

Vitello v Katz

2010 NY Slip Op 33344(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 111348/07

Judge: Alice Schlesinger

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

ALICE SCHLESINGER

IA PART 16

DEBENT.

Index Number : 111348/2007

VITELLO, RONALD

vs

KATZ, AARON M.D.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment by defendant Aaron Katz, M.D., is granted in accordance with the accompanying memorandum decision.*

FILED

DEC 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

NOV 30 2010

Dated: November 30, 2010



ALICE SCHLESINGER 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
COUNTY OF NEW YORK

-----X
RONALD VITELLO,

Plaintiff,

Index No. 111348/07
Motion Seq. No. 002

-against-

AARON KATZ, M.D.,

Defendant.
-----X

FILED

DEC 02 2010

SCHLESINGER, J.:

Plaintiff Ronald Vitello commenced this medical malpractice action in September 2007 with the assistance of counsel. Mr. Vitello alleges that defendant Aaron Katz, M.D., a urologist, failed to timely and properly treat his symptoms and negligently performed a robotic radical prostatectomy to treat his prostate cancer. In addition, Mr. Vitello has asserted a cause of action for lack of informed consent.

Following extensive discovery, plaintiff's counsel filed a Note of Issue in November 2009. Defendant then moved for summary judgment in his favor. Rather than submitting opposition to the motion, plaintiff's counsel Sanocki, Newman & Turret, LLP, moved to withdraw as counsel for Mr. Vitello. Following a detailed discussion with Mr. Vitello and his counsel outside the presence of defense counsel, this Court granted counsel leave to withdraw by decision dated July 21, 2010. The Court further stayed all proceedings for 60 days and directed that Mr. Vitello appear in Court, either with new counsel or representing himself, on September 22, 2010 at 9:30 a.m.

Mr. Vitello did appear on September 22, 2010. On that date, the Court conducted extensive proceedings on the record. Mr. Vitello explained that he wished to represent himself, and the Court explained the procedure for opposing defendant's summary

judgment motion. A written order was then issued confirming a deadline of October 18, 2010 for Mr. Vitello to serve and file his opposition papers, with a reply from defendant permitted by October 22.

In October, in lieu of opposition papers, Mr. Vitello sent a handwritten letter to the Court. There he essentially indicated that, whereas he believed in the merits of his case, he acknowledged that he could not successfully prosecute the case without the assistance of counsel.

The issue thus becomes whether Dr. Katz, in his motion for summary judgment, has established as a matter of law that Mr. Vitello's claims should be dismissed. After reviewing the papers, this Court finds that Dr. Katz has met his burden. The burden has thus shifted to Mr. Vitello to submit opposition sufficient to create a triable issue of fact. Since Mr. Vitello has not submitted substantive opposition to the motion, Dr. Katz is entitled to a judgment in his favor.

In support of his motion, Dr. Katz has submitted medical records, deposition transcripts, and reports prepared by Arnold Melman, Director of Urology at Montefiore Medical Center detailing his findings following a medical examination of Mr. Vitello on May 20, 2009 (Exh G). In addition, Dr. Katz has submitted a forensic psychiatric evaluation of plaintiff conducted by Dr. Paul Nassar on June 17, 2009 (Exh. H). Further, and quite significantly, defendant has submitted an eleven-page Affidavit from Vipul Patel, M.D., a board certified urologist opining with a reasonable degree of medical certainty that Dr. Katz was not negligent and committed no malpractice in connection with his care and treatment of Mr. Vitello. Whereas Dr. Melman and Dr. Nassar address the issue of claimed damages, Dr. Patel in his Affidavit focuses on the issue of liability.

Dr. Patel's Affidavit is persuasive. He begins by setting forth his credentials. As particularly significant here, Dr. Patel indicates that he is a founding member of the Society of Robotic Surgery and that he has performed "over 3,000 robotic prostatectomies." He then opines "within a reasonable degree of medical certainty that Dr. Katz' diagnosis and treatment of plaintiff, Ronald Vitello, on or about November 6, 2000 until on or about March 29, 2006, in all respects met the standard of care."

Dr. Patel then goes on to explain the basis for his opinion, beginning with Mr. Vitello's claim that "Dr. Katz failed to timely diagnose that he was a candidate for surgery, resulting in plaintiff's cancer being allowed to grow, and that he failed [to] perform surgery to remove plaintiff's prostate and/or refer him for prostatectomy." He indicates that when plaintiff first presented to Dr. Katz on December 6, 2000, he had a PSA level of 4. The test had been performed by Dr. Fracchia, another urologist, in May 2000. Dr. Fracchia had also done a needle biopsy which resulted in a diagnosis of benign prostatic hyperplasia (BPH). When Dr. Katz examined Mr. Vitello in December, the exam was normal so no follow-up was done, even though the PSA had risen to 6.8.

Mr. Vitello did not return to see Dr. Katz for 16 months, until March 20, 2002, when a PSA test by another physician showed a reading of 11. Dr. Katz did a test that showed a reading of 13.8. A biopsy was performed on April 2. A May 1, 2002 note indicated that Mr. Vitello had chronic inflammation, but no cancer. The plan was to get a semen culture and to take Proscar, a medication to treat BPH.

Mr. Vitello next returned to see Dr. Katz in the fall of 2003 when he called to complaint of blood in the sperm. In September a PSA test was performed and revealed a

level of 21.8. Dr. Katz prescribed the antibiotic Levaquin for six weeks and instructed Mr. Vitello to return at the end of that period, which he did. At that visit, on November 12, 2003, the PSA test showed a level of 22.3. Mr. Vitello was also diagnosed with human papillomavirus (HPV), a sexually transmitted disease that manifested itself with warts on the base of his penis.

Mr. Vitello's next visit to Dr. Katz was on March 30, 2005. Although he had no new symptoms, his PSA was 40. As a result, Dr. Katz performed 12 core biopsies on May 17, 2005. Cancer was diagnosed in 3 and categorized as a Gleason 7 (4+3). A CY scan and bone scan were performed on May 31, 2005, and revealed no metastasis. On June 10, 2005, Mr. Vitello returned to Dr. Katz at which time his treatment options were discussed and Dr. Katz recommended robotic-assisted surgery. According to the expert based on his review of documents, Dr. Katz discussed risks and benefits of surgery at that time. Mr. Vitello declined to proceed with the surgery, preferring to follow a diet and seek a second opinion.

Mr. Vitello next contacted Dr. Katz on September 21, 2005 to further discuss treatment options. Dr. Katz again recommended surgery and again discussed the risks and benefits. Two days later, Mr. Vitello returned to Dr. Katz with a PSA level of 63.6 and concerns about decreased libido and decreased energy. Hormone therapy was commenced while Mr. Vitello continued to consider his treatment options. The following week, Mr. Vitello had another bone scan and CT scan, which were negative for metastasis. However, as the CT showed a lung nodule, Dr. Katz referred Mr. Vitello to two pulmonologists for evaluation., and he was given another hormone injection. The pulmonologist, Dr. Simonelli, found that the lung nodule was not cancer.

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Mr. Vitello returned to Dr. Katz on October 19, 2005 for another hormone injection. Dr. Katz again discussed treatment options, including surgery. The PSA level then had decreased to 29.4. When Mr. Vitello next returned in January 2006 complaining of calf pain, his PSA level had decreased to 26 due to the hormone treatment. A sonogram revealed no abnormalities in the calf.

On January 4, 2006, Mr. Vitello returned to Dr. Katz complaining of low energy and weight gain. His PSA then was down to 3.5. Treatment options were again discussed. Rather than proceeding with the plan to consult Dr. David Samadi, another urologist, regarding possible robotic prostatic surgery, Mr. Vitello consulted Dr. Michael Droller, a urologist at a different hospital, on January 25, 2006. Dr. Droller discussed the risks and benefits of surgery and suggested a return visit, but Mr. Vitello did not return.

Instead, Mr. Vitello returned to Dr. Katz on February 1, 2006. On February 7 he called to ask that Dr. Katz perform the robotic surgery. Plaintiff was advised of risks and benefits, signed a consent form, and had the standard pre-operative work up. Surgery was scheduled for March 27, 2006 at New York Presbyterian Hospital. Dr. Katz was the primary surgeon. Dr. Samadi assisted. The surgery lasted about 3 ½ hours, which is acceptable according to the expert. The prostate was removed. Cancer was present in the prostate, in surrounding tissue and in the right bladder neck margin as well. Mr. Vitello was discharged on March 29, 2006 following a regular course of post-operative treatment, and told to return to see Dr. Katz in two weeks.

PSA tests on April 18 and June 13, 2006 confirmed no evidence of cancer. During the following year, Mr. Vitello had cardiac surgery and neurological injuries due to a car accident. In June 2007 he returned to Dr. Samadi complaining of incontinence. His PSA

was normal. On July 27, 2007, he had surgery to treat the incontinence by Dr. Brian Stone. As of September 18, 2007, Mr. Vitello had no further complaints of incontinence and his PSA was normal. In February 2008 Dr. Stone provided some follow-up treatment.

In November 2008 Mr. Vitello's PSA was normal. On June 3, 2009 it was 1.94. In July 2009 a full body scan and CT revealed no metastatic disease.

Following this highly detailed discussion of Mr. Vitello's course of treatment, Dr. Patel then expressed the following opinions with a reasonable degree of medical certainty:

- Dr. Katz timely diagnosed Mr. Vitello's cancer in May 2005 and promptly recommended surgery.
- Dr. Katz did not delay the surgery. He performed it as soon as plaintiff consented, in February 2006.
- The use of hormone therapy as a temporary treatment was appropriate while Mr. Vitello considered his options.
- Dr. Katz fully apprised Mr. Vitello of the risks and benefits of surgery, including urinary incontinence and impotence.
- The prostate surgery was properly performed, and Dr. Katz was qualified to perform it. The resulting incontinence is a known risk, providing no evidence of negligence.

This Court finds that Dr. Patel's review of the relevant evidence is thorough and that he is well-qualified to give opinions in this case. His opinions are reasonable based on the evidence in the record and are highly persuasive. As noted above, Mr. Vitello has not submitted any statement from himself or from another physician that would in any way counter the opinions expressed by Dr. Patel in support of the request by Dr. Katz for the dismissal of all claims against him.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 30, 2010

NOV 30 2010



J.S.C.
ALICE SCHLESINGER

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