Rey v Staten Is. Univ. Hosp.
2020 NY Slip Op 32863(U)
July 23, 2020
Supreme Court, Richmond County
Docket Number: 151037/2017
Judge: Judith N. McMahon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

IAS PART 6

JOSEPH REY and KATHLEEN REY,

Plaintiff(s),

- against –

STATEN ISLAND UNIVERSITY HOSPITAL,

Defendant(s).

ORDER

Index Number: 151037/2017

Hon. Justice
Judith N. McMahon

Defendant's, Staten Island University Hospital ("SIUH"), motion for Summary Judgment seeking to dismiss the case is denied in part and granted in part as detailed herein.

Plaintiff alleges among others, that Defendants failed to properly diagnose, care for, and treat Plaintiff and claims that Defendants departed from accepted standards of medical care of Plaintiff. Among others, Plaintiff specifically alleges Defendants misdiagnosed Plaintiff with leptomeningeal lymphoma and that Plaintiff needlessly underwent intrathecal chemotherapy via placement of an Ommaya reservoir under his scalp. Plaintiff further alleges a failure to obtain a proper informed consent.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or

departure was a proximate cause of injury or damage." *Castro v. New York City Health & Hosps. Corp.*, 74 A.D.3d 1005, 903 N.Y.S.2d 152 (N.Y.A.D. 2nd Dept. 2010). "To prevail on a motion for summary judgment in a medical malpractice action, the defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that any departure was not a proximate cause of the patient's injuries." *Kelly v. Rosca*, 164 A.D.3d 888, 83 N.Y.S.3d 317 (N.Y.A.D. 2nd Dept. 2018).

Defendant SIUH submits Affirmations from Dr. Julian Decter and Dr. Nirit Weiss which demonstrated their prima facie entitlement to judgment as a matter of law. *See Lefkowitz v. Kelly*, 170 A.D.3d 1148, 96 N.Y.S.3d 642 (N.Y.A.D. 2nd Dept. 2019).

In support of SIUH's motion, Dr. Decter states that, "it is my opinion to a reasonable degree of medical certainty that [Plaintiff] had low grade B cell leptomeningeal lymphoma." Dr. Decter opines that, "[Plaintiff's] presentation of lymphoma, specifically low grade B cell lymphoma of the cerebrospinal fluid ("CSF"), is a rare and serious disease which required immediate treatment in the form of chemotherapy…[and that] an Ommaya reservoir is further optimal for the long-term management of a leptomeningeal lymphoma patient such as [Plaintiff], by allowing a medical provider to easily obtain a sample of the patient's CSF for testing."

In further support of SIUH's motion, Dr. Weiss states, "it is my opinion that the Ommaya reservoir placement was appropriately performed, based upon a recommendation and request from treating Hematologists/Oncologists." Dr. Weiss also opines that, "Ommaya reservoirs can be removed surgically."

Defendant also moves to dismiss Plaintiff's claims related to *res ipsa loquitor*, contamination or mishandling of diagnostic studies results, and negligent hiring. Plaintiff did not oppose the dismissal of these claims, so those claims are dismissed without opposition.

"Once this showing has been made, a plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden." *Reid v. Soults*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

In opposition, Plaintiff submits an Affirmation from Dr. Richard Ambinder. Dr. Ambinder states that, "it is my opinion to a reasonable degree of medical certainty, that due to the inconclusive nature of the lumbar punctures, coupled with [Plaintiff's] improving clinical condition as documented by both the attending neurologist and [Plaintiff's] statements, it was a departure from the good and accepted standards of medical care and practice to place an Ommaya reservoir. At the time the Ommaya was placed, there was no clear diagnosis, and there was no medical urgency…The patient should simply have been monitored without surgical intervention."

As to Plaintiff's diagnosis by Defendants, Dr. Ambinder states that, "leptomeningeal lymphoma requiring intrathecal chemotherapy was an incorrect diagnosis. The correct diagnosis, based on the medical records, and as confirmed by the testing done at [non-party Memorial Sloan Kettering Center], should have been low grade B cell lymphoma with possible leptomeningeal involvement. The difference between these two diagnoses is significant… The fact that chemotherapy was neither indicated nor necessary is further supported by the fact that since 2015 [Plaintiff] has not required any chemotherapy whatsoever, he has developed no symptoms since 2015 and he remains healthy to this day."

In regards to Plaintiff's allegations related to the permanence of the Ommaya reservoir, Dr. Ambinder states, "it is well known in the medical and oncology communities, and confirmed

in medical literature, that Ommaya reservoirs are typically not removed, even if no longer needed for treatment, due to the risks associated with trying to remove such a device."

On the issue of informed consent, Plaintiff submits an Affidavit from Mr. Rey, wherein he states, "I was then told that I had a cancerous condition called lymphoma. The hospital sent one of their oncologists to see me, a Dr. Atallah on September 4, 2015. Dr. Atallah told my wife and I that I had a very bad disease, a cancer in the fluid in my spine and the prognosis for the future was very bad. Dr. Atallah told us that I urgently needed to have an Ommaya reservoir placed in my head and I needed to have chemotherapy treatments started immediately. We told Dr. Atallah that we wanted some time to think about it. Dr. Atallah then told my wife and I that if I did not have this surgery before leaving the hospital, I would be left crippled and blind from the lymphoma. He said that I could not be cleared for discharge until I had the surgery."

Dr. Ambinder states, "the plaintiffs were not fully or properly informed regarding the surgery and available alternatives, in a departure from the good and accepted standards of medical care and treatment. If they had been fully informed and not presented with the threat of permanent, disabling deformities absent undergoing the surgery, Mr. Rey would not have consented to the surgery and would have opted for the 'watch and wait' course of treatment."

"In opposition, [P]laintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that [D]efendant departed from the accepted standard of care." *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

As such, the remainder of Defendant SIUH's Motion for Summary Judgment must be denied as there are multiple questions of fact.

Accordingly, it is

ORDERED that Defendant Staten Island University Hospital's Motion for Summary Judgment is granted unopposed as to Plaintiff's causes of action related to *res ipsa loquitor* and those causes of action are severed and dismissed, and it is further

ORDERED that Defendant Staten Island University Hospital's Motion for Summary Judgment is granted unopposed as to Plaintiff's causes of action related to contamination of diagnostic studies results and those causes of action are severed and dismissed, and it is further

ORDERED that Defendant Staten Island University Hospital's Motion for Summary Judgment is granted unopposed as to Plaintiff's causes of action related to negligent hiring and those causes of action are severed and dismissed, and it is further

ORDERED that the remainder of Defendant Staten Island University Hospital's Motion for Summary Judgment seeking dismissal is denied, and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: July 23, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.