

**Bigman v Lisman**

2008 NY Slip Op 33236(U)

November 26, 2008

Supreme Court, New York County

Docket Number: 103576/07

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
*Justice*

PART 1A Part 16

Index Number : 103576/2007  
**BIGMAN, SHULA**  
vs.  
**LISMAN, RICHARD DEAN**  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

**FILED**

DEC - 5 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: NOV 26 2008

*Alice Schlesinger*  
\_\_\_\_\_  
ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

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

-----X

SHULA BIGMAN,

Plaintiff,

-against-

Index No. 103576/07  
Motion Seq. No. 003

DR. RICHARD LISMAN

Defendant

-----X

SCHLESINGER, J.:

Dr. Richard Lisman, the defendant in this medical malpractice action, is moving for summary judgment. He treated Shula Bigman for plastic and reconstructive eye surgery from August 23, 2006 to November 10, 2006. The actual surgery was on August 29, 2006. It is Dr. Lisman's position, supported by an affidavit from Dr. Henry Spinelli, a physician Board Certified in Plastic Surgery and Ophthalmology, that he did not in any way depart from standards of acceptable care in his treatment, nor cause injury to Ms. Bigman. Dr. Spinelli also examined the plaintiff on May 20, 2008 and as part of his affidavit describes his findings.<sup>1</sup>

The surgery performed by Dr. Lisman consisted of bilateral upper eyelid blepharoplasty, bilateral ptosis correction with Fasanella-Servat and bilateral chemical peel of the lower eyelids. Ms. Bigman in her complaint and in her opposition affidavit takes the greatest issue with the ptosis part of the surgery. It is her position that she was never told this procedure would be done (it is a cutting of the muscles to correct drooping eyelids),

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<sup>1</sup>Here it should be noted that, in opposition, the plaintiff points out that earlier, in a July 28, 2008 report to defense counsel following the examination, Dr. Spinelli includes additional findings which are omitted and even contradicted in his September 4, 2008 affidavit.

that she would not have consented if she had been told, that she was not given proper preoperative testing which would have shown that ptosis was contraindicated, and that the procedure has resulted in a worsening of her eye situation, both functionally and cosmetically. She also complains of continuing pain in her eyes.

Doctor Spinelli's affidavit first recalls the history of the plaintiff's relationship to Dr. Lisman, including their single preoperative visit on August 23, 2006. He relies here on a review of the pleadings and on Ms. Bigman's medical records. First, he describes Dr. Lisman's pre-August 23 discussions with several of the plaintiff's treating physicians. These were Dr. Sheldon Operman, an anesthesiologist at Manhattan Eye Ear and Throat Hospital, Dr. Marc Spero, her internist, and Dr. Gerald Pitman, her plastic surgeon.

While Ms. Bigman does take some issue with the fact of these discussions, she does acknowledge that she did first consult with Dr. Pitman vis-a-vis her desire for improvement of her eyelids. According to her, he was leaving for vacation soon and recommended the defendant. But again, she insists she never discussed ptosis surgery with him either. However, for this history, Dr. Spinelli relies, as he has a right to do, on the sworn deposition testimony of Dr. Lisman. He then goes on to say (at ¶16) that the defendant doctor "properly documented and took heed of the plaintiff's previous medical history...".

With regard to the visit of August 23, 2006, Dr. Spinelli opines that Dr. Lisman properly and thoroughly examined Ms. Bigman and conducted all appropriate tests for the plastic and reconstructive surgery he was planning. Here again, the plaintiff disputes this claim and she, as well as her expert, note that many of the alleged tests given by Dr. Lisman are not documented in his records. In this latter regard, for example, it is

pointed out that there is no documentation of a slit lamp examination or a Schermer test (to measure tear production).

Dr. Spinelli details the defendant's findings. Then he comments (at ¶9) that Dr. Lisman "properly and thoroughly discussed with the plaintiff what bothered her about her eyes, the treatment options in plastic and reconstructive surgery, the risks and complications associated with the proposed procedures, the anticipated healing time and the anticipated results". This took an hour.

Again Ms. Bigman strongly disputes this claim and, while acknowledging that she did sign consent forms, asserts that none of them ever specifically indicated that she would be undergoing ptosis surgery, which she would not have consented to. It should also be noted here that Dr. Lisman insists in his deposition that he did discuss ptosis thoroughly with Ms. Bigman.

Based on this testimony, which included discussions about reasonable expectations for the procedures and approximate healing time, Dr. Spinelli states (at ¶12) that Dr. Lisman "properly obtained the plaintiff's informed consent" and that "the plastic and reconstructive procedures proposed by Dr. Lisman were indicated".

Dr. Spinelli then opines that the surgery was properly performed without any complications. Postoperatively he adds, Dr. Lisman also provided appropriate care and treatment, including removal of the sutures and proper recommendation for treatment options for complaints of dry eye.

As for her present condition, based on his May 20<sup>th</sup> examination, Dr. Spinelli concludes that Ms. Bigman's ophthalmologic condition has improved or remained the same. This included her visual acuity, tear production, which is normal and "his findings

of no lagophthalmos" (inability to fully close the upper eyelid which can affect blinking and tear production). Moreover, he found that her eyes are appropriately symmetrical.

In opposition, Ms. Bigman submits the affidavit of Vivian Boniuk, a Board Certified Ophthalmologist with impressive credentials in this area. (In Reply, counsel points out she is an experienced expert witness as well and comments additionally on her status as an attorney admitted to the New York Bar).

Dr. Boniuk states that she has reviewed Dr. Lisman's deposition and his records, as well as the medical records of Ms. Bigmans' other treating eye doctors. She has also examined the plaintiff several times in 2008. She then opines (in ¶13), with a reasonable degree of medical probability, that Dr. Lisman departed from good and accepted medical practice in performing the bilateral upper eyelid blepharoplasty and ptosis surgery on August 29, 2006 and that this surgery has caused her continuous discomfort since. As referred to earlier, Dr. Boniuk comments unfavorably and says it was a departure not to specifically measure the existing gap in the closure of Ms. Bigman's lids, to examine her Bell's Reflex, and to evaluate the degree in which the upper lids cover or fail to cover the pupil.

Dr. Boniuk then criticizes the defendant in his failure to properly discuss the risks of the ptosis surgery, even relying on what Dr. Lisman testified at his deposition that he did tell Ms. Bigman. The defendant claimed to have mentioned dry eyes which can cause loss of vision, corneal erosion and other conditions, but according to Dr. Boniuk he did not testify to what she believes is the "one known risk of ptosis surgery, the over or under correction-cutting too much or too little of the muscle and as a result either no improvement in the condition or a gap and inability to close the lids completely." (¶10). Dr. Boniuk also

states that continuous pain can result (a condition Ms. Bigman complains of) from the thinning of the tissues of the cornea and exposed nerves. According to her, one needs further surgery to correct this condition, something the plaintiff is planning.

Therefore, Dr. Boniuk believes informed consent was not obtained as to the ptosis surgery due to these material omissions with regard to risks, risks which resulted in Ms. Bigman's alleged current injury. Further, Dr. Boniuk points out that the gap in the closure of Ms. Bigman's lid is larger now, two years after the surgery, than before. Here, she compares measurements taken by Dr. Deutsch in 2001 where there was reported a closure gap of 1.0 mm in the right eye and 0.7 mm in the left eye, as compared to an August 2008 measurement by Dr. Della Rocca of 2.4 mm in the right eye and 2.0 mm in the left eye. In Dr. Boniuk's concluding paragraph (#16) she suggests why she believes the plaintiff was a high risk candidate for ptosis surgery and why it was arguably contraindicated or at least that these things should have been revealed to the patient.

In Reply, counsel for the moving defendant takes issue with much of what Dr. Boniuk has to say. For example, he argues that she is not competent to give opinions here because she is merely an ophthalmologist and not a plastic surgeon. I disagree. Certainly this physician in maladies of the eye can opine about that organ. The jury can decide how much weight to give these opinions. But certainly, they are admissible.

He also argues that her opinions suffer from being vague and conclusory. However, one could level a similar charge at Dr. Spinelli's affidavit.

I find that this action should proceed to trial. The opposition, consisting of Ms. Bigman's affidavit wherein she insists that she was not informed of the ptosis surgery or its risks and that she would not have consented had she known, dispute Dr. Lisman's

testimony to the contrary. Together with Dr. Boniuk's opinion as to what risks the defendant was obligated to explain, the papers create a legitimate issue of fact as to informed consent.

Also the advisability of the ptosis surgery at all is an issue to be determined. It is the plaintiff's position that this procedure has caused her continuing pain, impaired the functioning of her eyes, and resulted in the need for corrective surgery. Dr. Boniuk supports this position.

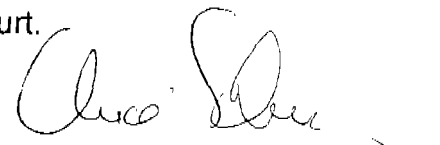
Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied. Plaintiff shall serve her 3101(d) statement by December 8, 2008, and defendant shall serve his by December 18. The parties shall report to Room 222 for jury selection and trial on January 5, 2009 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: November 26, 2008

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J.S.C.  
ALICE SCHLESINGER

**FILED**  
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