

Martino v Bendo

2010 NY Slip Op 33546(U)

December 23, 2010

Sup Ct, NY County

Docket Number: 110227/2006

Judge: Alice Schlesinger

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

IA PART 16
PART _____

PRESENT: ALICE SCHLESINGER
Justice

Index Number : 110227/2006
MARTINO, NICHOLAS
vs.
BENDO, JOHN A., M.D.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

JAN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: DEC 23 2010

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

-----X
NICHOLAS MARTINO and ANN MARTINO,

Plaintiffs,

-against-

JOHN A. BENDO, M.D.,

Defendant.

-----X
SCHLESINGER, J.:

Index No. 110227/06
Motion Seq. No. 004

FILED

JAN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

When Nicholas Martino first went to see Dr. John A. Bendo, an orthopedic surgeon, he provided the doctor with a history of severe lower back and bilateral buttocks pain. This was on December 9, 2003. Mr. Martino explained that he had been suffering with back problems for about 50 years, he was 69 at the time, but that the pain had worsened severely over the last several months to a year. Mr. Marino had also related that he had tried physical therapy, and epidural steroidal injections, but they only provided minimal pain relief. After an examination, Dr. Bendo suggested that Mr. Martino try some other pain injections, but despite that recommendation, he arranged for surgery in the next month.

On January 26, 2004, the defendant Dr. Bendo performed a non-instrumented decompression and posterior fusion at Mr. Martino's L3-4 level. Dr. Bendo also performed lumbar laminectomies at the L2, L3 and L4 level with decompression of the cauda equina and exiting nerve roots, a partial facetectomy and foraminotomies at L2-3 and L3-4. He also excised scar tissue. With the use of the laminectomy bone he performed this fusion. Mr. Martino stayed in the hospital for one day and the doctor reported no complications from the surgery.

The first post-operative visit was uneventful and occurred February 4, 2004. Dr. Bendo suggested physical therapy soon after the surgery and the therapist thereafter suggested that Mr. Martino see his surgeon again, which he did on February 26, 2004 for a wound check. At that visit, Mr. Martino complained of persistent numbness in his legs. The doctor continued him on therapy and pain medications. Mr. Martino saw Dr. Bendo again on April 20, 2004, and on June 15, 2004, which was his last visit. At that time, plaintiff complained of right lower back discomfort as well as persistent numbness of the legs. Dr. Bendo recommended a trial of Facet Joint Blocks on the right side at L3-4, L4-5 and L5-S1 and referred the plaintiff to Dr. Varlotta. Mr. Martino underwent this therapy in the fall of 2004.

During the ensuing three years, Mr. Martino says that he suffered continual pain, often at a level of 9 out of 10 on a pain scale. He also saw a number of doctors. Finally, on June 4, 2007, he came under the care of Dr. David Matusz, where he complained to the doctor of chronic low back pain, as well as numbness in both lower extremities. Pursuant to these complaints, Mr. Martino underwent a second back surgery on July 26, 2007, wherein Dr. Matusz performed pedicle screw instrumentation from L2-S2, partial facetectomies at L1-2 through L5-S1 and a TLIF fusion at L5-S1 with the use of grafts. In his operative report, he described observing a pseudoarthrosis at L3-4 which apparently no one had appreciated before. At a final visit to Dr. Matusz on July 31, 2009, plaintiff was doing extremely well with complete to nearly complete resolution of his pain and where the only numbness that he now felt was on the top of his feet. On a pain scale, he estimated his pain as 0-2 out of 10.

It is on these set of facts that the defendant John Bendo is moving for summary judgment. He makes this motion with the aid of the affirmation of Dr. Philip Fontanetta. Dr. Fontanetta is Board Certified in Orthopedic Surgery and has been practicing this speciality for over 30 years. He has performed thousands of spinal surgeries. Dr. Fontanetta provides a detailed statement which addresses all possible claims that the plaintiff has made in his Bill of Particulars as well as his Supplemental Bill of Particulars. Those claims involved allegations of a failure by the doctor to pursue a course of conservative treatment prior to his performing spinal surgery, as well as performing contraindicated or unnecessary surgery in January 2004.

Dr. Fontanetta first states that he has reviewed all the medical records, the plaintiff's radiologic studies as well as all the Examinations Before Trial. His overall opinion is that Dr. Bendo, in all ways performed pursuant to the standard of care. In other words, he opines that Mr. Martino was a candidate for the kind of surgery Dr. Bendo performed because the X-Ray of the spine which was reviewed by Dr. Bendo revealed significant advanced intervertebral disc space narrowing throughout the lumbar spine and central stenosis at L3 through L4-L5. Further, the November 2003 CT report also showed degenerative disc disease at L1-4, L5-S1 with mild to moderate canal and foraminal narrowing. Finally a CT myelogram which Mr. Martino had at the end of December 2003, showed multilevel degenerative disc disease with specific findings involving L1-S1.

With these findings Dr. Fontanetta opines that the surgery which was chosen by Dr. Bendo was appropriate in light of the length of time that Mr. Martino was suffering and the failure of conservative treatment. Significantly, he says that Dr. Bendo's decision to perform a non-instrumented decompression and posterior fusion at L3-L4 alone, as

opposed to a more extensive operation involving additional levels was proper. He urges that this kind of decision as to how extensive a fusion should be or whether an instrument should be used on a patient is an intra operative surgical judgment decision. Finally, that instrumentation under all the circumstances was not mandatory.

With regard to the post-operative period, Dr. Fontanetta states that all of the treatment recommended by Dr. Bendo involving therapy, medicines and injections was appropriate. He points out that in 2007, imaging showed that there was adequate decompression as well as other reassuring signs. Dr. Fontanetta says that these signs are at least indirect evidence that Dr. Bendo's attempts at fusion were successful in immobilizing the L3-4 segment and further, that the 2004 surgery had been carried out properly. Finally, in 2007, Dr. Fontanetta says that Mr. Martino had developed new pathologies and his situation had worsened. Therefore, more extensive surgery was at that time justified.

With regard to Dr. Matusz and his decision to use instrumentation and more extensive fusion, this was an exercise of his own independent surgical judgment and does not lead to the conclusion that Dr. Bendo improperly performed his surgery or that Dr. Bendo's surgery was not extensive enough. Finally, again with regard to the new findings of "pseudoarthrosis", this is a recognized risk and potential complication of Dr. Bendo's surgery, without any negligence by the doctor.

I find that Dr. Fontanetta's extensive statements, wherein he opines that Dr. Bendo at all times performed within the appropriate standard of care, does succeed in establishing a prima facie case for the defendant. Pursuant to law, the burden has now shifted to the plaintiff to see whether or not his opposition papers create any legitimate issue of fact with

regard to Dr. Bendo's treatment. This opposition consists of an affirmation from a board certified orthopedic surgeon, who indicates that he has a specialty in spinal surgery and that he has lectured and published in this subject area. His opinion very definitely states that Dr. Bendo's treatment of Mr. Martino caused or contributed to Mr. Martino's three and a half years of pain and suffering between the two surgeries, in 2004 and 2007. In this regard he points out, as was stated earlier in reviewing the patient's history, during those three and half years, despite Mr. Martino undergoing acupuncture, injections, and two lumbar facet joint injections he was still experiencing pain at a level of 9 out of 10. However, again as mentioned earlier, after his successful surgery with Dr. Matusz the pain level had almost been eliminated or at the most was 2 out of 10.

This expert does suggest that when Mr. Martino first presented to Dr. Bendo, the latter should have suggested facet joint injections or additional epidural injections to see if those would have reduced the pain. He does say that this failure to pursue those more conservative treatment options was a deviation of accepted orthopedic care. However, the major thrust of his opinion, where he disagrees completely with Dr. Fontanetta is the manner in which Dr. Bendo performed his surgery. This expert says that Dr. Bendo's decision to do a lumbar fusion without instrumentation was not in any way a medical judgment. He/she opines that it was not only improper, but was in fact contraindicated in light of Mr. Martino's physical presentation.

The expert states that the etiology of the spinal stenosis, which Martino had, a narrowing of the spinal canal, as well as facet joint arthritis which resulted in listhesis or instability of the spine was mechanical pain due to segmental instability, something other than and more than a pure nerve root compression. Dr. Bendo should have appreciated

the significance of the listhesis, the instability of the spine and should have appreciated and realized that his performance of a laminectomy, involving removal of lamina bone without instrumented fusion would result in greater spinal instability. Therefore, this surgical decision was a departure from accepted orthopedic practice. Further, the expert says that the resulting non-union was directly caused by the malpractice. In other words, the lamina graph was insufficient to stabilize the spine. The failure to utilize fixation with pedicle screws, to decrease the risk of nonunion, was not simply a poor judgment call. It was again a deviation from accepted practice.

With regard to the post operative care provided by Dr. Bendo, the expert says that it was also inadequate and improper. He opines that since it was clear that the physical therapy increased the pain, Dr. Bendo should have immediately suspected an increasing instability upon an inadequately fused spine. Further, the doctor should not have waited six months before he prescribed facet joint blocks. Finally, this expert says that the second surgery was not due to a simply worsening condition or aging in the plaintiff's spine, as suggested by Dr. Fontanetta. Rather, it was due to a failure of the initial surgery by Dr. Bendo. To summarize, the defendant should have adequately decompressed the entrapped nerve and properly fused the unstable spine by the use of instrumentation. Since he did not, he departed from accepted standards of orthopedic care.

Along with the plaintiff's opposition papers, is a cross motion by the plaintiff to amend their Bill of Particulars, to further specify Dr. Bendo's failure to properly diagnose spinal stenosis and spinal listhesis and appreciate that the facet joint arthritis was causing the instability of his spine. Counsel for the plaintiff notes that there has already been a supplemental Bill of Particulars and also that the note of issue was filed on April 1, 2010.

Therefore, this request to further amend is acknowledged to come late in the proceedings. Counsel explains that this is the case because it was only at Dr. Bendo's deposition, where he was extensively questioned as to his differential diagnosis as well as methods of treatment for spinal stenosis that their expert realized that he, the defendant had reached an improper diagnosis with regard to the etiology of plaintiff's spinal stenosis.

There is strenuous opposition to this motion to amend. Counsel for the moving defendant accuses the plaintiff of a last minute change in their theory of the case. In fact, he states plaintiff has totally reversed their position. He argues that this is absolutely improper, and should not be tolerated or allowed. He further urges the Court to disregard the entire opposition affirmation on the grounds that it is based on a new theory. His position is that the Court should disregard the opposition affirmation and deny plaintiff's cross motion to amend the Bill of Particulars, which would result in the granting of his summary judgment motion.

However, what the defense does not argue is prejudice. Counsel for the defense acknowledges that his affirmation by Dr. Fontanetta was extensive and complete and deals with all aspects of the pre-surgical care, the surgery itself as well as post operative care.

At oral argument I even asked counsel whether he wanted an opportunity to submit a further affirmation from Dr. Fontanetta. However, he declined this offer because he acknowledged that Dr. Fontanetta had covered all of the points that defendant wanted to make and had responded to the opposition opinions, even before having them.

I find in the first instance, contrary to the cases cited by the defense in opposition to the cross-motion to amend, such as *Zito v. City of New York*, 72 AD3d 451, 1st Dept, 2010, as well as *Schriber-Cross v. State*, 57 AD3d 881, 2nd Dept, 2008, that plaintiff here

is not trying to inject a different theory into the case. Nor is this on the eve of trial, although a note of issue was filed in April. In fact, the parties still have not chosen a trial date.

Rather, I agree with plaintiff's counsel when she argues that this is not a new theory of liability as she is not claiming that defendant made an improper diagnosis. Rather, she says the theory has always been that the kind of surgery that Dr. Bendo chose was contraindicated. Further, that the new Bill of Particulars is now specifying the reason for the contra-indicated surgery which was that Dr. Bendo failed to recognize the etiology of this condition. If he had, he would have performed a different kind of surgery, one with proper instrumentation.

I am accepting the opposition affirmation and I am granting the cross-motion to amend the Bill of Particulars. As stated earlier, I do not find that this is a new theory of liability. Instead it is a particularization or greater specification of the claims. In fact I do not think that anyone here questions that there is no prejudice, by these specifications, to the defense.

Further, I am denying the original motion for summary judgment by the defendant because the expert's affirmation from the plaintiff, which I am accepting, does create legitimate issues of fact as to the manner in which Dr. Bendo performed his surgery. However, I am dismissing the cause of action which sounds in lack of informed consent since it is not addressed by the plaintiff at all. Finally, I am directing plaintiff's counsel to provide to the defense the name of the author of their expert affirmation. I am doing this on the basis of the plaintiff's request for affirmative relief, permission to amend the Bill of Particulars. Since that relief is based on the expert affirmation, his name should be provided. This should be done by January 7, 2011.

In summary, the defendant's motion for summary judgment is denied, except for informed consent and the plaintiff's cross-motion to amend the Bill of Particulars is granted.

This decision constitutes the order of the Court.

Dated: December 23, 2010

DEC 23 2010



J.S.C.
ALICE SCHLESINGER

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