

Palmero v Ligenza

2014 NY Slip Op 33073(U)

June 30, 2014

Supreme Court, Putnam County

Docket Number: 202/12

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

SC 8/4/14 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
DEBRA PALMERO,

Plaintiff,

-against -

CYNTHIA LIGENZA, M.D., TERRY ALEXANDER,
NP, WESTCHESTER MEDICAL PRACTICE, P.C.,
WAL-MART STORES EAST, LP and WAL-MART
STORES EAST, INC.,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 202/12

Sequence No. 1

Motion Date 4/28/14

Plaintiff, Debra Palmero, brings this action sounding in negligence against defendants, Wal-Mart Stores East, LP and Wal-Mart Stores East, Inc., (collectively "Wal-Mart"), to recover for personal injuries sustained as the result of her prolonged and repeated use of Tobramycin Dexamethasone ("Tobradex"), a sterile, multiple dose antibiotic and steroid combination prescription eye drop medication.

Although not relevant to the instant motion, plaintiff also brings suit in the nature of medical malpractice and negligence against the remaining defendants including the prescribing physician, defendant Cynthia Ligenza, M.D., ("Dr. Ligenza") a nurse practitioner, defendant Terry Alexander, and their employer, defendant Westchester Medical Practice, P.C.

The disposition of this motion for summary judgment necessitates a determination of issues of first impression. First, whether a pharmacist has a duty of care to warn a customer and contact the prescribing physician about the known long term risks of a prescribed drug which is being dispensed by the pharmacist, long term, albeit in full compliance with duly issued prescriptions. Correspondingly, whether known long term medical risks of a particular drug imputed to a pharmacist who dispenses the medication long term, such that any continued dispensing of the prescribed drug is, as a matter of law, contraindicated. The Court answers the questions in the negative.

Plaintiff became a patient of Dr. Ligenza in 2003. On August 29, 2005, plaintiff was examined by defendant Terry Alexander, NP, Dr. Ligenza's nurse practitioner, for complaints of bilateral eye redness and discharge. A diagnosis of conjunctivitis was made and Tobradex was prescribed by Dr. Ligenza. Thereafter and continuing through May 2011, plaintiff would call Dr. Ligenza's office when she was experiencing eye irritation. In response, Dr. Ligenza would call in a prescription for Tobradex to the Wal-Mart pharmacy.

Finally, in or about May 2011, following Wal-Mart's dispensing of Tobradex to plaintiff pursuant to five prescriptions and their attendant pre-approved refills, plaintiff was diagnosed with steroid induced glaucoma, cataracts and loss of vision, known risks inherent in the long term use of Tobradex. This action follows.

Wal-Mart now moves for summary judgment, contending that it filled plaintiff's Tobradex prescriptions precisely as directed by plaintiff's physician and that it had no notice that plaintiff was experiencing any condition associated with the long term use of the drug. As such, it argues that it did not breach any duty of care to plaintiff.

The proponents of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572). Once the movant has demonstrated a prima facie showing of entitlement to judgment as a matter of law, 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 (see Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718; Alvarez v Prospect Hosp., supra).

(Smith v County of Nassau, 232 AD2d 474, 475 [2d Dept 1996]).

As is well summarized by the Court in Brumaghim v Eckel (94 AD3d 1391, 1392 [3d Dept 2012]):

'The standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of his [or her] business. The rule of ordinary care as applied to the business of a druggist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers

involved and the consequences which may attend inattention' (Hand v Krakowski, 89 AD2d 650, 651 [1982] [citation omitted]; accord Eberle v Hughes, 77 AD3d 1398, 1399 [2010]; see Willson v Faxon, Williams & Faxon, 208 NY 108, 114 [1913]). Generally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as directed by the physician or was aware that the customer had a condition that would render the prescription of the drug at issue contraindicated (see Matter of N.Y. County Diet Drug Litig., 262 AD2d 132, 132-133 [1999], appeal dismissed 94 NY2d 835 [1999], lv dismissed and denied 94 NY2d 895 [2000]; see also Winters v Alza Corp., 690 F Supp 2d 350, 354 [SD NY 2010]; Fagan v AmerisourceBergen Corp., 356 F Supp 2d 198, 212 [ED NY 2004]).

(Brumaghim at 1392; accord Eberle v Hughes, 77 AD3d 1398, 1399 [4th Dept 2010]). A contraindication ``refers to a circumstance under which the drug must never be given. It is absolute and admits of no exceptions'' (Hand v Krakowski, 89 AD2d 650, 651 [3d Dept 1982] [citing Baker v St. Agnes Hosp., 70 AD2d 400, 402 [2d Dept 1982]).

In support of its motion, Wal-Mart submits, among other things, the affidavit of Karen Ryle, MS, RPH. It also submits the affidavit of Leonard A. Vasile, a licensed New York State and Connecticut pharmacist. Vasile, who was deposed in this action, had been employed as the pharmacy manager at the Fishkill Wal-Mart for 13 years, which includes the time frame herein under consideration.

Ryle avers that, within a reasonable degree of certainty, Wal-Mart acted at all times consistent with the relevant industry standards for a pharmacy. Most notably, she attests that the underlying prescriptions were always filled in accordance with the instructions of the prescribing physician, Dr. Ligenza, and that the prescriptions were never filled incorrectly or filled early. She further notes that the pharmaceutical records are devoid of any references or alerts to the pharmacist that plaintiff was over-utilizing the prescription Tobradex.

Plaintiff's deposition testimony reveals that plaintiff never had any questions for the pharmacist. In addition, there is no indication therein that she ever discussed the reason for which the medication had been prescribed, nor was there any discussion with a Wal-Mart employee about any side effects suffered, including any vision problems. In reliance thereon, Ryle avers that no Wal-Mart pharmacist was ever advised of any special information, diagnosis or condition of plaintiff that would have placed Wal-Mart on notice

that Tobradex was contraindicated.

Based upon the foregoing, the Court finds that Wal-Mart has come forward with sufficient proof in admissible form demonstrating its prima facie entitlement to judgment as a matter of law; more precisely, that it neither failed to fill the prescription precisely as directed by the physician nor was it aware that plaintiff had (or even developed) a condition that would have rendered the prescription contraindicated at any particular period of time (see Matter of N.Y. County Diet Drug Litig., 262 AD2d 132, 132-133 [1999], appeal dismissed 94 NY2d 835 [1999], lv dismissed and denied 94 NY2d 895 [2000]; see also Winters v Alza Corp., 690 F Supp 2d 350, 354 [SD NY 2010]; Fagan v AmerisourceBergen Corp., 356 F Supp 2d 198, 212 [ED NY 2004]).

Beyond having established its compliance with the standard of care set forth in Brumaghim v Eckel, supra, Wal-Mart, through Vasile, advises that it offers prescription drug counseling at the time of purchase and, in any event, all prescriptions are accompanied by a computer-generated monograph containing warnings and listing potential side effects.

Plaintiff admits to having received various papers attached to and inside the bags containing Tobradex, including "warnings", but never read them nor discussed them with any of the Wal-Mart pharmacists or personnel. The Tobradex monograph, provided with every prescription to plaintiff, reads as follows:

If you have any questions, please feel free to contact your pharmacist at (845) 896-4055 or LIGENZA, CYNTHIA A. At (914) 265-1006. Call your doctor for medical advice about side effects.

CAUTIONS: ... Use this medicine with caution. PROLONGED USE OF THIS MEDICINE (eg, 10 days or longer) may increase the risk of glaucoma. Your doctor may monitor the pressure in your eye(s) while you use this medicine. Discuss any questions or concerns with your doctor.

POSSIBLE SIDE EFFECTS:...CONTACT YOUR DOCTOR IMMEDIATELY if you experience changes in vision...[or] vision loss...If you have questions about side effects, contact your healthcare provider. Call your doctor for medical advice about side effects.

PATIENT-ORIENTED DISCLAIMER: The information in this monograph is not intended to cover all possible uses, directions, precautions, drug

interactions, or adverse effects. This information is generalized and is not intended as specific medical advice. If you have questions about the medicines you are taking or would like more information, check with your doctor, pharmacist, or nurse.

(Vasile aff, ¶5).

In opposition, plaintiff argues that (a) the prescription for Tobradex was contraindicated by virtue of the dangers associated with prolonged and repeated use of same, and (b) since "it was known that the repeated and prolonged use of Tobradex could cause a serious eye condition," the pharmacist was negligent in continuing to dispense Tobradex to plaintiff.

In support, plaintiff submits, among other things, an affidavit from William Stroud, RPH. Therein, plaintiff takes the position that (a) Wal-Mart had an ethical responsibility to inform the patient regarding the long term results of the prolonged use of Tobradex; (b) Wal-Mart was aware that plaintiff was suffering from a condition affecting her eyes because Tobradex is prescribed to treat eye infections; (c) in light of the numerous refills, Wal-Mart should have reminded the prescribing physician of the dangers of long term usage; and (d) Wal-Mart should have been aware that the prescription of Tobradex was contraindicated for this plaintiff who was suffering from an ophthalmic condition and was receiving refillable prescriptions for a period of years for a drug with "known" long term side effects including glaucoma and vision loss.

Stroud's affidavit, however, is insufficient to establish that Wal-Mart violated a standard of care. His opinion is solely based on personal knowledge acquired "through years of experience" and is devoid of any reference to foundational scientific basis supporting same (see Burton v. Sciano, 110 AD3d 1435, 1437 [3d Dept 2013] [expert's affidavit is insufficient to establish a standard of care where it is devoid of any reference to foundational scientific basis]). In any event, Stroud's opinion regarding the proper standard of care for pharmacists goes beyond that which is recognized in the State of New York (see Brumaghim v Eckel, supra).

In any event, the asserted ethical duty (about which this Court makes no determination) does not necessarily establish a legal duty. Furthermore, even assuming that Wal-Mart could infer that Tobradex was being prescribed for an eye "condition", that "condition" is not "[the] condition that would [have] render[ed] the prescription of the drug at issue contraindicated" within the meaning of Brumaghim v Eckel, supra.

If anything, it would be the conditions that developed from the prolonged use of this prescription drug. In that regard, the Court rejects the inference that it should impute knowledge to a

pharmacist of a customer's actual medical condition simply by virtue of the "known" risks inherent in the prolonged use of a prescribed drug which is dispensed by the pharmacist over an extended period of time.

The Court notes that a pharmacist need not even "warn the patient or contact the prescribing physician when the physician prescribes excessive or inadequate dosages of a drug", albeit so long as the prescription is within medically acceptable ranges (Brumaghim v Eckel, 94 AD3d 1391, 1394 [3d Dept 2012] [citations omitted]).

Imposing a duty upon a pharmacist to contact the prescribing physician whenever there has been a change in dosage - within medically acceptable ranges - of a particular patient's medication would, in essence, require the pharmacist to question the physician's judgment regarding the appropriateness of each customer's prescription. Sound policy reasons exist for not imposing such a duty.

(Brumaghim, 94 AD3d at 1393). The Court sees no distinction where, as here, the issue concerns the number of prescriptions issued for a particular drug or the length of time prescribed. To hold otherwise, would "require the pharmacist to question the physician's judgment regarding the appropriateness of each customer's prescription" (id.) and, quite possibly, result in "antagonistic relations between pharmacists and physicians" (id. at 1394).

Furthermore,

'It is the duty of the prescribing physician to know the characteristics of the drug he [or she] is prescribing, to know how much of the drug he [or she] can give [the] patient, to elicit from the patient what other drugs the patient is taking, to properly prescribe various combinations of drugs, to warn the patient of any dangers associated with taking the drug, to monitor the patient's dependence on the drug, and to tell the patient when and how to take the drug. Further, it is the duty of the patient to notify the physician of the other drugs the patient is taking. Finally, it is the duty of the drug manufacturer to notify the physician of any adverse effects or other precautions that must be taken in administering the drug. *Placing these duties*

to warn on the pharmacist would only serve to compel the pharmacist to second guess every prescription a doctor orders in an attempt to escape liability'

(Brumaghim, 94 AD3d at 1394 (quoting Jones v Irvin, 602 F Supp 399, 402 [SD Ill 1985] [citation omitted] [emphasis added])).

In sum, "a pharmacist's professional judgment must defer to the prescribing physician's training, experience, and knowledge of the particular patient's condition" (Brumaghim, 94 AD3d at 1395).

Based upon the foregoing, the Court finds, as a matter of law, that Wal-Mart did not breach a duty of care to plaintiff and, in response, plaintiff has failed to establish a material issue of fact regarding same.

Accordingly, it is hereby

ORDERED, that, summary judgment be and is hereby granted in favor of Wal-Mart and against plaintiff on all causes of action against Wal-Mart; and, it is further

ORDERED, that all remaining parties are directed to appear before the Court at 9:30 A.M. on August 4, 2014, for a Status Conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

The following papers were considered in connection with this determination:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/AFFIDAVITS/EXHIBITS A-O	1
Memorandum of Law (Defendant)	2
AFFIRMATION IN OPPOSITION/EXHIBITS A-F	3
REPLY AFFIRMATION	4

Dated: Carmel, New York
June 30, 2014

S/

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