

Olsen v Staten Is. Univ. Hosp.
2013 NY Slip Op 31285(U)
June 18, 2013
Supreme Court, New York County
Docket Number: 111612/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

Walter Olsen
- v -
Staten Island Univ. Hospital

INDEX NO. 111412/08
MOTION DATE 3/5/13
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to 15 were read on this motion to/for Summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-11</u>
<u>12-14</u>
<u>15</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accord with the attached Decision
and Order

FILED

JUN 19 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/18/13

JBK
JOAN B. LOBIS 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
NEW YORK COUNTY: IAS PART 6**

-----X
WALTER and CATHY OLSEN, as Parents and
Natural Guardians of JOSEPH OLSEN, an Infant, and
WALTER and CATHY OLSEN, Individually,

Plaintiffs,

Index No. 111612/08

-against-

Decision and Order

STATEN ISLAND UNIVERSITY HOSPITAL,
HEALTHCARE ASSOCIATES IN MEDICINE,
P.C., JOHN SHIAU, M.D., ANTHONY J. ALASTRA,
M.D., EDWIN CHANG, M.D., RICHMOND
PEDIATRICS, P.C., ARTHUR BUONASPINA, M.D.,
SIU-PUN CHAN, M.D., MARK RADEN, M.D.,
STEPHEN D. BORCHMAN, M.D., P.C., and
STEPHEN D. BORCHMAN, M.D,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

FILED
JUN 19 2013
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 007 and 008 are consolidated for disposition. Defendant Stephen D. Borchman, M.D., P.C., and Stephen D. Borchman, M.D., (Dr. Borchman) (motion sequence 007), and Arthur Buonaspina, M.D., and Richmond Pediatrics, P.C., (Dr. Buonaspina) (motion sequence 008) move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiffs Walter and Cathy Olsen, individually and as parents and natural guardians of infant-plaintiff Joseph Olsen, oppose the motion. For the reasons below, the motions are denied.

This medical malpractice action involves the treatment rendered to Joseph Olsen by defendants from May 2007 through June 2007. On May 7, 2007, Joseph Olsen, then 15 years old, presented to his primary care physician, Stephen D. Borchman, M.D., complaining of headaches,

congestion and heavily discolored rhinorrhea. Dr. Borchman diagnosed Joseph with allergic rhinitis. On May 9, 2007, Joseph returned to Dr. Borchman's office with worsening headaches that prevented Joseph from sleeping, made him feel dizzy, and affected his balance. On May 11, 2007, Joseph was seen in the emergency room at Staten Island University Hospital (SIUH) with complaints of severe headaches. He underwent an MRI of the brain, the results of which was consistent with Chiari I Malformation, a condition in which brain tissue protrudes into the spinal canal due to an abnormal or misshapen skull. Later that day, Joseph was admitted to SIUH. He underwent a neurosurgical consultation with co-defendant Dr. John Shiau, who noted that the headaches were worsening and recommended surgery. On May 15, 2007, Joseph underwent a suboccipital craniectomy, and Joseph's headaches subsided by the following day. He, however, began to spike fevers and experience headaches and nausea. A lumbar puncture was not performed, but blood cultures reports were negative for infection. On May 17, 2007, Dr. Buonaspina, the infectious disease consultant, saw Joseph and ordered blood tests, which showed an elevated white blood cell (WBC) count. Dr. Buonaspina started Joseph on Ancef, an antibiotic. Joseph was discharged on May 22, 2007, after his condition improved.

On May 26, 2007, Joseph was seen in the emergency room at SIUH with complaints of persistent headaches and sensitivity to light. He was discharged home without admittance. On May 31, 2007, Joseph returned to the emergency room at SIUH with complaints of headaches and vomiting. An MRI was performed, which revealed fluid collection in the spinal canal. An increase in spinal pressure was suspected. Joseph was admitted into SIUH, and on June 1, 2007, a lumbar puncture was performed. On June 2, 2007, Dr. Buonaspina examined Joseph and documented a

WBC count of 42,000. To rule out meningitis, he ordered blood tests, and because a lumbar puncture had already been performed, he started Joseph on the antibiotics, Vancomycin and Fortaz, pending the lumbar puncture results. Blood culture and lumbar puncture results, however, were negative for infection, and antibiotics were discontinued.

On June 6, 2007, co-defendant Dr. Edwin Chang performed a re-exploration of the suboccipital cervical incision with an evacuation of an epidural hematoma on Joseph. Attempts at performing a spinal lumbar puncture during the procedure were unsuccessful. Following the surgery, Joseph was prescribed Ancef, which was continued through June 7. Joseph reported a high fever and complained of weakness. He was transferred to the intensive care unit and was restarted on antibiotics and follow-up blood counts were ordered. On June 8, an MRI of the brain revealed a possible infarction and an MRI of the thoracic spine showed signs of an epidural abscess. Joseph was transferred to New York-Presbyterian Hospital (NYPH) later that night, where it was determined that Joseph had suffered a stroke. He underwent a placement of a shunt and a surgical removal of a spinal epidural hematoma. On July 4, 2007, Joseph's culture results indicated the presence of *Klebsiella meningitis*.

Plaintiffs commenced this action on August 25, 2008, alleging, in relevant part, that defendants failed to perform a proper and timely infectious disease evaluation, which necessitated further medical procedures, and pain and anguish.

Drs. Borchman and Buonaspina move for summary judgment on the grounds that no

issues of fact exist that they rendered appropriate care to Joseph at all times. In support of his motion, Dr. Borchman offers his own affidavit. He states that he is a physician licensed to practice in New York. As the pediatrician who admitted Joseph to SIUH, he states that he had no input or control over the actions of the neurosurgeons, infectious disease surgeon, or critical care intensivist who handled Joseph's care. He states that he ordered the necessary tests when Joseph complained of headaches and that when Dr. Borchman arrived at SIUH on May 11, 2007, plaintiffs had already consulted with the neurosurgeon and had consented to surgery. Dr. Borchman was advised that the Chiari Malformation was the cause of Joseph's steadily worsening headaches. Dr. Borchman deferred the management of the neurosurgical problems to the neurosurgeons, Dr. Chang and Dr. Shiau, because neurosurgery is not his specialty. During the postoperative period, his role was to "follow along and manage medical complications" that may have arisen.

In support of his summary judgment motion, Dr. Buonaspina submits the expert affirmation of Margaret Hammerschlag, M.D., a physician licensed to practice in New York and board-certified in pediatrics and pediatric infectious diseases. After reviewing the relevant records, Dr. Hammerschlag opines that Dr. Buonaspina's treatment of Joseph was appropriate and that nothing he did caused any harm to Joseph. She avers that continued antibiotics were not indicated because there were no signs of infection, pneumonia, or meningitis on May 17 or 19, 2007. Dr. Buonaspina next saw Joseph on June 2, 2007, at which time Dr. Buonaspina performed a physical examination of Joseph and documented that he had an elevated WBC count. Dr. Hammerschlag opines that it was proper for Dr. Buonaspina to have started Joseph on antibiotics pending the results of the blood cultures and lumbar puncture. Once the results were negative, ruling out infection, no

further administration of antibiotics was necessary. After Joseph underwent a re-exploration of a suboccipital cervical incision on June 6 and was noted to be lethargic and with a temperature of 101.6 degrees Fahrenheit, Dr. Buonaspina ordered another blood count and lumbar puncture, and commenced broad-coverage antibiotics. The expert states that this was proper given that Joseph's condition had not been improving.

In opposition to the motion, plaintiffs contend that summary judgment is unwarranted as there remain issues of fact. They submit an expert affidavit from a physician licensed to practice in Massachusetts specializing in internal medicine and infectious diseases. The expert avers that defendants departed from good and accepted medical practice by failing to continue with antibiotics during Joseph's first visit to SIUH and by failing to perform a repeat WBC count prior to his discharge on May 22, 2007. The expert states that the continued elevation of Joseph's WBC count would have alerted defendants to the ongoing infection requiring the administration of broad spectrum antibiotics and subsequent tests to identify the source of the infection. A broad-based antibiotic, such as Vancomycin, should have been prescribed instead of Ancef to alleviate Joseph's symptoms, eradicate his need for subsequent hospitalizations, and prevent his stroke. The expert also adds that an elevated WBC count with continued complaints of headache warranted continued admission and that Joseph should not have been discharged on May 22, 2007, as he still had an infection. The expert further states that without conducting a repeat WBC count prior to Joseph's discharge, defendants were not alerted to his ongoing infection. All of the physicians overseeing Joseph's care had an obligation to ensure that the appropriate tests were being ordered and that Joseph continued on antibiotics. The expert adds that although the blood culture results were

negative for infection, blood tests do not rule out infections of the central nervous system, and given that Joseph underwent a surgery involving the brain and central nervous system, he was particularly prone to infection and meningitis.

In reply, Dr. Buonapina argues that plaintiffs fail to raise a triable issue of fact, as their expert opinion is not supported by the record. He submits a further affirmation by Dr. Hammerschlag, who states that it is a medical impossibility that Joseph had bacterial meningitis during his admission to SIUH. Dr. Hammerschlag attests that negative blood cultures and urine specimens dated May 19, June 2, June 7, and June 8, 2007, indicated that there was no infection, and negative cultures from the cerebral spinal fluid analyses on June 1 and 8, 2007, indicate that Joseph did not have bacterial meningitis during his preceding admissions at SIUH. She further states that if Joseph had developed bacterial meningitis, his cerebral spinal fluid glucose level would have been low; Joseph, however, had elevated glucose levels during his admissions. She adds that the *Klebsiella meningitis*, which was diagnosed on July 4, 2007, most likely developed during Joseph's admission to NYPH.

In his reply, Dr. Borchman also points to the negative lumbar puncture results in early June to assert that Joseph did not have *Klebsiella meningitis* during his preceding admissions at SIUH. He further adds that the decision to continue Joseph on antibiotics was reserved to the other specialists involved in Joseph's care, and that Dr. Borchman did not prescribe the original antibiotics prescription and deferred to Dr. Buonaspina, who indicated that infection was not suspected. Dr. Borchman posits that, in any event, absent other indications, a high WBC count would not have

indicated meningitis.

In further opposition to the motion, plaintiffs' expert submits an affidavit addressing the negative cerebral spinal fluid cultures in June 2007.¹ The expert opines that steroids and antibiotics can suppress or obscure the presence of organisms and bacteria in cultures. The expert notes that Joseph received Decadron, a steroidal anti-inflammatory, and Ancef, an antibiotic, during his admission to SIUH from May 11, 2007, through May 22, 2007, and again from May 31, 2007, through June 9, 2007. The administration of these drugs accounts for the negative tests in Joseph's blood and urine cultures and obscured the presence of Klebsiella in the cerebral spinal fluid cultures.

Dr. Buonaspina submitted a further affirmation by Dr. Hammerschlag, who opines that, while it is true that steroids can suppress inflammatory response, they do not obscure the growth of organisms. Furthermore, Dr. Hammerschlag states that Decadron cannot cause repeated negative cultures and Joseph did not receive enough Ancef to affect the results of the cerebral spinal fluid, and that it would have required at least three weeks of antibiotics treatment for the bacterial growth to be obscured.

"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." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985)

¹ During oral argument on March 5, 2013, the parties were permitted to submit further affirmations regarding the results of the June lumbar puncture results.

(citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). In medical malpractice actions, expert medical testimony is the sine qua non for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

Summary judgment must be denied due to conflicting expert opinions by defendants' and plaintiffs' experts. The essence of defendants' argument in seeking summary judgment is that Joseph did not have meningitis during his admission at SIUH. They rely on the negative results of the June 1 and 8, 2007 lumbar punctures as definitive proof of this. They also point to the negative blood cultures, which indicated the absence of infection. Plaintiffs' expert opines, however, that the tests were unreliable to rule out meningitis. Plaintiffs' expert states that the administration of steroids and antibiotics obscured the lumbar puncture and blood cultures results. The expert further avers that Joseph's re-admittance and development of *Klebsiella meningitis* could have been avoided altogether had the proper antibiotics been continuously administered during Joseph's first visit in May 2007. The expert opines that a repeat WBC count should have been administered prior to Joseph's May 22 discharge, which would have alerted defendants to the need for continued antibiotics and hospitalization. It is well-settled that a battle of experts, such as presented here, raises

credibility issues, which must be resolved by a fact finder and which preclude summary judgment.

Barnett v. Fashakin, 85 A.D.3d 823, 825 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623, 624 (2d Dep't 2003).

To the extent that Dr. Borchman disclaims responsibility for the continuation of antibiotics or the administration of a follow-up WBC count, he fails to demonstrate his insulation from liability. Dr.

Borchman was exercising his own independent judgment and was not under Dr. Buonaspina's or another physician's direct supervision. C.f. Muniz v. Katlowitz, 49 A.D.3d 511 (2d Dep't 2008);

Soto v. Andaz, 8 A.D.3d 470 (2d Dep't 2004); Walter v. Betancourt, 283 A.D.2d 223, 224 (1st Dep't 2001). Accordingly, it is

ORDERED that the motions of Stephen D. Borchman, M.D., P.C., and Stephen D. Borchman, M.D., (motion sequence 007), and Arthur Buonaspina, M.D., and Richmond Pediatrics, P.C., (motion sequence 008) seeking summary judgment are denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, July 16, 2013, at 9:30 a.m.

Dated: *June 18*, 2013

FILED

ENTER:

JUN 19 2013

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JB
JOAN B. LOBIS, J.S.C.