

Rubiano v CVS Pharm., Inc.

2020 NY Slip Op 35702(U)

September 22, 2020

Supreme Court, Queens County

Docket Number: Index No. 701964/2018

Judge: Peter J. O'Donoghue

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

Present: HONORABLE Peter J. O’Donoghue IA Part MD _____
Justice

**9/25/2020
10:07 AM**

**COUNTY CLERK
QUEENS COUNTY**

CLARA RUBIANO,

Index
Number 701964/ 2018

Motion
Date August 26, 2020

Plaintiff,

Motion Seq. No. 2

-against-

CVS PHARMACY, INC., SHASHI PATEL, M.D., and
PULMONARY ASSOCIATES OF QUEENS, P.C.,

x

x

The following papers read on this motion by plaintiff pursuant to CPLR 3212(c) for summary judgment against defendant CVS Pharmacy, Inc. (CVS)¹ on the issue of liability, and to set the matter down for a date certain for an immediate trial as to damages as against defendant CVS; and this cross motion by defendant CVS pursuant to CPLR 3212 for summary judgment dismissing the complaint.

Papers
Numbered

Notice of Motion - Affidavits - ExhibitsEF Doc. #40-#52²
Notice of Cross Motion - Affidavits - Exhibits.....EF Doc. #55-#66

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An answer was served by defendant CVS Albany, LLC, wherein it indicated that it has been sued incorrectly herein as “CVS Pharmacy, Inc.” It is unclear the reason that defendant CVS Albany, LLC does not use the name “CVS Albany, LLC” in opposing the motion by plaintiff and in making its own cross motion, but rather has reverted to the name “CVS Pharmacy, Inc.”

²see *infra* at n 4.

Answering Affidavits - ExhibitsEF Doc. #69-#74

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on February 7, 2018, alleging medical malpractice against defendant Shashi Patel, M.D.³ and negligence and seeking damages for alleged personal injuries. In her amended complaint,⁴ plaintiff alleges defendant CVS had a duty to provide “safe and appropriate prescription dispensing” care and treatment to her as a customer, and that CVS departed from the accepted standards of care in its care and treatment of her by dispensing the wrong medication to her. Plaintiff also alleges that as a consequence of such negligent care and treatment, she sustained great pain, agony, injury, suffering, disability, hospitalization, mental anguish, and emotional distress as a result. In her bill of particulars, plaintiff also alleges she sustained head injuries, including post-concussion headaches, seizures, memory loss, dizziness and chronic migraines, and injuries to her spine, with back and neck pain and difficulty sleeping. Issue has been joined.

Plaintiff moves for summary judgment on the issue of liability against defendant CVS. Defendant CVS opposes the motion, and cross moves for summary judgment dismissing the complaint insofar as asserted against it. Plaintiff opposes the cross motion.

A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212[a]). The court may set a date after which no such motion may be made, provided that the date is no earlier than 30 days after the filing of the note of issue (*id.*). In this case, by compliance conference order dated February 26, 2019 (EF Doc #29), plaintiff was directed to file a note of issue and certificate of readiness on or before

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Counsel for plaintiff and defendants Shashi A. Patel, M.D., s/h/a Shashi Patel, M.D. and Pulmonary Associates of Queens, P.C. entered into a stipulation dated April 3, 2020, discontinuing the action with prejudice as against defendants Patel and Pulmonary Associates of Queens, P.C., without costs to either party as against the other (*see* EF Doc. #67).

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Although plaintiff’s counsel makes reference to a copy of the amended complaint purportedly filed as Exhibit “A” to his affirmation dated February 4, 2020, the exhibit (EF Doc. #41) (*see also* EF Doc. #45]) is not a copy of the amended complaint, but rather is a copy of a confirmation notice. In addition, to the extent plaintiff’s counsel makes reference to CVS’s answer to the amended complaint, the exhibit presented in support of the court is a copy of CVS’s answer to the original complaint. Nevertheless, the court shall overlook these procedural defects (*see* CPLR 2001), and shall consider the copies of the amended complaint and CVS’s amended answer, previously filed under EF Doc. #19 and EF Doc. #25, respectively, when determining the motion and cross motion.

October 7, 2019, and by so-ordered stipulation dated November 4, 2019 (EF Doc. #39), the court directed that “summary judgment [motions are] due on or before 2/5/20.” Plaintiff timely filed the note of issue on October 7, 2019.

Plaintiff made this motion for summary judgment on February 5, 2020, and therefore it is timely. The cross motion by defendant CVS, however, is untimely (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).⁵

An untimely cross motion may be entertained where a timely motion for summary judgment has been made on nearly identical grounds (*see* CPLR 3212[a]; *Snolis v Clare*, 81 AD3d 923 [2d Dept 2011]; *Grande v Peteroy*, 39 AD3d 590, 592 [2d Dept 2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept 2005]). In this instance, the issues raised by the untimely cross motion of defendant CVS are already properly before the court and thus the nearly identical nature of the grounds provide the requisite good cause (*see* CPLR 3212[a]) to review the merits of the untimely cross motion (*see Snolis v Clare*, 81 AD3d at 925-926; *Grande v Peteroy*, 39 AD3d at 592). The court therefore shall consider the cross motion by defendant CVS on its merits, notwithstanding it is untimely made.

With respect to the cross motion by defendant CVS for summary judgment dismissing the complaint insofar as asserted against it, a pharmacy owes a customer a duty of care in filling and dispensing a prescription (*see Abrams v Bute*, 138 AD3d 179 [2d Dept 2016]). A defendant pharmacy, seeking summary judgment dismissing a claim against it for professional negligence, bears the initial burden of establishing, through the submission of expert evidence demonstrating that it “did not undertake to render any professional judgment in filling the plaintiff’s prescription, that the prescription was filled precisely as directed by the prescribing physician and that the prescription was not ‘so clearly contraindicated’ that ordinary prudence required the pharmacist to take additional measures before dispensing the medication (citations omitted)” (*id.* at 195).

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Defendant CVS served its cross motion on May 13, 2020. Even taking into account that the filing of papers was suspended by Administrative Order of the Chief Administrative Judge of the New York State Courts (AO/78/20), due to the emergency circumstances caused by the COVID-19 virus outbreak, such order did not take effect until March 22, 2020. By that date, the court-ordered deadline for making a summary judgment motion had passed 46 days earlier. As a consequence, the temporary moratorium on court filings pursuant to AO/78/20, cannot explain the reason for the untimeliness of the making of the cross motion for summary judgment by defendant CVS (*see* CPLR 3212[a]).

In support of its cross motion, defendant CVS offers, among other things, copies of the transcripts of the deposition testimony of plaintiff, defendant Patel and Megan D'Orazi Koykas, a registered pharmacist employed by CVS, various medical and hospital records, and an affirmation of its expert witness, David Dickoff, M.D., a physician, who is board certified in psychiatry and neurology, and electrodiagnostic medicine.

At the outset, defendant CVS acknowledges “there was a dispensing error” (*see* affirmation of Shayna A. Bryan, Esq. dated May 13, 2020), in that the prescription of defendant Patel for plaintiff actually called for Singulair, but Simvastatin was dispensed by Koykas, the CVS registered pharmacist, instead. Defendant CVS contends, however, that such error in dispensing did not constitute professional negligence. According to defendant CVS, the handwritten prescription was illegible, and CVS pharmacist Koykas, in filling the prescription, misread the name of the medication, reasonably believing it read “Simvastatin,” and had no reason to believe otherwise. Defendant CVS also contends that under such circumstances, Koykas, the CVS registered pharmacist had no duty to consult with defendant Patel for clarification as to the name of the medication before dispensing Simvastatin to plaintiff.

Defendant CVS has not presented a copy of the prescription at issue in support of its motion, or an expert’s opinion indicating the name of the medication on the prescription was visually capable of being read, or deciphered, as “Simvastatin,” or was not so illegible as to have required Koykas, the CVS registered pharmacist, to obtain clarification from the physician as to the name of the medication. Koykas testified that she herself became alerted to the discrepancy (“Simvastatin” versus “Singulair”) while she was in the process of verifying the prescription to refill it. Koykas admitted, it occurred to her at such time, it was unusual that as a customer as “young”⁶ as plaintiff had been prescribed Simvastatin. Koykas indicated such thought prompted Koykas to review plaintiff’s profile to see if plaintiff had had any history of being prescribed that type of medication, and then, to go on to examine the hardcopy of the prescription to check the name of the medication. Koykas testified it was upon her examination of the hardcopy of the prescription that she discovered a “second name that wasn’t what was originally thought.”

Furthermore, to the extent defendant CVS relies upon the opinion of its expert, Dr. Dickoff offers no opinion as to whether defendant CVS breached any standard of care owed to plaintiff as CVS’s customer in the filling and dispensing of plaintiff’s prescription. Rather, Dr. Dickoff only addresses the question of whether there is any causal relationship between plaintiff’s ingestion of Simvastatin and plaintiff’s alleged injuries. Dr. Dickoff

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Plaintiff was 26 years old at the time.


opines that to a reasonable degree of medical certainty, the injuries allegedly suffered by plaintiff are wholly unrelated to her ingestion of Simvastatin, and plaintiff's ingestion of Simvastatin did not cause plaintiff's alleged back and head injuries. According to Dr. Dickoff, Simvastatin is a cholesterol medication that is not known to have any effect on blood pressure, balance, cognition or judgment, and to a reasonable degree of medical certainty, dizziness and confusion are not known side effects of Simvastatin. Dr. Dickoff opines that there is no evidence that Simvastatin caused plaintiff's alleged episode of dizziness or confusion, or that she suffered any adverse reactions to Simvastatin. He also opines that plaintiff's medical records reveal multiple pre-existing medical conditions and factors which rendered her susceptible to weakness or dizziness to cause her to fall, and could have caused or contributed to plaintiff's alleged fall and her current condition.

In opposition, plaintiff offers a redacted affidavit of a physician licensed to practice medicine in the State of Pennsylvania, who is board certified in neurology. Plaintiff's expert states the opinions set forth in his affidavit are based upon his education and experience, a review of record evidence and application of generally accepted scientific and medical principles, and are within a reasonable degree of medical certainty. Plaintiff's expert opines that defendant CVS's failure to dispense the correct medication as prescribed to plaintiff, deprived her of necessary medication and proximately caused plaintiff to fall and sustain related head and neurological injuries. According to plaintiff's expert, the failure to dispense the correct medication (Singulair) initiated a spiraling decline in plaintiff's respiratory and cognitive status. Plaintiff's expert states that the failure to dispense Singulair caused plaintiff to be without her newly prescribed asthma medication for over one month, causing plaintiff to ingest the incorrect, ineffectual medication, thereby causing her asthma to remain uncontrolled, and increase in severity, and causing her to experience heightened problems consistent with progressive symptoms and signs, such as loss of breath, dizziness and lightheadedness, and cognitive difficulties, including memory difficulties and confusion. Plaintiff's expert disagrees with the opinion of Dr. Dickoff insofar as Dr. Dickoff's opinion solely focuses on the consequences of consuming the medication Simvastatin, and does not consider how deprivation of the asthma medication Singulair caused and contributed to plaintiff's worsening symptoms.

Under such circumstances, defendant CVS has failed to demonstrate prima facie that its admitted dispensing error was not a breach of the standard of care owed by it to plaintiff, its customer. Furthermore, plaintiff has raised a triable issue of fact as to whether the admitted error in dispensing her medication was a substantial factor in causing plaintiff's injuries and which may require resolution at trial. The cross motion by defendant CVS for summary judgment dismissing the amended complaint against it is denied.

A professional negligence action against a pharmacy requires expert proof that the defendant pharmacy breached its duty of care owed to the customer in filling his or her prescription, and that such breach was a proximate cause of the plaintiff's injuries (*see Abrams v Bute*, 138 AD3d 179). To the extent plaintiff relies upon the same redacted affidavit of her expert in support of her motion for summary judgment against defendant CVS, the affidavit is improperly submitted for the first time in reply, and may not be considered by this court for such purpose (*see Sullivan v American Airlines, Inc.*, 80 AD3d 600 [2d Dept 2011]; *GJF Const. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535 [2d Dept 2006]; *Adler v Suffolk County Water Authority*, 306 AD2d 229 [2d Dept 2003]). In any event, that affidavit does not address the issue of the alleged deviation or departure of defendant CVS from the standard of care of a pharmacy owed to its customers regarding the filling and dispensing of medications. The remaining submissions by plaintiff do not establish plaintiff's prima facie entitlement to summary judgment against defendant CVS as a matter of law.⁷ As a consequence, the motion by plaintiff for summary judgment against defendant CVS is denied.

Dated: September 22, 2020



J.S.C.

FILED

**9/25/2020
10:07 AM**

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Defendant Patel also did not testify as to any such standard of practice and whether defendant CVS deviated or departed from it.