

Fisch v Hadjipanayis

2023 NY Slip Op 32703(U)

August 3, 2023

Supreme Court, New York County

Docket Number: Index No. 805275/2020

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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LINDA FISCH, CHARLES FISCH,
Plaintiff,

- v -

CONSTANTINOS HADJIPANAYIS, MOUNT SINAI
MEDICAL CENTER, MOUNT SINAI HEALTH SYSTEM,
INC., ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI
Defendant.

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INDEX NO.	805275/2020
MOTION DATE	07/25/2023
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the motion for summary judgment of the defendants Constantinos Hadjipanayis, M.D., Mount Sinai Hospital s/h/a “Mount Sinai Medical Center,” and Icahn School of Medicine at Mount Sinai¹ is granted to the extent that (1) the complaint is severed and dismissed against the defendant Icahn School of Medicine at Mount Sinai; (2) all of plaintiffs’ direct claims against Mount Sinai Hospital are severed and dismissed; (3) all of plaintiffs’ claims for negligent hiring against Mount Sinai Hospital (“Third, Fourth Cause of Action”) and Icahn School of Medicine (“Fifth Cause of Action”) are severed and dismissed, and (4) all of plaintiffs’ claims arising from the alleged negligent performance of the March 9, 2018 neuroendoscopic resection of the colloid cyst are severed and dismissed. The balance of the motion is denied. The Court specifically notes that plaintiffs’ “Second Cause of Action” for lack of informed consent remains part of this case, as does Mount Sinai Hospital’s

¹ “Mount Sinai Health System, Inc.” never appeared in this action.

vicarious liability for the negligent conduct, if any, found by a jury on the part of its employee Dr. Hadjipanayis.

This medical malpractice action arises out of a March 9, 2018, surgical procedure performed on the 74-year-old Linda Fisch, by Dr. Hadjipanayis at Mount Sinai Hospital. Plaintiffs allege, *inter alia*, that the defendants departed from the standard of care when they improperly determined that Mrs. Fisch was a candidate for colloid cyst resection and failed to appreciate her post-operative complications, and that these departures were a cause of subsequent extensive injuries including memory loss, the need for shunt placement, cognitive deficits, impaired judgment, and urinary incontinence. Plaintiffs maintain that Mrs. Fisch was asymptomatic from a stable, slow-growing and conservatively managed colloid cyst that was discovered incidentally in 2009, that Dr. Hadjipanayis' surgery was unnecessary, and that had Mrs. Fisch been properly informed of the risks of the surgery she would have never agreed to it (*see, e.g.*, June 13, 2023, affidavit of Linda Fisch, NYSCEF Doc. No. 41, paras 11, 12). As such, the issue of plaintiff's informed consent is maintained and withstands summary dismissal.

FACTUAL BACKGROUND

It is undisputed that Linda Fisch first learned of the existence of a colloid cyst located in the third ventricle of her brain in 2009 during a sinus CT scan. Her history also includes a 15-minute syncopal episode in February of 2017.

On January 18, 2018, plaintiff slipped on ice and hit her the back of her head. As a precaution, she went to the emergency department at Mount Sinai Hospital where she underwent a CT scan that revealed a stable subarachnoid bleed and, what had been known since 2009, the presence of a colloid cyst². A further study on January 19, 2018, showed "a stable subarachnoid

² The "findings" of the January 18, 2018, CT scan of the head read as follows: "no evidence of mass. There is acute subarachnoid hemorrhage along the inter hemispheric fissure along the frontal lobes...and aligning a suici

hemorrhage along the interhemispheric fissure” (*id.*, p. 23). Upon discharge from the ED, neurosurgery noted: “Repeat head CT reviewed. Stable trace traumatic SAH. No further imaging needed at this time. Given that patient is otherwise asymptomatic, she can be discharged with outpatient follow up with Dr. Hadjipanayis, for workup of colloid cyst. Continue to hold aspirin” (*id.*, p. 15-16).

Plaintiff saw Dr. Hadjipanayis on January 23, 2018. The doctor compared plaintiff’s current and prior imaging and noted (incorrectly, according to plaintiffs’ expert) that Mrs. Fisch “presented with progressive ventricular enlargement (ventriculomegaly) and hydrocephalus over several years with associated memory problems and sleeping episodes difficult to arouse from” (*id.*, p. 57). He advised that the cyst was impacting the size of the ventricles and recommended surgery to remove the colloid cyst.

On March 5, 2018, Mrs. Fisch underwent a pre-operative MRI of the Pituitary with and without Contrast (*see* NYSCEF Doc No. 34, p. 117) which, in comparison with the head CT of January 19, 2018, the head CT of February 10, 2017, and the CT sinus of May 26, 2009, revealed, *inter alia*, that “the ventricular system is stable in size when compared to the prior examination. There is no evidence of acute hydrocephalus. There is no abnormal parenchymal or leptomeningeal enhancement...the ventricles and sulci are age-appropriate...Redemonstrated is a presumed colloid cyst at the level of Monro measuring up to 9 mm in maximum dimension. This is stable in appearance when compared to a prior examination dated February 10, 2017, and a CT dated May 26, 2009.” The “impression” portion of the March 5, 2018, MRI report reads: “a stable 9 mm colloid cyst. Ventricular size and configuration are also stable. Small amount of

along the inferior right frontal lobe...again demonstrated is a 8 mm hyperdense structure at the level of the foramen Monro consistent with a colloid cyst. The lateral ventricles are prominent in relation to the sulci, unchanged compared to the prior non-contrast CT of the head. No midline shift or other significant mass effect is noted...” (*see* NYSCEF Doc. No. 74, pp. 20-21). The comparison study referenced is from February of 2017.

susceptibility along the anterior interhemispheric fissure is again noted likely chronic blood ducts related to prior known subarachnoid hemorrhage in this region. There is no evidence of acute subarachnoid hemorrhage on FLAIR images” (*id.*).

On March 9, 2018, Dr. Hadjipanayis performed an image-guided neuroendoscopic colloid cyst resection, septum pellucidum fenestration, and placement of external ventricular catheter on plaintiff. Due to persistent hydrocephalus postoperatively, an additional external ventricular drainage catheter was placed on March 15, 2018, followed by a ventriculoperitoneal shunt on March 23, 2018. Plaintiff required intensive physical therapy and inpatient rehabilitation after placement of the shunt, and her anticipated four-day hospitalization lasted for six weeks.

On April 17, 2018, Dr. Hadjipanayis noted that an adjustment of plaintiff’s shunt made her more alert, but he agreed that Mrs. Fisch now required a walker when moving, and that she suffered cognitive impairment on short term memory. She was discharged from Mount Sinai Hospital on May 10, 2018 and released to long-term rehabilitation.

During a May 18, 2018, follow-up, Dr. Hadjipanayis noted that Mrs. Fisch still needed a walker, suffered continued urinary incontinence, and that her short-term memory remained impaired.

APPLICABLE LAW

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 [1986]). “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, defendants submit, *inter alia*, the expert affirmations of a neurosurgeon, Mark M. Souweidane, M.D., (*see* NYSCEF Doc, No. 29), and a neuroradiologist, Elizabeth Lustrin, M.D., (*see* NYSCEF Doc. No. 30), both of whom opine to a reasonable degree of medical certainty that all of the care rendered to Mrs. Fisch complied with good and accepted standards of medical care, and did not cause or contribute to her alleged injuries.

For his part, Dr. Souweidane sets forth that Dr. Hadjipanayis’ recommendation of the subject surgery was “entirely proper” (*see* NYSCEF Doc. No. 29, para. 8) for a symptomatic colloid cyst of the third ventricle, because these cysts have the highest risk of acute deterioration and mortality; (2) Mrs. Fisch was appropriately counseled by Dr. Hadjipanayis regarding the risks of that surgery, including catastrophic stroke, post-operative hematoma, infection, speech difficulties, visual changes, memory dysfunction, paralysis and death, and she was likewise informed that she would need an external ventricular drain post-operatively and in rare situations, a ventriculoperitoneal shunt; (3) the small subarachnoid bleed plaintiff suffered as a result of the fall on January 18th was not a contraindication to surgery; (4) the surgery was properly performed, and (5) postoperative hydrocephalus is a known and accepted complication of colloid cyst removal and the drainage catheter placed on March 15th and the shunt placed on March 23rd were known and accepted complications of colloid cyst resections, of which plaintiff was made aware prior to surgery. Dr. Souweidane is unequivocal that defendants did not depart from the standard of care, and that “it was proper for Dr. Hadjipanayis to recommend surgical

removal of Mrs. Fisch's colloid cyst given its deleterious effects" and that he "properly performed this surgery and appropriately managed Mrs. Fisch post-operatively" (*id.*, para 17).

For her part, Dr. Lustrin opines that Mrs. Fisch was an appropriate surgical candidate because of the risk of "complete obstruction of her ventricles" by the colloid cyst, which could result in sudden death. Dr. Lustrin found, upon her review of the pertinent imaging, that: (1) the CT scans taken on January 18, 2018 and January 19, 2018, when compared with the CT scan of 2009, demonstrates growth of the cyst and, "more significantly," the ventricles over time, with one ventricle doubling in size by 2018; (2) the January 18, 2018 CT scan showed that plaintiff already had chronic obstructive hydrocephalus, making it "imperative to surgically remove the cyst"; (3) postoperative imaging showed that the ventricles remained largely unchanged when compared to plaintiff's preoperative images, because the ventricles had enlarged over time and did not collapse upon removal of the cyst, which is a known and accepted outcome of the surgery. Despite this, Dr. Lustrin opines "the surgical excision of the cyst was beneficial because it was the only way to ensure that it would not continue to grow and lead to the development of an acute obstruction of the ventricular system" (*id.*, para. 8); (4) there is no radiographic evidence that plaintiff's ventricles were "over-shunted," and (5) there are no postoperative imaging studies reflecting an improper surgical technique or intraoperative negligence on the part of Dr. Hadjipanayis. Dr. Lustrin concludes that under these circumstances, "it was entirely appropriate for Dr. Hadjipanayis to recommend the neuroendoscopic colloid cyst resection" (*id.*, para 13).

Defendant's expert affirmations are detailed, specific and factual in nature, and 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 affirmations of defendant’s experts were sufficient to meet defendants’ *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 injuries” (*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 a neurosurgeon (*see* NYSCEF Doc, No. 40), who opines to a “reasonable degree of medical and neurological certainty that this surgery was not indicated for Mrs. Fisch at that time” (*id.*, para 3), inasmuch as “the CT imaging taken in the ED on January 18, 2018 explicitly reported that the cyst was stable in size since 2009, the MRI taken on March 5, 2018 confirmed that the ventricular system is stable in size when compared to the prior examination referencing the most recent CT scans performed just two months prior, and that the cyst is stable in appearance when compared to a prior examination dated February 10, 2017 and a CT dated May 26, 2009” (*id.*). Plaintiffs’ expert is emphatic that Dr. Hadjipanayis and Mount Sinai Hospital “deviated from the standard of care on March 9, 2018 when surgery was performed...because the imaging studies and her history, clinical course and symptomatology did not warrant surgery in this 74-year-old woman and that as a result...Mrs. Fisch suffered severe injuries including loss of memory, incontinence, inability to

walk and neurologic dysfunction as documented in the records and deposition testimony” (*id.*). Plaintiff’s expert sets forth the following departures from the standard of care: (1) the March 9, 2018 surgery was not indicated and should not have been performed; (2) the standard of care is to treat the colloid cyst with serial, annual scans and then, only if the cyst is growing, the ventricles are enlarging and plaintiff becomes symptomatic, to surgically remove the cyst; (3) the risks to older patients such as Mrs. Fisch outweigh the benefits of surgery, and (4) plaintiff was not given proper informed consent and no reasonable person including Mrs. Fisch would have proceeded with the March 9, 2018 surgery had a proper informed consent discussion taken place.

The plaintiffs’ expert affirmation raises clear questions of fact sufficient to defeat summary judgment in favor of defendant Dr. Hadjipanayis and vicariously, his employer Mount Sinai Hospital. “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]). Whether or not the March 9, 2018, surgical procedure should have been performed in the first place is a question of fact for the jury to resolve, not this Court. Plaintiffs’ expert affirmation and the hereinbefore referenced affidavit of Linda Fisch serves to raise clear questions of fact on the issue of plaintiffs’ lack of informed consent.

Accordingly, it is

ORDERED that defendants’ motion for summary judgment is granted to the extent that the complaint is severed and dismissed as against the defendant, Icahn School of Medicine at Mount Sinai; and it is further

ORDERED that all of plaintiffs’ direct claims against Mount Sinai Hospital s/h/a Mount Sinai Medical Center are severed and dismissed; and it is further

ORDERED that plaintiffs' Third, Fourth and Fifth causes of action are severed and dismissed; and it is further

ORDERED that all of plaintiffs' claims for negligent performance of the March 9, 2018, surgery are severed and dismissed; and it is further

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

ORDERED that this matter shall proceed against Dr. Hadjipanayis and Mount Sinai Hospital s/h/a Mount Sinai Medical Center, as the employer of Dr. Hadjipanayis, which may be vicariously responsible for negligence, if any, of Dr. Hadjipanayis; and it is further

ORDERED that plaintiffs' Second Cause of Action for lack of informed consent shall proceed; and it is further

ORDERED that the Clerk enter judgment in favor of defendant Icahn School of Medicine at Mount Sinai dismissing the complaint; and it is further

ORDERED that the parties appear for a pre-trial conference via Microsoft Teams on **October 2, 2023 at 12:45 p.m.**

8/3/2023
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

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