

Elbaum v Afridi
2016 NY Slip Op 30878(U)
May 10, 2016
Supreme Court, New York County
Docket Number: 805012/13
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JUDITH ELBAUM,

Plaintiffs,

Index No. 805012/13
Motion Seq. No. 001

-against-

NADIA S. AFRIDI, M.D., JEFFREY R. FISCHMAN, M.D.,
AND ELITE PLASTIC SURGERY, P.C.,

Defendants.
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SCHLESINGER, J.:

On July 11, 2012, Judith Elbaum, the plaintiff in this action, sounding in medical malpractice, underwent a rhytidectomy (a face lift), a cervicoplasty (a neck lift) and as well, a fat grafting to bilateral nasolabial folds and marionette lines. The surgery was performed by defendant Nadia S. Afridi, a plastic surgeon who had been Ms. Elbaum's physician since 2008. During that period, other surgical procedures, such as abdominoplasty and liposuction had been performed by Dr. Afridi.

At the July 11th operation, Dr. Afridi was assisted by co-defendant Dr. Jeffrey R. Fischman. He is also a plastic surgeon and at this time, rented professional space to Dr. Afridi. On the day after, July 12, 2012, when the patient returned, to the office, she presented with absent left facial nerve function. This affected her frontal, zygomatic, buccal and marginal mandibular nerve branches. They were not working. A repair procedure was performed on July 13, this time with Dr. Fischman taking the lead. She claims some permanency of this condition.

The motion now before me is by Dr. Fischman. It is made pursuant to §3211(a)(7). His counsel argues that all causes of action against him sounding in medical malpractice should be dismissed. Dr. Norman Godfrey, a board certified Plastic Surgeon supports this application. What Dr. Godfrey argues, after reading the depositions of both doctors and reviewing the records, is that Dr. Fischman's role in the first surgery was a limited one, which he performed in accord with accepted practices and it was Dr. Afridi, who not only made all the relevant incisions to the face, but also made all of the relevant medical and surgical decisions.

The facts of the surgery and what preceded it and came after, are not really in dispute. Dr. Afridi looked to Dr. Fischman, an "older and wiser and definitely more experienced surgeon" to "maximize the potential of her surgery" (p.59 of Dr. Afridi's deposition). As early as April 2012, Dr. Afridi, invited Dr. Fischman to consult about the face surgery that the plaintiff wanted. The two doctors had a good collegial relationship. So in April and May of 2012, Dr. Fischman saw the patient. She was told that Dr. Fischman would be assisting Dr. Afridi with the surgery. Dr. Afridi testified, "We would be operating together" (p. 77).

And they did. The surgery had originally been scheduled for June but because Ms. Elbaum had low platelet levels together with her history of smoking, it was decided by all the concerned doctors that postponing it to July was advisable.

Dr. Fischman agreed to participate in the surgery and help Dr. Afridi and in fact, on July 11, he was present before and during the entire procedure. Officially,

he administered anesthesia. But his function, as an "Assistant" was much more than that. He testified that he told Dr. Afridi he would assist her and show her certain things that she wanted me to show her. Some of these were how to do "an incision on the tragus..., a method of transillumination for evaluating the depth of the dissection, and a method of pulling on the SMAS [Superficial Musculo Aponeurotic System], tissue in the face being advanced laterally [¶15 of the Godfrey Affirmation]. Dr. Fischman testified to these procedures on pages 43-46 of his deposition.

Beside talking continually as the surgery progressed, "always making suggestions" (p.50 of Fischman EBT), he also did some markings with a sharpie. He even demonstrated how to do things, such as the tragus where one would create a hollow in front of the patient's ear. He set up the transillumination, a light coming from above rather than direct visualization with a head light which she had always used before (p.81). He was standing or sitting beside or behind her continually giving her advice. He felt free to tell her if he thought she was doing something wrong and while "she didn't always take my advice... she's entitled to that" (p. 83-84).

At one point in the surgery, buccal fat was unexpectedly seen. That is the fat underneath the SMAS - in big globules. This led the doctors to stop the procedure so that they could look for the end of severed nerves, each one doing their own investigation. But at the time they didn't see any and so continued with the

procedure (Fischman EBT p. 89-90).¹

Apparently, while Dr. Afridi was working on the left side, on the masseter, she decided to switch back to direct visualization as she found it less awkward than transillumination, at least on the left side (But she had more ease with it while working on the right side) Dr. Fischman continued to observe closely. At times he would ask her to stop, when he believed she was going too deep. He would then start the flap again in the correct place (p. 150 of his deposition).

As noted earlier, it is Dr. Godfrey's opinion, with the requisite certainty, that Dr. Fischman did not himself depart from accepted standards of plastic surgery, (§23) nor did his involvement in the July 11th procedure raise to the level of joint responsibility with Dr. Afridi. [She is not moving for dispositive relief herself and she is opposing Dr. Fischman's motion for this relief]. Specifically, Godfrey points out "that Dr. Fischman did not supervise, control, or direct Dr. Afridi's July 11, 2012 surgery in any manner" (§24). Further, he made no incisions, nor "did he direct or supervise any part of that procedure" (§25). Therefore he concludes, "within a reasonable degree of medical certainty that Dr. Fischman did not contribute to or cause any of plaintiff's injuries" (§25).

As stated earlier, Dr. Afridi opposes her co-defendants motion, as does the plaintiff. In support of the doctor's opposition is an affirmation from Dr. Joseph

¹On July 13, 2012, when the doctors attempted to repair the injured nerves, Dr. Fischman testified he located the defect at the front of the masseter, a facial muscle that plays a major role in chewing where Dr. Afridi was working.

Feinberg. He is also a board certified Plastic Surgeon and is now a Clinical Assistant Professor of Plastic Surgery at Cornell University Medical College and Director of Plastic Surgery at St. Francis Hospital in Roslyn, New York.

His opinion, is that "both physicians are responsible for the results of Ms. Elbaum's surgical procedure" (end of page 1, into page 2). What is also of some interest is that he states that he is not addressing the issue of malpractice vis-a-vis either of the defendants.

Dr. Feinberg then very briefly points out what things Dr. Fischman did during the procedure. He says both doctors "performed the surgery, assisting each other" and they were both identified as such on the operative report. This statement, of course is conclusory. Then Dr. Feinberg lists everything Dr. Fischman did; talking to Ms. Elbaum before the procedures, deciding with the other doctors to delay the scheduled procedure by one month, examining and marking the patient before he administered the anesthesia. He ends this short recitation with, again two conclusory statements. "They were both involved in the entire procedure" and "Dr. Fischman observed Dr. Afridi during every aspect of the procedure." No one takes issue with the "observation" part (p. 2 of Feinberg's statement).

He then notes Dr. Fischman's role as a "mentor" to Dr. Afridi. In that regard, he answered any questions and provided advice as to techniques and places for dissection. He concludes by restating his conclusion that the two doctors assisted each other and therefore had joint responsibility for the surgical outcome.

I do not find Dr. Feinberg's opinions persuasive. Neither do I find the plaintiff's submission. In that submission, no supporting affirmations are submitted. Rather, counsel refers to Ms. Elbaum's deposition testimony and Dr. Fischman's. The plaintiff apparently had concerns, which she expressed, as to Dr. Afridi's inexperience with face lifts. She wanted assurance from Dr. Afridi that Dr. Fischman, whom she had met and been examined by, would be at the entire surgery and supervisor. She was told that would happen and in fact, it did.

So what is left here after all have had a chance to opine and express themselves? Moving counsel, in her Reply, effectively reminds the Court that, via the expert submission of Dr. Fischman's expert, Dr. Godfrey, the following things go unchallenged; first and foremost that it was Dr. Afridi who was the surgeon acting alone while crating a skin flap on the left side of Ms. Elbaum's face. That's when she identified buccal fat at the level of the anterior masseter. Buccal fat is located under the SMAS and, as pointed out earlier it is buccal fat that contains the facial nerves. Therefore, it is absolutely clear that Dr. Afridi solely in her dissection, injured the nerves.

Second, Dr. Godfrey opines that nothing Dr. Frischman did or did not do was a departure from accepted standards of surgical care. No one refutes this. Third, that while Dr. Afridi was operating on the left side and making the flap, she switched from the transillumination method, suggested by Dr. Fischman, because it was too awkward, to direct visualization. The latter technique, while not a departure, does

rely on the doctor's feeling of the skin as opposed to seeing it with its varying thickness by way of the overhead light. Also, with direct visualization, only the dissecting doctor, here Dr. Afridi, can see and feel what is being cut. These facts show, not only how and by whom the injury occurred, they also show that it was Dr. Afridi alone who was calling the shots, opting for the familiar technique, direct visualization which she was comfortable with over the technique suggested by Dr. Fischman.

In *Pol v. Our Lady of Mercy Medical Center*, 51 AD3d 430 (1st Dep't 2008) the assistant surgeon defendant was relieved of liability since it was clear he "played no direct role in plaintiff's care, committed any departures from accepted medical practice or could have prevented the alleged departures committed by the lead surgeon". Precisely the same could be said here.

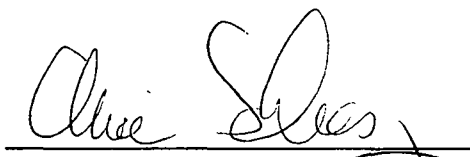
The primary surgeon here was Dr. Afridi, the patient's long time doctor. As much as she many have believed she and Dr. Fischman were "operating together" in a "team effort" (p.77 & 79 of Dr. Afridi's deposition), in fact she was the principal surgeon and he was the anesthetist and her assistant. Suggestions may have been made by him but decisions were made by her. One such decision most likely resulting in serious facial nerve injury.

Dr. Fischman's motion to dismiss the medical malpractice cause of action, is in all respects granted.² Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Jeffrey R. Fischman, M.D. is granted, and the complaint as against Dr. Fischman is therefore dismissed with prejudice. The Clerk is directed to enter judgment in Dr. Fischman's favor accordingly without costs or disbursements. Dr. Fischman's counsel shall serve a copy of this decision and order with notice of entry within 20 days of entry.

Dated: May 10, 2016

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J.S.C.
ALICE SCHLESINGER

²Though the complaint contains a cause of action sounding in lack of informed consent, I believe it is acknowledged by all that that claim was and is solely directed against Dr. Afridi, who beyond explaining the surgery to Ms. Elbaum, also had her sign a full consent form.