Hubsher v Schlesinger
2024 NY Slip Op 35684(U)
February 6, 2024
Supreme Court, Nassau County
Docket Number: Index No. 003266/2017
Judge: Catherine Rizzo

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

MARSHALL HUBSHER,

Plaintiff,

- against -

WILLIAM SCHLESINGER, M.D.,

Defendant.

TRIAL/IAS, PART 44
NASSAU COUNTY

INDEX NO.: 003266/2017

MOTION SUBMISSION DATE : 1/5/24

MOTION SEQUENCE NO.: 006, 007

The following e-filed documents for Motion Sequence 007 and 008 listed by NYCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 006

Notice of Motion and Affidavits/Affirmations..... X
Affidavits/Affirmations in Opposition..... X
Reply Affidavit/Affirmation..... X

Motion Sequence 007

Notice of Cross-Motion and Affidavits/Affirmations.. X
Affidavits/Affirmations in Opposition..... X
Reply Affidavits/Affirmations..... N/A

RELIEF REQUESTED

The defendant, William Schlesinger, M.D., (hereinafter referred to as "Dr. Schlesinger"), moves for an order granting the defendant summary judgment. The plaintiff, Marshall Hubsher, (hereinafter referred to as "Hubsher"), moves separately, to wit, one day latter, for partial summary judgment against the defendant. The plaintiff and defendant submit respective affirmations in opposition. The defendant submits a reply.

BACKGROUND

The plaintiff initiated this action sounding in medical malpractice claiming that the defendant's alleged departures from accepted standards of medical practice during his care and treatment of Hubsher caused a raging internal MRSA infection in his lower back to the defendant's failure to properly sanitize and disinfect before performing epidural steroid injections, devastating his body, causing an extended hospitalization, an infected epidural abscess, a bone infection, back surgery, renal failure, radiculopathy and a drop foot. The plaintiff, by way of motion for partial summary judgment, seeks a ruling from this court that the defendant departed from good and accepted medical practices and negligently caused an uncontrolled MSRA infection in plaintiff, and that the MSRA infection inflicted on the plaintiff was the cause of the injuries complained of. The defendant, by way of motion for summary judgment, submits that the treatment and care rendered by defendant pain management specialist was within good and accepted standards at all times.

APPLICALBE LAW

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opines as such credibility issues can only be resolved by a jury. (*Roca v. Perel*, 51 AD3d 757). The submission by the parties of conflicting medical opinions necessarily presents an issue of fact requiring the denial of the motion. (*Viti v. Franklin General Hospital*, 190 AD2d 790; *Zimmer v. Phelps Memorial Hospital*, 140 AD2d 436). The existence of conflicting expert opinions in a medical malpractice action creates a triable issue of fact. (*Wallenquest v. Brookhaven Mem. Hosp. Med. Ctr.*, 28 AD3d 538).

In determining whether a plaintiff had made out a *prima facie* case thereby precluding judgment to the defendant as a matter of law, plaintiff's evidence must be accepted as true and plaintiff is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence. (*Corvino v. Mt. Pleasant Central School District*, 305 AD2d 364; *Mosheyev v. Pilevsky*, 283 AD2d 469; *Akseizer v. Kramer*, 265 AD2d 356; and *Hughes v. New York Hospital - Cornell Medical Center*, 195 AD2d 442). In the context of a medical malpractice action, it has been held that all reasonable inferences are drawn from the alleged departures from acceptable medical practice and the injury from the affirmation of the plaintiff's expert. (*Wallenquest, supra; Baez v. Lockridge*, 259 AD2d 573).

DISCUSSION

The defendant submits the affirmation of a physician board certified in anesthesiology and pain medicine. The defendant's expert opines that all treatment and care rendered by the defendant was within good and accepted standards of medical care at all times and that no alleged act or omission by the defendant proximately caused the plaintiff's injuries. The expert provides that the plaintiff initially visited the defendant on January 2, 2015 at a referral to be evaluated for and discuss a possible epidural injection versus alternative treatment, whereby based upon the plaintiff's complainants, abnormal findings, and the defendant's physical examination of the plaintiff, the defendant appropriately recommended a lumbar epidural steroid injection to the plaintiff as a treatment option, discussing alternative treatment options. The expert provides that the defendant appropriately recommended that the epidural injection be administered at L4-L5 level, and after obtaining a duly informed consent from the plaintiff, notably a physician himself, a psychiatrist, who indicated he understood the risks of the epidural injection and consented to proceed, finds no merit to the plaintiff's claim that the epidural injection was improperly administered in a non-sterile office environment, as opposed to a surgical operating room or surgi -center. Additionally, due to the plaintiff's ongoing complaints of severe pain, the defendant appropriately adjusted the plaintiff's pain medication regimen at his February 23rd visit, and as so, discontinued the plaintiff's Norco prescription, and started him on a Fentanyl patch 25 mcg every 72 hours. The defendant's expert disagrees that this was an "over-prescription" of medicine given the severity of the plaintiff's complaints and interference with his daily activities. The expert provides that the February 27tt injection was appropriately performed in a sterile manner, identical to the initial January 2, 2015 lumbar epidural steroid injection, except that the defendant undertook a transforaminal approach rather than the translaminar approach which was initially chose. As to the plaintiff's claimed injuries resulting from the defendant's alleged departures, the expert provides that the defendant exercised appropriate sterile techniques at all times when performing the lumbar epidural steroid injections administered on January 2, 2015 and February 27, 2015, and otherwise rendered appropriate treatment and care to the patient at all times, including prescribing appropriate medications at appropriate dosages. The expert further clarifies that infection is a known risk of epidural steroid injection, a risk that the plaintiff was well aware of before both procedures, and notes that many of the plaintiff's alleged injuries pre-existed his treatment and care with the plaintiff.

The plaintiff, in opposition, submits an affirmation by a physician who affirms that he is board certified in internal medicine, anesthesiology and critical care. The plaintiff's expert opines that the defendant committed medical malpractice by deviating from the requisite standard of anesthesiology care by not using the antiseptic, chlorhexidine 2% in 70% alcohol to sterilize the plaintiff's back, never mentions chlorhexidine as his antiseptic prior to plaintiff's epidural injection, whereby "[t]his medical error, alone, reveals that Dr. Schlesinger deviated from the requisite standard of anesthesiology car and breached his medical duty to Mr. Hubsher." Plaintiff's expert provides that the medical records do not reflect if the plaintiff was allergic or sensitive to chlorhexidine, that betadine was used and submits that it is obvious that whenever the defendant used betadine as an antiseptic, he did not allow it to dry for at least 4 minutes, nor up to 10 minutes as required. The expert states that if the steroid injection on January 2, 2015 was sterilized properly, there should have been less pain, nor more; the MRI establishes that the defendant's epidural injections directly caused the 'abscesses' and 'infections' of plaintiff's spine in failing to sterilize plaintiff's back using chlorhexidine 2% in alcohol 70%, nor did he use betadine, which must be allowed to dry for 4-10 minutes; the MRSA infection in plaintiff's spine quickly spread into his bloodstream requiring IV administration of Vancomycin for 90 days. The

expert provides that the plaintiff never had acute renal failure or deceased bladder requiring a permanent foley urinary catheter and then a supra pubic catheter prior to the defendant's epidural injections of the plaintiff's lumbar region which also caused radiculopathy of his lumbosacral region and left food "drop foot'." Plaintiff's expert opines that the aforementioned departures with respect to the defendant's alleged unsterile epidural injections also caused plaintiff's acute kidney failure from MRSA which caused his anemia requiring weekly erythropoietin injections and needing a kidney transplant.

Here, the opinions set forth by the defendant's expert directly conflict with the opinions set forth by the plaintiff's expert. As already provided above, in the context of a medical malpractice action, it has been held that all reasonable inferences are drawn from the alleged departures from acceptable medical practice and the injury from the affirmation of the plaintiff's expert. (*Wallenquest, supra; Baez v. Lockridge*, 259 AD2d 573).

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

CONCLUSION

In light of the foregoing, the defendant's motions for summary judgment and the plaintiff's motion for summary judgment are hereby denied.

This hereby constitutes the decision and order of this Court.

ENTER:

HON. CATHERINE RIZZO, A.J.S.C.

Dated: February 6, 2024

ENTERED
Feb 07 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE