

Pianoforte v City of New York
2015 NY Slip Op 31149(U)
June 5, 2015
Supreme Court, Bronx County
Docket Number: 305876/13
Judge: Stanley B. Green
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6

-----X
STEVEN PIANOFORTE,

INDEX No. 305876/13

Plaintiff(s),

- against-

THE CITY OF NEW YORK, DR. ISSA MADHOUN,
DR. ARKADIY CHERNYAK, DR. SCOTT ALBIN,
DR. FARID FORCE, DR. GLORIA IHENACHO,
DR. CARLOS HEREDIA, AND DR. BARNES
EACH SUED INDIVIDUALLY AND IN THEIR
OFFICIAL CAPACITY,

Defendant(s).

DECISION

-----X

HON. STANLEY GREEN:

The motion by Dr. Scott Albin for summary judgment dismissing the complaint is hereby consolidated for decision with the motion for summary judgment by The City of New York, Dr. Issa Madhoun, Dr. Arkidiy Chernyak, Dr. Farid Force, Dr. Gloria Ihenacho, Dr. Carlos Heredia, and Dr. Barnes (the City defendants) and upon consolidation, the motions are granted.

Plaintiff claims that as a result of defendants' failure to properly evaluate and treat his medical condition during his incarceration at the Manhattan Detention Center (MDC) and Rikers Island, he suffered a grand mal seizure and other serious injuries on October 6, 2011.

Plaintiff was arrested on September 2, 2011 and charged with criminal possession of a weapon. On September 4, 2011, he was transferred to MDC, where he underwent an intake physical by Dr. Madhoun. Dr. Madhoun noted that plaintiff's medical history included hypertension, asthma, heart disease and seizures diagnosed in 2008, related to drug withdrawal. He also noted that plaintiff had been treated for depression, anxiety, bipolar disorder and schizophrenia. Plaintiff reported that he was taking medications, including prescription Xanax (a

benzodiazepine) for an anxiety disorder and that he had suffered seizures in the past when he was taken off the Xanax. Plaintiff's physical examination was normal, but due to his depression and anxiety, Dr. Madhoun ordered a one time dose of an anti-anxiety medication, Hydroxyzine HCL (Atarax), and referred him to the psychiatrist for mental health treatment.

On September 7, 2011, plaintiff reported to a corrections officer that he was extremely depressed and was referred to Dr. Chernyak for a psychiatric examination. Dr. Chernyak noted that plaintiff had been taking Xanax for years and that he had a history of seizures when he was off it for a few days. Based on the history given and the fact that plaintiff did not report any other types of seizures or having taken anti-seizure medications, Dr. Chernyak diagnosed plaintiff as having a history of "withdrawal seizures." According to plaintiff, Dr. Chernyak told him they did not prescribe Xanax there and if he wanted it, he would have to go to Rikers Island. Dr. Chernyak prescribed 2mg of Klonopin (a long-acting benzodiazepine) to address plaintiff's withdrawal symptoms and referred him to the medical team to be evaluated for transfer to C-95, the Detox Unit at Rikers Island. Plaintiff was cleared by Dr. Barnes (the medical team) to be given 2mg of Klonopin and for transfer to the Detox Unit at Rikers Island for detoxification from Xanax. Plaintiff was transferred to Rikers Island the same day.

On September 10, 2011, plaintiff was seen by Dr. Albin, a psychiatrist, for a medication re-evaluation and mental health follow-up. Dr. Albin noted that plaintiff was coping well, had no side-effects from this medication, and was stable to be housed with the general population. His assessment was Axis I Poly-substance dependence and adjustment disorder with anxious mood. He prescribed Zoloft and Abilify (which plaintiff had previously taken for his anxiety) and he ordered that plaintiff be seen by a mental health provider in a week.

On September 16, 2011, plaintiff was seen by Dr. Ihenacho for complaints of anxiety. Dr. Ihenacho found plaintiff to be well-appearing and in no acute distress. She diagnosed him with insomnia and prescribed Hydroxyzine HCL (Atarax) for five days and Benadryl.

On September 19th, plaintiff underwent a psycho-social evaluation by mental health professional, Gary Graves. His chief complaint was anxiety. He reported that he had been taking Abilify and Zoloft for his anxiety before he was arrested. His speech, language, and affect were found to be normal. He was referred for a follow up appointment by a mental health provider. The evaluation was approved and co-signed by Dr. Heredia on September 22, 2011.

On September 23, 2011, plaintiff reported to the medical clinic, complaining of high anxiety and inability to sleep. He requested pain medication for prior back and left shoulder. He was started on Naproxin and Robaxin for the pain and referred for a mental health evaluation.

On September 24, 2011, plaintiff was evaluated by Dr. Force, a psychiatrist. Plaintiff reported that he was having anxiety and had been unable to sleep. Dr. Force found plaintiff to be normal in thought process and able to express himself well and coherently. He prescribed Buspirone for plaintiff's anxiety and refilled plaintiff's prescriptions for Zoloft and Abilify.

On September 26, 2011, an emergency response was called for plaintiff. He reported that he had been drooling, had weakness on the right side of his body and difficulty walking for the past two days. When the emergency team arrived plaintiff was found sitting in a chair, alert and oriented and he was able to walk to the stretcher without assistance. He was taken to the clinic and examined by PA Gravesande. After the examination, plaintiff walked back to his dorm, unassisted. He was referred to the mental health clinic.

On September 27, 2011, plaintiff was evaluated again by PA Gravesande. Plaintiff

reported feeling better and a neurologic exam was negative.

On September 30, 2011, plaintiff was seen for a medication re-evaluation by PA Beauchard. PA Beauchard noted that plaintiff was still suffering from anxiety and he no longer wanted to take Zoloft. Noting that the changes were at plaintiff's request, PA Beauchard discontinued Zoloft, started plaintiff on Remeron, increased the dosage of Buspirone and continued the Abilify prescription.

On October 5, 2011, at approximately 7:00 p.m., a nurse responded to a reported "medical emergency." She found plaintiff lying in his bed, alert and verbal. He reported that he was lying in bed after taking his psychiatric medication when he felt weak and started shaking. Plaintiff was taken to the clinic on a stretcher. PA Gravesande evaluated plaintiff and found him to be well-appearing and in no acute distress. Plaintiff was diagnosed with an anxiety disorder and referred to see a mental health specialist.

On October 6, 2011, at approximately 5:30 p.m., plaintiff was seen by Dr. Force. Plaintiff reported that he had been getting anxiety attacks, having muscle twitching and a lot of saliva. He stated that he had been taking Xanax on the street was not doing well on Abilify. He requested Klonopin. Dr. Force changed plaintiff's medications, stopping Abilify, Remeron and Buspirone in favor of starting Sertraline and Hydroxyzine.

At approximately 7:00 p.m. on October 6, 2011, plaintiff was found on the floor while waiting for his prescription. He had suffered a seizure and collapsed, fracturing his right tibia and fibula. He was taken to Elmhurst Hospital where the fractures to his right lower leg were treated. On October 8, 2011, plaintiff was transferred to Bellevue Hospital. He underwent open reduction with internal fixation to the right leg. He was also treated for a pulmonary embolus

that developed. He was discharged on October 18, 2011.

In his supplemental bill of particulars, plaintiff alleges that defendants departed from the standard of care in the treatment they provided, inter alia, by: (1) ignoring complaints, signs and symptoms; (2) making erroneous diagnoses; (3) administering improper drugs; (4) failing to take or administer tests; (5) failing to prescribe appropriate anti-anxiety medication or, in the alternative, an anti-seizure medication, such as the benzodiazepine that he had been taking at the time of his arrest which had been acting to prevent him from having seizures by raising the threshold for such seizures to occur; and (6) by failing to contact plaintiff's treating physician "to verify that plaintiff was taking a benzodiazepine and that he had a history of seizures when off of said drug."

Dr. Albin seeks dismissal of the complaint and all cross-claims on the ground that the care and treatment he provided on September 10, 2011 was in accordance with good and accepted standards of psychiatric care and was not a proximate cause of plaintiff's claimed injuries. In support of the motion, Dr. Albin submits the affirmation of Dr. Hoge, a Board Certified psychiatrist.

Dr. Hoge notes that at the time Dr. Albin saw plaintiff on September 10, 2011, he was being concurrently managed by the medical and psychiatric teams. He explains that under the concurrent management model, the medical team is responsible for managing and treating the patient's underlying medical conditions, while the psychiatric team manages and treats the patient's psychiatric conditions. He opines that Dr. Albin was responsible for re-evaluating plaintiff for changes in mental status and determining whether the medications were indicated, but he was not expected to suspect, diagnose or treat an underlying seizure disorder, nor was he

required to undertake a complete re-evaluation, as Dr. Chernyak had already done so and, because plaintiff had been medically cleared for transfer to the Detox unit by Dr. Barnes, it was reasonable for Dr. Albin to rely on the accuracy of the history already taken and he was not expected to obtain records of plaintiff's prior neurologic treatment.

Dr. Hoge opines that the medications prescribed by Dr. Albin were appropriate, as plaintiff had previously been treated with them for depression and anxiety and that Dr. Albin could not have been expected to anticipate plaintiff's October 6, 2011 seizure because plaintiff did not present with complaints associated with an impending seizure, a neurologic condition or Xanax withdrawal requiring immediate referral to the medical team and the expected time for acute withdrawal symptoms from Xanax (2-3 days at a maximum) had passed.

Dr. Hoge notes that after plaintiff was seen by Dr. Albin, he was seen on numerous occasions by the medical staff and other psychiatrists and his psychotropic medication regimen was changed from that prescribed by Dr. Albin on three occasions. Thus, he opines that there is no causal relationship between Dr. Albin's treatment and the claimed injuries.

The City defendants seek dismissal of the complaint on the ground that the care and treatment they rendered to plaintiff was proper and plaintiff's seizure on October 6, 2011 resulted from an underlying seizure disorder of which they were unaware and had no reason to diagnose and treat prior to October 6, 2011. In support of the motion, the City defendants submit the affirmation of Dr. Fred Lado, a board certified Neurologist, and the affirmation of Dr. Steven Fayer, who is board certified in Psychiatry and Neurology.

Dr. Lado opines that: (1) there was no indication for physicians of MDC or Rikers Island to contact plaintiff's treating physician prior to October 6, 2011, because the medical staff had a

reasonable understanding that plaintiff was taking Xanax for anxiety and that his history of seizure disorder was related to Xanax withdrawal; (2) there was nothing the plaintiff said to the staff of MDC or Rikers Island that warranted further investigation; and (3) that even if the City defendants had contacted plaintiff's treating physicians, they would not have been informed of a seizure disorder because plaintiff was never diagnosed with epilepsy or a general seizure disorder.

Dr. Lado notes that there is an indication in plaintiff's medical record that he suffered a "seizure" on October 5, 2011, but opines that this was actually a "panic attack" because plaintiff was noted to be alert when seen by the medical staff, and if he had actually suffered a clonic-tonic seizure, his mental state would have been altered immediately following the seizure.

Dr. Fayer opines that all of the City defendants acted at all times in accordance with applicable accepted standards of medical practice and that no alleged departure in the care and treatment rendered by them was a proximate cause of plaintiff's seizure on October 6, 2011.

Dr. Fayer opines that: (1) based on plaintiff's presenting signs and symptoms, Dr. Madhoun properly prescribed Hydroxyzine for his anxiety and referred him to be seen by a psychiatrist; (2) Dr. Chernyak appropriately diagnosed plaintiff with benzodiazepine withdrawal, prescribed a 2mg dosage of Klonopin to treat his symptoms of withdrawal and referred him for a detoxification or a benzodiazepine-taper evaluation, which was cleared by the medical team; (4) Dr. Albin conducted a proper examination of plaintiff and the prescriptions for Zoloft and Abilify were appropriate to treat plaintiff's anxiety and depression; (5) Dr. Ihenacho's treatment on September 16, 2011 was reasonable and appropriate; (6) Dr. Heredia appropriately cosigned a psycho-social evaluation on September 22, 2011 which referred plaintiff for follow up mental

health services; (7) Dr. Force's initial examination on September 24, 2011 was appropriate and he properly started Buspirone as an additional medication to manage plaintiff's anxiety, as plaintiff was outside of the benzodiazepine withdrawal-seizure window; (8) PA Beauchard appropriately stopped plaintiff's Zoloft and started him on Remeron on September 30, 2011 to treat his depression; (9) on October 5, 2011, plaintiff was timely and properly assessed for his symptoms of shaking and diagnosed with an anxiety disorder; (10) on October 6, 2011, plaintiff was timely seen by Dr. Force for a follow up appointment and Dr. Force properly modified his medication. Dr. Fayer opines that all of plaintiff's complaints on October 6, 2011, including increased anxiety attacks, muscle twitching and excessive saliva, could have been reasonably attributed to either his history of anxiety and depression or to side effects from the medications that he was taking and does not believe that there were any signs of an impending generalized seizure that plaintiff demonstrated to Dr. Force on October 6, 2011, or to any other medical provider, at either MDC or Rikers Island at any time before that.

Dr. Fayer opines that it is completely appropriate to prohibit the administration or distribution of Xanax in a prison or jail facility because it is highly addictive and frequently abused in the prison population. He explains that Xanax and Klonopin are in a class of medications called benzodiazepines, which are prescribed to treat patients suffering from anxiety, depression and panic disorder. Dr. Fayer notes that prisoners like plaintiff, who are addicted to Xanax, have the potential to suffer from a benzodiazepine withdrawal seizure, but explains that a Xanax withdrawal seizure will always occur, at a maximum, within two to three days after a patient's last Xanax dosage and that with a long acting benzodiazepine, such as Klonopin, "a withdrawal seizure cannot occur greater than one week after the last dosage." Thus, Dr. Fayer

opines that the seizure plaintiff suffered on October 6, 2011 could not have been a withdrawal seizure. Thus, Dr. Hoge opines that “even assuming, arguendo” that the defendants failed to properly manage plaintiff’s benzodiazepine withdrawal when he was first incarcerated at MDC or Rikers Island, that treatment was completely unrelated to plaintiff’s seizure on October 6, 2011, which was not due to withdrawal from benzodiazepines.

Plaintiff contends that the defendants’ motions must be denied because there are conflicting factual and credibility issues which must be resolved by a jury. In opposition to the motions, plaintiff submits his own affidavit, which shows that he informed the corrections medical personnel that he was on prescription Xanax for an anxiety disorder and had been on this medication for more than two years and that he had experienced multiple seizures when he was taken off the Xanax. Plaintiff states that he never told defendants that he had “withdrawal seizures” and they never asked him any questions about the circumstances of his seizures. He claims that he sought medical care for his anxiety more than a dozen times and repeatedly complained that he needed his xanax and felt like a seizure was coming on, but doctors at Rikers did not prescribe Xanax or any other benzodiazepine, nor did they send him for a neurology consult or otherwise treat his “underlying seizure disorder.”

Plaintiff also submits the affirmed report of Dr. Stiler, a Board Certified neurologist, and the affirmation of Dr. Baydcr, a Board Certified psychiatrist.

Dr. Stiler opines that it was a departure for the staff to fail to contact plaintiff’s treating physicians to investigate his history of seizures and medications he was taking, a departure for the staff to fail to give plaintiff medication for his psychiatric and seizure diagnoses and as a result of these departures, plaintiff suffered a grand mal seizure on October 6, 2011.

Dr. Bardey's affirmation show that he performed a psychiatric evaluation of plaintiff, reviewed plaintiff's medical records and Dr. Stiler's affirmed report, and it is his opinion that plaintiff was not provided psychiatric treatment at Rikers Island that met the acceptable standard of care of psychiatric/medical community.

Dr. Bardey notes that plaintiff had a long history of severe anxiety, substance abuse, and benzodiazepine addiction and that prior to his arrest, plaintiff had experienced two to four seizures, "secondary to being without Xanax and going into withdrawal." He also notes that "a history of seizures" was noted prior to his incarceration at Rikers Island, "due either to a primary seizure disorder, to benzodiazepine withdrawal, or to a combination of both."

He opines that plaintiff was not provided psychiatric treatment at Rikers Island that met the acceptable standard of care of the psychiatric/medical community and that defendants' failure to obtain proper history of plaintiff's prior seizure disorder, failure to seek and review medical records, failure to properly diagnose benzodiazepine dependence, failure to consider the risks associated with benzodiazepine withdrawal, failure to adequately treat benzodiazepine dependence and failure to prescribe appropriate anti-convulsant medication upon admission and during his incarceration, all directly led to the repeated grand mal seizures plaintiff experienced and the injuries and medical problems that ensued. He also opines that defendants' "neglectful treatment" aggravated his underlying anxiety disorder, causing him unnecessary emotional pain.

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate prima facie entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v.

New York Univ. Med. Ctr., 64 NY2d 851). In a medical malpractice action, a defendant doctor establishes prima facie entitlement to summary judgment when he or demonstrates that in treating the plaintiff either there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (Costa v. Columbia Presbyterian Med. Ctr., 116 AD3d 525). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

Here, the evidence presented in support of Dr. Albin's motion is sufficient to establish, prima facie, that the treatment he provided to plaintiff on September 10, 2011 was within the standards of care and that no alleged act or omission by him was a substantial factor in causing the claimed injuries. Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a triable issue of fact. Plaintiff failed to meet this burden. Neither of plaintiff's experts identifies a specific departure by Dr. Albin and neither expert addresses Dr. Hoge's opinion that Dr. Albin had no duty to suspect, diagnose or treat an underlying seizure disorder and that Dr. Albin's care and treatment on September 10, 2011 was not a proximate cause of the claimed injuries. Accordingly, Dr. Albin is entitled to summary judgment dismissing the complaint and all cross-claims against him.

As to the City defendants, the affirmations of Dr. Lado and Dr. Fayer and medical records

establish, prima facie, that the care and treatment the City defendants rendered was at all times proper, that prior to October 6, 2011 there was no indication to the City defendants that plaintiff suffered from an underlying seizure disorder and that even if plaintiff's treating physicians had been contacted about plaintiff's medication, the City defendants would not have been apprised of any underlying seizure disorder because the records do not show that plaintiff was diagnosed with a seizure disorder or that he was being treated with Xanax to inhibit or prevent seizures prior to his incarceration. Thus, the burden shifted to plaintiff to present competent evidence sufficient to raise a material issue of fact to defeat defendants' motions. He has failed to do so.

Initially, it is noted that Dr. Fayer opines that the prescription of Abilify was entirely appropriate to treat plaintiff's anxiety and depression and plaintiff's experts did not offer an opinion to the contrary. Accordingly, defendants are entitled to dismissal of this claim (Costa v. Columbia Presbyterian Med. Ctr., 105 AD3d 525). It is also noted that it is improper to raise a new claim that was not previously pled in the Bill of Particulars in opposition to a summary judgment motion (Park v. Kovachevich, 116 AD3d 182). Therefore, Dr. Bardey's opinion that the "the neglectful treatment" plaintiff received aggravated his underlying anxiety disorder, causing him unnecessary emotional pain is not considered.

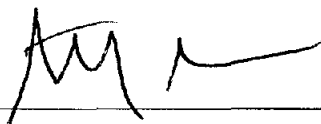
While Dr. Stiler and Dr. Bayer opine that the City defendants departed from good and accepted standards of medical and psychiatric care by failing to investigate plaintiff's "history of seizures" and the medications he was taking, no competent evidence has been presented to show that plaintiff was ever diagnosed with epilepsy or a general seizure disorder, only that he underwent testing in 2008 to determine if symptoms of shaking, twitching and jerking movements of his body were secondary to epileptic activity. However, the MRI and EEG were

normal and plaintiff never underwent the recommended additional testing to determine whether his symptoms of shaking, twitching, etc. were due to epilepsy, a general seizure disorder, or medication side-effects. Therefore, the records do not support Dr. Stiler's conclusion that plaintiff provided a "history of a seizure disorder." In fact, the records show that plaintiff reported a history of Xanax-related withdrawal seizures to Dr. Madhoun and Dr. Chernyak. While plaintiff and Dr. Stiler contend that the Xanax was prescribed prior to incarceration as an anti-convulsant for the prevention of seizures or for the treatment of an underlying seizure disorder, neither Dr. Stiler nor Dr. Bardey dispute that Xanax is prescribed to treat anxiety, depression and panic disorder, the conditions that plaintiff was seeing Dr. Packer for, and no competent evidence has been presented, such as a statement or note in the records, to show that plaintiff was prescribed Xanax or any other medication to treat or inhibit the likelihood of seizures. Absent such evidence, plaintiff's expert's opinions that the alleged departures by the City defendants caused plaintiff to suffer a grand mal seizure on October 6, 2011 seizure are speculative, conclusory and insufficient to raise a material issue of fact to defeat defendants' motions.

This constitutes the decision and order of the court.

Movant shall serve a copy of this order with Notice of Entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

Dated: June 5, 2015



STANLEY GREEN, J.S.C.