

Bren v Kahn

2024 NY Slip Op 34041(U)

November 14, 2024

Supreme Court, New York County

Docket Number: Index No. 805108/2020

Judge: Kathy J. King

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING PART 06

Justice

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JOEL BARRY BREN, ELLEN BREN,
Plaintiff,

INDEX NO. 805108/2020

MOTION DATE 09/25/2023

MOTION SEQ. NO. 001

- v -

STUART B. KAHN, KAUSHAL SHAH, THE SPINE
HOSPITAL AT MOUNT SINAI, THE MOUNT SINAI
HOSPITAL

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, Stuart B. Kahn, M.D., (“Dr. Kahn”), Icahn School of Medicine at Mount Sinai s/h/a The Spine Hospital at Mount Sinai and The Mount Sinai Hospital (“Mount Sinai”) collectively known as (“the Defendants”)¹ move, pursuant to CPLR 3212, for summary judgment dismissing the claims set forth in the Plaintiffs’ compliant with prejudice.

Plaintiffs oppose the motion.

In this action, Plaintiff Joel Barry Bren (“Plaintiff”) and his spouse, Ellen Bren, who sues derivatively for loss of consortium, assert causes of action sounding in medical malpractice and lack of informed consent against the Defendants arising out of the care and treatment rendered to Plaintiff between November 30, 2017 and December 12, 2017. Plaintiffs also claim that Mount Sinai was negligent in hiring incompetent, careless, insufficient and inadequately trained personnel, and failing to employ physicians with requisite skills, knowledge and expertise in performing epidural injections. As a result of the alleged negligence of the Defendants, Plaintiff claims that he sustained personal injuries, including an intraspinal epidural hematoma, for which

he was required to undergo emergency surgery on December 12, 2017, as well as increased pain in the neck down to the elbow, loss of sensation, difficulty walking, and numbness, tingling, and weakness in the extremities.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by submitting admissible evidence that demonstrates the absence of material issues of fact that would require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

In a medical malpractice action, a movant must provide evidentiary proof in the form of expert opinions and factual evidence to establish that Defendants did not depart from good and accepted medical practice, or, if there was a departure, that the departure was not a proximate cause of the injuries alleged (*see Brinkley v Nassau Health Care Corp.*, 120 AD3d 1287 (2d Dept 2014); *see also Stukas v Streiter*, 83 AD3d 18 (2d Dept 2011; *Alvarez*, 68 NY2d 325). Once the proponent makes a prima facie showing by submitting evidence refuting the allegations of medical malpractice contained in the pleadings and bills of particulars, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a material issue of fact that requires resolution at trial (*see Zuckerman v City of New York*, 49 NY2d 557, 558-59 [1980]).

In order to make a prima facie showing for summary judgment on a lack of informed consent claim, Defendants must demonstrate that a Plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op 30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *see also* Public Health Law § 2805-d).

In support of the instant motion, Defendants submit the affidavit of Dr. Christopher Gharibo, a board-certified Anesthesiologist and Pain Medicine physician who opines within a reasonable degree of medical certainty, based upon a review of the pleadings, Plaintiff's relevant medical records, the consent forms and deposition testimony, that the care and treatment rendered to the Plaintiff by the Defendants conformed to the standard of care, and that the allegations asserted in the Plaintiff's bill of particulars are without merit.

As a threshold matter, the Court finds that the Plaintiff's claims of lack of informed consent and medical malpractice, other than those claims arising from the Defendants' treatment of the Plaintiff on December 12, 2017, are dismissed based on Dr. Gharibo's affidavit. Plaintiffs have not opposed dismissal of this branch of Defendants' motion.

As to Plaintiff's allegations of medical malpractice arising from the December 12, 2017, cervical epidural steroid injection, Dr. Gharibo opines that Dr. Kahn appropriately recommended that Plaintiff receive this injection, since it was an indicated course of treatment considering Plaintiff's medical history, which included multilevel foraminal stenosis and disc osteophyte complex. Dr. Gharibo further opines that after recommending the cervical epidural steroid injection, Dr. Kahn properly administered it utilizing an appropriate needle and proper technique. Dr. Gharibo explains that although various types of needles can be utilized in connection with a cervical epidural steroid injection, a 17-gauge or 18-gauge Tuohy needle is an appropriate choice of needle for the procedure pursuant to the standard of care, since it is specifically designed to push blood vessels aside rather than pierce them.

According to Dr. Gharibo, during the administration of the cervical epidural steroid injection Dr. Kahn observed dye uptake, and repositioned the needle. He indicated that this technique was in conformance with the standard of care, and opines that the piercing of the blood

vessel and epidural bleed is a known and unavoidable risk of administering a cervical epidural steroid injection that can occur in the absence of negligence. Dr. Gharibo explains that there is nothing a physician can do to prevent dye uptake if the needle pierces a vein during the administration of a cervical epidural steroid injection. Notably, he opines that pursuant to the standard of care, both in 2017 and currently, there is no specific amount of time for which a physician is required to monitor a patient after administering a cervical epidural steroid injection. He notes further that pursuant to the standard of care, both in 2017 and currently, a physician must instruct a patient to seek immediate medical attention if the patient experiences new or increased pain and progressive numbness and weakness in the hours after receiving a cervical epidural steroid injection. In this regard, Dr. Gharibo opines that Dr. Khan exceeded the standard of care by personally escorting Plaintiff to the Emergency Room when he returned to the hospital after developing complications following the injection, and by arranging for emergent surgery.

The Court finds that the Defendants have established their prima facie entitlement to summary judgment as a matter of law based on the expert affirmation of Dr. Gharibo and the record evidence. In particular, Dr. Gharibo's affirmation establishes that the Defendants acted within the standard of care when they treated Plaintiff on December 12, 2017, before, during and after the procedure, including monitoring and resolution of complications from the administration of the cervical epidural steroid injection.

The Plaintiff, in opposition, submits the affirmation of a physician board certified in Physical Medicine and Rehabilitation Pain². Expert A opines, to a reasonable degree of medical certainty, based upon a review of the Plaintiff's medical records and fluoroscopic images of the December 12, 2017 procedure, deposition transcripts, and the Defendants' submissions in

support of the instant motion, that Defendants departed from accepted standards of medical practice by injecting a steroid into a blood vessel, and by negligently administering the cervical epidural injection, which proximately caused an epidural hematoma to develop. Expert A further opines that Plaintiff required an emergent laminectomy to evacuate the hematoma which resulted in spinal cord compression.

In addressing the post-injection monitoring of Plaintiff, Expert A opines that the Defendants departed in two ways. First, it was, and has remained the standard of care, to monitor a patient in the office status post spinal epidural injection for at least 45 minutes to one hour following the procedure to assess for any neurologic deficits secondary to the procedure. Second, patients should never be permitted to operate a vehicle following an epidural steroid injection that utilizes anesthetic medication that may cause weakness in the extremities.

The Court finds that Expert A's opinions are in direct contravention to those of Dr. Gharibo, and that based on the conflicting expert opinions, the Defendants' motion is granted to the extent that Plaintiff's informed consent cause of action, and all claims other than those relating to Defendants' treatment of Plaintiff on December 17, 2017, are dismissed. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" because "[s]uch credibility issues can only be resolved by a jury" (*Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]; *Feinberg v Feit*, 23 AD3d 517 (2d Dept 2005); *Griffin v Cerabona*, 103 AD3d 420 [1st Dept 2013]).

The Court also finds that the branch of Defendants' motion seeking dismissal of Plaintiff's medical malpractice claims arising from Defendants' treatment of the Plaintiff on December 17, 2017, is denied. Further, since a cause of action for loss of consortium is derivative of the injured spouse's right to recover damages for the personal injuries sustained, the

derivative claim sounding in loss of consortium on behalf of the plaintiff's wife, Ellen Bren, is precluded from dismissal (*see Liff v Schildkrout*, 49 NY2d 622 [1980]).

As to Plaintiffs' claim regarding negligent hiring and supervision of employees or agents, Defendants have established prima facie entitlement to summary judgment. To establish a cause of action based upon negligent hiring and supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (*see Jackson v New York Univ. Downtown Hospital*, 69 AD3d 801 [2d Dept 2010]); *Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563 [2d Dept 2009]; *Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875 [2d Dept 2006]).

Contrary to Plaintiffs' allegations that Mount Sinai was negligent in hiring incompetent, careless, insufficient and inadequately trained personnel, the record shows that Dr. Kahn is board certified in Physical Medicine and Rehabilitation and Pain Management, and had the requisite skill and training to administer the injection at issue. Additionally, Plaintiffs have not rebutted Defendants' prima facie showing. Notably, when Plaintiff was subsequently discharged from the Neurosurgery ICU, he had no loss of strength in either his upper or lower extremities; he had sensation in all his extremities; and he was able to ambulate 300 feet. Additionally, Dr. Gharibo opines that Dr. Kahn and the staff at Mount Sinai promptly and properly treated Plaintiff on December 12, 2017, by performing emergent surgery within 12 hours of Plaintiff's development of an epidural bleed.

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted only to the extent that Plaintiffs' claims of lack of informed consent, negligent hiring, and medical


malpractice for treatment rendered to the Plaintiff on dates other than December 17, 2017, are dismissed; and it is further,

ORDERED, that Defendants' motion for summary judgment is denied as to all other claims in Plaintiffs' complaint, including those relating to medical treatment rendered to the Plaintiff on December 17, 2017; and it further,

ORDERED, that within twenty (10) days of entry of this order, counsel for the Plaintiffs shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court, and it is further

ORDERED, that all parties appear for a settlement conference on December 3, 2024, at 10:00 a.m. at 60 Centre St., New York, NY, Room #351.

This constitutes the Decision and Order of the Court.

<u>11/14/2024</u> DATE		 KATHY J. KING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE