

Kubas v Blum

2008 NY Slip Op 32370(U)

August 22, 2008

Supreme Court, Nassau County

Docket Number: 4270-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
MIROSLAV KUBAS AND TARA KUBAS,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 004270/07

MOTION DATE: 7-3-08

SUBMIT DATE: 8-5-08

SEQ. NUMBER - 001

**JOSEPH BLUM, D.D.S. AND JOSEPH BLUM,
D.D.S. d/b/a NEW IMAGES SMILES,**

Defendants.
-----x

The following papers have been read on this motion:

- Notice of Motion, dated 6-9-08.....1**
- Affirmation in Opposition, dated 7-14-08.....4**
- Reply Affirmation, dated 7-28-08.....3**

The motion by the defendant pursuant to CPLR 3212 for summary judgment is granted to the extent that the second cause of action, sounding in lack of informed consent, is dismissed. The motion is otherwise denied.

In this dental malpractice action, the plaintiff Miroslav Kubas alleges in his complaint and bill of particulars that defendant Joseph Blum, D.D.S. is liable for damages on two

grounds.¹ The first is dental malpractice. He contends that Dr. Blum was professionally negligent on November 4, 2005 in that he improperly performed a root canal procedure, and that the plaintiff was harmed by a mandibular block injection² given to him as an anesthetic; in that Dr. Blum failed to recommend an oral surgeon for the root canal, and an appropriate specialist for complaints of parathesia/numbness after the procedure was performed; and in that Dr. Blum failed to provide appropriate post-operative care. The second ground is lack of informed consent for the allegedly harmful injection. The plaintiff claims that as a result of the foregoing, he suffers from nerve damage on the left side of his chin and mouth (numbness/parathesia), and has difficulty in eating, speaking and chewing.

It is undisputed that the plaintiff presented to the defendant on November 4, 2005 for dental services after not having been to a dentist for a dozen years. His complaint was pain on the left side of his mouth. Upon examination, Dr. Blum found significant decay on tooth #19, and performed an emergency pulpectomy, which at his examination before trial (EBT) he identified as removal of pulp tissue where the tissue had become infected. It is clear that as part of the services provided an anesthetic was administered. This was the mandibular block injection. No referral to a specialist was made or discussed. Dr. Blum did not explain nor seek the plaintiff's consent either to the injection or concerning the procedure he performed.

¹ A derivative claim is advanced by Miroslav Kubas's wife, but that claim is not at issue on this motion and thus for present purposes all references are to him and to his causes of action.

² It appears from the record as a whole that more than one injection was involved, but this factor does not serve to alter the claims or the defenses raised.

The plaintiff returned to Dr. Blum on December 13, 2005, January 6, 2006, April 11, 2006 and May 18, 2006. Some seven months after his last visit with Dr. Blum, the plaintiff sought treatment from another dentist, a Dr. Karter, on January 3, 2007. At the time of this visit, Dr. Karter noted that the plaintiff lacked feeling on his chin, and that upon probing the gingiva on the left side of the mouth from the second molar to the cuspid he found no sensation of pain. The present malpractice action was commenced by the filing of a summons and complaint in March, 2007.³

On a motion for summary judgment by a defendant in a dental malpractice action, the movant must demonstrate, *prima facie*, the absence of any departure from good and accepted dental practice, or that the plaintiff was not injured by any departure. *Amodio v Wolpert*, 52 AD3d 1078 (3d Dept. 2008); *Terranova v Finklea*, 45 AD3d 572 (2d Dept. 2007). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the bill of particulars. *Terranova v Finklea, supra*; *see also, Ward v Engel*, 33 AD3d 790 (2d Dept. 2006).

In support of his motion, the defendant presents the affidavit of a dental expert, Allan Kucine, DDS. Based upon his review of dental records and other documents associated with this litigation, including deposition transcripts, Dr. Kucine does not contend that the patient does not suffer from the nerve damage alleged, but that such damage was not caused by Dr. Blum, and that Dr. Blum acted within the standard of care throughout his treatment of the

³ The record also contains an unsigned complaint dated September 2006 in a Queens Civil Court action, in which Dr. Blum alleged that plaintiff had improperly abandoned a home contracting/carpentry job. Neither party has asserted that this has any relevance to the present case, and the presence of this paper thus appears to be of no importance whatsoever.

plaintiff.

Specifically, Dr. Kucine states that Dr. Blum recommended that he excavate the decay he found to determine if the tooth #19 could be salvaged. He performed a pulpectomy to remove residual necrotic tissue in the canals and put calcium hydroxide in the tooth as an anti-bacterial, and “partially instrumented” the tooth to 23 millimeters. Dr. Kucine states that this procedure was not the cause of parathesia/numbness because it was not possible for a small file the size of the one used to go through the apex of the tooth and through the bone, which is necessary to reach the inferior alveolar nerve canal, and that there was no evidence of this occurring. Further, he claims that the administration of the alveolar nerve block and long buccal nerve block was within the standard of care, and because risks associated with them are very rare Dr. Blum did not depart from the standard of care by not advising the plaintiff of those risks.

Finally, he opines that based on the records he reviewed the plaintiff never complained about numbness, and thus there was no need to refer him to a specialist.

The Court concludes based on the foregoing that the defendant has not made out a *prima facie* case that he is entitled to judgment as a matter of law. As noted above, the plaintiff alleges that the malpractice during the root canal that caused the claimed injury was the alleged improper administration of the nerve block. However, the expert makes no reference as how to such an injection should be performed, nor to the medical records or EBT testimony regarding how it was actually performed by the defendant in this case. Thus, given the critical role this injection plays in the plaintiff’s claim, as asserted in the bill of

particulars, the expert's single, unsupported statement that "Dr. Blum's administration of an inferior alveolar nerve block and a long buccal nerve block was within the standard of care" is insufficient as proof that it was properly performed.

Indeed, his statement can be read as asserting no more than that the giving of such injections was proper, something the plaintiff does not challenge, as opposed to asserting that they were given properly, which the plaintiff certainly does challenge. Dr. Kucine goes into detail about the root canal itself and provides a basis for a finding that it could not have been responsible for the nerve damage, but it was the injection beforehand that forms the substance of the claim. Nor does he provide an alternative explanation for the numbness alleged by the plaintiff after the visit to Dr. Blum, which the plaintiff described in his EBT. The transcript of this testimony is annexed to defendant's papers, and the expert asserts he read it. Accordingly, with respect to the first cause of action the motion must be denied, without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Terranova v Finklea, supra*; *cf., Amodio v Wolpert, supra*.

In any event, the plaintiff has provided sufficient proof to rebut the defendant's expert. In his affidavit in opposition to this motion, the plaintiff describes "an extreme pain/electric shock" and that he attempted to communicate this to Dr. Blum, but that he continued with the injection. The plaintiff's expert states that this is indicative of contact of the needle with the nerve, and that once there is any indication that this has occurred the needle should have been removed. The failure to do so may be seen as a departure from accepted practice and is sufficient to sustain a claim of dental malpractice. *Hubbard v Kamen*, 29 AD3d 339 (1st

Dept. 2006). Thus, reading this opposing proof, as it must, in a manner most favorable to the plaintiff (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept. 2003]; *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept. 1995]), the motion should be denied as to the first cause of action. The fact that in his EBT Dr. Blum testified that the plaintiff did not react to the injection simply creates an issue of credibility for the jury to resolve. In that regard, the Court notes the attack on the plaintiff's affidavit as tailored to defeat the motion and contrary to his own EBT testimony, but a review of the transcript fails to reveal any question put to him regarding what, if anything, he felt during the injection, but rather only the aftermath of the procedure.. M. Kubas EBT, at p. 23.

In view of this result, the Court need not address the other aspects of the malpractice claim, as the survival of any one theory articulated in the bill of particulars mandates denial of the motion. *Terranova v Finklea, supra.*

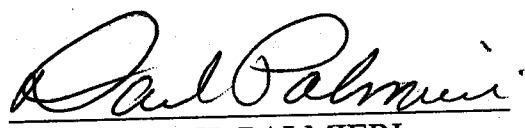
With regard to the claim of lack of informed consent, however, the Court reaches a different conclusion. The plaintiff has alleges in his bill of particulars at paragraph 10[d] and [e] that, as noted above, it was the injection that constituted the injury-causing malpractice during the November 4, 2005 root canal. The defendant's expert states that "the risks of these anesthetic injections are very rare, therefore the standard of care does not require that Dr. Blum advise a patient of those risks." That is sufficient to make out a *prima facie* case that the second cause of action is without merit, shifting the burden to the plaintiff to come forward with admissible proof that issues of fact exist meriting a trial. *See, e.g., Zuckerman v. City of New York*, 49 NY2d 557 (1980). In response, the plaintiff has failed to come

forward with any contrary evidence. His expert is silent with regard to the issue, essentially conceding the contention advanced by Dr. Kucine. Accordingly, the second cause of action should be dismissed.

This shall constitute the Decision and Order of this Court

ENTER

DATED: August 22, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: McKenna, Siracusano & Chianese
Attorneys for Plaintiff
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East Rockaway, NY 11518**

ENTERED
AUG 25 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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