

McCord v Dayen

2023 NY Slip Op 33414(U)

October 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 522261/2017

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2th day of October 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RICHARD J. MCCORD, AS TRUSTEE OF THE ESTATE OF
BENJAMIN BENI,

Plaintiff,

-against-

NINA DAYEN, M.D., LEONID CHERNOBELSKY, M.D., DR.
VLADIMIR KRICHEVSKY and DR. YEKATERINA
KLEYDMAN,

Defendants.

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

DECISION & ORDER

Index No. 522261/2017
Mot. Seq. 8 & 9

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: Seq. 8: 123 – 125, 127 – 142, 154, 155 – 156, 157
Seq. 9: 143 – 144, 145 – 149

Defendants NINA DAYEN, D.O. (“Dayen”), VLADIMIR KRICHEVSKY, D.O. (“Krichevsky”), and YEKATERINA KLEYDMAN, D.O. (“Kleydman”) move pursuant to CPLR § 3212 for summary judgment in their favor (Sequence #8); Defendant LEONID CHERNOBELSKY, M.D. (“Chernobelsky”) moves pursuant to CPLR § 3212 for summary judgment in his favor (Sequence #9).

At oral arguments, the case against Defendant Dr. Chernobelsky was voluntarily discontinued by the plaintiff. Sequence #9 is therefore rendered moot, and the action is dismissed against Defendant Dr. Chernobelsky.

This action arises from alleged acts of malpractices by several defendants in the care and treatment of plaintiff Benjamin Beni (“Beni”). Plaintiff claims that the defendants failed to timely diagnose and properly treat his condition of multiple myeloma. Defendant Dr. Dayen provided primary medical care to Mr. Beni from August 25, 2014, to March 29, 2017. Plaintiff was seen in Dr. Dayen’s office 43 times during this time period, and presented with various complaints including back pain, fatigue, and chest pain. Defendant Dr. Dayen referred the plaintiff to Defendant Dr. Kleydman for dermatological care, and to Defendant Dr. Krichevsky for urological care. Defendant Dr. Kleydman saw plaintiff three times in June 2015, where she treated him for various dermatological conditions. Defendant Dr. Krichevsky provided urological care and treatment to plaintiff from September 18, 2015, to December 16, 2016. Defendant Dr. Krichevsky treated plaintiff for various urological conditions, including chronic prostatitis, urinary tract infection, and kidney stones. On February 26, 2016, Defendant Dr. Dayen saw plaintiff where he presented with chest pains. Dr. Dayen ordered a chest CT scan for further evaluation of the plaintiff, which revealed scattered hyperdense/blastic lesions throughout the bilateral ribs, likely bone islands. The radiologist recommended a whole-body nuclear scan to exclude the possibility of metastatic disease. A bone scan was taken on March 16, 2016, and revealed an old fracture of the left ribs, however, the overall bone scan pattern did not suggest metastatic disease to the bone. Defendant Dr. Dayen continued to provide primary medical care to the plaintiff until his last visit on March 29, 2017, where he presented with complaints of pain

in his thoracic back area. In April 2017 plaintiff had an MRI of the thoracic spine, ordered by Dr. Koveleva, which revealed findings suggestive of multiple myeloma.

As a preliminary matter, plaintiff asserts that the motion for summary judgment regarding Defendants Dr. Dayen, Dr. Kelydman and Dr. Krichevsky (sequence #8) is impermissibly late. Plaintiff's Note of Issue was filed on November 29, 2022. Defendants had sixty days to file the motion for summary judgment. Sixty days from November 29, 2022, was January 28, 2023, which is a Saturday. Therefore, defendants had until the next business day to file the motion. The motion was filed on Monday, January 30, 2023, and thus was timely made.

“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.” *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept 2011]. “In moving for summary judgment dismissing a complaint alleging medical malpractice, a 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.” *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept 2015]. “Once a showing has been made, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact.” *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].

As to the expert testimony, “[E]xpert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact.” *Wagner v. Parker*, 172 A.D.3d 954, 955 [2d Dept 2019]. “An expert opinion submitted in opposition should address

specific assertions made by the movant's experts, setting forth an explanation for the reasoning and relying on specifically cited evidence in the record” *Murray v. Central Island Healthcare*, 205 A.D.3d 1036, 1037 [2d Dept 2022].

With regards to Defendants Dr. Kleydman and Dr. Krichevsky, plaintiff has not submitted expert testimony to raise a triable issue of fact as to whether Dr. Kleydman or Dr. Krichevsky deviated from accepted standards of medical care, or that such deviations proximately caused any injury to plaintiff. Defendants submitted affirmations from two experts, both licensed to practice in the State of New York. Defendant’s first expert, Randy Makovsky, M.D., is a board-certified urologist. Dr. Makovsky opines that the care and treatment provided to Mr. Beni by Defendant Dr. Krichevsky was consistent with the standards of good and acceptable urological care, and that none of plaintiff’s claimed injuries were caused by negligence on the part of Defendant Dr. Krichevsky. Defendants second expert, Jeffrey Ellis, M.D., is a board-certified Dermatologist. Dr. Ellis opines that Dr. Kleydman did not deviate from the standards of good and acceptable dermatological care, and that none of plaintiff’s injuries were caused by any negligence on the part of Dr. Kleydman. Both experts offer detailed opinions based on the evidence submitted. Plaintiff has not submitted any expert testimony with regards to the care and treatment of plaintiff by Defendants Dr. Kleydman and Dr. Krichevsky. Therefore, the portion of the motion for summary judgment on behalf of Defendants Dr. Kleydman and Dr. Krichevsky are granted without opposition and the action is dismissed as against them.

Defendant Dr. Dayen also moves for summary judgment as to the claims against her. The basis of the motion for summary judgment on behalf of Dr. Dayen is limited to the issue of proximate cause. Defendant claims that plaintiff’s injuries were not causally related to any

treatment or care rendered by Dr. Dayen, and that any alleged delay in the diagnosis of plaintiff's multiple myeloma had no effect on plaintiff's condition and injuries.

Defendant submitted the affirmation of Reed Phillips, M.D., a physician licensed to practice in the State of New York. Dr. Phillips is a physician board certified by American Board of Internal Medicine with sub certifications in Medical Oncology and Hospice and Palliative Medicine. Dr. Phillips opines that the alleged delay in the diagnosis and treatment of plaintiff's multiple myeloma did not alter his treatment or prognosis; that plaintiff did not have any radiologically detectable lesions when a chest CT scan was taken on February 29, 2016 nor did plaintiff have any detectable signs of multiple myeloma; that the lower back pain complained of by plaintiff in 2014 and early 2015 was not due to multiple myeloma; that an MRI or CT scan of the thoracic spine or bone marrow taken on or before November 2015 would not have revealed findings suspicious for multiple myeloma, and that even if plaintiff had multiple myeloma at the time any lesions present would have been too small to visualize. Furthermore, defendant expert opines that any study taken in November 2015 which revealed lytic lesions suggestive of multiple myeloma, the stage and prognosis of his cancer would have been the same, therefore any alleged delay in the diagnosis of his cancer would not have changed his diagnosis, treatment, or his outcome. Finally, expert opines that the alleged delay in diagnosis of plaintiff's multiple myeloma did not deprive him of the opportunity to get the best, most effective and possibly curative treatment.

Dr. Phillips further opines that plaintiff did not experience any complications with regard to getting effective, possibly curative treatment as a result of any alleged delay in the diagnosis and treatment of his multiple myeloma; that the alleged delay did not cause plaintiff to develop any complications in the course of his treatment; that the treatment plaintiff received was

identical to that which would have been prescribed had the multiple myeloma been diagnosed earlier; and that plaintiff did not undergo any more intense therapy over that which he would have received had the cancer been diagnosed earlier.

In order to defeat summary judgment as to the issue of causation, plaintiff must present evidence “from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury” *Flaherty v. Fromberg*, 46 A.D.3d 743, 745 [2d Dept 2007]. “To establish proximate cause, the plaintiff must demonstrate “sufficient evidence from which a reasonable person might conclude that it was more probable than not that” the defendant's deviation was a substantial factor in causing the injury” *Flaherty v. Fromberg*, 46 A.D.3d 743, 745 [2d Dept 2007], citing *Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881,883 [2d Dept 2005].

Plaintiff submitted the affirmation of Ellen Friedman, M.D., a physician licensed to practice medicine in the State of New York. Dr. Friedman specializes in hematology and medical oncology. Dr. Friedman opined that Dr. Dayen deviated from the acceptable standard of care and treatment with regard to Dr. Dayen’s care and treatment of plaintiff. However, the defendant has limited the basis for summary judgment on behalf of Dr. Dayen to the issue of proximate cause. Therefore, the present issue is whether Dr. Dayen’s alleged delay in the diagnosis of plaintiff’s multiple myeloma caused any of his alleged injuries.

Dr. Friedman did not refute any of defendant’s expert opinions with regards to proximate causation. Of relevance, Dr. Friedman did not refute Dr. Phillips’ opinion that any alleged delay in the diagnosis of plaintiff’s multiple myeloma would not have changed his diagnosis, treatment, or outcome. Further, Dr. Friedman did not refute Dr. Phillips’ opinion that any findings of lesions suggestive of multiple myeloma in November 2015 would have been of the

same stage and prognosis of his cancer when it was diagnosed in April 2017. Dr. Friedman does not refute Dr. Phillips' opinion that the lower back pain complained of by plaintiff in 2014 and early 2015 was not due to multiple myeloma.

Dr. Friedman states that timely testing of the thoracic spine would have revealed signs of multiple myeloma, and treatment would have been started immediately and would have likely prevented plaintiff's condition from deteriorating. However, Dr. Friedman does not opine as to what stage the cancer would have been, or how the treatment or prognosis would have differed from what plaintiff received in 2017. Dr. Friedman also opines that Dr. Dayen's alleged failure to timely diagnose multiple myeloma in the plaintiff negatively impacted his condition and led to the severe and substantial deterioration of his condition. However, Dr. Friedman does not opine as to when the cancer should have been diagnosed, or how the alleged delay impacted plaintiff's condition or explains how plaintiff's condition deteriorated. Plaintiff argues that he suffered needlessly due to the delayed diagnosis of his condition, however, does not offer any support of that conclusion.

All parties agree that plaintiff has been in remission for five years, which generally indicates that the cancer has been cured. Plaintiff fails to state what other outcome would have been achieved had the alleged delay in diagnosis not occurred. Plaintiff failed to raise an issue of fact as to defendant's showing that any delay did not diminish plaintiff's chance of a better outcome or that it did not increase his injury. Plaintiff also failed to raise an issue of fact as to the claim that Dr. Dayen's alleged delay in the diagnosis of Mr. Beni's cancer caused or exacerbated any of his alleged injuries or to refute any of Dr. Phillips' opinions regarding causation. In sum, plaintiff's expert affirmation is insufficient to defeat Dr. Dayen's prima facie showing of entitlement to summary judgment.

Accordingly, the portion of the motion for summary judgment on behalf of defendants Dr. Kleydman and Dr. Krichevsky is GRANTED without opposition and the action is dismissed as against them (Seq. 8). The motion of Dr. Dayen seeking summary judgment based on lack of proximate cause is GRANTED and the action is dismissed as against her (Seq. 8). Therefore, Motion Sequence 8 is GRANTED in its entirety.

The motion seeking summary judgment on behalf of Defendant Dr. Chernobelsky is moot as the action has been discontinued against him (Seq. 9).

This constitutes the decision and order of the court.¹

ENTER.



**Hon. Consuelo Malfre Melendez
J.S.C.**

¹ This decision was drafted with the assistance of intern, Heather Herndon, Brooklyn Law School.