

Dent v New York Downtown Hosp.

Supreme Court of New York, New York County

February 7, 2011, Decided

116199/08

Reporter

30 Misc. 3d 1228(A); 926 N.Y.S.2d 343; 2011 N.Y. Misc. LEXIS 508; 2011 NY Slip Op 50242(U)

Raphael Dent, Plaintiff, against New York Downtown Hospital, New York Downtown Medical Associates, Inc., New York Downtown Medical Associates, P.C., Quest Diagnostics, Inc., and Dr. Christopher Busillo, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Prior History: [Dent v. New York Downtown Hosp., 2011 N.Y. Misc. LEXIS 471 \(N.Y. Sup. Ct., Feb. 7, 2011\)](#)

Judges: [***1] JOAN B. LOBIS, J.S.C.

Opinion by: Joan B. Lobis

Opinion

Joan B. Lobis, J.

Motion Sequence Numbers 003 and 004 are hereby consolidated for disposition. In Motion Sequence Number 003, defendant Quest Diagnostics Incorporated s/h/a Quest Diagnostics, Inc. ("Quest") moves, by order to show cause, for an order granting it summary judgment dismissal of the complaint in its entirety. Defendants New York Downtown Hospital ("NYDH") and New York Downtown Medical Associates, Inc., s/h/a New York Downtown Medical Associates, Inc. and New York Downtown Medical Associates, P.C. ("NYDMA"), partially oppose Quest's motion for summary judgment. NYDH and NYDMA also separately cross-move, by notice of cross motion (hereinafter the "Cross Motion"), for an order granting NYDH summary judgment dismissal of the complaint in its entirety, and granting NYDMA partial summary judgment dismissal of any claims regarding negligence or medical malpractice except for claims of vicarious liability for the acts of defendant Dr. Christopher Busillo. In Motion Sequence Number 004, plaintiff moves, by order to show cause, for an order precluding any remaining defendants from asserting the benefits of [C.P.L.R. Article 16](#), and opposes the Cross [***2] Motion.

This is an action sounding in negligence and medical malpractice arising out of an incorrect diagnosis of the human immunodeficiency virus ("HIV") following a blood test that came back positive for HIV. In December 2006, Dr. Busillo, plaintiff's primary treating physician, ordered an HIV blood test for plaintiff. NYDMA staff drew plaintiff's blood and prepared the blood sample to be sent to Quest. Quest tested the

blood on or about December 28, 2006. The report of the results generated by Quest states that HIV-1 antibodies were detected in the sample and that "[i]f these results are clinically inconsistent, or if this is the first positive result for this patient, repeat testing of a new sample is recommended for confirmation." After receiving the results from Quest, Dr. Busillo informed plaintiff on or about January 3, 2007, that he was HIV positive. Dr. Busillo performed four viral load tests over the next year, all of which demonstrated undetectable amounts of HIV. Nevertheless, Dr. Busillo continued to treat plaintiff as if he were HIV positive. By April 2008, plaintiff was no longer treating with Dr. Busillo or NYDMA. After a few more viral load tests with negative results, [***3] plaintiff underwent a second HIV test in June 2008; the results of that test were negative for HIV. A July 2008 retest confirmed that plaintiff was HIV negative. For approximately eighteen (18) months, plaintiff believed that he was HIV positive, when in fact he was not.

The blood drawing and testing procedures at NYDMA and Quest, respectively, were discussed in detail during the depositions of the representatives from each facility. Caroline Cimino, R.N., was deposed from NYDMA. She was first employed by NYDMA in April 2007, after the plaintiff's blood test in December 2006. Nurse Cimino testified as to the policies and procedures in place at NYDMA regarding blood collection in December 2006 by recalling a conversation with a former NYDMA employee who explained the policy. When the patient arrives for an examination, a medical assistant ("MA") or a licensed nurse practitioner ("LPN") will bring the patient to an examination room. The MA or LPN checks the patient's vitals and blood pressure, exits the room, and leaves the chart on the outside of the door. The physician then enters the room. If blood work is ordered, the patient's physician picks out a requisition form from the laboratory [***4] corresponding to the patient's insurance coverage. On the requisition form, the physician marks the tests that are to be performed. The physician leaves the requisition form with the chart in the examination room where the patient is located. The physician exits the room and writes the date, the time, the examination room, and the type of test to be performed on a board. Either an MA or LPN will then check the board to see if there are any procedures that need to be done, proceed to the examination room, pick up the chart, and identify themselves as the person who will be drawing the patient's blood. The MA or LPN then asks the patient for his name and date of birth; identifies and clarifies the requisition form, the chart, the patient's identity, and the time of the blood draw; and confirms what type of blood work has been ordered. Next, the MA or LPN collects the blood sample in a container, labels the container with the patient's name and date of birth, and adheres a label from the requisition form to the container. Finally, the MA or LPN brings the specimen container and requisition form to a laboratory processing room. The person assigned to the laboratory processing room takes [***5] the specimen container and, depending on the type of container, either centrifuges the container or processes it. Containers with a red top, like the ones used to collect blood for HIV tests, are not centrifuged. Processing entails taking the requisition form, putting everything into a specimen bag, and sending the bag out for a pickup. The laboratory technician documents the processing in a logbook. Specimens are picked up three times daily.

Michael Joyner, a manager in the accession department, testified on behalf of Quest. The accession department is responsible for receiving and verifying samples, labeling samples, making the necessary pour offs, and sending the samples to the laboratory for testing. A pour off means separating part of a "master sample" and making an "aliquot" (portion) for testing. The accession department receives a bag which contains a sample and a requisition form. The accession department then opens the bag, verifies that the name on the vial matches the documentation, and enters the information into a computer system where it is stored for thirty days. Labels are generated according to the test requested. The sample

container is opened and some of the serum [***6] is poured off into a testing vial, which is capped and numerically labeled. The pour off is then placed in a rack with ten to forty-eight other samples and submitted to the laboratory for testing. The master vial is stored for fourteen days and then discarded. Mr. Joyner testified that the acquisition department receives approximately 25,000 to 30,000 requisitions daily. Approximately 500 of the requisitions are audited daily.

As to plaintiff's particular case, Mr. Joyner examined the requisition forms and testified that on December 27, 2006, Quest received two separate bags, each with a sample labeled as plaintiff's blood and a requisition form. One bag contained the HIV requisition form and the blood sample to be tested for HIV. Mr. Joyner could not determine who was responsible for the intake of plaintiff's requisitions or whether plaintiff's requisitions had been subject to an audit.

Plaintiff commenced this action by filing a summons and complaint on December 4, 2008. The complaint contains two causes of action. In the first cause of action, sounding in negligence, plaintiff alleges that either Quest tested the wrong sample of blood or that the remaining defendants (presumably, [***7] Dr. Busillo, NYDMA, and NYDH) negligently sent Quest a sample of another patient's blood mislabeled with plaintiff's information. Plaintiff alleges that as joint tortfeasors, defendants are liable to explain what happened and why plaintiff was given an incorrect diagnosis. In the second cause of action, plaintiff alleges that all of the defendants committed medical malpractice in failing to recommend an HIV retest after the second and third viral load tests demonstrated a zero viral load. Plaintiff's claimed injuries in this lawsuit are for the non-permanent emotional distress from which he suffered as a result of the incorrect diagnosis.

Defendants answered and the case proceeded through discovery. Plaintiff, Dr. Busillo, and representatives from NYDMA and Quest were deposed. Plaintiff filed his note of issue on July 28, 2010, indicating that all known discovery was complete. On or about September 28, 2010, Quest filed its motion for summary judgment. Plaintiff did not oppose Quest's motion. On November 1, 2010, NYDH and NYDMA filed the Cross Motion. On November 4, 2010, plaintiff brought his order to show cause on Motion Sequence Number 004.

Quest maintains that it is entitled to summary [***8] judgment as a matter of law because no triable issues of fact exist. Quest sets forth that it did not depart from any accepted practices or procedures and that it did not proximately cause plaintiff's injuries. Quest argues that it properly performed the HIV test on the blood sample that plaintiff's physician submitted to Quest. Quest sets forth that in order to prevail on his claim against Quest, plaintiff must establish that Quest improperly performed the HIV test on plaintiff's blood; that Quest switched plaintiff's blood sample with another patient's sample; or that Quest provided incorrect results to plaintiff's physician.

In support of Quest's motion is an affirmation from William Mandell, M.D., a physician licensed to practice medicine in the State of New York and board certified in infectious diseases. Dr. Mandell sets forth that he reviewed plaintiff's medical records, the transcripts of the depositions, and the pleadings in this matter. Based on his review of these documents and his professional experience, he opines that Quest did not depart from accepted medical or laboratory practice and procedure in performing the HIV test on plaintiff's blood sample on December 28, 2006. [***9] Dr. Mandell states that the test that Quest performed, the HIV-1 antibody test with a Western Blot, is the appropriate and acceptable test to determine whether someone has been exposed to the HIV virus. Dr. Mandell states that there is no evidence that there was any mix-up of blood samples at Quest. Rather, all testimony indicates to him that

blood samples are labeled prior to their arrival at Quest. Dr. Mandell posits that there was either a false positive, or an accurate result for blood that did not belong to plaintiff, neither of which resulted from negligence on the part of Quest. If the test did yield a false positive for HIV, that was not Quest's fault, as the test was proper and was properly performed. Dr. Mandell sets forth that the HIV test is not 100% accurate and that false positives are possible and not indicative of sample mishandling, contamination, mix-up, or mistesting. He sets forth that there are a variety of ways that a false positive test result for HIV can occur in the absence of negligence, and that false positives are an accepted risk of laboratory testing. Dr. Mandell further asserts that Quest performed the test that plaintiff's physician ordered, and there [***10] is no indication that the results were miscommunicated to plaintiff's physician. Once Quest relays the results to the physician, what an ordering physician chooses to do with the results is beyond Quest's control and beyond its scope of responsibilities. Dr. Mandell did not describe the mechanics of the blood test.

In opposition to Quest's motion, NYDMA objects to that part of Dr. Mandell's affirmation which states that if a mix-up of plaintiff's blood sample and another sample did occur, it occurred before the sample reached Quest. NYDMA points out that, as per Quest's deposition testimony, the sample could have been mixed up at Quest's facility because the blood sample that Quest tests is not the sample that is created and labeled by NYDMA. Rather, Quest generates a separate testing sample that it independently labels. So, NYDMA proposes that if a mix-up did occur, it could have occurred at either Quest or NYDMA.

In the Cross Motion, NYDMA argues that it is entitled to summary judgment dismissal of the complaint on the basis that NYDMA properly transferred plaintiff's blood sample to Quest. NYDMA asserts that plaintiff has failed to assert a *prima facie* case as to where the alleged [***11] mix-up of blood occurred (at NYDMA or at Quest). NYDMA also asserts that there is no evidence as to any wrongdoing on its part. NYDH argues that plaintiff received no treatment at NYDH; that plaintiff was Dr. Busillo's private patient; and that NYDMA is not a clinic within NYDH but a private faculty practice for physicians.

In support of the Cross Motion, NYDMA annexes an affirmation from its expert, Alan A. Pollock, M.D., a physician duly licensed to practice medicine in the State of New York and board certified in infectious diseases. Dr. Pollock sets forth that he reviewed the medical records, the transcripts of the depositions, and the pleadings in this matter. Based on his review of these documents and his professional experience, he opines that NYDMA did not depart from accepted medical or laboratory practice and procedure in collecting and handling plaintiff's blood sample on December 27, 2006. Dr. Pollock opines that the procedure described by Nurse Cimino is within the standard of care. Further, his review of the records and testimony reveal to him no evidence that NYDMA failed to comply with its own procedures. Quest reported no mismatch of the sample that it received from [***12] NYDMA. Plaintiff was Dr. Busillo's private patient and it was Dr. Busillo's responsibility to determine whether a retest was warranted. Dr. Pollock concludes that it is his opinion, within a reasonable degree of medical certainty, that plaintiff's allegations with respect to negligence or malpractice are without merit.

In anticipation of plaintiff's opposition to the Cross Motion, NYDH and NYDMA concede that the Cross Motion was untimely, but argue that it is properly before the court because the issues raised in the Cross Motion are "identical in nature to those raised" by Quest. NYDMA argues that NYDMA and Quest are "united in interest," because if Quest is dismissed but NYDMA remains, then plaintiff will allege that a mix-up occurred at NYDMA. It is NYDMA's position that the mix-up could have occurred at Quest or NYDMA, but that both entities have a valid defense to plaintiff's claims in that plaintiff has failed to provide any evidence supporting a *prima facie* case against either institution for negligently mixing up

plaintiff's blood sample. Citing to [New York Tel. Co. v. AAER Sprayed Insulations, Inc., 250 AD2d 49, 679 N.Y.S.2d 21 \(1st Dep't 1998\)](#), NYDMA maintains that when there are two defendants [***13] and only one could have possibly committed a wrongful act, plaintiff must prove which defendant committed the wrong. Accordingly, NYDMA asks the court to consider its motion for summary judgment.

Plaintiff maintains that the court should not consider the Cross Motion because NYDMA's grounds for seeking summary judgment are completely different than Quest's grounds. Plaintiff sets forth that Quest is claiming that its procedures conformed to the standard of care and that it recognized the possibility of a false result by recommending that the physician retest the patient under certain circumstances. In contrast, NYDMA failed to rebut Quest's motion with a credible claim that Quest breached the standard of care and only offers evidence as to its own procedures. Plaintiff contends that they are not identical motions, but different motions seeking the same relief for different reasons.

It is well established that absent a showing of good cause, the court shall not consider untimely motions for summary judgment. [C.P.L.R. Rule 3212\(a\)](#). However, the court, in its discretion, may consider a cross motion for summary judgment made after the expiration of the time frame provided in the court's [***14] rules, even without good cause shown, where the initial motion for summary judgment was timely and the cross movant raises issues nearly identical to the motion. See [Lapin v. Atlantic Realty Apts., Co., LLC, 48 AD3d 337, 851 N.Y.S.2d 543 \(1st Dep't 2008\)](#) (finding issues of lack of proof of defect and notice in both motion and cross motion nearly identical). Cf. [Leonardi v. Cruz, 73 AD3d 580, 904 N.Y.S.2d 4 \(1st Dep't 2010\)](#) (finding issues of liability raised in motion and issues of serious injury raised in cross motion not identical). In this case, the court finds that the issues raised in the Cross Motion are nearly identical to the issues raised in the motion, particularly due to the way plaintiff has chosen to plead his case. Plaintiff's first cause of action alleges that either Quest or NYDMA was negligent.¹ Both Quest and NYDMA seek to prove that they did not depart from the standard of care in the collection, handling, or testing of plaintiff's blood. Both motions seek to prove the absence of negligence in a chain of events that eventually led to plaintiff being misdiagnosed as HIV positive. The issues are sufficiently intertwined to grant consideration of the Cross Motion.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." [Winegrad v. NY Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 \(1985\)](#) (citations omitted). When relying on expert opinion evidence to support the *prima facie* showing, that opinion "must be based on facts in the record or personally known to the witness, and . . . an expert cannot reach a conclusion by assuming material facts not supported by record evidence." [Roques v. Noble, 73 A.D.3d 204, 206, 899 N.Y.S.2d 193 \(1st Dep't 2010\)](#). If the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." [Alvarez v. Prospect Hosp., 68 NY2d 320, at 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 \(1986\)](#) (citation omitted).

The parties essentially agree that there are only three credible scenarios where Quest would have reported to Dr. Busillo that plaintiff's blood had tested [***16] positive for HIV when, in actuality, plaintiff was not HIV positive: (1) NYDMA departed from good and accepted practice in collecting or labeling the

¹ None of the parties argue that Dr. [***15] Busillo played any role-except for ordering the test-in the collecting, handling, or testing of plaintiff's blood.

blood sample; (2) Quest departed from good and accepted practice in handling or testing the blood sample; or (3) a false positive result occurred and neither NYDMA nor Quest departed from good and accepted practice. Despite plaintiff's decision not to oppose Quest's motion, NYDMA did oppose Quest's motion.² Neither Quest nor NYDMA is entitled to summary judgment under these circumstances, simply because material issues of fact remain. Dr. Mandell opines that there is no evidence that Quest departed from the standard of care or that plaintiff's blood was mixed-up with another sample at Quest. Dr. Pollock similarly opines that there is no evidence that NYDMA departed from the standard of care or that plaintiff's blood was mixed-up with another sample at NYDMA. Yet, neither expert reviewed a first-hand account of the circumstances surrounding Mr. Dent's blood collection or testing. Both opinions are based on descriptions of the entity's procedures from individuals with no direct knowledge of the particular circumstances of this case. The [***17] expert's conclusions that no departures occurred presume facts that are not in the record and are pure conjecture. The court points out that this same problem may confront plaintiff at trial and merit a directed verdict if plaintiff pursues his claims of negligence regarding the collection and testing of plaintiff's blood. However, the issue at this stage is whether the defendants met their burden to eliminate all material issues of fact, and the court concludes that they have not. Determining judgment as a matter of law for either Quest or NYDMA on the first cause of action would be inappropriate at this juncture.

As to plaintiff's claim that defendants failed to recommend an HIV retest after the second and third viral load tests demonstrated a zero viral load, Quest has made out a *prima facie* entitlement to summary judgment. Dr. Mandell's affirmation demonstrated that Quest owes no duty to a patient once the test results are communicated to the physician, and that what an ordering physician chooses to do with the results is beyond [***18] Quest's control and beyond its scope of responsibilities. There was no attempt to rebut this showing by any of the other parties.

As to NYDH, the Cross Motion sets forth that plaintiff received no treatment at NYDH and that all of the treatment was provided by Dr. Busillo and NYDMA. Dr. Busillo testified that NYDMA is not a clinic within NYDH, but that NYDMA is a private faculty practice for physicians. Plaintiff did not come back with any proof that NYDH is a viable defendant in this action, either by direct liability or vicarious liability.

Plaintiff's motion to preclude any remaining defendants from asserting any benefits under [C.P.L.R. Article 16](#) is denied. There is no basis to preclude defendants from asserting the benefits of [C.P.L.R. Article 16](#).

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Quest Diagnostics Incorporated s/h/a Quest Diagnostics, Inc. ("Quest") on Motion Sequence Number 003 is granted to the extent of granting partial summary judgment in favor of Quest and against plaintiff on the second cause of action, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion for summary judgment [***19] by defendants New York Downtown Hospital ("NYDH") and New York Downtown Medical Associates, Inc. ("NYDMA") s/h/a New York Downtown Medical Associates, Inc., and New York Downtown Medical Associates, P.C., on Motion

² Consistent with proper practice, plaintiff must discontinue its claims against either of these entities if he knows he cannot meet his burden at trial.

Sequence Number 003, is granted to the extent of granting summary judgment in favor of NYDH only, and the Clerk is directed to enter judgment dismissing the complaint in its entirety against NYDH; and it is further

ORDERED that the action shall continue against Quest as to the first cause of action, and against all other remaining defendants as to the first and second causes of action; and it is further

ORDERED that plaintiff's motion on Motion Sequence Number 004 is denied.

Dated: February, 2011

JOAN B. LOBIS, J.S.C.