

Cardaci v Ciarello

2007 NY Slip Op 31413(U)

May 24, 2007

Supreme Court, New York County

Docket Number: 0116112/2004

Judge: Eileen Bransten

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

PRESENT: Bransten
Justice

PART 6

Robert Cardaci

INDEX NO. 116112/04

MOTION DATE 3-27-07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Dr. Robert Cardello, et al

The following papers, numbered 1 to 3 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 01 2007

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-24-07

E. L. Rant
J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
ROBERT CARDACI,

Plaintiff,

-against-

Index No. 116112/04

Motion Date: 3/27/07

Motion Seq. No.: 03

DR. ROBERT CIARELLO and
NU HART MEDICAL, P.C.,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendants Dr. Robert Ciarallo (“Dr. Ciarallo” listed in the caption as “Dr. Robert Ciarello”) and Nu Hart Medical, P.C. (“Nu Hart”) move for summary judgment dismissal of the action commenced by plaintiff Robert Cardaci (“Mr. Cardaci”). Mr. Cardaci opposes the motion.

FILED

JUN 01 2007

NEW YORK
COUNTY CLERK'S OFFICE

Background

Interested in hair-transplant surgery, Mr. Cardaci, age 36, made an appointment with Dr. Ciarallo, a partner at Nu Hart. Mr. Cardaci’s first treatment was rendered on January 7, 2002. At that visit, Dr. Ciarallo discussed the risks and benefits of micro-graft technique hair transplantation, which entails removing hair from the patient’s scalp at the back of the head, transplanting it in the desired location and suturing that area. Affirmation in Support (“Supp.”), at ¶ 6. Mr. Cardaci signed a two-page informed-consent form. After the

procedure, he was discharged and returned for a follow-up visit 10-14 days later at which time his sutures were removed. *Id.*, at ¶ 6.

On August 20, 2002, Mr. Cardaci returned to Dr. Ciarallo for a second hair-transplant. Again, Dr. Ciarallo discussed the risks and benefits of the procedure with Mr. Cardaci, who signed a two-page, comprehensive “Information and Consent to Operate for Hair Transplantation” form. Supp., Ex. H. After the procedure, Mr. Cardaci was discharged with written instructions and was given Dr. Ciarallo’s beeper number. *Id.*

On September 17, 2002, Mr. Cardaci informed Dr. Ciarallo that he was concerned about a vein in his left temporal region. *Id.*, at ¶ 8. Dr. Ciarallo examined the area and diagnosed mild thrombophlebitis (swelling of the vein). There was no report of arteriovenous fistula (an abnormal passage between an artery and a vein). *Id.* Dr. Ciarallo recommended application of warm heat to the area and Motrin.

Worried about his condition, Mr. Cardaci saw other physicians. Dr. Keith Preis, one of the doctors who evaluated Mr. Cardaci, concluded that there was no “neurologic type process going on.” Dr. Preis further noted: “Tortuous left superficial vein mildly on the right most likely secondary to thrombophlebitis.” Supp., at ¶ 8; Ex. I.

Mr. Cardaci commenced this medical malpractice on November 15, 2004. He alleges, among other things, that Dr. Ciarallo failed to properly perform hair transplant procedures, failed to take precautions to avoid initiating vascular injury and failed to inform

him of unwarranted complications. Supp., Ex. C, at ¶ 7. These departures, Mr. Cardaci asserts, resulted in “permanent injury to his vascular system,” including traumatically induced arteriovenous fistula in his left temporal artery and left temporal vein, cosmetic deformities, and permanent nerve damage *Id.*, at ¶¶ 7, 18.

The parties were given almost a year to complete discovery in this straightforward case. During that time, Mr. Cardaci repeatedly failed to comply with Court orders and deadlines. *See, e.g.*, Decision and Order issued on August 14, 2006 (motion sequence number 01). Mr. Cardaci filed the note of issue and certificate of readiness for trial, which states that discovery “proceedings now known to be necessary completed,” on September 18, 2006. Supp., Ex. G.

On November 20, 2006, defendants presented this Order to Show Cause to the Court, seeking summary judgment dismissal this action. The application was made returnable on December 5, 2006. In support of their motion, defendants rely on an affirmation by Robert True, M.D. (“Dr. True”), who is licensed to practice in New York and is board certified with the American Board of Family Practice and the American Board of Hair Restoration Surgery. *See*, Expert’s Affirmation in Support of Motion for Summary Judgment (“True Aff.”), at ¶ 2.

Dr. True opines to a reasonable degree of medical certainty, based on, among other things, his examination of Mr. Cardaci and his medical records:

“there was no surgery performed on [the] left temporal area of the patient’s head.

“It is my opinion * * * that Dr. Ciarallo properly managed the plaintiff’s care, and properly treated plaintiff’s initial complaints about mild thrombophlebitis in the left temporal area.

“it is also my opinion * * * that while arteriovenous fistula is a reported rare complication of hair transplant surgery, it is confined to areas in which surgery has been performed. It arises as a result of direct injury to approximating arteries and veins. Again, there was no surgery done by Dr. Ciarallo to the left temporal area. The surgery that was performed was in the back of [the] patient’s head, the crown and the front forehead--in particular behind the patient’s left ear.

“Therefore, it is my opinion * * * that if a fistula arose from surgery, it would have occurred some distance from the temporal area, behind or above the left ear (not in the left temporal region). Therefore, it is my opinion * * * that Dr. Ciarallo’s transplant procedures did not cause an arteriovenous fistula on the patient’s left temporal area.

* * *

“It is my opinion * * * that the alleged arteriovenous fistula that plaintiff claims to have was not caused by a departure of acceptable practice by Dr. Robert Ciarallo for the reasons stated above. It is my opinion with a reasonable degree of medical certainty that there was no departure from good and accepted practice of hair transplant surgeons before, during and after the surgical procedures performed by Dr. Ciarallo on January 7, 2002 and August 20, 2002.

“It is my opinion, with a reasonable degree of medical certainty, that Dr. Ciarallo obtained plaintiff’s informed consent for the surgical procedures * * * as evidenced by plaintiff’s signatures on the two informed consent forms, and plaintiff’s numerous consultations with Dr. Ciarallo before the procedures and Dr. Ciarallo’s documentation of discussion of the risks and benefits prior to both surgeries.”

True Aff., at ¶¶ 9-12, 16-17.

The motion was adjourned from December 5, 2006 to January 16, 2007, which was marked a “final” date, to allow Mr. Cardaci to properly oppose dismissal of the case. At his request, the motion was adjourned again (for more than a month) to February 26, 2007.

In opposition, Mr. Cardaci, who is not a doctor, relies on his own affidavit, which is dated February 26, 2007. He attests that “After the [August 20, 2002] procedure, I developed an Arteriovenous Fistula on my forehead, which is in essence a merging of a vein and an artery.” Affidavit of Robert Cardaci in Opposition to Summary Judgment (“Opp.”), at 1. He further contends that “immediately after the surgery the back of my head between the areas in which Dr. Ciarallo made incisions became numb and tingly, and throbbing, with scar tissue buildup and caused severe headaches and [severe] shooting pains throughout the back of my head.” *Id.* He alleges that he was not told by anyone associated with Nu Hart that “these were possible complications of hair surgery. Nor did they provide * * * a consent form concerning same.” *Id.*, at 2. Mr. Cardaci asserts that the surgery left him unable to function in the same way that he had functioned earlier and that he is “unable to lead a normal life.” *Opp.*, at 5.

Mr. Cardaci recounts in detail the doctors that he has seen in connection with his condition. *Opp.*, at 2-4.

He submits copies of prescriptions and test results. Opp., Exs. A, B, D. One of the prescriptions simply contains the words "AV Fistula" and "Arteriovenous fistula." Opp., Ex. D. There is no evidence, however, of any diagnosis with that condition. Mr. Cardaci also submits an unsworn letter from his primary care physician, Dr. Frank Alario, which states:

"I am Mr. Cardaci's primary care physician. He presented to me with complaints of headaches and burning of his scalp. He was referred to a neurologist, Dr. Sam Schneker. * * * The patient had none of these complaints before his hair transplant. As a primary care physician this is out of my field. Therefore I cannot voice an opinion."

Opp., Ex. C (emphasis added).

In his opposition papers, Mr. Cardaci further explains that this Court gave him an opportunity to consult with Dr. Frank Vieth, a vascular surgeon, in an effort to obtain medical evidence to oppose defendants' motion. Opp., at 4. Dr. Vieth, the affidavit points out, was away and was set to return the following day--on February 27, 2007. Mr. Cardaci asked for an extension of time to obtain submissions from Dr. Vieth or another physician. To accommodate Mr. Cardaci, this Court adjourned submission of the motion for a third time to March 6, 2007. On March 6th, the Court once again allowed Mr. Cardaci more time, setting a March 20, 2007 deadline for any additional opposition papers. The parties were directed to appear in Court on March 27, 2007 for oral argument. Mr. Cardaci, however, never offered any additional evidence.

Analysis

Summary judgment is a “drastic remedy” that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even “arguable.” *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

Further, “on a defendant’s motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff’s pleadings, as true, and [its] decision ‘must be made on the version of the facts most favorable to [plaintiff].’” *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue

of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. The opponent of summary judgment must present medical evidence that defendant physician departed from good and accepted medical practice, *Lyons v. McCauley*, 252 A.D.2d 516 (2d Dept. 1998), *lv denied*, 92 N.Y.2d 814, and that defendants' wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dept. 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dept. 2003). This evidence must generally be adduced through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003).

If the nonmovant submits an admissible affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dept. 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dept. 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dept. 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dept. 2000).

Mr. Cardaci's case must be dismissed. He has failed to submit any expert evidence of medical malpractice in response to defendants' showing.

By submitting the detailed affirmation of Dr. True, which sets forth that there were no departures from accepted practice and that consent was properly obtained, Dr. Ciarallo has demonstrated entitlement to judgment as matter of law. Mr. Cardaci's affidavit in

opposition is insufficient to rebut defendants' showing. To defeat summary judgment, he was required to come forward with competent medical evidence and his failure to do so is fatal. *Dow v. Lenox Hill Hosp.*, 831 N.Y.S.2d 903 (1st Dept. 2007) (unsworn letter from expert cannot be considered in opposition to summary judgment motion where *prima facie* showing of entitlement to judgment was made); *DeCintio v. Lawrence Hosp.*, 299 A.D.2d 165 (1st Dept. 2002) (granting summary judgment because plaintiff submitted only attorney's affirmation in opposition to motion), *lv. dismissed in part denied in part*, 100 N.Y.2d 549 (2003); *Oates v. New York Hosp.*, 131 A.D.2d 368, 370 (1st Dept. 1987); *Neuman v. Greenstein*, 99 A.D.2d 1018 (1st Dept. 1984) ("At least some statement of medical expertise in rebuttal was required in order to defeat defendant's motion for summary judgment"); *see also, Spicer v. Comm. Fam. Planning Council Health Ctr.*, 272 A.D.2d 317, 318 (2d Dept. 2000); *LaMarque v. North Shore Univ. Hosp.*, 227 A.D.2d 594, 595 (2d Dept. 1996).

In the end, Mr. Cardaci has not established that he suffers from any injuries that were proximately caused by defendants.

Dismissal of Mr. Cardaci's lack-of-informed-consent claim is also granted.

Public Health Law § 2805-d states that lack of informed consent "means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved * * *." The

statute further requires that a plaintiff establish that a reasonably prudent person in the patient's position "would not have undergone the treatment or diagnosis" had she been fully informed. Public Health Law § 2805-d; *see also, Benfer v. Sachs*, 3 A.D.3d 781, 782-83 (3d Dept. 2004), *affd*, 19 A.D.3d 853 (3d Dept. 2005); *Dunlop v. Sivaraman*, 272 A.D.2d 570 (2d Dept. 2000); *Hylick v. Halweil*, 112 A.D.2d 400, 401 (2d Dept. 1985).

On this record, Dr. Ciarallo has submitted sufficient medical evidence, namely the affidavit of Dr. True, to establish that he properly advised Mr. Cardaci of the "alternatives * * * and the reasonably foreseeable risks" of surgery. Public Health Law § 2805-d; *Rozelle v. Hermann*, 215 A.D.2d 224 (1st Dept. 1995); *see also, Canosa v. Abadir*, 165 A.D.2d 823 (2d Dept. 1990). In response, Mr. Cardaci submits no expert evidence to support his claim that Dr. Ciarallo failed to properly inform him of the risks of the surgery; thus, his lack-of-informed-consent claim is dismissed. *Hylick v. Halweil*, 112 A.D.2d, at 401 (expert medical testimony required to support claim for lack of informed consent); *see also, Romatowski v. Hitzig*, 227 A.D.2d 870, 871 (3d Dept. 1996), *lv. dismissed in part and denied in part* 89 N.Y.2d 915 (1996).

In the end, Mr. Cardaci has not met his burden in response to defendants' showing that they are entitled to judgment as a matter of law. This Court granted Mr. Cardaci many adjournments--to complete discovery and to oppose this motion-- and despite more than ample time, Mr. Cardaci has come up with absolutely nothing to support his allegations.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 24, 2007

ENTER



Hon. Eileen Bransten

FILED
JUN 01 2007
NEW YORK
COUNTY CLERK'S OFFICE