

Shields v Cohen

2023 NY Slip Op 32265(U)

June 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 18184/2013

Judge: Consuelo Mallafre Melendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS:

-----X
CAROL SHIELDS

Plaintiff,

-against-

ANDERS JONATHAN COHEN, D.O., GOTHAM
NEUROSURGERY, P.L.L.C. And THE
BROOKLYN HOSPITAL CENTER,
Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 87-120; 123-146; 147-150.

DECISION AND ORDER

Index No. 18184/2013

Motion Sequence: 005

Defendant THE BROOKLYN HOSPITAL CENTER moves this court for an Order Pursuant to CPLR § 3212, granting summary judgment and dismissing Plaintiff’s Complaint in its entirety as to THE BROOKLYN HOSPITAL CENTER. Plaintiff submitted opposition to this motion. This case involves multiple surgeries performed on Plaintiff at defendant THE BROOKLYN HOSPITAL CENTER, after Plaintiff had already undergone three (3) detethering procedures on her spinal cord. Plaintiff’s condition subsequently devolved into paraplegia.

“In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].” *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. “Thus, in moving for summary judgment, a physician defendant must establish, prima facie, ‘either that there was no

departure or that any departure was not a proximate cause of the plaintiff's injuries.”

Hutchinson, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted].” *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. “When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.” *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. “Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve.” *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant's expert, John K. Houten, M.D., a physician board-certified in Neurological Surgery established that they are qualified to opine as to the care and treatment rendered by defendant ANDERS JONATHAN COHEN, D.O., an employee of defendant THE BROOKLYN HOSPITAL CENTER. Plaintiff's expert is a board-certified neurosurgeon and has established their expertise to opine as to the care and treatment rendered in this case.

Defendant THE BROOKLYN HOSPITAL CENTER has established their prima facie burden to summary judgment. However, in opposition, Plaintiff raises issues of fact requiring denial of summary judgment as to all claims against the moving defendant.

On November 8, 2011, Dr. Cohen performed a spinal surgery on plaintiff at The Brooklyn Hospital Center. This was the first of multiple surgeries Dr. Cohen performed on

Plaintiff. Plaintiff had previously undergone three (3) detethering spinal surgeries, which was reflected in her medical records. Defendant's expert opines that "the standard of care warranted that Plaintiff undergo a laminectomy to detether her spinal cord to prevent further deterioration of her functional level, including paralysis." Defendant's expert further opines that if this surgery, as well as the subsequent surgeries Dr. Cohen performed on Plaintiff, were not performed, a deterioration of Plaintiff's functional ability would have continued to progress, and Plaintiff would have potentially become paralyzed. In opposition, Plaintiff's expert opined that considering that the patient had previously undergone three (3) detethering surgeries on her spinal cord, "[i]mmediate additional cord surgery upon this already weakened, frayed and significantly scarred spinal cord was contraindicated." Plaintiff's expert further opines that, "[t]he risk of damaging spinal nerves and nerve roots significantly increases with each subsequent surgical untethering procedure." Plaintiff's expert further opines that performing this surgery was a departure from good and accepted standards of care and was a substantial factor in causing Ms. Shield's injuries.

Furthermore, Defendant's expert opines that due to "plaintiff's deteriorating functional condition and dire pain, characterized as a level '10,' in November 2011, there were no non-surgical alternatives or less invasive modes of treatment for relief of plaintiff's symptoms that were becoming progressively worse, warranting surgical intervention." This is refuted by Plaintiff's expert in opposition. Plaintiff's expert opines that the standard of care "required that all other treatment options be exhausted since there existed the strong probability that the procedure ... would result in a significant worsening of the patient's condition." Plaintiff's expert further opines that alternative treatment options include, Vertebral Column Shortening, an injection of an epidural high dosage corticosteroid, Pedicle Subtraction Osteotomy, Spinal Cord

Stimulation, and Posterior Spinal Fusion. Plaintiff's expert explains that each of these procedures reduces tension to the spinal cord or provides long term relief without further damaging the spinal cord or the spinal dura. Plaintiff's expert further opines that Dr. Cohen's failure to consider, evaluate and address other viable options was a departure from accepted standards of surgical care and a substantial factor in causing the plaintiff's injuries.

Turning to the evidence submitted as to Plaintiff's claim that Defendant failed to treat Plaintiff's post-surgical bacterial infection. Defendant's expert opines that "Plaintiff was at an increased risk of infection because detethering of the spinal cord requires opening of the dura which increases the risk for cerebrospinal fluid leakage, and due to plaintiff's multiple prior spinal surgeries." Defendant's expert further opines that, Plaintiff's infection was promptly recognized, appropriate infectious disease consults were called to treat the infection, timely and appropriate antibiotic therapy was administered, and the infection resolved." In opposition, Plaintiff's expert opines that Plaintiff's complaints of headaches on November 12th and 13th, 2011 and her November 15, 2011 labs showing an increasing white blood count evidenced an ongoing bacterial infection, but the required antibiotic was not administered at that time. Plaintiff's expert indicates that it wasn't until November 25, 2011 that the patient was successfully tested for and diagnosed with bacterial meningitis. Plaintiff's expert opines that failure to administer the required antibiotic and failure to timely test for and diagnose the patient's bacterial meningitis was a departure from the standard of care. Plaintiff's expert further opines that the "deterioration and loss of lower extremity motor and sensory function is attributable to ... the extensive fibrotic scarring and multiple adhesions along [Ms. Shield's] spine caused by surgical incisions into the cord, and the further damage resulting from the effects of bacterial meningitis."

As to the experts' opinions, case law is clear that "mere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. "General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment." *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d dept. 2010]. Considering the foregoing conflicting opinions, which are detailed and not speculative, summary judgment is denied as to claims sounding in medical malpractice relating to THE BROOKLYN HOSPITAL CENTER. See *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004].

As to Plaintiff's claim of Lack of Informed Consent, it is well settled that to recover damages based on a claim of lack of informed consent, one of the elements a plaintiff must prove is "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." *Schussheim v. Barazani*, 136 AD3d 787, 789 [2d Dept. 2016]. Defendant's expert states that Plaintiff was advised "prior to undergoing surgery at THE BROOKLYN HOSPITAL CENTER of the risks, alternatives, and benefits of the surgery which included the chance of worsening of her condition, non-resolution of symptoms, cerebrospinal fluid leak, and no guarantee of improvement," and that "plaintiff signed a consent authorizing Dr. Cohen to perform the re-exploration of the lumbosacral with re-release of tethered cord." Defendant's expert opines that "Plaintiff was fully and appropriately advised of the risks of the procedure for which plaintiff testified she understood and consented to surgery." In opposition, Plaintiff's

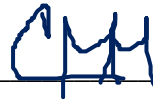
expert states that Plaintiff testified that Dr. Cohen did not inform her of any risks associated with any surgery performed by him. As indicated by Plaintiff's expert, Plaintiff further testified that Dr. Cohen told her she needed the surgery as soon as possible and that she can become paralyzed if she did not get it. Plaintiff's expert further states that Ms. Shields indicated that if she had been informed, she would not have consented to these procedures. Thus, Plaintiff's expert raises a question of fact as to whether informed consent was properly obtained by Dr. Cohen, an employee of The Brooklyn Hospital Center. Accordingly, summary judgment is denied as to this claim.

In conclusion, Defendant's motion for summary judgment is DENIED in its entirety.

This constitutes the decision and order of the court.

Dated: June 29, 2023

ENTER.



Hon. Consuelo Mallafré Melendez,
J.S.C.