

Ramos v Espinal

2014 NY Slip Op 31086(U)

March 7, 2014

Sup Ct, Bronx County

Docket Number: 309686/10

Judge: Stanley B. Green

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

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JOSHUA N. RAMOS,

INDEX No. 309686/10

Plaintiff(s),

- against-

SONIA ESPINAL, DDS and SERGEY SANDLER, DDS,

Defendant(s)

DECISION

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HON. STANLEY GREEN:

The motion by Sonia Espinal, DDS for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint is hereby consolidated for decision with the motion for summary judgment by Sergey Sandler, DDS and upon consolidation, the motions are denied.

Plaintiff claims that defendants failed to diagnose an Odontogenic Keratocyst of the left mandible that was present on an x-ray taken on May 29, 2007 and as a result, the tumor continued to grow until it was detected three years later. Plaintiff claims that as a result of the delay in diagnosing the tumor, there was significant tumor growth which resulted in his having to undergo a more extensive surgery, including a bone graft and additional surgical procedures.

On May 29, 2007, plaintiff presented to Dr. Sandler's office located at 3666 Boston Road, Bronx, NY. He was seen by Dr. Espinal, a dentist who had treated him once before, in 2006. X-rays of his mouth were taken and read as negative. However, they actually showed evidence of a lesion in plaintiff's jaw.

The lesion went undiagnosed until July 10, 2010, when plaintiff felt pain in his jaw and

consulted Dr. Klein at Throgs Neck Dental. Dr. Klein took a panorex x-ray which showed that plaintiff had a radiolucent lesion consistent with a cyst on the lower left quadrant of his mouth. Dr. Klein referred plaintiff to Dr. Moore, an oral surgeon, who saw plaintiff the same day. His preliminary diagnosis was an Odontogenic Keratocyst of the left mandible. Dr. Moore referred plaintiff for a CT scan to define the extent of the lesion.

On July 21, 2010, plaintiff presented to Montefiore Medical Center for a consultation with Dr. Bastidas. Due to the amount of tumor growth, it was determined that a marsupialization procedure was required prior to excision. The procedure, which involved the insertion of a drain in an effort to reduce the size of the tumor to make excision less complex and risky, was performed by Dr. Bastidas on July 24, 2010. On October 16, 2010, plaintiff underwent a second surgical procedure to change the size of the drain.

On March 17, 2011, plaintiff underwent surgery to excise the tumor and a bone graft from his hip was required. Due to problems with the bone graft, plaintiff had to undergo several additional surgeries, procedures and debridements and he lost multiple teeth as a result of the procedures.

Dr. Sandler seeks dismissal of the complaint on the ground that he never treated plaintiff and did not proximately cause the claimed injuries. He seeks dismissal of Dr. Espinal's cross-claim sounding in vicarious liability on the ground that she was employed as an independent contractor.

In support of the motion, Dr. Sandler submits his testimony which shows that he is the sole shareholder of Sergey Sandler, DDS, PC, that Dr. Espinal is employed as an independent contractor and that his only involvement in Dr. Espinal's treatment of the children was to refer all

the children to her care. He also testified that he does not review any of the objective tests performed by Dr. Espinal on patients who were children.

Dr. Espinal seeks dismissal of the complaint on the ground that plaintiff had no signs, symptoms or complaints related to his jaw at the time she saw him and even if plaintiff had been diagnosed in 2007 instead of 2010, the difference in treatment and plaintiff's ultimate prognosis would not have been appreciably different.

In support of the motion, Dr. Espinal submits the affidavit of Beth Boguslaw, D.M.D. who opines that the treatment would have been the same for the Odontogenic Keratocyst even if it had been diagnosed at the May 29, 2007 visit, with the exception of the number of teeth extracted.

Plaintiff contends that Dr. Espinal's motion must be denied because she does not dispute that it was a departure to fail to diagnose the lesion on the May 29, 2007 films and her expert's affidavit shows not only that defendants departed from the standard of care by failing to diagnose the lesion on the May 29, 2007, but also that plaintiff suffered, at least, the loss of an additional tooth that will require oral surgery for an implant.

Plaintiff also contends that Dr. Espinal's testimony that it was Dr. Sandler's custom and practice to first see the patient and decide the type of treatment and that Dr. Sandler "always" reviewed the x-rays and patient information before handing over the patient over to the next doctor to see the patient, raises triable issues of fact and credibility which preclude a grant of summary judgment.

In opposition to the motions, plaintiff submits the affirmation of an expert (with name redacted) who opines that the May 29, 2007 x-rays showed a lytic lesion between teeth #'s 18

and 19 that warranted further radiographs to rule out pathological process. The expert opines that the failure to conduct further x-rays and diagnose the lesion on May 29, 2007 were departures from the standard of care by Dr. Espinal and Dr. Sandler and that had an earlier diagnosis of the lesion been made, it would have been significantly smaller in size than it was at the time it was diagnosed three years later and the excision would have been performed without the need for marsupialization or with a period of marsupialization significantly shorter than the 8 months that plaintiff underwent. The expert opines that the growth of the tumor over the period of three years and its consequent size led to the need for the 8 month marsupialization and accompanying additional procedures, including the need for a bone graft and the additional procedures that arose from the wound breakdowns and infections surrounding the bone graft.

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate, prima facie, that he is entitled to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851). The burden then shifts to the party opposing the motion to demonstrate by evidentiary proof in admissible form that a triable issue of fact exists (Zuckerman v. City of New York, 49 NY2d 557). A court's task is issue finding rather than issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395) and the court must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact (Boyce v. Vazquez, 249 AD2d 724).

In a dental malpractice action, a defendant physician establishes prima facie entitlement

to summary judgment when he establishes 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. Noble, 73 AD3d 204). Once the defendant has met his prima facie burden, the burden shifts to the plaintiff to present competent evidence sufficient to show that the defendant departed from accepted standards of practice and that such departure was a proximate cause of the plaintiff's injuries (Kafka v. New York Hospital, 228 AD2d 332). In order to sustain this burden, the plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care (Berger v. Becker, 272 AD2d 565).

While Dr. Espinal contends that her expert's affidavit establishes that there is no causal relationship between the alleged departure and the claimed injuries, in light of Dr. Boguslaw's statement that a general dentist would have been able to see the lesion on the May 29, 2007 x-rays and that the treatment would have been similar "with the exception of the number of teeth extracted," it cannot be said as a matter of law that plaintiff did not suffer an injury as a result of defendants' failure to timely diagnose and treat the lesion.

Even assuming, arguendo, that the evidence were sufficient to meet Dr. Espinal's prima facie burden, the opinion of plaintiff's expert that the growth of the lesion over the three year delay in diagnosis and its consequent size led to the need for the 8 month marsupialization and additional surgical procedures, which is supported by the records which show that the tumor had advanced and increased in size, is sufficient to raise triable issues of fact which preclude a grant of summary judgment to Dr. Espinal.

As to Dr. Sandler, while he denies that he ever treated plaintiff or reviewed the x-rays, Dr.

Espinal's testimony that he always saw the patients first and reviewed the x-rays before turning them over to her for treatment, raises triable issues of fact as to whether he participated in plaintiff's treatment and as to the nature of Dr. Espinal's employment and his liability for her conduct. Accordingly, the motions by Dr. Espinal and Dr. Sandler are denied.

This constitutes the decision and order of the court.

Dated: March 7, 2014



STANLEY GREEN, J.S.C.