

Ceruzzi v Paley

2014 NY Slip Op 32806(U)

April 29, 2014

Supreme Court, Westchester County

Docket Number: 53777/2012

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
JEFFREY CERUZZI

Plaintiff,

-against-

**DECISION & ORDER
Index No. 53777/2012
Seq No. 1**

DR. BARRY PALEY

Defendant.

-----X
WOOD, J.

The following papers numbered 1-19 were read and considered in connection with the defendant's motion for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.	1-13
Expert Affirmation, Exhibits.	
Plaintiff's Counsel's Affirmation in Opposition, Plaintiff's Affidavit, Dr. Spieler's Affidavit, Dr. Spieler's Curriculum Vitae.	14-17
Defendant's Counsel's Reply Affirmation, Exhibit.	18-19

Plaintiff brought this action to recover damages for alleged dental negligence and dental malpractice. Defendant seeks an order, pursuant to CPLR 3212, granting him summary judgment and dismissing plaintiff's verified complaint against him.

By way of background, plaintiff commenced this action through the filing of a summons and verified complaint on March 14, 2012, and service on or about March 20, 2012.

Plaintiff's cause of action sounds in negligence for the dental treatment he received from defendant on or about February of 2011 up to and including March of 2011. Specifically, plaintiff claims that defendant negligently failed to properly and timely diagnose that plaintiff suffered from an infection, and improperly performed and/or treated a root canal. As a result of said conduct, plaintiff allegedly suffered injuries, including an infection, facial abscess/cellulitis, excruciating pain and discomfort, permanent injury, and was caused to undergo other medical procedures and hospitalizations.

On January 6, 2011, plaintiff was seen by Dr. Spielvogel (defendant's partner), who started root canal treatment on tooth #18. After Dr. Spielvogel had finished working on the root canal that day, he put a temporary filling in the tooth, and closed the tooth with antiseptic medication and formocresol. An x-ray was taken on that visit. One week later on January 13, 2011, plaintiff returned for further treatment. At this visit, defendant continued the root canal on tooth #18. Defendant did not note any pain, discomfort, or any signs of infection in plaintiff's mouth. That same day, plaintiff also saw the hygienist at defendant's dental office, who performed an examination, and a cleaning. The hygienist noted subgingival calculus and poor dental hygiene but did not note any indication of pain, discomfort or an infection. On March 4, 2011, defendant examined tooth #18 for purposes of continuing root canal treatment. Upon oral examination, he observed that plaintiff's tooth had fractured, and was not restorable. As such, he extracted tooth #18, after informing plaintiff about the fracture, and that there were no other treatment options than extraction. On this date, defendant again did not observe any pain, discomfort, or signs of infection. On March 7, 2011 plaintiff presented to an oral surgeon, Dr. Thomas Wilson, who treated plaintiff for an infection. Plaintiff was admitted to Greenwich Hospital on March 10, 2011 for treatment of an infection mandibular abscess and

cellulitis. Plaintiff was discharged from the hospital on March 13, 2011, but returned for further outpatient IV antibiotic treatments from March 14, 2011 through March 17, 2011. Plaintiff claims that defendant mishandled a routine root canal on plaintiff's tooth #18, which resulted in that tooth having to be extracted, and further resulted in a massive infection requiring plaintiff's hospitalization.

Plaintiff filed the Note of Issue on July 26, 2013, and this summary judgment was filed on September 24, 2013.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakobovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v

Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

“To establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries” (Stukas v. Streiter, 83 AD3d 18,23 [2d Dept 2011]). “In a medical malpractice action...a defendant physician seeking summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby” (Iulo v. Staten Island University Hospital, 106 AD3d 696,697 [2d Dept 2013]). To defeat the defendant’s application, the plaintiff must only submit evidentiary facts or materials to rebut the defendant’s prima facie showing. In other words, “this means that if the defendant demonstrates only that he or she did not depart from good and accepted medical practice, plaintiff need only raise a triable issue of fact as to whether such a departure occurred. The plaintiff is required to raise a triable issue of fact as to causation only in the event that the defendant makes an independent prima facie showing that any claimed departure was not a proximate cause of the plaintiff’s injuries” (Stukas v. Streiter, 83 AD3d 18 [2d Dept 2011]). In order to successfully oppose a motion for summary judgment dismissing a cause of action sounding in medical malpractice, a plaintiff must submit a physician’s affidavit of merit attesting to (depending on the defendant’s prima facie showing) a departure from accepted practice and/or containing the attesting doctor’s opinion that the defendant’s omissions or departures were a competent producing cause of the injury (Domaradzki v Glen Cove Ob/Gyn Associates, 242 AD2d 282 [2d Dept 1997]; see Arkin v Resnick, 68 AD3d 692,694 [2d Dept

2009]). Conclusory or general allegations of medical malpractice, “unsupported by competent evidence tending to establish the essential elements are insufficient to defeat a motion for summary judgment” (Mendez v City of New York, 295 AD2d 487 [2d Dept 2002]; see Alvarez v Prospect Hospital, supra, at 325). To establish proximate cause in a medical malpractice action, “a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant” (Johnson v Jamaica Hospital Medical Center, 21 AD3d 881, 883 [2d Dept 2005] citing Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2d Dept 1998]; see Clarke v Limone, 40 AD3d 571, 571-572 [2d Dept 2007]). Since the burden of proof does not ask the plaintiff to eliminate every possible cause of her injury, “the plaintiff’s expert need not quantify the exact extent to which a particular act or omission decreased a patient’s chances [of a cure or increased her injury], as long as the jury can infer that it was probable that some diminution” in the plaintiff’s chance of a better outcome (Jump v Facelle, 275 AD2d 345, 346 [2d Dept 2000]; see Flaherty v Fromberg, 46 AD3d 743, 745 [2d Dept 2007]; Calvin v New York Medical Group, P.C., 286 AD2d 469, 470 [2d Dept 2001]). In addition, summary judgment “is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions...such credibility can only be resolved by a jury” (Feinberg v Feit, 23 AD3d 517, 519 [2d Dept 2005] quoting Shields v Baktidy, 11 AD3d 671, 672 [2d Dept 2004]; see generally Darwick v Paternoster, 56 AD3d 714, 715 [2d Dept 2008]; Adjetey v. New York City Health and Hospitals Corp., 63 AD3d 865 [2d Dept 2009]).

Further, to establish a cause of action to recover damages for malpractice based on informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably

foreseeable risks associated with the treatment and the alternatives that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (McKinney's Public Health Law §2805-d(1) ; *see also* Magel v. John T. Mather Memorial Hospital, 95 AD3d 1081 [2d Dept 2012]).

Here, defendant's motion for summary judgment is supported by evidence establishing prima facie entitlement to judgment as a matter of law. Defendant offers the affirmation of Dr. Elliot Siegel, DMD, (a licensed dentist in private practice since 1977), who opined that defendant did not depart from good and accepted dental practice when he provided plaintiff with dental care and treatment, and that defendant's dental care and treatment was not a proximate cause of plaintiff's claimed injuries. Dr. Siegel points to a patient's non-compliance with treatment recommendations and instructions that can lead to adverse dental results and is not within the control of the treating dentist, in that plaintiff was aware that defendant had not completed the root canal on January 13, 2011, yet he did not visit defendant again until over one and a half months later on March 4, 2011. Therefore, Dr. Siegel concludes that it was plaintiff's non-compliance with defendant's recommendation covering treatment of tooth #18 to be the proximate cause of his alleged injuries. This evidentiary submission which indicates that defendant did not deviate from accepted standards of medical care is sufficient to meet defendant's burden as a proponent of a summary judgment motion.

Accordingly, the burden shifts to plaintiff to submit evidence which raises a triable issue of fact regarding these matters, and to demonstrate that defendant's actions were a

departure from the accepted standard of care in the medical community, and a proximate cause in bringing about the injury.

Plaintiff has met his burden. Opposition to the summary judgment motion is supported by expert medical evidence raising a triable issue of fact. Here, plaintiff has presented expert testimony, by way of an expert affidavit of Dr. Gary Spieler. In his affidavit, Dr. Spieler represents that he is a dentist licenced to practice dentistry and board eligible in the specialty of endodontic dentistry. However, defendant submitted license information that shows that Dr. Spieler resides in Florida, his date of license is May 19, 1978, his status is inactive, and thus the court should disregard his opinion. Upon review of Dr. Spieler's c.v., his extensive education and training, including his certificate of advanced graduate studies in Endodontics, his training as a tricare dental director, his prior employment, and his teaching experience as an assistance professor in the University of Florida College of Dentistry, the court determines that even though his status may be inactive, this expert is nonetheless possessed of requisite skill training, education, knowledge or experience from which it could be assumed that his opinion rendered is reliable (Matott v. Ward, 48 NY2d 455 [1979]; Rosen v. Tanning Loft, 16 AD3d 480[2d Dept 2005]). Thus, the court will not disregard Dr. Spieler's Affidavit, and will consider it in making its decision on this motion for summary judgment.

Dr. Spieler explains that an Endodontist performs a variety of procedures including endodontic therapy, commonly known as root canal therapy. Dr. Spieler asserts that patients look to the dentist to advise and guide them concerning return visits for further treatment and if defendant had acted in accordance with good and accepted dental practice, he would have scheduled an appointment in late January 2011 to complete the root canal therapy and prevent the risk of fracture and infection both of which were plainly risks that defendant was either

unaware of or chose to ignore. Moreover, Dr. Spieler expresses that the following are all clear departures from accepted dental practice: defendant's partner who did not place plaintiff on any kind of antibiotics before or after the first visit; failure to take additional x-rays; defendant's failure to take any measures to protect the tooth from fracture; defendant should have supported the tooth with a bonded restoration and a stainless steel band to prevent possible fracturing of the tooth; the treatment delay; and that there were no treatment recommendation or instructions in defendant's sparse records. According to Dr. Spieler by failing to place plaintiff on antibiotics and the other departures proximately caused plaintiff to experience severe pain and discomfort, loss of tooth #18, and subsequent infection and treatment. Based upon the foregoing, Dr. Spieler opines that defendant departed from accepted dental practice in his care and treatment of plaintiff and in particular his care and treatment of tooth #18, and in failing to properly protect plaintiff from the prospects of an infection.

The court finds that the expert's affidavit contained sufficient allegations to demonstrate that the conclusions it contained are more than mere speculation, in that it set forth foundational facts for his opinion, and it contained opinions within his area of expertise .

In light of the foregoing, plaintiff has raised triable issues of fact to sufficiently defeat the motion by defendant, and therefore, the summary judgment motion is **DENIED**. The motion papers submitted have presented a credibility battle between the parties' experts and issues of credibility are properly left to a jury for its resolution (Barbuto v. Winthrop University Hospital, 305 AD2d 623 [2d Dept 2003]).

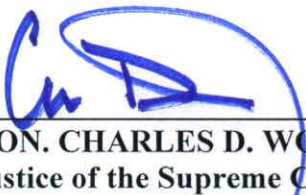
NOW THEREFORE, it is hereby

ORDERED, that the parties are directed to appear at a settlement conference on **6/19/14** at **9:30** a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

All matters not herein decided are denied. Plaintiff is directed to serve a copy of this Decision and Order, with notice of entry, upon defendant, within 10 days of such entry.

This constitutes the Decision and Order of the court.

Dated: April 29, 2014
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

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