

<b>Jefferson v Montefiore Med. Group</b>
2014 NY Slip Op 33417(U)
December 15, 2014
Supreme Court, Bronx County
Docket Number: 303142/11
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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MATTHEW JEFFERSON,

Plaintiff(s)

- against -

INDEX NO: 303142/11

MONTEFIORE MEDICAL GROUP, MONTEFIORE  
MEDICAL CENTER and RAJESH BHATNAGAR,  
M.D.,

Defendant(s)

DECISION/ORDER

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**HON. DOUGLAS E. MCKEON**

Defendant's motion for summary judgment and an order dismissing the complaint is decided as follows.

Plaintiff alleges that he underwent a reconstruction crest bone graft and surgical removal of maxillary mandibular hardware due to defendants' failure to biopsy, diagnose and treat an ameloblastoma located in his mandible. Movants argue that Dr. Bhatnagar properly treated plaintiff's complaint of a lump in his cheek by prescribing antibiotics and sending plaintiff for an x-ray of his mandible and referring him a to dentist. Defendants further argue that both Dr. Jaiswal and Dr. Bhatnagar properly and timely followed up on notifying plaintiff's mother of the abnormal x-ray on three separate occasions. Finally, movants argue that plaintiff would have required the reconstruction graft and surgical removal of hardware due

to the size of the mandible lesion and bone damage and that any delay in diagnosing and treating plaintiff's condition did not proximately cause the injuries alleged herein.

In opposition, plaintiff agrees that for the purposes of this motion only that had defendants spoken to plaintiff's mother to inform her of the results of the x-ray of April 9, 2006 and referred her to a dentist and subsequently followed up and left two messages reminding the mother to go to the dentist then defendants have "likely met the standard of care." However, plaintiff herein argues that this is not what happened. Plaintiff's mother testified that defendants did not call her or speak to her and did not leave messages for her about the results of the x-ray or refer her son to a dentist. Plaintiff argues that the evidence submitted by them must be accepted as true and a decision on the motion must be made on the version of facts most favorable to the non-moving party. As such, the conflict between the mother's testimony and the defendants' testimony regarding whether defendants called to relay the results of the x-ray and made a referral to a dentist preclude the granting of summary judgment. Furthermore, plaintiffs argue that defendants have failed to demonstrate their entitlement to summary judgment on proximate cause.

Defendants' expert opines that there would have been no difference if the surgery took place in 2006 as opposed to 2008 because there was already displacement of the osseous structures of the mandible so that further growth of the lesion after 2006 is irrelevant. Plaintiff has provided the Court with the affirmation

of Edward Rosenbaum, D.M.D., who reviewed the pathology report and concluded that the lesion was an ameloblastoma and not a dentigerous cyst. Dr. Rosenbaum compared the x-ray from 2006 with the CT scan from 2008 and opines that the lesion grew significantly in that time and that, as such, the resection of the lesion and surrounding tissue was necessarily more significant.

The Court finds plaintiff's deposition testimony that she did not receive followup calls and was never sent for an x-ray to be self serving and unreliable. The Court notes that it is not only plaintiff's word against the doctors'. The medical records demonstrate that Dr. Bhatnagar referred Matthew for an x-ray and the x-ray was performed on October 9, 2006 with the x-ray report in the medical records. Plaintiff's deposition testimony is nothing more than an unsubstantiated assertions and is insufficient to raise an issue of fact herein. See Scalisi v. Oberlander 96 A.D.3d 106 (1<sup>st</sup> Dept. 2012). The doctors' medical testimony supplemented by records made at the time in question indicate that defendants contacted plaintiff to inform her about the cyst and the need to take Matthew to a dentist. In contrast, plaintiff's deposition testimony that she did not receive the calls is unsubstantiated by any evidence in the record and does not raise the necessary triable issue of fact to repute the evidence.

Dr. Rosenbaum opines that from his review of the 2006 x-ray and the 2008 CT scan the lesion grew and "obviously the lesion would require more significant resection" as it caused further displacement an destruction. Absent from this

affirmation is any failure to disagree with defendant's expert's opinion that the two surgeries would have been the same treatment even in 2006. Dr. Rosenbaum fails to opine that there was a departure from the medical standard of care that proximately caused the injury nor does he disagree that the surgeries performed in 2008 would have been the proper treatment in 2006. He fails to offer a description of how the surgery performed in 2008 was more extensive and does not address facial deformity, asymmetry, pain suffering, emotional trauma or whether any of this would have occurred if the surgeries were performed two years prior. As such, plaintiff has failed to raise an issue of fact as to departure and proximate cause and, as such, the motion for summary judgment is granted.

So ordered.

Dated:

*December 15, 2014*



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Douglas E. McKeon, J.S.C.