

Mukasey v Curatola

2011 NY Slip Op 32226(U)

August 12, 2011

Sup Ct, NY County

Docket Number: 109293/09

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 : 109293/2009
MUKASEY, SUSAN
vs.
CURATOLA, GERALD P.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

this motion to/for _____

PAPERS NUMBERED

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

FILED

Answering Affidavits – Exhibits _____

Replying Affidavits _____

AUG 16 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

*by defendants
for partial summary judgment is
denied in accordance with the
accompanying memorandum decision.*

Dated: AUG 12 2011

Alice Schlesinger
ALICE SCHLESINGER
cc

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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
SUSAN MUKASEY,

Plaintiff,

Index No. 109293/09
Motion Seq. No. 003

-against-

GERALD P. CURATOLA, D.D.S., EAST HAMPTON
DENTAL ASSOCIATES, P.C., and PARK AVENUE
AESTHETIC & REJUVENATION DENTISTRY, P.C.,

FILED

AUG 16 2011

Defendants.

-----X
SCHLESINGER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This is an action that sounds in dental malpractice. While the parties dispute certain key aspects of the treatment provided by Dr. Gerald P. Curatola, they do agree on certain basic facts of that treatment. What is agreed upon is the fact that the plaintiff Susan Mukasey did receive treatment from the defendant dentist from July 10, 2008 until September 9, 2008. It is also agreed that Dr. Curatola did perform work on teeth numbers 4,5,6,7,8,9,10,11,12 and 13. With regard to the anterior incisor teeth, teeth numbers 6,7,8,9 and 10, Dr. Curatola used porcelain veneers, but for the other teeth, namely numbers 4,5,11,12,and 13, he did restorations involving crowns.

The complaint asserts causes of action for dental malpractice, lack of informed consent, assault and battery and fraud. The motion before the Court is for summary judgment on the malpractice claim and on the assault and battery claim. As counsel for the plaintiff points out accurately in opposition, no motion has been made by the defendants with regard to informed consent or fraud.

The moving defendants support their motion with an affirmation from Dr. Barry C. Cooper. He not only gives opinions with regard to the work performed by the defendant, but since he also performed an independent medical examination on Mrs. Mukasey on November 22, 2010, which included x-rays on a later day, he further opines as to the condition of the plaintiff's mouth when he examined her.

Dr. Cooper first narrates the history of the dental relationship between plaintiff and the defendant. At their first professional meeting for Mrs. Mukasey on July 10, 2008¹, Dr. Curatola responded to Mrs. Mukasey's complaints of pain with regard to tooth number 11, a recently restored tooth. On the next day July 11, Dr. Curatola did do a full examination that included radiographic tests. According to Dr. Cooper, the defendant properly reported findings of decay and failing restorations on teeth numbers 4,5,6,11,12 and 13. He also found incisal wear with stress fractures on the incisor teeth, teeth numbers 7,8,9, and 10. Apparently teeth numbers 4,5,11, and 12 had been previously crowned, and tooth number 13 had a large mesial occlusal distal metallic restoration. Dr. Cooper pointed out that Dr. Curatola wrote out a treatment plan on July 11, 2008, which included work on all of the above teeth.

On July 16, 2008, a complete prophylaxis was performed. Restorative treatment was then begun on July 26, 2008 and completed at a second visit on August 16, 2008. Following the completion of the work, Mrs. Mukasey complained of symptoms of TMD. Dr. Cooper says that the defendant properly dealt with these symptoms by making various

¹The two had met before when the plaintiff's husband had dental work done by Dr. Curatola. That work was on Mr. Mukasey's anterior teeth. According to the plaintiff, Dr. Curatola told her at that time that she needed similar work.

occlusal adjustments and fitting Mrs. Mukasey for an oral appliance to wear at night. However, when she still complained of pain, he referred her to Dr. Michael Gelb, whose speciality was TMD/TMJ.

Mrs. Mukasey did not go to see Dr. Gelb. Instead she went to see another dentist, Dr. Tannenbaum, who replaced crowns on teeth numbers 5 and 12. In a letter that Dr. Tannenbaum wrote to Dr. Goldsmith, which Dr. Cooper quotes, Dr. Tannenbaum stated that the maxillary restorations spanning teeth numbers 4 through 13 appeared to be stable. Also, the restorations appeared to be well-fitting and well-contoured.

Dr. Cooper reports that his examination of Mrs. Mukasey's mouth found that her restored teeth were all doing well, meaning that they had closed margins and that the porcelain restoration was intact with no defects. He also found that her gingival tissue appeared to be healthy. Finally, he found her occlusion was stable with no slides on contact. Finally, he reports that Mrs. Mukasey had no clinical signs or symptoms of TMD.

Dr. Cooper also reviewed Dr. Tannenbaum's records, which stated that besides the deficit with regard to tooth number 5, the restorations appeared to be well-fitting and well-contoured. He points out that in her deposition testimony, Mrs. Mukasey stated that before she made a visit to Dr. Tannenbaum the crown on tooth number 5 had fallen out, but Dr. Cooper says these things happen without any associated findings of negligence.

With regard to the dental malpractice claim, the first cause of action in the complaint, Dr. Cooper opines that the defendant here gave Mrs. Mukasey a proper work-up before deciding on treatment, which he says was appropriate. As for her subsequent need for occlusal adjustment, that in and of itself is not negligence. According to Dr. Cooper, adjustments and restorations are a usual and customary part of the restorative process.

Therefore, Dr. Cooper believes that it was understandable that Mrs. Mukasey might have developed these symptoms after the extensive treatment, but that Dr. Curatola appropriately dealt with these symptoms. He adds that at the time of his examination of Mrs. Mukasey, there were no signs of TMD.

However, Dr. Cooper specifically states that he is not giving any opinions with regard to the second cause of action, which sounds in lack of informed consent. As to the assault and battery claim, the third cause of action, it is counsel, rather than Dr. Cooper who argues against it. He cites to several Fourth Department cases which hold that in situations such as this, where there is an allegation that the plaintiff only consented to have some of her teeth restored but not others, such a complaint really sounds in a failure to give informed consent, but not an assault and battery. It should be noted here that Mrs. Mukasey claims not only that she gave consent only to have the front four teeth restored and that she never consented to having the back teeth worked on, but she also says that when she came for the treatment on July 26, she was given Xanax during the prep time and then was unconscious for the actual work. In this regard, there is testimony that the plaintiff's husband Michael, who was with her, came in from the waiting room after four hours to ask why the treatment was taking so long.

There is vigorous opposition from counsel for the plaintiff. He includes in his papers an affirmation from a licensed dentist and oral surgeon who is unnamed. However, that person says that he is a fellow of the International Congress of Oral Implantologists. He also says that he has extensive experience treating patients in general and restorative dentistry and that he is experienced in the treatment and diagnosis of patients with temporomandibular joint disorder ("TMD").

He has reviewed all the records and reports and opinions of Dr. Cooper. Not surprisingly, his opinions differ from Cooper's. This dentist notes that Dr. Curatola had informed Mrs. Mukasey that her four upper incisor teeth were severely worn and had several stress fractures. Further, Dr. Curatola told Mrs. Mukasey that he believed porcelain laminates should be placed in order to restore those teeth properly. This dentist also infers from the records that Mrs. Mukasey did agree to have a new crown fabricated on tooth number 11, as well as the four porcelain laminates on the incisors that were earlier referred to for teeth numbers 7-10. This dentist also describes what occurred on July 26, 2008, the day when most of the work was performed. He indicates that this work not only included the crown on tooth number 11 and the porcelain laminates on teeth numbers 7-10, but also preparation of teeth numbers 4, 5, 12 and 13 for crowns and a porcelain laminate for tooth number 6 as well. He also points out that Mrs. Mukasey was sedated with Xanax.

With regard to the next visit on August 16, Dr. Curatola inserted permanent crowns on teeth numbers 4, 5, 11, 12 and 13 and porcelain laminates on teeth numbers 6-10. Mrs. Mukasey then returned to the office on August 18, August 20, September 1 and September 9. At all of these visits she complained of having a great deal of pain which Dr. Curatola responded to by making adjustments on the restorations, providing her with a night guard, and finally referring her to a specialist to treat this TMJ pain. Finally, he notes that two of the crowns, tooth numbers 5 and 12, had to be replaced by another dentist and that the third crown on tooth number 13 also is to be replaced.

It is this expert's opinion that the anterior maxillary teeth numbers 6-10 were not in need of any restorative dentistry at all. In reviewing Dr. Curatola's chart and films, he opines that there is no evidence of erosion, extensive wear or stress fractures. While he

notes that there are some vertical lines present on the photographs, he says they are merely craze lines, which are tiny cracks that affect only the outer portion of enamel of the tooth. However, his position is that these teeth were completely asymptomatic and therefore required no treatment. Therefore, he opines that Dr. Curatola misdiagnosed these normal teeth and failed to properly interpret the tests and x-rays as well as his own examination in performing extensive and expensive work on teeth that did not need any. This, according to this expert, was a departure from dental standards of care. He also says that the use of porcelain laminate veneers for the anterior teeth was contraindicated because they serve only the outside of the teeth and provide no restorative function for treatment of lingual or palatal erosion.

Together with the opinion that this work was unnecessary and should not have been done, is the opinion that the extensive work performed on Mrs. Mukasey on July 26 caused her to suffer an iatrogenic injury; to wit, temporomandibular disorder or TMD. An iatrogenic injury is an injury caused by a doctor or dentist.

Finally, this expert comments on the three teeth numbers 5, 12 and 13 that either were replaced or will be replaced soon. Therefore, he believes that Dr. Cooper's opinion that all the work performed by the defendant was consistent with good dentistry is really speculative, as no one can say with certainty why these teeth failed.

On the issue of informed consent, this expert opines that Dr. Curatola departed from standards of care in dentistry in failing to obtain informed consent from Mrs. Mukasey. He notes specifically that the patient was never informed of the risks of developing TMJ from the extensive work that Dr. Curatola was planning on doing.

Counsel for the plaintiff in opposing argues that the defendant, in the first instance, did not even make out a prima facie case. He says this particularly with regard to teeth numbers 5, 12, and 13. He also comments that Dr. Cooper did not opine with regard to the necessity of doing the work on teeth numbers 6-10. With regard to the assault and battery claim, he argues that something more was done here, more than simply not explaining all that had to be explained and receiving consent to do work. He urges that pursuant to Mrs. Mukasey's testimony, as well as a letter written by Dr. Curatola to Mrs. Mukasey on February 5, 2009, all the work that Dr. Curatola did in Mrs. Mukasey's mouth, besides work on the anterior incisor teeth, was simply without any consent from the plaintiff. Therefore, it is his position that this action constitutes a completely improper interference with Mrs. Mukasey's body and constitutes an assault and battery.

It should be noted here, as counsel for the plaintiff points out, that this Court is only considering the two causes of action that the defendant is moving against, dental malpractice and the assault and battery claim. And as to those two, the defendants' motion is denied. While counsel for the defendants argues that the plaintiff's expert does not take any real issue with the actual work done and further that they were not on notice that the plaintiff would claim that the work on the incisor teeth was not necessary, I disagree with both points.

First of all, after reviewing the Bill of Particulars at oral argument, I find that there was sufficient notice to the defendants that plaintiff was claiming that the front incisor work was unnecessary and therefore should not have been done. Further, counsel for the moving defendants acknowledged at oral argument that his papers would not have been any different if he had taken specific note of that claim. Finally, he could have but did not

include a supplemental affirmation from Dr. Cooper in reply to address this claim, which he should have done if he truly had not been on notice of the claim and if Dr. Cooper had something significant to say on the subject.

I find that a claim sounds in malpractice if a dentist does work on healthy teeth, in other words, teeth that do not need any restorative work done. As to claims of faulty work, I believe that plaintiff's expert is correct when he points out that the failures of teeth numbers 5, 12, and 13 only a short time after Dr. Curatola's work was completed, leaves one at this point unable to say what caused those failures. Also, since Dr. Cooper could not say what caused those failures with any degree of dental certainty, this Court declines to grant summary judgment with regard to the work on those teeth. Further, the opposing expert criticizes the use of porcelain laminate veneers for the anterior teeth.

The more interesting issue is whether assault and battery should continue as a separate cause of action. I believe that it should. The main case that moving defendant relies upon, *Ponholzer v. Simmons*, 78 AD3d 1495 (4th Dep't 2010), involved a situation where a defendant surgeon took bone graphs from plaintiff's hip rather than using a donor bone from a cadaver. There, it was the defendant, not the plaintiff, who was arguing that this claim sounded in battery rather than informed consent. The argument was made because intentional torts, such as battery, carry only a one-year statute of limitations, thereby making the claim time-barred if the Court had found it.

It was on those facts that the Fourth Department rejected the defendant's contention that this claim sounded in battery. Specifically, defense counsel here points to the following language in *Ponholzer*. (at p 1496):

It is well settled that, "[w]hile lack of informed consent is a proper element of a medical malpractice cause of action..., the failure to obtain such consent should not be used to elevate the cause of action to one for intentional tort" (*Twitchell v. MacKay*, 78 AD2d 125, 129 [1980]).

However, what is significant in *Ponholzer* is additional language by the Fourth Department that the defendants there were mistakenly relying on cases from the First and Second Departments in which allegations had been made that the defendant physicians had knowingly performed work which exceeded the scope of plaintiff's consent.

In fact, the Fourth Department is right in this regard. Cases such as *Cross v. Colen*, 6 AD3d 306 (1st Dep't 2004), as well as *Messina v. Matarasso*, 284 AD2d 32 (1st Dep't 2001), stand for the principle that where a plaintiff alleges that she/he absolutely did not consent to having specific work done, as is the case here where Mrs. Mukasey says absolutely that she only consented to have work on her anterior incisors or teeth numbers 7-10, then those allegations sound in battery. These cases are distinguishable from informed consent situations. In those cases, the allegations are that all that was necessary, with regard to risks, alternatives, and benefits was not properly communicated to the plaintiff and that therefore the consent given was not an informed one.

But in cases where a battery was found, as in *Cross*, the plaintiff never has truly given any consent. In *Cross*, the plaintiff chose one surgical procedure over a second, but the defendant doctor elected to do the second one instead. That claim sounded in battery because the plaintiff had never consented at all to the second procedure.

Similarly, in *Oates v. New York Hospital*, 131 AD2d 368 (1st Dep't 1987) the plaintiff specifically did not consent to a hospital's decision to do surgery to ascertain whether he had internal injuries. However, the hospital did an exploratory laparotomy any way. It found nothing and then discharged the plaintiff in a much better condition. The court found that these facts did not constitute a lack of informed consent claim, but rather sounded in battery because no consent had ever been given to the surgery.

That is what Mrs. Mukasey is claiming here. Her lawyer argues that not only did she specifically say that she only wanted work done on her front teeth, but further that Dr. Curatola, in his own letter seems to acknowledge such was the case. Therefore, in a trial of this action, plaintiff should be allowed to argue either one of these claims, that she was not fully informed of what the work was and what it entailed and what it could lead to, as well as the claim that Dr. Curatola performed work on teeth that Mrs. Mukasey knew nothing about and never consented to. Finally, in this regard it should be pointed out that Mrs. Mukasey claims that she never saw the treatment plan that the defendant wrote on July 11, 2008, and because she had been given Xanax, she was unconscious during the actual work and knew nothing of the extent of that work.

Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment is in all respects denied.

Dated: August 12, 2011

AUG 12 2011

FILED

AUG 16 2011

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ALICE SCHLESINGER
J.S.C.