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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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JAMES E. MILLER

Index №. 805041/2015

Plaintiff

-against-

THE MOUNT SINAI HOSPITAL, KALMON D. POST, M.D., and EMANUELA BINELLO, M.D.,

Defendants

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HON. GEORGE J. SILVER:

In this medical malpractice action, defendants THE MOUNT SINAI HOSPITAL ("Mount Sinai"), KALMON D. POST, M.D. ("Dr. Post"), and EMANUELA BINELLO, M.D. ("Dr. Binello")(collectively "defendants") move, pursuant to CPLR §3212, for summary judgment and an order dismissing the complaint of plaintiff JAMES E. MILLER ("plaintiff") as against them. Plaintiff opposes the application.

BACKGROUND

This lawsuit arises from defendants' purported breach of the applicable standard of medical care by failing to fully and accurately explain to plaintiff the risks of pituitary surgery, and by failing to communicate alternative treatments that were available before performing the surgery at issue on August 2, 2012. Plaintiff also makes ancillary claims regarding how the surgery at issue was performed.

Plaintiff was 22 years old when he was first diagnosed with Cushing's disease in 2011. Cushing's disease (aka ""hypercortisolism") is a relatively rare, but very serious, hormonal disorder caused by prolonged exposure of the body's tissues to high levels of the hormone cortisol. Cortisol, which is produced in the adrenal glands, and plays a variety of roles in the body. Cortisol helps regulate blood pressure, reduces inflammation, and keeps the heart and blood vessels functioning normally. Cortisol also helps the body respond to stress and regulates the way the body converts (metabolizes) proteins, carbohydrates and fats into usable energy. Pituitary adenomas, which are benign tumors, cause most cases of Cushing's Disease, though there are other potential causes as well. The pituitary tumor secretes adrenocorticotropic hormone (ACTH), which overstimulates the production of cortisol, resulting in Cushing's Disease. Surgery is often performed to remove pituitary adenomas causing Cushing Disease. However, there are other treatment options, including medical management, radiation therapy and removal of the adrenal glands (adrenalectomy), that are also sometimes recommended and administered.

Plaintiff's Cushing Disease was treated by Dr. Post, a neurosurgeon at Mount Sinai. In this lawsuit, plaintiff claims that Dr. Post failed to properly perform pre-operative testing to confirm the existence and site of plaintiff's pituitary-based adenoma, and failed to properly perform surgery to remove the pituitary adenoma on two occasions (July 2, 2012 and August 2, 2012).[1] Plaintiff also claims that Dr. Post removed too much of plaintiff's pituitary during the second of the two surgeries, and failed to provide a proper informed consent prior to the performance of that surgery. Both surgeries were performed at Mount Sinai.

ARGUMENTS

In support of the instant motion, defendants annex the affirmation of neurosurgeon Edward Laws, M.D. ("Dr. Laws"), a board-certified physician who opines that the care rendered by defendants was entirely proper and that any claimed negligence did not proximately cause any of plaintiff's alleged injuries. Dr. Laws explains that proper pre-operative testing was performed in connection with plaintiff's previously diagnosed Cushing's Disease based upon various clinical signs and symptoms as well as other testing which demonstrated significantly elevated cortisol levels.

Dr. Laws further affirms that that the testing in this case, called IPSS (Inferior Petrosal Sinus Sampling), resulted in significantly highly abnormal levels, particularly on the right side of the pituitary. As such, Dr. Laws opines that the testing was essentially conclusive as to the existence of a pituitary source of plaintiff's Cushing's Disease and it being more predominantly right-sided rather than left-sided.

While other treatment options are available, absent a contraindication to do so (there were none here), Dr. Laws submits that the decision in this case to recommend and perform the initial attempt at locating and removing the pituitary adenoma surgically was entirely proper. In fact, Dr. Laws submits that Dr. Post properly performed the initial surgery, and removed a certain amount of tissue as well as what he believed to be a tumor intra-operatively. While Dr. Post's initial pathology was ultimately found negative for tumor, Dr. Laws opines that as per the standard of care, a recommendation by Dr. Post to perform a second attempt at removing the tumor was entirely appropriate. Indeed, Dr. Laws observes that Dr. Post appropriately recommended that he perform this second surgery within about one (1) week because scar tissue can develop if a patient waits too long to have the second surgery, which can make it more difficult to perform a re-operation and more difficult to locate and remove tumor, if found at all.

Based on his review of the medical records, Dr Laws submits that Dr. Post provided a proper and full informed consent to plaintiff and his parents. Dr. Laws notes that since plaintiff was only 22 at the time of the surgery, the record reveals that his parents, particularly his mother, were heavily involved in the discussions about the disease process, the recommendation for treatment, the discussions concerning surgery and the informed consent discussions. Dr. Post also

[1] The first of the two surgeries, performed on July 2, 2012, is not at issue.

testified that he spoke to plaintiff about the success and complication rate involved with performing the surgeries, including the potential complication of hypopituitarism.[2]

Defendants argue that rather than going forward with Dr. Post's recommendation to promptly undergo a repeat surgery, prior to the formation of scar tissue, plaintiff, at the insistence of his parents, particularly his mother, decided to seek out a second opinion and went to see physicians at the Mayo Clinic at the end of July, 2012, nearly four weeks after the initial surgery. At Mayo Clinic, plaintiff was seen by an endocrinologist and surgeons who confirmed that plaintiff had a pituitary-based tumor, and gave him the same options as did Dr. Post, including not performing surgery, performing a re-operation, performing an adrenalectomy or undergoing radiation treatment.

While initially agreeing to undergo an adrenalectomy at Mayo Clinic, which was scheduled for August 2, 2012, plaintiff changed his mind and instead opted for a re-operation with Dr. Post, which coincidentally was then scheduled for, and performed on, August 2, 2012. During the second surgery, Dr. Post searched, manipulated and removed additional pituitary tissue, but did not locate a tumor. Based upon testing performed post-operatively, which demonstrated the continued elevation of cortisol levels, the second surgery was unsuccessful. Thereafter, plaintiff suffered one of the known and reported complications of the surgery, hypopituitarism, and takes certain medications to treat the resultant hormone deficiencies, as well as medication for his underlying Cushing's Disease.

According to Dr. Laws, the second surgery was performed properly, and while pituitary gland tissue was removed, the amount removed was acceptable and within the medical and surgical standard of care. Indeed, Dr. Laws explains that Dr. Post removed an estimated 60% of glandular tissue, which is accepted in the medical community to be an appropriate amount and does not change the overall rates of post-surgical hypopituitarism. In fact, Dr. Laws notes that some neurosurgeons remove the entire pituitary gland, thus nearly guaranteeing hypopituitarism, in order to cure the disease.

Dr. Laws points out that since even the mere manipulation of one's pituitary during surgery can result in any and all of the potential complications associated with the surgery, it is entirely speculative to claim that had Dr. Post removed a smaller amount of pituitary, plaintiff would not have hypopituitarism. Therefore, Dr. Laws submits that Dr. Post and Mount Sinai did not depart from accepted medical and surgical standards and practices, and none of the alleged departures proximately caused the injuries alleged.

Separately, defendants submit that Dr. Binello, who was a seventh year resident in neurosurgery at Mount Sinai at the time of the alleged events, was not involved in any of the pre-

[2] Hypopituitarism occurs when there is a short supply of one or more of the various hormones that the pituitary secretes. In an adult, hypopituitarism can result in excessive thirst, excessive urination, hypoglycemia, fatigue, poor appetite, weight loss or weight gain, nausea, dizziness and other symptoms.

operative care of plaintiff, including the pre-operative testing and decisions to perform the surgeries. Rather, defendants state that Dr. Binello's sole role was as an assistant to Dr. Post during the two surgeries, at which time she made no intra-operative decisions, may have helped Dr. Post to provide nasal exposure during the surgeries, did not perform any portion of the surgery involving removal of tumor or pituitary tissue, and otherwise merely observed the procedures being performed by Dr. Post through a microscope to allow her to learn how to perform this type of surgery. As Dr. Post took responsibility for all intra- operative decision-making and performance of the surgery at Mount Sinai, defendants submit that dismissal of this case as against Dr. Binello is warranted, with prejudice.[3] Defendants also note that Dr. Binello took no part in obtaining plaintiff's informed consent prior to the second surgery being performed.

In sum, defendants submit that there was nothing in Dr. Post's conduct, including in his discussions with plaintiff regarding informed consent, that warrants the continued prosecution of plaintiff's claims. In addition, defendants submit that as there are no claims of independent negligent acts alleged against Mount Sinai distinguished from those claims alleged as against Dr. Post, defendants are entitled to dismissal of all claims as against them.

In opposition, plaintiff focuses on defendants' allegations with respect to plaintiff's informed consent claim. Indeed, plaintiff posits that Dr. Post has no written evidence showing what he told plaintiff about the risks of the recommended pituitary surgery. Moreover, plaintiff highlights that the informed consent form that he signed before the second pituitary surgery did not include any information about the risk of losing all pituitary function as a result of the surgery, nor many of the other risks specific to the surgery. Thus, plaintiff submits that a jury must decide this case based on the testimonial evidence offered by both sides.

Plaintiff concedes that his supplemental bill of particulars limited the live claims in this case to those surrounding informed consent.[4] Therefore, plaintiff does not oppose the remainder of defendants' motion for summary judgement. Indeed, plaintiff annexes the expert affirmation of David Kennedy, M.D. ("Dr. Kennedy"), a board-certified physician who solely opines that Dr. Post did not obtain proper consent from plaintiff.

In reply, defendants acknowledge plaintiff's failure to rebut all branches of their motion other than those portions addressing the issue of informed consent. On the issue of informed consent, defendants argue that plaintiff is attempting to raise an issue of fact by contradicting his own testimony, the testimony of several others, including his parents and another treating doctor,

[3] Prior to the submission of this motion, defendants' counsel forwarded to plaintiff's counsel via cover letter a Stipulation of Discontinuance with prejudice as to Dr. Binello only. Rather than signing the Stipulation as transmitted, plaintiff's counsel changed the language, and signed a Stipulation of Discontinuance as to Dr. Binello "without prejudice". After the filing of the note of issue, defendants' counsel requested that plaintiff's counsel sign a Stipulation of Discontinuance as to Dr. Binello, with prejudice, but plaintiff's counsel refused to do so. As such, defendants are moving for summary judgment on Dr. Binello's behalf as well.

[4] As to Mount Sinai and Dr. Post only.

Dr. Atkinson. Moreover, defendants highlight that plaintiff's claims are at odds with the testimony of Dr. Post, the medical records from not only Dr. Post and Mount Sinai, but also the three physicians including two surgeons at Mayo Clinic. Thus, defendants submit that plaintiff's opposition is tailored to avoid the consequences of summary judgment and dismissal of this action in its entirety. As such, defendants reiterate their position that they are entitled to judgment in their favor.

DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit

malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppel v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Thurston*, 66 AD3d at 1001, *supra*; *Myers*, 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

Here, based on the evidence submitted, including medical records, deposition transcripts, and Dr. Laws' expert affirmation based upon the same, the court finds that defendants have established a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Laws opines that the care and treatment rendered by defendants at all times comported with good and accepted medical practice and that nothing that defendants did, or did not do, was the proximate cause of plaintiff's alleged injuries. Significantly, Dr. Laws opines, to a reasonable degree of medical certainty, that proper pre-operative testing was performed in connection with plaintiff's previously diagnosed Cushing's Disease based upon various clinical signs and symptoms as well as other testing which demonstrated significantly elevated cortisol levels.

Dr. Laws further affirms that Dr. Post confirmed the existence of a pituitary source of plaintiff's Cushing's Disease and it being more predominantly right-sided rather than left-sided. Dr. Laws also explains that Dr. Post properly performed both surgeries. Illustratively, even though Dr. Post's initial pathology was ultimately found negative for tumor, Dr. Laws opines that as per the standard of care, a recommendation by Dr. Post to perform a second attempt at removing the tumor was entirely appropriate. As Dr. Laws' expert opinions are predicated upon ample support within the record, including a specific review of the relevant medical records and deposition testimony, defendants have shown that plaintiff was treated in full accord with good and accepted standards of medical care, and that no actions on defendants' part proximately caused plaintiff's alleged injuries.

As conceded by plaintiff, and highlighted in defendants' reply, plaintiff has not opposed defendants' prima facie showing as it pertains to Dr. Binello, whom the unrebutted evidence suggests only served as an assistant to Dr. Post during the two surgeries. Thus, the court finds that Dr. Binello is entitled to summary judgment, and dismissal of this matter as against her in its entirety.[5] Moreover, plaintiff has also not opposed Mount Sinai's prima facie showing as it pertains to any claims of direct negligence asserted against Mount Sinai in plaintiff's first cause of action. Accordingly, all such direct claims against Mount Sinai are dismissed. Likewise, plaintiff has failed to oppose defendants' prima facie showing with respect to any and all claims of negligence and medical malpractice as against Dr. Post, and vicariously Mount Sinai, regarding pre-operative testing, and the manner in which his two surgeries were performed. Thus, plaintiff's first cause of action in his summons and complaint must be dismissed in its entirety. To

[5] With respect to plaintiff's first and second cause of action.

be sure,"[f]acts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*SportsChannel Assocs. v Sterling Mete, LP*., 25 AD3d 314, 316 [1st Dept 2006], *citing Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]). Since plaintiff never factually or legally challenged the basis for defendants seeking dismissal of plaintiff's claims of direct negligence as to Mount Sinai, and claims of negligence and medical malpractice as against Dr. Post (and vicariously Mount Sinai), plaintiff is deemed to have conceded that branch of defendants' summary judgment motion. Accordingly, defendants are entitled to partial summary judgment dismissing plaintiff's first cause of action as a matter of law.

Plaintiff's only opposition to defendants' prima facie showing rests with plaintiff's second cause of action sounding in a lack of informed consent as against Mount Sinai and Dr. Post, and only with respect to the second pituitary surgery performed on August 2, 2012. To prevail on a lack of informed consent cause of action a plaintiff must establish the following:

> (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury. The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury (citations omitted)(*Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 811-812 [2d Dept 2016]; *see also* Pub. Health § 2805-d).

Here defendants' prima facie showing was met by documented medical evidence that plaintiff consented to the second pituitary surgery. In addition, Dr. Post testified that he provided a proper and full informed consent to plaintiff and his parents. Dr. Post further testified that he spoke to plaintiff about the success and complication rate involved with performing the surgery, including the potential complication of hypopituitarism. Defendants' proffered evidence is supported by Dr. Laws' expert affirmation, which explains that Dr. Post documented all the consent necessary to perform the second surgery, and that hypopituitarism is a known consequence of pituitary surgery.

In opposition to defendants' prima facie showing, plaintiff highlights that Dr. Post has no written evidence showing that he told plaintiff about the risks of the recommended pituitary surgery. Moreover, plaintiff states that the informed consent form that plaintiff signed before the second pituitary surgery did not include any information about the risk of losing all pituitary function as a result of the surgery, or any of the other risks specific to the surgery. Had plaintiff known of those risks, plaintiff submits that plaintiff would not have undergone the second surgery. Because plaintiff did undergo that surgery under what he alleges were false pretenses regarding the risks associated with the surgery, plaintiff alleges that Mount Sinai and Dr. Post proximately

caused his injuries based on their failure to obtain proper consent. In addition, plaintiff testified that "Dr. Post made a promise that… the second surgery…had a 70 percent chance of getting the tumor," and that plaintiff did not have to "worry about any hormonal replacement medication due to the pituitary [surgery]." Plaintiff further states that Dr. Post further indicated that there was a 70 percent chance of removing the tumor and curing the Cushing's Disease in the second surgery. These observations are reinforced by Dr. Kennedy, who opines that the informed consent obtained by Dr. Post excludes several necessary fields substantiating that plaintiff was fully informed of the risks and foreseeable consequences of Dr. Post's surgical intervention. As plaintiff's pleadings have asserted that there was "some unconsented-to affirmative violation of [plaintiff's] physical integrity" (*Hecht v. Kaplan*, 221 AD2d 100, 103 [2d Dept 1996]; Public Health Law § 2805-d[2][b]), the second cause of action predicated on lack of informed consent cannot be dismissed, as a matter of law (*see Pedone v. Thippeswamy*, 309 AD2d 792, 793 [2d Dept 2003]). Indeed, accepting as true the facts alleged in the plaintiff's complaint, and affording him the benefit of every possible favorable inference (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; *see Polonetsky v. Better Homes Depot, Inc.*, 97 NY2d 46,54 [2001]; Leon v. Martinez, 84 NY2d 83, 87-88 [1994]), this court concludes that the cause of action premised upon a lack of informed consent cannot be dismissed on this record as against Dr. Post. Likewise, since Mount Sinai admits that Dr. Post was its employee during the relevant period of time, the hospital cannot obtain summary judgment as to plaintiff's lack of informed consent claim since a hospital is required to obtain a patient's informed consent where the patient is treated by one of its physicians (*see Bailey v. Owens*, 17 AD3d 222, 223 [1st Dept 2006]).

Additionally, where, as here, the parties' respective experts proffer differing opinions regarding the sufficiency of the informed consent form that plaintiff signed, the court cannot make a determination on that issue that would substitute the fact-finding role of a jury. Indeed, since the affirmation of defendants' expert is credibly challenged by plaintiff's own expert affirmation, there is insufficient evidence to credit the conclusions of one expert over the conclusions of another. Certainly, the weight to afford each expert's opinion is for a jury, not this court, to decide. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 AD3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*; *see also Carnovali v Sher*, 121 AD3d 552 [1st Dept 2014]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 [2d Dept 2003]).

Similarly, the court finds no merit to defendants' suggestion that plaintiff's opposition is merely tailored to avoid the consequences of summary judgment. Plaintiff's position now is consistent with the position plaintiff maintained at his deposition, and has maintained throughout this lawsuit. As such, the court finds no merit in defendants' suggestion that plaintiff's opposition must be discounted as a matter of law.

Based on the foregoing, it is hereby

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ORDERED that defendants' motion is granted to the extent that the first cause of action is dismissed in its entirety as against defendants THE MOUNT SINAI HOSPITAL, KALMON D. POST, M.D., and EMANUELA BINELLO, M.D.; and it is further

ORDERED that defendants' motion is granted to the extent of dismissing the second cause of action alleging a lack of informed consent as to EMANUELA BINELLO, M.D.; and it is further

ORDERED that defendants' motion is denied with respect to defendants' request for the dismissal of the second cause of action alleging a lack of informed consent as against THE MOUNT SINAI HOSPITAL and KALMON D. POST, M.D.; and it is further

ORDERED that defendants are directed to file and serve a copy of this decision and order, with notice of entry, within 20 days of its issuance; and it is further

ORDERED that the Clerk is directed to amend the caption to reflect as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORL, PART 10

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JAMES E. MILLER **Index №. 805041/2015**

Plaintiff

-against-

THE MOUNT SINAI HOSPITAL, KALMON D. POST, M.D.,

Defendants

----------X

; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants THE MOUNT SINAI HOSPITAL, KALMON D. POST, M.D., and EMANUELA BINELLO, M.D. to the extent indicated; and it is further

ORDERED that the parties are directed to appear for a virtual or in-person conference before the court (the parties will be further notified of the conferencing approach in advance of the designated date) on June 30, 2020 (time to be determined).

This constitutes the decision and order of the court.

Dated: May 18, 2020

George J. Silver

GEORGE J. SILVER, J.S.C.