

Alexander v Milner

2010 NY Slip Op 31562(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 101254/2007

Judge: Joan B. Lobis

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

CO02

Joan B. Cobis

PART 6

Index Number : 101254/2007

ALEXANDER, CATHERINE

vs.

MILNER, BRUCE J., D.D.S.

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/27/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-13

* see mot. seq. 00:

14

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 23 2010

NEW YORK COUNTY CLERKS OFFICE

Dated: 6/25/10 _____ JCB _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
CATHERINE ALEXANDER,

Plaintiff,

Index No. 101254/2007

-against-

Decision and Order

BRUCE J. MILNER, D.D.S., ALEX M. GREENBERG, D.D.S.,
DAVID L. JURMAN, M.D., ALI M. SADEGHI, M.D.,
TRANSCEND DENTAL, P.C., ALEX GREENBERG, D.D.S.,
P.C., and THE MOUNT SINAI HOSPITAL CENTER

Defendants.

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JUN 23 2010
NEW YORK
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-----X
JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 006 and 007 are consolidated for disposition. In Motion Sequence Number 006, defendant Bruce J. Milner, D.D.S., a general dentist, moves, pursuant to C.P.L.R. § 3212, for summary judgment dismissing plaintiff's claims for dental malpractice and lack of informed consent. In Motion Sequence Number 007, defendants Alex M. Greenberg, D.D.S., an oral maxillofacial surgeon, and Alex Greenberg, D.D.S., P.C., move for similar relief.¹ For the reasons stated below, the motions are denied.

On January 11, 2005, plaintiff complained to Dr. Milner of pain in the area of her upper right molar ("Tooth 2"). The tooth was extracted. On February 17, 2005, plaintiff returned to Dr. Milner complaining of pain in the area of the extraction. Upon examination, a large amount of pus was present at the extraction site. Dr. Milner, after probing the area, admitted that he could not feel the floor of the maxilla, the upper jaw bone. Dr. Milner referred plaintiff to Andrei Mark,

¹ By a separate order, summary judgment has been granted to defendants The Mount Sinai Hospital Center, Ali M. Sadeghi, M.D., and David L. Jurman, M.D., and the claims against them have been dismissed.

D.D.S., on an emergency basis. According to Dr. Mark's operative report, plaintiff had been complaining of fluid leaking out of the maxillary sinus since the January extraction. Dr. Mark diagnosed plaintiff with an oral antral communication (a fistula) and an acute maxillary sinus infection. He attempted to close the fistula. During the course of the procedure, a cyst was discovered and tissue from the cyst was sent to a laboratory for analysis. A surgical pathology report issued by Mount Sinai Hospital Laboratory in February 2005 showed an odontogenic keratocyst ("OKC"). Plaintiff followed up with Dr. Mark, but the fistula did not close.

On May 9, 2005, plaintiff saw Dr. Greenberg for a consultation. Dr. Greenberg's treatment plan called for a bone graft procedure to close the fistula. On June 25, 2005, plaintiff was admitted to Mount Sinai Hospital and Dr. Greenberg performed a bone graft procedure and extracted the OKC. Dr. Greenberg scheduled plaintiff for a follow-up visit on July 26, 2005. The bone graft became infected and ultimately failed. Plaintiff underwent a subsequent revision surgery in October 2005.

Plaintiff commenced this action on or about January 26, 2007. Plaintiff alleges that the moving defendants committed acts of malpractice and that neither Dr. Greenberg nor Dr. Milner informed her of the risks and alternatives to the treatment she received. She asserts that defendants' acts proximately caused her injuries.

The party moving for summary judgment in a dental 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 [dental] 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 dental 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, 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, 324 (1986) (citation omitted).

Specifically, in a dental 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 [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted).

In support of his motion, Dr. Milner relies on the affirmation of Arthur C. Elias, D.M.D., a board certified oral and maxillofacial surgeon. Dr. Elias opines that Dr. Milner’s care was at all times in accordance with good and accepted dental care and that Dr. Milner obtained plaintiff’s informed consent to extract Tooth 2. Dr. Elias attributes the complications that followed the extraction to the presence of the OKC. He asserts that an OKC is the most aggressive odontogenic cyst in the oral cavity and that its removal would have required the removal of Tooth 2, regardless. He opines that the extraction was done properly.

Dr. Greenberg relies on the affirmation of Peter Sherman, D.D.S., an oral and maxillofacial surgeon. Dr. Sherman, relying on a written form and Dr. Greenberg's testimony at his examination before trial, maintains that Dr. Greenberg explained the risks and benefits of the surgery and his surgical plan for plaintiff. He asserts that the presence of an ear, nose, and throat specialist was not required during the surgery. Dr. Sherman maintains that infection, failure of the bone graft, and paresthesia of the chin in the area where the bone was removed for the graft are known risks of the procedure.

In opposition, plaintiff relies on the affirmations of a periodontist, an oral and maxillofacial surgeon, and a radiologist; their names have been redacted. The periodontist opines that Dr. Milner's extraction of Tooth 2 caused the fistula, which led to sinusitis (an infection) in her right maxillary sinus and plaintiff's further problems. The periodontist opines that it was a deviation from the standard of care for Dr. Miler to extract Tooth 2 instead of performing an alternative non-surgical treatment that would have saved the tooth. The periodontist further asserts that a small radiolucency at the tip of the root of Tooth 2 was visible on an x-ray. Such a finding required further investigation by Dr. Milner instead of extraction. The failure to conduct this further investigation was a deviation from the standard of care. The periodontist further alleges that no informed consent was obtained. The periodontist also asserts that the excessively large size of the socket and fractures of the septal and alveolar bones, as well as other injuries, were the result of departures from the standard of care in performing the extraction.

The oral and maxillofacial surgeon opined that, because pus was observed during the

bone graft surgery, only a debridement should have been done and only the sinus infection should have been treated. The surgeon maintains that proceeding with the graft was contraindicated, since the presence of infection would compromise the bone graft, and was a deviation from the standard of care. The surgeon further opines that no informed consent was obtained, stating a number of issues that should have been disclosed for plaintiff to give her consent to Dr. Greenberg's treatment. The procedure necessitated revision surgery and caused facial nerve pain and other injuries, which plaintiff asserts she has experienced since treatment.

The radiologist opines that, contrary to Dr. Greenberg's claims, an antrostomy (a surgically created damage tract) was not created during the bone graft operation. Plaintiff also includes the report of a neurologist that had been previously exchanged pursuant to C.P.L.R. 3101(d)(1)(i) in support of her claims of hearing loss, nerve damage, and pain as a result of the alleged malpractice.


In reply, defendants argue that the affirmations of plaintiff's experts are conclusory and have failed to link the alleged malpractice to plaintiff's alleged injuries. Defendant Dr. Greenberg also argues that the court should disregard the neurologist's report, which supports plaintiff's claims of injuries, because it is not in admissible form.

While Dr. Greenberg's papers offer detailed expert evidence asserting that his treatment was not a departure from the standard of care, Dr. Milner's papers barely make a prima facie case for summary judgment. His expert does little more than allege that the OKC was the

reason for the extraction. His expert does not address in detail the allegations of the improper nature of the extraction; alternatives to extraction; nor the creation of the fistula. Nevertheless, plaintiff's experts have more than adequately addressed both defendants' motions for summary judgment on all issues, including the claim that proper consent was given. While the 3101(d) statement by a neurologist is not admissible as evidence, it will be considered in conjunction with the other expert affirmations, particularly that of the periodontist, who asserts that the nerve pain was the direct consequences of Dr. Milner's departure, and that of the oral and maxillofacial surgeon, who asserts that Dr. Greenberg's departures caused nerve injury, facial pain, and other injuries. In light of the experts' conflicting opinions, summary judgment must be denied. See Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008). Accordingly it is

ORDERED that defendants' motions for summary judgment are denied. The parties shall appear for a pre-trial conference on August 3, 2010 at 9:30 a.m.

Dated: June 21, 2010



 JOAN B. LOBIS, J.S.C.

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