Barnum v Maramag
2019 NY Slip Op 34118(U)
November 21, 2019
Supreme Court, Onondaga County
Docket Number: 2017EF1407
Judge: Donald A. Greenwood
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on November 19, 2019.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

KAREN R. BARNUM,

Plaintiff,

v.

CORAZON Y. MARAMAG and COMMUNITY GENERAL HOSPITAL OF GREATER SYRACUSE,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2017EF1407
RJI No.: 33-19-0446

APPEARANCES: **PETER H. STOCKMANN, ESQ.**
For Plaintiff

JEFFREY M. NARUS, ESQ., OF SUGARMAN LAW FIRM, LLP
For Defendant Corazon Y. Maramag

The defendant Corazon Maramag moves for summary judgment dismissal of the complaint against her which alleges medical malpractice dating back to 1984.[1] The bill of particulars alleges that the defendant anesthesiologist administered an epidural catheter into the epidural cavity of plaintiff's spine during childbirth and that the front portion of the catheter broke off or was cut off while being improperly removed by defendant. The plaintiff alleges a theory of *res ipsa loquitur*. As the proponent of the motion, the defendant has met her burden of

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[1] The complaint alleges that defendant Maramag practiced medicine at defendant Community General Hospital and that she acted at the approval, direction and oversight of the defendant hospital with respect to the allegation. Plaintiff filed an affidavit of service only with respect to Maramag and it appears that the hospital was never served.

presenting factual proof to rebut plaintiff's claim of malpractice by establishing that she complied with the accepted standard of care or did not cause injury to the plaintiff. *See, Isensee v. Upstate Orthopedics, LLC*, 174 AD3d 1520 (4th Dept. 2019). She has likewise shown that the foreign object was not the cause of the plaintiff's pain. Even where a plaintiff raises an issue of fact regarding an alleged deviation of the standard of care, a physician can still succeed on a motion for summary judgment by establishing the alleged deviation was not the cause of plaintiff's injuries. *See, O'Shea v. Buffalo Medical Group, P.C.*, 64 AD3d 1140 (4th Dept. 2009). The defendant has provided the expert affidavits of Scott B. Groudine, M.D. and E. Mark Levinsohn, M.D., who both have reviewed all of plaintiff's medical records and detail the delivery at issue in its entirety. Levinsohn, a radiologist for forty years, and Groudine, who has practiced anaesthesiology for over thirty five years, both opine that this defendant did not deviate from the standard of care.

Those records and the experts' review thereof show that plaintiff was administered epidural anesthesia by defendant during her labor and was subsequently discharged in May of 1984. Plaintiff did not experience any back pain following the epidural while in the hospital or after her discharge. In September of 1994 plaintiff was hospitalized for a brain aneurysm, where she underwent a left craniotomy for clipping the aneurysm. The anesthesiologist at that time placed a drain in the plaintiff's lumbar spine and following a lengthy procedure, the lumbar drain was then removed from plaintiff's spine. During the course of this admission, plaintiff underwent multiple lumbar punctures. Plaintiff then transferred from to another hospital where she remained until October of 1994. Following the discharge she did not experience any back pain. In June of 2011 plaintiff underwent a total left knee replacement. During this procedure she received both

spinal and general anesthesia, with the spinal anesthesia administered at the L3-L4 level of the spine. The records indicate that she did not experience any back pain following that discharge. Plaintiff then underwent a total right knee replacement in September of 2013. Those records indicate that the initial plan was for the administration of both general and spinal anesthesia prior to the procedure. At that time, plaintiff signed a consent form listing the risks of the spinal anesthesia, including "problems relating to catheter placement." During the administration of anesthesia, multiple unsuccessful attempts were made at administering spinal anesthesia. Ultimately, general anesthesia was administered and the procedure was successfully completed. There was no indication that plaintiff experienced any back pain after the knee replacement. The medical records show that from 2004 to 2015 plaintiff experienced some back pain and she testified at her deposition that in late 2015 or early 2016 she began to experience more consistent pain and her chiropractor ordered an x-ray of the lumbar spine. The x-ray showed osteopenia and degenerative disc disease. The records show that plaintiff was seen for an evaluation for low back pain and was diagnosed with spondylosis without myelopathy or radiculopathy of the lumbosacral region and a CT scan of her lower back was ordered. In May of 2016, the scan showed that disc spaces were severely narrowed at L1-2, L2-3 and L5-S1. The CT scan also showed disc bulges throughout the lumbar spine and further found "an abandoned wire at the L3 level posteriorly on the right." Plaintiff was then seen by a neurosurgeon, who opined that the object was likely a remnant from a lumbar drain placement or epidural catheter placed during pregnancy. No clinical symptoms were found and further treatment was not recommended. Three months later, plaintiff was evaluated for lower back pain and was diagnosed with lumbar stenosis and lumbar spondylosis with radiculopathy with mild degenerative disc disease of the lumbar

spine. It was noted that because of her multilevel disc height loss it was difficult to determine what was causing her pain and it was determined that surgical intervention to remove the foreign object was not recommended as it was not believed to be the cause of her pain. A second CT scan of plaintiff's lumbar spine in June of 2017 resulted in the diagnosis of extensive degenerative disc disease, spinal stenosis and possible impingement on the nerve roots due to spondylosis. A third CT scan in December of 2018 revealed progression of multilevel disc degeneration, with no reference to the foreign object.

In his expert affidavit, Levinsohn opines that it is impossible for a radiologist to find that the object visualized on the May of 2016 scan was an epidural catheter from plaintiff's 1984 delivery, noting that after reviewing all of the images and reports, other than determining that the foreign object is radio-opaque, there are no other identifying marks which can been seen and that there is also no local reaction to the foreign object. He therefore concluded that it was impossible for a radiologist to opine that the foreign object had been in plaintiff's spine for a specific period of time. He also notes that plaintiff had multiple leads and catheters in her lumbar spine, most relevantly the 1994 lumbar procedure. He further opines that while the foreign object is located in the epidural space, that does not, as plaintiff's claims, mean it came from an epidural catheter as any catheter in the lumbar spine, such as a lumbar drain, must pass through the epidural space into the intradural space and must then exit back through the epidural space. Because plaintiff also had a lumbar drain placed and the foreign object had no identifying marks, in Levinsohn's opinion it is impossible for plaintiff to prove that the foreign object seen on the May of 2016 scan is from the 1984 epidural and not from the 1994 lumbar drain placement. He also opines that the object is not the cause of plaintiff's symptoms. He notes that plaintiff's

injuries and damages are low back pain with radiation. As the May of 2016, June of 2017 and December of 2018 scans all show, plaintiff has extensive degenerative changes at nearly every level of her lumbar spine. He references the last scan, where a 3D image was taken of her spine, which shows the extensive nature of the degenerative changes, including the loss of nearly all of the disc height and autofusion of multiple disc levels. He therefore opines that such degenerative changes at any level could cause plaintiff's back pain and that those changes exist at multiple levels. He further notes that the foreign object would not cause radiating pain, which results from compression or pressure of the nerve roots. It is further his opinion that the foreign object is not causing any compression on the nerve root and is not touching it. However, there are osteophyte complexes located on the facets at the L3 level, which are impinging on the L3 nerve root. He therefore opines that these complexes and their corresponding compression of the nerve root would result in radiating pain as plaintiff is experiencing.

Likewise, Groudine in his expert affidavit opines that this defendant did not deviate from the standard of care with regard to the administration of the 1984 epidural. He indicates that the standard in 1984 required the anesthesiologist to identify an area of the lumbar spine below the L2 vertebrae to administer the epidural, and then insert the catheter into the epidural space ensuring the catheter does not break in the process. According to Groudine, defendant complied with the standard of care and placed the catheter at L3-4. He also opines that defendant did not break the catheter tip off when administering the epidural, noting that if a catheter tip breaks during the administration the anesthesia, it would not properly work. The medical records show that the epidural was administered without issue and was effective. In addition, he notes that the catheter can be removed by an anesthesiologist, a nurse anesthetist or other properly credentialed

professionals and the medical records and testimony do not indicate who removed the catheter but they indicate a normal anesthetic course which would be indicative of an uneventful removal of the catheter. Groudine also opines that a catheter tip, drain, needle or wire may become broken during removal or insertion despite the physician or nurse complying with the standard of care and that the fact that a tip, drain, needle or wire broke does not mean the provider was negligent. Moreover, when a catheter tip, drain, needle or wire is retained in a patient's spine, the standard of care does not require immediate removal of same. Rather, the object can remain inside the patient's back unless it causes pain, nerve impingement or other symptoms. He notes that plaintiff was not experiencing any back pain after the 1984 epidural or the 1994 lumbar drain and that the numerous other catheters and needles in her lumbar spine that could be the cause of the foreign object. In his opinion, given the number and different forms of anaesthesia and drains plaintiff has had in her lumbar spine, defendant did not have exclusive control over the mechanism or instrumentality which resulted in a foreign body appearing in plaintiff's spine. He also notes that one of the spinal drains could be the foreign object in plaintiff's spine which broke upon passing through the epidural space on insertion or removal and that it is impossible for any anesthesiologist to say with a reasonable degree of medical certainty given plaintiff's extensive history that the foreign object came specifically from the 1984 catheter. He also opines that the object seen on the May of 2016 scan is not the cause of plaintiff's pain. He notes that plaintiff had been seen by two neurosurgeons in August of that year and that their reports note the object was not the cause of her pain and neither recommended any intervention with regard to the foreign object.

Defendant has thus established through her submissions that the plaintiff cannot prove that the foreign object is from the 1984 epidural without improper speculation as she had multiple catheters, drains, needles or other objects place in the lumbar spine. The defendant has likewise established that a radiologist cannot state with medical certainty that the foreign object was in fact the 1984 catheter, and that there was no local reaction to the foreign object. Defendant has shown that based on these facts and plaintiff's history it cannot be stated with a reasonable degree of medical certainty that the foreign object is the 1984 catheter and any opinions that it is possible for the foreign object to be that catheter is conclusory and speculative and cannot defeat defendant's motion for summary judgment. *See, Chase v. Cayuga Medical Center at Ithaca, Inc.*, 2 AD3d 990 (3rd Dept. 2003).

In addition, the defendant has also shown that plaintiff cannot sustain her case pursuant to a theory of *res ipsa loquitur,* which requires a showing that the event is of a kind that ordinarily does not occur in the absence of someone's negligence, that it must be caused by an agency or instrumentality within the exclusive control of the defendant and it must not have been due to any voluntary action or contribution on the part of plaintiff. *See, See, James v. Wormuth*, 21 NY3d 540 (2013). Defendant has shown that plaintiff cannot establish that the event causing the injury was the result of the negligence or that this defendant was in exclusive control of the instrument causing the injury based on the medical records and expert opinions. The records show that this defendant was not in exclusive control of the instrumentality allegedly causing the injury and the fact that she placed the epidural is not evidence that she was in control of or removed the epidural, which alone is sufficient to establish her proof on this element. *See, James, supra.*

Inasmuch as defendant has met her burden in the first instance, the burden shifts to the plaintiff to raise an issue of fact. Plaintiff, however, has failed to do so inasmuch as she has failed to submit evidentiary facts in admissible form to show that the defendant both deviated from the standard of care and was a cause of plaintiff's injuries. *See, Isensee, supra.* Plaintiff provides two affidavits from herself, which contains two charts which summarizes her spinal treatment and her five childbirths respectively, as well as information from the internet regarding the procedure at issue. These submissions do not, however, refute the expert opinions offered by the defendant. Nor do the two separate affidavits from Dr. Geoffrey Negin, a Board Certified Radiologist, who reviewed three studies provided by plaintiff. Nowhere in either affidavit does Dr. Negin indicate that he reviewed all of plaintiff's relevant medical records. These affidavits do not satisfy plaintiff's burden as "the ultimate assertions are speculative or unsupported by any evidentiary foundation"; they contain only general allegations of malpractice unsupported by competent evidence establishing the essential elements of medical malpractice and are insufficient to defeat a defendant's motion for summary judgment. *Occhino v. Fan*, 151 AD3d 1870 (4th Dept. 2017), *quoting, Diaz v. New York Downtown Hosp.*, 99 NY2d 542 (2002). As such, the affidavits do not satisfy plaintiff's burden to submit a physician's affidavit that is nonconclusory and supported by an evidentiary foundation. *See, Bagley v. Rochester General Hospital*, 124 AD3d 1272 (4th Dept. 2015); *see also, Golden v. Pavlov-Shapiro*, 138 AD3d 1406 (4th Dept. 2016). Nor has Dr. Negin discussed the standard of care in 1984 and provides no basis for his understanding through training and experience. Instead, he relies on a 2018 article regarding the performance of catheter removals by nurses and not doctors, which makes no reference to 1984 standards for an anesthesiologist in 1984. Therefore, Dr. Negin's affidavits fail to satisfy the requirement of

providing the applicable standard of care and how it was breached. *See, Golden, supra.* As a result, they are insufficient to defeat the defendant's motion and the opinions he provides are based on speculation without evidentiary foundation. *See, Webb v. Albany Medical Center*, 151 AD3d 1435 (3rd Dept. 2017). While the medical records show that defendant administered the epidural, there is no evidence supporting Negin's speculation that she also removed the catheter. In addition, Dr. Negin fails to refute Dr. Groudine's opinion that the epidural was removed consistent with the standard of care based on the medical records.

The Negin affidavits likewise fail to raise an issue of fact as to whether defendant's alleged malpractice was the cause of the plaintiff's injuries. In opposition to a motion for summary judgment, the plaintiff must demonstrate how the defendant deviated from the standard of care and that the deviation was a proximate cause of plaintiff's injuries. *See, Chillis v. Brundon*, 150 AD3d 1649 (4th Dept. 2017). Because the Negin affidavits offer only speculative and conclusory opinions, they are insufficient to meet that burden. *See, O'Shea, supra.* Nor does Negin advance any opinion with supporting foundation to dispute Levinsohn's opinions that: the foreign object was not the cause of any of plaintiff's injuries; the images show the foreign object was not touching any of the nerve roots where the osteophyte complexes are clearly compressing the nerve root; and the foreign object was not causing the symptoms but rather it was the osteophyte complexes. Negin offers a vague opinion that pain caused by the catheter could not be ruled out. As this is not an opinion rendered with a reasonable degree of medical certainty that the foreign object was a proximate cause of plaintiff's injuries, it is insufficient to create an issue of fact. *See, Thompson v. Orner*, 36 AD3d 791 (2d Dept. 2007).

In addition, plaintiff fails to meet her burden of demonstrating an issue of fact regarding the *res ipsa* theory. Defendant established *prima facie* entitlement to summary judgment dismissal through the expert opinions and Negin responds only that "negligence is evident", that defendant was the anesthesiologist of record and thus must be responsible and that defendant did not need to have exclusive control over the specific procedure which allegedly caused the injury because she was in control of the anesthesia process generally. That argument, known as the "captain of the ship" theory has been rejected by the Court of Appeals. *See, James, supra*.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the motion for summary judgment dismissal of defendant Corazon Y. Maramag, M.D. is granted in its entirety, and it is further

ORDERED, that the trial date of April 20, 2020 is hereby vacated.

ENTER

Dated: November 21, 2019
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion for Summary Judgment, dated September 19, 2019.

2. Affirmation of Jeffrey M. Narus, Esq. in support of defendant's motion, dated September 19, 2019, and attached exhibits.

3. Affirmation of Scott B. Groudine, M.D. in support of defendant's motion, dated September 5, 2019, and attached exhibits.

4. Affidavit of E. Mark Levinsohn, M.D. in support of defendant's motion, dated September 13, 2019, and attached exhibits.

5. First Affidavit of Plaintiff, dated October 17, 2019.

6. Second Affidavit of Plaintiff, dated October 17, 2019.

7. First Affidavit of Geoffrey A. Negin, M.D., dated October 17, 2019.

8. Second Affidavit of Geoffrey A. Negin, M.D., dated October 17, 2019.

9. Reply Affirmation of Jeffrey M. Narus, Esq., dated November 1, 2019.

10. Rebuttal Affirmation by Plaintiff to the Reply Affirmation of Defendant, dated November 3, 2019.