Caunter v Cohen
2022 NY Slip Op 32429(U)
July 21, 2022
Supreme Court, New York County
Docket Number: Index No. 805178/2018
Judge: Erika Edwards

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIKA EDWARDS** **PART 10M**

Justice

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SUSAN CAUNTER,

Plaintiff,

- v -

BEN ZANE COHEN, M.D., RETINA ASSOCIATES OF NEW YORK, P.C., RETINAL AMBULATORY SURGERY CENTER OF NEW YORK, INC., REGENERON PHARMACEUTICALS, INC. AND BECTON, DICKINSON AND COMPANY,

Defendants.

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INDEX NO. 805178/2018

MOTION DATE 10/05/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court grants in part Defendants Ben Zane Cohen, M.D.'s ("Dr. Cohen") and Retina Associates of New York, P.C.'s ("RANY") (collectively, "Defendants") motion for summary judgment dismissal of Plaintiff Susan Caunter's ("Plaintiff") complaint to the extent that the court grants dismissal of Plaintiff's lack of informed consent claim and all claims regarding Defendants' alleged actions or inactions occurring prior to February 9, 2018, and denies the remainder of the motion.

Plaintiff's claims against Defendants Dr. Cohen, RANY, Retinal Ambulatory Surgery Center of New York, Inc. ("RASCNY"), Regeneron Pharmaceuticals, Inc. ("Regeneron") and Becton, Dickinson and Company ("Becton") involve alleged products liability, medical malpractice and lack of informed consent involving Dr. Cohen's care and treatment of Plaintiff's left eye from May 2017 to February 2018, which included injections of Eylea manufactured by Regeneron for Plaintiff's wet age-related macular degeneration. Plaintiff alleges in substance that

Plaintiff underwent a course of injection therapy with anti-vascular endothelial growth factor therapy ("anti-VEGF) administered by Dr. Cohen at his practice, RANY, but the Eylea eye kit and syringe administered to Plaintiff on January 29, 2018 was unsafe and defective. Plaintiff further alleges that Dr. Cohen departed from good and accepted medical practice by failing to timely and properly manage and treat Plaintiff's retinal tears and detachment causing persistent retinal detachment, intraocular inflammation, worsened cataract and permanent vision loss in Plaintiff's left eye.

Plaintiff subsequently discontinued the action against RASCNY, Regeneron and Becton. The court amends the caption to reflect the discontinuances.

Defendants Dr. Cohen and RANY now move under motion sequence 002 for summary judgment dismissal of Plaintiff's complaint. Defendants rely on the expert affirmation of Dr. Jay Fleischman who opines in substance that Defendants did not depart from good and accepted standards of ophthalmology and medical practice, that Dr. Cohen properly obtained Plaintiff's informed consent verbally and in writing and that none of their actions or inactions was a proximate cause of Plaintiff's alleged injuries. Defendants argue in substance that the first six injections were performed from May 4, 2017 to December 18, 2017, and that they resulted in improved vision with no complications. However, Defendants argue that the seventh injection on January 29, 2018, had a latent manufacturing defect which caused Plaintiff's complications and injuries. Defendants argue that Regeneron admitted to the defect because they later advised doctors not to use the batch because it caused an increased incidence of severe intraocular inflammation. Defendants further argue in substance that such acknowledgement was too late for Dr. Cohen to do anything to restore Plaintiff's vision, but that he tried everything he could to do so. Defendants further argue that Dr. Cohen's subsequent treatment of Plaintiff, including

surgical procedures on January 31, 2018 and February 9, 2018, were well above the accepted standards of medical practice.

Defendants further argue that Plaintiff provided her informed consent verbally and in writing prior to each injection and procedure and that Dr. Cohen explained the risks, which included Plaintiff's alleged injuries, benefits and alternatives. Defendants also argue that Dr. Cohen's actions or inactions were not a contributing factor in causing Plaintiff's injuries, but that her injuries were caused by the latent defect in Regeneron's injection.

Plaintiff opposes the motion and argues that Defendants failed to establish their prima facie entitlement to summary judgment and that Plaintiff's expert's opinions raised material issues of fact precluding summary judgment. Plaintiff's expert ophthalmologist opine in substance that Defendants departed from good and accepted standards of medical practice by failing to timely and properly diagnose, manage and treat Plaintiff's retinal tears and/or detachment in her left eye during the surgical procedures on February 9, 2018 and February 19, 2018. Plaintiff argues that such deviations were contributing factors to Plaintiff's proliferative vitreoretinopathy, redetachment and vision loss in her left eye and required additional surgeries on July 10, 2018 and February 13, 2019. Plaintiff's expert further states that Dr. Cohen deviated from accepted standards of care by using silicone oil, without using laserpexy and/or cryotherapy, on February 9, 2018. Plaintiff further argues that since Dr. Cohen was a shareholder and employee of RANY, RANY is vicariously liable for his negligent conduct.

In reply, Defendants argue that Plaintiff failed to oppose Defendants' arguments regarding lack of informed consent and negligence regarding any of Dr. Cohen's treatment of Plaintiff prior to February 9, 2018. Therefore, Plaintiff abandoned these claims. Defendants also dispute Plaintiff's expert's claims.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]. It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307

AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a

grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

Here, the court finds that Defendants demonstrated their prima facie entitlement to summary judgment in their favor as a matter of law, however Plaintiff raised material issues of fact regarding her negligence/medical malpractice claims involving Dr. Cohen's actions or inactions which occurred on February 9, 2018 and February 19, 2018. Plaintiff's opposition focused on the manner in which Dr. Cohen performed the surgery to repair Plaintiff's retinal tears and/or retinal detachment on February 9, 2018 and causation, including that Dr. Cohen ignored culture results on January 31, 2018, which revealed that Plaintiff had streptococcus sanguinis and fibrin. Plaintiff's expert opined that the Eylea injection did not cause Plaintiff's initial inflammation, but that it was caused by a post-injection infectious process which Dr. Cohen failed to properly treat and that such failure resulted in Plaintiff's vision loss and other injuries.

Therefore, the court finds that the experts disagree on these issues, which creates a disputed issue of fact regarding Plaintiff's negligence/malpractice claims against Defendants for Dr. Cohen's alleged negligent conduct on February 9, 2018 and February 19, 2018 and whether

his actions caused or contributed to Plaintiff's alleged injuries. Additionally, the court finds that Defendants established that Dr. Cohen obtained Plaintiff's informed consent prior to each eye injection and surgical procedure and that Plaintiff failed to rebut Defendants' arguments.

Therefore, the court dismisses Plaintiff's claims regarding lack of informed consent and negligence/medical malpractice claims regarding Dr. Cohen's actions or inactions which occurred prior to February 9, 2018. The remaining claims are severed and continued.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendants Ben Zane Cohen, M.D.'s and Retina Associates of New York, P.C.'s motion for summary judgment dismissal of Plaintiff Susan Caunter's complaint filed under motion sequence 002, to the extent that the court grants dismissal of Plaintiff's lack of informed consent claim and all claims regarding Defendants Dr. Cohen's and RANY's alleged actions or inactions which occurred prior to February 9, 2018, and the court denies the remainder of the motion; and it is further

ORDERED that the remaining claims are severed and continued; and it is further

ORDERED that the court amends the caption to reflect Plaintiff Susan Caunter's previous discontinuance of the action against Defendants Retinal Ambulatory Surgery Center of New York, Inc., Regeneron Pharmaceuticals, Inc. and Becton, Dickinson and Company, the court deletes their names as defendants in this action and directs the Clerk of the Court to amend the caption as set forth below:

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SUSAN CAUNTER,

Plaintiff,

-against-

BEN ZANE COHEN, M.D. and RETINA ASSOCIATES OF NEW YORK, P.C.,

Defendants.
--X

and it is further;

ORDERED that Plaintiff's counsel shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten (10) days of the date of this order, who is directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the parties are directed to appear for a status conference to set a trial date/settlement conference on September 8, 2022, at 9:30 a.m., in Part 10, located in room #412, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

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7/21/2022
DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**	
	[ ] **GRANTED**	[ ] **DENIED**	[X] **GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**