

Rosell v International Cosmetic Surgery, P.C.

2010 NY Slip Op 33438(U)

December 13, 2010

Sup Ct, NY County

Docket Number: 103487/06

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART **IA** PART 16

Index Number : 103487/2006
ROSELL, MARIA
VS.
INTERNATIONAL COSMETICS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEC. NO. _____

MOTION CAL. NO. **DEC 15 2010**

this motion is for
NEW YORK
COUNTY CLERK'S OFFICE
PAPERS NUMBERED _____

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 *by defendants for*
summary judgment is granted to the
extent of severing and dismissing all
claims related to the 2003 surgery and
all claims of malpractice with regard to
the method by which Dr. Lesesne
performed the surgeries, but is otherwise
denied in accordance with the accompanying
memorandum decision.

DEC 13 2010

Dated: _____

Alice Schlesinger

ALICE SCHLESINGER 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
COUNTY OF NEW YORK

-----X
MARIA ROSELL,

Plaintiffs,

-against-

INTERNATIONAL COSMETIC SURGERY, P.C. and
CAP B. LESESNE, M.D.,

Defendants.
-----X

SCHLESINGER, J.:

Index No. 103487/06
Motion Seq. No. 002

FILED

DEC 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

This is a medical malpractice action that concerns procedures performed by the defendant Dr. Cap B. Lesesne, a plastic surgeon. Dr. Lesesne performed two surgical procedures on the plaintiff Maria Rosell. The first one occurred on June 17, 2003. After the filing of the instant motion and the receipt of opposition papers and oral argument, it is clear that the plaintiff is not alleging any claims of malpractice with regard to that procedure. However, the second procedure, an abdominoplasty performed by the defendant on March 16, 2004, is the basis of a claim that essentially sounds in lack of informed consent, as well as a claim that the procedure was contraindicated and thus constituted malpractice.

Dr. Lesesne first saw Ms. Rosell on April 9, 2003. At that time she was 5'1" and weighed approximately 205 pounds. More important for this case, she was a habitual smoker and smoked a pack of cigarettes a day, something the defendant knew from the very beginning of the relationship. I say that this was significant because at the end of the day plaintiff's only viable claim, and I do find that it is a viable claim, is that Dr. Lesesne should not have performed the second procedure in light of Ms. Rosell's serious smoking

habit, or at the very least he should have informed her that there were additional and serious risks in going ahead with this procedure in light of her smoking habit.

After the first surgery, the aftermath of which was uneventful, Ms. Rosell and the defendant discussed doing additional procedures. For example, on September 17, 2003, Ms. Rosell returned to see Dr. Lesesne and talked to him about an additional procedure which would involve the removal of redundant abdominal skin, essentially a large flap of skin that had been made after the original liposuction. On November 5, 2003, the two again talked about a second procedure, which would involve a suction-assisted lipectomy of the outer thighs and legs with a skin abdominoplasty of the abdominal flap. There was no question that Ms. Rosell signed a consent form that detailed many risks which could result after such a procedure. In fact, besides mentioning infection and bleeding, the possibility of death was also included. However, it is absolutely clear that Dr. Lesesne never specifically told Ms. Rosell that the procedure could be compromised in an additional manner from the fact that she was a habitual smoker. Also in this regard, it should be noted that on the form she signed there was a space for additional risks to be filled in if warranted. However, this space was left blank.

As mentioned above, on March 16, 2004, Ms. Rosell had a liposuction of her outer thighs and abdominoplasty of the abdominal pannus or flap. On the next day, March 17, 2004, she did not make any complaints in the post-operative interview. However, on March 19, 2004, there was noted to be "marked erythema from plaintiff's umbilicus to the inferior half of her abdomen with a 2 by 10 area of ecchymosis next to the incision." A drain to remove excess blood and fluid was placed. On March 21, 2004, the drain was removed. There was less erythema, but the ecchymosis remained unchanged.

On March 23, 2004, defendant noted possible post-operative infection. Interestingly, on March 30, 2004, the progress note indicated that the plaintiff was still smoking and was told to stop. The doctor continued to see Ms. Rosell at various times through May 29, 2004, when he removed areas of dead skin and debrided an area of fat in the "open" portion of the inferior abdomen. During the month of April the doctor noted that there was no evidence of infection.

After the last visit on May 29, 2004, Ms. Rosell on June 4, visited the Manhattan Eye, Ear and Throat Hospital where she was seen and treated by a Dr. Spero Theodorou. His treatment consisted of debridement of necrotic tissue, removal of old stitches and administration of oral antibiotics. In July, August, and September of 2004 this doctor noted that the wound was still healing and he would consider scar revision but only after the wound was fully healed. At the end of 2004 and into 2005, additional discussions were held between Dr. Theodorou and Ms. Rosell with regard to revision surgery, but the doctor insisted that she lose more weight before he would consider performing further surgery. Ms. Rosell's last visit with this doctor was on June 30, 2005, when Dr. Theodorou did propose this surgery. It is my understanding that the surgery was never performed.

In support of the defendant's motion for summary judgment is an affirmation from Dr. William B. Rosenblatt, who is board certified in plastic surgery. In essence, he opines that everything that Dr. Lesesne did was in accord with the standards of care for these procedures. He also says that there was informed consent given by the patient. Although he does mention Ms. Rosell's habit of smoking cigarettes, he merely says that this may have been a contributing factor to the poor results from the March 16, 2004 surgery.

The affirmation by Dr. Rosenblatt does strike the Court as conclusory without much elaboration to support the opinions given, but does succeed in presenting a prima facie case for summary judgment and placing the burden to contest that showing on the plaintiff.

The plaintiff does succeed in meeting that challenge. However, as mentioned earlier, the opposition only deals with the October 2004 procedure and the subsequent infection from that procedure. Further, the only claim presented by plaintiff's expert only relates to Ms. Rosell's habitual smoking and why it was so important to have informed the patient of the additional risks associated with her smoking or not to have performed the procedure at all in light of her continuing smoking habits.

Also, as part of the plaintiff's opposition is an affidavit from Ms. Rosell dated September 21, 2010 that says (at ¶2) that she was never informed that there was a higher rate of complications from the procedure among abdominaloplasty patients who were smokers. In paragraph 3 she says that if she had been so informed, she would not have gone ahead with the procedure.

However, more important is the convincing affirmation dated September 2, 2010, from Dr. Hubert Weinberg, a board certified plastic surgeon for 35 years. He says that in his 32 years of practice he has performed hundreds of abdominalplasties, which he defines as the surgical removal of excess skin from the patient's abdomen. While he does provide details, which the Court will discuss momentarily, he also says the following (at ¶ 4): "In sum, Defendants performed an abdominoplasty upon Plaintiff which resulted in a poor result, as a result of complications from reasonably foreseeable known increased risks associated with smoking." He then goes on to explain in great detail why smokers have much higher complication rates of tissue necrosis and infection because of the inhibitory

effect of smoking on wound healing.

Specifically, Dr. Weinberg explains the way in which cigarette smoke inhibits wound healing. It does it in several ways. The first is that nicotine causes constriction of blood vessels, which reduces blood flow and oxygen delivery to the tissues. Second, the carbon monoxide in cigarette smoke enters the blood stream of smokers and decreases the oxygen-carrying capacity of the hemoglobin. This reduces the amount of oxygen reaching the surgical site so that these patients have a higher rate of tissue necrosis because less oxygen reaches the site, which is needed for healing.

Finally, because there is reduced blood flowing into the abdomen due to the constriction of the blood vessels, the mobilization of white blood cells important in fighting off bacteria is reduced. Therefore, there is an increased risk of post-operative infection. He adds that this risk is particularly significant in patients undergoing abdominoplasty because the procedure involves the removal of skin and moving a skin flap, which interrupts the blood supply to the tissue. Therefore, survival of the skin depends on an adequate blood supply and oxygenation. In smokers the blood supply is often inadequate.

Dr. Weinberg adds that the patient must be directed to stop smoking at least two weeks before surgery. He further opines that there is malpractice by the surgeon in going ahead with this kind of procedure while the patient is still an active smoker. He also says that the surgeon must specifically inform the patient of the risks related to cigarette smoking, but this was not done.

In reply, counsel for the moving defendants makes the point that it "strains credulity" to believe that Ms. Rosell would not have proceeded with the surgery if she had been informed of the additional risks, in light of the fact that she did proceed to have the surgery

when told that she could die from it. However, it does not strain this Court's credulity. In other words, I find two triable issues, the necessity for giving Ms. Rosell specific information with regard to the additional risks that could occur from her smoking habit, and alternatively, whether the defendant should have advised the patient of the risk going ahead with the surgery in light of her smoking habit. Therefore, defendants' motion to dismiss is denied, except that there will be no claims with regard to the 2003 surgery and no claims of malpractice with regard to the method by which Dr. Lesesne performed the surgeries. However, remaining for trial will be the issue of lack of informed consent for the March 16, 2004, surgery which resulted in infection, and whether there was malpractice in going ahead with the 2004 surgery in spite of the fact that plaintiff's expert maintains that it was contraindicated under these circumstances.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing all claim related to the 2003 surgery and all claims of malpractice with regard to the method by which Dr. Lesesne performed the surgeries, and is otherwise denied.

Dated: December 13, 2010

DEC 13 2010

Alice Schlesinger

 J.S.C.
ALICE SCHLESINGER

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