

Mann v Cassidy
2018 NY Slip Op 31619(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 805159/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARY MANN and ROBERT SLATER,

Plaintiffs,

INDEX NO. 805159/15

-against-

JOSEPH CASSIDY, D.D.S, and WEST 10TH
DENTAL, P.C.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for dental malpractice, defendant Dr. Joseph Cassidy, D.D.S. (motion seq. no. 002) and defendant West 10th Dental, P.C. (motion seq. no. 003) move for summary judgment on the sole issue of causation.¹ Plaintiffs oppose the motions.²

Plaintiffs allege a failure to diagnose and treat plaintiff Mary Mann for a benign aggressive neoplasm of the right lower mandible (jaw), diagnosed as a desmoplastic fibroma. Plaintiffs allege the failure to diagnose the tumor occurred on November 15, 2012, when Ms. Mann saw Dr. Cassidy at West 10th Dental for a routine dental appointment. Plaintiffs allege the delay in diagnosis deprived Ms. Mann of the opportunity to have a better outcome; specifically that a less invasive procedure could have been performed resulting in less severe injuries.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing that “in treating

¹Motions seq. nos. 002 and 003 are consolidated for determination.

²On March 8, 2016, the parties executed a stipulation in which plaintiffs agreed to withdraw with prejudice all claims relating to acts or omission on or before October 20, 2012, and all claims for lack of informed consent, including plaintiff’s Second Cause of Action.

the plaintiff, there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. See id; Joyner-Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant’s expert should specify “in what way” the patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant’s expert opinion must “explain ‘what defendant did and why.’” Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

“[T]o avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.” Roques v. Nobel, supra at 207. To meet this burden, “plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” Id. Where the parties’ conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

As noted above, defendants’ summary judgment motions are limited to the issue of proximate cause. Defendants contend that even if there were a departure in failing to diagnose the tumor in November 2012, the alleged delay did not affect Ms. Mann’s ultimate diagnosis, out

come or surgical results, as her treatment options and outcome would have been the same and thus did not proximately cause any of her claimed injuries.

In support of this position, defendant Cassidy submits the expert affirmation of Dr. Douglas M. Monasebian, M.D., D.M.D., a board certified oral and maxillofacial surgeon, who reviewed the bills of particulars; the records of West 10th Dental and Dr. Cassidy; the operative reports and office notes of the surgeons at New York Presbyterian Hospital (“NYPH”), Dr. Sidney Eisig and Dr. Jay Neugarten; the CT scan from NYPH; and the records of Dr. Steven Rosenberg and Dr. Irwin Levy. Dr. Monasebian explains that desmoplastic fibroma of the mandible is a “rare, locally aggressive tumor of the mandible,” and to treat this disease adequately so to prevent reoccurrence, wide margins must be taken since the tumor grows and matures.³ He opines that whether the surgery was performed in November 2012 or March 2014, the tumor had reached such a size and location in the mandible that Ms. Mann would have required an “*en bloc* resection of bone followed by reconstruction,” and regardless of timing, the tumor resection would have left similar defects in the mandible requiring reconstruction.

Analyzing the x-rays taken at defendants’ office in November 2012, Dr. Monasebian opines that the size of the tumor in November 2012 warranted an “*en bloc* resection” from the point posterior to where plaintiff’s lower right wisdom tooth would have been, up to but not including tooth #27, and the resection would have resulted in the loss of teeth #s 29, 30 and 31 and the need for two surgeries.⁴ He opines that any alleged growth of the tumor would have had

³The meaning of “locally aggressive” in this context is not addressed in the experts’ affidavits.

⁴According to Dr. Monasebian, plaintiff was previously missing tooth #28.

no bearing on the ultimate treatment plan and surgeries, as even with growth of the tumor, the surgical procedures and outcome would be the same, i.e. the use of a reconstruction plate and a bone graft, and Ms. Mann would have lost the same teeth involved with the area of resection, noting that the adjacent tooth #27 was not resected in the eventual surgery.

With respect to plaintiff's allegations as to nerve damage, Dr. Monasebian explains that a nerve travels in a canal below the roots of the lower molars and pre-molars before it exits into the soft tissue of the lip, and the presence of a tumor in that area means the nerve would be involved and is already compromised. He opines that nerve tissue is often removed with wide local resections of this type to assure more complete resection and ultimate cure, and that the ultimate treatment or decision is a matter for the surgeon. He opines that regardless of the options, decision or attempts concerning the nerve, the presence, the involvement and potential compromise of this nerve by the tumor, at all relevant times, was the same, and all surgical options were the same regardless of time.

Dr. Monasebian avers that Ms. Mann's allegations as to speech and chewing problems, "if accurate" are a consequence of the loss of teeth and mandibular surgery, as the loss of teeth would affect her bite and occlusion although the loss of posterior teeth may not have a direct impact on her speech. He opines that loss of sensation due to the inferior alveolar nerve would not affect movement of the tongue, but could affect Ms. Mann's "proprioception on a subjective level, such as a feeling of a fat numb lip." He opines, however, that this type of complaint would be the same regardless of the timing of the surgery.

Dr. Monasebian opines that any allegations as to the loss or deterioration of gum tissue, bone, enamel and dentin, are "irrelevant" to time of diagnosis and surgery. He avers that the loss

of enamel and dentin relate to the teeth that were removed as a result of the surgery, and the loss of gum tissue relates to the surgical resection of the bone and teeth in order to establish wide margins, which is an “inevitable situation.”

In conclusion, Dr. Monasebian opines that the time of Ms. Mann’s diagnosis and surgery, whether in November 2012 or March 2014, is “irrelevant to the treatment options and outcome,” as the size and scope of the tumor as shown on the November 2012 x-rays was “significant enough to warrant the resection of the mandible involving the three subject teeth up to the point of tooth #27,” and this is the “exact scope” of the procedure ultimately performed by Dr. Eisig in March 2014. He further opines that Ms. Mann required the same second surgery to reconstruct the mandible as performed by Dr. Neugarten in September 2014, and has the same restorative treatment options and residual symptoms regardless of timing. He opines that since the tumor had already destroyed significant areas of bone and compromised the overlying three teeth, the extent of the surgery would have been the same to ensure clean margins even if performed in November 2012, and that earlier diagnosis and treatment would not have changed Ms. Mann’s outcome.

In support of its separate motion for summary judgment, defendant West 10th Dental submits the expert affirmation of Dr. Jay P. Goldsmith, D.M.D. , a board certified oral and maxillofacial surgeon, who reviewed the complaint, the bills of particulars, the parties’ depositions, the records of defendant West 10th Dental, and the subsequent treatment records. Dr. Goldstein opines that even assuming Dr. Cassidy failed to diagnose the mass in November 2012, “it is my expert opinion with a reasonable degree of dental certainty that this had no causal impact on plaintiff’s alleged injuries,” as plaintiff returned to West 10th Dental on November 1,

2013 and saw Dr. Sengos in Dr. Cassidy's absence and the x-rays taken that day showed the radiolucency and Dr. Sengos told Ms. Mann that she needed to speak to Dr. Cassidy about treatment; on November 4, 2013, Dr. Cassidy advised Ms. Mann to see an oral surgeon as soon as possible for an evaluation of the abnormality. Based on his review of the November 2012 and November 2013 films, Dr. Goldsmith opines that there was "no appreciable change in the size of the growth," and since Ms. Mann's neoplasm did not grow or change in appearance during the year between Dr. Cassidy's alleged failure to diagnose and Dr. Sengos' discovery and the referral to an oral surgeon, any alleged failure to diagnose the radiolucency in November 2012 could not have caused any injury to Ms. Mann.

Dr. Goldsmith further opines that West 10th Dental in no way caused or exacerbated any of Ms. Mann's alleged injuries, as her ultimate treatment would have been the same in November 2012 as it was a year later. He opines that the mass present in Ms. Mann's lower right mandible as of November 2012 necessitated removal and mandibular reconstruction, and this was the treatment the surgeons at NYPH provided in March and September 2014. He opines that since the size and shape of the mass did not change from November 2012 to November 2013, the procedures and techniques used to remove the mass and reconstruct Ms. Mann's jaw would have been "significantly similar, if not identical," if treatment had been instituted following a diagnosis in November 2012.

Based on the foregoing expert affirmations of Dr. Monasebian and Dr. Goldsmith, defendants have made a prima facie showing that even assuming a departure from the standard of care in failing to diagnose and treat the tumor in November 2012, such departure was not a proximate cause of Ms. Mann's alleged injuries.

Turning to plaintiffs' opposition, "evidence of proximate cause maybe found legally sufficient even if [plaintiff's] expert is unable to quantify the extent to which defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased the injury." Gaspard v. Aronoff, 153 AD3d 795, 796-797 (2nd Dept 2017); see Hernandez v. New York City Health & Hospitals Corp, 129 AD3d 532 (1st Dept 2015); Stewart v. Presbyterian Hospital in the City of New York, 12 AD3d 201 (1st Dept 2004).

Here, plaintiffs' expert affirmation is insufficient to permit the inference that the delay occasioned by defendants' alleged departure in failing to timely diagnose and treat Ms. Mann's tumor in November 2012 deprived her of the opportunity to have a better outcome. Plaintiffs' expert offers only conclusory assertions and speculation to support his/her opinion that the delay in diagnosis and treatment deprived Ms. Mann of the chance of a less invasive procedure and less severe injuries. See Bendel v. Rajpal, 101 AD3d 662 (2nd Dept 2012); Bullard v. St. Barnabas Hospital, 27 AD3d 206 (1st Dept 2006). Plaintiffs' expert opines that the "failure to timely diagnose the mass in November 2012 more likely than not diminished Ms. Mann's opportunity for an overall better result. Clearly, if a less invasive procedure could have been performed then there would have been less damage." Plaintiffs' expert, however, fails to state the medical and factual basis of this opinion, which is without evidentiary value. Plaintiffs' expert vaguely speculates that diagnosis and treatment in November 2012 would have resulted in Ms Mann having an "overall better result," "less significant injuries," a "different and better outcome," a "less invasive procedure," "less damage" and "end[ing] up in a better place."

Plaintiffs' expert fails to rebut the opinions of defendants' experts, based on their analysis of the November 2012 and November 2013 x-rays, that the identical surgeries and treatment would have been required, even if the tumor had been diagnosed in November 2012. Specifically, plaintiffs' expert fails to address Dr. Monasebian's detailed analysis of the November 2012 x-rays and his opinion that the "size and scope of the tumor as it appeared" on those x-rays was "significant enough to warrant the resection of the mandible involving the three subject teeth up to point of tooth #27," which is the "exact scope" of the procedure ultimately performed by Dr. Eisig in November 2014. Plaintiffs' expert also fails to address Dr. Monasebian's opinion that Ms. Mann would have required the same second surgery to reconstruct the mandible as performed in September 2014, and Ms. Mann had the "same restorative treatment options and residual symptoms regardless of the timing." Plaintiff's expert acknowledges that Ms. Mann "would have needed surgical removal of the mass," but merely speculates that the "delay in noting the mass and acting upon it reduced her chances to end up in a better place than she is now." Significantly, plaintiffs' expert admits that "regardless of the growth of the tumor over the year," Ms. Mann would have lost the same teeth and suffered damage to her gums.

Notably, the opinion of plaintiffs' expert that the size of the tumor (specifically, the depth/width from check to lingual) cannot be accurately determined from the November 2012 x-ray taken by defendant Dr. Cassidy, undermines plaintiffs' malpractice claim, as plaintiffs allege that the tumor continued to grow during the one-year delay in diagnosis, thereby proximately causing or exacerbating her injuries. Moreover, plaintiffs' expert speculates without support that the tumor could have "possibly grown" in depth or width during the one-year delay in

diagnosis and treatment. To the contrary, Dr. Goldsmith opines that based on his review of the November 2012 and November 2013 x-rays, there was no “appreciable change” in the size of the tumor, and it did not change in shape or appearance from November 2012 to November 2013.

Thus, since plaintiffs’ expert offers only conclusory assertions and speculation that earlier treatment and diagnosis would have resulted in a better outcome, plaintiffs fail to raise an issue of fact as to proximate cause, and defendants are entitled to judgment as a matter of law dismissing the complaint. See Bullard v. St. Barnabas Hospital, *supra*; DeFilippo v. New York Downtown Hospital, 10 AD3d 521 (1st Dept 2004); Ferrara v. South Shore Orthopedic Assocs. PC, 178 AD2d 364 (1st Dept 1991).

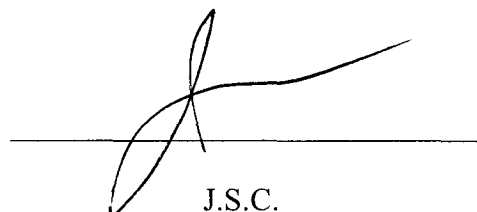
Accordingly, it is

ORDERED that the motion by defendant Joseph Cassidy, D.D.S. for summary judgment (motion seq. no. 002) is granted and the complaint is dismissed as against Joseph Cassidy, D.D.S., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion by defendant West 10th Dental, P.C., for summary judgment (motion seq. no. 003) is granted and the complaint is dismissed as against West 10th Dental, P.C., and the Clerk is directed to enter judgment accordingly.

DATED: July 10, 2018

ENTER:



J.S.C.