Brewster v Hunter
2024 NY Slip Op 35413(U)
May 23, 2024
Supreme Court, Bronx County
Docket Number: Index No. 28027/2018E
Judge: Joseph E. Capella
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23

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DORLENE BREWSTER,

Index No.: 28027/18E

Plaintiff,

Decision/Order

-against-

COREY HUNTER, M.D., and AINSWORTH INSTITUTE OF PAIN MANAGEMENT, PLLC,

Defendants.

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PAPERS	NUMBERED
Notice of Motion and Affidavit Annexed	1
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DECIDED AS FOLLOWS:

By notice of motion defendants, Corey Hunter, M.D., and Ainsworth Institute of Pain Management, PLLC (Ainsworth), move for summary judgment (CPLR 3212) dismissal of plaintiff's complaint. Plaintiff alleges a cause of action for medical malpractice by Dr. Hunter in his treatment and performance of an epidural lysis of adhesions on October 30, 2017. On February 14, 2017, plaintiff was involved in a hit-and-run accident in which she injured her lower back. After months of conservative treatment, plaintiff presented to Ainsworth and sought treatment from Dr. Hunter for back pain. Following an examination on October 10, 2017, Dr. Hunter recommended epidural steroid injections in the lumbar spine. However, as plaintiff had recently undergone a cesarean section with epidural, Dr. Hunter's plan was to perform a lysis of adhesions with epidurogram through the sacral hiatus caudally and an epidural steroid

injection using dexamethasone. Plaintiff alleges that the care provided by Dr. Hunter deviated from the accepted standards of care causing her to suffer serious and permanent personal injuries, including leakage of spinal fluid, subarachnoid hemorrhage, and subdural hematoma. The initial burden is on defendant to make a prima facie showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If they do, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez v Prospect*, 68 NY2d 320), and denial of summary judgment.

In support of the motion, defendants submit an expert affirmation from Dr. Christopher Gharibo, a board-certified anesthesiologist with a specialty in pain management. Dr. Gharibo opines, in sum and substance, that the lysis of adhesions with epidurogram was indicated and that Dr. Hunter properly performed the procedure. In support of his opinion, Dr. Gharibo refers to the fluoroscopic images taken during the procedure which he asserts show no evidence that the needle was inserted too deeply during the procedure. Dr. Gharibo opines that defendants properly evaluated, monitored and treated plaintiff following the procedure. In response to complaints of her legs feeling "weird," Dr. Hunter appropriately re-evaluated plaintiff, found no neurological deficits and monitored her for another hour until she was able to ambulate with no complaints. Dr. Gharibo further opines that plaintiff's alleged injuries were not caused by defendants' medical treatment, no different treatment could have changed plaintiff's

course or outcome, and any condition complained of occurred in the absence of medical malpractice.

Dr. Gharibo states that the subject procedure caused a "tiny puncture of the dura, resulting in an extremely slow, minor leak of cerebrospinal fluid. A dural puncture is a known, accepted risk of this type of injection and occurs in 1% of all injections even in the absence of negligence," as was the case here. Additionally, there were no indications that a dural puncture had occurred as plaintiff's complaints of numbness and transient weakness were normal side effects of the procedure, and Dr. Hunter's records document that she was hemodynamically stable and did not complain of a headache. Dr. Gharibo indicates that even if injury to the dura had been confirmed, the day after the procedure would have been too soon to perform the only direct treatment available–a blood patch. The standard of care is to monitor a patient's symptoms and administer a blood patch if a headache persists for three to five days after failure of conservative treatment. Dr. Gharibo also notes that while admitted to Montefiore Medical Center, plaintiff's neurology attending recommended she receive a blood patch if her headache persisted with no improvement, which she declined. Dr. Gharibo opines that defendants did not depart from accepted standards of practice and that there was nothing defendants could have done to bring about a better outcome, nor was any of the treatment rendered a proximate cause of the injuries claimed.

Defendants also submit an expert affirmation from Dr. Alan Segal, a physician board-certified in neurology. Dr. Segal opines that plaintiff experienced a known and

accepted complication of the procedure in the form of minimal contact with the dura and a negligible spinal fluid leak, which was successfully managed with conservative therapy, and that this occurs even in the absence of negligence. Dr. Segal states that plaintiff's complaints of numbness and weakness were normal side effects of an epidural injection and not indications plaintiff was experiencing any issue post-procedure. Also, the results of objective testing performed on plaintiff is not consistent with a brain injury or any of the other injuries alleged to be permanent and ongoing. Moreover, Dr. Segal opines that the "absolutely minimal midline shift caused by the subdural hemorrhage would not have caused any pressure on the brain sufficient to result in the type of neurological deficits" plaintiff is claiming in this case. Nor was there a cortical vein thrombosis or cerebellar lesion which would cause the type of neurological deficits plaintiff alleges in her bill of particulars. Dr. Segal notes that repeated follow-up imaging revealed that the previously identified blood collection has resolved and that plaintiff's most recent MRI on July 2, 2019, shows no pathology or objective basis for her subjective complaints. According to Dr. Segal, defendants did not depart from accepted standards of care and the care rendered by defendants was not a proximate cause of the injuries alleged. Based on the aforementioned, the court is satisfied that movants have met their burden of producing evidentiary proof in admissible form sufficient to establish an entitlement to summary judgment. (*Zuckerman v City of NY*, 49 NY2d 557 [1980].) The burden now shifts to plaintiff to submit proof in admissible form sufficient to create issues of fact to warrant a trial (*Sillman v Twentieth Century-Fox*, 3 NY2d 395 [1957]).

In opposition, plaintiff provides an expert affirmation from Dr. Allan Hausknecht, a board-certified neurologist. Plaintiff's expert alleges a theory of liability for the first time in plaintiff's opposition; specifically, lack of informed consent as plaintiff was not aware that she was undergoing a lysis of adhesions and that defendants deviated from good and accepted practice by failing to advise plaintiff of the potential complications of the procedure. A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment. (*Mezger v Wyndham Homes*, 81 AD3d 795 [2d Dept 2011].) This new theory of liability was not set forth in the complaint or bill of particulars. Accordingly, it is being improperly raised for the first time in opposition to the instant summary judgment motion and is insufficient to meet plaintiff's burden to create issues of fact to warrant a trial. (*Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012].) The remainder of plaintiff's opposition fails to rebut defendants' prima facie showing of entitlement to summary judgment. Dr. Hausknecht does not affirm that he has reviewed the defense experts' affirmations and does not refute, or even comment upon, any opinion offered by defendants' experts. Specifically, Dr. Hausknecht fails to rebut defendants' experts' opinions that plaintiff's complaints of numbness and weakness were normal side effects; that the standard of care was to monitor symptoms and administer a blood patch after three to five days of persistent headaches following conservative treatment; and that plaintiff's complaints are entirely subjective and unsupported by any objective testing, such as CT scans or MRIs. To avert summary judgment, plaintiff's expert must specifically address the opinions rendered by

defendant's expert. (*Kaplan v Karpfen*, 57 AD3d 409 [1st Dept 2008].) Here, Dr. Hausknecht's failure to review the opinions of defendants' experts is not a simple procedural defect in plaintiff's opposition, as a review of Dr. Hausknecht's affirmation demonstrates that he is *unaware* of the opinions offered by Drs. Gharibo and Segal, and therefore does not offer contrary opinion in rebuttal. Additionally, Dr. Hausknecht does not opine that the lysis of adhesions was not indicated, nor that Dr. Hunter deviated from the standard of care in his performance of same. The affirmation of plaintiff's expert is devoid of analysis or reference to scientific data and offers no opinion as to causation. (*Rodriguez v Waldman*, 66 AD3d 581 [1st Dept 2009].) Plaintiff failed to create a triable issue of fact sufficient to warrant a trial (*id.*), accordingly, the instant summary judgment motion is granted and the action is dismissed.

Defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. The county clerk is directed to enter judgment accordingly. This constitutes the decision and order of this court.

May 23, 2024
Dated

Hon. Joseph E. Capella, J.S.C.