

Homan v David Seinfeld, M.D., PLLC

2016 NY Slip Op 32261(U)

November 1, 2016

Supreme Court, New York County

Docket Number: 805060/13

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DEBORAH HOMAN

Plaintiff,

Index No. 805060/13

-against -

Motion Seq. No. 001

DAVID SEINFELD, M.D., PLLC and DAVID SEINFELD, M.D.

Defendants.

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SCHLESINGER, J:

Before this court is a motion for summary judgment by defendant doctor, David Seinfeld. He is the sole defendant sued by Deborah Homan who claims that Dr. Seinfeld, her internist/cardiologist failed to timely diagnosis endocarditis during two visits she had with him on March 18 and March 25 of 2011. On March 29 of 2011, Dr. Seinfeld referred Ms. Homan to Lenox Hill Hospital as a result of tests he had received showing the presence of an infection. A transesophageal echocardiogram (TEE) was performed at the Hospital on April 1, 2001 and revealed a .7 (point seven) centimeter vegetation on the right coronary cusp of Ms. Homan aortic valve. This confirmed the endocarditis diagnosis.¹

In support of Dr. Seinfeld's motion is an affirmation from Dr. Jerry Gliklich. He is board certified in internal medicine and cardiology, the same two specialities that the defendant has. He is now affiliated with New York Presbyterian Hospital. Dr. Gliklich's credentials make him qualified to opine in this action.

He informs the court that he has reviewed all of the relevant medical and hospital records, as well as the Bill of Particulars, EBT's of Ms. Homan and Dr. Seinfeld and many

¹At the time the motion was first brought, there were many allegations of malpractice leveled against Dr. Seinfeld. But by the time opposition papers were served by the plaintiff, all of these; not including the alleged delay in diagnosis, were omitted. Therefore, as defense attorney properly points out, these other allegations, such as a lack of informed consent and negligent hiring and supervision should be dismissed and they are.

other records of the plaintiff's treating doctors and her endodontist, Dr. Randolph Todd. He also states that he has practiced more than 35 years in his specialty, 75% of which is devoted to cardiology. By so doing, he has treated several thousand patients with heart murmurs of all grades and he has also diagnosed and treated at least 100 patients with endocarditis.

All the opinions Dr. Gliklich provides, he says, are with the requisite reasonable degree of medical certainty. The first part of the doctor's affirmation deals with Ms. Homan's heart murmur, one diagnosed by the defendant at her first visit with him, one he characterized as a Grade I out of six grades, I being the least serious. This was about 8 years before she was diagnosed with the endocarditis. This heart murmur was one, he never heard again. His opinions, therefore about that original murmur, I believe, are no longer relevant to the issues now extant in this motion. So I will spend no further time on it.

Dr. Gliklich, not surprisingly opines that nothing Dr. Seinfeld did or failed to do caused any injury to Ms. Homan. Nor did the defendant commit malpractice, he states, in not diagnosing endocarditis until the end of March, 2011. As to the visits Ms. Homan had with the defendant on March 18 and March 25, this expert says the patient had no symptoms relevant to endocarditis on those days and that it wasn't until Dr. Seinfeld received a phone call on Monday, March 29 with test results, that he had reason to believe Ms. Homan was suffering from an infection.

Specifically at the two March visits, Ms. Homan had no complaints of fever, weight loss or shortness of breath. These are symptoms that might give rise to including endocarditis in a differential diagnosis. But without them, there would not be a basis for doing that. Also, Dr. Gliklich asserts that the short time frame between March 18, 2011

and March 31, 2011, when the endocarditis was diagnosed, would have made no difference in her treatment or the course of the disease. He opines, in this regard, that her later hip pain and surgery was not connected to the endocarditis and points out that during the hip surgery, no pus was seen and that there were no signs of infection. Therefore he believes it was completely unrelated to the endocarditis.

The issue of a February 15, 2011 appointment with Dr. Seinfeld is then discussed. The issue is did Ms. Homan actually see Dr. Seinfeld that day or not. The doctor has no record of such a visit. Nor does he recall it. But Ms. Homan did testify, under oath, that she did see Dr. Seinfeld then with complaints of a runny nose, sore throat, chills and exhaustion. In fact, Ms. Homan remembers, it was the worst sore throat she had ever had. She also stated that in response to these symptoms, Dr. Seinfeld prescribed a Z-pack antibiotic which she filled on February 17 at her local pharmacy, Irmat Pharmacy and she was able to show this prescription at her deposition. Dr. Gliklich assumes, for purposes of his affirmation, that the February 15, 2011 visit occurred. Yet he says these symptoms that she had then are also unrelated to endocarditis.

Finally the expert for the defendant notes that after the hospitalization, Ms. Homan developed an infection from her PICC line. He points out that the relationship between Homan and Seinfeld had ended by then. Also this infection, pursuant to the records, was a complication of the necessary antibiotic therapy that she was prescribed.

Dr. Gliklich concludes by briefly touching on earlier events before 2010 and whether prophylactic drugs should have been prescribed by Dr. Seinfeld before Ms. Homan's dental care. He also opines that there is no validity here to the lack of informed complaint allegation. But, as noted earlier, it became clear in plaintiff's opposition papers that these other claims were no longer being made. Therefore, they will be dismissed. Does this

expert succeed in making out a prima facie case on behalf of Dr. Seinfeld? I find he does. He has proper credentials to opine on the relevant issues and he does so in a clear and complete manner. So under these circumstances, the burden shifts to the plaintiff. She must show that, with regard to the remaining claim, Dr. Seinfeld's alleged failure to timely diagnose and treat Ms. Homan's endocarditis, making the condition worse or less amenable to treatment, continues to have viability. In other words, the plaintiff must show there are issues here which cannot be resolved as a matter of law.

Plaintiff attempts to do this by submitting her own expert's statement. She presents an affidavit from an unidentified physician who appears to be well credentialed and qualified to opine on the issues in this action. He/she is a graduate of Cornell University Medical College, with a residency at Mount Sinai Medical Center as well as a Fellowship there in Cardiology. He/she has been associated with most of the major New York City Hospitals and his/her academic appointments are with leading New York City Medical Schools. In that regard, he/she is presently a Clinical Associate Professor of Medicine at Columbia University Medical School. Like both Doctors Seinfeld and Gliklich, his/her practice is confined to internal medicine with a speciality in cardiology. Also similar to these doctors, he/she states he/she has diagnosed and treated endocarditis, what Ms. Homan was afflicted with, "on multiple occasions during my long career." (¶2)

He/she has reviewed all of the relevant medical and hospital records, as well as the deposition transcripts of the parties. He/she has also reviewed Ms. Homan's current treating cardiologist records and the N.Y.U. Langone admission records from May and December 2011. His/her lengthy affidavit of more than 20 pages begins with the opinion that, with a reasonable degree of medical certainty, Dr. Seinfeld did depart from good and accepted medical practice in the treatment of plaintiff and that defendant's departures were

a substantial factor in causing injury to her. (¶15)

The expert first discusses the controversial February 15, 2011 visit by Ms. Homan to Dr. Seinfeld, the one the defendant has no record of. What is important about it is that the antibiotic Dr. Seinfeld prescribed was for an infection and according to this doctor "most commonly, upper respiratory, which includes sore throat, the complaint Deborah Homan testified she woke up with on February 14, 2011" (¶13) As noted above, there is no record of this complaint or Dr. Seinfeld's intervention in his records. This expert characterizes this as a departure from good and accepted medical practice, as well as from his (the defendant's) own custom and procedure of writing down relevant details. What's important to the issue of diagnosing endocarditis is that when Ms. Homan made her next visit to Dr. Seinfeld on March 18, 2011, there was nothing in his chart for him to refer to as to her recent medical history. The expert says that in addition, on March 18, the defendant failed to take a complete or adequate medical history as part of his evaluation. In this regard, this doctor points to a four page document signed by Dr. Seinfeld upon the plaintiff's admission to Lenox Hill Hospital. Specifically item numbered two reads, in part, "high suspicion for endocarditis with six weeks of low grade fevers" (¶21). That would bring it back to a time in February.

At the March 18, 2011 visit, Dr. Seinfeld wrote that Ms. Homan, his patient was "complaining of pleuritic pain, left infra-mammary area radiating to the left subscapular area, no rash, no recent URI" (¶25) The expert comments that this last entry about "no recent URI" (upper respiratory infection) was erroneous. He also criticizes the defendant's failure to note "when the chest pain began, whether it was constant, intermittent or otherwise" (¶27)

There was also a new heart murmur, at a different place, in Ms. Homan's heart.

The expert opines that the murmur taken together with her chest pains and the recent antibiotic therapy, required Dr. Seinfeld to send Ms. Homan “for an immediate echocardiogram to rule out potential bacterial endocarditis, and to undergo blood testing; including a complete blood count (CBC) and erythrocyte sedimentation rate (ESR)” (¶29). All of these events, including the February 15th visit, required Dr. Seinfeld to include in his differential diagnosis that Deborah Homan was suffering from an infectious process, including bacterial endocarditis. This failure was a departure from the standard of care, and according to this expert resulted in injury to Ms. Homan (¶33)

It is the elaboration of this point that introduces the subject of the size of the mobile vegetation on Ms. Homan's right coronary cusp. The vegetation was first observed on a TEE of April 1, 2011. This doctor's quotes from its report as “mobile vegetation on the right coronary cusp of the aortic valve measuring up to 7cm” (¶34). This size is important to the opposition affidavit as it leads the expert to describe Dr. Seinfeld's office evaluation of March 18, 2011 leading to his failure to diagnosis for about two weeks as “medically unreasonable and unrealistic” (¶35) In furthering this point, this doctor again refers to the April 1, 2011 TEE and its finding of “mobile vegetation...measuring up to 7cm”. He/she continues and states,

The development of this massive vegetation was the consequence of the above mentioned 2 week delay in diagnosing Deborah Homan with bacterial endocarditis. During those two weeks the uninhibited growth of bacterial was exponential in its progress. Within a reasonable degree of medical certainty, the size of the same vegetation on or about March 18, 2011 would have been exponentially smaller (under 1cm in size) (¶37)

So the expert opines that if the plaintiff had been given a CBC and ESR on or about March 18, 2011; the results would have revealed an ongoing blood infection, most likely “positive for the streptococcus bacteria that had been infecting her” (¶38) Then the endocarditis would have been successfully treated medically, solely by the administration

of I.V. antibiotics and she would have been cured of endocarditis without residual” (¶41). In fact, as detailed in the paragraph that follows, Ms. Homan had a prolonged, persistent infection requiring extensive chest surgery and other significant complaints and complications.

There is also a major difference between the experts of what was the cause of problems with the plaintiff’s right hip requiring surgery on April 2, 2011. Dr. Gliklich attributes this to an inflammatory hip not related to an infection process while this doctor criticizes that opinion as “without merit and inconsistent with all of the facts of this case.”(¶44) This doctor believes, within the requisite standard, that Dr. Seinfeld’s failure to diagnose an infection on March 18, 2011 was a “substantial factor in causing, permitting and allowing the infectious organism to seed in her right hip requiring the operation of April 2, 2011 at Lenox Hill Hospital” (¶46). He/she then elaborates at length.

On March 25, 2011, Ms. Homan again had a visit with Dr. Seinfeld. She told him she had gone to St. Francis Hospital ER the day before for right groin pain and feeling generally ill. Dr. Seinfeld noted that the Hospital’s CBC revealed an elevated white blood count. The physical examination by Dr. Seinfeld revealed “severe pain on extension of the right quadriceps and abductors.” Dr. Seinfeld was considering Lyme Disease or rheumatologic ailments but again failed to consider endocarditis and even failed on that day to listen to Ms. Homan’s heart with a stethoscope. The expert finds continued departures by these omissions. Further, this doctor believes the departures resulted in a more extensive and substantial endocarditis “with excessive vegetation growth and anchoring described as mobile vegetation on the right coronary cusp of the aortic valve measuring up to 7cm on the April 1, 2011 transesophageal echocardiogram” (¶61)

Finally this expert explains how endocarditis was ultimately diagnosed with input

from Dr. Randy Todd, Ms. Homan's endodontist and his computer's medical website. The plaintiff called him on March 30 and related her symptoms. He then advised her she had endocarditis and told her to call her doctor immediately, which she did. The following day, after a blood culture revealed gram positive cocci, ultimately determined to be a streptococcus bacteria, Dr. Seinfeld had her admitted to Lenox Hill Hospital.

Does the above succeed in sufficiently countering the defense motion? It does not. As pointed out by counsel in the Reply, because of a significant misreading of the April 1, 2011 TEE by the expert, there is virtually no proof that on March 18, at Ms. Homan's visit with Dr. Seinfeld that, she even had endocarditis, a very significant predicate finding. This is because the TEE documented a .7 (point seven) centimeter vegetation on the right coronary cusp of Ms. Homan's aortic valve, not the 7 (seven) centimeter vegetation that the plaintiff's expert relied upon. In other words, the opposing doctor enlarged the size of the vegetation 10 times. Counsel argues, since the record shows that when the diagnosis was made, the vegetation was only .7 in size, less than 1cm, the size the expert says it would have been on March 18 if diagnosed. "Thus, counsel says, all of the experts' opinions as to proximate cause must fail" (pg 3 of Reply)

At oral argument on June 1, 2016, counsel for Ms. Homan urged the court to allow her expert to correct and explain "an unintentional omission, the "missing decimal point," "a typo". In the interests of justice, I allowed a Sur Reply from plaintiff and a Sur-Sur Reply from the moving party, the defense.

In plaintiff's Sur Reply, her expert must and does acknowledge his/her error. He/she points out, as this court had noted, that at various paragraphs in the earlier affidavit, he/she had misstated the size of the vegetation, "an unintentional omission of a decimal point" (§4). However, he/she states that despite this error "all of my opinions remain the same

as referenced in my prior affidavit" (§15). This is so because the expert insists that the original opinions were in fact based on the much, much smaller size of the vegetation reported on the April 1, 2011 TEE.

This doctor tells me that a TEE can detect vegetations as small as 0.1cm in size. He/she then opines, with a reasonable degree of medical certainty, that the 0.7cm of vegetation on the April 1, 2011 TEE "is strong and compelling evidence that a vegetation existed on the aortic valve on March 18, 2011" (§16). The doctor explains his/her belief that a cardiac work up on March 18 would have shown this. He/she then for the first time urges that the heart murmur heard by Dr. Seinfeld on March 18, together with further descriptive language on the April 1, 2011 TEE, as to "moderate aortic regurgitation" of the left coronary cusp, evidences that there was endocarditis present and detectable on March 18. It should be noted this is a new and different rationale for the presence of this infection on March 18, a critical issue in this action. He/she concludes by opining that "had Dr. Seinfeld ordered an immediate echocardiogram it would have shown some evidence of an aortic valve vegetation-much smaller than the one ultimately identified...The basis of this opinion is simple.." Because an untreated and active bacterial infection in a patient's blood permits the bacteria to grow and "spread exponentially throughout the body" (§14)

But of course, the critical issue here is whether there is solid evidence to show that the infection was, in fact present on March 18. The expert suggests that it was and could have been as small as 0.1cm in size and detectable by a TEE. But as rebutted, successfully by Dr. Jerry Gliklich, defendants' expert in his Sur-Sur Reply affirmation, plaintiff's expert had no basis to conclude that the size of the vegetation was 0.1 centimeters on March 18, twelve days before it was 0.7 centimeters. He elaborates on this by tracing the actual growth of the vegetation as shown on subsequent TEE reports of

April, June and August 2011. In those four months, it goes from .7cm to 1.1cm, a less than 60% increase in size. How then, he asks, can the expert claim reasonably that in only 12 days, it increased from 0.1 to 0.7 or by 600%. Dr. Gliklich concludes his affirmation in this way, referring to the above:

Such speculation is beyond wild, it is absurd and surely cannot be deemed to raise a triable issue of fact sufficient to defeat my detailed opinions as to why the alleged 12 day (or 6 day or 2 day) delay made absolutely no difference in the treatment outcomes for this patient with bacterial endocarditis...(Final ¶, page 4)

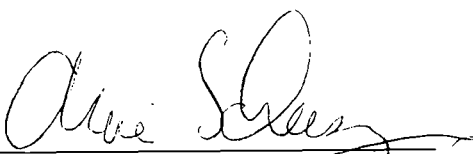
Additionally, Dr. Gliklich cites to three medical articles reflecting how vegetations are sized and when surgery is generally indicated. He points out that it is only when the size is over 10mm and in Ms. Homan's case, the size was ultimately 1.1cm that surgery is recommended. This illustrates the conclusion that treatment would not have differed during the twelve day alleged delay.

Finally, whether the plaintiff expert's affidavit was merely a typographical error, involving decimal points or something more substantive, as defense counsel suggests in her reference to the earlier affidavit's description of the vegetation on April 1, 2011 as "massive", the more significant point is that I cannot find any reliable evidence that the infection was present on March 18 and further if it was, was detectable. That being the case, I must conclude that the plaintiff insufficiently challenges the defendant's position that Dr. Seinfelds' care on either of the dates he saw Ms. Homan in March, 2011, was deficient and more important, made any difference in her treatment for endocarditis.

As stated earlier, since I found that a prima facie case was made out by Dr. Seinfeld and not adequately rebutted by the plaintiff, the defendant is entitled to summary judgment in his favor. The motion is therefore granted and the action is dismissed.

Accordingly, it is hereby ORDERED that defendant's motion for summary judgment is granted, and the complaint in this matter is therefore dismissed with prejudice. The Clerk is directed to enter judgment in the defendant's favor accordingly without costs or disbursements.

Date: November 1, 2016


Alice Schlesinger, J.S.C.