

Gentile v Juva Skin & Laser Ctr. Medispa

2023 NY Slip Op 33151(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 805179/2019

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHY J. KING PART 06

Justice

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MARLANA PERILLO GENTILE,

Plaintiff,

- v -

JUVA SKIN AND LASER CENTER MEDISPA, BRUCE M.
KATZ, MARY ANN WOODY, JENNIFER KRAMER

Defendant.

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INDEX NO. 805179/2019

MOTION DATE 04/24/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 94, 101

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

Upon the foregoing papers, defendants, Dr. Bruce Katz (“d/b/a Juva Skin and Laser Center, hereinafter referred to as “Java”), a dermatologist, and Jennifer Kramer (“Ms. Kramer”), an aesthetician, move for an order seeking summary judgment and dismissal of the complaint, pursuant to CPLR § 3212(b) or partial summary judgment to CPLR 3212(a).¹ Plaintiff opposes the motion and cross-moves for summary judgment against defendants on the issue of liability. Defendants oppose the cross-motion.

This action, sounding in medical malpractice, arises out of dermatological care rendered by Juva between January 2017 and October 2018, which includes 12 laser treatments performed between March 14, 2018 and April 17, 2018, based on a diagnosis of psoriasis. Plaintiff’s complaint raises allegations relating to the diagnosis, laser settings, the duration of treatment, and continuing such treatments despite alleged complaints, reactions, and laser-induced burns. The

¹ Defendant Marianne Woody settled the underlying action with the plaintiff.

complaint also alleges injuries include, *inter alia*, permanent scarring, hyperpigmentation and emotional sequelae. Additionally, plaintiff's bill of particulars asserts a claim of lack of informed consent for "failing to consider, inform, and appreciate the risks [of] the xtrac [sic] laser being used for unintended and approved purposes as well as at higher than acceptable and approved settings... [and] in failing to inform, attempt and provide viable conservative treatment options to the plaintiff prior to performing said laser treatments."

BACKGROUND

Plaintiff was treated at Juva for various dermatological issues, including, *inter alia*, acne and a rash, commencing from December of 2015 through December 2018. Plaintiff presented to Juva on July 11, 2017, due to itchy patches in her axilla, which Nurse Practitioner Marianne Woody ("Ms. Woody") recorded as an impression of pityriasis rosea, a rash that typically involves red scaly patches. Per her note for a visit on August 23, 2017, Ms. Woody prescribed a topical steroid. On September 7, 2017, plaintiff presented to Juva, and the rash had spread to her back. Ms. Woody prescribed a Kenalog spray, advised plaintiff to use a moisturizer, ordered blood tests, and did a shave biopsy (taken from the right breast).

The plaintiff was seen by Dr. Katz on October 19, 2017, for a recurring rash on her back. His exam showed papular squamous patches over her trunk and extremities. His impression (noted with a question mark) was psoriasis vs. PR (pityriasis rosea). He recorded that she had previously been treated with Clobetasol (a topical steroid). He prescribed Clobetasol and did a punch biopsy. The biopsy revealed spongiotic and interface dermatitis, vacuolar changes along the dermal-epidermal junction with areas of keratinocyte degeneration, dyskeratosis, and chronic inflammatory infiltrates.

The plaintiff was seen by Ms. Woody on February 3, 2018, for an acne breakout and follow-up for her rash. Plaintiff returned to Juva on March 3, 2018, and Ms. Woody noted that plaintiff had resumed using Clobetasol, listed the results of the biopsy, and noted that plaintiff's brother had eczema. Ms. Woody's impression was guttate PSO (psoriasis), and she noted "start Xtract laser for arms and lower legs, bilaterally."

Plaintiff signed and read a consent form prior to the laser treatments, which cited the needed number of treatments (ranging from 6 to 20), and the potential for blistering, a UVB-induced sunburn-like reaction, dryness, altered pigmentation, and other complications. Plaintiff underwent 12 sessions of laser treatment to her arms, legs and hips between March 14th and April 17, 2018, at varying laser settings. Although additional laser treatments were recommended by Ms. Woody, no further treatments were done. Plaintiff continued treating at Juva through December 2018, for various skin conditions, including a flare-up of psoriasis on September 25, 2018.

Thereafter, in February of 2019, plaintiff sought a second opinion from dermatologists Dr. Roy Geronemus and Dr. Bradley Bloom, and the slides from the biopsy done by Dr. Katz were evaluated by a dermatopathologist at NYU. Based on the analysis of the slides, Dr. Bloom's differential diagnosis included LP or lichenoid drug eruption. In April 2019, Dr. Bloom examined plaintiff and noted post inflammatory hyperpigmentation ("PIH"), due to LP on plaintiff's forearms and both legs. Dr. Bloom's treatment included a C&B laser procedure. Plaintiff continued to treat with Dr. Bloom for various skin conditions, including PIH. At the last visit in January 2020, Dr. Bloom noted that he discussed with the plaintiff that PIH is not uncommon after LP resolves.

Plaintiff consulted with plastic surgeon Dr. Jonathan Sherwyn, in October 2019, who noted that plaintiff had scars/hyperpigmentation on her trunk and bilaterally on her upper and lower extremities. In September 2020, plaintiff was seen by Dr. Anita Ackerman (“Dr. Ackerman”), a urologist/skin care specialist for complaints of scars and hyperpigmentation. Dr. Ackerman noted that plaintiff had one active area of LP, and her impression was “many” pigmented lesions on the neck, arms, flank and legs. Treatment with broad band light therapy was recommended.

In September 2021, plaintiff presented to Dr. Arash Akhavan, a dermatologist, and upon examination Dr. Akhavan’s impression was PIH with hyperpigmented patches on the left rib cage and trunk. A chemical peel was performed on plaintiff’s trunk, however she did not return to complete the recommended course of 10 to 20 of them. Plaintiff returned to Dr. Akhavan for evaluation, and again Dr. Akhavan’s impression was PIH, and another chemical peel was done. Although plaintiff was told to return in one month, she did not do so.

Defendants move for summary judgment on the basis that the diagnosis of psoriasis was reasonable, given the non-specific biopsy findings and the plaque-like appearance of plaintiff’s skin. They further contend that the use of the excimer laser or Xtract laser is appropriate for both conditions, and that the residual hyperpigmentation and/or scars (PIH) are due to LP, and were not caused by burns from treatment or over treatment with the laser. Defendants further contend that the skin defects claimed by the plaintiff are due to the residual effects of LP (referring to post-inflammatory hyperpigmentation or PIH), rather than, as she alleges, the result of treatment or over treatment with the laser. As detailed in her records and shown by numerous photos, they involve parts of her body that were not treated with the laser.

DISCUSSION

It is well settled that a party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). “To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff’s injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [2009]).

“In a medical malpractice action, a defendant doctor establishes prima facie entitlement to summary judgment by showing either: (i) ‘that in treating the plaintiff there was no departure from good and accepted medical practice’ or (ii) ‘that any departure was not the proximate cause of the injuries alleged’” (*Bahnyuk v Reed*, 174 AD3d 481, 482 [1st Dept 2019] [citation omitted]). “Bare conclusory denials of negligence without any factual relationship to the alleged injuries, and the submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint are insufficient to establish that defendant is entitled to summary judgment” (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

To rebut the defendant's prima facie showing, the plaintiff must tender medical evidence demonstrating that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). An expert opinion that is not supported by an evidentiary foundation or one based on speculation lacks probative value (*Park v Kovachevich*, 116 AD3d 182, 191 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]), whereas a "nonconclusory opinion of a qualified expert based on competent evidence" will suffice to defeat summary judgment (*Bartolacci-Meir v Sassoon*, 149 AD3d 567, 571 [1st Dept 2017]).

In support of the motion, defendants submit the expert affirmation of John Romano, M.D. ("Dr. Romano"), a board-certified dermatologist. In rendering his opinion, Dr. Romano reviewed the bills of particulars, medical records, deposition testimony, and photographs taken by Juva and by plaintiff. Dr. Romano opines, to a reasonable degree of medical certainty, that the treatment rendered to plaintiff at Juva was in accordance with accepted standards of dermatological care. As to the alleged misdiagnosis of plaintiff's skin condition, he opines that a clinical diagnosis of psoriasis was reasonable based on the appearance of her skin, which had a rash with plaques, and the nonspecific results of the biopsy. When her condition did not respond to topical steroids it was appropriate to treat her with the Xtract laser, which is a known, effective and generally safe treatment for psoriasis. Dr. Romano opines that there was no need for a repeat biopsy or follow-up because the laser resulted in reduced skin plaques, and there was no evidence of blistering or burns when she was examined at the Emergency Room in May 2018, for a different medical issue. Further, Dr. Romano opines that plaintiff's allegation that Dr. Katz permitted inexperienced staff to perform the laser treatment is without merit, as Ms. Kramer was a licensed aesthetician with considerable experience with this laser for psoriasis treatment.

Dr. Romano opines that the laser settings were appropriate, and the intensity was slowly increased, and according to the flow sheets, there was no evidence of blisters, and only on one occasion redness lasted more than 48 hours. He further opines that plaintiff's skin plaques were improving, and 12 laser treatments is not unusual, since 10 to 20 treatments may be needed, as stated in the consent form prepared by the manufacturer. Moreover, Dr. Romano notes that, contrary to plaintiff's claim, the consent form makes clear that the laser is FDA approved for psoriasis treatment.

Upon reviewing the photographs taken of plaintiff before and after the laser treatment, Dr. Romano opines that they do not reflect laser-induced burns, but rather PIH due to LP. This is evident from the records and the photos, which indicate that the lesions were observed on areas of plaintiff's body that were not treated with the laser. Dr. Romano also opines that the claim that plaintiff was injured by the laser, or the failure to appreciate that she had LP rather than psoriasis, ignores that this type of laser is also used to treat LP and was beneficial, notwithstanding the fact that plaintiff did not have psoriasis.

Based on the expert affirmation of Dr. Romano, defendants have met their prima facie burden of establishing their entitlement to summary judgment as a matter of law by demonstrating an issue of fact as to both medical malpractice and causation (*see Steinberg v Lenox Hill Hospital*, 148 AD3d 612 (1st Dept 2017); and *Camacho v Pintauro*, 210 AD3d 578 (1st Dept 2017)).

Defendants have also met their burden for entitlement for summary judgement on the issue of informed consent based on plaintiff's deposition testimony that she read and signed the consent form (*see Gardner v Widner*, 32 AD3d 728 (1st Dept 2006); *Bengston v Wang*, 41 AD3d 625 (2d Dept 2007); and *Johnson v Staten Island Medical Group*, 82 AD3d 708 (2d Dept. 2011)).

Plaintiff submits the affirmation of Anika Ackerman, M.D. (“Dr. Ackerman”) in opposition to defendants’ motion. While Dr. Ackerman affirms that she is a “Medical Doctor and owner of Cor Med Spa which is a laser skin treatment practice that operates in New Jersey,” she fails to attest that she is a physician duly licensed to practice in the State of New York. Significantly, Dr. Ackerman also fails to state whether she has an expertise in dermatology or her qualifications or board certifications, as a foundation for rendering an expert opinion in this matter. She attests that she was one of the medical providers that evaluated the plaintiff after receiving treatment at Juva.

Plaintiff has failed to raise a triable issue of fact in opposition to defendants’ motion. At the outset, the Court finds that Dr. Ackerman’s affirmation is defective in that it does not state that she is licensed to practice medicine in New York, and therefore has the right to affirm, pursuant to CPLR § 2106. Further, Dr. Ackerman does not state that she has the requisite knowledge or qualifications in dermatology, or in the use of the laser at issue here. Notably, her affirmation fails to state whether she is board-certified in any area of medical specialty. Thus, the expert affirmation of Dr. Ackerman, lacks probative value because the expert fails to establish that she has a foundational basis or the requisite personal knowledge on the issue of the standard of care in dermatology applicable to diagnosing skin conditions, treating skin diseases, and the use of the Xtract laser.

While it is not required that an expert practice the same specialty as the defendant, the lack of a foundation as to his or her knowledge of the applicable standard of care invalidates the expert’s opinions (*see Greenspan v Stand-Up MRI of Manhattan, P.C.*, 206 AD3d 588 [1st Dept 2022]); *Colwin v Katz*, 122 AD3d 523 [1st Dept 2014]; *Pauling v Orentreich Medical Group*, 14 AD3d 357 [1st Dept 2005]. This is particularly significant with respect to the issue of causation

(see *Elstein v Hammer*, 192 AD3d 1075 [2d Dept 2021]; *Simpson v Edghill*, 169 AD3d 737 [2d Dept 2019]). Thus, the defendants’ motion for summary judgment is granted.

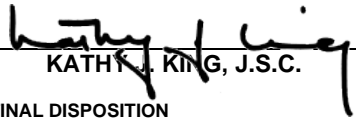
In light of the Court’s findings in favor of defendants, it is unnecessary to consider the plaintiff’s cross-motion for summary judgment.

Accordingly, it is hereby

ORDERED, that defendants’ motion for summary judgment is granted; and it is further

ORDERED, that plaintiff’s cross-motion is denied as moot.

This constitutes the Decision and Order of the Court.

9/8/2023		
DATE		KATHY J. KING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE