her mother's health. The complaints were identical to those at her last visit on February 28, 2003. There were no radicular signs or symptoms and no increase in arm pain. Dr. Lucia treated plaintiff as she had been treated in the past, ending finally with the dorsal cervical diversified technique. This involved moving the neck to its end of normal range and giving it a light thrust to improve alignment of the vertebrae. This is a widely used and standard type of chiropractic manipulation, the purpose of which is to realign vertebrae and relax muscles.

Plaintiff made no complaints at the time or immediately after the treatment. She had always responded well in the past to this treatment. Dr. Lucia noted nothing unusual at the time. Defendants' records show that plaintiff returned to the practice again on May 20, 2003 and was treated by Dr. Russell. She was complaining of right shoulder pain, tight trapezius muscles and tenderness at the C7, T1 and T2 vertebrae. Among the other maneuvers, Dr. Russell performed the dorsal cervical diversified technique and light cervical traction technique.

Dr. Lucia's treatment was appropriate and there were no contra-indications to performing the dorsal cervical diversified technique. Contra-indications would have been increased neural signs to suggest nerve root involvement. Dr. Lucia evaluated plaintiff first and ascertained that there were no increased neural or radicular symptoms that would correlate to possible nerve root involvement. Plaintiff's symptoms were the same and the manipulation was the same as that to which she had responded well before.

There was no evidence Dr. Lucia's treatment caused or exacerbated the injuries claimed. Had that been so, plaintiff would have experienced "fairly spontaneous pain with radiculopathy." In this case, nothing unusual occurred either during or after the treatment. Plaintiff did not meet

criteria for referral to an orthopedist or neuro-surgeon. She had no subjective complaints or symptoms.

In opposition to the motion, plaintiff argued that Dr. Lucia's affirmation was self-serving and unreliable.

Defendants have established their entitlement to summary judgment which the plaintiff has not opposed with admissible evidence of any kind. Defendants offered ample evidence of plaintiff's history of neck pain for many years from a variety of injuries, including a degenerative condition consistent with her age. She conceded in her testimony that she had always responded well to the treatment provided by defendants. Dr. Abda's opinion, expressed three years after the subject treatment, that cervical manipulation *may* have caused exacerbation of plaintiff's pre-existing cervical disc disease, is merely speculative as to the treatment provided by Dr. Lucia, but also confirms that plaintiff did, indeed, have pre-existing degenerative cervical disc disease. It is also notable that, three days after the treatment in question by Dr. Lucia, plaintiff returned to Dr. Russell and received the identical type of cervical manipulation she believes accounts for her current symptoms. Apparently Dr. Russell, about whom plaintiff has no complaint, did not discern any contra-indication to the cervical technique both he and Dr. Lucia used, nor did plaintiff have any complaints at that time about repeating it.

Plaintiff's opposition did not consist of admissible evidence, but only argument unsupported by case law (*see Mackey*, 238 AD2d 919 [defendant chiropractor's affidavit sufficient to warrant summary judgment in his favor]; *Machac*, 261 AD2d 811). Plaintiff's bill of particulars addressed only her cervical spine. Her complaints about other areas of her body five years after the alleged injury are irrelevant in this action. In any event, defendant offered evidence

of findings of degenerative conditions in her lumbar spine prior to the subject incident, plaintiff's beliefs to the contrary notwithstanding.

Movants are directed to serve a copy of this order on the Clerk of Court who shall enter judgment dismissing the plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: March 13, 2012
Bronx, New York


BETTY OWEN STINSON, J. S.C.