

**Galimore v Advanced Dermatology of N.Y. P.C.**

2016 NY Slip Op 31084(U)

February 19, 2016

Supreme Court, New York County

Docket Number: 451072/2013

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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PATRENA S. GALIMORE,

Plaintiff,

-against-

ADVANCED DERMATOLOGY OF NEW YORK P.C.,  
d/b/a ADVANCED DERMATOLOGY ASSOCIATES,  
RICHARD W. GREEN, M.D., HENRY X. YU  
and ANNE MARIE TULLOCK,

Defendants.

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

Index No. 451072/2013

**Decision, Order, and  
Judgment**

This medical malpractice action arises out of defendants' dermatological treatment of Patrena Galimore. Defendants Henry Yu and Richard Green, M.D. now separately move for summary judgment. Because the motions have common facts they will be decided together. For the following reasons the motions are granted.

Plaintiff met with physician assistant Mr. Yu at defendant Advanced Dermatology (Advanced) regarding skin conditions including excessive hair, pseudo-folliculitis (inflamed hair follicles), dyschromia (discoloration), and hyperpigmentation (darkened skin patches). On June 28, 2010 plaintiff underwent treatment with a Lumenis diode laser for hair reduction and for treatment of her pseudo-folliculitis. She returned for a second session on August 9, 2010. It is unclear whether Mr. Yu or medical assistant Anne Marie Tullock performed the first lasering. Plaintiff and Mr. Yu both contend Ms. Tullock performed the second lasering, although Ms. Tullock does not remember which of the two laserings she performed.

On May 15, 2012 plaintiff filed a summons and complaint alleging that she suffered burning and scarring as the result of defendants' negligent use of the diode laser and that she did not give informed consent to the procedure. Mr. Yu argues that he treated plaintiff in accordance with the standards of care and under the supervision of Dr. Green. He contends that plaintiff chose diode laser hair reduction after he explained the pros and cons of various treatment options to her. He argues that he only administered the first lasering which did not result in any adverse effects. Ms. Tullock performed the second lasering, he asserts, which resulted in hypopigmentation, or loss of pigment. Further, he argues, hypopigmentation is a known and accepted risk of the treatment and plaintiff's condition was transient. He contends he cannot be liable for failing to supervise Ms. Tullock or vicariously liable for her treatment of plaintiff because supervision of the medical assistant is a non-delegable physician duty.

In support of his application, Mr. Yu submits the affidavit of Dr. Andrew Alexis. Dr. Alexis is a New York licensed physician who is board certified in dermatology. He is also an attending in the dermatology department at St. Luke's Roosevelt Hospital and Director of the Skin of Color Center at St. Luke's Roosevelt Hospital. He has performed approximately fifty Lumenis diode laser procedures for hair removal. Dr. Alexis opines to a reasonable degree of medical certainty that Mr. Yu did not depart from accepted standards of care in his treatment of plaintiff and that he adequately obtained plaintiff's informed consent for the procedure after explaining the treatment procedures, risks, and alternatives. Dr. Alexis states that based on plaintiff's records, Mr. Yu appropriately treated plaintiff with lasering and that Dr. Green supervised Mr. Yu and concurred with his plan. Dr. Alexis avers that Mr. Yu used appropriate laser settings and performed test spotting prior to the first full laser session. It is his opinion that plaintiff's hypopigmentation most

likely resulted from her exposure to the sun and that Dr. Yu warned her against such exposure. Dr. Alexis concludes that temporary hypopigmentation was the only complication from either lasering, and that it is a known and accepted risk of the procedure.

Dr. Green's motion argues that plaintiff's treatment at Advanced was within the standards of care and not a proximate cause of any injury. Dr. Green asserts that plaintiff discontinued with prejudice against Advanced and Ms. Tullock and thus the issues of his vicarious liability for them are moot. Further, Dr. Green argues that plaintiff does not make out a claim for lack of informed consent. Among other things, he argues, she signed a consent form indicating she understood the risk of scarring. Additionally, he contends he cannot be liable for failing to inform plaintiff of the risks of a procedure he did not perform.

In support of his motion Dr. Green submits the affirmation of Dr. Julide Celebi, M.D. Dr. Celebi is a New York licensed doctor who is board certified in dermatology. Based on her review of the materials relevant to this litigation, as well as her relevant knowledge, training, and expertise, Dr. Celebi opines to a reasonable degree of medical certainty that all treatment plaintiff received was within the standard of care and that informed consent was obtained prior to the procedure. Dr. Celebi states Mr. Yu exercised independent medical judgment by recommending and implementing a treatment plan without any input or direction from Dr. Green and did not contact Dr. Green with any questions or concerns. She further opines that Mr. Yu's plan of care was all within accepted practice. She states that plaintiff's alleged injuries are because of her sun exposure between sessions not any act or omission of defendants. Further, she asserts, plaintiff

was appropriately treated for her pseudo-folliculitis and excessive hair complaints on August 17, 2010 and plaintiff's skin is in the same condition as prior to treatment.

Dr. Green also submits an affirmation in partial opposition to Mr. Yu's motion for the purpose of asserting that some of the statements in Mr. Yu's moving papers are inaccurate, though plaintiff's treatment was wholly in accordance with the standards of care. Dr. Green states that he did not directly treat or supervise the treatment Mr. Yu and Ms. Tullock rendered to plaintiff. He argues that Mr. Yu is not shielded from liability for his treatment of plaintiff because Mr. Yu exercised independent medical judgment and did not act pursuant to Dr. Greens' orders. Additionally, he states that Advanced protocols required Mr. Yu to supervise care rendered by Ms. Tullock. He adds that Mr. Yu was employed by Advanced not Dr. Green, and therefore Dr. Green cannot be liable for the negligent hiring of Mr. Yu.

In opposition plaintiff argues that there is a question of fact as to which procedures Mr. Yu and Ms. Tullock respectively performed. Moreover she contends it is uncontested that Mr. Yu determined the power level of the laser before each treatment and that Ms. Tullock followed Mr. Yu's instructions, rendering him liable for the burns she developed after the second laser treatment which turned into permanent scars. Additionally, she states that there are questions of fact as to whether test spots were performed before each procedure, whether an appropriate history was taken prior to each procedure, whether Mr. Yu supervised Ms. Tullock, and whether Mr. Yu negligently increased the power level of the laser before the second treatment. She states both Mr. Yu and Dr. Green were responsible for making sure this occurred. She argues that there is a

credibility issue as Ms. Tullock testified that she believes someone altered the notes from plaintiff's procedures. Plaintiff states that no one discussed the risks of the procedure with her.

In support of her opposition plaintiff submits a letter written to plaintiff's attorney by Dr. Salvatore Farrugio, a New York State licensed doctor. Dr. Farrugio states that he examined plaintiff on July 5, 2011 and concludes that she suffered permanent scarring from laser hair removal of the neck area on August 9, 2010. He states that it is his opinion that plaintiff's burn wounds were causally related to her laserings and that "[t]his is a known complication that can occur with laser therapy particularly in darker skinned individuals." Attached to the letter are notes from plaintiff's examination with Dr. Farrugio.

In reply, Mr. Yu argues that plaintiff's failure to submit an expert affidavit renders her opposition insufficient to rebut his prima facie showing of entitlement to summary judgment. He contends that the "mere letter-report" is not in admissible form as it is unsworn, does not indicate that the doctor intended it to bolster a claim of malpractice, does not state the doctor's qualifications, and does not mention Mr. Yu or any negligence. In his reply, Dr. Green states that plaintiff's opposition papers do not purport that Dr. Green failed to demonstrate entitlement to summary judgment. Dr. Green also states that plaintiff's expert fails to identify any deviations or offer opinions on proximate cause or state his familiarity with the laser at issue.

In a summary judgment motion in a medical malpractice action, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those

personally known to the expert. Rogues v. Noble, 73 AD.3d 204, 206 (1<sup>st</sup> Dep't 2010). The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Expert opinion should specify "in what way" a patient's treatment was improper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1<sup>st</sup> Dep't 2010). For a prima facie case, the defendant must present expert opinion testimony that is supported by the record and addresses the plaintiff's essential allegations. Rogues v. Noble, 73 AD.3d at 206. Once a movant makes a prima facie showing, the burden then shifts to the non-moving party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit stating the defendant departed from accepted practice and this proximately caused the injuries. See Rogues, 73 AD.3d at 207.

Here, Mr. Yu and Dr. Green both make a prima facie showing of entitlement to summary judgment. Through their experts, they establish that defendants' acted in accordance with the standard of care when treating plaintiff, that plaintiff's only complication was hypopigmentation which is a known and accepted risk of the procedure, and that the condition was transient. Mr. Yu makes a prima facie showing that he obtained informed consent through his testimony that he discussed the risks of and alternatives to the procedures with plaintiff and she elected lasering. Dr. Green establishes that he never met with plaintiff and did not participate in the lasering and thus did not need informed consent. This is sufficient to shift the burden to plaintiff. Plaintiff failed to submit expert testimony that is detailed or addresses her allegations. Plaintiff's expert's letter does not form an opinions concerning the way in which plaintiff's treatment was improper. Indeed, the letter does not even state the treatment was improper at all. As a result, plaintiff does not raise a

triable issue of fact as to negligence, which is a necessary part of her prima facie claim of medical malpractice. Plaintiff also fails to raise a triable issue of fact as to informed consent. Though plaintiff's attorney states that no one discussed the risks of the procedure with plaintiff, plaintiff signed a detailed informed consent form stating that she understood the risks of the procedure including scarring. Moreover, plaintiff herself does not refute the defendants' argument. The Court has considered the remainder of the parties' arguments and they do not change the outcome.

Accordingly, it is

ORDERED that motion sequences 004 and 006 are granted and the action is dismissed.

The Clerk of the Court is directed to enter judgment accordingly.

Dated: *Feb. 19*, 2016

ENTER:

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

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