

Mungeer v Leeds

2008 NY Slip Op 33415(U)

December 19, 2008

Supreme Court, New York County

Docket Number: 107798/06

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JOAN B. LOBIS

PART 6

Index Number : 107798/2006
MUNGEER, ZACHARY WILLIAM
vs.
LEEDS, GARY M.D.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/22/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-22
23-36; 37-39
40

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/19/08 _____ JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
ZACHARY WILLIAM MUNGEER,

Plaintiff,

Index No. 107798/06

-against-

Decision and Order

GARY LEEDS, M.D. and FAMILY MEDICAL
GROUP OF MANHATTAN, P.C. and DUANE
READE, INC.,

Defendants.

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

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK COUNTY

In Motion Sequence Number 004, defendants Gary Leeds, M.D., and Family Medical Group of Manhattan, P.C. (collectively "Dr. Leeds") move for an order granting summary judgment in favor of Dr. Leeds on all causes of action, pursuant to C.P.L.R. Rule 3212. In opposition, plaintiff's counsel asks the court to search the record and grant summary judgment to plaintiff, based on the theory of negligence per se. Plaintiff also seeks costs imposed on Dr. Leeds' attorneys, pursuant to 22 N.Y.C.R.R. § 130, et seq.,¹ for bringing a frivolous motion.

Plaintiff commenced this action for medical malpractice on June 5, 2006, against Dr. Leeds, alleging that Dr. Leeds improperly prescribed plaintiff a topical steroid cream, Lotrisone, for an extended period of time, resulting in permanent striae (stretch marks) on his axillae (underarms). This prescription was filled and refilled approximately thirteen times by the pharmacy department of Duane Reade, Inc ("Duane Reade"). After the non-party deposition of George Kowalski, a pharmacy district manager for Duane Reade, plaintiff commenced an action against Duane Reade

¹ Although plaintiff does not cite to any law under which he seeks costs imposed on Dr. Leeds' attorneys, the court will presume plaintiff is seeking costs pursuant to 22 N.Y.C.R.R. § 130.

on March 21, 2007, for improperly dispensing the steroid cream without a prescription. The cases were consolidated on June 26, 2007. On or about July 16, 2007, Dr. Leeds imposed a cross-claim against Duane Reade for contribution, apportionment, and indemnification, should plaintiff recover any verdict or judgment against Dr. Leeds.

Plaintiff is a 32-year-old business development manager for a telecommunications firm. Dr. Leeds is a family practitioner who began treating plaintiff as plaintiff's primary care physician on September 24, 2003. Between September 2003 and June 2006 (when this lawsuit was commenced), plaintiff sought treatment from Dr. Leeds for his ongoing condition of asthma and, at various times, for acute illnesses or issues such as gastroenteritis, congestion related to an upper respiratory infection, ankle sprain, and oral thrush. At issue in this case is Dr. Leeds' treatment of plaintiff's skin tags.

On January 5, 2004, plaintiff sought treatment from Dr. Leeds complaining of bumps on his underarms for the past three months, and complaining of a one-week history of aches and tingling in his upper and lower extremities bilaterally. Upon examination, Dr. Leeds observed that plaintiff was positive for nevi (moles), and had bilateral axillary skin tags, or skin tags on his underarm region on both sides. Dr. Leeds wrote plaintiff a prescription for Anaprox "double strength" for plaintiff's complaints of aches and tingling. With respect to plaintiff's skin issues, Dr. Leeds referred plaintiff to Sherwin K. Parikh, M.D., a dermatologist at the Tribeca Skin Center. Also, at some point during the January 5, 2004 appointment, it appears that plaintiff came into possession of a prescription for Lotrisone, which is a topical cream containing a combination of

clotrimazole (an antifungal medication) and betamethasone (a steroid). The facts surrounding the issuance of the Lotrisone prescription are hotly contested, and are set forth in greater detail below.

Plaintiff had the Lotrisone² prescription filled at Duane Reade on January 5, 2004, and began applying a dime-sized amount of the Lotrisone to his underarms twice a day, according to the instructions on the medication. Plaintiff applied the Lotrisone cream in this manner for approximately a year and a half. Plaintiff testified that whenever he ran out of the cream, he would go to Duane Reade to obtain a refill of his prescription. The Lotrisone was refilled for plaintiff twelve times: ten times in 2004, and twice in 2005. Plaintiff testified that he normally obtained refills in person at Duane Reade; if there were no refills left on a given day, the pharmacist or staff member would inform plaintiff that the pharmacist would need to call his doctor to obtain authorization for more refills. Plaintiff assumed that Duane Reade had called Dr. Leeds, because he continued to obtain refills of the Lotrisone. Throughout this whole time, plaintiff was also taking Advair and Singulair for his asthma. He testified that he would obtain refills for these prescriptions in the same manner as the Lotrisone—he would go to Duane Reade to obtain a refill, and if there were no refills left, the pharmacist would call Dr. Leeds to obtain more refills.

Following Dr. Leeds' referral to a dermatologist, plaintiff went to the Tribeca Skin Center on January 15, 2004.³ A consultation letter generated by the Tribeca Skin Center indicated

² It appears that on some occasions, Duane Reade filled the prescription for Lotrisone using the generic version of the cream, which was simply called clotrimazole and betamethasone dipropionate cream. For the purposes of this motion, the court will refer to the prescription in question as Lotrisone.

³ Consultation letters from the Tribeca Skin Center indicate that plaintiff was seen by Dr. Parikh on this occasion, although plaintiff testified that he was seen by Dr. Adam Geyer, an associate at the Tribeca Skin Center.

that plaintiff, complaining of skin tags, was seen by Dr. Parikh; it was noted that a few of the skin tags were irritated, and that he had scattered moles on his abdomen. Plaintiff testified that at that appointment, he mainly discussed his moles with the dermatologist; the issue of his using the Lotrisone cream to treat his skin tags did not arise.

Plaintiff was seen by Dr. Leeds for various ailments over the next year. Dr. Leeds' records reflect that he treated plaintiff on March 30, 2004, for congestion; on May 24, 2004, for an ankle sprain; and, on August 25, 2004, for thrush related to plaintiff's use of an oral inhaler. On April 8, 2005, plaintiff was again seen for complaints of recurring thrush. Although defendant did not see any indication of thrush, he referred plaintiff to the Tribeca Skin Center out of concern that there might be another reason for the thrush, other than plaintiff's use of an oral inhaler. It does not appear from the records that Dr. Leeds examined plaintiff's underarms at any of these appointments.

At an appointment on June 15, 2005, plaintiff showed Dr. Adam Geyer, a dermatologist at the Tribeca Skin Center, stretch marks which had emerged on plaintiff's armpits. Plaintiff testified at his deposition that he had first noticed the appearance of stretch marks on his underarms in the summer of 2004. He testified that he had brought the stretch marks to Dr. Leeds' attention around that time, and that Dr. Leeds had looked at them and told him that stretch marks were hereditary. Plaintiff testified that by the summer of 2005, the stretch marks had become larger and had increased in number. At the June 15, 2005 appointment, Dr. Geyer informed plaintiff that the use of a steroid cream—i.e., the Lotrisone—was causing his stretch marks by breaking down the skin and causing the skin to stretch. Dr. Geyer told plaintiff to stop using the cream immediately, and prescribed a Retin-A cream mixed with a moisturizer. Plaintiff testified that Dr. Geyer told him

that the stretch marks would be permanent, but that the new cream might make them fade and help them blend into the surrounding skin a little better. Plaintiff testified that he discontinued using the Lotrisone cream on June 15, 2005. He applied the Retin-A cream for approximately three-and-a-half weeks, but saw little change in the stretch marks, and discontinued using the Retin-A shortly thereafter.

After plaintiff stopped using the Lotrisone cream, he was seen by Dr. Leeds on at least four subsequent dates: on September 19, 2005, he was treated for his ongoing asthma condition; on January 23, 2006, he was treated for congestion; on March 1, 2006, he was treated for an irritation on his abdomen which had resulted from shaving his abdomen; and, on April 24, 2006, he was treated for an ear ache that had developed after flying on an airplane. Again, it does not appear from Dr. Leeds' office records that Dr. Leeds examined plaintiff's armpits at any of these appointments, nor does it appear that the issue of plaintiff's use or discontinuance of the Lotrisone cream was ever discussed.

A copy of the original Lotrisone prescription, which was filled on January 15, 2004, is annexed to the motion papers. The prescription, dated January 5, 2004, is on a slip of paper from Dr. Leeds' prescription pad, with his address and licensing information at the top. The patient's name is illegible, and the patient's address is blank. The prescription appears to read "Lotrisone 15 g." Dr. Leeds testified that it is his signature at the bottom of the prescription, but that the prescription appears to be made out to a patient with a first initial "R" and a last name beginning with the letters "Fri". The bottom of the prescription reads "REFILL _____ TIMES" and the number "1" is handwritten in the blank space. On the side of the prescription, in a different handwriting, are

the words "Spoke to doc. Auth 45 g", together with what appears to be the pharmacist's initials and the date January 5, 2004. The prescription also bears a sticker, which was generated by Duane Reade, indicating the prescription number, the date it was filled, the amount of the co-payment, the pharmacist's name, an authorization number from an insurance company, the expiration date of the product, and the manufacturer of the product. On the back of the prescription are notes, which plaintiff admitted are in his handwriting, which read: "Dr. Leeds (1) Advair (2) Albuterol Inhaler." (Underlining in original.)

Dr. Leeds maintains that he did not prescribe Lotrisone to plaintiff on January 5, 2004; in fact, he avers that he never prescribed Lotrisone for plaintiff. Dr. Leeds' office records for plaintiff reflect that Dr. Leeds wrote plaintiff a prescription for Anaprox "double strength" on January 5, 2004, but that nothing else was prescribed. Dr. Leeds testified to having prescribed plaintiff a steroid cream on two discrete occasions: he prescribed Mycolog cream on November 21, 2003, for rectal bleeding associated with gastroenteritis, to alleviate the redness on plaintiff's rectum; and, he prescribed Elocon lotion on March 1, 2006, for plaintiff's complaints of an itchy, red rash following shaving his abdomen. On both occasions, small amounts were prescribed, and the medications were never refilled.⁴ Defendant testified that Lotrisone is not prescribed for skin tags, and would only be prescribed for long-term use if a patient had a condition such as seborrhea, eczema, or psoriasis.

⁴ In searching the record, the court could not find copies of these prescriptions.

George Kowalksi, a representative from Duane Reade, testified that a pharmacist cannot dispense prescription medication without a prescription. A pharmacist either receives a paper prescription from a physician, or a prescription may be telephoned, faxed, or electronically sent to a pharmacist from a physician. If a customer or patient has previously been a customer at Duane Reade, and his refills of a prescription have run out, the pharmacist automatically calls the physician to ask whether the physician would like the pharmacist to refill the prescription. Only in an urgent situation in which a physician could not be reached would a Duane Reade pharmacist dispense medication without a prescription, at the pharmacist's discretion, and then only in a very small amount; a situation which might warrant this is where medication is necessary to sustain the patient's life or to keep a disease at bay. Duane Reade's records indicate that a pharmacist obtained telephone authorizations for refills of the Lotrisone cream or the generic equivalent on February 13, 2004 (together with three additional refills); July 19, 2004 (together with three additional refills); November 18, 2004 (together with two additional refills); and, March 15, 2005 (together with one additional refill). After each telephone authorization was obtained, a "telephoned prescription" was generated by the pharmacist, with Dr. Leeds listed as the prescribing physician and his phone number.

Regarding his office's procedure for refilling prescriptions over the telephone, Dr. Leeds testified at his deposition that if a pharmacist calls his office to obtain a refill, a doctor would be interrupted, where feasible, and would discuss the issue with the pharmacist. His staff is not permitted to authorize any refills whatsoever. If the doctor is in the middle of a procedure and cannot be interrupted, the pharmacist would be instructed to either call back or let the patient know that he or she would have to contact Dr. Leeds' office directly. Defendant testified that it is not his

practice to make a notation in the patient's chart when he refills a prescription over the telephone. Regarding the refills for the Lotrisone prescription at issue here, Dr. Leeds testified that neither he nor anyone in his office ever authorized refills over the telephone for the Lotrisone prescription that was refilled for plaintiff numerous times by Duane Reade.

Defendant testified that after he was served with the summons and complaint in June 2006, he reviewed plaintiff's chart and noticed that the chart indicated that he had never prescribed Lotrisone for this patient. Seeing on the chart that he had referred plaintiff to a dermatologist twice, Dr. Leeds called the Tribeca Skin Center to see whether any doctor there had ever treated plaintiff and asked to be faxed the consultation letters. The Tribeca Skin Center faxed four letters to Dr. Leeds. Dr. Leeds testified that he had never seen these letters before they were faxed to him in June 2006, although the letters bear dates of January 15, 2004; June 15, 2005; February 20, 2006; and, June 7, 2006. The June 15, 2005⁵ letter, from Dr. Geyer to defendant, indicates that plaintiff "returns with a complaint of striae in his axillae. He has been applying cortisone there for over 6 months, initially given by PMD for irritation in the axillae; pt continues to use 1-2 times daily." ("PMD" stands for primary doctor, or primary care physician.) The letter indicates that Dr. Geyer diagnosed plaintiff with striae due to steroid atrophy, and that plaintiff was to discontinue using the topical steroid cream.

⁵ The court notes that there appears to be some confusion with the letters because in addition to the June 15, 2005 letter, there is also a letter dated June 7, 2006, from Dr. Geyer to Richard Goldberg, M.D. (defendant's partner at Family Medical Group) rather than defendant, with the exact same information in the body of the letter as the June 15, 2005 letter.

In support of his motion for summary judgment, Dr. Leeds submits an affirmation from Martin Edelstein, M.D., a physician duly licensed to practice medicine in New York and board certified in family practice. Dr. Edelstein states that the medical records and deposition testimony “clearly demonstrate” that Dr. Leeds never prescribed Lotrisone to plaintiff, and opines that it was an error for Duane Reade to dispense the Lotrisone cream, since the prescription was “not intended for, nor was it written for, plaintiff.” Dr. Edelstein avers that the standard in family practice is to refer patients with conditions beyond the family practitioner’s area of expertise to the appropriate specialist, which Dr. Leeds did in this case, and that no record exists that Dr. Leeds ever initiated treatment for plaintiff’s skin tags. He also sets forth that plaintiff never spoke to Dr. Leeds about using the Lotrisone cream or about the striae, and that plaintiff failed to inform his dermatologist at the January 15, 2004 appointment that he was applying the Lotrisone cream twice daily to his axillae, just ten days after Dr. Leeds allegedly prescribed it. It is Dr. Edelstein’s opinion, with a reasonable degree of medical certainty, that “plaintiff’s current condition was caused by a dispensing error on the part of [Duane Reade], which was self-perpetuated by plaintiff for approximately sixteen (16) months.” Dr. Edelstein concludes that Dr. Leeds acted in accordance with accepted medical standards; that plaintiff should never have received Lotrisone from Duane Reade, when the prescription was “clearly not intended for plaintiff;” that Dr. Leeds’ care was entirely appropriate and consistent with the standard of care; and, that no act or omission by Dr. Leeds caused plaintiff’s injuries.

Defendant also annexes an affidavit from Joseph John Bova, a registered pharmacist duly licensed in New York. Mr. Bova opines that Duane Reade departed from good and accepted pharmacy practice by dispensing the Lotrisone to plaintiff in error, because the prescription was

written for another person. This not only violates Duane Reade's company policy, but also Section 29.7 of the Rules of the Board of Regents, which prohibits "[d]ispensing a written prescription which does not bear the name, address and age of the patient for whom it is intended." See 8 N.Y.C.R.R. § 29.7. By incorrectly filling the first prescription, Mr. Bova opines that Duane Reade "set off a chain of events which resulted in plaintiff's over-filling and over-usage of the medication." Had Duane Reade called Dr. Leeds in the first place to verify that the prescription was intended for plaintiff, the pharmacist would have known that Dr. Leeds did not prescribe the Lotrisone cream to plaintiff. Similar to defendant's other expert, Mr. Bova sets forth that the medical records and deposition testimony "clearly demonstrate" that Dr. Leeds never prescribed Lotrisone to plaintiff, and that Duane Reade dispensed the medication in error because the prescription was "not intended for, nor was it written for, plaintiff." Like Dr. Edelstein, Mr. Bova also affirms that "plaintiff's current condition was caused by a dispensing error on the part of [Duane Reade], which was self-perpetuated by plaintiff for approximately sixteen (16) months." Mr. Bova reaches the same conclusion as Dr. Edelstein: that Dr. Leeds acted in accordance with accepted medical standards; that plaintiff should never have received Lotrisone from Duane Reade, when the prescription was "clearly not intended for plaintiff;" that Dr. Leeds' care was entirely appropriate and consistent with the standard of care; and, that no act or omission by Dr. Leeds caused plaintiff's injuries.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Santiago v. Filstein, 35 A.D.3d 184, 185-86 (1st Dep't 2006), quoting Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Even if, for

the purposes of this motion, the court were to accept that the original prescription was not intended for plaintiff, plaintiff was able to obtain refills for this prescription numerous times. It appears from the records that at least four of these refills were obtained after Duane Reade telephoned Dr. Leeds for authorization of the refills. Dr. Leeds' sworn testimony that he never authorized telephone prescriptions to refill plaintiff's prescription for Lotrisone is directly contradicted by George Kowalski's sworn testimony that when a refill of a prescription is requested by a patient but there are no refills remaining, it is Duane Reade's policy that the pharmacist automatically call the physician to ask whether the physician would like the pharmacist to refill the prescription. Duane Reade's policy is documented by the copies of the telephone prescriptions, while Dr. Leeds testified that it is not his policy to record telephone authorizations of refills in his patient's chart. His experts recite that, other than the original prescription in Dr. Leeds' name that is "clearly" for another person, no record exists that Dr. Leeds prescribed Lotrisone to plaintiff. But, if it is not Dr. Leeds' policy to record prescriptions he authorizes over the telephone, there would be no record regardless of whether or not he authorized the telephone prescriptions.

Moreover, neither one of defendant's experts addresses what the standard of care is for recording telephone authorizations of prescription medication in a patient's chart, even though plaintiff alleges in his February 19, 2008 supplemental bill of particulars that defendant failed to keep accurate records. Even had defendant met his burden and demonstrated a prima facie entitlement to judgment as a matter of law, plaintiff has "produce[d] 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). To this end, plaintiff submits an expert affirmation from Bernard Schayes, M.D., wherein Dr. Schayes opines that Dr.

Leeds' policy of not recording a telephone authorization of a refill of a prescription medication departs from accepted standards of medical practice. The law requires all physicians to "maintain a record for each patient which accurately reflects the evaluation and treatment of the patient." 8 N.Y.C.R.R. § 29.2(3). Dr. Schayes opines that Dr. Leeds' departure caused plaintiff's injuries "by prescribing him continuous, excessive and overly-repetitive dosages of a dangerous steroid cream." Dr. Schayes avers that according to Dr. Leeds' own testimony, Dr. Leeds would never have prescribed Lotrisone for skin tags, nor for an extended amount of time. Dr. Schayes concludes that had Dr. Leeds "kept track and maintained an accurate record of each steroid cream prescription, he would not have allowed the re-scripting to continue for more than four weeks at the most."

At the very least, material issues of fact remain surrounding the issue of the telephone refills, so as to preclude summary judgment. For this reason, neither Dr. Leeds nor plaintiff is entitled to judgment as a matter of law. Dr. Leeds' motion is denied. Plaintiff's request for costs to be imposed on Dr. Leeds' attorneys is denied; defendant's motion is not frivolous within the meaning of 22 N.Y.C.R.R. § 130-1.1. Additionally, plaintiff did not cross-move for such relief. See, Thomas v. Drifters, Inc., 219 A.D.2d 639, 640 (2d Dep't 1995); C.P.L.R. Rule 2215.

The parties are scheduled to appear for a pre-trial conference on January 13, 2009, at 10:00 a.m. This constitutes the decision and order of the court.

Date: December 19, 2008

FILED

DEC 22 2008


JOAN B. LOBIS, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK