

Brown v Speaker

2007 NY Slip Op 31069(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0105230/2002

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

CRAIG BROWN,

Plaintiff,

Index No.: 105230/02

MOTION SEQ. NO. 07-08

MOTION CAL. NO. _____

-v-

MARK G. SPEAKER, M.D., LASER AND CORNEAL
SURGERY ASSOCIATES, P.C., TLC LASER EYE
CENTER and WILLIAM TULLO, O.D.,

Defendants.

FILED
MAY 07 2007
COUNTY CLERKS OFFICE
NEW YORK

The following papers, 1 - 33, were read on this motion by defendants Mark G. Speaker and Laser & Corneal Surgery Associates, P.C. to preclude plaintiff from proffering evidence/testimony at trial relating to FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery, to preclude testimony of plaintiff's expert optometrist from offering testimony relating to the applicable standard of care for an ophthalmologist when performing LASIK surgery, and to preclude testimony of plaintiff's expert ophthalmologist on the grounds that plaintiff failed to comply with CPLR §3101(d); and separate motion by defendant TLC Laser Eye Center seeking identical relief.

MOTION SEQUENCE NUMBERS 07

Order to Show Cause - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

Papers Numbered

1-10
11-19
20-21

MOTION SEQUENCE NUMBER 08

Notice of Motion - Affidavits - Exhibits - _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

22-31
32-33

Cross-Motion: Yes No

Plaintiff commenced the instant medical malpractice action against the defendants, alleging that as a result of their negligence in connection with a LASIK surgery, performed on January 21, 2000, he suffered extensive visual problems. Defendants Mark G. Speaker, Laser & Corneal Surgery Associates, P.C. and TLC Laser Eye Center presently move to preclude plaintiff from

proffering testimony at trial relating to FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery, to preclude testimony of plaintiff's expert optometrist from offering testimony relating to the applicable standard of care for an ophthalmologist when performing LASIK surgery, and to preclude testimony of plaintiff's expert ophthalmologist on the grounds that plaintiff failed to comply with CPLR §3101(d).

The moving defendants seek to preclude plaintiff from proffering testimony at trial relating to FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery. The FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery limited its use to patients who measured between zero to minus 14.00 diopters of refractive error. Plaintiff herein suffered from myopia measured as being in excess of minus 16.00 diopters of refractive error prior to the performance of the subject LASIK procedure, and, thus, the VISX Star 2 Laser was used in an "off-label" manner in connection with the procedure. According to defendants, physicians are not only permitted to use a medical device approved by the FDA in an "off-label" manner, but physicians also determine the accepted standard of treatment in the medical community in using FDA approved devices in such a manner. Therefore, it is argued by defendants, the fact that the VISX Star 2 Laser was used in an "off-label" manner in connection with the subject LASIK procedure, does not amount to a departure from good and accepted medical practice, and, thus, plaintiff should be precluded from offering testimony relating to the FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery.

The FDA cannot establish the standard of care for the practice of medicine and the use of medical devices for purposes other than those for which they have been approved, *i.e.*, "off-label" uses (see 21 USC §396; Buckman Co. v. Plaintiff's Legal Comm., 531 US 341, 350 [2001]; Sita v. Long Island Jewish-Hillside Medical Center, 22 Ad3d 643 [2005]). The standard of care for a physician is one established by the profession itself (see Spensieri v. Lasky, 94 NY2d 231 [1999], citing Toth v. Community Hospital, 22 NY2d 255 [1968]). As a result, plaintiff is precluded from offering expert testimony that the "off-label" use of the VISX Star 2 Laser in performing the LASIK surgery at issue was, in and of itself, a departure from good and accepted medical practice. Notwithstanding, plaintiff will be permitted to offer evidence relating to the FDA regulations governing the use of the VISX Star 2 Laser in performing LASIK Surgery, through the testimony of his expert ophthalmologist, to explain a physician's decision making process in connection with the performance of such a procedure (see Spensieri v. Lasky, *supra*; Hinlicky v. Dreyfuss, 18 AD3d 18 [3d Dep't 2005]).

The moving defendants further seek to preclude the testimony of plaintiff's expert optometrist from offering testimony relating to the applicable standard of care for an ophthalmologist when performing LASIK surgery. Defendants argue that because plaintiff's expert optometrist is not an ophthalmologist and has never actually performed a LASIK surgical procedure, he is not qualified to testify to the accepted standards of medical practice for an ophthalmologist performing LASIK surgery. In his opposition papers, plaintiff agrees to limit his optometry expert's testimony "to matters within the field of optometry and within the purview of his expertise and any opinions he offers concerning departures from the standard of care will be limited to the field of optometry" In any event, the Court agrees with the moving defendants that plaintiff's expert optometrist is not qualified to testify with respect to the standard of care for an ophthalmologist when performing LASIK surgery (see Karasik v. Bird, 98 AD2d 359 [1st Dept. 1984] "[t]he determination of the question of whether or not a witness is qualified to testify as an expert in

respect to a particular subject lies in the 'reasonable discretion [of] the trial court, which discretion when exercised, is not open to review unless in deciding the question the trial court has made a serious mistake or committed an error of law or has abused his discretion'.", quoting Prince Richardson On Evidence, §368, p. 343 [10th ed]). Accordingly, plaintiff's expert optometrist testimony will be limited to, as agreed to by plaintiff, to matters within the field of optometry.

Lastly, the moving defendants sought to preclude the testimony of plaintiff's expert ophthalmologist on the grounds that plaintiff failed to comply with CPLR § 3101(d), arguing that plaintiff's expert disclosure did not sufficiently set forth in reasonable detail the expert's qualifications. However, the court has been advised by the parties that subsequent to the filing of the instant motions the plaintiff supplemented the expert disclosure at issue and satisfactorily set forth the expert's qualifications. Accordingly, this issue has been rendered moot.

Based upon the foregoing, it is hereby

ORDERED that defendants Mark G. Speaker and Laser & Corneal Surgery Associates, P.C.'s motion is granted only to the extent set forth in detail above; and it is further

ORDERED that the separate motion by defendant TLC Laser Eye Center is granted only to the extent set forth in detail above; and it is further

ORDERED that counsel for all parties are to appear before the court on April 27, 2007, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for a trial scheduling conference.

Dated: 04/25/2007

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FILED

MAY 07 2007
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NEW YORK