

Lomax v New York City Health & Hosps. Corp.

2015 NY Slip Op 31547(U)

July 6, 2015

Supreme Court, Bronx County

Docket Number: 14495/01

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 6

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LAWRENCE LOMAX,
Plaintiff(s),

INDEX №.14495/01

-against-

DECISION

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and BRONX LEBANON HOSPITAL,
Defendant(s).

-----X

HON. STANLEY GREEN

The motions by Bronx Lebanon Hospital (Bronx Lebanon) and New York City Health and Hospitals Corporation (NYCHHC) for summary judgment dismissing the complaint against them are consolidated for decision, both motions are granted and the complaint is dismissed.

The infant plaintiff was born at home on August 4, 1989. His mother had been admitted to North Central Bronx Hospital for four days after her water broke but she left against medical advice.

The first hospital visit relevant to this case was to the emergency department at Lincoln Hospital, which is part of defendant NYCHHC, on February 4, 1993. He had complaints of a seizure with eyes rolling but no shaking. He had a temperature of 104°. The diagnosis was first febrile seizure (with fever) and an upper respiratory infection. He was admitted for four days and given Tylenol and IV antibiotics.

He was seen on March 4, 1993 at North Central Bronx Hospital (also part of NYCHHC) for a clinic visit, where his developmental abilities were tested. He performed in the low average range and was referred to a speech and language therapist.

On June 27, 1993 he presented to Bronx Lebanon Hospital with a fever of 103°. He had not vomited and had a non-productive cough. A past history of febrile convulsions and asthma was noted. He was alert and active with a supple neck, stuffy nose and clear lungs. The diagnosis was upper respiratory infection. He was discharged with a prescription for Tylenol Elixir and a follow-up appointment was scheduled for 3 days later in the clinic.

On June 30, 1993, the infant went to North Central Bronx. No fever or seizures were reported and he was referred to an ENT visit for July 21, 1993. That appointment, as well as several others, was not kept.

On January 7, 1994, plaintiff went to the Bronx Lebanon emergency department after reporting being touched on his penis by someone at school. Vital signs were normal. There were no complaints of seizures.

On February 19, 1994, plaintiff was brought to Bronx Lebanon emergency department with a history of two seizures ten minutes apart lasting five minutes. He had a history of two seizures the prior week. There were no tonic clonic signs, no rolling of eyes, no saliva or foaming of the mouth or vomiting. No fever was reported. A neurological exam was negative. He was discharged and told to return if any symptoms occurred.

On March 2, 1994, eleven days later, plaintiff went to the Montefiore Medical Group for a consultation. He had global delays in speech and hearing. The history included seizures involving plaintiff's eyes going blank, generalized tonic clonic movements for ten minutes, followed by headaches and tiredness. The impression was mild developmental delays with a nuance of generalized tonic clonic seizures. A CT scan on June 16, 1994 showed a hyperdense lesion in the right parietal occipital region with surrounding edema but no evidence of

hemorrhage. An EEG on July 12, 1994 was normal. An MRI on July 21, 1994 documented a small arteriovenous malformation (AVM).

On August 7, 1994, plaintiff presented to Montefiore emergency department after falling and lacerating his head. Stitches were placed and he was followed by Neurology. Plaintiff's mother stated that there were no seizures since March 1994.

On August 23, 1994, plaintiff returned to Montefiore for suture removal and a cerebral angiogram. His mother reported 15 to 20 seizures since February, 1993 while watching TV or playing Nintendo. Plaintiff was discharged on August 25, 1994.

Plaintiff saw Dr. Goodrich at Montefiore on September 6, 1994 and discussed surgery for the AVM with the infant's mother. He performed the surgery on October 6, 1994. The AVM was excised. Subsequent visits over the years found him to be doing well neurologically with some developmental delay.

Defendant Bronx Lebanon has submitted an affidavit from Anthony Mustalish, M.D. who is Board Certified in Preventive Medicine and Emergency Medicine. He reviewed the records of plaintiff's visits to Bronx Lebanon emergency department on June 27, 1993, January 7, 1994 and February 19, 1994 and opines that the infant was properly diagnosed and treated. In particular, he says that the infant's seizures were properly assessed and that no further treatment was warranted at those visits.

Bronx Lebanon also submitted the affidavits of Dr. Goodrich, who performed the surgery at Montefiore and saw plaintiff several times thereafter. He opines that the Bronx Lebanon visits in June, 1993 and February 1994 did not have a substantial effect on the neurological conditions of the infant or the outcome of the surgery he performed and was not a substantial factor in

causing any neurological deficits. Goodrich is the Director of the Division of Pediatric Neurosurgery and a Professor of Clinical Neurological Surgery, at the Albert Einstein College of Medicine.

Based on these affidavits, Bronx Lebanon has established prima facie entitlement to summary judgment.

Defendant NYCHHC (on behalf of Lincoln Hospital and North Central Bronx Hospital) has submitted the affirmation of Ingrid Taft, M.D., who is board certified in pediatric neurology and psychiatry with a special competence in child neurology. She opines that the treatment of the plaintiff at Lincoln Hospital from February 4, 1993 to February 8, 1993 was appropriate. He had an extensive work-up which included many tests and was properly diagnosed with a febrile seizure. Plaintiff had no seizures during this four day hospitalization. The diagnostic tests were negative (normal) and further test were thus not indicated for a simple febrile seizure such as plaintiff experienced.

The visit to North Central Bronx on March 4, 1993 was to assess his development. There was no complaint of seizures and thus no treatment was called for.

Likewise, the visit on June 30, 1993 to North Central Bronx did not involve complaints of fever or seizures and there were no departure.

Dr. Taff also opines that the AVM is not causally responsible for the infant's developmental disabilities. Rather, they were caused by a combination of medical risk factors, including prenatal exposure to cocaine, late prematurity and small gestational age, and social risk factors, i.e. maternal addiction, maternal educational level, foster care with the maternal grandmother and inadequate care and supervision.

Based on Dr. Taft's affidavit, NYCHHC has established prima facie entitlement to summary judgment.

Accordingly, the burden shifts to the plaintiff to establish issues of fact sufficient to defeat defendants' motions. To that end, plaintiff has submitted an affidavit by Mitchell I. Weiler, M.D., dated October 11, 1999. Dr. Weiler says he is a physician licensed to practice in the State of New York but he gives no further credentials. Thus we don't know if he has any board certifications or any experience or expertise in the areas of medicine involved in this case.

He gives a history of the hospital visits in this case but asserts that the records are all incomplete, without specifying which records are incomplete or how they are incomplete or the basis for his belief that they are incomplete. He says there were departures from February 4, 1993 (the 1st visit to Lincoln) through August of 1994 (the 1st visit to Montefiore). He lists many alleged departures, generally a failure to diagnose a seizure disorder and an AVM, but he lumps all defendant hospitals together and makes no specific reference to any particular date. He says that the NYCHHC departed from good and acceptable practice at Lincoln and North Central Bronx but fails to state that Bronx Lebanon departed from good and accepted care. He opines that departures caused cognitive and neurological deficits but gives no medical basis for this opinion. In fact, he states that the damage to the infant's brain was caused by the AVM, although he does not claim the defendants caused the AVM, which, in reality, is a congenital condition.

In reply, Bronx Lebanon points to Weiler's lack of credentials, his failure to specify any departure by Bronx Lebanon, his failure to address the assertions of Dr. Mustalish regarding the lack of departures or the affidavit of Dr. Goodrich regarding the lack of causation. New York City Health and Hospitals Corporation points out that Weiler's affidavit was conclusory and

unsupported by the evidence, that he lumped the treatment at all hospitals together, that he does not indicate that the infant displayed any signs or symptoms of a AVM other than a seizure and does not assert that a child presenting with the plaintiff's symptom should have been diagnosed with an AVM.

Initially, Weiler has failed to establish that he has any expertise in the relevant areas of medicine, contrary to the qualifications of defendants' experts, and thus he is not qualified to express an opinion on the medicine in the case (Diaz v. New York Downtown Hosp., 99 NY2d 452; Udoye v. Westchester-Bronx OB/GYN, PS 126 AD3d 653; Nguyen v. Dosce, 125 AD3d 571). In the absence of an opinion from a qualified expert on behalf of the plaintiff, there are no questions of fact to defeat defendants' motions.

In any event, the affidavit of Weiler is conclusory, unsupported by the evidence in the case, unresponsive to defendants' experts and not supported by specific reference to any medical record or any literature. He failed to establish that the infant displayed any symptoms, or history known to either defendant, which would have required further testing or treatment. He does not claim any departure by Bronx Lebanon. He failed to address the fact that the infant was seen at Montefiore only eleven days after the last visit to Bronx Lebanon or that the doctors at Montefiore did not feel the need to operate on the infant until seven months after he was first seen there. It is noted that Montefiore has not been sued and there is no claim that the seven month interval caused any problems to the infant

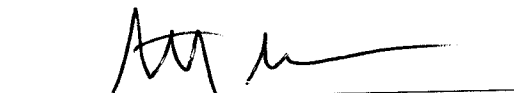
Accordingly, the motions are granted and the case is dismissed.

Movants shall serve a copy of this order with Notice of Entry on the Clerk of the Court who shall enter judgment dismissing the complaint against New York City Health and Hospitals

Corporation and Bronx Lebanon Hospital.

This constitutes the decision and order of the Court.

Dated: July 6, 2015


STANLEY GREEN, J.S.C.