

Parno v Beitner

2014 NY Slip Op 31778(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 110704/09

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16
PART _____

PRESENT:

Index Number : 110704/2009
PARNO, OLGA
vs
BEITNER, M.D., ORIT
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted in its entirety and the Clerk is directed to enter judgment dismissing the action with prejudice in accordance with the accompanying memorandums decision. No further appearance on August 6, 2014 is required.

FILED

JUL 11 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 10 2014

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
OLGA PARNO and JONATHAN HEINE,

Plaintiffs,

Index No. 110704/09
Motion Seq. No. 002

-against-

ORIT BEITNER, M.D., and ORIT BEITNER, M.D.,
d/b/a MUSEUM MEDICAL INSTITUTE, JANE/
JOHN DOE 1-10, BEING THOSE PHYSICIANS
AND OTHER MEDICAL/NURSING ENTITIES/
PERSONNEL WHO TREATED THE PLAINTIFF
HEREIN AT THE OFFICES OF ORIT BEITNER, M.D.,
and/or MUSEUM MEDICAL INSTITUTE,

Defendants.

JUL 11 2014

NEW YORK

COUNTY CLERK'S OFFICE

-----X
SCHLESINGER, J.:

Plaintiff Olga Parno treated with defendant Dr. Orit Beitner, a gynecologist, in 2004 and then again in 2007. In 2004, there were only three visits. The treatment then was for a right Bartholin cyst. Also, after a culture resulting in findings of gonorrhea and chlamydia, she was given Zithromax. Ms. Parno is making no claims against Dr. Beitner for any treatments in 2004.

However, three years later, when Ms. Parno next returned to the defendants' office on February 2, 2007, various findings, to be discussed, caused Dr. Beitner to perform several colposcopies (using magnification to look inside the vagina) and, more significantly, a LEEP (Loop Electrosurgical Excision Procedure) on March 16, 2007.

These procedures were performed, along with other treatments, mainly because of abnormal results from a Pap test that had been done at that first visit in 2007. The results of the Pap smear indicated positive HPV of a high risk type. Thereafter, on March 2, 2007,

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Dr. Beitner performed the first colposcopy in order to rule out a low-grade squamous lesion or HPV. On March 9, 2007, the patient and doctor discussed options, and it was decided that at the next visit, March 16, Dr. Beitner would perform a LEEP.

It is the performance of this procedure, along with the alleged internal application of Aldara, that has given rise to this lawsuit sounding in malpractice. Ms. Parno's claim is that, as a result of these two treatment protocols, she has suffered pain, discomfort and inflammation of her vagina. These conditions have caused her, among other things, extreme discomfort with sexual intercourse and a greater susceptibility to urinary tract infections.

Before the Court is a motion for summary judgment by the defendants. It is supported by an affirmation from Dr. Farhad Talebian, a board certified gynecologist since 1974. It is opposed with an affidavit from a board certified gynecologist, Dr. Richard Luciani, who is licensed to practice medicine in New Jersey. He also has been in practice for many years.¹

Dr. Luciani's statement is problematic, though his credentials are not; nor is his experience in managing patients with abnormal pap tests, HPV virus infections, and condyloma. He begins his statement by stating that he has reviewed the plaintiff's voluminous medical records, as well as the defendant's medical chart and notes, and the doctor's three days of deposition testimony.

¹I will, later in this decision, discuss the position of Dr. Talebian and why I believe his opinions support a finding that a prima facie case supporting the motion has been made out. But since I believe it is Dr. Luciani's position that is troublesome, I will discuss that position first.

The problem with the content of his statement is that the material on which he bases his opinions, material that in fact forms the predicate for those opinions on departures, seems not to have support in the record. For example:

In paragraph 8, Dr. Luciani says:

Inexplicably, Dr. Beitner scheduled a conization cervical LEEP biopsy. This was performed on 3/16/07.

And then in paragraph 9, he says:

As Ms. Parno apparently had internal condyloma, it appears Aldara was utilized intravaginally on multiple occasions for treatment by Dr. Beitner.

Further, toward the end of his affidavit, in discussing injuries, Dr. Luciani states halfway through paragraph 13:

Having had a LEEP procedure, Ms. Parno is now at an increased risk for scar tissue formation. She also now runs an increased risk of suffering from an incompetent cervix as a result of the LEEP procedure with a distinct possibility of premature delivery or the need for the placement of cerclage suture in an attempt to prevent the ramifications of an incompetent cervix.²

And paragraph 14 states:

Based on Ms. Parno's interview and history, if in fact Aldara was utilized by Dr. Beitner internally, this was a clear violation of the standards of care regarding its use and may very well be responsible for her subsequent symptoms,

²As I understand it, Ms. Parno has no children as of yet, but is of child-bearing age.

including burning discharge and dyspareunia.³

As is pointed out in the Reply papers, the two alleged departures, regarding the LEEP procedure and the use of Aldara, do not have support in the record. As to the LEEP performed on March 16, 2007, Dr. Luciani characterizes it as a “conization cervical LEEP biopsy” (¶8). Again in opining on this procedure, he states it was “an unnecessary LEEP conization procedure” (¶13). Later on in elaborating on why this procedure was not indicated and how it has compromised the plaintiff’s cervix, he refers to it as a “LEEP procedure” without the “conization” specification (¶13).

But these are different procedures. A conization LEEP involves a cone biopsy wherein the physician removes a cone-shaped wedge or piece of tissue using a scalpel. “Web MD” refers to it as an “extensive form of a cervical biopsy”. The LEEP aspect refers to the doctor’s use of an electrified wire loop to remove tissue. In both cases, the removed tissue is sent to a pathologist.

It is clear from reading the applicable portions of Dr. Beitner’s deposition that she did not do a cone biopsy. She was questioned about this point, using her records as a basis for the inquiry. She wrote that she did a “single pass removal of abnormally staining area around os at the cut/coag mode” (p. 417). She then further explains (p. 545) that sometimes when she believes that an “abnormality is affecting a deeper area of the cervix ... we may consider doing what’s called a cone biopsy or a removal of the tissue further into

³Dr. Luciani presumably interviewed the plaintiff when he examined her on February 1, 2010. There he found “extreme tenderness with vaginismus” (an involuntary spasm of the muscles around the vagina) but a normal cervix. Unfortunately, this examination was not revealed to the defendant before the opposition papers. Nor was a report ever sent to counsel.

the endocervical canal". However, she added (at 545-46) that here:

Because the patient was young and because I believed the lesion was that small lesion I saw at the junction right before going into the canal, I felt that we could treat this effectively without doing a cone biopsy.

Therefore, the testimony is that a cone biopsy, the more extensive procedure, was *not* done here. Dr. Beitner explains that a different instrument was used which accounts, in part, for less bleeding as the tool used in this procedure cauterizes tissues as they are cut (p. 420). Further, she testified that she did a single sweep and from that obtained one specimen from the cervix, approximately one millimeter in thickness (p.417-18).

The records support Dr. Beitner's testimony. In other words, there is nothing in her records describing the March 16, 2007 procedure which states or suggests that a cone LEEP biopsy was performed, as opposed to a simple LEEP.

Dr. Luciani, as stated earlier, in reviewing the various treatment Ms. Parno received from Dr. Beitner, introduces this one with the words "inexplicably". He states, "Inexplicably Dr. Beitner scheduled a conization cervical LEEP biopsy..." (¶8). He next addresses the LEEP procedure when he says that "Documents reviewed in this case indicate that Mrs. Parno had an unnecessary LEEP conization procedure" (¶13).

This Court is unaware of what, if any, documents Dr. Luciani is referring to. He does not elaborate. He states further, again in a conclusory manner, that: "Based on the results of the colposcopic biopsies (March 2007) there was absolutely no indication for performance of the cervical LEEP procedure by Dr. Beitner" (¶13). Again, however he does not spell out why the results, which happily for the patient were of a benign nature, made the procedure contraindicated.

Dr. Luciani then turns to the consequences of the LEEP and opines that the plaintiff "is now at an increased risk for scar tissue formation" (¶13). Once again, he fails to elaborate, though it appears that he is probably referring to the cone LEEP where much more tissue is removed. In that situation, it would be more likely that there could be an adverse affect on the integrity of the cervix.

Similarly, as to the alleged improper use of Aldara, there is nothing in Dr. Beitner's records or in her testimony that this medication was used internally. Dr. Luciani states that "it appears Aldara was utilized intravaginally on multiple occasions for treatment by Dr. Beitner" (¶9). But where does it appear? Not in the defendant's records, nor in her deposition testimony.

Dr. Beitner testified that she used Aldara once (p. 73) and not ever intravaginally (p. 74). When it was used, it was applied to the peri-rectal area, around the rectum. The plaintiff herself did not know what medication was being applied to the lesions in her cervix. She testified that she had inquired of the defendant's secretary once to find out how Aldara was used and was told that it was used on a peri-rectal lesion.

Therefore, again, there are no facts that support Dr. Luciani's departure opinions. Quite the contrary. Nothing supports the claim that the doctor did a conization LEEP and nothing supports the claim that the doctor applied Aldara intravaginally.

This being the case, the issue becomes in the first instance, does Dr. Talebian, on behalf of the moving defendants, make out a prima facie case in support of summary judgment? He does. He tells us that he has reviewed the court papers, including the depositions and Ms. Parno's medical records with Dr. Beitner and her subsequent treaters. He then opines in a general way that "within a reasonable degree of medical certainty the

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defendant Dr. Beitner did not depart from the standard of care in the treatment she rendered to Olga Parno". Nor did it cause her any injury (¶4, pg. 1). He then reviews the various visits to the doctor's office, why Ms. Parno went, the findings by Dr. Beitner, and the treatment she provided. This includes a brief discussion of the March 16, 2007 LEEP, wherein he describes the specimen(s) removed (a new smaller lesion was also seen and removed) and the minimal amount of blood that was lost. He adds that the pathological diagnosis indicated dysplasia on both specimens (p. 3).

He also notes that on August 28, 2007, Dr. Beitner administered Aldara to the peri-rectal area to treat a wart (p. 5).

When Dr. Talebian turns to the quality of care provided by the defendant, he says that because of Ms. Parno's sexually active history, together with evidence of high risk HPV, a known precursor of cervical cancer, she was at high risk for developing this disease. Therefore, it was appropriate to recommend and perform a colposcopy and biopsy.

As to the LEEP procedure, he says it "was indicated, properly performed and caused no injury to the plaintiff" (p. 5). He explains that the amount of tissue removed was "much less than a traditional LEEP procedure" and "did not involve conization or significant removal of tissue..." It "was appropriate and did not injure or harm Ms. Parno, and had no impact on her future fertility and reproductive outcome" (p. 6).

Further, Dr. Talebian opines that Dr. Beitner performed these procedures based on her judgment in treating her patient for the HPV virus and that it was acceptable for her to do that. Similarly, the use of Aldara in the peri-rectal area was appropriate.

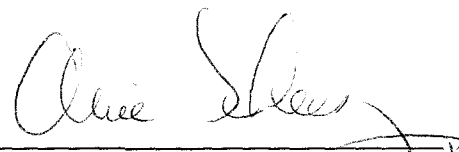
I conclude that these opinions, proffered in the first instance by a well-qualified physician, sufficiently made out a prima facie case in favor of dismissal of the claims asserted. The burden then shifted to the plaintiff. However, as discussed earlier in this decision, Dr. Luciani was unconvincing in asserting that Dr. Beitner committed malpractice in part because his opinions were conclusory. But more important, the opinions were based on assumed facts that were not established in any of the records of this case.

Accordingly, it is hereby

ORDERED that the motion on behalf of all the defendants for summary judgment dismissing the complaint herein is granted and the complaint is dismissed in its entirety as against all the defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: July 10, 2014

JUL 10 2014



J.S.C.
ALICE SCHLESINGER

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