

Noler v New York Univ. Med. Ctr. Hosp. for Joint Diseases

2010 NY Slip Op 31586(U)

June 17, 2010

Supreme Court, New York County

Docket Number: 113323/07

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

JA PART 16
PART _____

PRESENT: _____

Index Number : 113323/2007
NOLER, HERBERT
VS.
NEW YORK UNIVERSITY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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 *for summary* judgment by the various named defendants is granted in accordance with the accompanying memorandum decision, and this action is dismissed with prejudice in its entirety.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

JUN 17 2010

Dated: June 17, 2010

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

-----X
HERBERT NOLER,

Plaintiff,

-against-

Index No. 113323/07
Motion Seq No. 001

NEW YORK UNIVERSITY MEDICAL CENTER
HOSPITAL FOR JOINT DISEASES, STEVEN
STUCHIN, M.D., and G. SPESSOT, M.D.,

Defendants.

-----X
SCHLESINGER, J.:

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this medical malpractice case, the plaintiff Herbert Noler is claiming that his orthopedic surgeon Dr. Steven Stuchin departed from accepted standards of medical and surgical care by administering to him, prophylactically, the antibiotic Clindamycin before and after his left total hip replacement on July 13, 2005. For several days after the surgery, Mr. Noler, who was then 78 years old, remained at the defendant hospital, New York University Medical Center Hospital for Joint Diseases (the Hospital). Then on July 18, 2005 he was transferred to the Margaret Tietz Nursing Home.

On July 19, a physician at the nursing home became concerned because the patient's abdomen was distended and rigid and referred him to New York Hospital of Queens. The admitted diagnosis there was suspicion of an ileus. He also had an elevated white blood cell count (WBC). Tests were administered, and when Mr. Nolan's condition worsened and his WBC rose, it was decided on July 21 that he should undergo an abdominal laparotomy. During the procedure, a large part of his colon was resected as he showed signs of peritonitis. By the next day, the stool sample taken came back positive for C-difficile toxins.

Based on the above facts, plaintiff claims that the administration of Clindamycin was the cause of the C-difficile with its attendant injuries.¹ He urges that it was a departure from good and accepted practice for the defendants to have administered that antibiotic.

Before me is a motion by the defendant Hospital and Dr. Steven Stuchin for summary judgment. The motion is supported by an affirmation from Dr. Bruce Farber, a physician board certified in Internal Medicine with a sub-certification in Infectious Disease. Having reviewed all the hospital and nursing home records, Dr. Farber opines that the care given by the defendants was in accordance with accepted standards of medical practice.

Dr. Farber first discusses Mr. Noler's history, which included surgery for an incisional hernia in 1974, but more significantly, a right total hip replacement by Dr. Stuchin at the defendant Hospital on August 1, 2001, four years before the procedure now at issue. Since Mr. Noler at that time had indicated he was allergic to penicillin, Dr. Stuchin elected to use Clindamycin, a non-penicillin antibiotic, as a prophylactic for both surgeries. He administered 600 mg of this medication pre-operatively and three similar dosages post-operatively on the day of the surgery and the following day. Dr. Farber states that the administration of prophylactic antibiotics is mandated, in accordance with national guidelines and good practice. He further opines that, in the face of Mr. Noler's allergy to penicillin-type drugs and the previous use of Clindamycin during the earlier hip replacement with no ill effects, it was entirely proper for Dr. Stuchin to use it again.²

¹Other claims were made originally, regarding an excessive dose and failure to diagnose the condition while Mr. Nolan was still at NYU, but those claims are no longer relevant.

²Dr. Farber also addresses other alleged departures, such as excessive dosage and failure to diagnose, but since the opposition does not deal with those, essentially withdrawing the claims, this Court will not either.

It should be noted, however, that Dr. Farber never addresses the causation aspect of the claim. His opinion simply is that no departure occurred by using this antibiotic.

The question then arises whether the moving defendants have established a prima facie case entitling them to the relief sought. Counsel for the plaintiff argues that they have not, based on his opinion that the moving papers are too vague and conclusory. His other point is that the moving papers are deficient because there is no mention of the comments made about this drug, Clindamycin, in the Physician's Desk Reference (PDR). I disagree on both points. I find that Dr. Farber's affirmation, with no mention of the PDR, adequately establishes that neither the Hospital, nor more importantly Dr. Stuchin, departed from accepted standards of medical or surgical care by prophylactically administering this antibiotic.

The opposition elaborates on the deficiencies in the moving papers, related in large part to the lack of any reference to the PDR, which counsel describes as "authoritative concerning the use and administration of drugs." With regard to Clindamycin, counsel argues that the PDR contains certain relevant warnings. He also includes an affirmation from a physician who identifies himself as an attending at Montefiore Medical Center board certified in Internal Medicine and Emergency Medicine, with numerous articles published in the field of Toxicology.

After indicating that he/she has reviewed Mr. Noler's hospital records, as well as the opinions of defendants' expert Dr. Farber, plaintiff's expert then describes his familiarity with the antibiotic Clindamycin and the standards of care existing in 2005 regarding its use. The expert then states (at p 2) that the PDR and Mosby's Drug Consult (Mosby's) "are totally authoritative when it comes to the manufacturers' requirements to satisfy the FDA

concerning the description of the use, risks and dangers concerning the use of Clindamycin.” He further states, “with a reasonable degree of medical certainty” with regard to the issue of causation, that “there is no doubt ... that Mr. Noler lost his intestines due to the use of Clindamycin.”

This physician then refers the Court to two excerpts from the PDR and Mosby’s regarding Clindamycin, which in essence warn about its usage. Specifically, the PDR states that this antibiotic has been associated with severe colitis and thus “should be reserved for serious infections” and adds the following: “Because of the risk of antibiotic - associated pseudomembranous colitis, as described in the warning box, before selecting Clindamycin the physician should consider the nature of the infection and the suitability of less toxic alternatives (e.g. erythromycin).” The expert then opines that physicians must be aware of these warnings and the consequence of the drug they choose to use. He infers (at p 3) from these cited passages and others that the manufacturer’s warnings, which he states are in compliance with FDA rules and regulations, would preclude the use of Clindamycin prophylactically.

Plaintiff’s expert continues with a discussion of Mr. Noler’s situation, which included an allergy to penicillin as well as a history of an underlying gastrointestinal illness. Based on these factors, he opines that Clindamycin should not have been used, but rather an alternative antibiotic such as Vancomycin. The gastrointestinal disease referred to was hemorrhagic gastritis or bleeding in the stomach. He concludes with the opinion that this history was ignored by the defendant doctor to the plaintiff’s detriment.

The moving defendants reply with an affirmation from counsel and an affirmation from the defendant Dr. Steven Stuchin. The latter statement refers the Court to a 2002

National Surgical Care Infection Project ("SCIP"), a joint venture between the Centers for Medicare and Medicaid Services and the Centers for Disease Control. This project was established, according to Dr. Stuchin, to deal with the problem of post-operative infections in the elderly. The guidelines first chose the antibiotic Cefazolin (which is penicillin-related), but with regard to patients such as Mr. Noler who are allergic to penicillin, Clindamycin or Vancomycin was recommended. Dr. Stuchin concludes by opining (at p 2) that these SCIP guidelines, with which he complied, "render the PDR irrelevant". The guidelines are included as an exhibit in the reply on this topic.

Both counsel in opposition and reply cite to the 1999 decision by the Court of Appeals in *Spensieri v. Lasky*, 94 NY2d 231. However, not surprisingly they each read it differently. This Court reads it is to say that the PDR is not admissible at trial as stand alone proof of the standard of care because it is a hearsay document.

Spensieri involved the prescription of a drug Estinyl by the defendant doctor to control uterine bleeding. The drug contained a high level of estrogen and came with a warning that its use could bring on abnormal clotting, leading to stroke. The plaintiff, a 29 year-old, within a month of taking the drug, did suffer a severe stroke rendering her quadriplegic and unable to speak. At the trial, her counsel offered the applicable portion of the PDR into evidence. But the Court denied its admission, even though the plaintiff's medical expert characterized the information contained therein as authoritative. The defendants and their experts testified it was a source of information, but not authoritative as a standard of care. Despite the refusal to admit PDR portions into evidence, the plaintiff's expert did testify to the risks of birth control pills containing estrogen, which included the possibility of stroke.

There were other points raised by the plaintiff during the trial but they are not relevant to this discussion. The jury found in favor of the defendants. On appeal, the Court of Appeals said the following (at p 239):

Thus, we reject the contention that the PDR constitutes prima facie evidence of a standard of care. The PDR may have some significance in identifying a doctor's standard of care in the administration and use of prescription drugs, but is not the sole determinant. In our view, the information contained in the PDR can only be analyzed in the context of the medical condition of the patient. The testimony of an expert is necessary to interpret whether the drug in question presented an unacceptable risk for the patient in either its administration or the monitoring of its use.

Following up on that holding, in the 2006 case of *Hinlicky v. Dreyfus*, 6 NY3d 636, the Court of Appeals, referring to *Spensieri v. Lasky*, stated (at p 647):

In that case ... this Court rejected the contention that the PDR constituted prima facie evidence of a standard of care, observing that the PDR could have some significance in identifying a doctor's standard of care, but it could not be determinative... [T]hus expert testimony would be needed to interpret whether the treatment in question presented an acceptable risk for the patient. We concluded that the plaintiff was not barred from offering expert testimony partially based on reliance on the PDR; rather, she was prohibited from offering excerpts from the PDR as "stand alone proof" of a standard of care.

Therefore, to the extent plaintiff's expert and his counsel opine in opposition to defendants' motion here that the PDR by itself constitutes the standard of care precluding the use of Clindamycin as a prophylactic, they are wrong. Defense counsel asserted this point in their reply.

In that same reply, defendants introduced new material, which is not allowed in a reply, referring to the SCIP guidelines. But more importantly, it was not clear to the Court whether plaintiff's expert was relying exclusively on the PDR (which he may not do) or whether, as he suggested, the opinion was based on his familiarity with the standards of care concerning the use of Clindamycin. Therefore, I directed a supplemental medical statement from plaintiff addressing the above issue, as well as the new material included by defendants in their reply papers. I then allowed the moving defendants to have the last word by replying to this supplemental statement.

In the supplemental statement, plaintiff's physician rejects the "Guidelines" discussed in the reply papers as "irrelevant" as they do not specifically address the use of Clindamycin in the face of a history of gastritis or a hemorrhagic gastritis, the condition suffered by Mr. Noler. As to the substance of the controversy, the role played here by the PDR, this doctor persists in his reliance on its warnings. He then appears to conflate a history of gastritis with a propensity to develop C-Diff Colitis, and in this regard notes (at p 4) that in the PDR, the producer of the drug does not elaborate how and why gastritis with the use of Clindamycin can result in colon ischemia.

But more significantly, this physician offers nothing based on his own knowledge and experience as to how and why a history of gastritis, inflammation of the wall of the stomach, has anything to do with the development of C-Diff Colitis, a serious infection in a different organ, the colon or large intestines. It is not good enough, in this regard, to say as this physician does (at p 4) that "your deponent does not know of any physician who would prescribe Clindamycin to a patient who has a history of gastritis, let alone a hemorrhagic gastritis." That statement is irrelevant and inadmissible hearsay. What he

says, again, is not predicated on his own professionally acquired knowledge and experience.

Following this statement, the expert says: "Aside from the PDR, your deponent can state that it was a deviation from good and accepted medical practice to use this antibiotic with a history of hemorrhagic gastritis." However, this statement is insufficient on two grounds. First, it is conclusory, and second, it includes no basis for the opinion. Rather, it appears to simply respond to this Court's expressed concern with the doctor's improper reliance on the PDR as the basis of his standard of care opinion. Defendants' Supplemental Reply, containing a second affirmation from Dr. Farber, points out these deficiencies.

For these reasons, the defendants Dr. Steven Stuchin and the Hospital are entitled to summary judgment dismissing this action with prejudice. As stated earlier, the defendants in the first instance did make out a prima facie case for this relief, which was inadequately opposed by the plaintiff because, in essence, his expert relied on the PDR. Further, the plaintiff's expert failed to elaborate, based on his own knowledge and personal experience, how a history of stomach bleeding would make the drug Clindamycin contraindicated under these circumstances. The fact that Mr. Noler later developed C-difficile, probably from Clindamycin, was a most unfortunate event in and of itself, but it does not create a triable issue as to whether the defendants departed from accepted standards of medicine.

In the Reply Affirmation, defense counsel asks that the motion for summary judgment be deemed to include a similar request for relief by defendant G. Spessot, M.D., the anesthesiologist during the surgery at issue. Apparently, defense counsel did not move

on behalf of Dr. Spessot based on the belief that plaintiff would be discontinuing the action against him, but plaintiff then declined to do so. This Court finds that Dr. Spessot is entitled to the dismissal of this action against him. Plaintiff's expert makes no mention of Dr. Spessot and does not allege in any way that Dr. Spessot departed from accepted standards of care. Moreover, the only claim of malpractice here relates to the administration of Clindamycin, and there is no dispute that plaintiff's surgeon Dr. Stuchin gave the order for the administration of that drug.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants New York University Medical Center Hospital for Joint Diseases and Steven Stuchin, M.D., is granted and the complaint is dismissed with prejudice as to all the named defendants, including G. Spessot, M.D., but without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 17, 2010

JUN 17 2010

ENTER:


J.S.C.
ALICE SCHLESINGER

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE