

McNeil v Sandler

2023 NY Slip Op 32677(U)

August 2, 2023

Supreme Court, New York County

Docket Number: Index No. 805343/2017

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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LONNIE MCNEIL, JR., as Administrator of the Estate of
DOROTHY MCNEIL, Deceased,

Plaintiff,

- v -

SCHLOMIT SANDLER, M.D., NEW YORK EYE AND EAR
INFIRMARY OF MOUNT SINAI

Defendant.

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INDEX NO. 805343/2017

MOTION DATE 07/25/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that the motion for summary judgment by the defendant Schlomit Sandler, M. D.¹ is granted to the extent that (1) plaintiff's cause of action for lack of informed consent is severed and dismissed; (2) plaintiff's claims for damages arising from the performance of an allegedly unnecessary cataract surgery are severed and dismissed; (3) plaintiff's claims for damages arising from Dr. Sandler's alleged failure to refer plaintiff's decedent to a specialist within six months of the July 9, 2015 cataract surgery are severed and dismissed², and (4) plaintiff's claims for damages arising from proliferative vitreoretinopathy are severed and dismissed. The balance of the motion is denied.

This medical malpractice action arises out of alleged negligent care and treatment rendered to plaintiff's decedent, 71-year-old Dorothy McNeil, between June 8, 2015 and

¹ A Stipulation of Discontinuance in favor of New York Eye and Ear Infirmary of Mount Sinai was executed on November 15, 2022 (*see* NYSCEF Doc. No. 58).

² The medical records reflect that on September 30, 2015, Shlomit Sandler, M.D. referred Mrs. McNeil to specialist, Dr. Shah (*see* NYSCEF Doc. No. 74. P. 71).

November 30, 2015, relative to a July 9, 2015 left eye cataract surgery performed by Dr. Sandler at New York Eye and Ear Infirmary. It is undisputed that in February of 2016, seven months after the surgery, plaintiff's decedent was required to undergo a vitrectomy and later, a corneal transplant, which was performed in July of 2016.

By September of 2017 Mrs. McNeil's corrected vision was 20/30+1 in the right eye, and 20/50+2 in the left eye, with glasses. She passed away on January 21, 2020, from esophageal cancer which had been diagnosed two months earlier.

Defendant moves for judgment pursuant to CPLR 3212 on the grounds, *inter alia*, that Dr. Sandler's care was within the standard of care, and that no negligent act or omission by Dr. Sandler was the cause of plaintiff's claimed injuries³ which include "loss of vision, loss of distance perception, loss of contrast sensitivity, loss of peripheral vision, left eye pain, constant anxiety of damage or illness to remaining eye, proliferative vitreoretinopathy, and conscious pain and suffering" (*see* NYSCEF Doc. No. 66, para 11). Plaintiff opposes the motion, maintaining that Dr. Sandler's departures from the standard of care, particularly the excessive time she took to perform the surgery (one hour and twenty minutes, instead of the ten-to-twenty-minute average⁴), were a substantial contributing factor in causing decedent's eye trauma, decreased visual acuity and corneal decompensation, which necessitated two subsequent procedures and a corneal transplant.

³ Plaintiff's Amended Bill of Particulars (*see* NYSCEF Doc. No. 66) sets forth injuries including, but not limited to: failure to "timely and properly treat plaintiff's left eye cataract, negligently performing a phacoemulsification utilizing Trypan blue and Malyugin Ring and anterior vitrectomy, failing to remove all cortical debris after surgery, failing to properly refer plaintiff to a surgeon for removal of all lens fragments, failing to timely refer plaintiff to a retinal surgeon, and failing to prevent worsening of plaintiff's condition" (*id.*, para.3).

⁴ According to plaintiff's expert (*see* NYSCEF Doc. No. 79, para 31), "[t]he average cataract surgery employing phacoemulsification in the U.S. takes from 10-20 minutes. This procedure took 80 minutes...four times the average assuming the slowest duration of 20 minutes."

FACTUAL BACKGROUND

On July 9, 2015, Mrs. McNeil presented to New York Eye and Ear Infirmary to undergo left eye cataract surgery at the suggestion of Dr. Sandler, whom she initially saw for a cataract evaluation on June 8, 2015, at Fromer Eye Care.

Dr. Sandler's operative report reflects that after the incisions were made, there was a dense, opaque cataract hindering visualization. Decedent's pupil had poor dilation, so Dr. Sandler used a Malyugin Ring (iris dilator) and Trypan blue (a stain used on the front of a dense lens) to access and visualize the lens inside of the eye. Intraoperatively, the doctor noted a rent in the posterior capsule (the bag surrounding the lens) and vitreous (jelly-like substance inside the eye) entering the anterior chamber. Dr. Sandler decided that it was not safe to place the posterior chamber intraocular lens implant and opted instead to place an *anterior* chamber intraocular lens implant. Dr. Sandler then determined that the latter lens was in danger of falling posteriorly, so it was removed, and the eye was left without a lens. The report notes that Dr. Sandler removed all the cortical lens fragments that she could safely remove prior to ending the surgery, that the surgical wound was closed without adding a lens, and that Mrs. McNeil was moved to recovery in "excellent condition."

Defendant later informed Mrs. McNeil that there was insufficient support in the eye to place a lens implant during the surgery, and that the plan going forward was to help the eye heal, and then determine whether to place a lens in the eye later.

Decedent had numerous follow-up appointments with Dr. Sandler on a (generally) weekly basis between July 2015 and January of 2016. Her visual acuity improved, and the plan was to closely monitor progress with the hope that the remaining cortical material would be reabsorbed by the body. Dr. Sandler prescribed medication/eyedrops to reduce the inflammation

and intraocular pressure when necessary and performed an in-office suture removal and replacement procedure during which a large cortical fragment from the anterior chamber was released. When Mrs. McNeil's cornea had still not healed on its own as of September 30, 2015, Dr. Sandler referred her to a non-party cornea surgeon, Dr. Shah.

Decedent had two further eye surgeries by non-parties Dr. Fromer and Dr. Chen. In February of 2016 Dr. Fromer performed a vitrectomy and removal of vitreous opacity and lens material of the left eye, and in July of 2016 decedent underwent a corneal transplant surgery with lens placement performed by Dr. Chen at the Eye Surgery Centers of New York.

APPLICABLE LAW AND ANALYSIS

To prevail on a motion for summary judgment, the proponent must make *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 NY2d 833 [1996]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1996]). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v. Rozbruch*, 91 AD3d 147 [1st Dept. 2012]).

In support of the motion, defendant submits, *inter alia*, the expert affirmation of an ophthalmologist, Dr. Robert I. Appel, M.D. (*see* NYSCEF Doc. No. 62), who opines to a reasonable degree of medical certainty that the treatment rendered to decedent was within the standard of care, and that her injuries were not the result of any malpractice or negligence. Specifically, Dr. Appel opines that: (1) there was an indication for Dr. Sandler to perform left eye cataract surgery on July 9, 2015; (2) decedent was properly consented for surgery; (3) the

instrumentation used and the surgical maneuvers performed by Dr. Sandler were proper and within the standard of care, and the surgery itself was properly performed, evidenced in part by the objective improvement in plaintiff's vision; (4) a rent in the posterior capsule resulting in a lens not being placed during the surgery and the retention of cortical lens material is a well-known and accepted risk of cataract surgery that can occur despite the best of care, even when the procedure is properly performed; (5) Dr. Sandler's postoperative in-office follow-up care, including the suture removal and use of steroid, anti-inflammatory, and antibiotic drops was appropriate, and (6) Dr. Sandler's decision to render conservative treatment following the surgery, and closely evaluate how decedent responded to treatment before referring her to a corneal specialist, was all within the standard of care. Dr. Appel further opines that, contrary to what is set forth in the Amended Bill of Particulars, Mrs. McNeil never suffered from "proliferative vitreoretinopathy" which is a permanent condition associated with diabetes or retinal detachments.

Defendant's expert affirmation is detailed, specific and factual in nature, and is based upon the facts in the record (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]; *see also Pascocello v. Jibone*, 161 AD3d 516 [1st Dept. 2018]; [internal citations omitted]). Accordingly, "[t]he affirmation of defendant's expert was sufficient to meet the *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of plaintiff's alleged injured" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1st Dept. 2018]).

"Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting the affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and

accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact” (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 570 [1st Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1st Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1st Dept. 2017]).

Here, plaintiff submits the redacted expert affirmation of an ophthalmologist (*see* NYSCEF Doc. No. 79), who opines to a reasonable degree of medical certainty that Dr. Sandler departed from the standard of care and substantially contributed to plaintiff’s injuries when she: (1) took excessive surgical time during the initial cataract surgery on July 9, 2015 causing excessive trauma to the left eye; (2) failed to timely recognize and treat the retained lens material after the cataract surgery; (3) allowed decedent to suffer from significant corneal edema for up to six months, until she underwent a vitrectomy and removal of lens material and vitreous inflammatory cells of the left eye on February 9, 2016; (4) failed to timely recognize and treat the retained lens material after cataract surgery; (5) failed to remove the retained lens fragments within one month of the July 9, 2015 surgery, and (6) failed to refer decedent to a *retinal* specialist for the removal of the retained cortex (lens fragments) for six months, until she was seen by Dr. Fromer on December 18, 2015.

Plaintiff’s expert concludes, in relevant part, that “the failure of Dr. Sandler to recognize and timely treat the retained lens material in [decedent’s] left eye was a substantial contributing factor in causing [her] to suffer decreased visual acuity...[and] corneal decompensation which required a corneal transplant in the left eye” (*id.*, para 41).

Here, the affirmation of plaintiff’s expert raises questions of fact sufficient to defeat summary judgment in favor of Dr. Sandler, including the question of whether the surgical time was excessive, and whether Dr. Sandler failed to timely remove the retained lens fragments.

“The medical experts’ conflicting opinions...raise issues of fact that must be resolved at trial” (Hendricks v. Transcare New York, Inc., 158 AD3d 477, 478 [1st Dept. 2018]). As such, Dr. Sandler’s motion for summary judgment is denied.

Accordingly, it is

ORDERED that the motion for summary judgment by the defendant, Shlomit Sandler, M.D., is granted to the extent that plaintiff’s cause of action for lack of informed consent is severed and dismissed; and it is further

ORDERED that all of plaintiff’s claims for damages arising from the performance of an allegedly unnecessary cataract surgery are severed and dismissed; and it is further

ORDERED that all of plaintiff’s claims for damages arising from the alleged failure to timely refer plaintiff to a specialist are severed and dismissed; and it is further

ORDERED that all of plaintiff’s claims for damages surrounding the claim of proliferative vitreoretinopathy are severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk enter judgment in favor of Dr. Sandler dismissing plaintiff’s Second Cause of Action; and it is further

ORDERED that the parties appear for a pre-trial conference on **October 2, 2023 at 12:30 p.m.** via Microsoft teams.

8/2/2023
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

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