

Gilliam v Central Park Women's Imaging, P.C.

2016 NY Slip Op 30578(U)

March 30, 2016

Supreme Court, New York County

Docket Number: 159093/2012

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ALBERTA GILLIAM,

Plaintiff,

Index No. 159093/2012

**Supplemental Decision &
Order**

-against-

CENTRAL PARK WOMEN'S IMAGING, P.C. AND
CENTRAL PARK WOMEN'S IMAGING – NEW
YORK RADIOLOGY PARTNERS,

Defendants.

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

In this action, plaintiff alleges that due to defendants' malpractice during her treatment at their facility, she developed rashes or chemical burns on her breasts. Defendants now move for renewal of their prior motion to dismiss plaintiff's complaint. Alternatively they move for summary judgment. Plaintiff opposes the motion. In its October 8, 2015 decision, the Court denied the portion of defendants' motion seeking renewal of motion sequence number one. Now the Court addresses only the arguments relating to summary judgment. For the reasons below, the remainder of the motion is denied.

On April 2, 2010 plaintiff presented to defendants' office for a mammogram. She alleges that immediately following the procedure she developed rashes or chemical burns on those areas of her breasts that came into contact with the imagine machine. She contends that her injuries resulted from defendants' negligent use of Caviwipes, a cleaning solution used on the imaging machine. Defendants argue that use of Caviwipes is proper to maintain a safe environment for their

patients and that the ingredients in Caviwipes are not skin irritants. Thus, they state, plaintiff's alleged injuries were not foreseeable and they cannot be liable for any idiosyncratic allergic reaction plaintiff might have had to the wipes. Further, they argue that plaintiff merely speculates that the mammogram proximately caused her alleged injuries and does not offer evidence of a causal relationship between the Caviwipes and her rash. They argue that plaintiff did not seek dermatologic treatment for two months after her mammogram and it is not clear how many other substances she came into contact with during that time. Further, they argue, it does not make sense that plaintiff's condition endured for months or years without her being continually exposed to the irritant. Additionally, they contend, plaintiff only experienced pigmentation changes on the tops of her breasts while mammogram machine has plates that contact both the top and bottom of the breasts. Defendants conclude that plaintiff has failed to produce any evidence that the Caviwipes caused her alleged injuries or that dermatitis or burns are foreseeable consequences of Caviwipe use.

In support of their motion, defendants submit the affirmation of Richard S. Blum, a New York, Arizona, and Pennsylvania licensed doctor. Based on his review of the materials relevant to this litigation, Dr. Blum affirms that the Caviwipes did not cause plaintiff's alleged injuries. He opines that defendants used the Caviwipes properly and that they do not contain any skin irritants. Further, he states that had plaintiff experienced a chemical burn she would have needed treatment immediately, rather than two months later. He states that Section 6 of the Material Safety Data Sheet articulates that Caviwipes are not considered a skin irritant, and he concludes that consequently allergic reactions are patient specific. Therefore, he opines, allergic reactions to them are not foreseeable.

In opposition plaintiff argues that issues of fact exist as to whether defendants negligently cleaned the mammography machine prior to her mammogram and whether their failure to do so proximately caused her injuries. Plaintiff contends that the machine appeared damp and that a day or so after the procedure she experienced bumps and a change in pigmentation on the areas of her breasts that came into contact with the machine including areas other than the tops. Plaintiff argues she returned to defendants' facility a few days after the procedure, where she was told a supervisor was not available and she should see her doctor. Plaintiff argues this raises issues of fact as to how soon after the mammogram she sought treatment. Plaintiff states that defendants' doctor's affirmation fails to address that the ingredient Diisobutylphenoxyethoxyethldim ethylbenzylammonium chloride in Caviwipes is a skin corrosive. She argues that the Safety Data Sheet advises removing contaminated clothing and rinsing skin immediately for fifteen to twenty minutes after skin contact with Caviwipes and calling a poison control center or a doctor. Further, she states the wipes are rated on the Hazardous Material Identification System as a 1-Slight Hazard. As defendants have not eliminated all triable issues of fact, plaintiff argues that summary judgment must be denied. In support, plaintiff submits the affirmation of Dr. Joseph Jorizzo, a New York State licensed dermatologist who treated plaintiff. Based on this treatment and her medical records, Dr. Jorizzo opines to a reasonable degree of medical certainty that immediately after her mammogram plaintiff developed a post-inflammatory hypopigmentation and a severe hive-like rash on the areas of her breast that contacted the machine, and that this reaction is consistent with a chemical injury from Caviwipes.

In reply defendants argue that plaintiff fails to demonstrate that defendants were negligent or that their conduct proximately caused her alleged injuries. They assert that plaintiff

does not state that her injury was foreseeable, and her claim that the mammogram caused her rash is merely speculative. Defendants state that plaintiff argues in her opposition for the first time that she saw a doctor on April 19, 2010. They argue that the record of the April 19 appointment does not support her claim that she suffered from a rash on her breasts at that visit, but rather indicates that both breasts were normal and her only rash was between her toes. Defendants further contend that because the case is predicated on matters not within the ordinary experience of laymen, an expert is required to establish negligence.

Defendants argue that plaintiff's expert affidavit is not valid and probative because he does not state his qualifications to render an opinion and his opinion is based on plaintiff's version of her medical history rather than his own observation or treatment. Further, they argue, her expert states he "believes" the rash was from Caviwipes but does not opine to a reasonable degree of medical certainty. Additionally he does not opine that defendants were negligent in how they used the wipes or claim that the wipes proximately caused the rash. Defendants argue that plaintiff does not refute their expert's statements. Defendants also argue that the Safety Data sheet plaintiff submitted is hearsay, unauthenticated, and postdates the procedure. Conversely, they argue, they provided a Safety Data sheet which was authenticated by deposition testimony as the product in effect at the time of plaintiff's mammogram. Defendants submit a supplemental affirmation from Dr. Blum, who opines to a reasonable degree of medical certainty that Caviwipes did not cause any of plaintiff's alleged injuries. He states that plaintiff misinterpreted the Medical Safety Data sheet that she submitted and that plaintiff's photographs do not demonstrate any lesions on the bottom of her breasts. He also states she did not seek treatment immediately and would needed immediate medical attention if she had a chemical burn. Further, he adds, plaintiff

does not explain why her alleged allergic reaction required treatment months or even years later when she is not claiming she was exposed to the irritant during that time. He concludes that allergic reactions are patient specific and not predictable or foreseeable.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant, who bears the burden of showing there is no material issue of fact, Alvarez v. Prospect Heights, 68 N.Y.2d 320 (1986), must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. CPLR § 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. If the movant makes such a showing, the burden shifts to the opponent to show by admissible evidence that a triable issue exists. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. In addition, it does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 A.D.2d 355 (1st Dep't 1983). Summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Serv. v. James M., 83 N.Y.2d 178, 182 (1994).

Here, defendants meet their burden. Through their expert's affidavit they establish that Caviwipes are not a skin irritant and that there is no causal relationship between their use and plaintiff's alleged injuries. This is sufficient to shift the burden to plaintiff. Plaintiff's testimony

that defendants' left excess cleaning solution on the mammogram machine and that approximately one day after her examination she experienced bumps and discoloration is enough to create an issue of fact as to whether defendants' negligently cleaned the machine and that their negligence caused her injuries. Contrary to defendants' contention, plaintiff does argue that the risk was foreseeable because the safety data sheet describes first aid measures for skin contact with the Caviwipes. The safety data sheets submitted by both plaintiff and defendants describe emergency first aid procedures in the event of skin contact with the wipes. Defendants' contention that an expert is required is moot because plaintiff has provided expert testimony. Defendants' arguments that plaintiff's expert affirmation is invalid are predicated on the standards for expert testimony in a medical malpractice motion. In motion sequence number one this Court determined that this is a negligence not medical malpractice action. The only issue presented that is arguably outside the experience of laymen is whether skin contact with Caviwipes can result in skin irritation, and plaintiff submitted expert testimony which creates a triable issue of fact on that point.

Accordingly, it is

ORDERED that the portion of the motion seeking summary judgment is denied.

Dated: *Mar. 30* 2016

ENTER:



JOAN B. LOBIS, J.S.C.