Revich v Long Is. Spine & Orthopedics, P.C.
2012 NY Slip Op 30862(U)
March 29, 2012
Sup Court, NY County
Docket Number: 110019/08
Judge: Alice Schlesinger
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SCANNED ON 4/5/2012

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER, Justice

PART IA PART 16

Index Number : 110019/2008
REVICH, LANA
vs.
LONG ISLAND SPINE & ORTHO
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is granted to the extent of severing and dismissing the claim related to the Drug Dealer Liability Act and is otherwise denied.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 03 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 29 2012

ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

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LANA REVICH,

Plaintiff,

Index No. 110019/08
Motion Seq. No. 005

-against-

LONG ISLAND SPINE & ORTHOPEDICS, P.C.,
PHILIP M. RAFIY, M.D.,

Defendants.

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FILED

APR 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

This action concerns a young woman, Lana Revich, who at an early age became addicted to drugs. In 2005 when she was 18, she became a patient of the defendant Dr. Philip Rafiy, an orthopedist and employee of Long Island Spine & Orthopedics, P.C. ("LIS&O") for treatment of lower back pain and, a month later, for left ankle pain. From May 2005 through January 2007, Dr. Rafiy prescribed large amounts of Vicodin and Methadone for Ms. Revich's pain. It is the claim here that these multiple prescriptions by the defendants were improper, illegal and negligent and caused both physical and mental injury to Ms. Revich separate and apart from her earlier and continued addictions to illegal drugs such as heroin and cocaine and illegally obtained drugs such as Oxycodone.

Before the Court is a motion for summary judgment by the defendants. It is supported by an affirmation from Dr. L. Paul Brief, a Board Certified Orthopedist. He first reviews the allegations made by Ms. Revich against Dr. Rafiy. They include negligently and unjustifiably prescribing opiates to the plaintiff and, by doing so, aiding her drug habit and causing her addiction to these opiates, improperly prescribing Methadone without a proper license, and failing to refer Ms. Revich to a pain management specialist.

Dr. Brief states, with a reasonable degree of medical certainty after reviewing all the relevant medical records and deposition transcripts, "that Dr. Rafiy committed no departure from good and accepted medical standards in his treatment of Ms. Revich, which was appropriate in every respect" (¶12, emphasis in the original). He adds that "as a licensed physician he [Dr. Rafiy] was authorized to treat Ms. Revich and prescribe narcotic medications as he did" without any negligence or medical malpractice (¶13).

But even more significantly for the purposes of this motion, Dr. Brief also states:

> It is my further opinion to a reasonable degree of medical certainty that plaintiff's addictions could not have been, and were not, precipitated, exacerbated or worsened by the prescriptions written by Dr. Rafiy (¶16);

and

> In light of Ms. Revich's prior drug use, anyone who attempts to parse out which drugs precipitated, exacerbated or worsened Ms. Revich's addictions will be doing so without any basis in medicine (¶21);

and finally

> ...there is no basis in medicine or in fact to support the contention that the patient's use of narcotics as prescribed by Dr. Rafiy caused or contributed to her poly-substance addiction; and there is no evidence that plaintiff has suffered any permanent physical injuries as alleged in her Bill of Particulars (¶22).

The basis for these opinions, first as to the propriety of prescribing Vicodin and later Methadone, is Dr. Rafiy's medical chart. Dr. Brief points out that on May 23, 2005, when Ms. Revich was 18, she went to Dr. Rafiy for management of low back pain which had began after she had fallen off a stage while at work. Upon examination, the defendant

found tenderness in the plaintiff's back and buttock, "flexion to 60 degrees with discomfort, a slight antalgic gait; and difficulty getting on and off of the examination table". The doctor prescribed Vicodin for "severe breakthrough pain", along with heat and physical therapy (¶4).

Several weeks later, on June 12, Ms. Revich went to see Dr. Rafiy with complaints of left ankle pain. According to Dr. Brief, an X-ray that he reviewed revealed a chip fracture of the lateral malleolus left ankle with soft tissue swelling. Dr. Rafiy gave the plaintiff crutches, a Cam Walker boot, and a prescription for Vicodin. For the ensuing four months, the defendant continued to prescribe Vicodin for Ms. Revich who "continued to complain of pain in her ankles" (¶¶ 5 and 6).

On October 17, 2005, her prescription was switched to Methadone. The defendant then saw her twice a month and each time gave her a prescription for Methadone. On February 23, 2006, and again on January 24, 2007, in response to complaints of low back pain, Dr. Rafiy prescribed Methadone.

Without going into any detail or explanation, Dr. Brief then concludes with the following in ¶14:

> The narcotics prescribed by Dr. Rafiy were appropriate in amount, frequency and type. Vicodin was properly and appropriately prescribed at the outset of treatment, and five months later, Dr. Rafiy properly switched the patient to Methadone, an appropriate and well-accepted analgesic prescribed for pain relief in patients with heroin and/or cocaine addiction. In addition, Dr. Rafiy recommended that Ms. Revich see a pain management specialist on

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numerous occasions.[1]

As to causation, Dr. Brief referred to treatment records from Narcanon, a drug rehabilitation facility in California. Ms. Revich was a patient there in November 2006 and again in September 2007. Dr. Brief refers to the history of drug abuse which Ms. Revich gave at the first admission wherein she stated that her use of illegal drugs dated from 2003. She also reported abusing "Vicodin and Oxycontin on a daily basis, on and off for 'two to three years' and having used cocaine since 2003" (¶9).

In the second 2007 admission, Dr. Brief says this occurred after a "heroin relapse". At that time, Ms. Revich gave a history of "marijuana and alcohol use beginning in 1999, Ecstasy beginning in 2001; Oxycontin and Xanax beginning in 2002; and LSD, Heroin and Cocaine beginning in 2003. She also reported having used methamphetamine twice in 2006" (¶11). From these histories which appear in the Narcanon records, Dr. Brief concludes that the plaintiff's addictions began long before she met Dr. Rafiy, that the addictions "developed as a consequence of the people with whom she chose to associate" (¶¶17 and 18), and that again (¶21):

> In light of Ms. Revich's prior drug use, anyone who attempts to parse out which drugs precipitated, exacerbated or worsened Ms. Revich's addictions will be doing so without any basis in medicine.

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[1]At oral argument, I expressed confusion at what Dr. Brief meant by this part about patients addicted to heroin and/or cocaine. Dr. Rafiy has always insisted he knew nothing of Ms. Revich's addiction. Was Dr. Brief suggesting otherwise? Dr. Brief in the next paragraph states that "at no time did Ms. Revich show any sign or indication of substance abuse or dependency to Dr. Rafiy." I asked for a clarification.

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Therefore, according to Dr. Brief there was nothing to connect any of Dr. Rafiy's acts or omissions with any alleged injuries suffered by Ms. Revich.

The opposition papers include an affirmation from a physician Board Certified in General and Addiction Psychiatry. He is strong on departure opinions and less so on causation. In Reply, counsel for defendants zeroed in on this fact.

Before discussing the content of the expert affirmation, it is important to note another part of the opposition papers, a chilling chart prepared by counsel. In almost three full pages, this chart documents the dates between May 23, 2005 and January 24, 200, (the bookends of Ms. Revich's treatment with Dr. Rafiy) when plaintiff received prescriptions from Dr. Rafiy and his office and what those prescriptions were for, including amounts, when known. Specifically, in the seven months from late May 2005 through December of that year, Ms. Revich was given 20 prescriptions for Vicodin, 10 prescriptions for Methadone and 1 on October 20, 2005 for 50 Percocet tablets for "occasional left ankle pain", a total of 31 prescriptions!

In 2006, beginning with January 5, 2006, Ms. Revich was given 24 prescriptions for Methadone for "low back pain". These prescriptions were dispensed in every month of that year, sometimes more than once in a month with the exception of December 2006, which is consistent with the plaintiff's entry into the Narcanon facility in late November.

Ms. Revich testified that during the entire period of her treatment with Dr. Rafiy, she was only seen by him on approximately six occasions. (Exh D of Moving Papers, plaintiff's deposition of September 22, 2009, p.77, ll.13-16). The other times, she saw a receptionist and obtained her prescriptions from a secretary (pp. 77-78).

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In the Psychiatrist's affirmation, he uses this information to support his opinions that the prescriptions were improper and outside the standard of care and that the amount of narcotics prescribed for an 18 year-old woman with mild complaints of back and ankle pain was inappropriate and excessive (¶¶6-7).

Additionally, he opines that Dr. Rafiy departed from good and accepted standards of medical care in failing to ensure that Ms. Revich saw a pain management specialist (recommending one was not enough) and in failing to reduce the amount of narcotics which he dispensed to her (¶18). This expert in addiction explains that the plaintiff was exhibiting classic drug-seeking behavior, which Dr. Rafiy was obliged to pick up on and act upon by referring her to an addiction specialist or at least questioning her on her excessive need for these drugs.

With regard to the Methadone, which Dr. Rafiy switched the plaintiff to on October 27, 2005, this doctor opines that this prescription was outside the standard of care because it is primarily a narcotic pain medication for patients who are addicted to Heroin. But Dr. Rafiy insists he did not know that Ms. Revich had such an addiction. The expert says that Methadone "is infrequently used in the context of pain control" (¶11). In regard to this point, the Psychiatrist says that if the defendant was prescribing Methadone for Ms. Revich for her opiate addiction, which he says he was not, then he was required to have a special license to do so. Otherwise, there was no reason to use this drug.

Even more troubling, according to this expert in paragraph 17, is the failure by the defendant to order any diagnostic studies to find out the cause of the plaintiff's pain. This also was a departure from good and accepted practice. On the subject of tests, the physician notes that Dr. Rafiy never ordered urine or blood toxicology studies to ascertain

whether Ms. Revich was using other narcotics. This was a departure, as was the dispensing of prescriptions by office personnel and/or failing to note every time the patient was seen and a prescription given (¶¶18 - 19).

Finally, on the issue of causation, this doctor does deal with it, but only briefly and in a somewhat conclusory fashion. He opines that the continued prescription of narcotic pain medication was a substantial factor in the plaintiff's narcotic/drug addiction. It is also his opinion that:

> Ms. Revich's hospitalizations for shortness of breath, liver toxicity, polysubstance abuse and her ultimate in-patient drug rehabilitation were all directly related to Defendants' continued prescription of narcotic pain medication (¶22).

As noted above, counsel for moving defendants seized on this rather sparse opinion testimony provided by plaintiff's expert. She argued that this was fatal to the opposition and should result in the granting of the defendants' motion. She cites to several First Department cases, *Huffman v Linkow Inst. for Advanced Implantology, et al.*, 35 AD3d 214 (2006), *Margolese v. Uribe*, 238 AD2d 164 (1997), and *Rodriguez v. Waldman*, 66 AD3d 581 (2009).

But I conclude otherwise. In each of the above cases, moving defendants had in their initial papers succeeded in making out a prima facie case. In other words, via their experts they had satisfied the court that the defendants had met the standard of care and had not caused the alleged injuries. But that cannot be said here. All Dr. Brief has done in his affirmation is to state in conclusory terms that "Dr. Rafiy' committed <u>no</u> departure from good and accepted medical standards in his treatment of Ms. Revich, which was appropriate in every respect." He further stated that because of her long-term addiction

and drug abuse before she began a medical relationship with Dr. Rafiy, one could not "parse out which drugs precipitated, exacerbated or worsened Ms. Revich's addiction".

However, with regard to departures or the lack of these, as noted earlier Dr. Brief fails to elaborate on how and why the extraordinary amount of narcotics dispensed and their frequency in a case with no seeming predicate for this, met acceptable standards. His further statement in paragraph 14 to the effect that the "narcotics prescribed by Dr. Rafiy were appropriate in amount, frequency and type" adds nothing of value. This was particularly brought home to the Court when I read the chart appearing in the opposition. This documented the very large number of prescriptions dispensed in a relatively short time, most often, pursuant to Ms. Revich's testimony and Dr. Rafiy's records, without even seeing or examining the patient.[2]

At oral argument, the causation issue was discussed in terms of Dr. Brief's opinion as to the impossibility of parsing out the drug addition and the Psychiatrist's failure to attempt to do this or even deal specifically with the plaintiff's early addiction. Therefore, I asked for three additions. First, I wanted a clarification of Dr. Brief's paragraph 14. Second, I wanted a supplemental affirmation from the plaintiff's expert on whether he could, in fact, separate the addictions, and finally, I wanted a supplemental affirmation from defense counsel in further support of her motion. Even though I was very concerned about the inadequacy of Dr. Brief's opinions on the defendant meeting standards of care, I believed that if plaintiff could not show that the alleged injury(s) were divisible, the action should not continue.

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[2]In this regard, counsel for plaintiff includes a CD-Rom (Exhibit D) containing a recording of Ms. Revich receiving a Methadone prescription from the defendant's office when she was neither seen nor examined by Dr. Rafiy or any other medical person.

Dr. Brief then explained that he did not mean to imply that Dr. Rafiy was aware of plaintiff's heroin or cocaine addictions. Rather, he intended to address the allegations that these prescriptions worsened plaintiff's heroin addiction. He states:

> I had intended to illustrate that this allegation is without merit by pointing out that Methadone is in fact properly prescribed for management of chronic pain in patients with heroin or cocaine dependency (¶4).

I still did not fully understand why he expressed himself so as to suggest that Dr. Rafiy knew of Ms. Revich's addiction, but ultimately, it was not that important.

Following this, I received affirmations from both sides on the issue of whether any injuries alleged in the plaintiff's papers were divisible in nature; that is, could they be separated from Ms. Revich's other and earlier addictions to heroin and cocaine. These addictions to illegal drugs, which had led to in-patient drug rehabilitation, I earlier stated were clearly not injuries that could or would be laid on the doorstep of Dr. Rafiy. His prescriptions were solely for Vicodin and Methadone. Was there evidence showing that injuries suffered by the plaintiff could be connected to this access to different substances that was separate and apart from the earlier addictions? In other words, could the plaintiff show that Vicodin and Methadone caused plaintiff to suffer discernible and concrete injuries different from the earlier addictions? With the additional papers, I believe the medical opinions proffered by plaintiff's expert do succeed in doing that, at least to the extent sufficient to defeat summary judgment.

What the Addiction Psychiatrist does is tie together the access and use of Methadone by Ms. Revich, which the defendant provided, with the multiple hospitalizations in 2006 for respiratory distress. It should be noted here that defense counsel, in the final

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papers, discusses each of these hospitalizations to show that it is far from clear that Methadone was solely responsible for the hospital admissions or for the respiratory distress diagnoses. And she may well be correct. But it is not this Court's function to make ultimate factual findings at this point. That is for another time and by other people, namely, jurors at a trial.

The plaintiff's expert explains that Methadone and Vicodin, the medications the defendant abundantly prescribed, are "like heroin, opioid agonists". They produce physical dependence if taken steadily for a sufficient period of time (¶7). Next he states that Methadone is "a known respiratory depressant" (¶9). Then this doctor shows that at the various 2006 admissions to hospitals for respiratory distress, Methadone provided by Dr. Rafiy was either diagnosed as being present in toxicology tests or was not separately tested for. Therefore, though certainly not conclusive on this point, it is enough at this stage to show this connection between the alleged excessive and improper dispensing of Methadone to this patient and her physical difficulties. The doctor coordinates the hospital admissions with Ms. Revich's filling of prescriptions obtained from the defendant for Methadone.

Finally, this expert, who is familiar with characteristics of addiction, opines that Dr. Rafiy's departures via the excessive dispensing of narcotic prescriptions "clearly accelerated her addiction" (¶20) as well as her respiratory distress. Here he points out that there is no record that the plaintiff was hospitalized for respiratory distress before 2005, the year she began her relationship with the defendant.

Therefore, with the exception of the cause of action sounding in a violation of the Drug Dealer Liability Act, where plaintiff has not opposed defendants' motion, I am denying the motion for summary judgment to the extent delineated in this opinion.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment is granted to the extent of severing and dismissing the cause of action based on the Drug Dealer Liability Act but is otherwise denied. Counsel shall appear for the previously scheduled pre-trial conference on April 4, 2012 at 9:30 a.m. prepared to select a trial date.

Dated: March 29, 2012
MAR 29 2012

J.S.C.
ALICE SCHLESINGER

FILED

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