

Nardone v Burns

2019 NY Slip Op 34456(U)

November 25, 2019

Supreme Court, Westchester County

Docket Number: Index No. 62521/2017

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 WESTCHESTER

-----X

SHARON NARDONE,

Plaintiff,

-against-

**INDEX NO. 62521/2017
DECISION/ORDER
Motion Date: 10/23/2019
Motion Seq. 1**

DAVID L. BURNS, M.D., RRS RX, INC. D/B/A
"MEDICINE CHEST PHARMACY" and
LEWIS R. KLEIN, PHARM., D.,

Defendants.

-----X

ECKER, J.

The following papers were considered on the motion of defendants RRS RX, INC. D/B/A "MEDICINE CHEST PHARMACY" (the Pharmacy) and LEWIS R. KLEIN, PHARM., D. (the Pharmacist) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint and all cross-claims¹ as against plaintiff SHARON NARDONE:

PAPERS

- Notice of Motion, Affirmation, and Exhibits A-I
- Affirmation in Opposition (plaintiff) and Exhibits A-B
- Affirmation in Partial Opposition (Burns) and Exhibits A-G

Upon the foregoing papers, the court determines as follows:

This action involves allegations of medical and pharmacological malpractice. In essence, plaintiff alleges that she suffered personal injuries due to being overprescribed Oxycodone over a number of years. Plaintiff sues the prescribing physician, defendant David L. Burns, M.D. (the Physician), in addition to the Pharmacist and the Pharmacy that filled the prescriptions written by the Physician. Plaintiff does not claim that, over the five-year prescription period, the prescriptions were not filled accurately or that she was given the wrong medication or dosage. Plaintiff's sole contention is that the Pharmacist, and thereby the Pharmacy, was negligent because the medicine should not have been prescribed or dispensed to her.

¹ Defendant David L. Burns, M.D. does not allege any cross-claims against the Pharmacist or Pharmacy in his answer. [NYSCEF No. 19].

On a motion for summary judgment in a pharmacist malpractice action, the defendant has the initial burden of establishing the absence of any departure from good and accepted pharmacological practice or that the plaintiff was not injured thereby (see *Abrams v Bute*, 138 AD3d 179, 187 [2d Dept 2016]). This may be accomplished by presenting the testimony of an expert who has demonstrated his or her knowledge of the relevant standards of care in the profession (*Id.*).

Where such a showing is made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact (*Duvidovich v George*, 122 AD3d 666 [2d Dept 2014]; see *Bowe v Brooklyn United Methodist Church Home, supra*; *Bueno v Allam*, 170 AD3d 939 [2d Dept 2019]). While general allegations of malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of malpractice, are insufficient to defeat defendant's summary judgment motion (*Duvidovich v George, supra*), summary judgment is not appropriate in a malpractice action where the parties adduce conflicting expert opinions (*Amendola v Brookhaven Health Care Facility, LLC*, 150 AD3d 1061 [2d Dept 2017]; *Henry v Sunrise Manor Ctr. For Nursing & Rehabilitation*, 147 AD3d 739 [2d Dept 2017]).

Of note, it is the duty of the prescribing physician to know the characteristics of the drug he is prescribing, to know how much of the drug he 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 (*Abrams v Bute, supra*; *Brumaghim v Eckel*, 94 AD3d 1391, 1394 [3d Dept 2012]). The pharmacist's traditional role in the system of prescription medicine distribution is to accurately fill the prescription in accordance with the instructions provided by the prescribing physician (*Abrams v Bute, supra*).

There is no merit, however, to the categorical contention that a pharmacist's duty will never extend beyond accurately filling a prescription as, while this may be the extent of a pharmacist's duty in particular cases, in other cases, a pharmacist's education and expertise will require that he or she do more to help protect the patrons from risks which pharmacists can reasonably foresee (*Abrams v Bute, supra*; see *Eberle v Hughes*, 77 AD3d 1398 [1st Dept 2010]). It is the circumstances of each case that dictates the specific conduct required to satisfy a pharmacist's duty since the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct (*Abrams v Bute, supra*; see *Levine v City of New York*, 309 NY 88, 92–93 [1955]). Hence, in *Abrams v Bute, supra*, the Second Department held that:

“when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, a pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication.”

In this case, the Pharmacist and the Pharmacy move for summary judgment dismissing the complaint. In support of the motion, defendants submit the expert affidavit of a registered pharmacist, Mark Filosi, R. Pht.² (the Defendants' Expert) [NYSCEF No. 52]. The Defendants' Expert opines that the Pharmacist, and thereby the Pharmacy, comported with good and accepted standards of pharmacist practice in filling the relevant prescriptions. Specifically, after reviewing the record, the Defendants' Expert states, with a reasonable degree of pharmaceutical certainty, that:

"As the result of all of the above stated factors, it is my opinion that [the Pharmacist] acted within the standard of practice of his pharmacy profession. The pharmacist based his judgment on the State Database, the patient testimony, disease states indicated by the ICD9 and ICD10 codes documented, as well as other notes by his staff and colleagues given to the pharmacy by the licensed medical practitioner. The pharmacist also relied on the medical judgment of the prescribing practitioner for guidance on the dosing since pain is subjective and titration of Oxycodone is also very subjective. There are numerous points in time where the pharmacist repeatedly called the practitioner to verify if the high doses of Oxycodone was still required to alleviate the pain of the patient as evaluated by the practitioner. [The Pharmacist] did not have access to the patient chart from the practitioner and was totally reliant on the information provided by the practitioner. Furthermore, literature that a pharmacist has access to indicates that there is no upper dose limit for Oxycodone. I suspect that this patient was not opioid naive when she came to [the Pharmacy]. It is reasonable to believe based on the testimony that the dose required for the patient's pain needs was the dose prescribed by the practitioner."

Based on this expert affirmation, defendants demonstrate that the dosage that was prescribed was appropriate, that the prescription did not exceed that drug manufacturer's maximum recommended dosage, and that, given the information available to the Pharmacist, the generally accepted standards in the community did not require the Pharmacist to take any additional measures before filling the prescription (*see Abrams v Bute, supra*). As such, movants establish defendants' *prima facie* entitlement to judgment as a matter of law through the submission of expert evidence (*see Abrams v Bute, supra, see generally Doria v Benisch, 130 AD3d 777, 778 [2d Dept 2015]*).

In opposition, plaintiff submits the affidavit of Joanne M. Daprano, Rph BCGP, an individual who is licensed to practice pharmacy in the State of New York (the Plaintiff's Expert). [NYSCEF No. 60]. The Plaintiff's Expert opines, with a reasonable degree of pharmaceutical certainty, that the Pharmacist, and therefore the Pharmacy, departed from safe and accepted pharmacy practice:

² Defendants also submit the affirmation of Miguel De La Garza, M.D. Dr. De La Garza practices medicine outside of the State of New York. By its explicate language, CPLR 2106 requires that the expert physician seeking to submit an affirmation, instead of an affidavit, must be "authorized by law to practice in the state." Affirmations from physicians who are not authorized by law to practice in the State of New York lack probative value (*Worthy v Good Samaritan Hosp. Med. Ctr.*, 50 AD3d 1023 [2d Dept 2008]; *Tomeo v Beccia*, 127 AD3d 1071 [2d Dept 2015]; *Sul-Lowe v Hunter*, 148 AD3d 1326 [3d Dept 2017]; CPLR 2106). Accordingly, the affirmation of Dr. De La Garza lacks probative value and is not considered on this motion.

“when filling prescriptions for excessive amounts of Oxycodene each month for more than five years for [plaintiff]. These deviations from standards of practice, which are not limited to state regulatory laws but include moral and ethical obligations to his patient, resulted in the plaintiff suffering from conditions consistent with opioid dependence and addiction. The defendant’s expert claimed that [defendant] deferred to the medical expertise of Dr. Burns, and without independent knowledge of other issues surrounding this case, between the patient and the physician, no one would have known that she was in this untenable situation. [The Pharmacist] ignored the red flags that any pharmacist would typically notice to conclude that something was amiss. Additionally, he deviated from the standard of practice by not offering counseling to the patient about her prescriptions and not pursuing any substantive communications with the physician to discuss the flawed treatment plan.”

In essence, the Plaintiff’s Expert opines that, under the circumstances, it was a departure from safe and accepted pharmaceutical practice for the Pharmacist: to continue to fill the prescription without additional, in-depth communication with the prescribing physician; and to fail to offer information with regards to counseling. As such, in opposition, plaintiff raises a triable issue of fact.

Hence, on this record, there are conflicting expert opinions as to the appropriateness of the Pharmacist’s, thereby the Pharmacy’s, actions, and whether those actions were the proximate cause of plaintiff’s alleged injuries. As such, whether the Pharmacist, and thereby the Pharmacy, departed from the standard of care and whether that deviation caused the alleged injuries are factual questions that are for the jury to resolve (*Amendola v Brookhaven Health Care Facility, LLC, supra; Henry v Sunrise Manor Ctr. For Nursing & Rehabilitation, supra*). Consequently, the motion for summary judgment is denied.

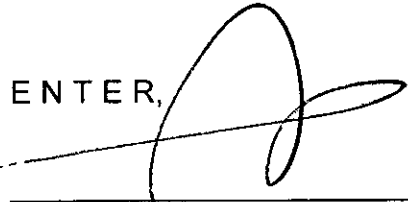
The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants RRS RX, INC. D/B/A “MEDICINE CHEST PHARMACY” and LEWIS R. KLEIN, PHARM., D. [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint and all cross-claims as against plaintiff SHARON NARDONE is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on January 21, 2019, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
November 25, 2019

ENTER, 

HON. LAWRENCE H. ECKER, J.S.C.

Appearances-via NYSCEF