

Accardo v Heller

2008 NY Slip Op 31705(U)

June 11, 2008

Supreme Court, Nassau County

Docket Number: 2579-06/

Judge: Ute W. Lally

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SCAW

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

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Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

GIOVANNI ACCARDO,

Plaintiff(s),

MOTION DATE: 4/28/08
INDEX No.:12579/06
MOTION SEQUENCE NO:1

-against-

CAL. NO.:2007H3485

JOE HELLER, D.M.D.,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... 1-5
- Answering Affidavits..... 6-8
- Replying Affidavits.....
- Briefs:

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing plaintiff's complaint is denied.

This is an action to recover damages for dental malpractice. Plaintiff alleges that the defendant departed from good and accepted dental practice in treating the plaintiff by failing to properly perform a root canal on plaintiff's tooth #10, failing to properly diagnose an infection caused by the root canal and post installation procedure, failing to perform the proper tests to identify the infection, failing to prophylactically prescribe antibiotics before the onset of infection, failing to properly treat the subsequent infection, and failing to obtain plaintiff's informed consent prior to performing the root canal procedure.

It is alleged that the negligent acts occurred on June 8, 2004, June 11, 2004, June 18, 2004, June 28, 2004 and February 1, 2006. As a result of the alleged negligent acts plaintiff claims that he sustained the following damage to root of tooth #10:

- Broken dental implant;
- Improper fitting dental prosthesis;
- Infection;
- Swelling;

- Pain;
- Temporary disfigurement of upper lip;
- Need for subsequent root canal; and
- Need for implant in future.

Defendant seeks summary judgment dismissing the complaint. In support thereof defendant submits (a) his own affidavit and (b) affidavit of Rodney Leibowitz, D.D.S.

"[O]n a motion for summary judgment dismissing the complaint in a medical [or dental] malpractice action, 'the defendant doctor [or dentist] has the initial burden of establishing the absence of any departure from good and accepted medical [or dental] malpractice or that the plaintiff was not injured thereby'" (*Starr v Rogers*, 44 AD3d 646, quoting *Williams v Sahay*, 12 AD3d 366, 368; see *Gargiulo v Geiss*, 40 AD3d 811; *Alvarado v Miles*, 32 AD3d 255, *lv to app granted* 8 NY3d 810, *aff'd.* 9 NY3d 902). "General allegations of medical [or dental] malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical [or dental] malpractice, are insufficient to defeat defendant physician's [or dentist's] summary judgment motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325; see *Kremer v Buffalo Gen. Hosp.*, 269 AD2d 744; *Juba v Bachman*, 255 AD2d 492, 493, *lv to app den.* 93 NY2d 809).

Defendant established his *prima facie* entitlement to judgment as a matter of law through the submission of, *inter alia*, his own expert affidavit, the affidavit of Dr. Leibowitz, and the plaintiff's dental records (*Starr v Rogers*, *supra*; see *Gargiulo v Geiss*, *supra*).

In his affidavit, Dr. Leibowitz states that he is "familiar with the matter by virtue of a review of the pleadings, bill of particulars, records and films from Dr. Heller, records and films from Dr. Donn Jacobs, records and films from Dr. Michelle Hartunian, records and films from Dr. Victor Nannini, the transcript of the deposition of the plaintiff." Dr. Leibowitz further states that:

"[i]t is my professional dental opinion, within a reasonable degree of dental certainty, that all of the care and treatment rendered by Dr. Heller was appropriate and completely within standards of acceptable dental practice, and that none of the care and treatment rendered by him proximately caused or contributed to any injury to the plaintiff.

It is further my professional dental opinion,

within a reasonable degree of dental certainty, that the plaintiff was adequately informed, both from the record and from the fact that the plaintiff had previously had root canal on the adjacent tooth, which subsequently required an apicoectomy procedure, the very same procedure which he ultimately required with respect to the tooth in issue in this matter."

Accordingly, I believe within a reasonable degree of dental certainty, that the defendant Dr. Heller is in no way culpable of dental malpractice or failure to obtain adequate informed consent, and should be dismissed from this matter."

In opposition, plaintiff submits, *inter alia*, the affirmation of an expert board certified in general dentistry. In his affirmation, he states, in pertinent part, that:

"After evaluating the material, I submit this affirmation in opposition to the motion for summary judgment on behalf of defendant Joel Heller, D.M.D., . . . because, in my opinion, to a reasonable degree of medical certainty, Dr. Heller departed from good and accepted standards of dental care in treating the plaintiff Giovanni Accardo and these departures were the proximate cause of plaintiff's injuries, including protracted untreated infection and the need for remedial oral surgery.

* * *

It is further my opinion, to a reasonable degree of medical certainty, that Dr. Heller's departure from the accepted standard of dental practice proximately cause of [sic] plaintiff's injuries, including prolonged infection and attendant pain and suffering, as well as the need for surgical intervention and multiple retreatments of the root canal at tooth #10. This opinion is based upon a review of the relevant records, testimony, and pleadings, as well as my experience in dentistry and the performance of root canal therapy in particular."

The conflicting experts' opinions establish the existence of issues of fact. "Summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert

