

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. KELLY
Justice

IAS PART 16

HANNAH COHEN,

INDEX NO. 12677/00

Plaintiff,

MOTION

- against -

DATE AUGUST 4, 2004

ALAN EGELMAN, M.D., ROBERT
BERNSTEIN, M.D., ROBERT COHEN, M.D.
and RONALD HOFFMAN, M.D.,

MOTION

CAL. NO. 6

Defendants.

The following papers numbered 1 to 12 read on this motion by defendant Ronald Hoffman, M.D. for summary judgment dismissing plaintiff's complaint.

| | Papers <u>Numbered</u> |
|------------------------------------------------|---------------------------|
| Notice of Motion - Affidavits - Exhibits | 1-7 |
| Answering Affidavits - Exhibits | 8-10 |
| Reply Affidavits | 11-12 |

Upon the foregoing papers it is ordered that the motion is granted.

In this medical malpractice action, plaintiff alleges that from May 1999 to November 1999, Dr. Hoffman departed from the accepted standards of medical care by failing to include multiple sclerosis (hereinafter referred to as "MS") as a possible diagnosis for her several complaints, failing to recommend a neurological examination and failing to order laboratory tests to confirm the disease. This failure, plaintiff contends, deprived her of receiving prophylactic medication which was a substantial contributing factor to injuries for which she was treated in November 1999 during a 10-day admission in Long Island Jewish Medical Center.

"In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact" (Anderson v Lamaute, 306 AD2d 232, 233, quoting Alvarez v Prospect Hosp. , 68 NY2d 320, 324).

The requisite elements of proof are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (Anderson v Lamaute, supra; Holbrook v United Hosp. Med. Ctr., 248 AD2d 358). Conclusory or speculative expert affidavits have no probative force and are insufficient to raise an issue of fact (Alvarez v Prospect Hosp., supra; Holbrook v United Hosp. Med. Ctr., supra; Yasmin v Manhattan Eye, Ear & Throat Hosp., 254 AD2d 281).

In the case at bar, Dr. Hoffman has made out a prima facie showing entitling him to summary judgment dismissing the complaint. Dr. Hoffman has submitted the affirmation of Irwin Schlesinger, M.D. who is board certified in neurology and neurophysiology. Dr. Schlesinger concluded that, after reviewing all the pleadings, medical records, the deposition transcripts, and other relevant documents, Dr. Hoffman proceeded properly and in accordance with good and accepted medical practice during the approximately six months he treated the plaintiff. Dr. Schlesinger opines, within a reasonable degree of medical certainty, that there were no acts or failures to act by Dr. Hoffman which caused or contributed to plaintiff's claimed injuries.

In support of these opinions, Dr. Schlesinger attests that there is no specific test for MS as making such a diagnosis is a process of eliminating all other possibilities. According to Dr. Schlesinger, the complaints and symptoms expressed by plaintiff when she first presented to Dr. Hoffman in May 1999 were non-specific and did not include a history of multiple transient neurological dysfunction lasting more than 24 hours. Indeed, Dr. Schlesinger points out, plaintiff disclosed she had short bouts of slurred speech, numb legs, face, tongue, and tingling arms which lasted only a few minutes, and fatigue and flu-like symptoms following exercise. Dr. Schlesinger avers that based on plaintiff's history and symptoms, including plaintiff's disclosure of a family history of thyroid disease, Dr. Hoffman appropriately considered diagnoses of Chronic Fatigue Syndrome and Lyme disease, and appropriately treated and tested plaintiff to rule in or out these diseases. Additionally, testimony revealed, and Dr. Schlesinger notes in his affirmation that plaintiff subjectively noticed a decrease in slurred speech and improved energy with the treatment she received from Dr. Hoffman.

Moreover, Dr. Schlesinger states that there was no delay in diagnosing plaintiff as the criteria for possible MS can take years to manifest. He also notes that plaintiff did not have a flare up during the six months she was treated by Dr. Hoffman. According to Dr. Schlesinger, MS would be suspected if plaintiff had experienced at least two episodes of neurological dysfunction separated by at least one month and the location of lesions revealed by MRI are in at least two distinct sites in the central nervous system. Significantly, Dr. Schlesinger states, it was not until November 9, 1999 that plaintiff disclosed to Dr. Hoffman that in 1991 an MRI had been performed which revealed a lesion in the parietal lobe. Dr. Schlesinger states, upon such disclosure, Dr. Hoffman appropriately considered MS as a differential diagnosis and promptly referred plaintiff to a neurologist.

Furthermore, since Dr. Schlesinger states MS has no cure, there was no lost opportunity for a cure. According to Dr. Schlesinger, the injuries alleged by plaintiff are all part and parcel of the multi-varied effects of MS which plaintiff would experience no matter when she was diagnosed because they are simply sequelae of the disease.

The affirmation of plaintiff's expert does not set forth the expert's medical qualifications. Thus, as the court does not have a basis upon which to conclude that plaintiff's expert was qualified to render an expert opinion (See, Daum v Auburn Memorial Hosp., 198 AD2d 899; cf., Menzel v Plotnick, 202 AD2d 558), plaintiff's proof is insufficient to demonstrate the existence of a triable issue of fact (See, Daum v Auburn Memorial Hosp., supra).

In any event, the assertions in the affirmation are insufficient to rebut Dr. Hoffman's prima facie showing. The affirmation does not address the assertions by Dr. Schlesinger that plaintiff did not have a history of multiple transient neurological dysfunction, that Dr. Hoffman appropriately considered and treated plaintiff for other diseases, and that plaintiff would have experienced the same multi-varied effects of MS no matter when the diagnosis was made. Additionally, plaintiff's expert does not address Dr. Schlesinger's averments that it can take years to diagnose MS. These omissions by plaintiff's expert are fatal (See e.g., Dennis v St. Peter's Hosp., 163 AD2d 703).

Moreover, even accepting as true the averments by plaintiff's expert that during plaintiff's initial visit Dr. Hoffman should have considered MS as a possible diagnosis, it has been held that a mere delay in diagnosis does not necessarily constitute a departure from accepted practice (See e.g., Margolese v Uribe, 238 AD2d 164). For liability to be imposed, it must be demonstrated that the medical provider's diagnosis and treatment decision was something less than a professional medical determination (Ibguy v State, 261 AD2d 510). Such a demonstration was not made by plaintiff's expert. Thus, the plaintiff's expert failed to show how the care and treatment rendered by Dr. Hoffman proximately caused plaintiff's injuries (See, Anderson v Lamaute, supra; Yasmin v Manhattan Eye, Ear & Throat Hosp., supra).

Hence the requisite nexus between the malpractice allegedly committed by Dr. Hoffman and the diagnosis of MS is missing (See e.g., Koeppel v Park, 228 AD2d 288). Under the circumstances, the affirmation of plaintiff's expert is incompetent to demonstrate that the treatment provided by Dr. Hoffman failed to comport with accepted medical practice and that such failure was the proximate cause of plaintiff's injuries (See Margolese v Uribe, supra; Koeppel v Park, supra).

Accordingly, the motion for summary judgment is granted and the complaint is hereby severed and dismissed as to defendant Ronald Hoffman, M.D.

Dated: DECEMBER 14, 2004

Peter J. Kelly, J.S.C.