

**Janeczko v Russell**

2007 NY Slip Op 30937(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0108125/2005

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

\_\_\_\_\_

Barbara Janeczko

INDEX NO. 108125/05

MOTION DATE 2/28/07

MOTION SEQ. NO. 004

- v -

Linda Russell, M.D. and Andrew J. Elliott, M.D.

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendants for summary judgment dismissing the complaint is granted only to the extent indicated below.

Initially, the court notes that while plaintiff maintains that the summary judgment motion is untimely, both counsel agree that the court extended the filing deadline to January 13, 2007. Defendant's counsel has provided a copy of the filing receipt stamped by the Motion Support Office with the date of January 12, 2007. Thus, the motion is timely.

Defendant Linda Russell, M.D. is a rheumatologist and defendant Andrew J. Elliott, M.D. is an orthopedic surgeon. Plaintiff alleges that defendant Dr. Russell performed a steroid injection in the area of her big toe on August 29, 2002 and that the injection caused an infection. She further claims that both Dr. Russell, and defendant Dr. Elliott, to whom plaintiff was referred for treatment, were negligent in failing to timely diagnose and treat

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

the infecting bacteria. Specifically, plaintiff claims that the bacteria involved in this case was *Mycobacteria chelonae*, and that defendants failed to timely order an Acid Fast Bacteria ("AFB") culture which would have identified the bacteria so that it could be properly treated. Instead, according to plaintiff, she was prescribed antibiotics that were ineffective in treating this bacteria, causing her to undergo unnecessary procedures on her toe.

The submissions of defendants' experts in support of the motion have made a prima facie showing of entitlement to summary judgment with respect to some of the allegations set forth in the bill of particulars, and plaintiff's expert has not raised any issue of fact with respect to those claims. Defendants have shown that summary judgment should be granted regarding plaintiff's claim that Dr. Russell improperly performed the August 29, 2002 injection; that Dr. Russell was negligent in administering an injection without knowing plaintiff's history of foot injections and that Dr. Russell should have discontinued her immunosuppressant medications. Defendants have also shown that summary judgment should be granted regarding plaintiff's claim that Dr. Elliott was negligent in failing to alter plaintiff's treatment based upon her steroid regimen; that Dr. Elliott utilized inappropriate techniques in performing the incision and draining procedures; and that Dr. Elliott failed to make appropriate referrals for treatment of plaintiff's foot.

The competing experts' submissions raise triable issues of fact as to whether defendant Dr. Russell was negligent in failing to order an AFB culture first on September 25, 2002 when plaintiff presented with an infection in the injection area, and thereafter, and whether Dr. Elliott was negligent in failing to order an AFB culture in October 2002 and each subsequent time that he ordered other cultures to be run. Defendants' experts have stated that defendants ordered appropriate cultures and that plaintiff was appropriately treated with broad spectrum antibiotics. In contrast, plaintiff's expert opines that "[o]ne of the well known and common

ways a person can become infected with the bacteria involved in this case, namely Mycobacteria chelonae is by the process of an injection; that identification of the microorganisms is an "absolute requirement for proper and effective antibiotic use" and that "[t]he standard of care requires that, if culture and sensitivity (C&S) testing is negative or inconclusive in the presence of a continuing infection as here, especially after a procedure known well to cause Mycobacteria infections, the treating doctor(s) must order AFB testing as part of culture and sensitivity testing." Plaintiff's expert notes that the AFB culture successfully identified the bacteria in April 2003 and that in a relatively short time the infection was cured. The expert concludes that the delay in curing the infection caused plaintiff to sustain damage to her foot and to suffer significant injury.

Thus, there are issues of fact with respect to the alleged delay in identifying and treating the bacteria that caused the infection.

Regarding the lack of informed consent cause of action, summary judgment is denied. Defendants argue that because plaintiff's expert makes no mention of this claim, it should be dismissed. However, it is defendants' burden to make a prima facie showing of entitlement to summary judgment, and their experts' submissions do not address the lack of informed consent claim. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (citations omitted)." Winegrad v. New York University Medical Center, 64 NY2d 851, 853 [1985]). Thus, ". . . the burden never shifted to plaintiff to come forward with evidence to refute [the] defense (citations omitted)." (Bradley v. Soundview Healthcenter, 4 AD3d 194 [2004]). Furthermore, the court is unpersuaded by defendants' argument that the lack of informed consent claim must fail in light of the dismissal of the claims that the injection and the subsequent procedures were improperly performed. Plaintiff has alleged that she was not adequately informed regarding the risks, benefits and alternatives of those procedures. This is distinct from an allegation that the

procedures were performed negligently.

Based upon the foregoing, the motion is granted to the extent indicated and is otherwise denied.

Dated: 4/17/07

SA-S

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
APR 23 2007  
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COUNTY CLERK'S OFFICE