

Berger v Bronsky

2008 NY Slip Op 30724(U)

March 6, 2008

Supreme Court, New York County

Docket Number: 0115702/2006

Judge: Stanley L. Sklar

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

PRESENT: Hon. Stanley L. Sklar
Justice

PART 29

Berger

- v -

Bronshteyn et al

INDEX NO. 115 702 / 06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated for
disposition with motion 002 and is hereby

**DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/6/08

[Signature]
STANLEY L. SKLAR, s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 29

-----X
 BRENDA LEANNE BERGER,

Plaintiffs,

Index No.: 115702/06

-against-

DR. MARK BRONSKY, DR. DAVID ZADICK, and DR.
 JORGE MATOS,

Defendants.

-----X
SKLAR, J.:

Motions 001 and 002 are hereby consolidated for disposition.

Defendant orthodontist, Dr. Mark Bronsky, (Motion 002) and co-defendant orthodontist, Dr. Jorge Matos, (Motion 001) move for orders dismissing the lack of informed consent cause of action as to them. Motion 002 is one day late and Motion 001 is four days late. In light of a lack of objection from plaintiff's counsel and in view of the de minimus lateness, I shall entertain the applications.

Berger who was in her early 30's at the time in issue had a right permanent upper canine tooth that had never emerged, and instead still had the right upper canine baby tooth. Berger's childhood dentist had previously informed her that she could leave the baby tooth in place or if she wanted she could have orthodontic treatment to pull down the adult tooth, telling her that "plenty of adults have baby tooth [sic]." Berger EBT pp 109-110 Berger then in about 1999 came under the general dental care of co-defendant Dr. David Zadick. At the time Berger was allegedly satisfied with the way her teeth appeared and had no concerns about the baby tooth. Id 106; But see Brodsky EBT pp 34-35 Dr. Zadick informed Berger shortly after she began seeing

him that the baby tooth would not last forever, that she needed to consider pulling that tooth and that she should see Dr. Bronsky to get his opinion about the situation. Id 107-108

Berger then went to see Dr. Bronsky in July 2002, and he told her that she should have braces put on in an attempt to pull down the impacted permanent canine, a process that would also involve pulling out the baby tooth. Dr. Bronsky claims that Berger was also given the option of having the baby tooth and impacted permanent tooth removed and having braces put on to make space for an eventual implant. See Bronsky EBT, pp 42-44; But see Berger EBT, pp 122-123

Dr. Bronsky, who did not recall Berger's baby tooth being mobile (Bronsky EBT, p 35), and who testified that "[t]here are plenty of baby teeth that last an entire lifetime for the patient" (Id 38), had no recollection of discussing leaving the baby tooth in place (Id 38). The consent form which Dr. Bronsky ultimately had Berger sign on October 31, 2000 did not list doing nothing as an option. Meanwhile initially Berger rejected the suggestion of braces because she was concerned with the aesthetics in light of the fact that she was still single and because of her job. Ultimately Dr. Zadick told Berger that he had spoken to Dr. Bronsky and that they "felt strongly" that the best course of treatment was to have braces in an effort to bring down the impacted tooth so that she would have her natural teeth when she was 60. Berger EBT, p 120

Berger ultimately decided to go ahead with the plan to try to bring down her impacted permanent canine after it was determined that the braces could initially be placed on the side of her teeth closest to her tongue so as to minimize the visibility of the braces. Dr. Bronsky worked out a payment plan and installed braces on the lower teeth on October 31, 2000. On November 27th co-defendant Dr. Jorge Matos, who was employed by Dr. Bronsky, installed braces on

Berger's upper teeth. Orthodontic treatment continued for about five years with Berger being seen equally by Drs. Bronsky and Matos and on occasion by other orthodontists who evidently worked for Dr. Bronsky. See Berger EBT, pp 114-115 Dr. Matos testified that from his recollection the baby tooth was not mobile and that he had no opinion on how long such a tooth could stay in Berger's mouth. Matos EBT, p 112 Dr. Bronsky testified that he worked together with Dr. Matos "on this" (Bronsky EBT, p 106), that "[a]ll of the films are always ordered by myself, or Jorge" (Id 112) and that he and Matos conferred "on every patient, every day" (Id 128).

Ultimately another orthodontist in the office became concerned that Berger, who initially presented to Dr. Bronsky with root blunting, was experiencing root resorption, and treatment was terminated in September 2005. Berger ultimately lost several teeth and other upper teeth were at risk allegedly as a result of the orthodontic treatment. She then commenced this action against Drs. Bronsky, Zadick and Matos.

Drs. Matos and Bronsky now seek summary judgment dismissing the lack of informed consent cause of action. As movants they have the burden of prima facie establishing their entitlement to the relief sought. Dr. Bronsky's expert's (the expert's name was provided to all counsel during oral argument held via a conference call) affirmation is provided. The expert's affirmation is wholly bald and conclusory and is inadequate to prima facie establish the adequacy of the consent given since it does not state what specific risks, alternatives and benefits had to have been explained.

Dr. Matos' counsel simply asserts that Dr. Matos must be granted summary judgment because he was entitled to rely on the fact that an informed consent was obtained by Dr. Bronsky,

citing Perez v Park Madison Labs (212 AD2d 271, lv. to app. den., 87 NY2d 896). However in that case it was established that the healthcare providers who started the medical procedure on one day which another physician later completed on another day had obtained a full and proper informed consent to the procedure. As noted in Perez (supra at 277) the second physician's reliance on the consent obtained by the earlier medical provider "came with the risk" that the second provider would be held liable for any deficiency in the consent. Since Dr. Bronsky did not prima facie establish his entitlement to summary judgment neither has Dr. Matos.

In addition plaintiff's expert opined in his affidavit¹ that each of the movants was required to inform Berger of the option of doing nothing, which option the expert characterized as "the better choice", in light of the patient's lack of concern with the aesthetics of retaining the baby tooth and the risks that the orthodontic approach presented, which risks according to Berger, Dr. Bronsky undercut by telling her that the orthodontic approach would work. See Berger EBT, p 122 In any regard, plaintiff's expert also opined that the risk that orthodontics might fail should have been but was not fully explained to the patient because Dr. Bronsky allegedly downplayed the risk and told Berger that the orthodontic approach would work and that the tooth would be pulled down within 24 months.

In light of the foregoing the motions are denied.

Settle order.

Dated: March 6, 2008
60 Centre Street
New York, NY



J.S.C.

STANLEY L. SKLAR

¹Dr. Bronsky's attorney takes issue with the form of plaintiff's expert's "affirmation". However the expert provided an affidavit, not an affirmation.