

Zak v Mintz

2010 NY Slip Op 31436(U)

June 4, 2010

Supreme Court, New York County

Docket Number: 406168/07

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lolis

PART 6

Index Number : 406168/2007

ZAK, IRINA

vs

MINTZ, BETTY J.

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE 2/22/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-16

17-25

26

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1712).

Dated: 6/4/10

[Signature]
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
IRINA ZAK,

Plaintiff,

Index No. 406168/07

-against-

Decision, Order and Judgment

BETTY J. MINTZ,

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
appear in court, counsel or authorized representative must
appear in person at the Jurisdiction Clerk's Office (Room
1000) at the County Clerk's Office, New York County Courthouse,
100 West Street, New York, New York 10038.

In Motion Sequence Number 007, defendant Betty Mintz, M.D., moves for an order

dismissing the complaint, pursuant to C.P.L.R. § 3126, for plaintiff's failure to comply with court orders; pursuant to C.P.L.R. Rule 3216, for plaintiff's failure to prosecute the action; or, pursuant to Rule 3212, for summary judgment in her favor. Plaintiff, proceeding pro se, opposes the motion.

This action, which sounds in medical malpractice, was commenced by plaintiff's filing of a summons and complaint on or about August 21, 2007. Issue was joined by defendant's service of an answer on or about September 12, 2007. The parties appeared for a preliminary conference before the Hon. Eileen Bransten, to whom this case was originally assigned, on December 11, 2007. Due to inventory changes shortly after the preliminary conference, this matter was reassigned to the undersigned. Issues that arose in the discovery phase of this litigation resulted in several motions, and the parties have appeared for a number of compliance and status conferences over the course of the discovery phase. The instant motion was filed on or about December 22, 2009. On January 27, 2010, plaintiff filed the note of issue. A subsequent motion by defendant to strike plaintiff's note of issue was denied (see decision and order dated March 26, 2010, on Motion Sequence Number 008).

Plaintiff had one appointment with Dr. Mintz on April 7, 2005. Dr. Mintz' medical records reflect that plaintiff was seen for a neurological evaluation. Plaintiff reported that she had an accident at work on November 18, 2003, when she lifted a couch and felt pain in her back and right leg. She had an MRI in January 2004 that revealed a disc herniation at L4-5. She had been to physical therapy and seen multiple doctors. Surgery had been suggested. She went to Dr. Mintz for another opinion. Dr. Mintz tested plaintiff's reflexes and found them to be normal. She tested plaintiff's other motor groups and believed they were normal, although it was Dr. Mintz' impression that plaintiff's effort during testing was suboptimal. Straight leg raising was negative. Her coordination was normal and sensation was intact. Dr. Mintz' examination did reveal some weakness in foot dorsiflexion. Also, Ms. Zak could not hop on her right foot. Dr. Mintz' impression was that plaintiff had an L5 radiculopathy, and she recommended an EMG study, physical therapy, and a repeat MRI. At the time, Dr. Mintz indicated that she was "leaning toward recommending surgery," although she wanted to wait for the results of the tests first.

Plaintiff alleges that during the examination, Dr. Mintz injured her when she tested plaintiff's reflexes. Her complaint alleges that Dr. Mintz left her office, returned, and "without warning started hitting the patient's [left] kneecap with a steel tip hammer felt like one used for chopping wood." Plaintiff also alleges that Dr. Mintz could not see where she was hitting plaintiff because plaintiff was wearing pants at the time. Ms. Zak maintains that she "screamed in agony" and that Dr. Mintz laughed at her. Plaintiff states that Dr. Mintz then hit plaintiff's right knee several times to achieve a reflex. Plaintiff claims that two days later, she could hardly walk, her kneecaps were inflamed, her left kneecap in particular felt worse, and she felt like the bones were

grinding together. After a month of self-prescribed icing and rest, she began seeing doctors to discuss her condition. She was diagnosed with patellofemoral pain syndrome. She then began physical therapy for what she describes as her "loosened kneecap." The complaint states that she still suffers from a loosened kneecap and all of the discomfort and problems that go along with that injury.

During her examination before trial ("EBT"), plaintiff described and drew a picture of the reflex hammer she believes Dr. Mintz used on her. The description and drawing were of an instrument with a straight-edged metal head affixed to a wooden handle. Plaintiff estimated that the handle of the instrument was a foot to eighteen inches long. Plaintiff alleges that Dr. Mintz used this instrument instead of a standard reflex hammer to test her reflexes. At her own deposition, Dr. Mintz produced her inventory of reflex hammers, and all parties agreed that none of the hammers produced by Dr. Mintz matched plaintiff's description of the instrument plaintiff believes that Dr. Mintz used.

With respect to that branch of defendant's motion seeking dismissal under C.P.L.R. § 3126, for plaintiff's failure to comply with court orders, defendant cites the fact that Ms. Zak failed to appear for her court-ordered independent medical examination ("IME"). A review of the recent court orders reveals that the orders were inconsistent in directing plaintiff's obligation to undergo a timely IME. The parties' pre-trial stipulation and order, dated July 14, 2009, directed that IMEs were to be completed by November 30, 2009 and set the trial down for March 22, 2010. A separate order, signed on the same day, directed plaintiff to "submit to [an] IME (defendant's physical

examination) up to 60 days before trial.” The parties had a trial date of March 22, 2010, but that date was adjourned due to motion practice. A third order, which was made on the record on August 18, 2009, directed plaintiff to schedule her appointment for the IME by September 11, 2009. Because of the noted inconsistent orders and the fact that the parties never had a firm trial date, at this time the court declines to grant the relief defendant seeks under C.P.L.R. § 3216.

Turning to that branch of defendant’s motion seeking dismissal pursuant to C.P.L.R. Rule 3216(b), three conditions are required to be met before the court may dismiss a complaint for failure to prosecute: (1) issue must have been joined, (2) one year must have elapsed since issue has been joined in the action, and (3) the court or the party seeking the relief shall have served a written demand (the “90-day Notice”) by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety (90) days after receipt of the demand. A review of the affidavit of service does not indicate that the 90-day Notice was served by registered or certified mail; rather, it appears defendant’s office served plaintiff by ordinary mail. Accordingly, defendant is not entitled to dismissal pursuant to Rule 3216.

Regarding that branch of defendant’s motion seeking summary judgment, the party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 2010 N.Y. Slip Op. 3177, ___ A.D.3d ___ (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice actions must

present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, however, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, at 324 (1986) (citation omitted).

Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Rogues, 2010 N.Y. Slip Op. 3177 (internal citations omitted). The plaintiff's expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant's prima facie showing. Id.

Dr. Mintz maintains that the care she provided to plaintiff was in accordance with good and accepted medical practice. She provides her own affidavit, in which she maintains that at no time did she own or use a reflex hammer like the one described by plaintiff. She states that, by custom and practice, she either taps the reflex or swings the reflex hammer from a thirty (30) degree angle from the reflex, but in any event, she has never swung a reflex hammer from a distance greater than two inches from a patient's knee. She claims that plaintiff's allegation that she used an instrument with a twelve to eighteen inch wooden handle is “preposterous.” She has never owned or seen such an instrument. She claims that the allegation that she used an instrument with a blade

that could be used to chop wood to perform a routine neurologic examination is "ridiculous and incredible." Dr. Mintz states that reflex tests are simple, physical tests that are entirely safe and no precautions are needed. She also reports that her examination of plaintiff showed that the reflexes in plaintiff's knees were normal. She opines that she performed the reflex hammer test in accordance with good and accepted medical practice, and did not cause injury to plaintiff. She further opines that it is within good and accepted medical practice to perform a reflex hammer test while the patient is sitting down and wearing pants that cover the knee.

In further support of her motion for summary judgment, defendant submits an expert affidavit from Joseph Bosco, M.D., a physician licensed to practice medicine in New York and board certified in orthopedic surgery. He states that he reviewed the office records, plaintiff's and defendant's EBT transcripts, Dr. Mintz' affidavit, the photographs of Dr. Mintz' inventory of reflex hammers that she produced at her deposition, Ms. Zak's drawing of the instrument she recalls, and Ms. Zak's subsequent treatment records.¹ He states that there is no evidence from Dr. Mintz' medical records of plaintiff's visit that plaintiff was injured during the reflex test. Dr. Bosco states that Dr. Mintz used a standard reflex hammer to test Ms. Zak's reflexes; this statement appears to be based on his observation of the five (5) standard reflex hammers that Dr. Mintz produced at her EBT, which he observes to be standard reflex hammers. He opines that it is good and accepted practice to use such hammers to perform the examination that Dr. Mintz performed on plaintiff. He also states that her technique for testing reflexes, as she described in her affidavit, is in accord with

¹ The court notes that the subsequent treatment records were not included with the motion for summary judgment.

good and accepted practice. Dr. Bosco joins in Dr. Mintz' opinion that plaintiff's allegation that Dr. Mintz used an "ax-like instrument" instead of a reflex hammer is preposterous. He opines that had Dr. Mintz used such an instrument in the manner described by plaintiff, plaintiff would have been severely disfigured, which she was not. He sets forth his opinion, within a reasonable degree of medical certainty, that the reflex test Dr. Mintz performed on plaintiff was performed in accordance with good and accepted medical practice. He further opines that there is no objective evidence that Ms. Zak sustained an injury, and notes that she failed to appear before him for a physical examination (although this is contradicted by plaintiff, who states that Dr. Bosco cancelled her scheduled IME). However, his review of her subsequent medical records shows that plaintiff had both x-rays and MRIs performed, both of which were negative, and that the diagnosis of patellofemoral pain syndrome was based on her subjective complaints of pain. Dr. Bosco opines that patellofemoral pain syndrome is not caused by being struck by a reflex hammer; rather, it is often a congenital condition. He maintains that the findings of an "osseous formation" in the left knee is "completely coincidental and has nothing to do with the reflex hammer." He finds no nexus between the alleged malpractice and the alleged injuries.

In opposition, the pro se plaintiff provides an extensive affidavit in opposition, although as discussed, infra, she provides no expert affirmation in support of her position. She raises various complaints about defendant's attorney's distortion of the facts of the case. She maintains that she never used the word "attacked" to describe Dr. Mintz' physical examination, and that she has never used the term "axe-like" to describe the hammer (plaintiff's words were actually a "steel tip hammer felt like one used for chopping wood"). Plaintiff also sets forth that there are issues of

credibility that preclude summary judgment. She argues that defendant did not meet her initial burden to establish a prima facie entitlement to summary judgment, and that defendant did not establish a meritorious defense. She maintains that the evidence submitted by defendant is “insufficient, speculative, inconsistent and contradictory.” Plaintiff complains that instead of presenting evidence that supports her defense, Dr. Mintz merely pointed out the gaps in plaintiff’s proof and attempted to discredit plaintiff’s testimony and evidence.

Ms. Zak points out that Dr. Mintz testified at her EBT that she was not aware of any standards for doing a reflex examination. Then plaintiff refers to her exhibits to the motion, which she states are excerpts from textbooks describing standards for performing reflex tests. Plaintiff maintains that these textbooks instruct examiners to perform reflex exams “carefully,” as opposed to the statements by Dr. Bosco and Dr. Mintz that “no precautions” are necessary when performing a reflex exam. Plaintiff opines that a “no precautions” reflex exam or an exam done “quickly” is evidence of negligence, stating that a “rushed through medical exam where no precautions are taken is not a sign of a good medical exam.” Plaintiff also references Dr. Mintz’ testimony to the effect that she has encountered reflex hammers that do not look sound or that need repair, and that she has encountered a reflex hammer that was broken during an exam. To plaintiff, those statements suggest that Dr. Mintz was using “excessive force” to test a patient’s reflex.

Dr. Mintz testified at numerous points during the deposition that she did not recall what type of reflex hammer was used on plaintiff during the examination, and that she was not familiar with the type of hammer plaintiff described and drew. Ms. Zak contends that Dr. Mintz did

in fact recall the hammer that plaintiff drew, but that her attorney prevented her from answering the question. However, a review of the transcript indicates that the question posed by Ms. Zak was “[d]o you recall in 2005 if you had any hammer that looked like the hammer that I drew?” Dr. Mintz’ answer was “I do recall.” It is clear from the follow-up testimony that Dr. Mintz’ initial answer was only to whether she indeed recalled, and that her recollection, as elicited later in the testimony, was that she did not have a hammer of that type in her possession in 2005. Plaintiff attaches to her motion excerpts from what she states is a book titled “The Clinically Important Reflexes.” She refers to an illustration of a reflex hammer that is similar in appearance to the one Ms. Zak described at her EBT. This is her proof that there does exist such an instrument as the one she described.

Plaintiff further includes in her opposition a series of condemnations of the statements and opinions of Dr. Mintz and Dr. Bosco. She is suspicious of the fact that the two physicians rely on similar wording in their affirmations, indicating to her that the expert’s opinions are biased. She maintains that Dr. Bosco failed to state that his medical opinions are generally accepted in the medical community. She points out that both doctors have been the subject of other medical malpractice cases. She complains that Dr. Bosco failed to review Rimma Bitman’s (her mother’s) EBT testimony, although plaintiff herself fails to annex such transcript. These and other seeming deficiencies form the basis for plaintiff’s position that Dr. Mintz never met her burden to eliminate all material issues of fact.

Towards the end of plaintiff’s affidavit, she states that pre-trial disclosure of the name of a party’s expert is not mandatory in order to justify why she declined to provide an expert

affidavit. However, she states that if the court determines that she must submit a medical witness affidavit to support her case, she will do so. At the first scheduled oral argument of this motion, the court allowed plaintiff additional time to serve an expert's affidavit on defense counsel. Plaintiff failed to do so, and the motion was fully submitted without any expert affirmation on plaintiff's behalf and without plaintiff appearing in court to argue the motion on the return date.

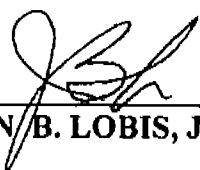
Plaintiff's essential allegations are that Dr. Mintz used an improper instrument and excessive force in testing her reflexes, causing her patellofemoral pain syndrome. While there certainly exist disputes about the facts of the case, defendant has firmly established, through expert opinion, the absence of proximate cause. There is no indication that plaintiff's injury as alleged was caused by any departure, act, or omission of Dr. Mintz. It was incumbent upon plaintiff to rebut defendant's showing of no proximate cause with an expert affidavit. She failed to provide an expert affidavit, even when given additional time to do so. While she spent a great deal of time in her affidavit in opposition deconstructing the factual elements of this case, she never describes any causative link between patellofemoral pain syndrome, her alleged injury, and the alleged departures. Moreover, it has not been established that she even has an actual injury. The conclusions that plaintiff draws about Dr. Mintz' medical technique and practice, and how she conducts reflex examinations, are opinions that only a medical expert is qualified to render. Her citations to textbooks are not a substitute for expert opinion testimony. Plaintiff failed to sufficiently rebut defendant's prima facie showing, and as such, defendant is entitled to summary judgment dismissal of the complaint. Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted, and the complaint is hereby dismissed as against defendants Betty J. Mintz, M.D., and the Clerk is directed to enter judgment in favor of Dr. Mintz; and it is further

ORDERED that those branches of defendant's motion seeking relief under C.P.L.R. § 3126 or C.P.L.R. Rule 3216 are denied.

This constitutes the decision, order, and judgment of the court.

Dated: June 4, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear at the County Clerk's Judgment Clerk's Desk (Room 41B).