Corey v Saint Vincents Catholic Med. Ctr. of New York- Manhattan
2014 NY Slip Op 30145(U)
January 15, 2014
Supreme Court, New York County
Docket Number: 117120/2007
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 : 117120/2007
COREY, RICHARD
vs.
SAINT VINCENT'S CATHOLIC
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

FILED
JAN 21 2014
COUNTY CLERK'S OFFICE
NEW YORK

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 denied in accordance with the accompanying memorandum decision.

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

Dated: JAN 15 2014

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

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RICHARD COREY and ILENTHAL COREY,

Plaintiffs,

-against-

SAINT VINCENTS CATHOLIC MEDICAL CENTER OF NEW YORK-MANHATTAN, ROBIN MITNICK, M.D., MICHAEL GERARDI, M.D.,DANIEL SILVERSHINE, M.D., CONCORDE MEDICAL GROUP and TOKO MORIMOTO, M.D.,

Defendants.

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Index No. 117120/07
Motion Seq. No. 005

SCHLESINGER, J.:

This action is an old case. One reason for this is the fact that the sole remaining defendant, St. Vincent's Catholic Medical Center, was in bankruptcy for a good portion of the time after the action was first commenced. Further, in November 2012, this Court allowed the plaintiff to amend his complaint to essentially change the theory of the case, finding no prejudice to the hospital from this change.

When the complaint was originally filed, the allegation was that Mr. Corey was suffering from brain cancer that had not been properly diagnosed when he was a patient at St. Vincent's between July 2 and July 4, 2005. At that time, one of the original defendants was Dr. Robin Mitnick, a neuroradiologist practicing at St. Vincent's at the time. She had read a CT scan taken of Mr. Corey's brain on July 2, 2005 and had dictated a report as to her findings. Dr. Mitnick did not find a tumor, a mass or a lesion. Essentially, she said that the ventricles and sulci where within normal limits. But she also found an area of hypodensity in the right posterior centrum semiovale.

When she was deposed on September 30, 2009, Dr. Mitnick explained how the area appeared darker and what the significance of the hypodensity was. She said she could not tell precisely what it was. But "it just indicates that it is an abnormality. It is saying that it is different than the brain near it." (l. 20-22, p. 15). She suggested that there be follow-up scans. Further Dr. Mitnick positioned this hypodensity on some of the white matter on the upper portion of the brain, in one of the cerebral hemispheres. She also said in her report that it "may be ischemic and of questionable age" (l. 21-22, p. 16). She explained that that meant there was a possibility that it was an "infarct". However, she explained that it was hard to characterize things on a CT scan. Finally, she said that she could not tell how old this infarct was.

Plaintiff's counsel, who was questioning Dr. Mitnick at the deposition, went on to pursue what this hypodensity could represent and Dr. Mitnick responded as follows (l. 20-9, pps. 21-22):

> A. The most likely thing I thought was this was an area of ischemia there was this hypodensity it did not have mass effect.
> Could it have been an area of demyelinating disease? Yes, it could be an area of demyelinating disease.... Could it be an area of edema related to infection or a tumor? That is a possibility, but there wasn't any mass effect, so I thought that was a less likely possibility.

Counsel for Dr. Mitnick, who was also counsel for St. Vincent's in 2010, then brought a summary judgment motion on behalf of this doctor. In support of that motion defense counsel submitted an affidavit from a Dr. Caren Jahre, who is also neuro-radiologist. Her opinions centered around the interpretation of the July 2, 2005 CT scan

of the head. In somewhat general terms, after setting down what Dr. Mitnick's reading of the scan was, the expert then said that Dr. Mitnick's interpretation did not depart from the standard of care. Further she said that "her documented observations are appropriate and accurate, and her recommendation for a follow-up study to obtain further information for evaluation of the abnormality documented was a proper and appropriate recommendation."

All of the above is important because the relative positions of the parties after the complaint was amended have now changed.[1] The amendment alleged that St. Vincent's was negligent in its radiologist's failure to identify the mass in the lung, not in the brain. This change was explained by what later happened in 2007 and 2008, when Mr. Corey was diagnosed with cancer at both Sharon Hospital in Connecticut and Memorial Sloan Kettering in New York. That diagnosis was that Mr. Corey had a primary cancer in his lung which then metastasized to his brain. The theory of the plaintiff's case was that by failing to diagnose a mass in his lung in July 2005, no actions were taken, and Mr. Corey's cancer was allowed to metastasize into his brain. Subsequently, he had a craniotomy, a second craniotomy, as well as radiation and chemotherapy for the lung cancer.

In November 2012, when plaintiff moved to amend his complaint, a significant part of his papers asking for this relief was an affirmation from Dr. Robert Laurence Bard, a board certified radiologist. Dr. Bard stated that he had numerous occasions to diagnose lung cancers. He reviewed the x-rays taken at St. Vincent's Hospital in 2005

[1] The action was discontinued against Dr. Mitnick and there was no judicial decision on the summary judgment motion.

and compared them to x-rays and CT scans taken at the Sharon Hospital in 2007. He stated (p.4) that the 2005 x-ray at St. Vincent's:

> Shows a mass measuring 1x1 centimeter in the right lung, with an increased density at the right upper bronchus. This mass is overlying the Aorta.

Dr. Bard then opined that the Sharon studies showed a mass in the exact location as it was in 2005. He measured the lesion and found that it was 1x1 centimeter at St. Vincent's and 2x3 centimeters at Sharon Hospital.

Further, a significant part of Dr. Bard's affidavit was his review of the CT scan of the plaintiff's brain, also done in July 2005. Dr. Bard stated, "My review of the CT scan of Mr. Corey's brain, done in 2005 shows no evidence of a mass or tumor." (p.4). He said also that his reading of the 2005 brain scan was consistent with "deposition testimony of Dr. Mitnick and statement of defendant's expert Jahre and supports the fact that no Stage IV cancer existed in 2005." (p.4)

Why this is so interesting is that the defendant's present position, in arguing for why the hospital is entitled to summary judgment, is that even if there was an undetected mass in Mr. Corey's lung in 2005, none of that would have made a difference because at the time he had Stage IV brain cancer. In other words, it's the defendant's current theory that in 2005, the original or primary lung cancer had already metastasized to become a significant malignant tumor in Mr. Corey's brain. Counsel does not seem to think that this is inconsistent with her prior position stated above that "no evidence of a mass or tumor" in Mr. Corey's brain existed in 2005.

The current motion is supported with an affidavit from a Dr. Mark Fialk, who is board certified as a medical oncologist and hematologist. He is licensed in New York and is affiliated with Westchester Medical Center. He is also a Clinical Assistant Professor at New York Medical College. But he is not a radiologist. Therefore, he does not opine with regard to any reading of the various scans and x-rays. He points to other records to suggest certain opinions and conclusions that he has arrived at.

Specifically, in ¶19 he gives the core of his opinion; that is, that "the metastasis to the brain was synchronous with the initial development of the lung cancer". How does he arrive at this conclusion? He says that since the cancers were the same kind, they would have been growing at the same rate. Therefore, based on the fact that they were the same size in 2007 when they were measured at Sharon Hospital, the metastasis to the brain must have occurred immediately after the development of the initial tumor in the lung. He finds support for this opinion in the notes of the surgeon at Memorial who performed the craniotomy, Dr. Philip Gutin.

Dr. Gutin, of course, is a surgeon and not a radiologist. Pursuant to his notes in the Memorial records, he stated that after presentation at the weekly neuro-oncology conference, it was made clear that Mr. Corey had had brain edema in the area for more than two years. Dr. Fialk says that this proves to him that the brain "lesion" seen in 2005 was the same one present in 2007. However, there is nothing by any one, much less a radiologist, that states that a brain lesion, tumor or mass was seen in 2005. Edema itself is not a cancerous lesion; it is swelling caused by fluid retention.

Dr. Fialk's opinion with regard to the presence of serious cancer in Mr. Corey's brain in 2005 is the predicate for additional opinions that he gives. These opinions have

to do with whether or not the diagnosis of a cancerous lesion in Mr. Corey's chest in 2005 would have made any difference to either his survival rate or to the injuries that he suffered. As to the survival rate, Dr. Fialk says that, assuming, as he does, that Mr. Corey had both primary lung cancer and metastatic brain cancer in July 2005, his survival rate would have been 7.1 months. He then points out that Mr. Corey, with the care and treatment that he received at Memorial, is still alive today. He does have continuing symptoms in his brain, but he is doing well with the aid of medication.

However, clearly there is a major discrepancy between the opinions given by the various experts for both sides. It is the plaintiff's position that there was no metastatic brain cancer in July 2005. If that were true, then the survival rate would not have been a matter of months; arguably it would have been years, as articulated by an expert for the plaintiff, Dr. Dickerman Hollister. Dr. Hollister is board certified in Hematology and Oncology. He is presently an Assistant Clinical Professor at Yale University School of Medicine and an Adjunct Professor of Medicine at the New York Medical College.

Dr. Fialk's final opinion is that there would have been no difference in treatment if in fact the primary cancer in Mr. Corey's right lung would have been detected in 2005. In this regard, moving counsel, on behalf of the defendant hospital, points out that the neuro-oncology conference "established" that the plaintiff had brain edema in the area of the brain where the mass was for more than two years. Further, she argues that the craniotomy to remove the brain mass was further proof that the brain lesion seen on the radiology film in 2005 was at the same location as the mass in 2007.

With regard to Dr. Fialk's belief that the treatment would have been the same, specifically he points out that Mr. Corey would still have needed a craniotomy for the

brain and chemotherapy and radiation for the lung. It appears that the cancer in the lung did reoccur in January 2008. But Dr. Fialk says that this happened because Mr. Corey failed to follow the doctors' orders at Memorial for "consolidative treatment". However, he then did follow that advice in April 2008 and ultimately was "cured" of this cancer. Here, Dr. Fialk points out that multiple PET scans have shown no uptake anywhere in Mr. Corey's body.

Finally, Dr. Fialk opines as to the second craniotomy that Mr. Corey underwent. He says that it was the result of experimental treatment offered to the patient and agreed to by Mr. Corey. According to Dr. Fialk, this treatment was unnecessary and harmful as it caused radiation necrosis that led to the second craniotomy.

At this stage of a motion by a defendant for summary judgment, the Court would often make a decision as to whether or not the moving defendant had made out a prima facie case. However, here I hesitate to do that because without even reading the plaintiffs' opposition papers, it is disconcerting to the Court that all of Dr. Fialk's opinions rely on the presence of a malignancy, a notable malignancy, in Mr. Corey's brain in July 2005, even though neither Dr. Fialk, nor any other doctor, ever saw or testified to any primary evidence of such a malignancy.

Counsel for the plaintiff in his opposition accuses the moving papers, with their account of the defendant's theory of the case, as being full of inconsistencies and serious errors of material facts. Counsel notes that the defendant's entire theory, that the failure to detect a lung mass in July 2005 would have made no difference in treatment, is all based on the assumption that Mr. Corey had Stage IV brain cancer in July 2005. However, as opposing counsel attempts to show, there is simply no

evidence that this assumption is correct. In this regard, he points to the sworn deposition testimony of Dr. Mitnick, as well as an affidavit by Dr. Jahre on Dr. Mitnick's behalf, and an affidavit from Dr. Robert Bard in plaintiff's moving papers to amend his complaint which he includes again here. All of these sworn statements opine to something different. Significantly, though, all three of these radiologists state that after reading the July 2005 scan of the brain, they could detect no discernable cancer.

But counsel for plaintiffs' does more in his opposition. As referred to earlier, he also includes an affidavit from Dr. Dickerman Hollister, a physician licensed to practice in Connecticut. In addition to the earlier credentials I noted, Dr. Hollister has a Research Appointment by the National Cancer Institute in Bethesda, Maryland. He has also had numerous articles published in the field of Cancer-Oncology (p. 2).

The first observation he gives is that he knows "of no scientific information that substantiates Dr. Fialk's conclusion that if a primary cancer and metastatic cancer are the same size, they must have existed simultaneously" (p.3). In this regard, however, he points out that, in fact, in 2007 the brain tumor was smaller than the lung cancer. Also, he notes that no one described the size of the brain tumor in 2005, while the lung tumor was described as 1x1 cm at that time.

Counsel for the plaintiff also finds fault with Dr. Fialk's assessment of the sizes of the tumors in 2007. He says:

> Dr. Fialk does not appreciate the facts of the case. In 2007 the lung cancer was measured to be 2 cm in diameter. At Memorial, it is noted by MRI that the brain tumor of the parietal area was 1.7 cm x 1.3 cm. Clearly, the tumors were not the same size.

The affidavit of Dr. Hollister goes on to say that in his opinion, assuming the lung cancer was 1x1 cm in 2005, this would be described as a T1a-NN tumor. A patient with that diagnosis statistically would have a 50% chance of survival. While he does not specifically opine on what that patient's chances for survival would be if in 2005 he had metastatic brain cancer as well, it certainly would appear that he believed it would be much less. However, what he does state with a reasonable degree of medical certainty — and which squarely contradicts the defense position that the treatment would have been the same even if the lung cancer had been diagnosed in 2005 — is that the treatment would have been different and less. His opinion is that a diagnosis of lung cancer alone would have been treated only with surgery, without the need for chemotherapy or radiation.

Dr. Hollister further elaborates on what occurred because the lung cancer was not diagnosed and treated in 2005. He states that a portion of Mr. Corey's brain was removed during his two craniotomies. Further, the plaintiff experienced the effects of radiation and chemotherapy, therapies he would not have needed if the lung cancer had been discovered.

Finally, Dr. Hollister opines that "as a result of the radiation and chemotherapy, Mr. Corey has a seizure disorder, steroid dependency, neurocognitive decline, poor memory, confusion, personality changes and chronic fatigue" (p.5). All of these conditions, he states, are described in the Memorial records.

In Reply, defense counsel accuses the plaintiff's counsel of making up facts and arguments. I have no idea what she is referring to. Rather, I find plaintiff does make specific reference to the records and to the sworn testimony of the three radiologists.

Counsel also urges that Dr. Hollister never stated a "specific opinion on the only issue of fact that matters in this motion: the fact that the Plaintiff's lung cancer had already metastasized to his brain in July 2005" (¶1 of Reply). While Dr. Hollister may not opine on this point, Dr. Bard does (Opposition Exhibit C). He states on page 4 of his affidavit and as a board certified radiologist, which Dr. Fialk is not, that his review of Mr. Corey's CT scan of his brain done in 2005 "shows no evidence of a mass or tumor" and "supports the fact that no Stage IV Cancer existed in 2005."

Moving counsel misinterprets what Dr. Hollister says about scientific information supporting Dr. Fialk's opinion as to the simultaneous growth of the two tumors. He does not say he "does not know about the scientific information that substantiates Dr. Fialk's opinion" (¶4 of Reply), implying that such information exists but he is not familiar with it. Rather, what he actually says is: "I know of no scientific information that substantiates Dr. Fialk's conclusion that if a primary cancer and metastatic cancer are the same size they must have existed simultaneously" (p.3). That statement implies that no such scientific information exists.

Further, the Reply suggests that plaintiff's counsel has a convoluted interpretation of various measurements based on a misleading comparisons of studies. It is true that the records from the two hospitals are not identical, but it is fair for each side to emphasize the parts of the record that help their position.

Finally, counsel argues that the opposition also misreads Dr. Jahre's affidavit and Dr. Mitnick's deposition. She completely ignores Dr. Bard's sworn statement. I find that plaintiff's counsel accurately reported what each radiologist said and that the affidavit and testimony referred to are open to varying interpretations.

The motion by defendant is denied. The basis for it is the alleged absence of causation between any failure to diagnose a lung tumor in 2005 and injury. First of all, that allegation is explicitly disputed by the evidence and opinions proffered by the plaintiff. Second, as discussed at length, the entire premise of the defense agreement rests on an opinion expressed by oncologist Fialk that Mr. Corey had metastatic brain cancer in 2005. That opinion is strongly contested, as it is plaintiff's position instead that Mr. Corey had lung cancer at that time which had not spread to the brain, or if it had, it had certainly not attained the status of a Stage IV cancer.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that counsel shall appear in Room 222 for a pre-trial conference on Wednesday, April 2, 2014 at 9:30 a.m.

Dated: January 15, 2014

JAN 15 2014

J.S.C.

ALICE SCHLESINGER

FILED

JAN 21 2014

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