

Ellis v Mollette

2021 NY Slip Op 30913(U)

March 22, 2021

Supreme Court, Kings County

Docket Number: 502484/2018

Judge: Pamela L. Fisher

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At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on this 22nd day of March 2021

PRESENT:
HON. PAMELA L. FISHER, J.S.C.

-----X
JOHNNIE ELLIS

Plaintiff,

DECISION/ORDER

-and-

Index No. 502484/2018

ARABIA DIVINE MOLLETTE, M.D.,
ALEXANDER TSUKERMAN, M.D., KINJAL
PANCHAL, P.A., WOODHULL MEDICAL AND
MENTAL HEALTH CENTER, NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,
WYCKOFF EMERGENCY MEDICAL SERVICES, P.C.
And WYCKOFF HEIGHTS MEDICAL CENTER
Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>33-46, 48-65, 68</u>
Opposing Affidavits (Affirmations) _____	<u>73-84</u>
Reply Affidavits (Affirmations) _____	<u>85, 86-88</u>

Upon the foregoing papers in this medical malpractice action, defendants Alexander Tsukerman, M.D., Kinjal Panchal, P.A., & Wyckoff Emergency Medical Services P.C, Wyckoff Heights Medical Center, Arabia Divine Mollette, M.D. and New York City Health and Hospitals Corporation, s/h/a Woodhull Medical and Mental Health Center, New York City Health and Hospitals Corporation move in motion sequences 1, 2 and 3, pursuant to CPLR 3212, for summary judgment, dismissing plaintiffs’ complaint against them in its entirety. The Court notes that motion sequence 3, defendant’s New York City Health and Hospitals Corporation, s/h/a Woodhull Medical and Mental Health Center’s (“NYCHHC”) motion and annexed exhibits are listed in error under motion sequence 2 in NYSCEF as documents 49 through 67.

Plaintiff commenced this action by filing a summons and complaint on or about February 17, 2018. Issue was joined as to all defendants on March 8, 2018, February 16, 2018 and March 12, 2018, respectively, and plaintiff filed a bill of particulars on May 23, 2018. Plaintiff filed his Note of Issue on May 12, 2020. In his complaint and bill of particulars, plaintiff alleges that defendants negligently and improperly failed to diagnose and treat a brain abscess causing and/or allowing vasogenic edema resulting in a craniotomy (Plaintiffs’ Complaint ¶¶ 62, annexed as Exhibit A to defendant’s motion papers, motion sequence 1; Plaintiffs’ bill of particulars, annexed as Exhibit C to defendant’s motion papers, motion sequence 1).

The following facts are not in dispute: Plaintiff, Mr. Ellis (“Plaintiff”) was thirty-three (33) years old, on December 26, 2016, when he presented to the emergency room at defendant Woodhull Medical and Mental Health Center (“Woodhull”) and was evaluated for a right frontal headache that he had for three (3) days. (Defendant’s motion sequence 3, Affirmation in Support - Statement of Facts and Exhibit K Woodhull records). Plaintiff’s medical history was significant for headaches and he reported his current headache was similar to a past episode but denied a fever, chills, shortness of breath, neck and chest pain, nausea/vomiting and visual disturbances (Id. ¶ 15). Emergency medicine attending, defendant Dr. Arabia Divine Mollette (“Dr. Mollette”), saw Plaintiff at approximately 5:08PM and noted pain level severity was seven (7) out of ten (10) (Id.). Dr. Mollette diagnosed a recurrent migraine headache, administered Ibuprofen (800 mgs) and discharged the plaintiff (Id. ¶ 20-21). On January 20, 2017, Plaintiff presented to defendant Wyckoff Heights Medical Center (“Wyckoff”) emergency department with complaints of body aches, frontal headaches, nasal congestion and intermittent fever for two (2) months (Defendant’s motion sequence 1, Affirmation in Support - Statement of Facts and Exhibit H Wyckoff Emergency Department Chart). A neurological history and examination were performed, noted to be noncontributory and Plaintiff was discharged with a prescription for Augmentin (antibiotics) (Id. ¶ 12 & Exhibit H). On January 21, 2017, Plaintiff returned to Wyckoff’s emergency room in critical condition. Plaintiff was obtunded and a CT scan of his head revealed a three-point five (3.5) cm abscess with a white blood count of twenty-two point six (22.6) (Id. ¶ 13 & Exhibit I Wyckoff Emergency Department Chart). Thereafter, plaintiff was transferred to Lenox Hill Hospital where he underwent a bifrontal craniotomy, evacuation of an abscess and repair of the frontal sinus (Id.).

As a result of defendants’ alleged negligence and malpractice, plaintiff claims he sustained severe and permanent personal injuries including, among other things, seizures; mass/abscess/empyema in the brain; was caused to undergo a craniotomy, will be caused to undergo an additional surgical procedure to reconstruct his skills, neurological deficits; difficulty with coordination; and difficulty with comprehension (Defendant’s motion sequence 1, Exhibit A: Plaintiff’s Complaint ¶ 63).

Defendants Tsukerman, M.D., Panchal, P.A., Wyckoff Emergency Medical & Wyckoff Heights Medical Center’s Motions for Summary Judgment:

In support of its motion for summary judgment, defendants Tsukerman, M.D., Panchal, P.A., Wyckoff Emergency Medical submit the pleadings, deposition transcripts, Wyckoff medical charts and an attorney affirmation. Defendants contend that the record establishes that defendant P.A. Panchal did not deviate from the accepted standard of medical practice in its care and treatment of the Plaintiff while at Wyckoff Heights Medical Center and that co- defendant Dr. Tsukerman, did not treat Plaintiff or direct/control the work of co-defendant P.A. Panchal. Defendants further contend that it is undisputed that defendant Dr. Tsukerman’s name appears in the Wyckoff medical records merely based on his status as the attending physician in the emergency department on January 20, 2017, and that defendant Dr. Tsukerman was never asked to consult regarding the treatment of Plaintiff (Defendant’s motion sequence 1, Attorney Affirmation, ¶ 22-25).

In further support of their motion, defendants submit two expert affirmations from Dr. Phillip W. Perlman, M.D., Director of Otolaryngology Head and Neck Surgery at St. Francis Hospital, Roslyn, New York and Dr. James G. Ryan, M.D. Dr. Perlman's opinion is based on review of the documents related to this litigation and relevant medical records (Defendant's motion sequence 1, Exhibit J. at ¶ 1). Dr. Perlman opines that with a reasonable degree of medical certainty, the care provided by Dr. Tsukerman, M.D., P.A. Panchal, & Emergency Medical was appropriate when Plaintiff presented to Wyckoff for the first time on January 20, 2017. (Id. ¶ 6). Dr. Perlman maintains that at the time of Plaintiff's presentation, he showed no signs of symptoms and no evidence on examination or by history to suggest a brain abscess or frontal sinus dehiscence (Id.). Dr. Perlman opines that Plaintiff did not exhibit signs of severe infection until January 21, 2017 when his presentation was more in line with the ongoing central nervous system infection that warranted the CT scan, blood work up and subsequent surgical treatment (Id. ¶ 7). He concludes that based on the Plaintiff's symptoms and physical examination the treatment provided at Wyckoff on January 20, 2017 was consistent with current guidelines and was not a deviation from acceptable standards of care. Dr. Perlman further concluded that there would have been no change in treatment plan or outcome if a CT scan was ordered during Plaintiff's first visit to Wyckoff on January 20, 2017 (Id. ¶¶ 9-12). Dr. Ryan's opinion is based on a review of the medical records and documents relating to the litigation (Defendant's motion sequence 1, Exhibit K ¶ 1). Dr. Ryan maintains that upon review of the medical records, Plaintiff presented to Wyckoff on January 20, 2017 with complaints of headaches, congestions and body aches for approximately one (1) to two (2) months and that the findings on examination were consistent with defendant's diagnosis of sinusitis (Id. ¶ 14). Dr. Ryan states that most current guidelines for the treatment of sinusitis recommend that patients with symptoms of sinusitis should not receive antibiotics until the symptoms have been present for at least seven (7) days and therefore defendant's treatment of Augmentin on January 20, 2017 was not a deviation from acceptable standards of care (Id.). Dr. Ryan further opines that when Plaintiff returned to Wyckoff on January 21, 2017, he received a more extensive evaluation and sinusitis with intracerebral abscess formation was discovered on the CT scan resulting in a transfer for neurological intervention (Id. ¶ 15). Dr. Ryan opines that while there is no imaging evidence from Plaintiff's visit to Wyckoff on January 20, 2017, the intracerebral abscess was almost definitely present at the time (Id. ¶ 17). He maintains that even if the defendants performed a CT scan and diagnosed the abscess on January 20, 2017, Plaintiff would still have required the same surgical intervention and treatment (Id.). Dr. Ryan concludes that the defendants care and treatment on January 20, 2017 and January 21, 2017 were consistent with guidelines and not a deviation from acceptable standards of care (Id. ¶¶ 18-21).

Defendant Wyckoff Heights Medical Center incorporates by reference all procedural history, arguments, legal authorities and evidence submitted in the Affirmation of Michael J. Morris, Esq. in support of Dr. Tsukerman, P.A. Panchal and Wyckoff Emergency Service's motion for summary judgment (Defendant's Attorney Affirmation, motion sequence 2). Defendant Wyckoff states that should the Court determine that Dr. Tsukerman, P.A. Panchal and/or Wyckoff Emergency Services did not deviate from the accepted standards of

medical practice, the same relief should be afforded to movant Wyckoff as movant cannot be held vicariously liable for those acts and omissions of agents who have been released from a case (Id. ¶¶ 4-6).

In opposition, plaintiff submits a redacted expert affirmation from a physician board certified in general surgery and vascular surgery, who concludes that defendants Tsukerman, M.D., P.A. Panchal, and Wyckoff deviated from the standard of care on January 20, 2017 by failing to take a complete and thorough medical history, failing to diagnose intracerebral abscess, failing to consider and rule out intracerebral abscess, failing to order radiological studies, failing to refer the Plaintiff for appropriate consults and failing to admit Plaintiff to the hospital (Plaintiff's Opposition to motion sequences 1, 2, & 3, Redacted Expert Affirmation p. 4). Plaintiff's expert opinion is based on review of the medical records of Woodhull, Wyckoff and non-party Lenox Hill Hospital, records of non-party Queens Nassau Rehab Center, deposition testimony and the affirmations of defendant's experts (Id. p. 4). Plaintiff's expert maintains that when Plaintiff presented to Wyckoff on January 20, 2017, he was experiencing at least three (3) months of recurrent headaches as well as a progression of his symptoms (Id. p. 13). Based upon the Wyckoff medical chart and the testimony of defendant P.A. Panchal, Plaintiff's expert maintains that defendant Panchal was completely unaware of the history of dental abscess due to her failure to make a proper and thorough medical history, which was a departure from good and accepted practice (Id.). Plaintiff's expert opines that defendant P.A. Panchal's superficial neurological examination was inadequate in view of the severity of the Plaintiff's symptoms on January 20, 2017 and that good and accepted practice dictated that defendant Panchal perform a sinus series x-ray and CT scan to evaluate the extent of the infectious process and to rule out the infection progressing to involve the brain (Id.). Plaintiff's expert maintains that as the attending physician, defendant Dr. Tsukerman is responsible for all acts and/or omissions by defendant P.A. Panchal, who he was responsible for supervising and subsequently co-signed and agreed with her diagnosis and treatment (Id. p.13 n.5). Plaintiff's expert cites to defendant's expert, Dr. Ryan who submits that the standard of care for a patient with sinusitis "should not receive antibiotics until the symptoms have been present for at least 7 days" but opines that while antibiotics were mandated, discharge of the Plaintiff without further evaluation was a departure from good and accepted medical practice based on the Plaintiff's symptoms and medical history (Id. p. 14). Plaintiff's expert notes that defendant's expert Dr. Perlman confirmed that "[t]he extensive sinusitis and intracerebral abscess had likely been present long before the WHMC-ED (Wyckoff) visit on January 20, 2017" (Id. p. 13 n.4) but disagrees that the pre-operative condition, course of surgical intervention and post-operative treatment would have been the same (Id. p. 15). Plaintiff's expert opines that had Plaintiff been "appropriately diagnosed, admitted to the hospital and stabilized on January 20, 2017, he would have, more likely than not, avoided the drastic and serious deterioration of his condition which occurred over the next 24 hours and continued until his transfer to Lenox Hill Hospital." (Id.). The expert maintains that a review of the Lenox Hill records shows by the time of Plaintiff's transfer to Lenox Hill, his condition showed severe neurological injury and therefore in his opinion the abscess and the inflammatory changes caused in the brain had further progressed between Plaintiff's emergency room visit to Wyckoff on January 20, 2017 and January 21, 2017 (Id.). Plaintiff's expert concludes

that the departures of defendants Wyckoff, Dr. Tsukerman and P.A. Panchal, singularly and/or in combination, were a proximate cause of plaintiff's injuries, including the continued progression of the infectious process which deprived plaintiff of the substantial possibility of a better outcome and more favorable prognosis, including less complicated surgical course and less extensive neurological sequelae (Id.).

In reply, defendant Dr. Tsukerman maintains that it is undisputed that Dr. Tsukerman did not have contact with the Plaintiff and was never asked to treat the Plaintiff (Defendant's motion sequence 1, Reply Attorney Affirmation ¶¶ 11-13). Defendant maintains that Dr. Tsukerman did not direct or control P.A. Panchal's work at Wyckoff on January 20, 2017 and his name appears in the Wyckoff medical record merely based on his status as the attending physician in the emergency department (Id. ¶¶ 15-16). Defendants state that Plaintiff's expert fails to raise a triable issue of fact regarding whether the defendant's conduct was a proximate cause of the plaintiff's injuries since the expert merely states in a conclusory manner that the defendants deprived plaintiff of a "better outcome, "more favorable prognosis", "less complicated surgical course" and "less extensive neurological sequelae" (Id. ¶ 27).

Woodhull Medical and Mental Health Center and NYC HHC's Motion for Summary Judgment

In support of its motion for summary judgment, defendants submit the pleadings, deposition transcripts, Wyckoff, Woodhull and Lenox Hill's medical charts and an attorney affirmation. Defendants contend that the record establishes that defendants rendered the appropriate level of care and treatment for the plaintiff at all times that he presented for treatment at Woodhull Medical and Mental Health Center (Defendant's motion sequence 3, Attorney Affirmation). In further support of their motion, defendants submit an expert affirmation from Dr. Timothy Haydock, M.D., a board-certified emergency medicine physician, whose opinion is based upon a review of the pleadings, depositions and medical records of Woodhull, Wyckoff and Lenox Hill (Defendant's motion sequence 3, Exhibit A-Physician Affidavit ¶ 7). Dr. Haydock opines that to a reasonable degree of medical certainty the care rendered by Dr. Mollette and Woodhull Medical and Mental Health Center comported with good and accepted standards of medical practice and within a reasonable degree of medical certainty that there were no departures from the standard of care and therefore no acts or omissions caused or contributed to Plaintiff's alleged injuries (Id. ¶ 8). Defendant's expert states that upon review of the medical records, Plaintiff presented to Woodhull on December 26, 2016 with a chief complaint of right frontal headache, pain level of seven (7) out of ten (10) and a history of migraines (Id. ¶ 9). Dr. Haydock states that Dr. Mollette examined Plaintiff and questioned him regarding a complaint of tooth abscess that was reported in the triage record and that upon questioning, Plaintiff reported his only complaint was a migraine (Id.). He further states that Dr. Mollette performed various tests to confirm that Plaintiff's cranial nerves were intact and that there was no evidence of an oral abscess (Id.). Based on the complaint, history and examination results, Dr. Haydock states that Dr. Mollette properly prescribed Ibuprofen for head pain and provided discharge instructions with a notation to follow up with a primary care physician as soon as possible (Id.). The expert opines that Dr. Mollette timely saw and treated Plaintiff, documented Plaintiff's chief complaint and properly questioned Plaintiff (Id. ¶ 10). He further opines that Dr. Mollette properly evaluated

and performed a full examination to rule out abscess/infection and intracranial process when the Plaintiff presented to Woodhull on December 26, 2016 (Id.). Based upon a review of Plaintiff's medical records at Wyckoff and Lenox Hill, Dr. Haydock opines to a reasonable degree of medical probability that Plaintiff's condition when he was seen in the Woodhull emergency room was not consistent with a brain abscess but a migraine headache that was similar to a past episode of migraine headaches (Id. ¶ 11). Defendant's expert maintains that to rule out intracranial process a patient's vital signs should be stable, and a physical examination should be within normal limits and that based upon a review of the record, Dr. Mollette properly ruled out intracranial process as a source of Plaintiff's pain (Id. ¶ 13). Dr. Haydock states that to rule out tooth/oral abscess, an examination of the mouth including the uvula, gums, teeth, and breath should be benign and that here, Dr. Mollette properly performed said examination by determining that the uvular was normal and there was no tooth pain or swelling (Id. ¶ 14). Dr. Haydock concludes that Dr. Mollette's treatment of Plaintiff comported with the standard of care for an emergency physician and that in his opinion, the standard of care did not require Dr. Mollette to recommend a CT scan and/or MRI, make any referrals to infectious disease, neurology or neurosurgery or request an urgent neurology consult (Id. ¶ 16). It is Dr. Haydock's opinion that Dr. Mollette and Woodhull complied with the standard of care in their evaluation, diagnosis and treatment of Plaintiff on December 26, 2016 (Id. ¶ 17).

In opposition, plaintiff submits a redacted expert affirmation from a physician board certified in general surgery and vascular surgery, who concludes that defendants Woodhull and Dr. Mollette departed from good and accepted medical practice on December 26, 2016 in misdiagnosing Plaintiff with a recurrent migraine, in failing to diagnose an intracranial infectious process, in failing to consider and/or rule out bacterial sinusitis, intracranial infectious process, in failing to order and/or administer sufficient and/or efficient antibiotics, in failing to order and/or perform blood work, in failing to order radiological studies including sinus series x-rays and/or CT scan and in failing to refer the Plaintiff for appropriate consults, including an ENT and dental consult (Plaintiff's Opposition to motion sequences 1, 2, & 3, Redacted Expert Affirmation p. 10). Plaintiff's expert states that upon review of Plaintiff's medical records, it is clear Dr. Mollette failed to appreciate Plaintiff's history of headaches and instead interpreted a history of migraines which is clinically inaccurate (Id.). Plaintiff's expert maintains that Plaintiff was experiencing intermittent headaches for at least a month at the time he presented to Woodhull, which was confirmed as a focused frontal radiating headache (Id.). The expert opines that it was imperative that Dr. Mollette take the requisite steps to rule out bacterial sinusitis with possible extension to an intracranial infectious process as Plaintiff's presentation was highly suspicious for an infectious process (Id.). The expert further states that the records establish that Dr. Mollette performed a superficial physical examination and visual examination of Plaintiff's mouth and teeth but that the severity and duration of Plaintiff's symptoms mandated that a sinus series x-ray and/or CT scan be performed to rule out bacterial sinusitis and a possible intracranial process (Id. p. 11). It is the expert's opinion that Dr. Mollette departed from good and accepted practice in failing to prescribe a course of broad-spectrum antibiotics, even in the absence of a confirmed sinusitis and that a referral for urgent

consultations was required (Id.). Plaintiff's expert concludes that had Plaintiff's sinusitis been diagnosed on December 26, 2016, more likely than not, the sinusitis would have been treated and resolved with antibiotics without the need for surgical intervention and that because of Dr. Mollette and Woodhull's departures, Plaintiff was deprived of the substantial possibility of a better outcome and more favorable prognosis including the total avoidance of intracerebral abscess(es), craniectomy and residual sequelae (Id. pp. 12-13).

In reply, defendants state that plaintiff's expert as a doctor certified in vascular surgery, is unable to speak to the appropriateness of an emergency room attending's treatment plan and that the expert's opinions are generalized and conclusory in nature (Defendant's motion sequence 3, Reply Attorney Affirmation ¶ 4). Defendant maintains that based on the record and deposition testimony, it is clear Dr. Mollette appreciated Plaintiff's history, reviewed the triage notes, performed her own questioning and examinations before diagnosing and discharging Plaintiff on December 26, 2016 (Id. ¶ 7). Defendant further maintains that Plaintiff has failed to raise a triable issue of fact as to any departure from the standard of care or that Dr. Mollette proximately caused any of the Plaintiff's alleged injuries (Id. ¶ 12).

To prevail on a cause of action for medical malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*lulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). Once the defendant meets its burden, "the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury" (*Johnson v. Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 526 [2d. Dept. 2005]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (Id.).

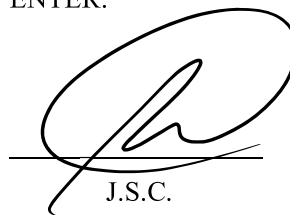
Here, defendants Wyckoff, Dr. Tsukerman and P.A. Pachal met their prima facie burden. They submitted the expert affirmations of Dr. Phillip W. Perlman, M.D. and Dr. James G. Ryan, M.D. who described the standard of care for an emergency room physician, and they affirmed that the treating physicians did not deviate from this standard of care by failing to rule out and/or diagnose intracerebral abscess given that at the time of Plaintiff's presentation on January 20, 2017, he showed no signs of symptoms and no evidence on examination or by history to suggest a brain abscess or frontal sinus dehiscence. Their opinions constitute competent evidence, in that they are based on the medical records, bill of particulars, and deposition testimony of the parties. The Court notes that defendants failed to cite to any cases to support their argument that Dr. Tsukerman cannot be held liable for the care and treatment rendered to Plaintiff by P.A. Panchal in the

Wyckoff emergency department on January 20, 2017. It is undisputed that Dr. Tsukerman was the attending physician in the Wyckoff emergency department on January 20, 2017 and that he signed off on P.A. Panchal's notes, diagnosis and treatment within the Wyckoff medical records. Defendants Woodhull and NYC Health and Hospitals Corporation also met their prima facie burden. They submitted the expert affirmation of Dr. Timothy Haydock, M.D., who described the standard of care for an emergency room physician and affirmed that Dr. Mollette did not deviate from the standard of care by failing to recommend a CT scan and/or MRI, make referrals to infectious disease, neurology or neurosurgery, request an urgent neurology consult or diagnose Plaintiff with a migraine based on the Plaintiff's symptoms and test results.

In opposition, Plaintiff produced an expert affirmation from a general and vascular surgeon attesting to departures from accepted standards of medical practice, and that these departures were a proximate cause of plaintiff's injuries. Plaintiffs' expert opinion, based on review of the medical records, deposition testimony, and bill of particulars, raises triable issues of fact. Due to the conflicting expert reports, defendants' respective motions for summary judgment are denied (See *Deutsch*, 71 AD3d at 719).

This constitutes the decision and order of the Court.

ENTER:

A handwritten signature in black ink, appearing to be 'P. Fisher', written over a horizontal line.

J.S.C.
HON. PAMELA L. FISHER