

Litman v Lipkin

2011 NY Slip Op 33183(U)

December 7, 2011

Sup Ct, NY County

Docket Number: 109328/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART _____

Index Number : 109328/2007
LITMAN, LARAINÉ
vs.
LIPKIN, PAMELA R.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

Motion to/for _____

_____ | No(s). _____
_____ | No(s). _____
_____ | No(s). _____

Upon the foregoing papers, it is ordered that the motion is *denied in accordance with the accompanying memorandum decision.*

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

FILED

DEC 12 2011

COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 07 2011

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
LARAINÉ LITMAN,

Plaintiff,

Index No. 109328/07
Motion Seq. No. 002

-against-

PAMELA R. LIPKIN, M.D.,

Defendant.
-----X

SCHLESINGER, J.:

In this medical malpractice action involving a procedure known as blepharoplasty of the upper and lower eyelids, the plaintiff Laraine Litman accuses Otolaryngologist Pamela R. Lipkin, the defendant of negligence causing her permanent injury. Before the Court now is a motion for summary judgment brought by counsel for Dr. Lipkin.

The motion is accompanied by an affirmation from Dr. Paul Striker, who is board certified in Plastic Surgery with a specialty in Facial Plastic Surgery. He has reviewed Ms. Litman's records, which provide a history of her going to various doctors where she made complaints of vision problems as well as cosmetic issues. Dr. Striker then relates the relationship Ms. Litman had with Dr. Lipkin beginning on October 29, 2004, when they first met, wherein plaintiff related many complaints involving her eyes as well as specified facial problems.

Dr. Lipkin, who specializes in plastic surgery and liposuction, recommended on that first day that Ms. Litman undergo various procedures which included a face and neck lift, liposuction of the lower back, removal of a tumor on her forehead, and a bilateral upper and lower lid blepharoplasty. A blepharoplasty involves the removal of redundant, excess

skin in the upper lid and extra fatty deposits in the upper and lower eyelid.

The plaintiff consented to the recommended procedures, according to Dr. Striker, after Dr. Lipkin had performed a physical examination. Dr. Lipkin noted based on the exam, Ms. Litman, a 57 year-old woman, had eyes that were slightly prominent with moderate overhang of skin and prominence of fat pads in the upper eyelids with bilateral hurling. She also noted a similar prominence of fat pads with some skin looseness in Ms. Litman's lower eyelids.

Dr. Striker also points out that Dr. Lipkin's records indicate that there was a full discussion of the procedures, potential complications and alternatives. The doctor discussed these matters in detail and answered questions. She also gave Ms. Litman a detailed patient information form which set out, among other things, complications from a blepharoplasty. These included inflammation of the eyes and eyelids, persistent dry eye, severe dry eye and impairment of vision, as well as trouble closing and opening eyes, asymmetry, ectropion or a turning out of the eyelids, clogged glands, eyelid drooping, conjunctivitis, and inability to wear contact lenses.

Surgery was set for the next week, November 11, 2004. A few days earlier, a pre-operative assessment was done. On November 11, photos were taken of her eyes, face and back and Ms. Litman was asked to read and sign every one of the 18 paragraphs that appeared on a consent form she was given. She did do this after taking time to read the form.

The defense expert then reviews the surgery which took 3-4 hours and, pursuant to defendant's records, involved no complications. Ms. Litman stayed at the defendant's suite overnight with a nurse and on the following morning Dr. Lipkin saw her, loosened the

bandages and discharged her, to come back on November 16, when she removed eyelid sutures.

In the details of the surgery there is particular emphasis, appropriately so, on the blepharoplasty. Apparently this procedure was undertaken after the liposuction of plaintiff's lower back and before the face and neck lift. Regarding the blepharoplasty, Dr. Lipkin first worked on the upper lids and then turned to the lower eyelids where she excised small amounts of fat but did not remove any skin. She testified this was a conservative decision to help prevent dry eyes.

The defendant saw Ms. Litman numerous times in the first month after surgery and removed sutures and noted good healing but with moderate swelling. She also applied steristrips to the lower corners of plaintiff's eyes for support. The doctor also recommended eye drops, ointments and eye exercises.

On November 22, Ms. Litman saw Dr. Lipkin and also saw an ophthalmologist, Dr. Robert Friedman, someone she had gone to with various vision complaints before meeting with the defendant. She complained to Dr. Friedman that her left lower eyelid was tender, droopy and irritated. He advised certain measures. Then on December 14, Ms. Litman saw another ophthalmologist, Dr. Stanley Burns, who, Dr. Striker noted, recorded problems with her left eye. But Dr. Burns also wrote that her scar was well healed and that there was good lid closure. On that day, Dr. Burns took photos of his patient's eyes and face.

Dr. Lipkin continued to see the plaintiff each month. Ms. Litman never complained to her of dry eyes and that included her last visit, on October 26, 2005, almost one year after the surgery. Dr. Striker notes she did see ophthalmologist Dr. Friedman in May and

June 2005, and other plastic surgeons during this year and that she did complain to Dr. Friedman of dryness in both eyes since her blepharoplasty. Also, in March and June of 2006, Ms. Litman saw another ophthalmologist, Dr. Ray Mostafavi, where she complained of dry eye in both eyes.

After this very extensive review, Dr. Striker sets down the various complaints and allegations made by Ms. Litman regarding her care at the hands of Dr. Lipkin. After this, he gives his analysis of the treatment beginning with his opinion; that is, "to a reasonable degree of medical certainty, Dr. Lipkin's pre-operative, intra-operative and post-operative care rendered to the plaintiff fully complied with the standard of care." He then elaborates on this opinion, first dealing with the issue of informed consent which, he states, Dr. Lipkin "clearly met".

Significantly, Dr. Striker opines that the plaintiff does not have the alleged injuries she claims except for scarring, an unavoidable by-product of surgery, and a "subjective complaint of an inability to wear contacts". He questions whether she truly has a severe and chronic dry eye condition. He bases his skepticism on the post-operative medical records, the results of an "independent medical examination" performed by a Dr. Dweck, and photographs of Ms. Litman's eyes and face. The latter, he says, "do not evidence a left crossed eye, lopsided left eye, left eyelid more closed than right, eyelid closure problem, lower lid retraction, lid chop, eversion or drooping or asymmetrical eyelids". In fact he says, "The post-operative photographs I reviewed, taken one month after surgery, show a good result" (¶150, p.15).

With regard to vision problems such as blurriness, Dr. Striker says those had nothing to do with the blepharoplasty. Rather, they are a result of pre-existing conditions,

diagnosed by Dr. Friedman, such as progressive open angle glaucoma. As to the operation itself, Dr. Striker opines that all aspects of it were performed in accordance with good and accepted practice, as was the post-operative care. This expert details his reasons for these opinions.

Therefore, in summary, Dr. Striker states that all the medical treatment was up to standards and that nothing done by Dr. Lipkin proximately caused plaintiff's alleged injuries. On the basis of this detailed statement, I find that the defendant has made out a prima facie case in her motion to dismiss the action.

How does the plaintiff respond? She does that, very forcefully, via an affirmation from the before-mentioned Dr. Stanley Benjamin Burns.¹ Dr. Burns is a board certified Ophthalmologist who has been practicing this specialty for over forty years. He also has reviewed all of Ms. Litman's records, as well as Dr. Striker's affirmation. But he adds, "I have also treated the plaintiff and have personal first hand knowledge, on which I base my medical expert opinion" (§3, p.1).

Dr. Burns, consistent with the above, begins by saying that the plaintiff is well known to him, having been his patient from 1972-1999. In this regard, he notes that in 1997 he performed bilateral laser iridectomies for narrow angle glaucoma. He states she did well after this procedure and was able to use contact lenses without complaints. Now she is unable to do this, a result, Dr. Burns states, directly flows from the surgery performed by Dr. Lipkin.

¹In fact, the opposition is so forceful and complete that the moving defendant elected not to reply.

Dr. Burns points out that he examined Ms. Litman on December 14, 2004, about one month after surgery, and again in September and October of 2011. As to departures by the defendant, he details the following. First, he says Dr. Lipkin failed to properly examine Ms. Litman before the surgery. Specifically, she did not have her remove her contact lenses and therefore was not able to evaluate her corneal state or any tendency she might have for a dry eye condition. This is absolutely necessary, Dr. Burns says, in evaluating whether a patient is a suitable candidate for blepharoplasty. Specifically, it is the standard of care to test for dry eye, by the "Schirmer test". If this is not done it is a departure because patients who wear contact lenses are more susceptible to corneal problems post-operatively. Therefore, it is crucial to properly test for this and to fully inform the patient, here Ms. Litman, of this possibility. As this was not done here, the failure to properly examine Ms. Litman pre-operatively and to advise her accordingly were departures from medical standards of care and were a direct and proximate cause of the plaintiff's inability to wear contact lenses.

At the September 22, 2011 examination, Dr. Burns found persistent staining in band shape along the lower part of both corneas. This finding is, he says, consistent with damage of the corneal epithelium from exposure and inability to heal properly from the surgery of November 11, 2004. This condition is called "superficial punctuate keratitis" and causes eye pain. When Dr. Burns again examined Ms. Litman on October 11, 2011, with the use of a slit lamp and no eye drops, her cornea again showed the same staining.

He opines:

These lesions are significant and create enough physiological damage to cause the patients (sic) persistent symptoms. In my opinion, to a

reasonable degree of medical certainty, the corneal damages directly related to the blepharoplasty surgery performed by Dr. Lipkin on November 11, 2004. Furthermore, in my opinion, surgery performed by Dr. Lipkin is the direct and proximate cause of her continued need and use of moisturizers.

Dr. Burns relates that Ms. Litman's eye pain is consistent with a foreign body type sensation for which she uses eye drops twice a day, in addition to multiple applications of wetting solutions during the day and ointments at night. According to Dr. Burns, the stained cornea and the symptoms it produces cannot be treated satisfactorily. Also, if Ms. Litman were to try to use contact lenses, it would be contraindicated as the open cuts in her cornea could lead to infections or worse.

Dr. Burns also opines that the immediate post-surgical care by Dr. Lipkin was inadequate and improper. The immediate failure to diagnose and refer Ms. Litman for proper treatment for her complaints in the year following the operation was another departure from accepted care.

Finally, Dr. Burns believes that the operative procedure itself was problematic, as he opines that Ms. Litman had a more extensive manipulation and removal of lid tissue than was indicated for her condition and prior lens use. Further, pointing to the examination after surgery by Plastic Surgeon Dr. Frederick Marks, the surgery should have been a more conservative two-step process.

Clearly, the medical opinions expressed by Dr. Burns, a well-credentialed ophthalmologist who has treated Ms. Litman and examined her multiple times post-surgery as to conditions of her eyes, create factual issues here as to informed consent and whether there was negligent care by Dr. Lipkin before, during and after her surgery. Since my

function here is merely issue finding, as opposed to issue deciding, these issues compel the denial of the defendant's motion.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is in all respects denied; and it is further

ORDERED that all counsel shall appear in Room 222 on January 25, 2012, at 10:30 a.m. for a status conference to set a schedule to complete all outstanding discovery and file a Note of Issue.

Dated: December 7, 2011

DEC 07 2011

Alice Schlesinger

J.S.C.
ALICE SCHLESINGER

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DEC 12 2011
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NEW YORK