SHORT FORM ORDER

INDEX No. 05-24644
CAL. No. 06-02811-DM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-30-07
ADJ. DATE 5-21-07
Mot. Seq. # 001 - MG; CASEDISP

BRYAN McELROY,

Plaintiff,

- against -

CRAIG L. LEVINE, D.D.S., P.C.,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 14 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 15-20 ; Replying Affidavits and supporting papers 21-22 Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion by defendant Craig L. Levine, D.D.S., P.C. for summary judgment dismissing plaintiff's complaint is granted.

The complaint alleges causes of action sounding in dental malpractice and lack of informed consent. Plaintiff, Bryan McElroy, alleges that defendant Craig Levine, D.D.S., an oral surgeon, rendered dental services to him from August 25, 2004 through September 2004, and was negligent in improperly and incompletely performing an Apicoectomy Anterior and Retrograde Amalgam on tooth #7 under general anesthesia with local anesthesia, in failing to diagnose, treat and remedy nerve damage caused by the negligently performed root canal procedure, resulting in numbness in the upper gum area and loss of taste. Plaintiff also alleges Dr. Levine did not provide an informed consent in that he failed to apprise plaintiff of the risks, hazards and/or complications involved in the root canal surgery. As a result, plaintiff claims permanent damage to his teeth, bone and surrounding nerves and tissue.

Defendant asserts there were no departures from the appropriate medical/dental standards of care in administering dental care to plaintiff and that plaintiff was fully apprised of the foreseeable risks and complications of apicoectomy. Defendant seeks summary judgment dismissing the complaint on both causes of action.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, defendant has submitted, inter alia, copies of the pleadings, bill of particulars; copy of the transcripts of the examinations before trial of plaintiff and defendant; incomplete report of the independent medical examination of plaintiff at Stony Brook University Hospital; copies of uncertified dental records of plaintiff; and the affirmation of Mark Swerdloff, D.D.S.

Defendant's expert, Mark Swerdloff, D.D.S., set forth with a reasonable degree of medical certainty in his affirmation that there is no basis for the claims of malpractice and lack of informed consent as to Dr. Levine, and the injuries claim by plaintiff could not be caused by the apicoectomy performed by Dr. Levine on August 27, 2004.

With respect to plaintiff's claim of lack of informed consent, Dr. Swerdloff sets forth that the informed consent form signed by Mr. McElroy specifically states that the possible complications include "temporary or permanent numbness and tingling of the lip, chin, tongue, gums, cheek or teeth." It is Dr. Swerdloff's opinion based upon a reasonable degree of medical certainty that Dr. Levine properly obtained informed consent from Mr. McElroy prior to performing the apicoectomy on tooth #7. Mr. McElroy admitted he signed the consent form on August 27, 2004, and Dr. Swerdloff states this form is an acceptable form of informed consent for this procedure and conforms to accepted standards of dental care. Dr. Levine's discussions with Mr. McElroy, as set forth in the record as to the risks and benefits of the proposed procedure, were proper and conformed to accepted standards of dental practice.

Based upon the foregoing, defendant Dr. Levine has demonstrated prima facie entitlement to summary judgment on the issue of lack of informed consent.

With respect to plaintiff's claim of medical malpractice, Dr. Swerdloff opines with a reasonable degree of dental certainty that all care provided by Dr. Levine before, during and after the apicoectomy of tooth #7 was within accepted standards of dental care.

Defendant's expert sets forth that Mr. McElroy testified that he returned for a post operative visit to Dr. Levine two days after the surgery and made no complaints at the time of this visit, which is significant in that Mr. McElroy testified that the pain and numbness did not develop for another two days after that. Dr. Swerdloff sets forth that when patients develop numbness in any part of the oral cavity due to trauma of a nerve during dental surgery, the numbness becomes evident to the patient shortly after surgery, and within hours after the injection of local anesthesia. In that plaintiff's numbness did not become apparent until four days after surgery, it is Dr. Swerdloff's opinion within a reasonable degree of dental certainty that the incision made by Dr. Levine during the apicoectomy did not cause the plaintiff's complaints of bilateral gum numbness that became apparent to plaintiff four days after the surgery.

Dr. Swerdloff further set forth that any time an area is incised during a surgical procedure, there will be some degree of loss of sensation due to incising superficial sensory nerves in the surgical area, and the loss of sensation is limited to the area that is incised. During the independent dental examination performed by Dr. Swerdloff on August 9, 2006, Mr. McElroy reported a history of numbness from the right to the left canine teeth on the lip side of the upper jaw including teeth # 5, 6, 7, 8, 9, 10, 11 and 12 following the surgery, and when tested for sharp and dull, gave inconsistent responses. The surgical scar does not extend beyond the midline of the upper jaw to the left side of the upper jaw where teeth #9, 10, 11, and 12 are located. The post operative x-rays reveal the presence of undisturbed bone to the right of the midline of the upper jaw adjacent to the area curetted by Dr. Levine, confirming that the surgical area did not extend to the midline of the upper jaw, and the surgical area was confined to the right side of the midline of the upper jaw. It is therefore Dr. Swerdloff's opinion within a reasonable degree of dental certainty that the bilateral loss of gum sensation reported by Mr. McElroy cannot be attributed to the apicoectomy performed by Dr. Levine.

Dr. Swerdloff states that the gum to the right of the midline of the upper jaws is supplied by a completely different anterior superior alveolar nerve than the gums to the left of the midline of the upper jaw. Since these sensory pathways originate in either the right or left side of the brain and subsequently separate into distinct nerves that innervate either the left side of the maxillary gingiva or the right side of the maxillary gingiva, bilateral gum numbness can only be caused by trauma or insult that occurs in both sides of the brain or by incising both the anterior superior alveolar nerve that supplies the left maxillary gingiva and the anterior superior alveolar nerve that supplies the right maxillary gingiva. In that the incision did not extend beyond the upper jaw midline, the claimed injury of bilateral gum numbness cannot have been caused by the surgery performed by Dr. Levine.

With regard to plaintiff's claim of loss of taste, defendant's expert states taste sensation in the anterior part of the tongue is innervated by the chorda tympany nerve which is a branch of the 7th cranial nerve. Taste sensation in the posterior part of the tongue is innervated by the glossopharyngeal nerve which is the 9th cranial nerve. The anatomic location of these nerves that innovate taste are not in any proximity to the location of the apicoectomy of tooth # 7 or the local anesthetic injection sites, and therefore, could not have been affected by any part of the surgical procedure or local anesthetic injections performed by Dr. Levine.

Based upon the foregoing, defendant Dr. Levine has demonstrated prima facie entitlement to summary judgment on plaintiff's medical malpractice claim.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see,* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious,*** 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see,* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York,*** 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

In opposition, plaintiff has submitted, inter alia, copies of uncertified medical records and reports, and the affirmation of an expert witness with the name redacted. To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see,* ***Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.,*** 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.,*** 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

A redacted version of an expert affidavit lacks evidentiary value (***Marano v Mercy Hospital,*** 241 AD2d 48, 670 NYS2d 570 [2nd Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (***Marano v Mercy Hospital,*** supra). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (***Rubenstein v Columbia Presbyterian Medical Center,*** 139 Misc.2d 349, 527 NYS2d 680 [NYCounty 1988]). A copy of the affirmation with the expert's name and signature have not been provided to this court under separate cover. Accordingly, plaintiff's expert affirmation is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (***Rose v Horton Medical Center,*** 29 AD3d 977, 816 NYS2d 174 [2nd Dept 2006]). However, even if plaintiff were to provide a signed and unredacted expert report to this court, it is determined that plaintiff's expert's report is conclusory and fails to demonstrate departures from accepted dental or medical standards and that the consent was qualitatively insufficient, and has thus failed to raise a triable issue of fact.

Notably, plaintiff's expert states Dr. Levine failed to prepare an appropriate operative report with respect to whether or not defendant utilized the appropriate techniques of an injection as well the general anesthesia given to Mr. McElroy. However, plaintiff's expert does not set forth how this alleged departure in charting proximately caused plaintiff's injury. Therefore no factual issue has been raised concerning Dr. Levine failing to prepare an appropriate operative report.

Plaintiff's expert sets forth that the operative report does not indicate the modality of the local anesthetic, and that if Dr. Levine administered a supraperiosteal injection, it would have been contraindicated in the presence of an infection. However, plaintiff's expert does not set forth a medical basis for his opinion as to why a supraperiosteal injection would have been contraindicated, does not establish that the site was infected, and how the supraperiosteal injection was the proximate cause of the numbness, pain or impaired taste. This opinion is therefore deemed conclusory and unsupported by any medical basis.

Plaintiff's expert also states that if a nerve block were administered instead of a supraperiosteal injection, this may have been a departure from appropriate standards of care as damage to the greater palantine nerve is not an acceptable risk associated with an apicoectomy. However, plaintiff's expert does not indicate whether injury to the palantine nerve is an acceptable risk associated with a nerve block. Plaintiff's expert does not give a medical basis for his opinion, does not set forth the location of the palantine nerve in relation to the area of the surgery, or how the palantine nerve could become damaged during apicoectomy or nerve block, and whether such injury is a commonly accepted and known risk of the nerve block procedure. Plaintiff's expert does not indicate that the palantine nerve is associated with sensation in the palate, pain or numbness. Therefore, plaintiff's expert has raised no factual issue to preclude summary judgment on this issue as his reference to the palantine nerve is speculative and conclusory and without an articulated medical basis.

Plaintiff's expert takes issue with respect to Dr. Swerdloff's conclusion that immediate symptoms would have been appreciated by plaintiff if Dr. Levine had caused damage to plaintiff's nerve, however, when plaintiff began noticing the numbness does not go to the issues of departure or causation, and thus raises no factual issue in that regard.

Plaintiff has not demonstrated that the procedure or the injection was the proximate cause of the injury as plaintiff's expert has not set forth the standards, techniques or procedures which should have been utilized by defendant and how defendant departed from the same. Nor has plaintiff's expert set forth any medical basis to support proximate cause of any alleged departures from acceptable standards of dental care resulting in the injuries plaintiff claims to have suffered.

Based upon the foregoing, plaintiff has raised no factual issues with regard to departures from accepted standards of dental care proximately causing plaintiff's claimed injuries.

In order to establish a prima facie case for failure to procure a patient's informed consent to a procedure, the plaintiff, pursuant to N.Y. Public Health Law §2805-d(2), must establish three elements. Firstly, the doctor failed to apprise the plaintiff of a reasonably foreseeable risk of the procedure. Secondly, having been informed of the risks and alternatives, the plaintiff must prove that a reasonable person in the plaintiff's condition would have opted against it, and thirdly, the plaintiff must prove that the procedure was the proximate cause of the injury insufficient (***Romano v Colen,*** 305 AD2d 575, 759 NYS2d 353 [2nd Dept 2003]).

Public Health Law § 2805-d[1] provides that lack of informed consent means the failure of the person provicing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric

practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation. Public Health Law § 2805-d[2] provides that the right of action to recover for medical, dental, or podiatric malpractice based on lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body. Public Health Law § 2805-d[3] provides for a cause of action therefor it must also be established that a reasonable prudent person in the patient's position would not have undergone the treatment of diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. (**see, *Eppel v Fredericks***, 203 AD2d 152, 610 NYS2d 254 [1st Dept 1994]). However, the injured party is not required to adduce expert medical testimony to the effect that a reasonably prudent person in his position would not have undergone such an operation if he or she had been fully informed of such a risk (***Osorio v Brauner,*** 242 AD2d 511, 662 NYS2d 488 [1st Dept 1997]).

Plaintiff's expert opines there was an insufficient executed informed consent and sets forth that the consent does not state the risks and benefits of an apicoectomy and is merely a standard "boiler plate' paragraph which plaintiff, with only a tenth grade education, could not and would not have fully understood the extent of the risks inherent with the surgical procedure. However, plaintiff's expert has not set forth the proper standard for a consent for the apicoectomy, including the risks and benefits that should have been included. Plaintiff testified there was no part of the consent form he did not understand, but he also testified that he did not read it word for word and asked no questions after he read the consent. He further testified that if he did not understand, he would ask. Plaintiff also testified when he followed up with Dr. Levine the day after being seen by Dr. Duane, he was advised by Dr. Levine that there was pulp left in the tooth in which he had a previous root canal, and that he would have to make an incision and chip away the bone. Plaintiff could not remember if Dr. Levine spoke to him about anesthesia and the risks involved with the surgery. He remembered Dr. Levine said the surgery would make it feel better. Therefore, plaintiff's expert's opinion that the consent was insufficient and that plaintiff could not have understood it is deemed conclusory and unsupported by the record.

Plaintiff's expert also states that even if the informed consent was fully understood by plaintiff, which includes the possibility of complications including "permanent numbness of the lip, chin, tongue, gums, cheek or teeth", it does not mention numbness of the palate. However, plaintiff's expert does not indicate whether or not the numbness of the palate is a risk of the surgery for which plaintiff should have been informed. Therefore, plaintiff's expert's opinion is conclusory and unsupported.

Based upon the foregoing, plaintiff's expert has failed to set forth what a proper consent form for this procedure would contain and thus how the consent obtained by defendant was insufficient. Plaintiff's expert, therefore, fails to qualitatively set forth the standard and the basis for his opinion, and conclusively states the consent was insufficient or that plaintiff could not have understood it. Therefore, no factual issue has been raised by plaintiff on this issue.

Plaintiff's expert also states the consent was executed while plaintiff was in severe pain and under the influence of Vicodin, a mind altering medication. Plaintiff's expert sets forth that the consent was signed two days before surgery, however, it is dated August 27, 2004, the day of surgery. Neither plaintiff's supporting affidavit, the bill of particulars, the complaint, plaintiff's testimony in his examination before trial, or plaintiff's affidavit, or plaintiff's expert, support the claim that plaintiff was

under the influence of Vicodin at the time the consent was obtained. Plaintiff testified the surgery was performed on August 27, 2004, that he had no conversation with Dr. Levine prior to surgery, and did not recall any discussion with his staff either, but he also testified Dr. Levine told him he would put him out for the surgery. He signed a consent for treatment and anesthesia on August 27, 2004. Dr. Levine's record indicates anesthesia was discussed. The surgical consent form submitted as part of Dr. Levine's office record indicates on August 27, 2004 that plaintiff, in response to the question "Are you taking any medication(s) including non-prescription medication?" answered, "Synthroid." Plaintiff does not indicate he took Vicodin prior to coming in for surgery and there is no testimony in the record to support the same. Plaintiff's expert's opinion is therefore speculative, conclusory and unsupported by the record.

Based upon the foregoing, and viewing the testimony in the light most favorable to plaintiff, the court concludes that plaintiff has failed to set forth any prevailing standards and practices existing at the time of the surgery and how defendant departed from those standards in obtaining plaintiff's consent. Plaintiff has not established that the consent was qualitatively insufficient (***Romano v Colen,*** supra). Nor has plaintiff demonstrated the material risks, benefits and alternatives to the surgery which a reasonable medical practitioner "under similar circumstances would have disclosed, in a manner permitting [the plaintiff] to make a knowledgeable evaluation," and that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed." (***Romano v. Colen,*** supra). Nor has plaintiff established what the reasonably foreseeable risks of the procedure were. Plaintiff's expert has merely set forth in a conclusory manner that the consent form was not sufficient. Plaintiff's expert has not set forth a medical basis or the prevailing standard for what should have been included in the consent.

Plaintiff has not demonstrated that having been informed of the risks and alternatives that a reasonable person in plaintiff's condition would have opted against it. Plaintiff has not set forth in the complaint, the bill of particulars, in his affidavit or deposition testimony, that he would not have had the surgery if he knew he would suffer the claimed injuries (*see,* ***Dodes v North Shore University Hospital,*** 149 AD2d 455, 539 NYS2d 954 [2nd Dept 1989]).

Based upon the foregoing, plaintiff has failed to raise a triable issue of fact to preclude summary judgment on his claim of lack of informed consent.

Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated JUL 30 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**