Carson v Brodman
2016 NY Slip Op 30012(U)
January 5, 2016
Supreme Court, New York County
Docket Number: 805314/2012
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1
--X
MICHELLE CARSON,

Plaintiff,

-against-

MICHAEL BRODMAN, M.D., THE MOUNT SINAI MEDICAL CENTER,

Defendants.
--X

Index No.: 805314/2012

DECISION

MARTIN SHULMAN, J.:

In this medical malpractice action, defendants Michael Brodman, M.D. (Dr. Brodman) and The Mount Sinai Medical Center (collectively Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

In January 2009, plaintiff Michelle Carson (Carson or Plaintiff) underwent a pelvic ultrasound at Lenox Hill Radiology which showed a "posterior uterine leiomyoma (fibroid), likely with a sub-mucosal component" and a "small simple cyst" on her right ovary (Choi Aff. in Supp. of Motion, at Exh. E). A sonogram taken in October 2009 also showed the fibroid's presence (*id.* at Exh. H). Thereafter, in January 2010 at a routine annual checkup Plaintiff complained of severe pelvic discomfort and, although a further sonogram was performed, the previously noted fibroid was not detected (*id.*).

Approximately 6 months later at a follow-up appointment Carson once again complained of pain. Another sonogram was performed and two "intramural fibroids" were detected (*id.*). Plaintiff discussed the results of the sonogram and the treatment options with her physician and ultimately decided to undergo surgery to remove the

fibroids. Thereafter, Carson presented at the New York Downtown Hospital emergency room complaining of abdominal pain. Another sonogram was performed which also showed the two intramural fibroids (*id.* at Exh. I).

Plaintiff was initially seen by Dr. Brodman on July 7, 2010. Dr. Brodman noted that Carson complained of pelvic pain and reported having several fibroids, one of which was submucous.[1] On examination Dr. Brodman noted a tender uterus with a small anterior submucous fibroid. His plan was to perform a hysteroscopy[2] to remove the submucosal fibroid and a diagnostic laparoscopy[3] to rule out endometriosis or chronic pelvic pain (*id.* at Exh. E).

Thereafter, on August 3, 2010 Dr. Brodman performed an ambulatory hysteroscopy, dilatation and curettage, a pelvic laparoscopy and the destruction of adhesions. Dr. Brodman's post-operative diagnosis was chronic pelvic pain and adhesions. He noted that upon insertion of the hysteroscope he did not see any submucosal fibroids. He also noted that there was a small posterior fibroid on the back wall of the uterus but that he did not remove it. During the laparoscopic portion of the procedure Dr. Brodman noted no sign of endometriosis (*id.* at Exh. F).

The day after the surgery, Plaintiff called Dr. Brodman's office and spoke to Dr. Brodman's assistant regarding what Dr. Brodman removed during the surgery.

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[1] The medical dictionary defines submucous as lying under or involving the tissue under a mucous membrane.

[2] A hysteroscopy allows a doctor to look inside a patient's uterus to diagnose and treat abnormal bleeding.

[3] A pelvic laparoscopy allows for the visual examination of the inside of the uterus using a laparoscope.

[* 3]

Thereafter, on August 16, 2010, Carson spoke to Dr. Brodman and discussed the surgery. At that time she reported that she still had some pelvic pain (*id.* at Exh. E).

At Plaintiff's follow-up appointment in November 2010, she complained of continuing pelvic pain and increased urination. Approximately one month later, a pelvic sonogram revealed two fibroids. Later that month, Carson underwent a CT scan of her abdomen and pelvis, which merely noted a fibroid uterus (*id.*).

On January 2, 2011, Plaintiff underwent a pelvic MRI which showed two submucosal fibroids. Carson met with Dr. Brodman on January 5, 2011 and stated that she wanted surgery to remove the fibroids. At that meeting Dr. Brodman advised against surgery because he did not believe the fibroids were causing her symptoms. He suggested that she first undergo a cystoscopy to determine whether a urinary tract problem was causing her pelvic pain. If the cystoscopy revealed no problems Dr. Brodman stated that he would then schedule surgery to remove the fibroids (myomectomy) (*id.*).

The cystoscopy, which was performed on January 25, 2011, was normal. The assessment after the cystoscopy was that Plaintiff's discomfort was likely due to the pressure from the fibroids (*id.*) and, on February 8, 2011, Dr. Brodman performed the myomectomy. Plaintiff's pre- and post-operative diagnoses were: chronic pelvic pain; endometriosis; fibroid uterus; and right ovarian cyst. In the operative report, Dr. Brodman wrote that he fulgurated[4] the uterosacral ligaments and the endometriosis in

[4] Fulgurating is defined as removing and destroying tissue using high intensity electric current.

the pelvis. He also noted that he fulgurated the base of the cyst and, in the uterus, he dissected out the posterior fibroid and a smaller fibroid (*id.* at Exh. G).

Carson met with Dr. Brodman on February 14, 2011 and reported that she was still in pain. Dr. Brodman noted that she was healing well. Six months later at her post-surgical follow-up appointment, Plaintiff was reportedly doing well and had no complaints (*id.* at Exh. E).

For the next several months, Plaintiff complained of painful menses which, in her estimation, seemed to be getting progressively worse (*id.*). An ultrasound in February 2012 revealed a fibroid that was partially outside the uterine wall and another submucosal fibroid. Carson discussed the findings with Dr. Brodman who suggested trying continuous birth control pills for three months and then reevaluating the situation (*id.* at Exh. J).

In April 2012, Plaintiff had a pelvic sonogram where no fibroids were seen. The report specifically mentioned that the previously seen posterior fibroids were not there (*id.* at Exh. H).

For the next year, Carson saw several other doctors for her symptoms. A sonogram performed in May 2012 revealed endometriosis (*id.* at Exh. M). An ultrasound performed in August 2012 showed a normal uterus with no fibroids (*id.* at Exh. L). Two of the doctors she saw recommended a hysterectomy, but Plaintiff elected not to undergo the procedure.

Thereafter, Carson commenced this lawsuit alleging medical malpractice and failure to obtain informed consent (*id.* at Exh. A). In her bill of particulars, Plaintiff

alleges that Defendants: 1) did not inform her that they failed to remove her uterine fibroids; 2) failed to properly inform her of surgical risks; 3) misrepresented that the fibroids were removed; and 4) failed to advise her of the risk of not removing the fibroids (*id.* at Exh. C). Carson claims that, as a result of these omissions, she sustained the following injuries: chronic pelvic pain; uterine fibroids still present; endometriosis; adenomyosis;[5] uterine scarring; early menopause; likely hysterectomy; depression and anxiety; sleeplessness; and headaches (*id.*).

CONTENTIONS

In support of their motion for summary judgment dismissing the complaint, Defendants argue that they did not depart from accepted medical standards in treating Plaintiff. They submit the affirmation of John Evanko, M.D., a board certified obstetrician and gynecologist who is the Chief Medical Officer at New York Presbyterian -Lawrence Hospital and an assistant clinical professor of Obstetrics and Gynecology at Columbia University College of Physicians and Surgeons, who opines to a reasonable degree of medical certainty that Defendants did not depart from accepted standards in treating Carson (*id.* at Exh. P).

As to Plaintiff's claim that Dr. Brodman failed to remove uterine fibroids, Dr. Evanko opines that Dr. Brodman used sound medical judgment in not removing the small fibroid during the first procedure because Dr. Brodman did not believe that it was causing Plaintiff's symptoms. Dr. Evanko further opines that Dr. Brodman's

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[5] Adenomyosis is a condition in which the endometrial tissue exists within and grows into the uterine wall.

[* 6]

performance, overall, was in accordance with good and accepted medical practice. Dr. Evanko also notes that, during the laparoscopy, Dr. Brodman did not see the submucosal fibroid and, for that reason, it was not removed (*id.*).

As to the myomectomy performed in February 2011, Dr. Evanko explains that Dr. Brodman's removal of the two fibroids is confirmed by the pathological diagnosis of the specimens that were removed. Dr. Evanko further opines, within a reasonable degree of medical certainty, that any fibroids seen on subsequent imaging were either newly developed, or, if present in February 2011, were of such size to have been undetectable (*id.*). Further, Dr. Evanko opines that Plaintiff's claim that, after the first surgery, Dr. Brodman misrepresented that the fibroids had been removed, is belied by the record which demonstrates that the extent of the surgery was discussed with Plaintiff by phone the next day and at the first postoperative visit a few days later (*id.*).[6]

As to Carson's claim that Defendants did not explain the risks of not removing the fibroids, Dr. Evanko points out that the consent forms that Plaintiff signed state that the risks, benefits and alternatives to the surgery were explained and, in addition, the records demonstrate that the risks were explained to her by Dr. Brodman and that she fully understood the explanation (*id.*). Regarding being advised of the results of the surgery, it is Dr. Evanko's opinion that the record reflects that the surgery was discussed with Plaintiff postoperatively and that plaintiff knew beforehand that the purpose of the second surgery was to remove the fibroids. Finally, Dr. Evanko opines

[6] Plaintiff testified that she was not told that the fibroids were not removed after the first surgery (Choi Aff. in Supp. of Motion, at Exh. N, 48-49) and that she was not told about the risks associated with the myomectomy (*id.* at 55-56).

that no departure from the standard of care exercised by the Defendants caused or contributed to the injuries Carson alleges in her bill of particulars.

In opposition to summary judgment, Plaintiff argues that Defendants departed from accepted standards of medical care in treating her. Plaintiff submits the affirmation of Fred Hurst, M.D. (Dr. Hurst), a board certified physician who is a graduate of Columbia University Medical School with over 40 years experience in the field of obstetrics/gynecology (Vandamme Aff. in Opp., at Exh. A). It is Dr. Hurst's opinion that the care Plaintiff received deviated from the good and accepted medical practice for treatment of pelvic pain, fibroids and endometriosis and that these departures caused and contributed to Plaintiff's ongoing pain, recurring fibrosis and endometriosis and that the departures were a substantial factor in causing Plaintiff's alleged injuries (*id.*).

Dr. Hurst lists the following departures from the standard of care: 1) failing to locate and remove the submucosal fibroid during the first surgery when Dr. Brodman believed that it was the cause of Carson's pain; 2) performing a second surgery to remove fibroids when Dr. Brodman believed the surgery to be unnecessary; 3) failure to recognize endometriosis during the first surgery;[7] 4) failure to adequately remove the endometriosis during the second surgery; and 5) failure to prescribe medication to treat endometriosis when it was discovered (*id.*).

It is Dr. Hurst's position that performing a second unwarranted surgery is never the standard of care because surgery is always accompanied by risks and

[7] Dr. Hurst claims that a tissue sample should have been taken that could have been tested for endometriosis and that the endometriosis which was diagnosed in the second surgery was undoubtedly present during the first procedure.

complications and that surgery causes scarring which also increases pain. He also opines that once the endometriosis was discovered the treatment plan should have changed. Dr. Hurst adds that, in his opinion, the second surgery was not properly performed because Dr. Brodman failed to adequately remove the endometriosis; specifically, he did not remove tissue with wide enough margins to prevent the condition from recurring. As a result, he concludes that Carson's condition has worsened and can now be treated only by a hysterectomy.

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562).

In a medical malpractice action, a plaintiff must plead and prove that the defendant departed from accepted practice and that the departure proximately caused the injury (*Elias v Bash*, 54 AD3d 354, 357 [2d Dept], lv denied 11 NY3d 711 [2008]). Therefore, a defendant "moving for summary judgment must make a prima facie

showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to [his/her] alleged departure from accepted standards of medical practice" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]). To defeat the defendant's prima facie case, a plaintiff must produce expert testimony regarding specific acts of malpractice. "In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor" (*id.,* citing *Murphy v Conner*, 84 NY2d 969, 972 [1994]). However, speculative, unsupported assertions by an expert are insufficient to withstand summary judgment (*id.,* citing *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

In this case, the record reveals Plaintiff and Defendants' experts are both board certified in obstetrics/gynecology and have extensive experience in their fields of expertise. In addition, both experts reviewed Carson's medical records and based their opinions upon evidence contained therein. Accordingly, it appears that both are qualified to provide expert opinions (*see id.* at 24-25; *Guzman v 4030 Bronx Blvd. Assoc., L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008] ["whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court . . ."]).

In this case, Defendants established their prima facie case that they were entitled to judgment as a matter of law by submitting Dr. Evanko's affirmation which, based on a review of Plaintiff's medical records, specifically addressed Plaintiff's allegations that Dr. Brodman deviated from accepted medical practice. It was Dr. Evanko's opinion, based on a reasonable degree of medical certainty, that Dr. Brodman

used sound medical judgment in not removing the small fibroid during the first procedure because he did not believe that it was causing Plaintiff's symptoms and that his performance, overall, was in accordance with good and accepted medical practice. Dr. Evanko also notes that, during the laparoscopy, Dr. Brodman did not see the submucosal fibroid and, for that reason, it was not removed. He also opined, to a reasonable degree of medical certainty, based on the record, that the fibroids removed during the myomectomy were either newly formed or so small as to have been undetectable during the laparoscopy. He also reviewed the record and found that both Dr. Brodman's testimony, and the consent forms that plaintiff signed, demonstrated that she was apprised of the risks, benefits and alternatives to both surgeries. He also specifically addressed Carson's endometriosis, opining to a reasonable degree of medical certainty that the cause of endometriosis is unknown but that nothing in the record indicates that Defendants caused or contributed to Plaintiff's alleged endometriosis or adenomyosis.

In response, Plaintiff's medical expert completely contradicts Defendants' medical expert, thereby raising questions of fact about whether Defendants departed from good and accepted medical practice, which questions must be resolved by the finder of fact (*see Schantz v Fish*, 79 AD3d 481 [1st Dept 2010]). Through references to the medical records, Dr. Hurst specifically opines that the laparoscopy and myomectomy were departures from the standard of care in that the submucosal fibroid should have been located and removed during the first surgery; a tissue sample should have been tested to detect endometriosis after the first surgery; and that the removal

and treatment of endometriosis in the second surgery was a deviation from the relevant medical standards.

In this case, the well-qualified experts have reviewed the same materials and reached different opinions. Accordingly, because a battle of experts raises credibility issues and factual questions for the jury to resolve (*see Mitrovic v Silverman*, 104 AD3d 430, 430 [1st Dept 2013]; *Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]), it is

ORDERED that defendants Michael Brodman, M.D. and The Mount Sinai Medical Center's motion for summary judgment dismissing the complaint is denied.

Counsel for the parties are directed to appear for a settlement conference at Part 1, 60 Centre Street, Room 325, New York, New York, on February 9, 2016 at 9:30 a.m.

The foregoing is this court's decision and order.

Dated: January 5, 2016

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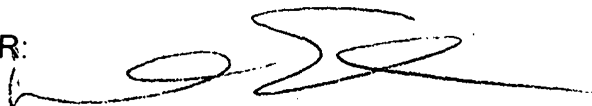

Hon. Martin Shulman, J.S.C.