

Block v Singh

2009 NY Slip Op 32652(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 106297/08

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 106297/2008
BLOCK, MURIEL
vs.
SINGH, PANKAJ P.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 10/13/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-14
15-23; 28
24-27; 29

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 DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____
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
NEW YORK COUNTY: IAS PART 6**

-----X
MURIEL BLOCK,

Plaintiff,

-against-

PANKAJ P. SINGH and ARCH DENTAL
ASSOCIATES, P.C.,

Defendants.

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

Index No. 106297/08

Decision and Order

JOAN B. LOBIS, J.S.C.:

Defendants Pankaj P. Singh and Arch Dental Associates, P.C. (collectively "defendants"), move, pursuant to C.P.L.R. Rule 3212, for summary judgment on the grounds that there are no triable issues of material fact. Alternatively, defendants move, pursuant to C.P.L.R. § 4102(e), for an order granting defendants leave to serve and file a jury demand, and deeming the jury demand served on June 10, 2009, as timely served *nunc pro tunc*.

This is an action for dental malpractice and lack of informed consent, arising out of defendants' treatment of plaintiff regarding dental implants and a bone graft; plaintiff alleges that the surgery was improperly performed on May 23, 2007, while she had a detectable sinus infection, and that this improperly performed surgery led to a host of complications. In examining this summary judgment motion, the court found that material issues of fact exist regarding the allegation of dental malpractice as to warrant denying the motion for summary judgment. Plaintiff alleges that Dr. Singh departed from acceptable standards of dental practice by, *inter alia*, misreading and/or negligently reading a cone beam scan; failing to diagnose or failing to appreciate the significance in plaintiff's left sinus of a significant amount of inflamed polyp tissue; performing the sinus lift and

bone graft procedure before plaintiff's sinus was clear of inflammation and infection; and, failing to adequately treat plaintiff's sinus infection before and after the procedure. Defendants' expert, Mordechai M. Hoschander, D.M.D., licenced to practice dentistry in New York, opines that Dr. Singh "had no reason to suspect that plaintiff had an inflamed or infected polyp in her left sinus." Regardless, even had Dr. Singh known of the sinus infection, Dr. Hoschander maintains that it would have been within the standard of care to proceed with the procedure anyway. But, there is no further explanation as to why Dr. Singh had no reason to suspect an infection, or why it would have been appropriate to perform the procedure even if there were an infection. On a motion for summary judgment, conclusory statements which do not address the allegations in the pleadings are insufficient to demonstrate entitlement to summary judgment. See Cregan v. Sachs, 65 A.D.3d 101, 108 (1st Dep't 2009). Moreover, plaintiff's expert (name redacted), a dentist licensed to practice in New York, maintains that the April 9, 2007 cone beam scan demonstrates a significant amount of inflammation/infection present and opines that, in light of the cone beam scan depicting an infection approximately six weeks prior to the surgery, it was a departure from accepted standards of care to go forward with the procedure without taking a follow-up scan. Plaintiff's expert opines that defendants' "failure to timely diagnose and treat the infection began the negative course for [plaintiff] in terms of how serious the untreated infection ultimately became. . . ." Further, plaintiff includes an affirmation from plaintiff's ear, nose, and throat doctor, Steven H. Sacks, M.D., who sets forth that he was previously unaware that a cone beam scan was performed six weeks prior to the bone graft/sinus lift procedure, but now that he has had a chance to review that cone scan, he sees that the left sinus contains visible evidence of inflammation and infection. He contends that had he known about the cone scan, he would not have recommended that Ms. Block undergo the graft/lift

procedure while she had an ongoing infection. Even had defendants made a prima facie showing of their entitlement to summary judgment, plaintiff sufficiently rebutted this by demonstrating the existence of material issues of fact.

With respect to plaintiff's claim of lack of informed consent, defendants point out that plaintiff had signed a consent form on the day of the procedure, which indicated that the surgery was fully explained to her; that she had been fully informed, and fully understood, the risks and benefits of the treatment, the alternative treatments, and no treatment; and, that she understood there could be complications, including infection. In those portions of the deposition testimony annexed to the papers, Dr. Singh testified that on May 7, he gave plaintiff preoperative and postoperative instructions regarding the surgery that was to be performed on May 23. He stated that he went over the procedure on May 7 and gave plaintiff the necessary preoperative and postoperative medications (antibiotics) and the preanesthesia instructions. Dr. Singh testified that it is his practice that at the time he gives the instructions, he also goes over the procedure and the risks of the procedure, although he testified that his notes do not specifically reflect that the risks were discussed on May 7. A consent form, coupled with deposition testimony and medical records establishing that the physician had informed the plaintiff of the risks associated with the procedure, would generally satisfy the requirements of a prima facie case for summary judgment on a lack of informed consent claim. But here, the dental records themselves do not reflect that the risks were discussed, as Dr. Singh admitted, and Dr. Singh's deposition testimony is directly contradicted by plaintiff's. Defendant has not made out a prima facie entitlement to summary judgment on the lack of informed consent claim because there remain unresolved material issues of fact.

Turning to the second branch of defendants' motion, defendants seek permission to serve and file a late jury demand. Plaintiff filed the note of issue on April 16, 2009. Plaintiff checked the box next to "Trial without jury". Pursuant to C.P.L.R. § 4102(a), "[a]ny party served with a note of issue not containing [a demand for a jury trial] may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand in the office when the note of issue was filed within 15 days after service of the note of issue. . . . If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties." Defendants assert that "[d]ue to an inadvertent oversight, defendants failed to serve a jury demand within the requisite fifteen day period." At oral argument, the court asked the parties to submit supplemental affirmations addressing the circumstances of defendants' failure to file a timely jury demand. Counsel for defendants acknowledges that she received plaintiff's note of issue, reviewed it, and filed it away in the case file in her office, but that she initially overlooked the fact that plaintiff had filed the note of issue without a jury demand. Counsel for defendants asserts that on or about June 10, when she looked at the note of issue again, she belatedly noticed plaintiff's request for a non-jury trial. Counsel then attempted to serve a demand for a jury trial on June 11, 2009, which was rejected.

Defendants argue that the court should relieve them of their failure to timely file their jury demand, so long as this relief does not unduly prejudice the other party, and claim that since the trial date has not been scheduled, plaintiff is not prejudiced. Plaintiff argues that it is not plaintiff's burden to demonstrate that she has been prejudiced in order to defeat defendants' application; rather, that the standard is whether actual proof of inadvertence has been demonstrated.

C.P.L.R. § 4102(e) sets forth that the court may relieve any party from failing to comply with § 4102 “if no undue prejudice to the rights of another party would result.” The First Department has upheld a liberal construction of § 4102(e), finding that a party should be permitted to file a late jury demand *nunc pro tunc* where there has been a “factual showing that the waiver of the right to a jury trial . . . was purely inadvertent . . . rather than an intentional waiver of a jury trial,” and that the other party would “suffer no undue prejudice as a result of the filing. . . .” Ossory Trading, S.A. v. Gelderman, Inc., 200 A.D.2d 423, 424 (1st Dep’t 1994), citing Lane v. Marshall, 89 A.D.2d 597 (2d Dep’t 1982) (jury demand served more than fifteen days after note of issue permitted to be filed *nunc pro tunc* “[i]n view of the absence of prejudice to the plaintiffs, the fact that defendant . . . had no intention of waiving a jury trial, and [defendant’s] prompt application to be relieved from her default.”); Breezy Point Coop. v. Young, 234 A.D.2d 410, 410 (2d Dep’t 1996) (leave to file late jury demand properly granted in the absence of prejudice to plaintiffs and defendant’s demonstration that the waiver of the right to a jury trial was “inadvertent and unintentional”); but cf. Med Part v. Kingsbridge Hgts Care Ctr., Inc., 22 A.D.3d 260, 261 (1st Dep’t 2005) (leave to file late jury demand properly denied in the “absence of any explanation for the lateness”). The Second Department has held that a party’s explanation that he failed to realize that the note of issue was filed with a request for a non-jury trial is an inadequate excuse. Lackowitz v. City of Yonkers, 29 A.D.3d 744 (2d Dep’t 2006), citing Fertik v. Fertik, 264 A.D.2d 463, 464 (2d Dep’t 1999) (“defendants’ excuse that counsel inadvertently failed to notice that the plaintiff’s note of issue requested a bench trial is inadequate.”). But, in Lackowitz, the delay in filing a jury demand was seven months from the date the note of issue was filed, and in Fertik, cited by Lackowitz, the delay was fifteen months. Lackowitz, 290 A.D.3d at 744; Fertik, 264 A.D.2d at 464. In the instant

case, the delay was just over six weeks from the deadline to timely demand a jury under the C.P.L.R. This motion was filed on June 16, 2009. There was only a relatively short delay in defendants' seeking leave to file a late jury demand. Defendants never evinced any intentional waiver of their right to a jury trial. See Ossory Trading, S.A., 200 A.D.2d at 424. Furthermore, in general, these types of cases are tried before juries. Plaintiff's counsel has not articulated that any prejudice to his client would result should the court grant defendants' application. In light of these facts, the court will permit defendants' untimely jury demand to be filed *nunc pro tunc*.

That branch of defendants' motion seeking summary judgment is denied, and that branch seeking leave to serve and file a jury demand and deeming the jury demand served on June 10, 2009 timely served *nunc pro tunc* is granted. This constitutes the decision and order of the court.

Dated: November 10, 2009



 JOAN B. LOBIS, J.S.C.

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