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

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Vitalia Reyes,

Plaintiff,

-against-

Quest Diagnostics Incorporated, Quest Diagnostics Clinical Laboratories, Inc., Quest Diagnostics of Pennsylvania, Inc., All Med Medical & Rehabilitation Centers,

Defendants.

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DECISION AND ORDER

Index No. 13051/2007

Hon. Douglas E. McKeon

Hon. Douglas E. McKeon, J.S.C.:

The following papers were considered in connection with the motion of defendants Quest Diagnostics Incorporated, Quest Diagnostics Clinical Laboratories, Inc., Quest Diagnostics of Pennsylvania, Inc.'s (collectively, "Quest" or "the moving defendants") seeking summary judgment pursuant to CPLR 3212:

Papers	Numbered
Notice of Motion, Affidavit, Affirmation	1
Affidavit in opposition	2
Reply	3

The plaintiff commenced this action on March 19, 2007, seeking damages for "AIDS-phobia" arising out of an allegedly false report by defendant Quest that plaintiff's June 29, 2004 blood test was HIV-positive. Although the complaint seeks damages based only on plaintiff's June 29, 2004 blood test, the undisputed facts establish that Quest tested three blood samples from the plaintiff for the presence of HIV-1 antibodies – i.e., in June, 2004, July, 2004, and June 2005. On each occasion, Quest found that HIV-1 antibodies were present, and thus reported that the plaintiff's blood was "reactive."

The moving defendants seek summary judgment dismissing the complaint,

pursuant to CPLR 3212, contending that Quest was not negligent, and that Quest complied with good and accepted standards of diagnostic laboratory practice. The undisputed facts show that Quest performed the following tests on the plaintiff's blood samples:

- June 28, 2004 HIV antibody test: Blood sample was marked specimen #51532665. Sample was reactive to HIV-1 EIA antibody screen; sample was reactive on three subsequent quality control tests. An HIV-1 Western Blot antibody test was then run, which was "positive" for three of the ten antibodies recognized by the test: gp41, gp 120, and gp160. Quest reported "HIV antibodies detected" and "repeatedly reactive."
- July 12, 2004 HIV antibody test: Blood sample was marked specimen #54617803. Sample was reactive to HIV-1 EIA antibody screen; sample was reactive on three subsequent quality control tests. An HIV-1 Western Blot antibody test was then run, which was "positive" for two antibodies: gp41 and gp160. Quest reported "HIV antibodies detected" and "repeatedly reactive."
- July 12, 2004 "viral load" test: Found to be negative and reported as such.
- June 5, 2005 HIV antibody test: Blood sample was marked specimen #H4014117. Sample was reactive to HIV-1 EIA antibody screen; sample was reactive on three subsequent quality control tests. An HIV-1 Western Blot antibody test was then run, which was "positive" for two antibodies: gp41 and gp160. Quest reported "HIV antibodies detected" and "repeatedly reactive."

It is undisputed that despite the positive tests for the presence of antibodies, plaintiff did not develop any HIV or AIDS-related disease or symptoms.

The moving defendants' expert, Emilia Sordillo, M.D., who is certified by New York State as a Health Laboratory Director, states in support of the motion that the HIV-1 enzyme immunoassay (EIA) test was customarily used in 2004 and 2005 to detect HIV antibodies. If the EIA was repeatedly reactive, the HIV-1 Western Blot test would be performed. Neither test detects the actual virus. Under the controlling guidelines then in effect, a positive result was reported if any two of the following antibody "bands" were detected on the test strip: p24, gp41, gp120, or gp160. Dr. Sordillo stated that the EIA and Western Blot tests were generally accurate, but could produce false positive results. The likelihood that a sample was switched was "virtually impossible," given the consistency in the results of the three samples, with antibodies detected in all samples at gp41 and gp160. Dr. Sordillo further opined that because HIV PCR tests performed by Quest (as well as other HIV PCR tests performed by non-parties) were negative, the most likely cause of the positive test results were "false positives," the cause of which is unknown.

In opposition, plaintiff argues that material issues of fact exist as to whether the moving defendants "switched" or mislabeled the plaintiff's samples, negligently performed the tests, and improperly reported their findings. Plaintiff's expert, Patricia Gonzalez, M.D., opined that (as stated by the moving defendants) "both tests (EIA and Western Blot tests) could produce false positive results,"[1] and thus, "where

[1] Plaintiff's expert provides a list, which comprises two pages of her affidavit, and which sets forth the myriad conditions that can cause false positives for the HIV antibody tests performed by Quest. She states, without any supporting proof, that none of these conditions applied to the plaintiff.

the test results were inconclusive and did not match plaintiff's profile for HIV exposure the proper interpretation should have been inconclusive"; in this regard, she opined that New York City Department of Health protocols then in effect required a finding of 'inconclusive." She further opined that plaintiff's samples were mislabeled because different client information numbers were used on the third test sample – i.e., the June 15, 2015 sample.

In reply, Quest's expert (Dr. Sordillo) opined that Quest followed the CDC established criteria and protocols then in effect. She further concludes that Quest was obligated to report the positive findings, and that it was the role of a health provider, not the laboratory, to take into account the plaintiff's lifestyle and other criteria in making a diagnosis.

Analysis

The court's function on a motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

The moving defendants have made a prima facie showing that they were not negligent. Their evidence demonstrates that no specimen was "switched" or mislabeled, and that no test was negligently performed. To the extent that plaintiff's expert, Patricia Gonzalez, M.D., opined otherwise, her opinion is based on pure

speculation and unsupported surmise. As Quest's expert opined, the consistency in the results of the antibody tests establishes that it was highly unlikely that someone else's sample was substituted for that of the plaintiff.

It is undisputed, and both experts agree, that the EIA and Western Blot tests could produce false positive results. Although plaintiff's expert states that plaintiff did not have any condition that would have produced a false positive, her opinion is, again, completely unsupported. (*See Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723, 725-726 [1984] [opinion evidence must be based on facts in the record, facts personally known to the witness, out-of-court material that satisfies the professional reliability doctrine, or facts from a witness subject to cross examination].)

There is no evidence in admissible form suggesting that the moving defendants violated any standards or protocols. While the plaintiff's expert stated that New York City Department of Health protocols then in effect required a finding of 'inconclusive," she has not identified any such protocol, much less shown that it was binding on testing laboratories. (*See Diaz v. New York Downtown Hospital*, 99 N.Y.2d 542, 544 [2002]; *see also Buchholz v. Trump 767 Fifth Ave., LLC*, 5 N.Y.3d 1, 6 [2005].)

Plaintiff argues that the present motion must be denied in view of *Dent v New York Downtown Hosp.* (30 Misc. 3d 1228(A), 926 N.Y.S.2d 343 [Sup. Ct., NY Co 2011].) While similar facts were presented in *Dent*, in which the motion court that found issues of fact precluded summary judgment in favor of Quest, there is one salient factual distinction – in *Dent*, only one blood test was performed. The court in

Dent held that it was impossible to conclude the test result was a false positive, as opposed to an error in labeling or testing. In the present case, however, the same tests were repeated twice, with similar results. The existence of three consistent blood tests establishes prima facie that there was no error in labeling or testing.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion is granted, and it is further

ORDERED that the complaint is dismissed against defendants Quest Diagnostics Incorporated, Quest Diagnostics Clinical Laboratories, Inc., Quest Diagnostics of Pennsylvania, Inc

This constitutes the Decision and Order of the Court.

Dated: December 13, 2017

Hon. Douglas E. McKeon, J.S.C.