

**Valenti v Camins**

2010 NY Slip Op 33196(U)

November 3, 2010

Sup Ct, NY County

Docket Number: 102427/2008

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

*Judge*

Index Number : 102427/2008  
VALENTI, JOSEPH  
vs.  
CAMINS, MARTIN  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/14/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

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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**

FOR THE FOLLOWING REASONS:

**FILED**  
NOV 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/3/10

JBL  
J.B.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  
**JOSEPH VALENTI and IRENE VALENTI,**

**Plaintiffs,**

**Index No.: 102427/2008**

**- against -**

**Decision and Order  
FILED**

**MARTIN CAMINS, M.D., and MT. SINAI  
MEDICAL CENTER**

**NOV 05 2010**

**Defendants.**

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----X  
**JOAN B. LOBIS, J.S.C.:**

Defendants Martin Camins, M.D., and Mt. Sinai Medical Center ("Mt. Sinai"), move, pursuant to C.P.L.R. Rule 3212, for an order granting them summary judgment dismissing this matter in its entirety. For the reasons discussed below, the motion for summary judgment is granted to the extent of dismissing plaintiffs' claim of lack of informed consent.

This action, sounding in medical malpractice and lack of informed consent, concerns back surgery and subsequent corrective surgery that Dr. Camins performed on Mr. Valenti at Mt. Sinai in 2006. On February 23, 2006, after experiencing pain and numbness on his left side, emanating in his face, shoulder, arm, penis, and leg, Mr. Valenti underwent an MRI of his cervical spine at Pocono MRI Imaging. The MRI report, dated February 24, 2006, revealed "C 3-4 disc herniation[;] C 4-5 moderate size herniation with disc material extruded inferiority, severe canal stenosis, spinal cord compression, flattening and mild increased T 2 signal intensity within the spinal cord[; and] [d]egenerative changes C5-6 with significant canal and left foraminal stenosis." Mr. Valenti was seen by Mahesh Chhabria, M.D., a neurologist, at Neurology Associates of Monroe County. Dr. Chhabria referred Mr. Valenti to Dr. Camins, who saw Mr. Valenti for the first time

on March 16, 2006. Dr. Camins examined Mr. Valenti and discussed the possibility of spinal surgery. According to Dr. Camins' records, he provided Mr. Valenti with a six page document entitled "Some Common Risks of Surgery" for a surgery described as a "C 4-5, C5-6 anterior cervical diskectomy, fusion and plating." The document outlines numerous risks and complications, including cervical spinal hardware failure. Mr. Valenti's signature appears on the document and his initials are on twelve additional places; it bears a date of April 1, 2006. Mr. Valenti's records from Mt. Sinai also contain a consent form entitled "Permission for Operation And/Or Procedure And Anesthesia," which defendants assert was signed before the surgery. The surgery was performed on April 11, 2006. Mr. Valenti was discharged to his home on April 12, 2006 in the afternoon.

On May 4, 2006, plaintiffs were seen by Dr. Camins for a the first post-operative visit. According to the medical records, Mr. Valenti reported improvement in his overall condition. His sole complaint at the time was retro-scapular pain. Dr. Camins told him that the pain was secondary to the procedure and would likely resolve with certain therapies, including physical therapy. Mr. Valenti underwent fourteen sessions of physical therapy under the supervision of Laurie B. Samet. On June 9, 2006, Mr. Valenti underwent a routine cervical spine radiograph, which showed evidence of a screw back-out. According to a letter from Pocono MRI Imaging to defendant, the radiograph showed that the "inferior screws appear to overlie the C6-7 disc space." In Dr. Camins' testimony at his examination before trial ("EBT"), he asserted that the letter misstated the radiograph. On June 12, 2006, in a letter from defendant to Dr. Chhabbria, defendant set forth that "[i]t appears that at the C7 level the screws are backing out." According to his EBT testimony, Dr. Camins contended that this was another misstatement.

The screw back-out necessitated revision surgery. The revision surgery was performed at Mt. Sinai on June 27, 2006 and involved two stages. In the first, cervical plates that spanned Mr. Valenti's spine from C4 to C7 were removed and replaced. In the second stage, a posterior cervical arthrodesis, or stiffening, was performed by the placement of rods from C3 to C7. In preparation for the revision surgery, Mr. Valenti signed a consent form similar to the one he signed in April. The form indicated that the surgery was for C5-C7 removal of Anterior Hardware Place of Cervical Spine Locking Plate." He was discharged on July 1, 2006. Both the pre-operative and post-operative reports set forth that there was a screw back-out at the C7 level.

Mr. Valenti returned to Dr. Camins for a follow-up appointment on August 3, 2006. The office chart reflects that Mr. Valenti reported numbness on the top of his head, an achy sensation in his left suboccipital region, numbness in his penis, and difficulty swallowing. Dr. Camins last saw Mr. Valenti on November 9, 2006, at which time he reported that his paraspinous muscles occasionally felt like they were "on fire." Dr. Camins recorded that other complaints had diminished. Plaintiffs commenced this lawsuit by filing a summons and complaint on or about January 13, 2008.

A defendant 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, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice

action 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 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 physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, and alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1).

In support of their motion, defendants offer the affirmation of Douglas S. Cohen, M.D., a board-certified neurosurgeon experienced in cervical spine fusion surgeries with placement of hardware. He reviewed the medical records, the bill of particulars, and deposition transcripts. Dr. Cohen opines that Dr. Camins and Mt. Sinai provided Mr. Valenti with appropriate information prior to both surgeries. Dr. Cohen details the steps taken to treat Mr. Valenti, including the pre-operative examinations and decision to undertake surgery, and post-operative care, and asserts that all of the treatment adhered to the standard of care. He maintains that screw back-out is a well

known and accepted complication that can occur even with proper surgical technique and selection of hardware.

In opposition, plaintiffs argue that defendants, because they presented only conclusory arguments that there was no malpractice, failed to meet their prima facie burden. They assert that Dr. Cohen's affirmation merely restates the procedures followed by defendants, almost verbatim from the records, and endorses them as good and accepted practice. Thus, they assert, the affirmation contains no independent evaluation of the procedure.

In an exercise of caution in the event that the court determined that defendants did meet their prima facie burden, plaintiffs offer the affirmation of a board-certified orthopedic surgeon who has experience in performing spinal procedures. The expert opines that there is evidence that a screw was placed at the C7 level. According to the expert, the placement of the screw was improper and a departure from good and accepted medical practice. The expert contends that Dr. Camins concedes this point by maintaining that all references to a screw at the C7 level were erroneously made. The expert further submits that the improper placement caused the screw to back out and was a substantial cause of injury to Mr. Valenti.

In reply, defendants reassert their claim that they are entitled to dismissal of the lack of informed consent cause of action. They further argue that plaintiffs' expert's contention that the screw was misplaced is contradicted by Dr. Camins' EBT testimony. Defendants further contend that there is ample evidence to suggest that references to a screw back out at the C7 level were erroneous.

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In support, defendants submit the affirmation of a certified radiologist. The radiologist reviewed Mr. Valenti's imaging studies and asserts that the screws did not extend into the C6-C7 disc space.

Though plaintiffs argue that defendants' expert affirmation is insufficient to meet their prima facie burden on a summary judgment motion, the expert's recitation of the medical records is used to set forth that, based on his experience, each step of the surgery was done properly and that there is nothing in the records to indicate otherwise. The expert's conclusion that the surgery was proper and that screw back-out was a known risk of surgery and not indicative of malpractice is sufficient to shift the burden to plaintiffs. The affirmation of plaintiffs' expert adequately disputes the opinion that the surgery was done properly, pointing to evidence that supports the theory that a screw was misplaced. In light of the conflicting expert opinions and the disputed evidence on which they rely, summary judgment is unwarranted See Boston v. Weissbart, 62 A.D.3d 517, 518 (1st Dep't 2009); Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008). Defendants' reply only underscores this conflict. To the extent that defendants offer new evidence their reply papers for summary judgment, the court cannot consider it. See Dannasch v Bifulco, 184 A.D.2d 415 (1st Dep't 1992); Ritt v Lenox Hill Hospital, 182 A.D.2d 560 (1st Dep't 1992). However, since plaintiffs do not contest the assertion that Mr. Valenti's informed consent was obtained, their claim sounding in lack of informed consent is dismissed. Accordingly, it is hereby

ORDERED that the branch of the motion seeking summary judgment as to the claim for failure to obtain informed consent is granted and the cause of action for lack of informed consent is severed and dismissed as to all defendants; and it is further

ORDERED that the branch of the motions seeking summary judgment as to the cause of action sounding in medical malpractice is denied, and the remainder of the action shall continue.

ORDERED that the parties shall appear for a pre-trial conference on November 23, 2010 at 9:30 a.m.

Dated: *Nov. 3*, 2010

  
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JOAN B. LOBIS, J.S.C.

**FILED**  
NOV 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE