

**Bloch v Cantor**

2007 NY Slip Op 31715(U)

June 15, 2007

Supreme Court, New York County

Docket Number: 0100594/2006

Judge: Eileen Bransten

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

PRESENT: BRANSTEN  
Justice

PART 6

BARBARA BLOCH

INDEX NO. 100594/06

MOTION DATE 5-15-07

MOTION SEQ. NO. 2

MOTION CAL. NO. \_\_\_\_\_

- v -

ARTHUR MILLMAN M.D.

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

**FILED**

Upon the foregoing papers, It is ordered that this motion

JUN 20 2007

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 6-15-07

Eileen Bransten  
HON. EILEEN BRANSTEN J.S.C.

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  
BARBARA BLOCH and MYRON BLOCH,

Plaintiffs,

-against-

Index No. 100594/06  
Motion Date: 5/15/07  
Motion Seq. No.: 02

FRED CANTOR, M.D. and MANHATTAN CENTER  
FOR FACIAL and RECONSTRUCTIVE SURGERY,

Defendants.

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

Pursuant to CPLR 3212, defendant Fred Cantor, M.D. (“Dr. Cantor”) moves for summary judgment dismissal of the action commenced against him by plaintiffs Barbara Bloch and Myron Bloch (“Plaintiffs”). Plaintiffs oppose the motion.

Background

On May 20, 2003, Barbara Bloch (“Ms. Bloch”) discussed potential plastic -surgery procedures, including a blepharoplasty (surgical repair of the eyelid), with Dr. Arthur Millman (“Dr. Millman”), an ophthalmologist who specializes in plastic surgery. Affirmation in Support (“Supp.”), at ¶ 11; Affirmation in Opposition (“Opp.”), at ¶ 5. During that consultation they discussed different forms of anesthesia. Dr. Millman recommended monitored anesthesia care (“M.A.C.”) sedation (also known as conscious sedation), which is given intravenously by an anesthesiologist. Supp., at ¶ 11. Dr. Millman explained that he would administer a local nerve block to the area being worked on and that

Dr. Cantor, if available, would be the anesthesiologist during the procedure. *Id.*, at ¶ 12.

Ms. Bloch chose M.A.C. sedation for her procedure. *Id.*

On August 7, 2003, Ms. Bloch presented for a four-lid blepharoplasty and a peri-umbilical abdominal fat transfer to nasal labial folds. Supp., at ¶ 13; Affirmation in Opposition (“Opp.”), at ¶ 5. Dr. Millman discussed the procedures, including anesthesia care. Dr. Cantor met with Ms. Bloch before the surgery as well. Supp., at ¶ 14. He advised her that the M.A.C. sedation would make her comfortable and relaxed and that she would be arousable during surgery and able to respond commands. *Id.*

Dr. Cantor took Ms. Bloch’s medical history and consent for anesthesia was obtained and reviewed by him. Supp., at ¶ 14.

Dr. Cantor administered conscious sedation to Ms. Bloch. Subsequently, Dr. Millman provided local anesthetic via a needle in Ms. Bloch’s eye socket. Opp., at ¶ 5.

Dr. Cantor saw Ms. Bloch in the recovery room post operatively. He had no further contact with her. Supp., at ¶ 15.

A few days after the surgery, it was discovered that Ms. Bloch sustained a perforation injury to the retina of the left eye. Opp., at ¶ 6. She suffers from permanent vision loss in her left eye. *Id.*

In June 2004, Ms. Bloch and her husband commenced a medical malpractice action against Dr. Millman (Index Number 108505/04). Supp., at ¶ 3. In January 2006, plaintiffs

commenced this second action, this time naming Dr. Cantor and Manhattan Center for Facial and Reconstructive Surgery (a professional corporation that Dr. Millman is affiliated with) as a defendants.\*

Dr. Cantor now moves for summary judgment dismissal of the complaint as against him. In support of his motion, he submits an affidavit from Alexander Nacht, M.D. (“Dr. Nacht”), a New York licensed physician who is board certified in anesthesiology. Supp., Ex. Q. Based on the medical records, deposition testimony and his “professional knowledge and experience in the area of anesthesia,” Dr. Nacht states that the medications administered by Dr. Cantor in the course of sedation “are all commonly used and well recognized as acceptable medications to accomplish the conscious sedation chosen by the patient.” Supp., Ex. Q. He opines:

“Dr. Cantor appropriately used a 20 gauge IV in the right arm, and the patient had the appropriate monitoring by EKG, pulse oximetry and blood pressure. Vital signs were properly monitored and recorded by Dr. Cantor throughout the entire procedure.

\* \* \*

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\* In an Order dated September 19, 2006, this Court explained that the two cases had “already been consolidated.” Supp., Ex. E. It appears, however, that the consolidation was never processed; thus, this Decision and Order is issued under Index Number 100594/06. The parties to both actions had an opportunity to submit papers on this motion. This Decision and Order will, moreover, consolidate the actions for trial.

“It is within the standard of care for the Anesthesiologist to communicate with the surgeon that the Anesthesiologist believes the patient is sedated for the procedure. At that point, the surgeon will make his own assessment whether to proceed with the local nerve block injection by conducting his own tests.

“This practice was followed here, where Dr. Cantor advised Dr. Millman when he believed the patient was sedated after he assessed the patient by appropriately observing her and trying to elicit a response by calling her name. After his assessment and not receiving a response from the patient, he appropriately believed he achieved the desired result.

“Thereafter, Dr. Millman performs his own tests such as palpating the patient’s rims and touching her with the needle; he did not get any reaction from the patient. It is the surgeon who then decides after completing his own assessment, when to proceed with the needle for the local nerve block injections.

“It is not uncommon for the patient to have a reflexive reaction to the needle. If this occurs, the anesthesiologist may administer additional sedation, but it is not a deviation from the standard of care to do so. There is no evidence on Dr. Cantor’s anesthesia record of his administration of any additional medication, which he would have noted. The anesthesiologist is not responsible to guarantee a patient will not move. It is the anesthesiologist’s duty to make the patient comfortable, to monitor vital signs and to intervene if there is a problem with vital signs.

“\* \* \* [Ms. Bloch] claims she sustained penetrating trauma to the left eye during blepharoplasty surgery by Dr. Millman; ocular perforation in the left eye resulting in endophthalmitis and vitreous membrane left eye requiring further surgery. The needle used by Dr. Millman in advancing his local nerve block allegedly caused these injuries.

“Plaintiffs allege in the bill of particulars that these injuries are caused either by *inter alia*, surgery, injectable anesthesia, and failure to protect plaintiff’s ocular anatomy during the administration of the anesthesia and/or performance of surgery, none of which was performed or administered by Dr. Cantor. It is my opinion based upon a reasonable degree of medical certainty

that Dr. Cantor's decision, plan and administration of intravenous sedation including the dosages used, was well within accepted standards of medical practice for this medical procedure, and that no act or omissions on his part, caused or contributed to the patient's alleged injuries."

Supp., Ex. Q.

In opposition to Dr. Cantor's motion, Plaintiffs point out that, at his deposition, Dr. Millman testified that "it's highly likely" that the perforation was related to the surgery. Opp., Ex. A., at 94. More specifically, Dr. Millman stated that if a needle perforated the retina, it "most likely would have done so because of an unexpected perioperative event at that time." *Id.*, at 115. Dr. Millman maintained that he did not perforate Ms. Bloch's eye with the needle; however, "if the needle perforated the eye, it's because of a perioperative event, the eye moving, the patient moving, the head moving, the table moving, the room moving, the anesthesia moving." *Id.*, at 118.

Plaintiffs further point out that Dr. Millman's account of the events differs dramatically from Dr. Cantor's. They establish that Dr. Millman recalls that "there was a head reflex movement" and that Dr. Cantor told him to "hold up, and he gave her more medicine." Opp., Ex. A, at 126. Plaintiffs set forth that Dr. Millman remembers waiting for more sedation before advancing the needle. Plaintiffs further demonstrate that Dr. Cantor does not recall Ms. Bloch's head moving up or down or the administration of any additional anesthesia. Opp., at ¶ 16.

Plaintiffs argue that since the perforation resulted from surgery and only two physicians--one being Dr. Cantor--were present at the time, summary judgment should be denied. Opp., at ¶ 11. They further contend that Dr. Cantor's account of the surgery and Dr. Millman's recollection of the procedure "cannot both be correct." *Id.*, at ¶ 17. The issues upon which the testimony differs, Plaintiffs maintain, "go directly to the heart of the alleged malpractice; they are material and must be resolved by a fact finder at trial." *Id.*, at ¶ 18. Plaintiffs urge that "there are material fact issues to be tried as to whether the care rendered by [Dr. Cantor] constituted departures from good and accepted standards of medical practice and whether those departures were a substantial factor in causing the injuries sustained by [Ms. Bloch]." *Id.*, at ¶ 26.

On reply, Dr. Cantor asserts that in response to his showing that there was no malpractice, Plaintiffs have failed to establish that there was any departure from accepted practice. Reply Affirmation ("Reply"), at ¶¶ 12, 18-24.

Dr. Cantor is correct and his summary judgment motion is granted.

#### 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 defendant’s 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).

Plaintiffs' action against Dr. Cantor must be dismissed because they failed to submit any expert evidence of medical malpractice in response to Dr. Cantor's showing. By submitting the detailed affirmation of Dr. Nacht, which sets forth that there were no departures from accepted anesthesia practice and states that if a patient has a reflexive reaction to a needle, the requirement for additional sedation does not give rise to any deviation from the standard of care, Dr. Cantor made a *prima facie* showing of entitlement to judgment.

Reliance on Dr. Millman's deposition testimony to rebut that showing is unavailing. Dr. Millman never testified that Dr. Cantor departed from accepted practice in any way. Even accepting Dr. Millman's account as true, there is no indication that Dr. Cantor committed malpractice or that he caused Ms. Bloch's injury.

Contrary to Plaintiffs' assertion, they have not demonstrated that there are any questions of material fact as to whether Dr. Cantor departed from accepted medical practice. They have not submitted any expert medical evidence establishing that if Ms. Bloch's head moved and Dr. Cantor provided additional sedation, his conduct constituted a deviation from the applicable standard of care. *See, 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, Plaintiffs have not met their burden and Dr. Cantor is entitled to judgment as a matter of law. Although there are differing factual accounts of what happened during the operation, there is absolutely no evidence that these differences are material with respect to whether Dr. Cantor committed malpractice.

Accordingly, it is

ORDERED that Dr. Cantor's motion for summary judgment is granted and the complaint is dismissed solely as against him and the Clerk is directed to enter judgment in his favor; and it is further

ORDERED that the action shall continue as to defendant Manhattan Center for facial and Reconstructive Surgery; and it is further

ORDERED that this action is consolidated with the action commenced under Index Number 108505/04, and the consolidated action, which will proceed under Index Number 108505/04, shall bear the following caption:

BARBARA BLOCH and MYRON BLOCH,

Plaintiffs,

--against--

ARTHUR MILLMAN, M.D. and MANHATTAN CENTER FOR FACIAL and RECONSTRUCTIVE SURGERY,

Defendants.

JUN 20 2007

COUNTY CLERK'S OFFICE  
NEW YORK

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that a copy of this Order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby respectfully directed to mark the court's records to reflect the consolidation

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
June 15, 2007

ENTER



Hon. Eileen Bransten