

Miller v Michler

2014 NY Slip Op 31087(U)

March 20, 2014

Sup Ct, Bronx County

Docket Number: 309985/10

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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MICHAEL MILLER and DEBBIE MILLER,

Plaintiff(s)

- against -

INDEX NO: 309985/10

ROBERT MICHLER, M.D. BRIAN LATZMAN,
M.D., EDGARDO LIVICA, R.P.T., LIVICA
PHYSICAL THERAPY, P.C. and MONTEFIORE
MEDICAL CENTER,

Defendant(s)

DECISION/ORDER

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HON. DOUGLAS E. MCKEON

Motion by defendants Edgardo Livica R.P.T., and Livica Physical Therapy, P.C. for an order dismissing plaintiff's complaint against them is decided as follows.

This is an action wherein plaintiffs allege that the defendants negligently and carelessly rendered physical therapy treatments to the plaintiff. On August 12, 2008 the plaintiff underwent heart valve replacement surgery at co-defendant Montefiore Medical Center. Plaintiff's medical history included failed renal transplant, end stage renal disease, and hypertension. On August 28, 2008 plaintiff was referred by his cardiologist to the ER at Montefiore for a check on his INR values. Plaintiff had no complaints of pain or weakness in his left arm. The exam at Montefiore revealed

no lumps or masses in his left upper extremity. The following day the plaintiff was first seen at Livica P.C. for physical therapy for left arm pain. The plaintiff complained of pain that went up and down his arm and said the pain started while he was in the hospital turning on his bed. Livica's objective assessment of the wrist was minimal intensity spasm around the wrist, tenderness, muscle guarding, limited range of motion, limited muscle strength, and pain of seven out of ten on a pain scale of zero to ten. After this evaluation only plaintiff's left wrist was treated because that was the only area he complained about. The treatment plan included hot pack, ultrasound, stretching resistance exercises and a home exercise program. Plaintiff continued to receive physical therapy by defendants from September 8th through October 3, 2008. Livica testified plaintiff never complained of numbness, tingling or swelling at any visit. Plaintiff testified he never made any complaint of his left upper extremity to physicians he treated with and did not speak to any co-defendants about the physical therapy treatments that might have been the cause of an aneurism or how long the aneurism was present. On October 13th, ten days after his last physical therapy treatment with Livica, plaintiff went to the Montefiore ER with complaints of pain and numbness to his left arm, and a nodule in his left arm for the past four days. The physician's exam revealed a two centimeter by four centimeter mass in the forearm. Plaintiff testified that he first noticed the lump under his left arm the day he went to the ER.

Movants argue that the claims against them should be dismissed as the

treatments rendered to plaintiff were in accordance with accepted standards of physical therapy care and none of the treatment proximately caused the claimed injuries.

In support of this motion, movants have provided the court with an expert affidavit from a licensed physical therapist, Joseph Weissberg. Dr. Weissberg opines, within a reasonable degree of physical therapy certainty, that Livica confirmed in all aspects to good and accepted therapy practices at the time and that they did not deviate from the standard of care in treating plaintiff nor were they the proximate cause of plaintiff's alleged injuries. Movants argue that an allegation that defendant failed to diagnose an aneurism in the upper left extremity is unavailing as a physical therapist may not render a medical diagnosis. The diagnosis of an aneurism is a medical diagnosis to be rendered by a medical professional and not a physical therapist. As a result, the diagnosis of an aneurism is outside the scope of practice of defendants and they did not deviate from accepted care in not diagnosing it. The expert opines that based on the signs and symptoms reported by plaintiff and observed by movants plaintiff did not have an aneurism at any time plaintiff saw defendants for physical therapy treatment and there was therefore no reason to refer him to a physician for an aneurism. According to Dr. Weissberg, it was appropriate to believe plaintiff had a muscle problem and appropriate to believe the weakness in plaintiff's left arm was due to poor vasculature as a consequence of long term dialysis. Dr. Weissberg believes plaintiff was getting better with

physical therapy. Dr. Weissberg opines that if plaintiff had a vascular problem such as an aneurism the physical therapy would not have improved his complaints but that since he was improving it was appropriate for defendants to believe it was not an aneurism. Plaintiff himself stated that he did not feel the mass until four days before he went to the emergency room at Montefiore which was after his last date of treatment with defendants. If the mass was palpable only four days before presenting to Montefiore it was not present or palpable at any of the visits to Livica.

In opposition, plaintiffs argue that defendants have failed to make a *prima facie* showing of entitlement to summary judgment.

Plaintiffs argue that Mr. Miller's initial complaint to Mr. Livica included pain up and down his left arm. Despite this, there is no documentation of a comprehensive below the next physical examination. Plaintiffs argue that Mr. Livica failed to refer plaintiff to a physician for evaluation of his persistent complaint of left arm and hand pain and that Mr. Livica negligently had patient perform weight lifting exercises during his physical therapy sessions on September 22nd and September 26, 2008. Plaintiffs submit the affirmation of an expert within the field of physical therapy, Elaine Rosen, in support of their opposition. Dr. Rosen opines, to a reasonable degree of certainty in the field of physical therapy, that Mr. Livica departed from good and accepted physical therapy practice in failing to refer Mr. Miller to a physician for evaluation of his persistent left arm and hand complaint. Furthermore,

attributing the pain to dialysis was not in conformance with good and acceptable medical practice as Mr. Livica failed to take into account that plaintiff's pain began several days after his recent cardiac surgery although he had been a dialysis patient since 1990. Dr. Rosen further opines that the failure to refer plaintiff to a physician was a substantial factor in causing injury as it contributed to the delay in diagnosing the condition that was causing compression of the nerves. Finally, Dr. Rosen opines that having plaintiff perform the weight lifting exercises was a substantial factor in causing injury and harm to him as weight lifting exercises create the need for increased blood flow to the involved muscles causing increased pressure and dilation of the arteries which exacerbated his aneurism by causing it to expand.

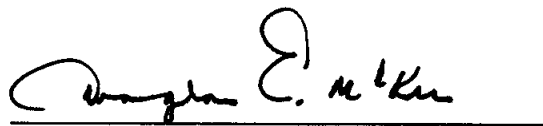
Movants argue that plaintiff's expert (Dr. Rosen) incorrectly describes a problem with the entire left arm instead of focusing on the left wrist. According to defendant's records, after the initial visit the plaintiff complained of pain with focus on his left hand and wrist and not his left arm. The lump, complaint of pain and numbness were only present four days before plaintiff went to the hospital and therefore were not present six days earlier at plaintiff's last visit to defendant's offices. Therefore, plaintiff's expert's opinion that the aneurism was present during the times he saw the defendants is speculation. As such, it was not a deviation from accepted physical therapy practice to not refer plaintiff to a physician or medical professional according to plaintiff's experts. Furthermore, according to Dr. Weissberg, the signs and symptoms of an aneurism were not present here. There

was no swelling, heat, numbness, tingling, decreased range of motion or more generalized pain. The plaintiff testified he did not have swelling, heat or decreased range of motion but complained of pain in the wrist and hand which was attributed to a traumatic incident in bed. Furthermore, according to Dr. Weissberg, if the source of pain was unknown a complete examination would have been warranted. However, if there was a history of pain from an acute event of plaintiff turning in bed a complete examination was not warranted. Plaintiff's expert also opines that the exercises with light weights were not deviations from accepted physical care and did not make plaintiff's condition worse explaining that had they been a problem for plaintiff there would have been complaints of pain and swelling from the onset of the exercises.

Although the Court has carefully considered movant's reply affirmation containing Dr. Weissberg's affirmation, the Court finds that there are questions of fact sufficient to defeat the motion for summary judgment and that the differing expert opinions herein warrant a jury trial. The Court notes that defendant's expert consistently states that the plaintiff's pain was localized to the left hand and wrist and not the entire arm. However, the Court notes that the patient initially presented with pain going up and down the entire arm. Furthermore, the expert fails to explain why it was reasonable to attribute plaintiff's persistent left arm and hand pain to dialysis when the pain began during his recent surgical admission although he had been a dialysis patient since at least 1990

So ordered.

Dated: *March 20, 2014*

A handwritten signature in cursive script, reading "Douglas E. McKeon". The signature is written in black ink and is positioned above a horizontal line.

Douglas E. McKeon, J.S.C.