

Hill v Morrison

2016 NY Slip Op 31258(U)

March 18, 2016

Supreme Court, New York County

Docket Number: 805325/2012

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

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

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ASSATA HILL,

Plaintiff,

-against-

NORMAN G. MORRISON, M.D.,

Defendant.
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Index No. 805325/2012

Decision and Order

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

This medical malpractice action arises out of an elective reduction mammoplasty (breast reduction) procedure that defendant performed on plaintiff. Defendant now moves for summary judgment. For the reasons that follow, the motion is denied.

On May 4, 2010 plaintiff presented to defendant's office due to back pain. Following an examination, defendant diagnosed plaintiff with bilateral breast hypertrophy (enlargement of both breasts). Plaintiff underwent the mammoplasty as well as a suction-assisted lipectomy (surgical fat removal) of the abdomen and flank on June 22, 2010. At several follow up appointments defendant noted that though plaintiff complained of some soreness she was healing well. On July 29, 2010 and September 4, 2010 he noted that plaintiff felt her breasts were still too large. Defendant examined plaintiff for the last time on January 25, 2011. Plaintiff subsequently saw non-party Dr. Wendy-Ann Oliver with complaints of back and shoulder pain. On November 19, 2013 she underwent a second breast reduction procedure performed by non-party Dr. Andrew Jimerson.

On November 8, 2012, plaintiff filed a complaint claiming negligence, medical malpractice, and lack of informed consent against defendant. Defendant now moves for summary judgment. He argues that he treated plaintiff in accordance with accepted practice and that the doctrine of informed consent is inapplicable to her claim. He purports that plaintiff elected to undergo the surgery and that her only post-operative complaint was aesthetic, which he contends cannot be the basis for medical malpractice liability.

In support of his motion defendant submits the affirmation of Dr. Joseph Feinberg, a New York State licensed physician who is board certified in plastic and reconstructive surgery. Based on a review of the relevant documentation, Dr. Feinberg affirms to a reasonable degree of medical certainty that defendant acted in accordance with accepted practice at all times during his treatment of plaintiff and did not proximately cause any of her purported injuries. Dr. Feinberg states that defendant documented his discussion of the common risks and benefits of and alternatives to the procedure with plaintiff. He opines that the procedure was elective and that, in accordance with the standard of care, defendant removed an adequate amount of breast tissue and created symmetrical proportional breasts in a manner that allowed plaintiff to maintain sensation. He states that the amount of tissue removed during breast reduction surgery is a decision properly made during the procedure. He concludes that plaintiff's dissatisfaction with the appearance of her breasts does not equate to a departure from the standard of care.

In opposition, plaintiff argues that because of defendant's negligence she needed a second surgery to treat her neck and back pain. She contends that defendant did not address injuries

and departures set forth in her bill of particulars and therefore cannot establish prima facie entitlement to summary judgment. For example, she argues, defendant did not discuss the loss of nipple sensation and reduced blood flow to the nipple that she experienced as the result of her procedure. Additionally, plaintiff states that defendant did not obtain her informed consent for the procedure. Rather, she believed the procedure would result in reducing her breasts to a C cup and allowing her to be more active, satisfied with her appearance, and pain free. She states following her second breast reduction, her surgeon nonparty Dr. Andrew Jimerson informed her that removal of enough tissue to make her a C cup was not possible because tests demonstrated that removal of that much tissue could result in necrosis and loss of sensation to her nipples. Plaintiff argues that defendant's expert's affidavit is conclusory and mischaracterizes her surgery as cosmetic rather than for treatment of persistent back, neck, and shoulder problems. Plaintiff argues that she consented a procedure to reduce her breasts to a C cup, which defendant led her to believe he could perform, and is not the procedure defendant ultimately performed on her.

In support of her motion plaintiff submits a redacted affirmation by a New York and New Jersey licensed physician who has worked as a plastic surgeon since 1983. Based on his review of the relevant records as well as his experience and training, plaintiff's expert opines to a reasonable degree of medical certainty that defendant departed from accepted standards of care in his treatment of plaintiff. Plaintiff's expert states that defendant's negligence substantially contributed to plaintiff's continued pain, loss of nipple sensation, need for additional surgery, and other physical limitations and related injuries. Plaintiff's expert opines that defendant did not come to a consensus with plaintiff as to her goals following the surgery. He also maintains that defendant failed to document any discussion with plaintiff as to whether surgery could accomplish her pain

reduction or size goals. He states that defendant's negligently failed to document the consistency of plaintiff's breasts as part of his initial evaluation or take those findings into consideration when planning for plaintiff's surgery. Plaintiff's expert concludes that the surgery subjected plaintiff to unnecessary trauma, decrease in nipple sensation, scarring, medication, and pain and suffering.

In reply, defendant argues that plaintiff's expert's affirmation is conclusory, contrary to the records, and without support for the stated opinions. Defendant contends that dissatisfaction with one's appearance is not a basis for a medical malpractice claim and that plaintiff's expert never states the standard of care for assessing patients for breast reduction surgery. Defendant argues that plaintiff's expert does not state that defendant departed from accepted practice in the performance of the surgery itself. Defendant argues that he did not depart from the standard of care and that the surgery achieved an appropriate result for plaintiff's body size. Further, defendant argues that if, as plaintiff's expert opines, defendant guaranteed a certain result and did not deliver, this matter would have arisen in contract not tort.

In a medical malpractice action, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Rogues v. Noble, 73 AD.3d 204, 206 (1st Dep't 2010). The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Expert opinion should specify "in what way" a patient's treatment was improper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). 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 at 206. Once a movant makes a prima facie showing, the burden then shifts to the non-moving party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." 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 practice and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).

The right to recover for a lack of informed consent claim is limited to those cases involving non-emergency surgery, treatment, or procedures, or diagnostic procedures in which the body is invaded or its integrity is disrupted. Public Health Law § 2805-d; see also Janeczko v. Russell, 46 AD3d 324, 325 (1st Dept 2007); Sample v. Levada, 8 AD3d 465, 467 (2d Dept 2004); Keselman v. Kingsboro Med. Group, 156 AD2d 334, 335 (2d Dept 1989). To prima facie demonstrate a defendant's failure to obtain an informed consent, a plaintiff is required to show 1) that the practitioner failed to disclose that information which a reasonable practitioner would have disclosed under the circumstances concerning what he proposed to do, and the risks, benefits, and alternatives to the proposed treatment, 2) that a reasonably prudent patient in the plaintiff's position would not have undergone the treatment if the allegedly withheld information had been provided, and 3) that the treatment was a cause of the patient's injury. Zapata v. Buitriago, 107 AD3d 977,

979 (2d Dept 2013); see also Balzola v. Giese, 107 AD3d 587, 588 (1st Dept 2013); Orphan v. Pilnik, 66 AD3d 543, 544 (1st Dept 2009), affd 15 NY3d 907 (2010); PJI 2:150A.

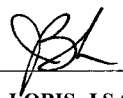
Here, defendant makes a prima facie showing that his treatment was within the standards of accepted care and that he obtained plaintiff's informed consent for the procedure. Through Dr. Feinberg's affirmation he establishes to a reasonable degree of medical certainty that he performed an elective breast reduction procedure on plaintiff within the standard of care and did not cause or contribute to any alleged injuries. He further establishes that the amount of breast tissue to remove is determined at the time of surgery and that failure to remove the amount of tissue desired by a patient is not a departure. Through his motion papers he establishes that he advised plaintiff of the risks of and alternatives to the procedure and obtained her consent. This is sufficient to shift the burden to plaintiff. In response, plaintiff meets her burdens as to both her medical malpractice and informed consent claims. Through her expert affidavit, plaintiff creates a triable issue off act as to whether defendant departed from the standard of care by operating on her without first properly evaluating her and without making clear that the procedure might not achieve her desired result, causing her to endure unnecessary pain, scarring, and loss of nipple sensation. Further, plaintiff raises a triable issue of fact as to whether defendant disclosed all risks of the procedure, whether a reasonably prudent person would have undergone the procedure knowing it might not achieve the desired outcome, and whether the procedure caused plaintiff's injuries. The Court has considered the parties' remaining arguments and they do not change the result.

Accordingly, it is

ORDERED that the motion is denied. The Clerk of the Court is directed to enter accordingly.

Dated: *Mar. 18,* 2016

ENTER:



JOAN B. LOBIS, J.S.C.