

Kramer v Pathmark Stores, Inc.

2009 NY Slip Op 30182(U)

January 22, 2009

Supreme Court, Suffolk County

Docket Number: 03-16974

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

P R E S E N T :

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 2-19-08
ADJ. DATE 5-13-08
Mot. Seq. # 003 - MG
004 - XMG; CASEDISP

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Upon the following papers numbered 1 to 42 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers 26 - 42; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (003) by the defendants Corey A Muscara, M.D., and Corey A Muscara, M.D., P.C. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against them, is granted and the complaint and cross claims are dismissed with prejudice; and it is further

ORDERED that this motion (004) by the defendants, Pathmark Stores and/or d/b/a Pathmark Pharmacies #635, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, is granted and the complaint and cross claims are dismissed with prejudice.

The complaint of this action sounds in medical malpractice and lack of informed consent wherein the plaintiff, Russell Kramer, alleges that he was a patient of, and received medical care and treatment from the defendant, Cory A. Muscara, M.D., P.C., and that on or about January 10, 2001, Mary Flanagan, a physician's assistant at the office of Cory Muscara, M.D., prescribed medication known as Naproxen (Naprosyn) to Russell Kramer for a sprained wrist, and that such prescription was dispensed by the

defendant Pathmark Stores, Inc. and/or d/b/a Pathmark Pharmacies #635 (hereinafter Pathmark), separately and in conjunction with other pharmaceutical medication known as Celestone/Benadryl/Maalox. It is alleged that the defendants departed from good and accepted standards of pharmacological and medical care in that they failed to advise the plaintiff of the possible dangerous interaction of the aforementioned medications, causing plaintiff to suffer serious and severe permanent personal injuries, including great pain and suffering, permanent disfigurement and marring, and severe mental anguish and emotional shock, as well as severe and permanent internal injuries consisting of, inter alia, gastric ulcer and peritonitis.

Cory A. Muscara, M.D. and Cory A. Muscara, M.D., P.C., seek summary judgment dismissing the complaint alleging that there were no departures from good and accepted practice of medical care in prescribing the Naproxyn to the plaintiff.

Pathmark seeks summary judgment dismissing the complaint asserting that it was not negligent in dispensing medications to the plaintiff and did not proximately cause injury to the plaintiff.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage, Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept. 1998] *app denied* 92 NY2d 818. To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury, *see*, Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 224 AD2d 674 [2d Dept. 1996]. Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury, *see*, Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516, 517 [2d Dept. 1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465, 465 [2d Dept. 1994].

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, 64 NY2d 851. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form ... and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [1979], and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [1981]. Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979].

Russell Kramer, whose date of birth is January 7, 1979, testified that he had been a patient of Dr. Muscara who referred him to see Dr. Sullivan on an ENT consult for leukoplakia, which he stated was white patches in his mouth. He stated Dr. Sullivan prescribed Celestone, a liquid medication to swish around in his mouth and spit out every morning and every night, which medication was prescribed in solution with Benadryl and Maalox. He testified he had one visit at Dr. Muscara's office for complaints of pain in his chest and the feeling like his heart was racing. He also saw Mary Flanagan, RPA, at Dr. Muscara's office, on one occasion on January 9th or 10th, 2001 for complaints of pain in his right wrist after pulling a heavy box at work at Pathmark the day before. He states she checked his wrist, said it was swollen, ordered an x-ray and prescribed Naproxen, one pill two times a day for the pain, and was instructed to take it with food or milk. He further testified that the Naprosyn, when it was filled, came with instructions to take it with milk or have food before taking the pill. He believed he followed up in ten days with Mary Flanagan, as instructed. During the interim, he took the Naprosyn and the Celestone/Benadryl/Maalox, and did not take any other medications, except maybe an Excedrin for a headache, but had no specific recollection of having taken Excedrin. According to his testimony, he did not swallow or ingest the Celestone/Benadryl/Maalox solution and after swishing it in his mouth, he spit it out.

Mr. Kramer testified that he then presented to Good Samaritan Hospital emergency room on January 28, 2001, because he began to feel abnormal pain in his stomach, and had to lie down for about fifteen minutes for the pain to go away. This, he stated, started about two days after his second visit at Dr. Muscara's office for his wrist. He stated he continued the same medications previously mentioned over the following week. The third episode of pain occurred while he was at work on January 28, 2001, so he went home. He stated the pain became severe "like I was having a heart attack," he was sweating profusely, his arms and legs were numb, and he thought he was going to die. He went to the emergency room by ambulance. Upon being admitted to the hospital, he states he was taken to surgery for an exploratory and then placed in intensive care after surgery for a perforated gastric ulcer.

Dr. Cory Muscara testified at his examination before trial that he incorporated his practice in 1993 and is the sole owner and shareholder of his practice, but employs two physicians and two physician's assistants, and sets the policies by which the medical practice runs. He stated there are no written rules, policies, guidelines or standards for doctors who practiced within his group, but he has guidelines for the physician's assistants in his group, Mary Flanagan and Rich Piccione.

Dr. Muscara testified that he practices in the field of Family Medicine and stated Russell Kramer was a patient of his practice since 1994 and was treated by him previously for sinusitis, a sore throat in 1997, and on May 23, 2001 for post-surgical depression for which he was placed on Effexor and referred to psychiatrist. He stated Mr. Kramer was seen in his office on other occasions, but not by him, and he was given ENT referrals in February, 1997, October, 1999 and December, 2000. Dr. Muscara stated Mr. Kramer had a history of chewing tobacco.

Dr. Muscara testified that medications being taken by a patient chronically and ongoing would be listed on the patient's comprehensive medical history sheet under "medications" in the patient's chart. He stated that Mr. Kramer was not on any medications which were being taken over a period of months and he had no recollection of Mr. Kramer being prescribed medication to treat lesions on his tongue or within

his mouth during the time he was a patient in his practice, or by the ENT practice to which he was referred. He stated it was his custom and practice to counsel any patient who uses tobacco products that they are carcinogenic and should be stopped.

Dr. Muscara testified that Mary Flanagan saw Russell Kramer on August 3, 1999, for intermittent chest wall pain for one week; her impression was chest pain, possibly gastroesophageal reflux (GERD), for which he was placed on Prevacid 15 to 30 mgm. daily, and was told he was to be rechecked in two weeks. He stated that this condition would not be one which Ms. Flanagan would have to notify one of the physicians about. Dr. Muscara testified the Prevacid was prescribed on a trial basis, and stated that it would be used to treat several possibilities including gastroesophageal reflux and gastritis. He described gastritis as a nonspecific inflammation of the stomach, which he attributed to most likely being caused by diet. Dr. Muscara described a gastric ulcer as an erosion of the normal lining of the stomach, caused by multiple factors that cause an imbalance between the protective layer and the erosive forces, such as gastric pH, *H. pylori* (which Dr. Muscara described as a bacteria), and the presence of prostaglandins (which Dr. Muscara stated are messenger proteins that affect certain physiological processes). Dr. Muscara testified that *H. pylori* is associated with gastric ulcers, and the presence of *H. pylori* might cause the patient with chronic symptoms, such as chronic dyspepsia, chronic reflux symptoms, and chronic abdominal pain, to be referred for endoscopy.

Dr. Muscara testified that Rich Piccione saw Mr. Kramer on August 12, 1999 for follow-up for his complaints of chest pain, and was told that the Prevacid was of no help. Mr. Piccione's impression or assessment was that Mr. Kramer had gastritis, and he was referred to a cardiologist, instructed to stop the tobacco, add Mylanta to the Prevacid, and have an EKG. Dr. Muscara testified that in reviewing the notes of Rich Piccione and Mary Flanagan, based on their questions and the physical makes him conclude that they considered and explored the possibility of an ulcer and concluded it was not likely. He stated that Mary Flanagan wrote that there was no nausea or heartburn or bloating, that the symptoms were unrelated to meals, and the abdomen was soft and nontender. He further testified that she specifically did not include it (gastric ulcer) as her impression, nor did she insist that the patient get an urgent endoscopy and see a gastroenterologist, which would be the customary thing to do if you suspected the patient had an active ulcer. With regard to Rich Piccione's note, Dr. Muscara stated that some of the things that lead him to conclude that he considered whether or not Mr. Kramer had a gastric ulcer were that the Prevacid was of no help, there was no nausea or vomiting, no tarry stools, no bloody vomitus, and that his abdomen was soft and nontender. However, Dr. Muscara did note that Rich Piccione listed gastritis in his assessment and that it was not likely cardiac, and further testified that gastritis is a very, very common phenomenon, and a very, very small subset of gastritis can deteriorate into a gastric ulcer, likely only if it was chronic gastritis. He stated that chewing tobacco, all tobacco products, and alcohol are risk factors for gastritis, but was not sure if alcohol was a risk factor for a gastric ulcer. Dr. Muscara stated that because the Prevacid did not help, that it was not likely a pathological gastritis or ulcer or reflux. He stated he believed Mr. Kramer was instructed to continue the Prevacid and to take Maalox, and stated Mr. Kramer was referred for a chest x-ray and upper GI series, and to Dr. Michael Aaron for cardiology consult in August, 1999. The EKG conducted in the office on August 12, 1999 was, he testified, essentially normal, but showed a possible right bundle-type intraventricular conduction defect.

Dr. Muscara testified that he did not believe his office was aware Mr. Kramer was using the Celestone/Benadryl/Maalox combination as prescribed by Dr. Sullivan. He stated he had read of the use

of a combination of Maalox and Benadryl for aphthous ulcers, which he described as benign, self-limiting oral shallow ulcers that can occur in the mouth and are possibly caused by viruses, and had in the past prescribed it for patients in liquid form. He stated he did not have occasion to prescribe Celestone to his patients. He described it as a steroid, but stated he did not know the side effects of it because he did not use it.

Dr. Muscara testified that Mary Flanagan saw Russell Kramer on January 10, 2001 for complaints of pain in his right wrist which began when he woke up that morning, and that he had felt a pull in the right wrist the day before after lifting a 50 pound box off the shelf. After examination of the wrist was performed, Ms. Flanagan ordered an x-ray of the right forearm and placed him on Naprosyn 500 mgm. bid (twice a day). Dr. Muscara testified that the more common side effect of Naprosyn is gastrointestinal upset, and the rare ones are renal insufficiency, gastric ulcers, possible exacerbation of asthma, and rash. In addition to headache, dizziness, confusion, cough, and abdominal pain, he stated a stomach perforation is a known risk associated with Naprosyn. He also testified that there was no way he could tell from the office notes what other medications Mr. Kramer was taking in January 2001. He testified that coffee, tea, soda, chocolate, alcohol, aspirin, Advil, Mobic, Ibuprofen, Indocin, certain antibiotics such as aminoglycosides, beta blockers, prednisone, some antifungals, and coumadin could increase the deleterious side effects of Naprosyn when taken at the same time, and could predispose a patient to an ulcer by synergistically working together. He further testified he was not familiar with the prescription Celestone/Benadryl/Maalox to know whether taking Naprosyn at the same time increased Mr. Kramer's risk of suffering a stomach perforation. He testified that the Celestone/Benadryl/Maalox solution was prescribed as a "swish and swallow" and although he was not very familiar with the solution, he felt that taking the Maalox and taking the Naprosyn with food were protective against ulcers, and if Mr. Kramer spit out the Celestone/Benadryl/Maalox solution, it would not cause an interaction.

Mary Flanagan testified she has been a physician's assistant since 1979 has worked for Dr. Muscara since 1993. She described a physician's assistant as a medical practitioner trained to work under the supervision of a physician, trained to take histories, perform physical examinations, form differential diagnoses, order diagnostic tests, and prescribe medications. She stated she saw Russell Kramer as a patient on August 3, 1999 for chest pain, and after examining him, made a differential diagnosis of gastroesophageal reflux disease, ordered Prevacid, and instructed him to come back in two weeks. He then followed up with Rich Piccione. She stated she did not see Mr. Kramer thereafter until January 10, 2001, at which time he presented with pain in his wrist after pulling a fifty pound box at work, and for which she ordered an x-ray, no work for three days, recheck in one week, and Naprosyn 500 mg bid (twice daily). According to her note, she did not indicate Mr. Kramer was taking any other specific medication, and to her knowledge, was not taking any other medication at the time of that visit.

Ms. Flanagan testified she did not believe Mr. Kramer had a gastric ulcer at that time of that visit as he had no history of heartburn or nausea. She stated that medications which carry a greater risk of a person developing a gastric ulcer are drugs such as anti-inflammatory medication, steroids, antibiotics, and blood pressure medication. She described the Naprosyn as a nonsteroidal anti-inflammatory medication used for inflammation, fever and pain, and stated she used short courses of anti-inflammatory medication for acute sprains and strains on an as needed basis. She testified the Naprosyn can cause an allergic drug reaction, can impair kidney function, exacerbate asthma, cause photosensitivity, irritate the stomach, cause a rash, cause stomach irritation and if left untreated, a stomach perforation. She stated she

was unfamiliar with the compound Celestone/Benadryl/Maalox. She testified it is her custom and practice to give oral instructions to take Naprosyn with food, and if GI symptoms (which she described as upset stomach, irritated stomach, abdominal pain) developed, to discontinue the medication and notify the office immediately. She stated she also wrote on the prescription to take the Naprosyn with food and ordered only a short-term two week supply.

Barbara Piotrowski, a staff pharmacist and supervising pharmacist at the Pathmark Pharmacy since 1987 testified at her examination before trial that there were prescriptions filled on behalf of Mr. Kramer on December 28, 2000 for a compound, Celestone/Benadryl/Maalox three teaspoons swish and swallow three times a day, prescribed by Dr. Ronald Sullivan, and two prescriptions on January 11, 2001 for Naproxen (Naprosyn) 500 mgm. and a refill of the Celestone/Benadryl/Maalox compound. She testified that Pathmark, at that time, had a drug interaction program in a software program provided by Health Resources. Information was provided when the prescription was entered into the computer, and if the patient has been entered into the computer with previous medications, the software checked for drug interactions, and would indicate mild, moderate, and severe interaction levels, if any. She described Celestone as a steroid, but stated that when a compound such as Celestone/Benadryl/Maalox is entered into the computer, that the side effects sheet may come out blank. She could not recall any sheets being generated which contained information including side effects for this compound. She testified, however, that even if no information is printed out, if there is something that she thought was necessary for the patient to know, she would discuss it with the patient. She could not remember Mr. Kramer, however, or this particular instance. She testified that the pharmacy technicians, clerks at the cash register, hand the medication out to the patient and ask if there are any questions; if there are, they are referred to the pharmacist.

Ms. Piotrowski further testified that the side effects of Celestone were stomach upset, increased blood sugar, or increased appetite. For the upset stomach, she stated she would recommend the medication be taken with food or with something to protect the stomach, and in this case, Maalox which Mr. Kramer was getting in the compound. She further testified that when you make a compound, the ingredients are diluted, and that the Celestone, being mixed with Maalox and Benadryl, would reduce irritation and be a good mixture as the Maalox forms a protective coating in the stomach. She did not know if the drug interaction software broke down a compound to check for interaction with other medications. She further testified that the Naprosyn was an anti-inflammatory which had side effects, small things, such as stomach irritation and possible drowsiness and that Mr. Kramer would have been given dispensing information, the Health Resources generated information sheet, which sets forth side effects. He would have been instructed to take the Naprosyn with food, told that it may cause drowsiness, to be careful operating machinery, and general things of that nature. She further testified that the document labeled "Plaintiff's exhibit 3" advises that some OTC (over-the-counter) medicines containing Naprosyn, aspirin, or other nonsteroidals (analgesics, arthritis pain medication, products for menstrual cramps or migraine headaches) may affect this medicine; before taking any of these OTC medicines, check with your doctor to find out if it is okay for you to take the OTC product. Ms. Piotrowski testified that in 2000 and 2001 there was no contraindication to dispensing Naproxen (Naprosyn) while a patient was also taking the compound, Celestone/Benadryl/ Maalox, and she did not know of any synergistic effects.

The affirmation of Richard Blum, M.D., defendants' expert, has also been submitted in support of

the Muscara and Pathmark defendants' applications to dismiss the complaint and cross claims. Dr. Blum sets forth that he is a physician duly licensed to practice medicine in the State of New York and is board certified in Internal Medicine and Medical Examiners, and is the Chairperson of the Pharmacy and Therapeutics Committee at St. Francis Hospital and the New York State Drug Utilization Review Board. He states he has reviewed the medical records in this matter as well as the deposition transcripts and opines with a reasonable degree of medical certainty that Cory Muscara and Cory Muscara, M.D., P.C. did not depart from the good and accepted practice of medicine and that in all instances, good and appropriate care was demonstrated. He also stated that Pathmark did not depart from the good and accepted practice of pharmacology and did not proximately cause Mr. Kramer's injuries.

Dr. Blum states that on January 10, 2001, Mary Flanagan, a physician's assistant employed by the defendant Dr. Muscara, prescribed Naprosyn for the plaintiff's right wrist injury. He described Naprosyn as an NSAID, a nonsteroidal anti-inflammatory drug which promotes healing by decreasing inflammation and alleviating discomfort. He states the standard of care is to inform the patient as to the best practices of taking it with food, avoiding certain other medications and notifying the prescriber should any discomfort occur. Dr. Blum states conclusively that Mary Flanagan appropriately discussed the medication with the plaintiff at the time it was prescribed and that the co-defendant Pathmark properly dispensed the medication and complied with the standard of care of pharmacies by transmitting to the patient the information about the drug and offering to discuss the medication if there were any questions. He further states that Dr. Muscara did not see the plaintiff and was not involved in the alleged negligent care, did not prescribe the Naprosyn, and that the plaintiff was only seen by Mary Flanagan up through and including the plaintiff's admission to Good Samaritan Hospital on January 28, 2001.

Dr. Blum states that Ms. Flanagan, as her custom, appropriately discussed the risks, benefits and alternatives, would tell the patient to take Naprosyn with food, give GI precautions, and advise the patient to discontinue the medication immediately and notify the office if there is any GI upset, and not to take any over the counter medications, especially anti-inflammatory medication such as Advil, Motrin, Ibuprofen, or Aleve. He stated her custom and practice was not to give long term prescriptions and to advise the patient that the medication could irritate the stomach and even result in an ulcer or perforation of an ulcer.

Dr. Blum opines that there is no basis to infer that the alleged perforated ulcer was proximately caused by the Naprosyn, but could have been due to the H. pylori bacteria found in the plaintiff's stomach. He further states that the plaintiff ingested Aspirin even though he was instructed to check with the office before taking other medication. Dr. Blum opines that the Celestone compound being taken by the plaintiff did not interact with the Naprosyn as the plaintiff did not swallow the Celestone mixture, but swished it in his mouth and spit it out.

Dr. Blum states that the informed consent properly given by the physician's assistant was to consult with a physician before taking aspirin or any pain relievers and to report any unusual symptoms to the physician. He further states that the Pathmark pharmacist testified that the instruction sheets were provided to the patient with the medication and advised that the Naprosyn be taken with food, described side effects, and stated that if there was stomach upset to contact the physician. He stated the instruction sheet also warns the person to inform the doctor of all prescription and non-prescription medications, vitamins, mineral substances, natural products and herbal medicines, and that the sheet states that some

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over-the-counter medications containing aspirin or other non-steroidal anti-inflammatory drugs may affect this medicine. Dr. Blum opines that there is nothing the defendants did or did not do that proximately caused the plaintiff's injuries.

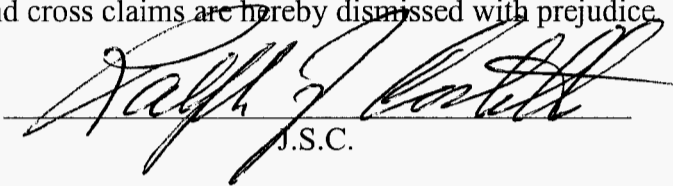
Based upon the foregoing, the defendants have established prima facie entitlement to summary judgment

Plaintiff has not opposed these two motions for summary judgment. To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff, see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [1997]. Therefore, the plaintiff has failed to raise any triable issue of fact to preclude summary judgment.

Accordingly, motions (003) and (004) for summary judgment dismissing the complaint and the cross claims are granted, and the complaint and cross claims are hereby dismissed with prejudice.

Dated: _____

Jan 22, 2019



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION