

Bahnyuk v Reed
2018 NY Slip Op 32599(U)
October 11, 2018
Supreme Court, New York County
Docket Number: 805273/15
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

ALLA BAHNYUK,

Plaintiff,

INDEX NO. 805273/15

-against-

LAWRENCE S. REED, M.D.,

Defendant.

-----X

JOAN A. MADDEN, J.:

In this action for damages for medical malpractice and lack of informed consent, defendant Dr. Lawrence S. Reed moves for an order pursuant to CPLR 3212 granting partial summary judgment dismissing only the medical malpractice claim. Plaintiff opposes the motion.

Plaintiff's medical malpractice claim is based on a procedure performed by Dr. Reed on March 24, 2015, whereby he injected into plaintiff's face, fat removed from other parts of her body.¹ Plaintiff alleges Dr. Reed negligently performed the procedure, and as a result the fat injected into her face traveled to the central retinal artery, causing an occlusion or blockage, and the loss of vision in her left eye. The bill of particulars alleges several departures, but based on plaintiff's expert affirmation, the alleged departures are limited to Dr. Reed's failure to aspirate during each injection of fat into plaintiff's face, and/or his failure to avoid injecting too large an

¹At the same time, Dr. Reed performed a number of other procedures which are not the subject of this action. Those procedures included breast augmentation surgery, fat injections to the buttocks, and liposculpture to the calves and ankles.

amount of fat at too high a pressure.

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 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 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).

In support of partial summary judgment on the malpractice claim, defendant Dr. Reed submits the expert affirmation of plastic surgeon Dr. Karol A. Gutkowski, the pleadings, the bills of particulars, his own records of plaintiff's treatment, the medical records of other treating physicians and the transcripts of the parties' depositions. Dr. Gutkowski reviewed the pleadings, pertinent medical records, and the deposition testimony.

As noted above, plaintiff relies on two alleged departures: 1) Dr. Reed's failure to aspirate during each injection into plaintiff's face; and 2) Dr. Reed's failure to avoid injecting too large an amount of fat at too high a pressure.

With respect to the first departure, Dr. Gutkowski points to Dr. Reed's deposition testimony about the technique he used when injecting the fat into plaintiff's face. Specifically, Dr. Gutkowski states that Dr. Reed testified that "if he visualizes a vessel during the injections that he 'would clearly avoid it' . . . [and] also explained that when administering the fat he 'insert[s] the needle and then I withdraw the syringe and needle as a unit, injecting small aliquots of fat, first drawing back to make sure I am not near a blood vessel and blood. I do little drawbacks if I am not and I inject small aliquots at multi different levels so it's surrounded by healthy living tissue to increase the chance of survival.'" Dr. Gutkowski also states that Dr. Reed "explained . . . that the 'drawing back' on the plunger to see if blood comes into the syringe is the technique of aspirating prior to the injection" and "he injects the fat in 'very small amounts' of 0.05 or 0.02 cc. micro droplets at multiple different levels."

Based on such testimony, Dr. Gutkowski opines that the "evidence shows Dr. Reed properly aspirated prior to injecting the fat," since he testified that "he drew back on the plunger

to determine whether any blood was entering the syringe.” She explains that the “withdrawal technique also known as aspirating, is a method commonly used by plastic surgeons to help prevent fat from being injected directly into a blood vessel,” but “even the aspiration technique does not entirely eliminate the risk of fat entering a vessel.” Dr. Gutkowski opines that the “risk of an occlusion simply cannot be completely prevented, even with perfect surgical technique during facial fat injections, because the surgeon does not have the ability of knowing the exact location of each blood vessel behind the skin while injecting the fat.”

Dr. Gutkowski’s opinion is insufficient to establish prima facie entitlement to summary judgment with respect to the alleged failure to aspirate. It is undisputed that the fat injected into plaintiff’s face found its way into the central retinal artery, causing a blockage which resulted in the loss of vision in her left eye. Even assuming without deciding, as Dr. Gutkowski opines, that Dr. Reed properly aspirated and therefore presumably saw no blood each time he withdrew the needle, Dr. Gutkowski provides no explanation as to how, in the absence of blood, fat could have otherwise gotten into plaintiff’s blood system.

Thus, since Dr. Reed fails to make a prima facie showing as to issue of whether he properly aspirated, the burden does not shift to plaintiff and the Court need not consider plaintiff’s opposition on this issue. See Carnovali v. Sher, 121 AD3d 552 (1st Dept 2014).

The Court reaches a different conclusion with respect to the second departure alleging Dr. Reed failed to avoid injecting too large an amount of fat at too high a pressure. Addressing this departure, Dr. Gutkowski opines that “the aliquots [portions of the total amount of fat] for each pass during the administration of fat were completely proper,” as Dr. Reed “testified that the

aliquots were approximately either 0.05 cc or 0.02 cc, and it is my opinion that these were appropriate aliquots.” She opines that the standard of care is to “limit the size of the aliquots to approximately 0.1 cc per pass in small areas such as the face” and there is “no evidence Dr. Reed administered larger aliquots.” Dr. Gutkowski also opines that the “total volume” of fat injected to each area of plaintiff’s face was “completely reasonable,” as “Dr. Reed injected 2cc/side in the nasolabial folds, 2cc/side in the nasojugal grooves, and 1.5 cc/side in the prejowl areas,” which are “not unusual amounts for these areas of the face and they are all within the range of normal.”

Dr. Gutkowski further opines that Dr. Reed “utilized one cc syringes and twenty gauge needles for the fat injections, which were proper sizes,” as the one cc syringe gives the surgeon the “most control for these injections and allows the surgeon to deliver small amounts of fat to precise areas of the face,” and a twenty gauge needle allows the “fat to pass through without plugging up and also avoids large chunks of fat from coming out, which can be a risk of damage to the patient.” She opines that the standard of care allows for “larger sized instruments for this procedure” and that the “record is bereft of any evidence that Dr. Reed injected the fat too quickly or used excessive force.”

Based on Dr. Gutkowski’s affirmation, Dr. Reed has made a sufficient prima facie showing as to the departure alleging that he injected too large an amount of fat at too high a pressure. Dr. Gutkowski’s opinion that Dr. Reed complied with standard of care is based on a detailed analysis of Dr. Reed’s testimony and medical records as to the precise amounts of fat injected, and the specific type of syringe and needle used for such injections.

The burden shifts to plaintiff to raise an issue of fact. Plaintiff's opposition includes her own affidavit, the redacted affirmation of a board certified plastic surgeon, and consent forms dated March 24, 2015 and October 16, 2015. Plaintiff's affidavit focuses solely on the lack of informed consent claim, and her expert's affirmation is devoted almost exclusively to that claim. Plaintiff's expert merely states that the fat entering plaintiff's "facial vasculature was caused by . . . [Dr. Reed's] failure to avoid injecting too large an amount of fat at any given pass, at too high a pressure." This conclusory opinion is insufficient to raise an issue of fact. Plaintiff's expert neither addresses nor rebuts the detailed opinion of defendant's expert, supported by Dr. Reed's testimony and medical records, that the specific amounts of fat injected, and the type of syringe and needle used, complied with the standard of care.

Dr. Reed, therefore, is entitled to partial summary judgment dismissing the medical malpractice claim to the extent it is based on the allegation that he failed to avoid injecting too large an amount of fat at too high a pressure.

Accordingly, it is

ORDERED that defendant's motion for partial summary judgment is granted only to the extent of dismissing the portion of plaintiff's medical malpractice claim based on the allegation that Dr. Reed departed from the standard of care by failing to avoid injecting too large an amount of fat at too high a pressure; and it is further

ORDERED that defendant's motion for partial summary judgment is denied with respect to allegation that Dr. Reed departed from the standard of care by failing to aspirate during each injection into plaintiff's face; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on November 1, 2018 at 11:30 am, in Part 11, Room 351, 60 Centre Street.

DATED: October *11*, 2018

ENTER:

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a trailing flourish.

HON. JOAN A. MADDEN
J.S.C.