

Zordan v Lesesne

2013 NY Slip Op 31684(U)

July 23, 2013

Supreme Court, New York County

Docket Number: 800191/10

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

Monique Zordan

INDEX NO. 800191/10

MOTION DATE 3/19/13

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -
Carroll Hesesney
M.D., Et Al.

The following papers, numbered 1 to 19 were read on this motion to for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-16</u>
<u>17-18</u>
<u>19</u>

FILED

Cross-Motion: Yes No

JUL 26 2013

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 & ORDER

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

Dated: 7/23/13

JB
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
MONIQUE ZORDAN,

Plaintiff,

Index No. 800191/10

-against-

Decision and Order

CARROLL LESESNE, M.D., and CAP
LESESNE, M.D., P.C.,

Defendants.

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

Defendants Carroll Lesesne, M.D., and International Cosmetic Surgery, P.C., sued here as CAP Lesesne, M.D., P.C., move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiff Monique Zordan opposes the motion. For the reasons stated below, the motion is granted in part and denied in part.

FILED
JUL 26 2013
NEW YORK
COUNTY CLERK'S OFFICE

This medical malpractice action involves Ms. Zordan's breast augmentation procedure performed by Dr. Lesesne on January 6, 2009. Ms. Zordan is a bartender, model, and aspiring actress. In 2005, prior to the procedure at issue, Ms. Zordan underwent a procedure to augment her breasts and correct her asymmetry, performed by non-party Dr. Brad Jacobs. Dr. Jacobs inserted 600 cubic centimeter (cc) gel implants in the right breast and 550cc gel implants in the left breast. In April 2007, after expressing concern that her breasts were too large, Ms. Zordan underwent surgery by Dr. Jacobs to reduce the size of her implants.

The treatment at issue involves plaintiff's second reduction. On December 22, 2008, Ms. Zordan presented to Dr. Lesesne, seeking to further reduce her breasts. She also sought to

correct her persistent asymmetry. Ms. Zordan indicated that her breasts were a D cup and wanted a reduction to a B cup. Although plaintiff believed that she had 450cc implants, Dr. Lesesne was unable to confirm the implant sizes since he could not obtain plaintiff's medical records from Dr. Jacobs' office. Both plaintiff and Dr. Lesesne testified that Dr. Lesesne did not provide Ms. Zordan with the exact cc implant size he intended on using for the procedure and that plaintiff referred to her desired size in terms of bra cups. Without knowing which size implants plaintiff already had inside of her, Dr. Lesesne ordered 300cc gel implants, but planned to have various implant sizes available at the time of surgery, including 250cc and 350cc.

On January 6, 2009, Dr. Lesesne performed an exchange of implants and capsulorrhaphy procedure on Ms. Zordan. Via the old incisions, Dr. Lesesne dissected down to the capsule with a cautery. Plaintiff's old implants were removed intact, and Dr. Lesesne determined her implant sizes to be 400cc on the right side and 350cc on the left side. He placed a new 300cc implant on the left side and took the 350cc implant that had been in Ms. Zordan's left breast and, after rinsing it with saline and soaking it in Betadine, placed the 350cc implant into the right breast. Dr. Lesesne closed the incisions with Vicryl, plain and nylon sutures. He administered Ancef, an antibiotic, intraoperatively, and the procedure was concluded without any noted complications.

Following the surgery in January 2009, Ms. Zordan indicated that she was doing well. But a month later, in February 2009, Ms. Zordan sent various e-mails to Dr. Lesesne, complaining of pain and indicating displeasure with her breasts. Because Ms. Zordan resided in California at that time, Dr. Lesesne referred her to non-party Dr. Jay Jenson. Dr. Jenson evaluated Ms. Zordan on

February 9, 2009, and found no signs of infection. Dr. Jenson's impression was that plaintiff was experiencing post-operative pain following her bilateral breast procedure.

Ms. Zordan reported to still be in pain on February 13 and 16, 2009. Dr. Lesesne believed that Ms. Zordan was experiencing inflammation and prescribed Toradol. When plaintiff again complained of pain on February 20, 2009, Dr. Lesesne's impression was that Ms. Zordan had capsular contraction.¹ On March 5, 2009, Dr. Lesesne examined Ms. Zordan in Los Angeles and found no evidence of abnormalities. He instructed Ms. Zordan to massage her breasts at least once a day for five minutes.

On October 17, 2009, Ms. Zordan presented to non-party Dr. Garth Fisher, complaining of pain and deformation. She also believed that her breasts were still too large and sought a reduction. On November 5, 2009, Dr. Fisher operated on plaintiff and noted the presence of thick scar tissue on plaintiff's breasts and external deformities. He also observed "old suture material that looked like Ethibond in the medial aspect of both breasts." Dr. Fisher indicated that "the right Pectoralis muscle had been transected very high to about the 3rd rib and it appeared there was suture material in an attempt to repair this." Dr. Fisher removed the suture material and placed a 240cc implant in plaintiff's right breast and a 150cc implant in her left side. In May 2010, plaintiff underwent another procedure by Dr. Fisher to further reduce her breasts and correct her persistent asymmetry.

¹ Defendants' expert explains that capsular contracture is a condition where the capsule around the implant tightens, resulting in pain and distortion of the breasts.

Plaintiff commenced this action on December 20, 2010, against Dr. Lesesne. Plaintiff alleges, among others, that Dr. Lesesne failed to follow proper preoperative procedures by not administering certain tests prior to surgery, failed to use the proper size implants, failed to remove suture materials within her breasts, and improperly cut her right pectoralis muscle. Plaintiff's injuries include severe pain, asymmetrical and deformed breasts, depression, scarring, and the need for additional surgeries.

Defendants move for summary judgment on plaintiff's medical malpractice claim. In support of their motion, they submit the expert affirmation of William Rosenblatt, M.D., a physician licensed to practice in New York and certified by the American Board of Plastic & Reconstructive Surgery. After reviewing the documents and medical records in this matter, he opines to a reasonable degree of medical certainty that the treatment rendered by Dr. Lesesne was within the standard of care and did not proximately cause Ms. Zordan's alleged injuries.

Addressing the preoperative procedures, Dr. Rosenblatt opines that the standard of care in existence at the time of plaintiff's surgery on January 6, 2009, did not require any testing to be performed on Ms. Zordan, a healthy 23 year old patient, prior to her procedure. The expert points out that preoperative tests were nonetheless performed, including a blood count, a comprehensive metabolic panel, and a pregnancy test. Dr. Rosenblatt believes that there were no additional tests that would have altered Dr. Lesesne's surgical approach or Ms. Zordan's outcome.

Dr. Rosenblatt also opines that Dr. Lesesne used the appropriate size implants. He

states that Ms. Zordan did not request a specific implant size and only asked that her bra size be reduced to a B cup. He explains that bra sizes do not translate into any specific implant size, because there are numerous factors involved in determining bra sizes, including the brand and style of the bra and the wearer's frame size and breast shape. Dr. Rosenblatt believes that without knowing the exact sizes of Ms. Zordan's implants used in Dr. Jacobs' second procedure, it was proper for Dr. Lesesne to make a number of implant sizes available at the time of surgery. According to the expert, Dr. Lesesne's decision to reduce plaintiff's implants by 50cc on each side was within the standard of care. He states that the size of the implants to be used during this procedure is a matter of medical judgment and is based upon discussions with the patient and upon the size and shape of the patient's body, rib cage, chest, and breasts. Dr. Rosenblatt adds that taking the old 350cc implant from plaintiff's left breast and placing it in her right breast was proper, so long as the risk of contamination was reduced by immersing the implant in Betadine and rinsing it with saline.

Dr. Rosenblatt further opines that plaintiff's claim that Dr. Lesesne departed from the standard of care by failing to remove suture material used during his procedures is without merit. Dr. Fisher's operative report from November 5, 2009, noted that old suture material that looked like Ethibond was found in plaintiff's breasts. The expert states that Dr. Lesesne closed Ms. Zordan's incisions with Vicryl, plain and nylon sutures. He states that Vicryl and plain sutures are dissolvable and would have no longer been present at the time of Dr. Fisher's surgery. The expert adds that while nylon is permanent, it looks very different from Ethibond, which is a fairly thick, braided suture. He concludes that the sutures of the type noted by Dr. Fisher were not used by defendant. Dr. Rosenblatt advances that Ethibond is a well-accepted suture, and the standard of care did not

require Dr. Lesesne to remove any suture material he may have encountered, especially since the suture would have been inside Ms. Zordan without incident for two years.

Dr. Rosenblatt further opines that plaintiff's claim that Dr. Lesesne improperly cut her right pectoralis muscle is without merit. He opines that, given the nature of the procedure performed, it is more likely that Dr. Jacobs was responsible for cutting Ms. Zordan's pectoralis muscle. Regardless, the expert affirms that it is not a deviation from the standard of care to cut the pectoralis muscle during an exchange of implants procedure. He adds that cuts, chest pain, capsular contractures, asymmetry, deformity, scarring, and additional surgeries are well-known risks and complications of breast augmentations, and their occurrence does not indicate any malpractice on the part of the surgeon. There are no known causes of capsular contracture, although it is theorized that preoperative and perioperative antibiotics may reduce its risk. Here, Dr. Lesesne prescribed preoperative antibiotics, administered perioperative antibiotics and used drains, which actions the expert asserts were proper.

In opposing the motion, plaintiff argues that defendants fail to establish a basis for summary judgment. Plaintiff submits an expert affirmation from David J. Bikoff, M.D., who indicates that he is a physician licensed in New Jersey and "previously New York" and certified by the American Board of Plastic Surgery. Pursuant to Section 2106 of the Civil Practice Law and Rules, only select professionals, such as attorneys, physicians, osteopaths, or dentists, who are licensed by the State of New York are allowed to submit affirmations in lieu of affidavits. Although plaintiff's expert is a physician, the expert is unlicensed in New York, and should have

submitted an affidavit. This technical error, however, will be excused provided that plaintiff submits the physician's affidavit within ten days of receipt of a copy of this decision and order. The Court will consider Dr. Bikoff's affirmation at this time subject to the submission of a proper affidavit.

After having reviewed plaintiff's medical records and the documents in this case, plaintiff's expert opines to a reasonable degree of medical certainty that the care rendered by Dr. Lesesne deviated from the acceptable standard of care. He assesses that Dr. Lesesne's preoperative procedure was improper because Dr. Lesesne did not obtain and chart plaintiff's information, did not maintain complete notes, and did not record the breast size requested by Ms. Zordan. Dr. Bikoff opines that Dr. Lesesne failed to use the implants requested by Ms. Zordan, because the implants Dr. Lesesne ultimately placed in her were too large. The expert adds that Dr. Fisher's finding of a transected pectoralis muscle on November 5, 2009, is proof that Dr. Lesesne made this cut, which was a deviation from the standard of care. Dr. Bikoff also states that Dr. Lesesne did not "utilize appropriate procedures and techniques to obtain an aesthetically appropriate result." In reply, defendants aver that plaintiff's opposition must be disregarded because her expert's affirmation is inadmissible as competent evidence, is conclusory, and is speculative.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has

no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts “require a trial of any issue of fact.” Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010). In claiming that the treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific, and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep’t 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify “in what way” a patient’s treatment was proper and should “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010). A defendant’s expert opinion must “explain ‘what defendant did and why.’” Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff’s essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, a plaintiff must then rebut that showing by submitting an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

This Court finds that defendants have established a prima facie case for summary judgment on plaintiff's claim that Dr. Lesesne failed to follow preoperative procedures, failed to use the appropriate size implants, and failed to remove suture material. This Court agrees with defendants and finds that plaintiff's expert failed to rebut this showing by offering non-conclusory statements on these alleged departures. Plaintiff's expert opines that defendant departed by not using appropriate and requested implants. The expert, however, fails to specify what specific implants were requested and how the size inserted by Dr. Lesesne proximately caused Ms. Zordan's injuries. As to the issue of the retained suture, the plaintiff's expert fails to dispute the statement by Dr. Rosenblatt that an Ethibond suture material is visually distinctive and different from the materials that Dr. Lesesne used or the statement that Dr. Lesesne was not required to remove old suture material he may have encountered during his surgery.

Defendants fail to remove all issues of material fact, however, regarding the origination of the cut on plaintiff's right pectoralis muscle and the suture found there. Dr. Rosenblatt's statement that it was more likely that Dr. Jacobs was responsible for the alleged cut in the right pectoralis muscle is conclusory in nature and is adequately disputed by the plaintiff's expert, who points out that the first mention in the record of any muscle tear occurs after Dr. Lesesne's surgery. This dispute presents a factual issue that cannot be resolved in this motion. See Rojas v. Palese, 94 A.D.3d 557 (1st Dep't 2012). Accordingly, it is

ORDERED that the portion of the motion seeking summary judgment on plaintiff's claim that Dr. Lesesne failed to follow preoperative procedures, failed to use the appropriate size

implants, and failed to remove suture material is granted; it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, July 30, 2013, at 9:30 a.m.

Dated: *July 23*, 2013

ENTER:

JBL

JOAN E. LOBIS, J.S.C.

FILED
JUL 26 2013
NEW YORK
COUNTY CLERK'S OFFICE