

Lubell v Benham Cohen, DDS
2014 NY Slip Op 31035(U)
April 16, 2014
Sup Ct, New York County
Docket Number: 805155/12
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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ROBERT LUBELL,

Plaintiff,

Index No. 805155/12

-against-

Decision and Order

BENHAM COHEN, DDS, and BENHAM COHEN,
DDS, PC,

Defendants.

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

This dental malpractice case arises out of the failure of implants placed in Plaintiff Robert Lubell’s upper and lower arches. Lubell sues Behnam Cohen, DDS, and Behnam Cohen, DDS, PC, sued here as Benham Cohen, DDS, and Benham Cohen, DDS, PC, alleging dental negligence and lack of informed consent. Defendants move for partial summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules on Plaintiff’s claim of lack of informed consent. For the following reasons, the Defendants’ motion is denied.

Robert Lubell and Behnam Cohen, DDS, first met at a facial rejuvenation seminar. Mr. Lubell was a model at the course and assigned to Dr. Cohen. In applying anesthetic to Mr. Lubell, Dr. Cohen noticed his teeth and gave Mr. Lubell his card.

On July 20, 2009, Mr. Lubell, then age 59, consulted with Dr. Cohen about the placement of dental implants. At the time, Mr. Lubell had two removable dentures. He wore a complete upper denture and had a removable partial denture in the lower arch. He told Dr. Cohen that he was dissatisfied with his current prosthetics. Mr. Lubell also completed a patient information

form. In completing his medical history, Mr. Lubell, who has epilepsy, indicated that he had taken anti-seizure medications and had lost his teeth between the ages of 18 and 35. In 2003, Mr. Lubell had corrective heart valve surgery, and his file was marked as medically alerted for prophylactic antibiotics.

Dr. Cohen discussed placing sixteen implants with two fixed bridges for \$50,000. Alternatively he proposed a less costly option of eight implants with dentures held by the implants. His treatment note of July 20, 2009, further states “[f]ully discussed pt’s options + alt tx.” When Dr. Cohen saw Mr. Lubell later that month he noted that Mr. Lubell “k/u [abbreviation for knows and understands] his treatment and possible infection, rejection and/or pain” and he “discussed fully and in detail the treatment plan and options.”

On July 31, 2009, Mr. Lubell signed several printed forms. These included a Letter of Patient Consent, Oral Surgery Consent Form for extraction of his remaining lower teeth, and a Consent for Two-Stage Osseousintegrated Implant Surgery. The Letter of Patient Consent included standard text that listed “body rejection” among treatment risks. It also listed the alternative treatment of “no treatment.” The form relating to implant surgery at paragraph 6 included text at items K. and L., listing “[b]one loss around implants” and “[l]oss of the implant due to rejection by the body.”

By September, Mr. Lubell’s upper implants began to fail. Dr. Cohen tried replacement and bone grafting. His treatment notes of October 2, 2009, indicated “very poor bone quality evident.” By this date, Dr. Cohen had placed eight implants. Later that same month the

doctor found the implant at the area of tooth #7 had not integrated into the bone. Treatment in November showed that the area of bone at sites #6 and #7 had been resorbed.

In May 2010, Dr. Cohen placed four more implants. This time he used narrow body implants on the bottom, although he had originally planned to use regular ones. By July, Dr. Cohen considered it possible that all the implants might fail. Nevertheless, on July 26, 2010, he placed an implant at site #26, and placed a further replacement implant in December 2010.

In 2011, Mr. Lubell stopped treating with Dr. Cohen. In June 2012, he sued in a summons and complaint that he personally verified. In the first cause of action, he alleged dental malpractice. In the second cause of action, he alleged lack of informed consent. In particular, Mr. Lubell complained that Dr. Cohen failed to inform him of the dangers, risks, hazards, and alternatives that were incident to the treatment provided by Dr. Cohen. Mr. Lubell further claimed that a reasonable and prudent person in his position would have not consented to the treatment provided by Dr. Cohen if he had been fully and properly informed of those dangers, risks, hazards, and alternatives.

Following completion of disclosure and the filing of the note of issue, Defendants now move for partial summary judgment, arguing that they are entitled to judgment as a matter of law and that there are no genuine issues of material facts in dispute on Plaintiff's cause of action for lack of informed consent. Defendants' attorney affirmation in support of the motion argues that Mr. Lubell admitted that he asked Dr. Cohen questions and those questions were answered to Plaintiff's satisfaction. In further support, Defendants provide an expert opinion by Allan J. Kucine, D.D.S.

Dr. Kucine is a New York-licensed dentist, who is board-certified in oral and maxillofacial surgery.

Dr. Kucine opines that Dr. Cohen met the standard of care by appropriately obtaining Mr. Lubell's informed consent before treating him. He opines that the appropriate risks, benefits and alternatives were properly disclosed to Mr. Lubell. In support, he refers to Dr. Cohen's medical records for Mr. Lubell, including the doctor's July 2009 treatment notes. Dr. Kucine further opines that Dr. Cohen's printed forms provided "sufficient information" to satisfy the standard of care owed to Mr. Lubell, and that each of the two options presented to Mr. Lubell were better than his present condition. While the preprinted forms were not required, the expert opined that they provided "the information necessary to provide a prospective patient with the information necessary to make an informed decision."

Plaintiff Lubell opposes the Defendants' motion. He claims that they failed to establish entitlement to summary judgment and that there are disputed issues of material fact. In support, he offers the expert opinion of a New York-licensed dentist, whose identity has been redacted pursuant to Section 3101(d) of the Civil Practice Law and Rules. That expert, who affirms to having more than thirty years of practice, has performed hundreds of implant placements. He further affirms that the expert has refused to place implants in patients with similar dental histories and conditions as those of Mr. Lubell upon presenting to Dr. Cohen.

Plaintiff's expert opines that informed consent was not obtained from Mr. Lubell prior to placement of the implants. In the expert's opinion, Mr. Lubell was never a candidate for the implant procedures. The expert, who reviewed the deposition transcripts in preparing the opinion,

points to Mr. Lubell's testimony that he recalled discussing with Dr. Cohen risks arising from Mr. Lubell's heart condition. The expert further notes that even Dr. Cohen's treatment note that he discussed fully and in detail the treatment plan and options did not mention risks. The expert contends that Mr. Lubell had an elevated risk of failure due to his medical and dental history. Mr. Lubell had been toothless on his upper arch for more than twenty years. Under those circumstances, the atrophy and resorption of bone caused by that condition created a "risk of failure that greatly exceeded any acceptable" benefit associated with placement of implants. Plaintiff's expert not only relies on these circumstances, but also notes that Dr. Kucine, Defendants' expert, did not even address these conditions in his opinion in support of summary judgment.

Plaintiff's expert contends that by not taking into consideration Mr. Lubell's particular medical and dental history, Dr. Cohen failed to adequately apprise Mr. Lubell of the risks and benefits. The standardized forms, Plaintiff's expert opines, would not be sufficient to apprise Mr. Lubell of his particular risks. In reply, Defendants contend that Plaintiff's expert affirmation is not credible and fails to rebut their prima facie showing of entitlement to summary judgment.

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). The 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 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 are shown “sufficient to require a trial of any issue of fact.” Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer’s Estate, 93 A.D.2d 355 (1st Dep’t 1983). It is well-established that summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep’t of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a malpractice case, in claiming 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 v. Noble, 73 A.D.3d 204, 206 (1st Dep’t 2010). The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. A defendant’s expert opinion must “explain ‘what defendant did and why.’” Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep’t 2010) (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep’t 2003)). Conclusory medical affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Expert opinion that fails to address a plaintiff’s essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id. If a defendant establishes a prima facie case, only then must a plaintiff rebut that showing. Id. at 207. Where opposing experts disagree on issues, those issues must be resolved by the fact finder, and summary judgment is precluded. E.g., Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep’t 2011).

Claims of lack of informed consent are statutorily defined. Pub. Health Law § 2805-d. The law requires in pertinent part that dentists providing treatment disclose to the patient

alternatives and reasonably foreseeable risks and benefits involved. Id. § 2805-d(1). The statute conditions that disclosure, moreover, upon that which a reasonable dental practitioner “under similar circumstances would have disclosed.” Id. And that disclosure must permit “the patient to make a knowledgeable evaluation.” Id. To prevail in a summary judgment motion on a lack of informed consent claim, the movant must establish as a prima facie case that a reasonably prudent person in the patient’s position would have undergone the treatment had the patient been fully informed. See, e.g., Schilling v. Ellis Hosp., 75 A.D.3d 1044, 1046 (3d Dep’t 2010); see also Pub. Health Law § 2805-d(3). Consent forms signed by a plaintiff are not dispositive of claims for lack of informed consent. See, e.g., Wilson-Toby v. Bushkin, 72 A.D.3d 810, 811 (2d Dep’t 2010).

This Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment on Plaintiff’s lack of informed consent claim. The record before this Court shows that the parties in sworn testimony dispute the breadth and depth of Dr. Cohen’s disclosure to Mr. Lubell to make a knowledgeable evaluation. In his deposition, Mr. Lubell recalled Dr. Cohen discussed prescribing antibiotics and explaining he had to take them before any treatment due to his artificial heart valve. Dr. Cohen, in contrast relies on the texts of his printed forms and his July 2009 treatment notes to claim that he fully disclosed all relevant information. Plaintiff’s verified complaint, which this Court treats as testimony, disputes the adequacy of that disclosure. See C.P.L.R. 105(u) (verified pleading may be used as affidavit); see also Sanchez v. Nat’l R.R. Passenger Corp., 21 N.Y.3d 890, 892 (2013) (summary judgment not appropriate where verified pleadings dispute material fact at issue in motion). In addition, in his deposition, Dr. Cohen acknowledged that Mr. Lubell’s history of anti-seizure medications raised the issue of possible hyperplasia of the gum. He agreed that not every patient is a candidate for implants and that it would

be a departure if a candidate were not eligible and the doctor knew that but still placed implants. The patient's candidacy is determined, he testified, based on the patient's medical history, habits, prior dental history, and the patient's future hygiene maintenance. Dr. Cohen "definitely" agreed that a candidate would have to have a certain level of bony support in the mouth for placement of implants. He agreed that a patient that was toothless for more than twenty years would likely have bone atrophy. He admitted that bone shrinks when a tooth is missing in the mouth and that shrinkage can prevent some patients from being implant candidates. He testified that he would determine candidacy based on clinical palpation and x-rays.

Nor does Defendant establish that a reasonably prudent person in Mr. Lubell's position would have undergone the implant plan had that patient been fully informed. See, e.g., Schilling, 75 A.D.3d at 1046. That representation is absent from the movants' affirmations, including the defense expert's. Indeed, Dr. Kucine never addresses the particulars of Mr. Lubell's medical and dental history in opining that informed consent was provided.

The defense expert's opinion is deficient. Dr. Kucine disregards Plaintiff's testimony in his complaint and deposition in favor of Dr. Cohen's printed forms and treatment notes. But Dr. Kucine's affirmation lacks foundation to show that he had any personal knowledge that Dr. Cohen made those statements reflected in his notes. The defense expert may not credit Dr. Cohen's version of material facts over Plaintiff's. That fails to address all material facts alleged. 73 A.D.3d at 206.

As drafted, the defense expert opinion improperly shifts the burden from the doctor to properly disclose to the patient the information required under Section 2805-d to the patient to ask the “right” questions. Thus, Dr. Kucine’s repeated emphasis that Mr. Lubell dreamed of perfect teeth does not obviate Dr. Cohen, as the licensed medical professional to disclose information to permit Mr. Lubell to make a knowledgeable evaluation whether that dream would be a reality. The expert’s reliance on Mr. Lubell’s testimony that he discussed implants with his partner who “had already been rehabilitated with dental implants” ignores that informed consent is specific to the individual undergoing treatment. Just because Mr. Lubell’s partner had positive results from implant placements, that outcome did not obviate Dr. Cohen’s duty to make proper disclosure to Mr. Lubell under Section 2805-d to permit Mr. Lubell to evaluate his own candidacy. Based on this record, Defendants have not shown that as a matter of law Dr. Cohen disclosed alternatives, risks and benefits involved as a reasonable dentist under similar circumstances would have disclosed in a manner permitting Mr. Lubell to make a knowledgeable evaluation whether to undergo the implant plan or that a reasonably prudent person in Mr. Lubell’s position would have undergone the treatment if the person had been fully informed. Accordingly, it is

ORDERED that Defendants’ motion for partial summary judgment is denied; and it is further

ORDERED that the parties appear for a pretrial conference on May 20, 2014, at 9:30 am.

Dated: April 16, 2014

ENTER:



JOAN B. LOBIS, J.S.C.