Sheehan v Marvin
2023 NY Slip Op 35335(U)
January 3, 2023
Supreme Court, Rockland County
Docket Number: Index No. 035164/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ERIN SHEEHAN,

Plaintiff,

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

-against-

Index No.: 035164/2018

KENNETH MARVIN, M.D. and MARVIN FAMILY CHIROPRACTIC, P.C.,

Motion #2

Defendants.

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Sherri L. Eisenpress, J.

The following papers, numbered NYSCEF documents 59-84, were reviewed in connection with Defendants' Notice of Motion seeking an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in favor of Defendants and dismissal of the action:

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The instant action alleging chiropractic malpractice and lack of informed consent was commenced on August 21, 2018, and arises out of the care and treatment rendered to Plaintiff Erin Sheehan by Dr. Kenneth Marvin on September 11, 2017, September 14, 2017 and September 16, 2017. On September 11, 2017, Plaintiff, a 36 year-old woman, presented to Dr. Marvin, a chiropractor, with complaints of neck and head pain that began one week prior. After a medical history was taken, and an examination performed, Dr. Marvin assessed Plaintiff as having sprained ligaments of the cervical spine, strains to the muscle fascia and tendon at the neck level. A treatment plan was formulated which included e-stimulation therapy; heat pads to the cervical spine; therapeutic exercises to the cervical spine; rehab exercises; hydrotherapy; and cervical adjustments to all levels that were found

to have subluxations. During the initial visit, Dr. Marvin performed all aspects of care outlined in the treatment plan.

On September 14, 2017, Plaintiff returned for a second visit, at which time she indicated that her condition and complaints had improved. At the September 14, 2017 visit, the same treatment was performed as was done on the first visit. After treatment, Plaintiff reported improved range of motion, decreased pain and overall improvement. She was provided with a "neck traction device" and instructed to use it 3-4 times a day.

Plaintiff returned to Dr. Marvin for a third visit on September 16, 2017, at which time she reported an improvement in her condition. Plaintiff asserts that she was pleased with Dr. Marvin's non-aggressive treatments and indicated to him that she was not interested in any aggressive manipulation of her neck. However, Plaintiff testified that she received an adjustment to her cervical spine that entailed two quick movements to the left and then two quick movements to the right. She described the movement as "shocking" and "quick" but denied experiencing anything she would describe as pain. Contrary to the testimony of Dr. Marvin, Plaintiff asserts that no "activator" was used during this visit.

Plaintiff then left the visit, but on the way to her car, she unexpectedly felt a "rush" of heat; started sweating; began feeling nauseous; and felt a sensation that the "world was spinning and that she was "falling to the right." These symptoms prompted her to return to the office. Upon return to the office, Dr. Marvin met Plaintiff in the waiting room where she reported dizziness, a spinning sensation, feeling hot and feeling as if she was falling to the right. Dr. Marvin provided her with a cold compress and some water and had her sit in the waiting room for 20-25 minutes. Thereafter, Dr. Marvin returned to evaluate Plaintiff, had her walk forward and backwards and performed a finger to nose test. Plaintiff testified that most of her complaints had subsided except for a headache and that she "felt a little light on her feet" and had a "slightly altered gait."

On September 30, 2017, Plaintiff presented to The Valley Hospital via ambulance, with complaints that she had awoken around 4:00 a.m. with a headache and ataxia, unsteadiness, severe dizziness and numbness in her face, arms and legs. By 7:00 a.m, Plaintiff indicated she was unable to move the entire right side of her body. At the hospital, a CT-scan and an MRI were performed and Plaintiff was eventually diagnosed with a dissection of the vertebral artery (VAD) and a subsequent stroke.

The Parties' Contentions

Defendants move to dismiss the entirety of Plaintiff's case. With respect to the chiropractic malpractice claim, Defendants submit that the facts and expert evidence will confirm that none of Dr. Marvin's care and treatment departed from the standard of care and that none of the alleged departures proximately caused any of the injuries alleged in the matter. More specifically, Defendants contends that the evidence will confirm that Plaintiff did not suffer from a traumatic dissection of the vertebral artery as a result of chiropractic treatment on September 16, 2017, which led to her September 30, 2017 stroke, and that she was suffering from an evolving spontaneous dissection prior to her care with Dr. Marvin.

In support of their motion, they submit expert medical affidavits/affirmations. Joseph Murphy, D.C. a licensed chiropractor who practices in New York, opines that within a reasonable degree of chiropractic care that there were no departures form the standard of care with respect to the care and treatment rendered by Dr. Marvin or Marvin Family Chiropractic, and that none of the care provided proximately caused or contributed to the alleged injuries. More specifically, Dr. Murphy opines that that Plaintiffs' elevated blood pressure reading did not contraindicate any of the treatment performed; nothing in Plaintiff's medical history or further physical exam contraindicated chiropractic adjustment to the cervical spine with the use of an activator[1]; nothing in Plaintiff's medical history or further

[1] The Court notes that Plaintiff disputes the cervical adjustment was performed with the use of an activator.

physical exam contraindicated chiropractic adjustment to the cervical spine without the use of an activator; and Dr. Marvin did not fail to diagnose any post-treatment injury and properly evaluated her condition when she returned to the office and her complaints resolved before she left the office.

Defendant also submitted the expert affidavit of Harold Pikus, M.D., a Board Certified Neurosurgeon, who practices in Florida, Vermont, North Carolina and New Hampshire. Dr. Pikus opines to a reasonable degree of medical certainty that Plaintiff began exhibiting symptoms of an evolving spontaneous dissection of the vertebral artery prior to her treatment with Dr. Marvin; that the precipitating event began between September 2, 2017 and September 9, 2017; the September 30, 2017 MRI and CT-scan do not show any evidence of a traumatic vertebral artery dissection and no injury to any structure in the neck; and Plaintiff did not suffer a traumatic vertebral dissection or on September 16, 2017 but rather a TIA related to the spontaneous dissection that occurred in early September prior to Dr. Marvin's care.

With respect to the issue of informed consent, it is Defendants' contention that this cause of action must fail as a matter of law because (1) chiropractic adjustments do not involve an invasion in the physical integrity of the body; (2) traumatic dissections and strokes are not risks associated with chiropractic adjustments and (3) none of the alleged care and treatment proximately caused any of the injuries.

In opposition to the summary judgment motion, Plaintiff submits that the motion must be denied as there are material issues of fact in dispute relative to departures from the standard of care and injury causation. More specifically, Plaintiff asserts that there are divergent recollections of the nature of the treatment performed on September 16, 2017. Plaintiff contends that Dr. Marvin performed a high velocity neck manipulation such as the Diversified Technique, which Plaintiff contends Dr. Marvin admitted he used in his practice

(though he denies using it on Plaintiff), and which he admitted is capable of causing a VAD (Vertebral Artery Dissection) or an exacerbation of an evolving spontaneous dissection.

Plaintiff further asserts that divergent expert opinions require the denial of the summary judgment motion. In support of this argument, Plaintiff submits the affidavit of William J. Lauretti, D.C, a licensed Chiropractor in the State of New York. Dr. Lauretti opines that Defendant was negligent and committed chiropractic malpractice by either causing, triggering or enhancing a minimally symptomatic VAD; in causing a TIA (transient ischemic attack) and then failing to promptly differentially diagnose a TIA or VAD, and then failing to intervene to prevent Plaintiff from suffering a stroke. He further opines that defendant had no cause or justification to advance to more forceful, aggressive and vigorous techniques which were never requested nor welcomed by the Plaintiff and that he failed to appreciate the severe, unusual and dramatic symptom complex on the third visit and properly diagnose Plaintiff and/or refer her for emergency care.

Additionally, Plaintiff submits the affidavit of Todd L. Berland, MD, a Board Certified Vascular Surgeon at NYU Langone Health. Dr. Berland opines that high velocity chiropractic neck manipulation or overly vigorous side to side stretching of the neck can cause the dissection of a vertebral artery and that in this case, this likely caused Plaintiff's vertebral arterial dissection and her subsequent stroke. Dr. Berland opines that Plaintiff's VAD did not happen or spontaneously "evolve" until after the September 16, 2016 thrusting because it was only after that event that Ms. Sheehan displayed severe and acute vascular or neurologically based symptoms. Additionally, Dr. Berland opines that even if Plaintiff's VAD was non-traumatic and was evolving before Dr. Marvin's September 16, 2017 neck manipulation, Dr. Marvin's failure to act upon Plaintiff's severe and acute symptoms deprived Plaintiff of the chance for a better outcome.

With respect to the lack of informed consent cause of action, Plaintiff submits that her expert opinions that it is the standard of care to acquire verbal and written consent

from the patient for Neck Manipulation with regard to properly advising the patient as to the risks of cerebrovascular and neurological injuries, requires a denial of this aspect of the summary judgment motion.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). In reviewing a summary judgment motion, the court must accept as true the evidence presented by the nonmoving party, and the motion must be denied if there is even arguable any doubt as to the existence of a triable issue of fact. Baker v. Briarcliff School Dist., 205 A.D.2d 652, 653, 613 N.Y.S.2d 660 (2d Dept. 1994).

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from accepted practice; and 2) evidence that such departure was a proximate cause of injury or damage. Wiands v. Albany Medical Center, 29 A.D.3d 982, 983, 816 N.Y.S.2d 162 (2d Dept. 2006). In a summary judgment motion on a medical malpractice

action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby. Belak-Redl v. Bollinger, 74 A.D.3d 1110, 1111, 903 N.Y.S.2d 508 (2d Dept. 2010). The defendant doctor must establish his or her entitlement to judgment as a matter of law by proffering competent evidence, such as affidavits of medical experts, hospital or medical records, examinations before trial, etc.. Georges v. Swift, 194 A.D.2d 517, 518, 598 N.Y.S.2d 545 (2d Dept. 1993).

With respect to the negligence/chiropractic malpractice claims, the Court finds that Defendants have met burden on summary judgment. However, the Court finds that Plaintiff raised a triable issue of fact sufficient to deny summary judgment. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as such credibility issues can only be resolved by a jury. Feinberg v. Feit, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661 (2d Dept. 2005); Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); Bengston v. Wang, 41 A.D.3d 625, 839 N.Y.S.2d 159 (2d Dept. 2007); Barbuto v. Winthrop University Hosp., 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept. 2003); Fink v. DeAngelis, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014). Where an expert's opinion is neither speculative nor conclusory, but relies on specifically cited evidence in the record, it may be sufficient to raise a question of fact precluding summary judgment. Roca v. Perel, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008).

Here, the competing expert affidavits demonstrate triable issues of fact with respect to the exact nature of the treatment rendered to Plaintiff on September 16, 2017, and whether the cervical manipulation caused Plaintiff to suffer a VAD leading to a stroke, or, as Defendant contends, whether Plaintiff suffered an evolving spontaneous dissection prior to her care and treatment with the Defendants. Additionally, there are triable issues of fact based upon the "loss of chance" doctrine which permits a plaintiff to make a showing of proximate cause by presenting expert evidence from which the jury may infer that the defendant's

conduct diminished the plaintiff's chance of a better outcome or increased the injury. Schuster v. Sourour, 207 A.D.3d 491, 171 N.Y.S.3d 551 (2d Dept. 2022). Here, Plaintiff's experts contend that Dr. Marvin should have recognized the nature of Plaintiff's symptoms when she returned to the office and referred her to the emergency room, resulting in a reduction of the chance that she would suffer a stroke.

Lastly, the Court finds that there are triable issues of fact as the cause of action based upon lack of informed consent. "To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law §2805-d, that (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner 'under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation', and (2) a reasonably prudent person in the patient's position would not have undergone the procedure if he or she had been fully informed." Rodriguez v. New York City Health and Hospital Corp., 50 A.D.3d 464, 465, 858 N.Y.S.2d 99 (1st Dept. 2008). Where a plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively insufficient, the cause of action for medical malpractice based on lack of informed consent must be dismissed. Id.

As an initial matter, Defendants have proffered no case law in support of their contention that the informed consent doctrine is inapplicable to chiropractors in general on the ground that chiropractors' actions do not constitute an "invasion of the physical integrity of the patient's body." See Evart v. Park Avenue Chiropractics, P.C, 86 A.D.3d 442, 926 N.Y.S.2d 491 (1st Dept. 2011)(plaintiff permitted to pursue a lack of informed consent claim in a chiropractic malpractice case.[2]) In the instant matter, both parties submit expert

[2] In Evart, although the claim was permitted, the Court found the evidence to support the claim to be insufficient based upon the failure to present expert testimony on the issue.

affidavits which address the informed consent claims and which are diametrically opposed to each other, including whether the cervical manipulation can be the cause of Plaintiff condition, and whether there is a necessity for specific warnings. As such, triable issues of fact are present which require denial of the summary judgment motion to dismiss that claim.

Accordingly, it is hereby

ORDERED that the Notice of Motion by Defendants for summary judgment and dismissal of the Complaint against them is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a settlement Conference, in person, on **February 10, 2023 at 10:00 a.m. in person.** The parties must email Confidential Settlement Memorandum to mtarnan@nycourts.com or skrance@nycourts.com at least three (3) business days before the conference outlining their settlement positions on liability and damages. During the settlement conference, attorneys MUST be able to contact their clients and/or Adjusters to get authority.

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York
January 3, 2023

HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

To: All parties via e-filing