

Pullman v Silverman

2012 NY Slip Op 32242(U)

August 27, 2012

Sup Ct, New York County

Docket Number: 111065/08

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

DAVID Pullman

INDEX NO. 11065/08

MOTION DATE 6-12-12

DAVID A. SILVERMAN
M.D. ET AL.

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to (for) summary judgment.

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

PAPERS NUMBERED

1-11

Answering Affidavits — Exhibits _____

12-24

Replying Affidavits _____

25-32

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION*

~ ORDER

FILED

AUG 28 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/27/12

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

DAVID PULLMAN,

Plaintiff,

Index No. 111065/08

-against-

Decision and Order

DAVID A. SILVERMAN, M.D., and K. MOREAU,
a nurse employed by defendant David A. Silverman, M.D.,

Defendants.

-----X

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

In Motion Sequence Number 003, defendant David A. Silverman, M.D., moves, by order to show cause, for summary judgment dismissal of the complaint against him. Plaintiff David Pullman opposes Dr. Silverman’s motion.¹

This case sounding in medical malpractice and lack of informed consent arises out of treatment that Dr. Silverman rendered to plaintiff in 2007. Plaintiff had been seeing Dr. Silverman since 1995. On January 23, 2007, Dr. Silverman prescribed Lipitor (also known as atorvastatin), a statin used to treat high cholesterol, to plaintiff. On February 16, 2007, plaintiff discontinued Lipitor after feeling chest discomfort, especially while running (plaintiff was an avid runner). Dr. Silverman advised plaintiff to follow up with his cardiologist in California, where plaintiff was living at the time. About this time, Dr. Silverman also prescribed Zithromax (also known as azithromycin), a macrolide antibioidic, to plaintiff for flu-like symptoms. Mr. Pullman returned to California. On March 5, 2007, after a near-fainting episode, plaintiff was admitted to the

¹ There is no indication that the other defendant named in the caption, “K. Moreau,” ever appeared in the action. A nurse named “K. Moran” was apparently deposed as a nonparty.

hospital at the University of California Los Angeles where he was diagnosed with a second degree atrioventricular heart block (a type of arrhythmia caused by problems in electrical conductivity). A pacemaker was recommended at that time, but plaintiff refused. On March 26, 2007, plaintiff was admitted to Cedars-Sinai Medical Center (“Cedars-Sinai”) in Los Angeles, where he was diagnosed with third degree (complete) atrioventricular heart block. He ultimately had a dual chamber pacemaker implanted on March 29, 2007. In his bill of particulars, plaintiff alleges that Dr. Silverman’s negligent administration of Lipitor or his negligent administration of the combination of Lipitor plus azithromycin caused him to have a cardiac arrhythmia, which progressed to third degree atrioventricular heart block, which necessitated placement of a dual chamber pacemaker.

Dr. Silverman moves for summary judgment on the grounds that plaintiff cannot establish that Lipitor alone or Lipitor in conjunction with azithromycin proximately caused the atrioventricular heart block. As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), a party moving for summary judgment motion must show that there are no disputed issues of fact. A defendant in a medical malpractice case moving for summary judgment must demonstrate either that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Rogues v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). Once the movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Alvarez, 68 N.Y.2d at 324. In medical malpractice actions, expert medical testimony is essential for demonstrating either the absence or the existence of material issues of fact

pertaining to an alleged departure from accepted medical practice or proximate cause.

In support of his motion, Dr. Silverman offers an expert affirmation from Monty M. Bodenheimer, M.D., a physician licensed to practice medicine in New York and board certified in internal medicine and cardiovascular disease. Dr. Bodenheimer explains that atrioventricular heart block is an impairment of the conduction between the atria and ventricles of the heart. Based on plaintiff's electrocardiography ("EKG") studies from 2001 through 2006, Dr. Bodenheimer opines that plaintiff had a first degree heart block since 2001. He opines that, without any connection to the Lipitor, plaintiff's heart block naturally and idiopathically progressed to a second and third degree heart block in March 2007.

Dr. Bodenheimer sets forth that Lipitor is a statin, which is a drug that reduces levels of bad cholesterol and increases levels of good cholesterol. He states that Lipitor is used to treat high cholesterol and to lower risk of stroke, heart attack, or other heart complications in people with type 2 diabetes, coronary heart disease, or other risk factors. He opines that Lipitor, alone or in conjunction with azithromycin, does not cause atrioventricular heart block. He states that there are no epidemiological scientific studies linking Lipitor or other statins to atrioventricular heart block. He states that in rare cases, Lipitor can cause rhabdomyolysis (myopathy or muscle disease which results in breakdown of skeletal muscle tissue). When this happens, a byproduct of broken down skeletal muscle is released into bloodstream and can damage kidneys. However, Dr. Bodenheimer sets forth that plaintiff did not have rhabdomyolysis, as evidenced from the medical records. Dr. Bodenheimer states that rhabdomyolysis is tested by evaluating levels of creatine kinase ("CK") in

the blood and that CK levels that are five times the normal range suggest rhabdomyolysis; plaintiff's CK levels were normal. Further, troponin is a diagnostic marker for rhabdomyolysis, but plaintiff's troponin levels were normal. Also, an EKG with certain irregularities can indicate rhabdomyolysis, but plaintiff's EKGs showed no such irregularities. Furthermore, the complete cardiac work-up performed by Cedars-Sinai specifically demonstrated that plaintiff did not have myopathy. In conclusion, Dr. Bodenheimer opines, to a reasonable degree of medical certainty, that plaintiff cannot establish proximate cause between Dr. Silverman's acts or omissions and plaintiff's injuries because Lipitor does not cause atrioventricular heart block.

Defendant has established his entitlement to summary judgment as a matter of law. Dr. Silverman submitted evidence that Lipitor does not cause atrioventricular heart block, nor did plaintiff have rhabdomyolysis or myopathy.

In opposition, plaintiff submits seventy-eight (78) pages of expert opinion evidence in the form of affidavits from four experts, two of whom are medical doctors and two of whom hold Ph.D.'s. The affidavits are confusing and difficult to distill, and include multiple references to studies and articles that are not annexed as exhibits to plaintiff's papers. The experts refer to no epidemiological studies but rely on anecdotal case studies. The experts' conclusions are nearly identical, in that they opine that plaintiff's heart block was caused by the administration of Lipitor or Lipitor plus azithromycin, based on the proximity between the administration of the drugs and the onset of plaintiff's symptoms, their own knowledge of the interactions between the drugs, and their claim that there were no other risks factors for heart block.

Plaintiff's experts set forth that Lipitor has been found to cause rhabdomyolysis, or destruction of skeletal muscle tissue. They also point out that the heart is made of muscle. The experts draw on these two principles to opine that Lipitor could destroy heart muscle cells that are responsible for the heart beating in a regular fashion, which could lead to heart block. Further, plaintiff's experts aver that Lipitor can cause a reduction of coenzyme Q10, which aids in the mitochondrial production of energy; that heart tissue depends on energy for normal function; that depletion in Q10 can impair the conduction system of heart; and that, therefore, it is physiologically possible that the Lipitor caused plaintiff's third degree heart block. They dispute that plaintiff had any history of first degree heart block; rather, they maintain that what Dr. Bodenheimer believes was first degree heart block as early as 2001 was a natural consequence of plaintiff being such an athletic person with a heart accustomed to pumping large volumes of blood.

Plaintiff's experts set forth that macrolide antibiotics (like azithromycin) interfere with body's ability to break down statins (like Lipitor), causing the effects of the statin to be increased. Plaintiff's experts believe that plaintiff's flu-like symptoms in the days preceding his diagnosis of heart block were actually symptoms from an adverse reaction to statin treatment, and that the administration of azithromycin amplified the adverse reaction. The experts aver that macrolide antibiotics increase a patient's risk of myopathy, and that myopathy plus increased CK is a sign of muscle toxicity, which can in turn cause arrhythmia. However, plaintiff's experts concede that there have been no studies published linking the dual administration of Lipitor and azithromycin to heart block.

In reply, defendant argues that plaintiff's experts never establish the requisite nexus between the alleged malpractice (prescribing Lipitor alone or in conjunction with azithromycin) and plaintiff's heart block. He points out that plaintiff's experts concede that there are no published studies establishing causation between Lipitor and heart block; thus, defendant argues, plaintiff's experts' theories of causation are speculative and unsupported. Defendant also argues that plaintiff's theory that his injuries arose out of a depletion of coenzyme Q10 is a theory offered for the first time in response to this motion for summary judgment; moreover, defendant argues, the theory is novel and not generally accepted in the medical community. Defendant submits a second affirmation from Dr. Bodenheimer, who reiterates his opinion that there is no evidence which is generally accepted in the medical community that Lipitor, alone or in conjunction with azithromycin, causes heart block, whether by affecting the Q10 enzyme or by any other mechanism. Dr. Bodenheimer opines that epidemiologic studies are the only studies that are accepted in the scientific and medical communities to establish causation, and that case studies, which are based on the individual characteristics of a patient are not subject to controls, do not allow for scientific conclusions about causation. He contends that plaintiff's experts make an illogical leap that because Lipitor may cause myositis (inflammation of skeletal muscles) it will also cause cardiomyositis (inflammation of the heart muscle) and affect the conduction system of the heart, resulting in heart block. Dr. Bodenheimer asserts that myositis and cardiomyositis are medically distinct conditions and that there is no literature to support the novel theory that Lipitor causes cardiomyositis or affects the conduction system of the heart. Regardless, Dr. Bodenheimer points out, plaintiff's medical records indicate that plaintiff never had myocarditis or myositis.

There are clear questions as to whether Dr. Silverman should have prescribed Lipitor or azithromycin to Mr. Pullman. Plaintiff's experts spend a great deal of space opining that prescribing Lipitor to the healthy plaintiff, who had no signs of needing it, was highly inappropriate and a departure from the standard of care. However, the summary judgment motion is solely based on proximate cause; therefore, to survive summary judgment, plaintiff's experts need only raise an issue of fact as to proximate cause. Plaintiff fails to adequately rebut defendant's showing of entitlement to summary judgment as a matter of law. His experts do not refute defendant's evidence that Lipitor does not cause heart block and that plaintiff did not have rhabdomyolysis or myopathy. Plaintiff's experts' opinions that it is conceivable that Lipitor, or Lipitor in conjunction with azithromycin, could cause heart block, are insufficient to establish proximate cause. Their opinions that the Lipitor must have caused the heart block because it could not have been caused by anything else is conclusory. Their opinions that it is physiologically possible that Lipitor could cause a reduction in coenzyme Q10, which could impair the conduction system of the heart, is vague, speculative, and only offered as a theory of the case for the first time in opposition to defendant's motion for summary judgment. Accordingly, it is hereby

ORDERED that defendant David S. Silverman, M.D.'s motion for summary judgment is granted, and the clerk is directed to enter judgment accordingly.

Dated: *Aug. 27*, 2012

FILED
 AUG 28 2012
 COUNTY CLERK'S OFFICE
 NEW YORK
 ENTER: *[Signature]*
 JOAN B. LOBIS, J.S.C.