

Nathan v Caravana

2015 NY Slip Op 30765(U)

May 6, 2015

Supreme Court, New York County

Docket Number: 805248/2012

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
JOYCE NATHAN,

Plaintiff,

-against-

CARL CARAVANA, D.D.S. and GROUP
HEALTH DENTAL FACILITY,

Defendants.
-----X

Index No. 805248/2012

Decision and Order

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

In this dental malpractice action, defendants Carl Caravana, D.D.S. and Group Health Dental Facility (“Group Health”) move for summary judgment dismissing the case. Plaintiff Joyce Nathan opposes the motion. For the reasons below, the motion is denied.

In late 2009, plaintiff’s dentist referred her to Dr. Caravana for an implant consult. Among other problems not relevant here, plaintiff had chronic periodontitis at tooth number 30. During plaintiff’s November 25, 2009 initial visit to Dr. Caravana, the doctor proposed a treatment plan in which he would extract tooth number 30 and replace it with an implant tooth, and he took a panorex x-ray of plaintiff’s mouth. On December 16, 2009, he extracted plaintiff’s tooth and prescribed penicillin and Tylenol.

Plaintiff’s implant procedure was scheduled for March 17, 2010. On that date, plaintiff signed an informed consent form. According to defendants, in addition to this Dr.

Caravana spoke to her about the potential risks and side effects of the procedure, including the risk of post-operative complications. When he performed the March 17, 2010, procedure, Dr. Caravana relied on the November 25, 2009, panorex x-ray as well as his own visual survey of the area in question. He asserts that he successfully placed the implant fixture in the mesial socket, prescribed penicillin and Tylenol #3, and gave her post-operative instructions.

Dr. Caravana saw plaintiff for follow up treatment on March 18, at which point she told him she had persistent numbness in her right mandible and lip. He determined that she suffered partial paresthesia of the lip and chin on her right mandible and removed the implant. According to Dr. Caravana, during his further appointments and conversations with plaintiff between March 22 and July 14 she reported, and he observed, that her numbness continued to diminish. On July 14, plaintiff's final visit, Dr. Caravana extracted another tooth and prescribed medication.

In August 2012, plaintiff commenced this action against Dr. Caravana and Group Health. She alleged that defendants deviated from the standard of care by relying on the November 2009 panorex x-ray for the March 2010 procedure and by failing to monitor and treat her properly post-operatively. She alleged that as a result she has sustained permanent nerve injury including numbness in the chin, lip and cheek area on the right side, continuing and intolerable pain to the touch, dribbling, and difficulty speaking. Plaintiff additionally alleged lack of informed consent. Defendants' answer challenged all of plaintiff's allegations.

After the filing of the note of issue, defendants brought this motion, arguing Dr. Caravana did not depart from the standard of care. In support, Dr. Caravana's affirmation states there was a sufficient amount of bone near tooth #30 at the time of the procedure. He states that the reliance on the panorex and his own visual observations was reasonable and he made proper decisions based on the condition of tooth #30. Dr. Caravana states that he did not transect the inferior alveolar nerve, there is no radiographic evidence that he drilled into the inferior alveolar canal, and even if he had drilled a few millimeters into the canal it would not constitute negligence. He states that plaintiff's numbness was temporary and not caused by any negligence.

In addition, defendants submit the affirmation of Mark Wolff, D.D.S. Dr. Wolff asserts that Dr. Caravana's treatment of plaintiff was within the standard of care for dental surgeons before, during and after the surgery. He agrees there is no evidence that Dr. Caravana transected the inferior alveolar nerve and he states that plaintiff recovered from her numbness. He opines that it was reasonable for the doctor to rely on the November 2009 panorex and his direct visualization of the socket area, and that any changes between the date of the x-ray and the date of the procedure were minimal. He states that plaintiff's claim regarding root resorption between November 2009 and March 2010 is exaggerated as any resorption would have been minimal. He states that even if Dr. Caravana had drilled a few millimeters into the mandibular bone this would not be negligence and would not create plaintiff's alleged injuries.

Defendants challenge plaintiff's claim regarding informed consent. They contend that Dr. Caravana explained the procedure, risks and alternatives and point out that plaintiff signed the informed consent form. They state plaintiff, who has a Ph.D. in psychology, is sophisticated and educated enough to comprehend the risks and alternatives the doctor described to her.

In opposition, plaintiff states that because Dr. Caravana did not take x-rays in March 2010, he could not assess the amount of bone resorption when he performed the implant. She states that Dr. Caravana's deposition testimony and his post-operative x-ray show the doctor overestimated the decrease in bone height when he performed the implant. The failure to take the additional x-rays, she states, was a departure from the standard of care, and he negligently drilled into the mandibular canal, did not prescribe cortico-steroids after the implant, and delayed in referring plaintiff to a specialist. As for informed consent, Dr. Caravana's notes do not indicate what he discussed about procedure's risks and he did not recall the details of the discussion. Plaintiff has stated that she recalls that Dr. Caravana did not make her aware of any risks, including numbness, and that she would not have undergone the procedure had she known he would drill close to her nerve. She states the consent form she signed is a general permission form not tailored to implants and drilling and does not use language related to the procedure and risks in question.

Plaintiff challenges the relevance of defendants' experts' argument that the inferior alveolar nerve was not transected, as her claim was not that the nerve was transected but that it was damaged. She states that the experts do not point to specific support for their conclusion that

there is no causal connection between her temporary numbness and the allegedly negligent drilling. In addition, she submits the expert affidavit of Dr. Stanley W. Lane, D.D.S., who concludes that it was negligent for Dr. Caravana to rely on the November 25, 2009, panorex and his visual observation. As a result, he states, Dr. Caravana drilled into the mandibular canal. Among other things, he disputes defendants' experts' conclusion that there is no radiographic evidence that the doctor may have drilled into the inferior alveolar canal and their belief that plaintiff's numbness was not causally connected to the negligent drilling. He points to CT scan sections taken three months after the drilling and implant, and photographs taken a week after the procedure, in support of his contentions. He states that the records of Dr. Salvatore L. Ruggiero, who evaluated plaintiff in May 2010, and of Dr. David Behrman, who conducted an independent medical examination for defendants four years later, show nerve problems and continuing impairment. He concludes that the failure to take an updated x-ray, the negligent drilling, and the failure to prescribe corticosteroids post-operatively were departures from the standard of care and caused plaintiff's injuries.

In reply, defendants state that their experts' statements prove there was no indicia of traumatic neuropathy. They generally challenge plaintiff's expert's conclusions. They provide supplemental statements from their experts to further clarify, explain and support their position and to dispute plaintiff's expert's contentions.

In considering a summary judgment motion, a 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, the pleadings, and other

available proof. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where the defendant is the movant, that the cause of action has no merit. Id. Courts grants the motion if, the papers and proof submitted show it is warranted as a matter of law. Id. It denies the motion where facts are shown "sufficient to require a trial of any issue of fact." Id.

For a prima facie case, the defendant must present expert opinion testimony that is supported by the record and addresses the plaintiff's essential allegations. Rogues v. Noble, 73 AD.3d 204, 206 (1st Dep't 2010). Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to produce admissible evidentiary proof "sufficient to establish the existence of material issues of fact" Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an expert affidavit stating the defendant departed from accepted dental practice and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree, summary judgment is denied. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011).

Here, defendants satisfy their prima facie burden. The expert affidavits along with Dr. Caravana's statements and notes are sufficient to shift the burden to plaintiff on the issues of whether Dr. Caravana departed from the standard of care in relying on the November 2009 x-ray along with his visual observation, whether he drilled in a manner that caused nerve damage, whether plaintiff's numbness was a normal and temporary side effect of a successful procedure, and whether the post-operative medication prescriptions and treatment in general were adequate.


In response, plaintiff raises triable issues of fact on these points with her submission of Dr. Lane's affidavit and the documents on which he relies. Similarly, although defendants shift the burden to plaintiff on the issue of informed consent, plaintiff responds by challenging the adequacy of the form she signed and arguing that her discussion with Dr. Caravana did not address the types of risks she faced. Moreover, defendants' reply only underscores the existence of differing opinions on the issues before the Court.

As disputed issues of fact exist, it is

ORDERED that the motion is denied.

Dated: *May 6*, 2015

ENTER:



JOAN B. LOBIS, J.S.C.