

Dym v Burniewicz

2008 NY Slip Op 31010(U)

March 25, 2008

Supreme Court, Richmond County

Docket Number: 0101800/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 101800/06
Motion No.: 3**

CAROL KENNEKE DYM,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**ANTHONY M. BURNIEWICZ, D.P.M.,
PHYLLIS N. MERLINO, D.P.M., and
VICTORY PODIATRY ASSOCIATES, P.L.L.C.,**

Defendants.

The following items were considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant, Anthony M. Burniewicz, D.P.M. (“Dr. Burniewicz”), seeks a motion for summary judgment pursuant to CPLR §3212, dismissing the plaintiff’s complaint in its entirety with prejudice.

This is a claim for personal injuries sustained by plaintiff Carol Kenneke Dym (“Ms. Dym”) as a result of an alleged podiatric malpractice. Plaintiff first saw defendant in 2004 for podiatric complaints including a long-standing problem with a bunion in her left foot. Dr. Burniewicz recommended a bunionectomy so as to relieve the pain and to permit her to wear shoes normally. Plaintiff alleges that defendant Dr. Burniewicz, and co-defendant Dr. Phyllis Merlino, improperly performed an Austin bunionectomy on November 29, 2004, making further surgery necessary on December 13, 2004, and leaving plaintiff with an alleged permanent deformity. Plaintiff alleges that defendant either mistakenly severed the extensor hallucis lungus tendon during the surgery or he intentionally scored it to perform a lengthening procedure but inadequately sutured it afterward.

In support of her claim, plaintiff presents the affidavit of an undisclosed expert who interpreted Dr. Burniewicz reports and depositions. Plaintiff's expert concludes that Dr. Burniewicz deviated from accepted standards of podiatry by using inadequate suturing of the EHL causing a failure of the tendon to be properly repair, which necessitated a second procedure. As a result, plaintiff's expert opines that the big toe (hallux) has become abnormally bent upward which makes normal ambulation difficult. In plaintiff's expert's opinion, the second operation would have been avoided if there had been adequate suturing during the initial procedure.

Defendant, Dr. Burniewicz, through his expert, Dr. Caprioli, claims that all of the care and treatment rendered by Dr. Burniewicz was well within good and accepted podiatric practice and his treatment did not cause the plaintiff any harm.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."¹ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ A moving party on a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case.⁴

Here, in reviewing the parties' competing contentions, there are issues of fact as to whether Dr. Burniewicz deviated from good and accepted podiatric practice during plaintiff's first surgery on

¹CPLR §3212[b].

²*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [App Div 2nd Dept 1990].

³*American Home Assur. Co., v. Amerford Intl. Corp.*, 200 AD2d 472 [App Div 1st Dept 1994].

⁴*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].

November 29, 2004. More specifically, there is a triable issue as to whether Dr. Burniewicz improperly sutured the ends of the EHL tendon together, which allegedly resulted in a second surgery. Therefore, defendant's motion for summary judgment, is denied.

As to defendant's motion for summary judgment for the informed consent cause of action, the motion is granted. Plaintiff's failure to challenge the defendant's prima facie showing of entitlement to dismissal of the lack of informed consent claim constitutes an abandonment and waiver of that cause of action.⁵ Furthermore, plaintiff presents no evidence that defendant failed to advise her of a reasonably foreseeable risk of the procedure and that a reasonable person in plaintiff's condition would not have undergone the procedure and that the procedure was the proximate cause of her injury.⁶

Accordingly, it is hereby:

ORDERED, that defendant Anthony M. Burniewicz, D.P.M.'s motion for summary judgment pursuant to CPLR §3212, dismissing the plaintiff's complaint in its entirety with prejudice, is denied; and it is further

ORDERED, that plaintiff's cause of action for failure to receive informed consent, is dismissed; and it is further

ORDERED, that all parties appear at DCM 3 on **Thursday, March 27, 2008 at 9:30AM** for a compliance conference.

ENTER,

DATED: March 25, 2008

Joseph J. Maltese

⁵*See, Kane v Triboro Bridge & Tunnel Auth.*, 8 AD3d 29 [2d Dept 2008].

⁶Public Health Law §2805(d)(2).

Justice of the Supreme Court