

Tussey v Patlut

2014 NY Slip Op 32402(U)

September 9, 2014

Supreme Court, New York County

Docket Number: 805005/13

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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JAMES TUSSEY,

Plaintiff,

Index No. 805005/13

-against-

Decision and Order

LEONARD PATLUT, D.D.S., and LEONARD
PATLUT, D.D.S., d/b/a EZ DENTAL,

Defendants.

-----X

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

Plaintiff James Tussey brings this dental malpractice action based on numbness to the left side of his tongue following a wisdom tooth extraction that was performed by Leonid Patlut, D.D.S. Dr. Patlut is sued here as Leonard Patlut, D.D.S. The Defendants, Patlut and his professional corporation, EZ Dental, P.C., sued here as Leonard Patlut, D.D.S., d/b/a EZ Dental, move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. Plaintiff opposes the motion. For the following reasons, the motion is denied.

James Tussey first saw Dr. Patlut on January 30, 2011, complaining of problems with his wisdom teeth. In his deposition testimony, Mr. Tussey recalled that he had begun experiencing minor wisdom teeth pain, beginning a couple of weeks prior to the visit. Dr. Patlut examined Tussey, performed a cleaning, and took a full-mouth series of x-rays. Tooth #17 had partially erupted. The treatment plan entailed extracting three impacted wisdom teeth: #1, which was located at the upper right of the jaw, #16, at the upper left, and #17, the third molar on the lower left of the jaw.

The record is in dispute regarding several key issues, including the order of extractions.

Dr. Patlut testified at his deposition that he did not have any independent recollection of Mr. Tussey's treatment. According to Dr. Patlut's chart for Mr. Tussey, Dr. Patlut extracted tooth #17 on March 12, 2011, #16 on March 13, 2011, and #1 on March 16, 2011. Dr. Patlut testified that he dictated his office notes, which his wife and dental assistant, Irina Miller, then transcribed onto the chart.

Mr. Tussey testified in his deposition, however, to a different order of extractions. He claimed that Dr. Patlut removed the upper right wisdom tooth first, followed by the lower left, and then the upper left wisdom tooth. In recalling that order, Tussey testified that the second extraction took more force, and the procedure lasted considerably longer than the first one. Tussey remembered the top extractions as having been very simple and short procedures, taking five minutes each after onset of the local anesthesia, while the extraction procedure for the lower left tooth took over an hour.¹

In testifying regarding the extraction of tooth #17, the lower left molar, Tussey related that Dr. Patlut commented that the procedure had been a bit more difficult than the doctor had thought it would be. Tussey recalled receiving two injections, one where the cheek and the jaw met and another inside the jaw between the jaw and tongue. He testified that the anesthesia had left the whole left side of his face numb, including the entire tongue. Later the same day, the numbness in his left cheek and right side of his tongue wore off, but the numbness to the left side of his tongue has not worn off. In contrast, Tussey had not noticed any numbness in his tongue during the first procedure, involving extraction of his upper right wisdom tooth. Although Dr. Patlut testified that he had no

¹Dr. Patlut testified that he had no specific recollection of extracting tooth #17. The chart does not indicate the length of that procedure.

specific recollection regarding the extraction of tooth #17, he testified that the extraction was not difficult.

Tussey testified that when he returned to Dr. Patlut the next day for further treatment he mentioned the numbness on the left side of his tongue. In speaking with Dr. Patlut about the numbness, Tussey testified that Dr. Patlut looked “a little concerned” and that Dr. Patlut had a “curious look” on his face. Tussey also recalled telephoning Dr. Patlut later that day to express concern regarding numbness in the left side of his face. Tussey claims that Dr. Patlut told him to take the pain medication, that the numbness would eventually wear off, and that he would see Mr. Tussey first thing in the morning. Tussey claimed that he continued to mention the numbness in his tongue even after the third wisdom tooth extraction. Dr. Patlut denies that Mr. Tussey ever complained about the left side of his tongue after the extraction of tooth #17.

The parties also disagree regarding the events that transpired relating to consent for the procedures. Two consent forms were executed. One, entitled “Dental Treatment Consent Form,” was signed by Tussey but is undated. Paragraph 4 of that preprinted form addresses removal of teeth but it is then blank in the area in which the patient authorizes the dentist to remove “the following teeth.” A second consent form, entitled “Informed Consent Surgical Procedure,” was also executed by the patient. Mr. Tussey could not recall in his deposition, however, signing the form. It is dated March 13, 2011. The blank area on the form for indicating the condition requiring surgery contains the following handwritten notation: “#17 3/12/11 #16 3/13/12 [sic] #01 3/20.”

Mr. Tussey testified that Dr. Patlut did not tell him about any risks of the procedures.

Dr. Patlut did not offer to refer him to an oral surgeon or present any alternatives to pulling the wisdom teeth. Tussey did not recall being told about any possibility of numbness, loss of sensation or anything else prior to the extraction of tooth #17.

After Tussey stopped treating with Dr. Patlut, he consulted with another dentist regarding the numbness. That dentist diagnosed him with lingual nerve damage. Mr. Tussey was told that any attempt to repair the damage raised the greater risk of permanent paralysis to the left side of his mouth, based on the proximity of the motor function nerve to the injured area. Recovery of sensation was estimated as possible but extremely unlikely. This action followed.

Mr. Tussey sues for dental malpractice and lack of informed consent. The verified complaint and bill of particulars allege that Dr. Patlut negligently extracted tooth #17, including failing to take proper x-rays and failing to refer Tussey to the necessary specialists preoperatively and post-operatively for treatment of his dental condition. They further allege that he failed to obtain informed consent, including failing to inform Tussey of the alternative of having an oral surgeon perform the extraction or having no extraction at all. Nor did Dr. Patlut advise Tussey of the risks of the procedure. Injuries alleged include loss of sensation, left side of tongue numbness, loss of taste on the left side of the tongue, difficulty eating and speaking, as well as pain, discomfort and embarrassment.

Dr. Patlut and his practice, of which Dr. Patlut is sole owner, now move for summary judgment. They offer in support the expert opinion of Theodore J. Jenal, D.D.S. Dr. Jenal is a New York-licensed dentist. Dr. Jenal indicates that in forming his opinion he reviewed the complaint, bill

of particulars and depositions in this case, as well as the dental chart.

In his opinion, Dr. Jenal asserts that Dr. Patlut did not depart from standards of care and his treatment was not a substantial factor in causing Mr. Tussey's alleged injuries. Dr. Jenal opines that in discussing the treatment plan, Dr. Patlut provided Tussey with all possible treatment options. Dr. Jenal claims that Dr. Patlut advised Tussey of the alternative of not extracting the teeth, that Dr. Patlut presented the option of referring Tussey to an oral surgeon and cites Dr. Patlut's claim that Tussey wanted Dr. Patlut to perform the extractions because Tussey was uncomfortable with having an oral surgeon do them. Dr. Jenal also affirms that Dr. Patlut told Tussey that if he had any numbness to report it immediately so that Dr. Patlut could refer Tussey to a neurosurgeon to repair the nerve.

On the claim of lack of informed consent, Dr. Jenal affirms that Dr. Patlut verbally told Tussey of the risks of the procedure and again recounts Dr. Patlut's claim that he advised Tussey to report any numbness to refer him to a neurosurgeon. Dr. Jenal also claims that Tussey asked Dr. Patlut to do the extractions even after the possibility of referral to an oral surgeon was given. Dr. Jenal claims that Tussey only referred to slight inflammation following the extraction of #17 and did not complain about loss of sensation, numbness or the site #17 generally. Dr. Jenal supports that contention by referring to Dr. Patlut's chart, which does not reflect any complaint regarding numbness, as well as Dr. Patlut's testimony that had Tussey informed him of any numbness, he would have referred Tussey to a neurosurgeon, which was not done. Rather, Dr. Jenal opines that Tussey caused and exacerbated his injuries by failing to inform Dr. Patlut of numbness. He further opines that Tussey's injury was a known and accepted risk of the procedure.

Tussey opposes the motion for summary judgment. He claims that the Defendants failed to establish a prima facie case and that Dr. Jenal's opinion is premised on the assumption that Tussey never mentioned numbness to Dr. Patlut, which is disputed. He submits an expert opinion and contends that multiple genuine issues of material fact preclude any determination in favor of Defendants.

Plaintiff's expert, whose name has been redacted pursuant to Section 3101(d)(1)(i) of the Civil Practice Law and Rules, disputes Dr. Jenal's expert opinion. Plaintiff's expert is a NY-licensed dentist, who is an oral and maxillofacial surgeon. The expert opines that Dr. Patlut departed from accepted dental practice and that departure caused trauma to Mr. Tussey's lingual nerve. The expert notes that Dr. Patlut's x-ray of tooth #17 fails to show Tussey's complete root structure and opines that the x-ray is inadequate to be used in an extraction of that tooth. The expert adds that, based on the location of the lingual nerve, which cannot be seen on an x-ray, any extraction of an impacted third molar must be done from the cheek side of the mandible to avoid injury to the nerve. Plaintiff's expert opines that Dr. Patlut used excessive force that caused trauma to Mr. Tussey's lingual nerve. Upon knowledge of the numbness to Mr. Tussey's left side of the tongue, Dr. Patlut should have referred Tussey to a specialist for nerve repair surgery, and the expert notes that any delay in referral would have reduced the likelihood of success of any repair. Finally Plaintiff's expert opines that Dr. Patlut failed to provide Mr. Tussey with informed consent. In reply, Defendants continue to assert that summary judgment is warranted. They criticize Plaintiff's expert for relying on Tussey's testimony, which they characterize as "self-serving."

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).

A defendant moving for summary judgment in a dental 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. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). To satisfy this initial burden, a defendant must address and rebut any specific allegations of malpractice set forth in a plaintiff's bill of particulars. See, e.g., Chan v. Young, 66 A.D.3d 642, 643 (2d Dep't 2009). In positing a prima facie showing, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the complaint and the bill of particulars. 73 A.D.3d at 206. Expert opinion must be based on the facts in the record or those personally known to the expert. Id. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id.

If a movant makes a prima facie showing, the burden then shifts to the non-moving party “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). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted dental practice and that the departure proximately caused the injuries alleged. See Roques, 73 A.D.3d at 207. Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. 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).

Claims of lack of informed consent are statutorily defined. Pub. Health Law § 2805-d. The law applies a reasonable practitioner standard to the duty to disclose: a dentist providing treatment or diagnosis must disclose to the patient alternatives and reasonably foreseeable risks and benefits involved as a reasonable dentist under similar circumstances would have provided. See id. § 2805-d(1). The disclosure, moreover, must permit “the patient to make a knowledgeable evaluation.” Id. To prevail on a summary judgment motion on such a claim, the movant must establish as a prima facie case that proper disclosure was done and a reasonably prudent person in the patient’s position would have undergone the treatment had the patient been fully informed of the alternatives to treatment and its reasonably foreseeable risks and benefits. 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). Or, even assuming a reasonably prudent person in the patient’s position would not have undergone the treatment had that patient been fully informed, a movant may show that the lack of informed consent

did not proximately cause the injury alleged. See 75 A.D.3d at 1046; Pub. Health Law § 2805-d(3). Signed consent forms by themselves 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).

Addressing Plaintiff's claim for dental malpractice, this Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment. They fail to rebut Plaintiff's allegations in the complaint and bill of particulars that Dr. Patlut negligently extracted tooth #17, and they ignore Mr. Tussey's deposition testimony in contending there is no evidence to support the claim. Dr. Jenal's expert opinion improperly credits Dr. Patlut's version of the facts over Plaintiff's. See 73 A.D.3d at 206. For example, although Dr. Jenal acknowledges that he reviewed Mr. Tussey's testimony, he disregards that testimony in asserting that Mr. Tussey did not inform Dr. Patlut of the numbness and opining that Dr. Patlut did not depart from standards of care in not referring Tussey to a specialist for nerve repair surgery. Dr. Jenal was not present for the treatment in this case, and he lacks foundation to assert that conversation did not take place. Thus, the issue remains for the jury to determine regarding the propriety of Dr. Patlut's care. Moreover, even assuming the Defendants were to have established a prima facie case for summary judgment on the claim of dental malpractice, this Court would find that Plaintiff's opposition raises genuine issues of material fact. The medical experts in this case conflict in their opinions regarding Dr. Patlut's treatment.

This Court is similarly unpersuaded that Defendants have met their burden in moving for summary judgment on Plaintiff's claim for lack of informed consent. 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). Nor is reliance on the obtaining of consent forms dispositive in this case, given contrary evidence including the pleadings and deposition testimony of Tussey. See 72 A.D.3d at 811. Tussey contends, among other things, that he was not told of the option of having an oral surgeon perform the extraction. This dispute over the adequacy of the disclosure remains an issue for the jury to determine. Nor have Defendants shown that there are no genuine issues of material fact whether a reasonably prudent person in Tussey's position would have consented to the treatment if that person had been fully informed of alternatives, risks and benefits. Lastly a jury question remains whether any lack of informed consent did not proximately cause the alleged injuries of numbness, among others. Accordingly, it is

ORDERED that Defendants' motion for summary judgment is denied.

Dated: September 9, 2014

ENTER:



JOAN B. LOBIS, J.S.C.