

Formisano v Lans

2019 NY Slip Op 33922(U)

October 21, 2019

Supreme Court, Westchester County

Docket Number: 55042/2016

Judge: Terry Jane Ruderman

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

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ADELAIDE B. FORMISANO and
ANTHONY FORMISANO,

Plaintiffs,

Index No.: 55042/2016

-against-

Motion in Limine Ruling
Motion Sequence No. 3

DR. DAVID LANS,

Defendant.

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RUDERMAN, J.

This matter has been assigned to this Court for retrial after a jury deadlock on the first trial resulted in a mistrial. The remaining claim being tried here is the alleged failure of defendant Dr. David Lans to obtain plaintiff Adelaide Formisano's informed consent to treatment with the prescription medication Plaquenil. Based on testimony by defendant in the first trial, plaintiffs now seek an order precluding defendant from offering testimony at trial regarding his custom and practice as to the prescription of Plaquenil.

At the first trial, Dr. Lans testified that he had no recollection of warnings he gave Ms. Formisano at the time he prescribed Plaquenil, but that he believed he would have told her, based upon his knowledge of the drug, his general practice regarding the prescription of the medication and the risks it poses for a patient with psoriatic arthritis. Plaintiff now seeks to preclude Dr. Lans from testifying to that effect on retrial.

The very recent case of *Martin v Timmins* (___ AD3d ___, 2019 NY Slip Op 07391 [2d Dept Oct 16, 2019]) reviewed the law regarding the use of testimony regarding custom and practice:

“A party can rely on custom and practice evidence to fill in evidentiary gaps where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances. Evidence of such a practice is generally admissible to allow the inference of the persistence of the habit on a particular occasion. However, evidence of conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances is not admissible as custom and practice evidence.

“Custom and practice evidence draws its probative value from the repetition and unvarying uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation. To justify the introduction of habit evidence, a party must be able to show on voir dire, to the satisfaction of the court, that the party expects to prove a sufficient number of instances of the conduct in question.”

(*Id.* at *2 [internal quotation marks and citations omitted]).

There, the plaintiff claimed that the defendant surgeon had failed to properly suture a mesh patch to the injured plaintiff’s abdominal wall, and the defendant had testified at his deposition that he had no independent recollection of performing the injured plaintiff’s surgery. The Second Department found that the trial court committed reversible error by allowing the defendant surgeon to testify “as to his general method for suturing mesh patches during hernia repairs as evidence of the defendant’s custom and practice,” since his testimony reflected that the suturing procedure for particular type of mesh patch used on the injured plaintiff differed from the suturing procedure for other types of mesh patches, so he failed to establish that the suturing procedure in question qualified as a custom and practice.

Here, the custom and practice evidence plaintiff challenges is defendant’s claimed custom of providing his patients with side effect warnings when prescribing Plaquenil. His testimony at the first trial was that it was his custom and practice over the course of 30 years, when prescribing Plaquenil to his patients “many hundreds of times” prior to 2012, to always advise his

patients of the most common side effects of the medication, namely nausea, dizziness and headaches, and of the most serious likely side effect of the medication, which is retinal toxicity, and also advises his psoriasis patients of the risk of worsening psoriasis.

It is the final portion of that testimony, in which defendant affirmatively stated that he advises his psoriasis patients of the risk of worsening psoriasis, that fails to satisfy the standard for custom and practice evidence. Since defendant acknowledged that he had only prescribed Plaquenil to patients with psoriatic arthritis a “handful of times” over 30 years, his claim that it is his custom and practice to advise his psoriasis patients of Plaquenil’s risk of worsening psoriasis is based, at best, on conduct that occurred only “a handful of times.” Indeed, he explained that he “customize[d]” his warnings for his psoriatic arthritis patients.

In *Rivera v Anilesh* (8 NY 3d 627 [2007]) the defendant dentist was allowed to introduce evidence regarding habit with respect to performing an injection procedure because it had been performed by the dentist thousands of times over the course of his practice, “in light of the frequency that this technique was used and the nature of the routine conduct” (*id.* at 635). In *Rigie v Goldman* (148 AD2d 23 [2d Dept 1989]), the defendant dentist was permitted to testify as to what he usually and customarily warned patients regarding the risks and complications of wisdom tooth extraction, because “the evidence of habit exhibits a uniformity of response and a sufficient number of instances of the repetitive conduct” (*id.* at 29).

While defendant’s previous trial testimony establishes sufficient uniformity and sufficient numbers to allow him to testify as to his custom and practice of advising his patients of the most common and the most serious side effects of the medication, the same does not hold true of the warnings he gives his patients with psoriatic arthritis patients regarding Plaquenil’s particular

risk to them. His testimony that he has given such warnings a “handful of times” over a 30-year period does not amount to “a sufficient number of instances of the conduct in question” (*Martin v Timmins, supra*). Under the standard reiterated in *Martin v Timmins*, and considering Dr. Lans’ testimony from the first trial, there is no basis to allow him to testify to his custom and practice in regard to advising his psoriatic arthritis patients of Plaquenil’s particular risk to them. Indeed, by testifying that his typical warnings were “customized” for his psoriatic arthritis patients, Dr. Lans’ testimony established the converse of habit evidence, that is, conduct “likely to vary from time to time depending upon the surrounding circumstances” (*id.*).

Accordingly, barring an offer of proof that a different showing will be made, plaintiff’s motion is granted to the extent that while defendant is permitted to testify to his custom and practice of providing his patients with warnings of the most common and most serious side effects of Plaquenil, his custom and practice testimony may not extend to a claim that he advised his psoriatic arthritis patients of Plaquenil’s particular risk to them.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 21, 2019


HON. TERRY JANE RUDERMAN, J.S.C.