

Reyes v Reyes

2013 NY Slip Op 30180(U)

January 29, 2013

Supreme Court, Suffolk County

Docket Number: 10-20206

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-17-12

ADJ. DATE 10-1-12

Mot. Seq. # 002 - MG

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CLAUDIA REYES,
Plaintiff,

- against -

SAENZ DENTISTRY, P.C. and MAURICE
SAENZ, D.D.S.,
Defendants.

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Claudia Reyes seeking summary judgment in her favor on the issue of liability is granted.

Plaintiff Claudia Reyes commenced this action against defendants Saenz Dentistry, P.C. and Maurice Saenz, D.D.S., to recover damages for dental malpractice and lack of informed consent. In September 2009, plaintiff, who was a patient of Saenz Dentistry, began experiencing pain in the area where her lower left third molar ("wisdom tooth") was located. In November 2009, the dental assistant, Claudia Contrares, took x-rays of the wisdom tooth, which was growing in the pterygoid muscle of her gums and pushing against her lower left second molar. On December 11, 2009, plaintiff presented to Dr. Saenz, a general dentist, to have her wisdom tooth extracted. The following morning, plaintiff telephoned Dr. Saenz and informed him that she was unable to open her mouth, that her face was swollen, and that her mouth and tongue were numb. Dr. Saenz instructed plaintiff to continue to take her antibiotics and pain medication, and "to wait a little while longer," because the nerves in her mouth may have contracted after the extraction procedure, which required her mouth to remain open for an extended period of time. On December 15, 2009, plaintiff telephoned Dr. Saenz with the same complaints and he prescribed muscle relaxers for her. During this time, plaintiff also informed

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Contrares that she was unable to open her mouth. In May 2010, plaintiff sought treatment from an oral surgeon, who allegedly advised her that she had suffered lingual nerve damage on the left side of her mouth, and that the damage was irreversible.

Plaintiff now moves for summary judgment in her favor on the issue of liability, arguing, among other things, that defendants deviated from acceptable standards of dental care in the treatment that was rendered to her. Specifically, plaintiff alleges that Dr. Saenz failed to take adequate pre-treatment diagnostic x-rays of her wisdom tooth prior to its extraction, that he applied unnecessary excessive force during the extraction procedure, and that he caused trauma to her lingual nerve during the extraction. Plaintiff further asserts that Dr. Saenz failed to advise her of the risks associated with extracting her wisdom tooth and, as a result, she was unable to provide him with her informed consent prior to the procedure. In support of the motion, plaintiff submits copies of the pleadings, the parties' deposition transcripts, and the affirmations of her experts, Raida Sadda, D.D.S., and Peter Blauzvern, D.D.S. Defendants oppose the motion on the basis that plaintiff failed to establish a prima facie case of dental malpractice and lack of informed consent. In opposition to the motion, defendants submit an affidavit of Dr. Saenz and the affirmation of their expert, Mario Catalano, D.D.S., MAGD.

To prove a prima facie case of dental malpractice, a plaintiff must establish that there was a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of his or her injury (*see Zito v Jastremski*, 84 AD3d 1069, 925 NYS2d 91 [2d Dept 2011]; *Sharp v Weber*, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 942 NYS2d 558 [2d Dept 2012]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]; *Cohen v Kalman*, 54 AD3d 307, 863 NYS2d 63 [2d Dept 2008]). In order to establish such a departure, a plaintiff must present expert medical testimony (*see McGinn v Sellitti*, 150 AD2d 967, 541 NYS2d 648 [3d Dept 1989]). Moreover, a plaintiff need only proffer sufficient evidence from which a reasonable person may conclude that it was more probable than not that the injury was caused by the defendant, and the plaintiff's evidence need not eliminate every other possible cause of the resulting injury (*Clarke v Limone*, 40 AD3d 571, 571, 835 NYS2d 381 [2d Dept 2007], *lv denied* 9 NY3d 809, 844 NYS2d 784 [2007], *quoting Borawski v Huang*, 34 AD3d 409, 824 NYS2d 362 [2d Dept 2006]; *Pasquale v Miller*, 194 AD2d 597, 598, 599 NYS2d 58 [2d Dept 1993]; *see Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 2d Dept 1998)).

Here, through the submission of the parties' deposition transcripts and her experts' affirmations, plaintiff established a prima facie case of entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Perricone-Bernovich v Gentle Dental*, 60 AD3d 744, 875 NYS2d 169 [2d Dept 2009]; *Vona v Wank*, 302 AD2d 516, 755 NYS2d 261 [2d Dept 2003]; *Calvin v N.Y. Med. Group, P.C.*, 286 AD2d 469, 730 NYS2d 337 [2d Dept 2001]). Dr. Sadda, an oral and maxillofacial surgeon licensed to practice dentistry, opines in her affirmation that, based upon a reasonable degree of dental certainty, Dr. Saenz deviated from good and accepted dental practice when he extracted plaintiff's wisdom tooth without first having a periapical x-ray depicting the entire tooth structure, including the distal root to the length of the apex. Dr. Sadda states that during the surgical removal of plaintiff's wisdom tooth, Dr. Saenz used unnecessary force, which resulted in damage to both the lingual and alveolar nerves in plaintiff's lip and the left side of her tongue. Dr. Sadda explains that, had Dr. Saenz taken a periapical x-ray of the subject tooth prior to the extraction

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procedure, he would have recognized that a straight elevator would not have elevated it for removal, but would have caused greater pressure on the surgical area, resulting in an increased risk of trauma to the lingual and alveolar nerves. Dr. Sadda further states that Dr. Saenz should not have attempted to remove the tooth by elevating it from the mesial aspect due to the configuration of the distal root. Dr. Sadda opines that Dr. Saenz should have referred plaintiff to an oral surgeon, “who would have created a flap in the tissue surrounding the distal aspect of the tooth to gain access to the distal root and remove[d] the tooth after first severing the distal root structure to avoid placing undue pressure on the surrounding nerves in the area when elevating the tooth from its socket.”

Moreover, at his examination before trial, Dr. Saenz testified that he explained to plaintiff that her wisdom tooth had to be extracted because it was pushing into another tooth and, since the tooth was in an “upright position,” he would be able to extract it. Dr. Saenz testified that x-rays were taken of plaintiff’s wisdom tooth approximately two weeks prior to the extraction, which showed the mesial root, but did not depict the distal area of the tooth, which is part of the root and the crown portion of the tooth. He testified that after being unable to completely rotate the tooth, which he had loosened, he took additional x-rays of the tooth, and was able to see the “hook” in the distal root of the tooth. Dr. Saenz testified that after reviewing the x-rays taken during the course of the extraction, he realized that he had to change his extraction technique in order to provide the necessary rotation in the tooth to extract it; he would need to cut the distal cup. Moreover, Dr. Saenz testified that after reviewing the additional x-rays he still would have recommended that plaintiff have the wisdom tooth extracted, but he would have referred her to an oral surgeon, because he would have known it was a “traumatic surgery.” Dr. Saenz further testified that the trauma to the area of plaintiff’s mouth where the tooth was extracted resulted from his rotation of the tooth.

In opposition, defendants’ submissions failed to raise a material triable issue of fact precluding summary judgment (*see Pasquale v Miller, supra; cf. Calabro v Heschel*, 22 AD3d 622, 801 NYS2d 921 [2d Dept 2005]). Defendants primarily rely upon the affirmation of their expert, Dr. Mario Catalano, a licensed dentist, who asserts that Dr. Saenz did not depart from the accepted standard of care during his extraction of plaintiff’s wisdom tooth. Dr. Catalano states that plaintiff’s limited pattern of “claimed” numbness involving the lingual and inferior alveolar nerves are the result of the administration of the anesthetic Septocaine during the extraction procedure. Dr. Catalano explains that Septocaine is commonly used during dental procedures because the onset of anesthesia is within one to nine minutes of injection and the effects of the anesthesia lasts for approximately two hours when used to block nerve sensations. However, he avers that Septocaine can cause parathesia in patients when it is administered as a mandibular block. Dr. Catalano further states that the “lingual nerve runs in a channel in the mandible of the jaw and is well protected from trauma;” that it takes a significant amount of trauma to affect the lingual nerve, such as a fracture of the mandible, and that plaintiff did not sustain such an injury. Dr. Catalano concludes that Dr. Saenz performed the extraction with appropriate care.

Dr. Catalano’s conclusory affirmation failed to rebut all of plaintiff’s specific allegations of dental malpractice set forth in her bill of particulars (*see LaVecchia v Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]). Indeed, Dr. Catalano failed to address the crux of plaintiff’s complaint that Dr. Saenz deviated from good and acceptable dental care when he decided to extract her wisdom tooth without obtaining pre-treatment x-

rays showing the entire root of the wisdom tooth. “Expert opinions that are conclusory or unsupported by the record are insufficient to raise a triable issue of fact” (*Micciola v Sacchi*, 36 AD3d 869, 871, 828 NYS2d 572 [2d Dept 2007], citing *Schrader v Sunnyside Corp.*, 297 AD2d 369, 371, 747 NYS2d 26 [2d Dept 2002], *lv dism.* 100 NY2d 553, 763 NYS2d 807 [2003]). “Hindsight reasoning is insufficient to defeat summary judgment” (*Zawadzki v Knight*, 76 NY2d 898, 561 NYS2d 907 [1990]). Therefore, Dr. Catalano’s conclusion that the anesthetic Septocaine caused the parathesia in plaintiff’s lingual and alveolar nerves presents a feigned issue of fact and conflicts with Dr. Saenz’s deposition testimony. In fact, Dr. Saenz testified that prior to beginning the extraction procedure he injected plaintiff with two and an half capsules of anesthetic agent to numb her, and then he injected her with an additional one and an half capsules of anesthetic agent during the procedure, because she was “feeling pressure.” Dr. Saenz testified that it took approximately 15 minutes before the anesthetic agent numbed plaintiff’s mouth, which he stated was unusual. Moreover, Dr. Saenz testified that he tried using the elevator for at least 5 or 7 minutes, although he does not recall the exact amount of time, to loosen plaintiff’s tooth before he decided to extract the tooth by sectioning it. In addition, Dr. Saenz testified that the trauma to plaintiff’s mouth was not caused by his decision to section the tooth, but by his attempts to rotate the tooth.

Furthermore, Dr. Saenz’s self-serving affidavit, which appears to be tailored to avoid the consequences of his earlier testimony, failed to raise a triable issue of fact, because it is in direct contradiction to his own deposition testimony (see *Lipsker v 650 Crown Equities, LLC*, 81 AD3d 789, 917 NYS2d 249 [2d Dept 2011]; *Benamati v McSkimming*, 8 AD3d 815, 777 NYS2d 822 [2d Dept 2004]; *Marcelle v N. Y. City Transit Auth.*, 289 AD2d 459, 735 NYS2d 580 [2d Dept 2001]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 701 NYS2d 403 [1st Dept 2000]).

Finally, plaintiff established her entitlement to judgment as a matter of law on the issue of lack of informed consent (see *Kozlowski v Oana*, __ AD3d __, 2013 NY Slip Op 00185 [2d Dept 2013]; *Magel v John T. Mather Mem. Hosp.*, 95 AD3d 1081, 945 NYS2d 113 [2d Dept 2012]; *Wilson-Toby v Bushkin*, 72 AD3d 810, 898 NYS2d 633 [2d Dept 2010]). To recover damages for dental malpractice based on lack of informed consent, a plaintiff must establish that the dentist failed to disclose the material risks, benefits, and alternatives to the surgery which a reasonable dental practitioner under similar circumstances would have disclosed, in a manner permitting the plaintiff to make a knowledgeable evaluation, and that a reasonably prudent person in the plaintiff’s position would not have undergone the surgery if he or she had been fully informed, and that the lack of informed consent is a proximate cause of the injury sustained (Public Health Law § 2805-d [3]; *DeVivo v Birnbaum*, 301 AD2d 622, 623, 754 NYS2d 60 [2d Dept 2003]; see *Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Smith v Fields*, 268 AD2d 579, 702 NYS2d 364 [2d Dept 2000]; *Innucci v Bauersachs*, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]). Here, Dr. Saenz testified that despite explaining the extraction process to plaintiff, he did not have her sign a written consent form, and he did not explain to her the risk of damage to her lingual nerve during the extraction process, because he did not anticipate that such an injury would occur. Dr. Saenz further testified that he would have informed plaintiff of possible injury to the lingual nerve if he had been able to see the entire tooth, including the distal root, on the pre-treatment x-rays. In opposition, Dr. Saenz failed to raise a triable issue of fact as to the claim of lack of informed consent, since his expert failed to address this specific allegation, and the record demonstrates that the information that Dr. Saenz provided to plaintiff prior to the extraction was

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qualitatively insufficient for her to make an informed decision (*see Dehaarte v Ramenovsky*, 67 AD3d 724, 889 NYS2d 68 [2d Dept 2009]; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Sarwan v Portnoy*, 51 AD3d 655, 857 NYS2d 667 [2d Dept 2008], *lv denied* 11 NY3d 705, 866 NYS2d 609 [2008]).

Accordingly, plaintiff's motion for summary judgment in her favor on the issue of liability is granted.

Dated: _____

1/29/13



THOMAS F. WHELAN, J.S.C.