

**St. Fleur v Union Health Ctr.**

2022 NY Slip Op 30630(U)

February 28, 2022

Supreme Court, New York County

Docket Number: Index No. 805166/2018

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ELDA ST. FLEUR,

Plaintiff,

- v -

UNION HEALTH CENTER, QUEST DIAGNOSTICS INCORPORATED, and SOUSSAN AYOUBCHA, M.D.,

Defendants.

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INDEX NO. 805166/2018

MOTION DATE 11/17/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 95, 98

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

In this action to recover damages for medical malpractice, premised upon the reporting of a false positive blood test for HIV/AIDS, the defendant Quest Diagnostics Incorporated (Quest) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Quest.

The facts of this dispute are set forth in some detail in this court's February 28, 2022 order disposing of Motion Sequence 002, in which the court awarded summary judgment to Quest's codefendants dismissing the complaint as against them. In short, the plaintiff asserted that Quest negligently obtained and reported a false positive result on her September 19, 2017 HIV-1/2 AG/AB 4th Generation Reflex test, thus causing her emotional distress. As described in that order, other tests that Quest ran on the same blood sample, including an HIV-1/2 Antibody Differentiation test and an HIV-1 RNA test were negative for HIV, and a follow-up reflex test was negative as well, establishing that the plaintiff was not, in fact, positive for HIV.

In support of its motion, Quest relies on the same pleadings, bills of particulars, deposition transcripts, and medical records as were relied upon by its codefendants. Quest also submits the expert affirmation of Emilia Mia Sordillo, M.D., Ph.D., a physician board-certified in internal medicine and infectious disease treatment, who has significant experience directing various laboratories, including pathology laboratories. She is also the System Director for microbiology at the Mount Sinai Health System and an associate professor in pathology and molecular and cell-based medicine at the Icahn School of Medicine at Mount Sinai. Dr. Sordillo also obtained a Ph.D. from the Memorial Sloan Kettering division of the Cornell Graduate School of Medicine.

Based upon her review of the pleadings, bills of particulars, Quest's records, including worksheets for HIV testing that was performed on the plaintiff's blood samples, and certified records from codefendant Union Health Center, Dr. Sordillo opined that Quest complied with good and accepted standards of diagnostic laboratory practice in performing, processing, and reporting the plaintiff's HIV testing, and that no care, treatment, or lab testing by Quest was the proximate cause of any injury to the plaintiff.

Dr. Sordillo first noted that Quest never directly reported the test results to the plaintiff but, as required by 10 NYCRR 58-1.8, reported the results to the plaintiff's treating physician, codefendant Soussan Ayubcha, M.D., who in turn reported them to the plaintiff. As she explained it,

"Quest Diagnostics received an order from a New York licensed physician to perform specific HIV tests; Quest Diagnostics then performed the testing and noted a reactive HIV screening test, but then performed and reported standard confirmatory tests as negative or nonreactive, meaning plaintiff did not have HIV, and issued a report to the referring doctor, Ms. St. Fleur's primary care doctor, that unequivocally stated there was no laboratory evidence of HIV infection."

Dr. Sordillo asserted that Quest properly drew the blood samples, properly labeled them with the plaintiff's name and a bar code, and assured that there was no mix-up between the samples drawn from the plaintiff and those drawn from other patients.

With respect to the testing itself, Dr. Sordillo stated that

“The protocol employed by laboratories that performed testing like this in 2017 was as follows: If HIV Antigen and Antibody, 4th Generation Screen is repeatedly reactive, then HIV-1/2 Antibody Differentiation will be performed. If HIV-1/2 Antibody Differentiation is indeterminate or negative, then HIV-1 RNA, Qualitative, RT-PCR will be performed.

“Pursuant to Dr. Ayoubcha's order, the sample was tested for HIV using an initial 4th generation HIV Ag/Ab Combo assay. This is a screening test whose results are either reactive or non-reactive. If non-reactive, this test result is reported to the ordering physician. If it is reactive, the test is repeated to make sure the first result is not an aberration. This additional testing, called repeat testing, is performed as part of the test procedure. The Quest Diagnostics lab worksheet supports that the test was accurately noted as ‘repeatedly reactive’ because recurrent tests were performed on separate runs, with the same result. Plaintiff's reactive finding of 3.61 S/CO would have constituted a low level reactive (A low-level reactive typically being from 1 to 5).

“Since the initial HIV Ag/Ab Combo 401 generation immunoassay was repeatedly reactive, the specimen was tested by reflex using the HIV-1/HIV-2 differentiation antibody test. The purpose of this test is to determine whether a patient has antibodies to either HIV-1 or HIV-2, which would represent likely exposure to HIV and potential infection with HIV. This test was negative. The specimen was then reflexed to testing using the GenProbe APTIMA HIV-1 RNA qualitative assay (HIV-1 QL TMA) to look for evidence of HIV-1 RNA. This test was resulted as ‘Not Detected,’ with the explanatory comment that ‘HIV-1 RNA is not detected, No Laboratory evidence of HIV infection.’”

As Dr. Sordillo interpreted it, Quest's report, after noting that the reflex test should not be the sole test employed before a diagnosis is made, explained that an antibody immunoassay and RNA test should be employed before a conclusion is reached.

Dr. Sordillo explained that Ayubcha properly reported the results of all three tests performed on the plaintiff's September 17, 2017 blood sample, that only the reflex test suggested that the plaintiff was positive for HIV, and that the antibody immunoassay and RNA tests established that the plaintiff was HIV negative. She agreed with Ayubcha's decision to conduct further testing at one, three, and six months after the report, and noted that all further testing, including follow-up reflex testing, indicated that the plaintiff was negative for HIV.

Dr. Sordillo expressly opined that

“Quest complied with the standard of care applicable to diagnostic laboratories when it processed, tested and reported results for the plaintiff's specimen

collected September 19, 2017 as repeatedly reactive by the 4th generation HIV Ag/Ab Combo assay, the HIV-1/HIV-2 Antibody Differentiation assay test for HIV 1 and HIV 2 antibodies test as negative, and the HIV-1 QL TMA test for HIV-1 RNA as Not Detected."

She further opined that

"the plaintiff's blood specimen was not inadvertently switched with that of another patient. The measures employed by Quest Diagnostics, including having the patient acknowledge and sign her blood tube after blood was drawn at the PSC, the packaging of one patient's blood samples per plastic bag, the process followed by the accessioning department for opening and scanning bar codes on the patient's tubes, unique to that patient and sample, and the monitoring of the samples throughout the testing process to the release of the results, are standard and accepted measures used by laboratories to prevent specimen mix-up or errors in processing and testing."

With respect to the question of why one test conducted on the plaintiff's sample showed a false positive result, she explained that false positives can be caused by the administration of certain vaccines, such as influenza and hepatitis vaccines, can be expressed in persons who have received transfusions or gamma globulin, or had multiple pregnancies, can sometimes be found in patients with some cancers, renal transplant, or rheumatologic diseases, or can be caused by certain infections, such as syphilis, Epstein-Barr virus infection, malaria, or dengue, or infections with retroviruses other than HIV-1.

Dr. Sordillo also opined that that Quest's conduct did objectively not cause or contribute to any injuries that the plaintiff may have sustained because "any psychological harm the plaintiff may have suffered as a result of any subjective belief that she was HIV-1 positive is not the fault of the diagnostic laboratory that performed the tests."

In opposition to the motion, the plaintiff submitted medical records, an attorney's affirmation, and her own affidavit. She does not submit an expert affirmation or affidavit from a physician or health-care provider setting forth how Quest deviated or departed from good and accepted medical practice. Nor does she submit an expert affirmation or affidavit explaining how such a deviation caused or contributed to her injuries.

The standards applicable to summary judgment motions in medical malpractice actions were articulated in detail in this court’s February 28, 2022 order disposing of Motion Sequence 002. As with that motion, to the extent that the court has discretion to consider affirmations by experts who were identified only after the filing of the note of issue, the court exercises its discretion and considers Dr. Sordillo’s affirmation. Here, Quest established its prima facie entitlement to judgment as a matter of law with its expert’s affirmation, demonstrating that it did not deviate or depart from good and accepted medical practice and that none of its conduct caused or contributed to the plaintiff’s alleged injuries. Since the plaintiff did not oppose the motion with an expert affirmation or affidavit, she failed to raise a triable issue of fact, and Quest’s motion must be granted.

As with Motion Sequence 002, the plaintiff untimely served and filed her statement of contested material issues of fact by submitting it after Quest had served and filed its reply affirmation. As with the order disposing of that motion, it is irrelevant as to whether Quest’s statement of uncontested material facts is deemed admitted in light of the court’s determination on the merits of Quest’s motion.

Accordingly, it is

ORDERED that the motion of Quest Diagnostics Incorporated for summary judgment dismissing the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against Quest Diagnostics Incorporated; and it is further,

ORDERED that the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

2/28/2022

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE