

Kantor v James

2011 NY Slip Op 32146(U)

August 4, 2011

Supreme Court, New York County

Docket Number: 111069/07

Judge: Joan B. Lobis

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

PRESENT: Sean B. Lolis
Justice

PART 6

Dennis Kantors Et Al.

INDEX NO. 11069/07

MOTION DATE 8/31/11

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

- v -

DR. DAVID JAMES ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-19</u>
<u>21-22</u>
<u>23</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 05 2011

NEW YORK COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM...

Order & Judgment

Dated: 8/4/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X

DENNIS KANTOR as Executor of the Estate of ANNA
KANTOR and DENNIS KANTOR individually,

Plaintiff,

-against-

DR. DAVID JAMES and DR. MONICA PEACOCK,

Defendants

-----X

JOAN B. LOBIS, J.S.C.:

Index No. 111069/07

**Decision, Order, and
Judgment**

FILED

AUG 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Dr. David James moves, by order to show cause, pursuant to C.P.L.R. Rule

3212, for an order granting him summary judgment dismissing this matter as against him. Plaintiff

Dennis Kantor, individually and as Executor of the Estate of Anna Kantor, opposes the motion.

This action sounding in medical malpractice concerns care rendered to Anna Kantor for lichen sclerosis from 1992 until she was diagnosed with infiltrating squamous cell carcinoma of the left vulva in November 2005. The cancer ultimately caused Ms. Kantor's death on September 1, 2006.

Ms. Kantor first presented to Dr. James with clinical signs of lichen sclerosis on February 24, 1992, when he discovered a "small whitish lesion [and] cut next to her clitoris." Starting in February 1994, he prescribed Premarin vaginal cream. Ms. Kantor continued on Premarin from July 1994 through February 1996. On July 15, 1997, Dr. James discovered and performed a biopsy on a small black lesion on Ms. Kantor's right labia. The biopsy revealed angiokeratoma, a benign condition. On January 1998, Ms. Kantor presented with a white lesion near her vulva. Dr. James prescribed

chronic inflammation. Dr. James testified that the findings were benign and consistent with irritation of the skin.

Starting in May 1999, under Dr. James' direction, Ms. Kantor began a regimen of Lotrisone and Ogen vaginal cream, which she continued on through August 15, 2000. On that date, Ms. Kantor called Dr. James' office to report that the Ogen vaginal cream was causing "itching and burning" and the Lotrisone was providing no relief. Dr. James prescribed Mycolog-II cream and told Ms. Kantor to stop applying the Ogen cream for three weeks.

On August 28, 2001, Dr. James diagnosed Ms. Kantor with atrophic vaginitis and vulvitis and prescribed Vagifem tablets and Valisone cream. Ms. Kantor remained on the medications through June 8, 2004. On July 2, 2003, Dr. James discovered a white lesion on Ms. Kantor's left labia and performed a biopsy on the area. The findings were benign.

On December 21, 2004, Dr. James' son, who is also a doctor, prescribed clobetasol and continued Ms. Kantor on Vagifem. Ms. Kantor next reported to Dr. James on June 1, 2005. Dr. James observed a "firm nodule" on her left labia and referred her to a gynecological oncologist, who performed multiple biopsies. The biopsies were negative.

On June 30, 2005, Ms. Kantor began treating with Dr. Peacocke, a physician specializing in vulvar and vaginal diseases. Dr. Peacocke recommended that Ms. Kantor stop using Vagifem and clobetasol and prescribed Keflex. At a July 12, 2005 visit, Dr. Peacocke told Ms. Kantor to start using

clobetasol again. Ms. Kantor had three more follow-up appointments with Dr. Peacocke and ended treatment with her on September 20, 2005.

Ms. Kantor presented to Dr. James' son on September 27, 2005. According to the medical records, the biopsy site was "not healing well" and he had her restart Vagifem and "triple antibiotics." By October 10, 2005, Ms. Kantor had still not healed and Dr. James' son prescribed Keflex and lidocaine gel. Ms. Kantor presented to Dr. James the next day. He noted a "firm induration" on her left labia. By November 1, 2005, the area became "indurated [and] thickened" with a "palpable lymph node in the groin." He sent Ms. Kantor to the gynecological oncologist, who diagnosed Ms. Kantor with squamous cell carcinoma of the left vulva.

With regard to Dr. James' treatment, plaintiff initially claimed that he failed to properly perform and misread biopsies. On or about June 1, 2010, Dr. James moved for summary judgment on the grounds that there were no material issues of fact that he improperly performed or misread biopsies. In opposition to the motion, plaintiff, for the first time, raised a theory that Dr. James improperly treated the lichen sclerosus causing her to develop cancer. Plaintiff did not address the issue of the biopsies. As a result, the court denied the summary judgment motion, without prejudice, to allow plaintiff time to move to amend his bill of the particulars. Plaintiff made such motion, and the motion was granted by decision and order dated October 12, 2010. The same decision and order struck a previously filed note of issue. After a period of further discovery, plaintiff filed his second note of issue on February 14, 2011. Now, Dr. James again seeks summary judgment.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted).

In support of his motion, Dr. James offers an affirmation from Harold Grossman, M.D., who is board certified in obstetrics and gynecology. Upon his review of the medical records, the bills of particulars, and the deposition transcripts, Dr. Grossman opines that Dr. James did not depart from the standard of accepted medical care nor cause or contribute to Ms. Kantor’s vulvar cancer. Dr. Grossman asserts that Dr. James appropriately treated Ms. Kantor with a series of medications,

including Vagifem, Premarin, Ogen, Valisone, Lotrisone, and clobetasol. Dr. Grossman sets forth that it was appropriate to first use Valisone and Lotrisone over clobetasol, because, although clobetasol is of “slightly higher potency,” it has a “greater risk of absorption and . . . generalized negative effects on the endocrine system.” Dr. Grossman points out that Ms. Kantor was eventually prescribed clobetasol and used the medication until June 2005, when Dr. Peacocke discontinued it. Dr. Grossman asserts that clobetasol is not a cure for lichen sclerosus and that it can only relieve the symptoms. Dr. Grossman sets forth that in Ms. Kantor’s case, clobetasol failed to relieve her symptoms.

Dr. Grossman further asserts that clobetasol cannot prevent vulvar carcinoma and that the failure to treat lichen sclerosus does not cause cancer. Dr. Grossman maintains that Dr. James properly performed biopsies and “timely and properly” referred Ms. Kantor to the gynecological oncologist. Dr. Grossman sets forth that Ms. Kantor’s cancer could not be diagnosed any sooner, because all of the biopsies returned benign findings, and it was not until November 1, 2005, when Ms. Kantor presented with a swollen lymph node, that cancer was indicated and confirmed.

In opposition to Dr. James’ motion, plaintiff submits an affirmation from Mark Spitzer, M.D., a board certified obstetrician and gynecologist, who sets forth that, based on his review of the medical records and the deposition transcripts, Dr. James deviated from the standard of care and caused Ms. Kantor injury. Dr. Spitzer asserts that Ms. Kantor should have been prescribed clobetasol earlier because it is a “super potent topical corticosteroid” that can treat “itching as well as other symptoms” associated with lichen sclerosus. Dr. Spitzer contends that had the clobetasol been prescribed “at least five (5) year earlier” than it was, Ms. Kantor would not had suffered “as much” from the symptoms of

lichen sclerosis. Dr. Spitzer further contends that 1 in 20 women with lichen sclerosis develop cancer due to chronic skin damage caused by the condition. He asserts that aggressive treatment of the lichen sclerosis with clobetasol “possibly” could have prevented Ms. Kantor’s vulvar cancer.

In reply to plaintiff’s opposition to his motion, Dr. James argues that Dr. Spitzer’s expert opinion is conclusory and speculative in that he never asserted that clobetasol would cure lichen sclerosis, which Dr. James argues would be impossible anyway. Dr. James further argues that there is no evidence supporting the theory that lichen sclerosis can lead to cancer.

Dr. James has met his prima facie burden for summary judgment by setting forth that Ms. Kantor was appropriately treated with a regimen of lower-risk topical steroids; that clobetasol was eventually used and still did not relieve Ms. Kantor’s symptoms; and that lichen sclerosis does not cause vulvar cancer. Plaintiff’s expert’s has failed rebut the prima facie showing. Dr. Spitzer’s bald claim that 1 in 20 women with lichen sclerosis develop skin cancer is unsupported by medical literature or medical surveys. See Hooks v. Court Street Med., P.C., 15 A.D.3d 544, 545 (2d Dep’t 2005). In fact, the basis of this statistic is unclear. Furthermore, assuming the statistic is true, the mere fact that 1 in 20 women with lichen sclerosis develop skin cancer does not create a causal link between the two within a reasonable degree of medical certainty. Similarly, Dr. Spitzer’s theory that lichen sclerosis “likely” causes vulvar cancer due to chronic skin damage is unsupported by any medical literature or studies.

Dr. Spitzer's affirmation also fails to set forth the success rate of clobetasol treatment in reducing skin damage and, again assuming his statistics are true, there is no discussion of whether the relatively low risk of developing vulvar cancer warrants admittedly "aggressive" treatment. Indeed, Dr. Spitzer does not even mention the risks of clobetasol, which according to Dr. Grossman's affirmation include damage to endocrine system. Accordingly, it is hereby

ORDERED that defendant Dr. David James' motion for summary judgment is granted in its entirety and the Clerk is directed to enter judgment in favor of said defendant, dismissing the action as against him.

Date: August 4, 2011



JOAN E. LOBIS, J.S.C.

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