

Libin v Rybalova

2012 NY Slip Op 32576(U)

October 5, 2012

Sup Ct, NY County

Docket Number: 110556/08

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Yelena Libin

INDEX NO. 110556/08

MOTION DATE 6/19/12

MOTION SEQ. NO. 11

MOTION CAL. NO. _____

- v -

Irina Rybalova, Et Al.

The following papers, numbered 1 to 60 were read on this motion to/for dismiss

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-41
42-60

FILED

Cross-Motion: Yes No

OCT 11 2012

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 10/5/12

JOAN B. LOBIS J.S.C.

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
NEW YORK COUNTY: IAS PART 6**

-----X
YELENA LIBIN,

Plaintiff,

Index No. 110556/08

-against-

Decision and Order

IRINA RYBALOVA, EHAB SHAHID, JOSEPH
JACOBS, and NEW YORK UNIVERSITY KRISER
DENTAL CENTER,

Defendants.

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

Motion Sequence Numbers 011 and 012 are hereby consolidated for disposition. In Motion Sequence Number 011, defendants Irina Rybalova, D.D.S., Ehab Shahid, D.D.S., and New York University College of Dentistry s/h/a New York University Kriser Dental Center (“NYU”) (collectively the “NYU Defendants”) seek summary judgment, pursuant to C.P.L.R. Rule 3212, dismissing all claims against them in this medical malpractice action. In Motion Sequence Number 012, defendant Joseph Jacobs, M.D., seeks summary judgment. Plaintiff Yelena Libin opposes the motions. For the reasons stated below, the motions are denied.

FILED
OCT 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

On September 18, 2006, Ms. Libin presented to NYU complaining of a loose bridge. She was forty-nine (49) years old at the time with a history of tooth extractions. On October 4, 2006, plaintiff returned to NYU for a consultation. Full mouth x-rays of plaintiff were taken. Dr. Rybalova, a dentist enrolled in the implantology program at NYU, discussed with plaintiff the available treatment options, which differed depending on how the work was staged. Also in early October, plaintiff filled out a number of forms, including one titled “New York University College of Dentistry Terms and Conditions of Treatment-Patient Consent,” dated October 4, 2006, and one

titled "NYU College of Dentistry: Implants-Patient Fee Determination and Accepted," dated October 11, 2006. On October 11, 2006, plaintiff accepted a treatment plan for a full upper denture involving extractions, bone grafting, and a possible sinus lift. Following that work, the plan was that Ms. Libin would be given "teeth in an hour," a particular process of fitting dental implants in a single sitting. In her treatment plan, she was to have eight implants and crowns. The final approval for the treatment plan was made by Dr. Trevor Bavar, the director of the program.

From October 11, 2006, to November 15, 2006, plaintiff consulted with and had work done by Dr. Rybalova and Dr. Shahid, a part-time faculty member who supervised dentists like Dr. Rybalova who were enrolled in the implantology program. On December 6, 2006, the extractions were performed, the bone graft material was placed, and plaintiff was fitted with a complete temporary upper denture. Both Drs. Shahid and Rybalova performed the extractions, but only Dr. Shahid placed the bone graft material.

Ms. Libin returned to NYU for a follow-up appointment on December 13, 2006, at which time she reported that her "teeth looked longer." At her next appointment, on January 10, 2007, her sutures were removed. She reported that the denture was getting looser. Ms. Libin called the clinic and spoke with Dr. Rybalova on January 24, 2007. She was planning a skiing strip to Europe in February and wanted to know if the trip posed any risks. Apparently, an appointment for a dental adjustment was scheduled, but Ms. Libin did not keep the appointment. On February 17, 2007, she again spoke with Dr. Rybalova on the telephone. At this time, Ms. Libin complained of a low grade fever and pus coming out of her nose. On February 27, 2007, plaintiff was seen at Dr. Rybalova's office, which is unaffiliated with NYU. Dr. Bavar was involved in the consultation and

spoke with Ms. Libin. At this time, Dr. Bavar suspected an oroantral fistula and referred Ms. Libin to Joseph Jacobs, M.D., a board certified otolaryngologist ("ENT") at NYU Medical Center.

Dr. Jacobs saw plaintiff on February 27, 2007, the same day that she was referred to him by Dr. Bavar. Plaintiff underwent a physical examination, which included a diagnostic nasal/sinus endoscopy and a CT scan. Dr. Jacobs diagnosed plaintiff with chronic rhinosinusitis (inflammation of the nasal passage and sinus cavities) of the right ethmoid and right maxillary sinus. The report of the CT scan identified an area associated with an oroantral fistula. Other findings were not considered to be significant by Dr. Jacobs. On March 7, 2007, Dr. Jacobs performed an endoscopic right maxillary sinus antrostomy to aid in draining the sinus and clearing the infection that was believed to have been the cause of the rhinosinusitis. Plaintiff followed up with Dr. Jacobs on March 12, 2007, for post-operative treatment.

On March 14, 2007, Ms. Libin was seen again by the NYU Defendants. Her dentures were realigned. No presence of a fistula was noted. She returned to Dr. Jacobs on March 19, 2007, and continued treatment for sinusitis until May 21, 2007. On December 17, 2007, plaintiff saw Dr. Jacobs again for symptoms of odor and discharge, which Dr. Jacobs attributed to acute chronic sinusitis. On December 20, 2007, Dr. Jacobs noted in plaintiff's chart that she would be going to a doctor in her plan for any future treatments.

During the treatment by Dr. Jacobs, the dental reconstruction continued at NYU. A CT scan was taken on April 11, 2007, and Drs. Rybalova and Shahid decided to perform a sinus lift on the upper left side. On May 2, 2007, the left-side sinus lift was performed. Plaintiff's sutures

were removed and she was healing uneventfully. Routine visits followed. In August 2007, plaintiff saw neurologist Dr. Marina Neystat about headaches that she had been experiencing. In October 2007, plaintiff reported experiencing headaches and a clicking in her temporomandibular joint (“TMJ”), and was prescribed Motrin and amoxicillin (an antibiotic). On October 15, 2007, plaintiff consulted with a different ENT, Michael Stewart, M.D., who reviewed a CT scan and saw no abnormalities that required further treatment. He expressed a view that the headaches were likely due to a neurologic etiology and told plaintiff to follow up with him in six months. On November 15, 2007, Ms. Libin returned to Dr. Neystat, who prescribed plaintiff medications and administered a Botox injection, which partially relieved her headache pain. She saw Dr. Stewart again on January 15, 2008, for sinus problems. At this visit, a sample was sent to be cultured, which identified the presence of “sparse coagulase negative staphylococcus species.” Antibiotics were prescribed.

On January 30, 2008, the final treatment plan for Ms. Libin’s implants was reviewed at NYU and the “teeth in an hour” implants were placed by Drs. Bavar and Shahid. On February 6, 2008, a panorex was taken. A right-side sinus lift was scheduled for March 26, 2008.

On February 19, 2008, plaintiff returned to see Dr. Stewart, again complaining of sinusitis. Plaintiff saw Dr. Stewart again on March 11, 2008, and another CT scan was taken. The results were discussed over the telephone. Treatment alternatives to medical management with antibiotics was considered, and Dr. Stewart suggested a surgical procedure. On April 2, 2008, Dr. Stewart performed an endoscopic right maxillary antrostomy with removal of tissue from the maxillary sinus and an endoscopic right anterior ethmoidectomy, procedures designed to increase drainage from the sinus. As part of the procedure, a calcified foreign body was removed from the

floor of the right maxillary sinus and sent to pathology for analysis. It was identified as a 1.5 cm x 0.5 cm x 0.5 cm piece of tan material and was a gross specimen only. Plaintiff continued on antibiotics. Two follow-up appointments occurred in April 2008 and plaintiff reported that her condition was improving.

Ms. Libin did not have a sinus lift scheduled for March 26, 2008. She returned to NYU on April 20, 2008, for repairs to two temporary implants and she saw Dr. Neystat for head and neck pain on April 24, 2008. She saw Dr. Stewart on May 20, 2008. Although she had a cold, her maxillary sinus was completely open and a CT taken on May 12, 2008, showed improvement. The plan was for her to return to Dr. Stewart in three to four months. Her last visit to him was on August 26, 2008. While her headaches had continued, the problems with her sinuses had resolved.

Meanwhile her dental care at NYU continued with another repair to her temporary prosthesis. Several more adjustments were made over the summer. She received her permanent bridge on July 16, 2008, and last visited NYU on October 15, 2008, to have her bridge recemented. She continued her dental care with a private dentist and continued treatment for severe headaches with Dr. Neystat, Dr. Lawrence Newman, and Dr. Alexander Mauskop, a board certified neurologist and a director of the New York Headache Institute. On December 21, 2009, Dr. Newman admitted plaintiff to St. Luke's Roosevelt Hospital ("St. Luke's") for treatment for an intractable migraine. Plaintiff was diagnosed with intractable headaches and it was questioned whether her headaches were resulting from a condition known as hemicrania continua. Plaintiff continued treatment with Dr. Neystat through January 11, 2012.

It is plaintiff's contention that during the December 6, 2006 extractions and/or placement of the bone graft material by Drs Shahid and Rybalova, the membrane on the floor of the maxillary sinus cavity was perforated, which created a fistula. She further contends that material from the bone graft was pushed through the fistula and stayed in the maxillary sinus cavity. Plaintiff alleges that defendants deviated from the standard of care while treating her. Specifically, she asserts that Drs. Shahid and Rybalova did not appreciate the fact that they had created a fistula and that they deviated in the manner they placed the bone graft material, a portion of which ended up in her sinus cavity. She also claims that Dr. Jacobs' failure to appreciate and remove the foreign body during his March 7, 2007 antrostomy was malpractice. She asserts that his failure to determine why antibiotics were not resolving her sinus problems and his failure to perform another antrostomy were additional deviations. She states that these departures proximately caused her injury—her sinusitis and migraine condition. She also alleges that the NYU Defendants never obtained her informed consent prior to treatment. It is to these allegations that defendants offer expert testimony in the form of affirmations to support their claims for summary judgment.

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.

Rogues, 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 informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment, and “that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]” Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Public Health Law § 2805-d(1).

In support of the NYU Defendants’ motion, they offer the affirmation of Mark W. Green, M.D., a board certified neurologist licensed to practice medicine in New York.¹ Dr. Green reviewed various documents, including the dental records. The focus of his affirmation is that the alleged departures of the NYU Defendants did not cause Ms. Libin’s headaches. In Dr. Green’s opinion, plaintiff’s headaches result from hemicrania continua, the condition that her physicians questioned whether she had when she was hospitalized at St. Luke’s in December 2009. Dr. Green admits that the hemicrania continua is a condition of an unknown etiology, but he maintains that in

¹ The caption and index number on the first page, which reads Yelena Libin v. Irina Rybalova known as Montefiore Medical Center, North Division and Rumana Sabur, M.D., 300170/10, is clearly erroneous.

medical literature, the condition has never been linked to dental treatment, sinus infection, fistula, foreign body in a sinus cavity, or related dental care or treatment. He sets forth that plaintiff's symptoms were consistent with the diagnosis of hemicrania continua, and that she responded to a medication, indomethacin, which is used to treat the disorder.

The NYU Defendants also offer the opinion of Steven N. Rosenberg, D.D.S., a board certified oral and maxillofacial surgeon who is licensed to practice dentistry in New York. In his affirmation, Dr. Rosenberg states that he reviewed the treatment records and certain legal documents. In his opinion, the care was appropriate and performed according to the standard of care. He opines that the extractions were done properly, as were the bone graft and sinus lift. He asserts that a fistula is a known risk associated with extractions and occurs in the absence of negligence. He believes that all of the alleged injuries are unrelated to the NYU Defendants' care. It is his opinion that there is no evidence that the foreign body found in plaintiff's sinus was material from the NYU Defendants' dental treatment.

Dr. Jacobs offers the opinions of two experts, Leonard Schiffman, D.M.D., a board certified oral and maxillofacial surgeon licensed to practice in New York, and Jacqueline Jones, M.D., a board certified otolaryngologist licensed to practice in New York. Dr. Schiffman asserts that Dr. Jacobs' treatment was at all times within the acceptable standard of dental and oral surgery practice. He states that the fistula was a risk of the extraction of molar number 2 and Ms. Libin's anatomy. He points out that an oroantral fistula may exacerbate a pre-existing sinusitis. In reviewing medical records unrelated to the dental treatment, Dr. Schiffman found evidence that Ms. Libin experienced sinusitis prior to the start of the dental treatment at issue. Accordingly, Dr.

Schiffman viewed Dr. Jacobs' treatment of Ms. Libin for chronic sinusitis as appropriate. Furthermore, Dr. Schiffman asserts that neither February 27, 2007 nor the April 11, 2007 CT scan demonstrated evidence of a foreign body in plaintiff's right maxillary sinus. Dr. Schiffman points out that the material that made up the foreign body found in plaintiff's sinus was never identified. Dr. Schiffman asserts that the headaches were properly addressed by referring plaintiff to neurologists. He sets forth that the fact that plaintiff's headaches persisted after Dr. Stewart removed the foreign body supports his opinion that Dr. Jacobs did not injure plaintiff.

Dr. Jones opines that the treatment rendered by Dr. Jacobs was appropriate. She reviews the medical decisions that Dr. Jacobs made and the techniques that he utilized, and concludes that there were no departures from the standard of care. She opines that on March 7, 2007, Ms. Libin's sinus was tremendously infected, that Dr. Jacobs would not have been able to see the floor of the sinus cavity, and the CT scans of February 27 and April 11, 2007, show no evidence of the foreign body. Treating plaintiff for sinusitis and advising Ms. Libin to return to the oral surgeon was proper, according to Dr. Jones. She also points to the lack of evidence to establish the composition of the foreign body, but does concede the possibility that it was dental material. She supports the position taken by the NYU Defendants' experts that the headaches were unrelated to the dental treatment.

In opposition to defendants' respective motions, plaintiff argues that they have not made out a prima facie showing. She argues that the NYU Defendants submitted conclusory affirmations unsupported by facts. As to her damages claim, plaintiff argues that the NYU Defendants' experts gave improper consideration to the mention of hemicrania continua in the St.

Luke's records, since she was never actually diagnosed with the disorder. Similarly, she argues that Dr. Jacobs' expert offered unsupported conclusions and failed to address a number of factual issues. In particular, plaintiff argues that Dr. Jacobs' experts fail to affirmatively state that Dr. Jacobs could not have visualized the floor of the maxillary sinus cavity (presumably during the endoscopic examinations).

Plaintiff also offers her own experts' affirmations.² One expert is a general dentist licensed in New York who attests to having experience in tooth extractions and replacements (the "dental expert"). The second expert is a board certified surgeon licensed in New York and experienced in treating and operating on patients with sinusitis and patients with foreign bodies in the maxillary sinus cavity (the "surgical expert"). The dental expert reviewed relevant records and court documents. The dental expert opines that it is a deviation from the standard of care to perforate the sinus membrane and fail to realize that a fistula occurred. He or she asserts that the dentists improperly placed the bone graft material. The dental expert opines that the quality of alveolar bone between the sinus cavity and teeth numbers 4 and 2 required x-ray review during the treatment because of an increased risk of the creation of a communication (fistula). The standard of care required an assessment of the risk and that the patient be informed of the risk. The dental expert opines that the NYU Defendants deviated from the standard of care by failing to discover the communication and change the plan for doing the graft until the fistula healed. He or she opines that the foreign body as described in the pathology report fits the description of bone graft material and it is the only possibility from the facts in the case. Finally, plaintiff's dental expert argues that the

² While the file copy of the affirmations that plaintiff offered redacted the names of the experts, unredacted copies were supplied to chambers.

headaches that Ms. Libin suffered are causally related to the sinusitis that developed following the tooth extraction and graft procedures.

The surgical expert's position is that Dr. Jacobs should have located and removed the foreign body, and he or she opines that Dr. Jacobs' failure to do so was a departure from the standard of care which caused plaintiff to experience sinus problems and intractable migraines. He opines that the prolonged, severe sinusitis led to irreparable damage to Ms. Libin's nerve endings, which in his opinion explains why her headaches persisted even after the foreign body was removed and the sinus infection cleared.

All of the moving defendants submitted reply affirmations arguing that they met the prima facie burden and that plaintiff's opposition papers fail to make a persuasive case that factual issues exist; they ask the court to grant their respective motions for summary judgment. The NYU Defendants point out that plaintiff has not presented the opinion of a neurologist to dispute their neurology expert's affirmation. They argue that it is purely speculative to conclude that Ms. Libin was not informed of the risks of the procedure or that the manner in which the extractions and bone grafts were done negligently. They point to a post operative CT scan in February 2007 to support their argument that plaintiff's claim is inaccurate and argue that there is no evidence that the graft was not done properly or that the foreign body was graft material. They urge the court to reject the claims that the headaches are causally related because, they argue, no competent evidence has been presented to support the claim. Without this injury, the NYU Defendants argue that there is no other claim for damages. The NYU Defendants submit further affirmations from their experts supporting the arguments in their reply papers.

Dr. Jacobs, in reply, argues that he met his prima facie burden. He asserts that no material issues of fact have been put forth by plaintiff's papers. He argues that the experts offered by plaintiff should be given no probative value because of their lack of credentials in the specialties involved and the lack of detail in their experience with the procedures at issue. In addition, he argues that the opinions of plaintiff's experts do not address facts in the record or the conclusions of defendants' experts.

After reviewing all the submissions and argument of counsel, I find that material issues of fact exist as to the prevailing standard of care. The experts assert different standards for the proper procedures to be used in plaintiff's care. The fact of a fistula developing as a result of teeth extractions may be a widely recognized complication, but it does not automatically mean that no negligence was involved in Ms. Libin's care. The issue of Dr. Jacobs' care, likewise, raises factual issues about his failure to find what Dr. Stewart found in Ms. Libin's sinus cavity. Moreover, factual issues exist about the oral representations about risks, as the written consents in file are not sufficient proof of informed consent. There are also disputed facts about the nature of the foreign body found in Ms. Libin's sinus cavity and whether the alleged departures proximately caused the headaches about which Ms. Libin's complains. It is well settled that a battle of the experts, such as presented here, raises issues that must be resolved by a fact finder and precludes summary judgment. Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009). The fact that plaintiff's experts are not specialists in the same field of dentistry and medicine as defendants' experts does not render plaintiff's experts automatically incompetent to opine on certain matters. If they assert experience in the areas of treatment at issue

as they do here, it is for the fact finder to weigh in determining which expert to believe. Limmer v. Rosenfeld, 92 A.D.3d 609 (1st Dep't 2012).

As to plaintiff's claim for lack of informed consent, neither movant established a prima facie entitlement to summary judgment. Defendants allege, in a conclusory fashion, that adequate consents were obtained. Yet none of the supporting affirmations address the second prong of the informed consent test, i.e., that a reasonable person would not have declined the procedures if informed of the risks. Therefore, plaintiff's cause of action for lack of informed consent survives. Accordingly, it is hereby

ORDERED that the motions are denied; and it is further


ORDERED that the parties shall appear for their previously scheduled pretrial conference on October 23, 2012, at 9:30 a.m.

Dated: October 5, 2012

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