

Dibiasi v Wooster

2010 NY Slip Op 30954(U)

April 13, 2010

Supreme Court, Suffolk County

Docket Number: 20271/06

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 20271-06**SUPREME COURT - STATE OF NEW YORK**
TRIAL TERM, PART 8 SUFFOLK COUNTYPRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 9-24-09
SUBMITTED: 1-28-10
MOTION NO.: 001-MD_____
DENISE and JOHN DIBIASI, x

Plaintiffs,

-against-

CASTRO & TRODDEN, LLC
Attorneys for Plaintiffs
29 Bellemeade Avenue, Suite A201
Smithtown, New York 11787MICHAEL F. WOOSTER, D.P.M., SUNSHINE
FOOT CARE and BROOKHAVEN
MEMORIAL HOSPITAL MEDICAL CENTER,
INC.,PATRICK F. ADAMS, P.C.
Attorney for Defendants
49 Fifth Avenue
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Defendants.

x

Upon the following papers numbered 1 39 read on this motion for summary judgment; Notice of Motion and supporting papers 1-22; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23-35; Replying Affidavits and supporting papers 36-39; it is,

ORDERED that this motion (001) by the defendants, Michael F. Wooster, D.P.M and Sunshine Foot Care, pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint is denied.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent, negligent hiring, on behalf of the plaintiff Denise Dibiasi, with a derivative claim asserted on behalf of John Dibiasi, wherein it is alleged that from on or about July 23, 2002, and continuing during a continuous course of treatment through on or about April 3, 2004, the defendants, Michael F. Wooster, DPM, Sunshine Foot Care and Brookhaven Memorial Hospital, undertook to treat Denise Dibiasi for certain podiatric complaints, and during that care and treatment, the defendants departed from good and accepted standards of medical care, failed to inform her of the reasonably foreseeable risks and benefits of, and alternatives to, the treatment proposed and rendered, and failed to obtain an informed

consent, and negligently hired and supervised employees causing her to sustain personal injury. It is claimed that the defendants negligently severed plaintiff's tendon, failed to diagnose the severed tendon during and after surgery, causing her to suffer a prolonged surgical procedure, prolonged anesthesia, mental anguish, unnecessary surgery, deformity of the second digit of the left foot requiring fusion of the joint and release of the second metatarsal phalangeal joint. The plaintiff was hospitalized at Brookhaven Memorial Hospital Medical Center on May 10, 2003 and January 31, 2004 and St. Catherine of Siena Medical Center on March 4, 2005.

The defendants, Michael Wooster, DPM and Sunshine Foot Care, now move for summary judgment dismissing the complaint on the basis that there was no departure from the accepted standard of care in the treatment provided to the plaintiff in that both surgeries performed by Dr. Wooster were medically correct and without complications, removal of the neuroma was medically indicated and subsequently removed from the left foot second interspace, the exploratory surgery and hammertoe correction procedure performed thereafter on January 31, 2004 was medically correct and without complication, and that proper informed consent was given to the plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answer, bill of particulars; copies of various partial medical records consisting of excerpts and pages; unsigned, partial copy of the transcript of the examination before trial of an unidentified witness; and the affirmation of the defendants'

expert, Raymond J. Mollica, DPM.

In opposing this motion the plaintiff has submitted an attorney's affirmation; affidavit of Denise Dibiasi; verified bill of particulars; plaintiff's various medical and operative records; copies of the transcripts of the examinations before trial of Denise Dibiasi dated May 8, 2008 and Michael Wooster dated October 10, 2008; and the affirmation of plaintiff's medical expert.

Raymond J. Mollica, DPM, the moving defendants' podiatric expert, sets forth in his affidavit that he is licensed to practice podiatric medicine and surgery in New York State and is board certified in podiatric surgery and in wound care. He sets forth that he states with a reasonable degree of medical certainty that the actions taken by Dr. Wooster in his treatment of Ms. Dibiasi were at all times medically reasonable and appropriate under the circumstances and that there were no departures from the accepted standard of care by Dr. Wooster and that the surgical procedures performed by Dr. Wooster were at all times reasonable, indicated and properly performed. Dr. Mollica bases this opinion upon his review of the summons and verified complaint, the verified bill of particulars, the medical records pertaining to Denise Dibiasi and the hospital record from her admission to Brookhaven Memorial Hospital.

Dr. Mollica states Dr. Wooster first saw Ms. Dibiasi on July 23, 2002 for complaints of pain in her left second toe which occurred after walking, swelling between her second metatarsal joint, and stiffness in her left foot. Upon examination, the left foot appeared to be mildly cavus with mild swelling between the left second metatarsal joint and second interspace, with considerable splaying between the second and third toes of her left foot, with pain upon palpitation. A cortisone injection was administered into the second left metatarsal joint and an x-ray revealed splaying but no fractures. A differential diagnosis was made of either a neuroma in the second interspace or an arthropathy of the second MPJ. A second cortisone injection was administered on August 13, 2002, with good response. After returning to work as a teacher, she reported to Dr. Wooster on September 15, 2002 that her pain had become much worse despite taking Naproxen regularly. Dr. Wooster noted the spreading of the left second and third toes had increased and that she complained of pain in the bottom of the left foot. Another cortisone injection was administered. On December 3, 2002, she advised Dr. Wooster that she was feeling approximately eighty to ninety percent better, and a decrease in the spreading of the second and third toes on her left foot was noted. A third injection of cortisone was administered. However, on December 27, 2002, Ms. Dibiasi complained that the pain in her foot increased and it was noted that the spreading of her second and third left toes increased as well, and the second left toe was crossing over the top of the first left toe. Another cortisone injection was administered and her medication was changed to Voltaren. On January 8, 2003, Ms. Dibiasi returned complaining of increased pain with no relief from the cortisone injection or medication and that her second and third toes were still very separated. An MRI scan of the left foot was ordered, and on February 6, 2003, Dr. Wooster received the MRI results and informed Ms. Dibiasi that there was a neuroma in the left foot between the joint spaces of her second and third

toes, but that the spreading of the toes was an indication that there were other issues occurring in the foot and referred her to Dr. Furci for a second opinion who advised Dr. Wooster that there might be a joint problem in Ms. Dibiasi's left foot. Dr. Wooster administered another cortisone injection on that date as well as March 8, 2003, March 26, 2003 and April 4, 2003. On April 15, 2003, Ms. Dibiasi complained of increasing pain in the left foot, but swelling was decreased and the left second toe was still crossing over the top of the left first toe. He advised Ms. Dibiasi that the neuroma was not the cause of her second toe crossing over the top of her first toe and scheduled surgery for May 10, 2003. Dr. Dr. Mollica states that at a pre-operative visit on May 7, 2003, Dr. Wooster examined her and explained the procedure would probably resolve her symptoms but may not prevent the left second toe from crossing over, and further explained the risks and benefits of the procedure, and written informed consent was obtained.

On May 10, 2003, Dr. Wooster performed an excision of the neuroma from the second interspace in her left foot and found the neuroma was larger than indicated on the MRI. No other irregularities were noted. Post-operative visits were attended on May 14, 2003, May 21, 2003 and June 17, 2003. At the June 17 visit it was noted that the left second toe was still crossing over the first toe although the cleft at the left second joint was almost completely resolved. She was to wear a metatarsal pad and loop on her left foot to keep her second toe in place during recovery. On November 5, 2003, the left second toe was still crossing over and was painful after Ms. Dibiasi had gone dancing a few evenings prior to the visit and she informed Dr. Wooster that her mother had the same type of issue with her feet which she tried to correct without success. Subsequent visits were on December 13, 2003 and December 16, 2003 with complaints of worsening pain and increased swelling and an MRI was ordered. The left second toe was still crossing over the first toe. On December 24, 2003, Dr. Wooster reviewed the MRI results which indicated fluid was collecting in the joint space where the neuroma had been removed from and about 5 cc's of fluid was aspirated and was negative for malignant cells. Dr. Wooster recommended a second surgical procedure to clean out the second interspace of the left foot and to try to correct the toe from crossing over, which he advised had only a 75 to 80 % chance of success.

A pre-operative exam was conducted on January 27, 2004 at which time the procedure was discussed in length and written consent was obtained for the procedure performed on January 31, 2004. A cystic lesion was noted in the second interspace of the left foot and capsular defect on the lateral aspect of the metatarso-phalangeal joint was noted. The cystic lesion was drained, the area was flushed with sterile saline, the cyst was removed and the capsular defect was corrected. A pre-operative x-ray revealed the presence of a hammertoe deformity of the left second toe. Dr. Mollica states that Dr. Wooster corrected the alignment of the left second toe by removing a small amount of bone from the head of the proximal phalanx of the left second toe and inserted K-wire through the toe to stabilize it, placing it in correct anatomical position as noted on the February 4, 2004 visit. On February 11, 2004, February 27, 2004 and March 12, 2004, Ms. Dibiasi was complaining of pain in her foot. She had returned to work on March 24, 2004 and returned thereafter to Dr. Wooster for a visit due to pain. On April

In 2004, Ms. Dibiassi's final appointment, she complained that the pain in her left foot was as bad as it had been prior to her surgeries. She was recommended to Dr. Furci for a second opinion. Dr. Wooster noted that the second toe had some swelling but was not overlapping the left first toe.

Dr. Mollica states that the medical records do not support Ms. Dibiassi's claims set forth in her bill of particulars and that Dr. Wooster treated Ms. Dibiassi conservatively after making a differential diagnosis of neuroma and splaying of the left foot and crossing over of the left second toe over the left first toe, and then appropriately employed surgical treatment when conservative treatment failed. He states the neuroma was properly removed as evidenced by the fact that it did not grow back. Splaying of the left foot was resolved after the first surgery although the left second toe still crossed over, but this condition was addressed with a metatarsal pad with a loop. Fluid was properly aspirated post-operatively, an MRI scan was ordered and a second surgery was appropriately advised to examine the second interspace and to correct the crossover toe, although the success rate was only 75 to 80 %. Postoperatively, some deviation was still noted of the left second toe.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (**Holton v Sprain Brook Manor Nursing Home**, 253 AD2d 852, 678 NYS2d 503 [1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; **Prete v Rafla-Demetrious**, 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; **Lyons v McCauley**, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; **Bloom v City of New York**, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendants' acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; **Domaradzki v Glen Cove OB/GYN Assocs.**, 242 AD2d 282, 660 NYS2d 739 [1997]).

In the instant action, the defendants have not established prima facie entitlement to summary judgment dismissing the complaint. The defendants' expert has opined within a reasonable degree of medical certainty that the care and treatment rendered to Ms. Dibiassi was

necessary and properly performed, that there were no departures from accepted medical/surgical standards of care, and there was nothing the defendant did nor did not do that caused her injury and that Dr. Wooster did not lacerate the tendon. Dr. Mollica states that Dr. Wooster has established that Ms. Dibiasi presented to his office on the first visit with pain in her left foot, splaying of the foot, and a crossing over of the left second toe over the left first toe. Treatment was conservative initially, and when conservative treatment failed, surgical treatment was instituted. However, the medical records submitted with the moving papers raise factual issues concerning whether an incision was made into a tendon during the surgeries performed by Dr. Wooster.

In reviewing the medical records submitted by the defendant Dr. Wooster, it is noted that the consent form dated May 7, 2003 is for "Surgical removal of this neuroma from the 2nd interspace of the l. foot. Possible lengthening of the tendon to the 2nd toe l. foot." The operative report is silent as to whether the tendon was lengthened. The consent form dated January 26, 2004 is for the surgery consisting of "Surgical correction of this 2nd hammer toe, left. Also removal of mass/cyst from 2nd interspace left foot." The operative report for the surgery performed January 30, 2004 indicates in pertinent part that "... a 2.5 cm linear incision was made from the second proximal interphalangeal joint to the metatarsophalangeal joint. Dissection was carried down via sharp and blunt dissection with care taken to identify and retract all vital structures. Dissection was carried down to the level of the long extensor tendon tenon over the head of the proximal phalanx. The tendon was incised and reflected exposing the head of the proximal phalanx...." However, Dr. Mollica opines that there is no evidence in the medical records or in the anatomy of this specific area of the foot to suggest that Dr. Wooster cut any tendons while performing the surgical procedures and that the splaying of the toes had onset prior to her treating with Dr. Wooster and occurred while she was walking barefoot. Dr. Mollica states, this positively shows that these conditions were not caused by any tendon being cut in her left foot, and that the hammertoe was in all likelihood a hereditary condition. However, the operative report indicates the tendon was incised.

Dr. Mollica further opines that because Ms. Dibiasi did not have optimal results that it does not mean that there was any malpractice. Accordingly, there is a factual issue concerning whether any tendons were incised or cut during the surgical procedures, which issue is not resolved by Dr. Mollica's report. There is a factual issue concerning whether the surgery produced poor results.

Additionally, although Dr. Mollica sets forth that Ms. Dibiasi's left second toe was crossing over her first toe at the time of the first visit, review of the medical records provided by the defendants reveals that her chief complaint was that her second toe has been very painful- was more swollen below 2nd MJ and Dr. Wooster's physical examination does not reveal that the left second toe was crossing over the first toe. However, the note of February 6, 2004, after the surgery of January 30, 2004, indicates "I suspect also some ** path b/c of increased med. deviation of 2nd toe." Accordingly there are factual issues concerning when the crossing of the

left second toe over the first toe began, whether it existed prior to the first surgery or developed after the first surgery and whether there were departures from good and accepted standards of care in failing to correct the hammer toe during either surgery performed by Dr. Wooster on May 10, 2003 or January 30, 2004. Dr. Mollica does not address this issue in his expert affirmation. Therefore, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint.

Additionally, it is noted in the papers submitted in opposition to this motion that Denise Dibiassi testified to the effect that the first time she experienced pain in the ball of her left foot was in June 2002 while she was walking in the sand on the beach while on vacation. Upon returning, she made an appointment with Dr. Michael Wooster who examined her foot. She does not testify that her left second toe was crossing over her first toe prior to the first surgery. The pain in her foot continued through May, 2003 despite treatment, her foot was swollen and the pain intensified. She was advised surgery would be necessary and the surgery was performed by Dr. Wooster around May 7, 2003 at Brookhaven Memorial Hospital. After about six weeks, she returned to work, but continued to have pain in the bottom of her left foot. Shortly thereafter, the second toe on her left foot began to cross over her first toe, which she stated Dr. Wooster attributed to the swelling of her foot. A second surgery on the left foot was performed by Dr. Wooster on January 30, 2004 at Brookhaven Hospital at which time a pin was placed to straighten out the second toe which crossed over the first toe and the fluid was cleaned out of the foot. The pin was removed after about three weeks, but when it was removed, her second toe crossed over to the opposite side it had been crossed prior to surgery, but she stated that Dr. Wooster thought taping the toe would correct it. She returned to work about eight to ten weeks later, but the pain continued in her left foot and she again felt like she was walking on glass. She was taking anti-inflammatory medication. Dr. Wooster, she stated, advised her that there was nothing more he could do for her.

In addition to the moving papers failing to demonstrate entitlement to summary judgment, it is determined that the papers submitted in opposition to the defendants' motion raise factual issues as well to preclude summary judgment.

Denise Dibiassi submitted an affidavit wherein she avers that her left second toe did not cross over her left first toe prior to the first surgery of May 10, 2003.

Plaintiff's expert is a podiatrist licensed to practice podiatric medicine in the State of New York and opines with a reasonable degree of medical certainty that Dr. Wooster departed from accepted medical care and that these departures were a substantial contributing cause of the plaintiff's injuries. At Ms. Dibiassi's first visit, she did not complain of her second toe crossing over and that condition is not documented in Dr. Wooster's records prior to the May 7, 2003 surgery. Plaintiff's expert's review of the radiology films taken prior to the May 7, 2003 surgery do not demonstrate that the second toe was malaligned prior to that surgery. Additionally, plaintiff's expert opines that the pathology report of May 13, 2003 does not confirm that the

specimen removed from the second interspace is a neuroma, and the size of the tissue removed is so large to have come from the second interspace and could also contain tissue from the second interspace. Plaintiff's expert further opines that neither of the surgeries performed by Dr. Wooster were successful as neither surgery corrected the second toe from crossing over the first toe in that Dr. Wooster claims it did at the first visit.

Based upon the foregoing, it is determined that the moving defendants did not establish prima facie entitlement to summary judgment due to factual issues raised in the moving papers as set forth. It is further determined that there are factual issues raised by the experts' conflicting opinions concerning, inter alia, whether or not Ms. Dibiasi suffered from hammer toe of her left second foot prior to the first surgery; whether the hammer toe was caused by a laceration to the tendon during the first surgery; whether or not there were departures from good and accepted standards of care in failing to correct the hammer toe with either surgery; and whether the tendon was lacerated during the first surgery. Such factual issues preclude summary judgment.

Accordingly, motion (001) is denied.

Dated: April 13, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.