

Perez v Mount Sinai Hosp.

2013 NY Slip Op 30867(U)

April 23, 2013

Supreme Court, New York County

Docket Number: 113157/10

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 113157/2010
PEREZ, CANDIDA R.
vs.
MOUNT SINAI HOSPITAL
SEQUENCE NUMBER : 001
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

*by defendants
for summary judgment or alternative
relief is denied in accordance with
the accompanying memorandum
decision.*

FILED

APR 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: APR 23 2013

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
CANDIDA R. PEREZ,

Plaintiff,

Index No. 113157/10
Motion Seq. No. 001

-against-

THE MOUNT SINAI HOSPITAL, IAN M. KRONISH, M.D.,
and MICAH D. MANN, M.D.,

Defendants.
-----X

SCHLESINGER, J.:

FILED

APR 25 2013

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This is a case about a dog bite. But since it is an action that sounds in medical malpractice, the owner of the dog is not the one being sued. Rather, it is the owner of the dog who was bitten and it is the two doctors from whom she sought treatment at The Mount Sinai Hospital who are being sued.

On the same day, May 3, 2010, that Candida Perez was bitten on her left calf, she went to the Mt. Sinai Internal Medical Associates ("Clinic") where she had been a long-time patient. She went because the wound was bleeding a lot and her pain was terrible. She evaluated the pain as a 10 out of 10, the highest category. There was also significant bleeding which could be stopped with pressure. Dr. Micah Mann, a resident, saw Ms. Perez even before she came into the exam room. He questioned her and was told that her dog was up to date with all vaccinations and that she herself had recently had a tetanus shot. Dr. Mann noted that the patient's vital signs were all normal and that at that time the patient had no sign of infection.

He stated that the wound did not have redness surrounding it and no significant swelling. Also, he said it did not feel warm. In describing it, he judged it was "about 1.5

centimeters by a centimeter, and diamond-shaped, and there was a small amount of subcutaneous fat” (p. 30 of Dr. Mann's deposition).

Dr. Mann spoke to his “preceptor,” attending Dr. Ian Kronish who examined the wound also. Dr. Kronish described the wound as through the top layer. However, he did not believe it was extremely deep or that it needed stitches.

The two doctors decided to research animal bites to help them decide whether or not to prescribe antibiotics prophylactically. They went onto a website called “Up to Date”, authored by physicians who, according to defense counsel are “world-renowned experts in their specialities;” the content of the site “is continually reviewed to ensure it is of the highest quality and based on the latest evidence” (Affirmation in Support of Motion at n 3).

The article viewed discussed various categories of animal bites and studies concerning treatment of them. Its conclusion was that antibiotics were not mandated unless the wound was on the hand, was of a puncture type, or if the patient was at an increased risk for infection due to diabetes or some other immune compromise.

Since Ms. Perez presented with none of these factors, the defendants decided not to prescribe antibiotics. Dr. Kronish, who knew the patient and believed she was reliable, gave her detailed instructions as to when to return if her symptoms worsened.

The symptoms worsened so that by the next morning, May 4, 2010, Ms. Perez had a fever of 102 which went up to 103. By the next morning, May 5, the fluid which had been draining from the wound and was clear yellow on May 4, was now thick and dark. Also, the skin around the wound was red and hot. These signs led Ms. Perez to call the Clinic, which had instructed her to return immediately.

She did return, this time with a clearly infected wound. This led to her admission to the hospital, with a surgical debridement performed by Dr. Lester Silver the next day, May 6. Dr. Silver's operative note described two wounds about an inch and a half apart, which he connected underneath. He noted that the wounds did not extend into the muscle or beneath the fascia. Ms. Perez was discharged from the hospital on May 12, 2010.

This motion by all defendants for summary judgment is supported by two affirmations. The first is authored by Dr. Bruce Farber, who is board certified in Internal Medicine and Infectious Diseases (Exh I). The second is from Dr. Jeffrey Ascherman, who is board certified in Plastic Surgery (Exh J). Both are well-credentialed and associated with major New York Hospitals, Dr. Farber with North Shore University and Dr. Ascherman with New York Presbyterian.

Not surprisingly, both opine that the defendant doctors did not in any way depart from accepted standards of medical care. Also, they agree that the doctors acted in accordance with the standards for treating dog bites. From each expert's perspective, they state that Ms. Perez was properly triaged and given a proper physical examination. Further, the wound was thoroughly irrigated and not sutured or closed over. Also, she was given proper instructions. As to her purported delay in returning to the Clinic, they say this contributed to the severity of the infection.

As to providing the patient with prophylactic antibiotics, Dr. Farber says that he believes, based on his review of current literature including the material from "Up to Date", that the defendants correctly determined that they should not have been prescribed. He says: "There is no evidence that providing prophylactic antibiotics to patients such as Ms. Perez decreases the likelihood of an infection" (¶11). Further, he describes this as a "low

risk” and “shallow” dog bite from her own pet, and he dismisses Dr. Mann’s note in the chart as to the visibility of subcutaneous fat as “incidental without medical significance” (¶13).

Dr. Ascherman, who also states that he reviewed current literature, makes the same point, that he did not believe that a prescription for prophylactic antibiotics was required on May 3, 2010. He states several times in his affirmation that there is “no significant evidence that prophylactic antibiotics would have prevented the development of this infection” (¶11 and ¶9). Both experts provide the names of articles and studies that they consulted in support of their opinions. The articles are the same.

With regard to the main relief sought, a dismissal of the action, I do find that a prima facie case has been made out by the defendants. This means that the burden then shifts to the plaintiff who must show that legitimate factual issues exist regarding the standard of care, whether it was met, and if not, whether that was a cause of the plaintiff’s injury.

In this endeavor, counsel for the plaintiff submits an affirmation from a New York licensed physician board certified in Internal Medicine and Infectious Diseases, as is Dr. Farber (Exh 2). This doctor states that he/she (the name is not provided, except to the Court) has significant knowledge and experience in treating infections from dog and other mammal bites. She/he confirms familiarity with the records of Ms. Perez’s treatment, the deposition transcripts, the defendants’ expert affirmations, and the medical literature on this subject.

Plaintiff’s expert specifically disagrees with Dr. Farber’s evaluation of the seriousness of this wound. This doctor opines that a bite wound which, according to Dr. Mann, exposed the subcutaneous fat and which the surgeon, Dr. Silver, had said had two teeth wounds that connected beneath the surface and extended into beneath the fascia,

[* 6]

is clinically a deep bite, not a superficial one. Further, "the risk of infection under these facts cannot be legitimately characterized as being low" (¶3).

This doctor opines with a reasonable degree of medical certainty that the defendants deviated from the local and national standard of care by failing to prescribe a course of prophylactic antibiotics for three to seven days and that this failure was a substantial factor in causing the infection the patient suffered and the treatment it required, including the surgery by Dr. Silver (¶2).

In other words, this physician does not really take issue with the mandated treatment presented by defense experts. Rather, it is with the evaluation of the wound itself on May 3, 2010, because he/she says this was a deep bite, one that fully penetrated beneath the skin.

Further, the expert states that there is only a minimal risk of developing a C-difficile infection when prescribing antibiotics under these circumstances. On the 3rd, it was a non-hospital setting "and the chance of developing an infection by not prescribing prophylactic antibiotics was substantially greater than if not prescribed. The benefits associated with antibiotic prophylaxis in this case greatly outweighed the risks" (¶4).

Finally, this doctor disagrees with the defendants as to the significance of an alleged delay by the plaintiff in returning to the Clinic because "without prophylactic antibiotic therapy, the risk of infection was substantial. Had prophylactic antibiotics been prescribed, the likelihood of infection would have decreased greatly" (¶6).

I find that by this affirmation, counsel for the plaintiff has shown that a legitimate issue exists as to the depth and seriousness of the wound, which in large part determines whether prophylactic antibiotics should have been prescribed.

support their opinion. The defense experts believe this was a superficial low risk bite. The plaintiff's expert says it was more serious, that it was a deep wound, and not a low risk. That is the disagreement. There is nothing unusual about such a controversy. Prophylactic antibiotics is nothing new or experimental. None of the proffered articles say that it is. Certainly, neither expert for the defense says that.

Similarly, on the issue of causation, there is nothing unusual about the experts' difference of opinion. The doctor for the plaintiff takes the position that the early use of antibiotics would have prevented an infection. The defense experts on this point seem to blame Ms. Perez for her two day delay in returning to the Clinic. There is nothing obscure about differences such as these. A hearing is not called for because there is no literature that substitutes for a treating physician's evaluation of an injury. The dispute here is quintessentially one which juries are asked to determine constantly, the question of the seriousness of the wound and the best treatment, or rather, the one that comports with the standard of care. *Frye* is simply not relevant here.

Accordingly, it is hereby

ORDERED that the motion by defendants is in all respects denied. Counsel shall appear in Room 222 for a pre-trial conference on Wednesday, May 22, 2013 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

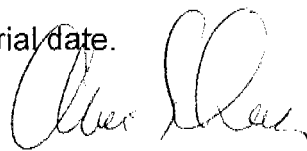
Dated: April 23, 2013

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