Orenstein v Park
2006 NY Slip Op 30862(U)
June 14, 2006
Supreme Court, New York County
Docket Number: 113808/04
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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JEFF ORENSTEIN,

Plaintiff,

-against-

DR. HENRY PARK and
NYU HEALTH CENTER,

Defendants.

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Index No.: 113808/04
Motion Date: 4/04/06
Motion Seq. No.: 005
Motion Cal. No.: 011

EILEEN BRANSTEN, J.:

Pursuant to CPLR 3212, defendants Dr. Henry Park ("Dr. Park") and NYU Health Center move for summary judgment dismissal of the action commenced by plaintiff Jeff Orenstein ("Mr. Orenstein"). Mr. Orenstein opposes the motion.

Background

In August of 2001, Mr. Orenstein began experiencing pain, itching and redness in his scrotum. Affirmation in Support of Motion ("Aff."), at ¶ 12. Because he was residing in Canada at the time, he sought treatment from a clinic there, where he was informed that he had a fungal infection and given a prescription for anti-fungal medication. *Id.*

After he did not obtain relief from the medication, Mr. Orenstein sought the advice of his brother-in-law Dr. Michael Kalin ("Dr. Kalin"), an internist, who advised him to use a mixture of one percent hydrocortisone and Nizorol cream – a cream another dermatologist

had prescribed Mr. Orenstein for peeling on his hands. Aff., at ¶ 13. Mr. Orenstein used this cream for four or five days. *Id.*

In late August 2001, Mr. Orenstein moved to New York to attend New York University School of Law. Aff., Ex. E, at 7. On August 24, 2001, Mr. Orenstein presented at NYU's emergency room complaining of itchiness, redness and discomfort in his scrotum. Aff., at ¶ 14. Doctors at the emergency room did not render treatment to him, but advised him to consult a dermatologist. *Id.*

On August 27, 2001, Mr. Orenstein sought treatment from NYU Health Center. Aff., at ¶ 15. Staff at the Health Center noted that he had total scrotal erythema (abnormal redness of skin) and referred him for a dermatological consultation. *Id.*

On August 28, 2001, plaintiff met with dermatologist Dr. Park, who diagnosed him with idiopathic contact dermatitis. Aff., at ¶ 16. The doctor instructed Mr. Orenstein to stop using the cortisol creams and anti-fungus medications and prescribed Proctocort (a hydrocortisone steroid cream) for use twice daily. *Id.*

One week later, Mr. Orenstein returned to Dr. Park's office, stating that his condition was improving but that he had an occasional itch. Aff., at ¶ 17. Dr. Park advised plaintiff to continue using Proctocort twice daily. *Id.* Nonetheless, when the prescription ran out, Mr. Orenstein used an over-the-counter hydrocortisone cream. Aff., at ¶ 18.

On October 4, 2001, plaintiff again met with Dr. Park, who noticed that the erythema had worsened. Aff., at ¶ 18. Thus, Dr. Park prescribed a more potent hydrocortisone cream, which he instructed plaintiff to apply twice daily. *Id.*

On October 11, 2001, Dr. Park again examined Mr. Orenstein and found a sharply demarcated line separating the erythema from the unaffected skin. Aff., at ¶ 19. Dr. Park advised Mr. Orenstein to continue applying the cream for one week, then discontinue use of all topical creams for two weeks, and to return in three weeks for allergy testing. *Id.* Dr. Park continued treating Mr. Orenstein for another several months by prescribing an alternating course of topical solutions with and without steroids. Aff., at ¶ 20.

On May 16, 2002, Dr. Park examined plaintiff and found mild scrotal erythema, but no evidence of atrophy or scaling. Aff., at ¶ 21. At this visit, Mr. Orenstein informed Dr. Park that he was using the cream, but not consistently. *Id.* Mr. Orenstein then graduated from New York University and returned to Montreal; he did not meet with Dr. Park after the May 16, 2002 visit. Aff., at ¶ 21.

In this medical malpractice action – commenced on September 28, 2004 – Mr. Orenstein claims that defendants negligently diagnosed his symptoms and prescribed steroid creams, which caused him to suffer from and/or exacerbated his symptoms of "Red Scrotum Syndrome." Aff., at ¶ 3.

Defendants now move for summary judgment dismissal of plaintiff's claims against them, arguing that they did not depart from accepted standards of medical care in treating Mr. Orenstein. Aff., at ¶ 23. In support of their motion, defendants submit the affirmation of Robert Auerbach, M.D., F.A.C.P. ("Dr. Auerbach"), a physician practicing dermatology, who opines to a reasonable degree of medical certainty, based on his review of the records and testimony in this case, that defendants treated Mr. Orenstein in accordance with accepted standards of medical care. Aff., Ex. J, at ¶¶ 2-4.

In particular, Dr. Auerbach concludes that Dr. Park correctly diagnosed Mr. Orenstein with contact dermatitis given the unlikelihood of a fungal infection of the scrotum and plaintiff's symptoms of pain, itching and redness. Aff., Ex. J, at ¶ 24. Furthermore, Dr. Auerbach avers that Dr. Park appropriately prescribed steroid medications, which did not cause or exacerbate Mr. Orenstein's injuries. Aff., Ex. J, at ¶ 25. Finally, Dr. Auerbach opines that Mr. Orenstein developed Red Scrotum Syndrome before Dr. Park treated him and that it is an extremely rare condition of unknown cause. Aff., Ex. J, at ¶¶ 26-27.

In opposition to defendants' motion, plaintiff submits the affidavit of a physician licensed to practice medicine in California. *See*, Affidavit of Plaintiff's Expert ("Expert Opp."), at 1. The doctor concludes to a reasonable degree of medical certainty, based on his review of the medical records and testimony in this case, that Dr. Park deviated from accepted standards of medical care in treating Mr. Orenstein. Expert Opp., at 1-2.

Specifically, the doctor states that Mr. Orenstein clearly had Red Scrotum Syndrome when he presented to Dr. Park and that Dr. Park negligently failed to diagnose the condition. Expert Opp., at 2. Further, the doctor opines that Dr. Park improperly prescribed corticosteroids, which worsened Mr. Orenstein's condition. *Id.* The doctor avers, moreover, that Dr. Park failed to obtain plaintiff's informed consent because he did not explain the risks and alternatives to treatment. *Id.* The doctor concludes by averring that Dr. Park proximately caused Mr. Orenstein's injuries. Expert Opp., at 3.

On reply, defendants argue that plaintiff's expert affidavit is insufficient to defeat their motion for summary judgment because the doctor does not profess to have any specialized training in dermatology. Affirmation in Reply ("Reply"), at ¶ 8. Moreover, they point out that the doctor does not state familiarity with the standard of care in New York and is only licensed in California. Reply, at ¶ 9. Finally, defendants claim that plaintiff's expert did not controvert the opinion of Dr. Auerbach – specifically, his opinion that Mr. Orenstein had Red Scrotum Syndrome before he presented to Dr. Park – and thus summary judgment dismissal must be granted. Reply, at ¶ 10.

Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. In a medical malpractice action, the opponent of summary judgment must present evidence that the

defendant physician departed from good and accepted medical practice, *Lyons v. McCauley*, 252 A.D.2d 516 (2d Dept. 1998), *lv denied* 92 N.Y.2d 814, and that defendant's wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dept. 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dept. 2003). This evidence must generally be set forth through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003).

If the nonmovant submits an admissible affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dept. 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dept. 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dept. 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dept. 2000).

General Allegations of Malpractice

With regard to plaintiff's general allegations of malpractice, the parties have submitted evidence sufficient to support their respective positions. The conflicting expert submissions establish that there are material issues of fact that warrant a trial, in particular, whether defendants negligently diagnosed and treated Mr. Orenstein's scrotal redness and whether their negligence exacerbated Mr. Orenstein's symptoms. Dr. Auerbach insists that

defendants did not commit departures that proximately caused Mr. Orenstein's injuries and plaintiff's expert urges that they did. The issue of which expert is correct is for the jury to decide after a trial. *Santiago v. Brandeis*, 309 A.D.2d 621 (1st Dept. 2003). This Court cannot hold as a matter of law that defendants' motion definitively establishes that defendants treated Mr. Orenstein in accordance with accepted standards of medical care.

Moreover, defendants are incorrect in asserting that plaintiff's expert affidavit is insufficient to defeat their motion for summary judgment because the expert fails to outline expertise in dermatology, fails to state familiarity with the standard of care in New York, and opines that Mr. Orenstein had Red Scrotum Syndrome before he presented to Dr. Park.

To begin, the expert's failure to outline expertise in dermatology is not fatal. Case law is clear: a physician need not practice in the same field as defendants to offer medical evidence. *Robertson v. Greenstein*, 308 A.D.2d 381, 382 (1st Dept. 2003), *lv dismissed* 2 N.Y.3d 759 (2004). "The alleged lack of knowledge in a particular area of expertise is a factor to be weighed by the trier of fact that goes to the weight of the testimony, not its admissibility." *Bodensiek v. Schwartz*, 292 A.D.2d 411 (2d Dept. 2002).

Nor is the expert's California licensure dispositive to the motion. An expert need not practice in New York to be cognizant of the relevant standard of care. *See*, *Hoagland v. Kamp*, 155 A.D.2d 148, 150 (3d Dept. 1990). Indeed, many courts have deviated from strict application of the locality rule and applied a state-wide or national standard of care. *See,*

e.g., McCullough v. Univ. of Rochester Strong Mem. Hosp., 17 A.D.3d 1063, 1064 (4th Dept. 2005); *Riley v. Wieman*, 137 A.D.2d 309, 314 (3d Dept. 1988) (broadening application of locality rule to standard held by "average member of * * * profession"). When "a medical expert proposes to testify about minimum standards applicable throughout the United States, the locality rule should not be invoked." *Payant v. Imobersteg*, 256 A.D.2d 702, 705 (3d Dept. 1998). This is particularly true here, and the California physician's affidavit should not be deemed insufficient in the posture of denial of summary judgment.

Finally, the expert's conclusion that Mr. Orenstein developed Red Scrotum Syndrome before he was treated by Dr. Park is not inconsistent with plaintiff's claims that Dr. Park negligently failed to diagnose his condition and exacerbated it. The expert's affidavit is sufficient to rebut defendants' showing of entitlement to judgment as a matter of law and summary judgment dismissal must be denied.

Informed Consent

Dismissal of plaintiff's lack-of-informed-consent claim is also denied.

Public Health Law § 2805-d states that lack of informed consent "means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved * * *." The

statute further requires that a plaintiff establish that a reasonably prudent person in the patient's position "would not have undergone the treatment or diagnosis" had she been fully informed. Public Health Law § 2805-d; *see also*, *Benfer v. Sachs*, 3 A.D.3d 781, 782-83 (3d Dept. 2004), *affd* 19 A.D.3d 853 (3d Dept. 2005); *Dunlop v. Sivaraman*, 272 A.D.2d 570 (2d Dept. 2000); *Hylick v. Halweil*, 112 A.D.2d 400, 401 (2d Dept. 1985).

On this record, defendants have failed to submit any medical evidence to establish that they properly advised Mr. Orenstein of the "alternatives * * * and the reasonably foreseeable risks" of the prescribed treatment. Public Health Law § 2805-d; *Rozelle v. Hermann*, 215 A.D.2d 224 (1st Dept. 1995); *see also, Canosa v. Abadir*, 165 A.D.2d 823 (2d Dept. 1990). Defendants' expert, Dr. Auerbach, does not even mention plaintiff's lack-of-informed-consent claim; thus, the burden never shifted to plaintiff to oppose the motion as to lack of informed consent and summary judgment as to that claim is denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissal is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2006

ENTER:

Eileen Bransten, J.S.C.