

Butera v Columbia Presbyterian Med. Ctr.

2009 NY Slip Op 30377(U)

February 18, 2009

Supreme Court, New York County

Docket Number: 100951/07

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lobis

PART 6

Index Number : 100951/2007
BUTERA, JAMES
VS.
COLUMBIA PRESBYTERIAN MEDICAL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/10/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-8; 9-10
11-12
13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/18/09 _____
J.S.C.

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

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

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

-----X
JAMES BUTERA and ELENA BUTERA,

Plaintiffs,

-against-

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
NEW YORK-PRESBYTERIAN HOSPITAL,
COLUMBIA PRESBYTERIAN DERMATOLOGY
ASSOCIATES, KIMBERLY M. WARD, M.D.,
and DANIELLE E. ENGLER, M.D.,

Defendants.

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

Index No. 100951/07

Decision and Order

FILED
FEB 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendant Danielle Engler, M.D., brings this motion, pursuant to C.P.L.R. Rule 32.12, for summary judgment in her favor. For the reasons set forth below, the motion is granted.

According to the papers, on April 9, 2004, plaintiff James Butera, then 33 years old, presented at the Columbia Presbyterian Dermatology Clinic. A dermatology resident, Dr. Kimberly Ward, obtained a history and examined Mr. Butera, whose complaint was a lesion on his lip. Mr. Butera told Dr. Ward that the lesion was present for seven (7) years, that he had been biting it, and that it had increased in size. He also indicated that the lesion would bleed spontaneously. Mr. Butera expressed concern that it might be a genital wart. Dr. Ward examined the lesion, which measured 8 by 7 mm, and consisted of plaque with a white periphery, centrally eroded with crust. Dr. Ward further noted that Mr. Butera had no risk factors for skin cancer. She determined that the lesion was a factitial/habit erosion caused by biting. Dr. Ward prescribed Aquaphor and instructed Mr. Butera to stop biting the lesion. He was directed to return in four (4) weeks for a reassessment. The notes specifically reflect that a biopsy would be considered at that visit if the lesion did not

improve or resolve. On the same day, Dr. Engler saw Mr. Butera; she confirmed Dr. Ward's observations and reassured Mr. Butera that it was not a sexually transmitted disease. Her notes confirm that Mr. Butera was to return in four weeks and that a biopsy would be considered at that time.

Although he was instructed to return in four weeks, Mr. Butera did not return until July 23, 2004, three and one-half months later.¹ Dr. Ward examined Mr. Butera, and noted that although Mr. Butera had stopped biting the lesion, and that he stated he was using the Aquaphor, the lesion appeared to be getting bigger. At this visit, Mr. Butera stated that the lesion was four years old. Dr. Ward recommended punch biopsy to rule out squamous cell carcinoma; Dr. Engler concurred, and the biopsy was performed the same day. Mr. Butera was told to return in one week. The pathology report, dated July 27, 2004, confirmed squamous cell carcinoma. Mr. Butera returned on July 30, 2004. The notes reflect that the biopsy site was clear. The chart further reflects that the nature of the lesion and need for excision was explained to Mr. Butera.

Dr. Engler referred Mr. Butera to Désirée Ratner, M.D., a surgeon and the Director of the Department of Dermatology. Dr. Ratner saw Mr. Butera on August 3, 2004, and recommended Mohs surgery, a microscopically-controlled surgery that is used for skin cancer, in coordination with a plastic surgeon, Dr. Khosh, to optimize cosmetic results. A letter from Dr. Ratner to Drs. Ward and Engler notes that the surgery was to be scheduled "at [Mr. Butera's] earliest

¹ Plaintiffs, who did not submit an affidavit by Mr. Butera, fail to explain why Mr. Butera did not return in four weeks as instructed. According to the examination notes, he said something to the effect that he did not come back because his insurance had changed.

convenience once repair has been coordinated with Dr. Khosh's office." The Mohs surgery was performed one month later, on September 2, 2004, and the plastic surgery was performed the next day. Dr. Ratner's report to Dr. Ward indicates that the lesion measured 2.0 by 1.6 cm, and that a mass of 3.1 by 1.4 cm was excised. According to the follow-up examination, there has been no indication of any recurrence or spread of the cancer.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Id. (citation omitted). Specifically, this requires, in a medical malpractice action, that a plaintiff opposing a physician's summary judgment motion

must submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

In support of the motion, defendant submitted an affirmation by Edward R. Heilman, M.D., a physician board certified in Anatomic Pathology and Dermatology. He states that he also has a Certification of Special Competency in Dermatopathology. Dr. Heilman states, with

* 5]

a reasonable degree of medical certainty, that it was reasonable not to biopsy the lesion when Mr. Butera appeared for his first visit on April 9, 2004. On that date, Mr. Butera stated that the lesion was present for approximately seven years. He was relatively young, a non-smoker, and had no family history or significant history of sun exposure. On these facts, it was reasonable to instruct the patient to stop biting the lesion, apply emollient cream, and return in four weeks, when a biopsy would be performed if there were no improvement. Dr. Heilman notes that punch biopsy of the lip “is a painful procedure with some associated morbidity. It is done only when one’s suspicions outweigh the risks of the procedure.”

Dr. Engler has met her burden as the proponent of summary judgment. She has submitted an affidavit by an expert qualified in the field of dermatology and pathology. The expert concluded, after reviewing all relevant documents, that there was no departure from the standard of care in failing to perform a biopsy on April 9, and no proof of any additional injury following the surgery as a result of the alleged delay in performing the biopsy.

Having established a *prima facie* showing of entitlement to summary judgment, the burden shifts to plaintiff to assert a genuine issue of material fact as to whether the proper standard of care was used. There is no dispute that the biopsy and surgery was necessary. The only issue raised by plaintiffs is the alleged delay in performing the biopsy. Plaintiffs contend that at Mr. Butera’s first appointment on April 9, he should have been screened or evaluated for cancer. Plaintiffs assert that it was not until July 23, when Mr. Butera complained that the lesion was continuing to grow, that “defendant finally considered and determined that the [sic] Mr. Butera could be suffering from skin cancer.”

In response to the motion, plaintiffs submitted an affidavit by a physician who is board certified in general and thoracic surgery. Defendants object to the expert's level of expertise, claiming that he or she has not established knowledge of the applicable standards for a dermatologist. This argument is rejected on a summary judgment motion, since the court does not have the full opportunity to explore the expert's level of expertise. See, DaRonco v. White Plains Hosp. Center, 215 A.D.2d 339, 340 (1st Dep't 1995). The affidavit is deficient in opposing the summary judgment motion in that it fails to set forth how performing the biopsy on July 23, rather than on April 9, had any effect on Mr. Butera's subsequent surgery or recovery. Indeed, the delay until July 23 was caused by Mr. Butera's failure to schedule a follow-up within four weeks, as he was instructed, and which he does not deny. Therefore, Dr. Engler argues, the only possible delay attributable to her would be from April 9, 2004 to May 7, 2004, which is four weeks. Defendants argument that there was no extreme urgency to the surgery is further supported by the fact that following the biopsy results on July 27, and Mr. Butera's appointment with the surgeon on August 3, the surgery was performed a month later, on September 2, 2009. Mr. Butera was referred immediately to a surgeon on August 3; since the surgery was not performed until September 2, and the surgeon noted that the surgery would be performed at Mr. Butera's convenience, it is clear that there were no exigent circumstances. Plaintiffs' expert fails to set forth how Mr. Butera was injured in any way because the surgery was performed on September 2, rather than sometime in May through August.

Although plaintiffs' expert states that Dr. Engler deviated from accepted standards of medical care by allowing the lesion to "progress, grow, and spread in to the plaintiff's body," there is absolutely no evidence of the spread of any cancer. Plaintiffs' expert states that defendant failed

to perform evaluation and testing at the first office visit, including "skin cultures, and/or MRIs." No explanation is given as to why an MRI would be performed for a lesion on the lip. There is no claim that the surgery performed on September 2 and 3 would have been any less invasive or would have had a more favorable result if it had been performed any earlier. While plaintiffs' expert states that Mr. Butera experienced some unfavorable results from the surgery, even if this court were to accept the allegation that the biopsy should have been done on April 9, no connection is made between what should have been at most a four-week delay in diagnosis of the cancer and the resulting diagnosis and surgery. In short, the statements are insufficient to demonstrate that Dr. Engler's actions proximately caused Mr. Butera's alleged injuries.

Accordingly, it is hereby

ORDERED that Dr. Engler's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Danielle E. Engler, M.D., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue. The remaining parties are directed to appear for the previously-scheduled trial date of March 16, 2009.

This constitutes the decision and order of the court.

Dated: February 18, 2009

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FEB 23 2009
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NEW YORK



JOAN B. LOBIS, J.S.C.