

**Wufka v Rubinstein**

2015 NY Slip Op 32881(U)

March 30, 2015

Supreme Court, Bronx County

Docket Number: 20558/13

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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TALEA WUFKA,

INDEX No. 20558/13

Plaintiff(s),

- against-

JOSHUA RUBINSTEIN, M.D.,

Defendant(s)

DECISION

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**HON. STANLEY GREEN:**

The motion by Joshua Rubinstein, M.D. for summary judgment dismissing the complaint is denied.

In October 2008, plaintiff consulted Dr. Rubinstein regarding liposuction, abdominoplasty (tummy tuck) and mammoplasty (breast reduction) procedures. Dr. Rubinstein reviewed the procedures with plaintiff and gave her consent forms which described each procedure. Among the risks noted in the forms were the risk of infection, the risk of scarring and the fact that smokers have a greater risk of skin loss and wound healing complications.

Plaintiff decided to undergo liposuction and a tummy tuck and signed consent forms for those procedures. However, she could not afford to pay for the two procedures so a payment plan was agreed to in anticipation of her surgery. According to Dr. Rubinstein, he told plaintiff that she needed to stop smoking if she wanted him to do the surgery.

In April 2011, plaintiff underwent pre-operative tests and was cleared for the surgery. On April 26, 2011, plaintiff presented to St. Joseph's Medical Center for the surgery. Dr. Rubinstein reviewed the surgery with plaintiff as well as the risks, benefits, limitations and possible

complications. He also asked what her smoking situation was like and she told him that she had not smoked for two weeks. He reviewed the risks of smoking with her and she wanted to go ahead with the surgery. He told her that she should not smoke postoperatively.

The surgery was performed without complication. After the surgery, Dr. Rubinstein dressed the abdominal incision and placed plaintiff in a compressive garment to control the swelling. The garment was similar to a girdle, but it extended from mid-thigh to upper abdomen. Plaintiff was instructed to keep the dressings and girdle in place until her follow up visit on April 28, 2011.

When plaintiff came to Dr. Rubinstein's office for her follow up appointment on April 28, 2011, she told him the girdle had "rolled down" and that she had kept it in that position. Otherwise, she had no complaints. Dr. Rubinstein noted that the incision line was dark and discolored, but there was no sign of infection. He removed the surgical drain and instructed plaintiff to return in three weeks. When plaintiff returned, she complained of a "wound problem." Dr. Rubinstein noted a small amount of dry eschar (a piece of dry scar tissue), but there were no signs of infection. He recommended local wound care and told plaintiff to follow-up in two weeks.

On May 22, 2011, plaintiff called Dr. Rubinstein's office, concerned that her wound had opened up and become infected. A nurse told her to come in at 10:30 am on May 23, 2011, but plaintiff did not come in until after Dr. Rubinstein had left the office. She returned the next day, complaining that her wound had opened. Dr. Rubinstein noted that the central portion of the eschar had separated and opened, but there were no signs of infection. He recommended local wound care and instructed plaintiff to return for a follow up in one week.

On June 5, 2011, plaintiff presented to the North Shore LIJ Forest Hills Hospital Emergency Department complaining of an open wound with greenish discharge on her abdomen since her surgery. The emergency department staff noted a small amount of serosanguinous discharge, but there was no bleeding, pus, green discharge or cellulitis. Plaintiff was diagnosed with a slow healing wound. She was not diagnosed with an infection or given antibiotics.

Plaintiff returned to Dr. Rubinstein's office on June 9, 2011. At that time, he noted that there was ongoing granulation and contraction of the wound, but no signs of infection. Dr. Rubinstein recommended local wound care and follow up in one week, but plaintiff did not return.

In her original Verified Bill of Particulars, plaintiff alleged that Dr. Rubinstein departed from the standard of care by failing to properly perform an abdominoplasty with liposuction on April 21, 2011, failing to diagnose and treat post-operative wound infection and failing to institute antimicrobial therapy. She claims that as a result, she suffered severe abdominal scarring and cosmetic deformity. In her Amended Bill of Particulars, plaintiff also alleges that Dr. Rubinstein departed from the standard of care by: (1) Failing to obtain a new informed consent; (2) performing an abdominoplasty and liposuction concomitantly; (3) failing to defer surgery until plaintiff had achieved a longer period of not smoking; (4) failing to appreciate intra-operative venous congestion; (5) improperly compressing the abdominal incision with surgical garments; (6) providing an improper garment; (7) failing to properly dress the wound; (8) failing to properly clear plaintiff for surgery; (9) failing to administer antibiotics in the post-operative period; and (10) by failing to appreciate and treat post-operative infection. Plaintiff claims that as a result, she developed a post-operative wound infection with pus and skin necrosis.

Dr. Rubinstein seeks dismissal of the complaint on the ground that the care and treatment was entirely appropriate and he properly informed plaintiff of the risks and benefits of the procedures in detail, including the risk of infection and scarring.

In support of the motion, Dr. Rubinstein submits the affirmation of Dr. Feinberg, a board certified plastic surgeon who opines that Dr Rubinstein properly informed plaintiff about the surgery and obtained consents for the procedures. He opines that it was appropriate and within the standard of care for Dr. Rubinstein to perform the tummy tuck and liposuction concomitantly as these procedures are routinely performed during the same operation. He also opines that even if plaintiff had only stopped smoking for two weeks, as she reported at the time of her surgery, that Dr. Rubinstein appropriately considered this to be enough to conduct the operation and his decision to perform her surgery was entirely within the standard of care.

As to plaintiff's claim that Dr. Rubinstein failed to appreciate intra-operative venous condition is without merit as her vital signs and clinical status remained stable through the surgery, there were no complaints from the procedure, and there is no indication that plaintiff suffered intra-operative venous congestion or any other ill effects during the surgery. Dr. Feinberg also opines that there is nothing to indicate that Dr. Rubinstein's care in managing Ms. Wufka's surgical wound was at all inappropriate.

Dr. Rubinstein also submits the affirmation of an Infectious Disease expert, Dr. Johnson, who opines that Dr. Rubinstein never deviated in any way from good and accepted practice in his care and treatment of plaintiff from an Infectious Disease Standpoint. Dr. Johnson notes that plaintiff received antibiotic coverage both prior to and during her surgery and that she was never diagnosed with an infection nor was she ever given or prescribed antibiotics.

In opposition to the motion, plaintiff submits the affirmation of Dr. Zaccaria, a board certified plastic surgeon. Dr. Zaccaria opines that Dr. Rubinstein deviated from the standard of care by performing the combined procedure on plaintiff, who was obese and had only stopped smoking two weeks prior to the surgery and that he deviated from the standard of care by suctioning 1200 cc's from plaintiff's upper abdomen and by applying a compression garment that was too tight and compressed the suture line further, contributing to the ischemia which caused the skin breakdown. He explains that "extreme caution" must be exercised during the performance of the combined liposuction and abdominoplasty to minimize the effects of abdominal wall ischemia. He opines that all of these deviations caused vascular compromise, which contributed to skin necrosis, wound breakdown, and unsightly scarring of the surgical site. He opines that Dr. Rubinstein "threw caution to the wind by" suctioning 1200 cc's of fat during the liposuction portion of the procedure, an amount he describes as "excessive" under the circumstances, which further led to vascular compromise, contributing to the ischemic/necrotic result evidenced in the pictures.

In reply, Dr. Rubinstein notes that plaintiff's expert did not address the claims of whether Dr. Rubinstein properly obtained informed consent, whether he appropriately cleared plaintiff for surgery; properly dressed the wound; appropriately administered antibiotics; and that plaintiff did not suffer a post-operative infection.

Initially, it is noted that plaintiff's expert has only addressed the issues of whether Dr. Rubinstein departed from the standard of care by performing the surgery only two weeks after cessation of smoking and in doing a combined surgery, by the amount of fat that was suctioned during the procedure and by providing a compression garment that plaintiff testified was tight


and rolled down. Therefore, those claims that were not addressed in opposition to the motion are dismissed.

As to the remaining allegations, while Dr. Rubinstein's evidence establishes, prima facie, that the care and treatment he rendered was proper and that plaintiff was properly informed of the risks and benefits of the surgery, including the risk of scarring and risks associated with smoking, Dr. Zaccaria's opinion, coupled with plaintiff's testimony that the compression garment was too tight and the photos of plaintiff's scarred abdomen raise triable issues of fact as to whether these alleged departures caused the claimed injuries.

As to the articles annexed to Dr. Rubinstein's reply papers, which indicate that lipoabdominoplasty has several benefits, including a lower complication rate when compared with traditional abdominoplasty, these articles merely raise triable issues of fact and credibility as do the conflicting opinions of the experts. Accordingly, Dr. Rubinstein's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: March 30, 2015



STANLEY GREEN, J.S.C.