

Tolmach v Langer

2019 NY Slip Op 30732(U)

March 12, 2019

Supreme Court, New York County

Docket Number: 805289/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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ALBINA TOLMACH,

INDEX NO. 805289/13

Plaintiff

-against-

BURTON LANGER DMD and LAUREEN LANGER
DDS, P.C., BURTON LANGER, DMD, and LAUREEN
LANGER DDS,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged dental malpractice and lack of informed consent, defendants move for an order granting summary judgment dismissing the complaint against them. Plaintiff opposes the motion.

Background

This action arises out of the dental treatment provided to plaintiff by Burton Langer, DMD (“Dr Langer”) between January 11, 2011 and June 9, 2011, in connection with the extraction of teeth nos. 13 and 14, and the placement of implants in those locations. Specifically, it is alleged in the supplemental bill of particulars that defendants were negligent and departed from good and accepted dental practice by failing to properly perform the extraction of teeth nos. 13 and 14, bone graft at teeth nos. 13 and 14, a sinus lift at tooth no. 14, and the surgical placement of implants at teeth nos. 13 and 14; in negligently advising plaintiff to perform unnecessary tooth extraction and unnecessary surgical placement of endosteal implants; in negligently operating a drill resulting in over penetration of the drill into bone; in failing and neglecting to allow several months in between grafting and placing of implants to ensure appropriate conditions for placement of the

implants; in negligently failing to timely diagnose trigeminal neuralgia causing plaintiff to lose teeth nos. 15, 19, and 20; and in failing and neglecting to obtain informed consent where plaintiff understood that the likelihood of success was diminished when all the dental procedures are performed in one setting.

Plaintiff was 31 years old when she was referred to Dr. Langer for the evaluation of teeth nos. 13, 14, 19, and 20. Plaintiff consulted with Dr. Langer on January 11, 2011 and x-rays were taken. Dr. Langer testified that according to plaintiff's dental chart, X-rays revealed that the four teeth, 13 and 14, which are left upper molars had "severe decay and couldn't be restored by normal dental means," and 19 and 20, which are left lower molars, "had infections." (Langer EBT at 21-22). Dr. Langer recommended extraction for teeth nos. 13 and 14, and plaintiff elected to proceed with extractions of teeth nos. 13 and 14, and the placement of implants.

On February 11, 2011, Dr. Langer extracted teeth nos. 13 and 14 and performed a sinus lift at tooth no. 14, placed bone graft material and two implants in the area of the extracted teeth (Defendants' Motion, Exhibit P). On the date of the surgery, plaintiff signed a form consenting to the surgery. The form states, in relevant part, under the heading "Complications or and Untoward Results," that "[s]erious complications are uncommon with this type of surgery. As with any surgery, bruising, swelling, bleeding, infection or other complications may occur...For the upper jaw, sinus penetration in the molar area or delayed healing is possible" (Id). Plaintiff testified that before the procedure Dr. Langer did not tell her whether it would take more than one visit to place the implants; did not offer her any alternative treatments other than the implants; did not talk to her about the risks associated with the implants; or the risks associated with anesthesia (Plaintiff's EBT at 25-27).

Plaintiff returned to Dr. Langer for follow-up on February 28, 2011 and, at that time,

complained about pain and numbness extending from her cheek bone, across her cheek and the bridge of her nose, including her upper lip (Plaintiff's EBT at 33-34; Exhibit P). In response, Dr. Langer prescribed steroids (Exhibit P; Langer EBT at 76). At an office visit on March 10, 2011, plaintiff continued to complain of numbness (Exhibit P; Langer EBT at 77). On March 25, 2011, plaintiff returned to the office for an x-ray "to check everything" and Dr. Langer testified that the x-ray showed "no apparent infection" but he prescribed Keflex and antibiotic "just in case there was something [he] couldn't see" (Exhibit P; Langer's EBT at 78-80).

Plaintiff's final visit to Dr. Langer was on June 9, 2011, when she return to his officer in connection with the second stage, or the uncovering phase, of her implant therapy in the area of teeth nos. 13 and 14 (Exhibit P; Langer EBT at 84-85). X-rays of the implants were taken on that date (Exhibit P). Plaintiff continued to complain of facial pain, which Dr. Langer advised could be related to the infected teeth nos. 19 and 20, which were present at the time of her original referral, and which had not yet been treated (Exhibit P; Langer EBT at 86). On September 13, 2011, plaintiff had the implants placed by Dr. Langer removed by a subsequent treating dentist, Dr. Glickman.

Defendants move for summary judgment dismissing the complaint, asserting that the care and treatment rendered to plaintiff by Dr. Langer was at all times within good and accepted dental practice, and was not a substantial factor in causing plaintiff's injuries. In support of their motion, defendants submit the affidavit of Dr. Stewart K. Lazow, MD, DDS, who is an oral surgeon.

With respect to the recommendation by Dr. Langer to extract teeth nos. 13, 14, 19 and 20, Dr. Lazow opines that this recommendation was appropriate, and within the standard of care. In support of this opinion, he notes that plaintiff testified at least one of those teeth was loose, and x-rays revealed radiolucencies at the apices of the teeth despite prior root canal therapy. He further

states that the recommendation for replacement of those teeth with dental implants was well within accepted dental standards.

Dr. Lazow also opines that Dr. Langer prescribed appropriate antibiotics and pain medications in advance of the extraction and implant procedure. In terms of informed consent, Dr. Lazow opines that the consent provided was within accepted practice, and did not deviate from the standard of care. In this connection, Dr. Lazow states that the risks discussed and outlined within the consent form are proper, and further notes plaintiff's own testimony that she researched the procedures in advance. He points out that with respect to the risks associated with the implants, "the consent form lists numerous risks, including bruising, swelling, bleeding, infection, nerve injury, sinus penetration, and delayed healing [as well as]... the possibility of implant failure due to lack of osseointegration, requiring surgery to remove the failed implant."

As for the February 11, 2011 extraction and implants at teeth nos. 13 and 14, Dr. Lazow opines, within a reasonable degree of dental certainty, that Dr. Langer properly extracted teeth nos. 13 and 14, performed a sinus lift at no. 14, placed bone graft material, and placed two implants at those locations. Dr. Lazow opines that based upon his review of post-operative x-rays, there is no evidence to suggest Dr. Langer "over penetrated" plaintiff's bone while drilling, or impacted any nerve distribution in placing plaintiff's implants. He opines that "post-operative x-rays... reveal appropriate placement of implants # 13 and 14."

To the extent that plaintiff expressed complaints of numbness extending on to her cheekbone, below her eye, across her cheek and the bridge of her nose, including her upper lip, Dr. Lazow opines, within a reasonable degree of medical certainty, that "this description of infraorbital parasthesia was not caused by extraction of #13 and 14 or the placement of implants in the area." He also opines that the prescription of steroids, and later antibiotics, was appropriate

and within the standard of care. Dr. Lazow further opines that treatment provided by Dr. Langer on June 9, 2011, which involved the uncovering stage of plaintiff's implant therapy at teeth nos. 13 and 14 was appropriate and within the standard of care since "[a]s of that point, [a]n x-ray revealed that the implants at #13 and 14 were well placed, and healed within the bone."

He also opines that to the extent plaintiff's complaints after implant surgery were suggestive of Bell's Palsy or other neuropathic condition, Dr. Langer appropriately noted that plaintiff was following with other practitioners to evaluate those complaints, as well as numerous other complaints which Dr. Lazow opines were anatomically unrelated to dental extractions and implant placement.

Dr. Lazow further opines that while plaintiff's expert has opined that plaintiff's various complaints are related to the use of Infuse bone graft material for sinus elevation, that upon his review of records and testimony, "there is no evidence to suggest that Infuse was used in this case [and that] Dr. Langer's records do not reflect the use of Infuse." Moreover, he states that "a hallmark sign of the use of Infuse would be heterogenic bone formation, something not evident in plaintiff's subsequent medical records." Dr. Lazow also opines that it cannot be inferred from plaintiff's complaints, which could be caused by many different medical conditions, that such complaints are the result of Infuse being used for the bone graft performed by Dr. Langer.

Dr. Lazow further opines, to a reasonable degree of dental certainty, that the later extractions of additional teeth, that is #'s 15, 19 and 20, "were not the result of any negligence or departure from the standard of care by [Dr. Langer]." Instead, he states that "#19 and 20, in the lower jaw, were recommended for extraction prior to the performance of the extraction and implants at #13 and 14. Tooth #15 was a tooth that had a prior root canal, and its extraction is unrelated to any action Dr. Langer took in extracting and replacing #13 and 14 with implants."

He further opines that with regard to any infection suffered by plaintiff, there was “no deviation from accepted dental standards on the part of [Dr. Langer] that was a substantial factor leading to any infection [and that]...the potential for infection is a known risk associated with implant surgery,” and that Dr. Langer reduced this risk when he prescribed antibiotics at the time of surgery, and that following the surgery as a precaution even though infection was not evident.

As for defendant Laura Langer, Dr. Lazow states that his review of the record show that no treatment was rendered to plaintiff by this defendant.

In opposition to the motion, plaintiff submits the affirmation of David A. Sirois, DMD, PHd, a licensed dentist in the State of New York. Upon review of plaintiff’s medical and dental records, Dr. Sirois opines, to reasonable degree of dental certainty, that Dr. Langer departed from good and accepted dental practice in his care of plaintiff and that these departures were a substantial factor in causing plaintiff’s injuries. He states that:

the areas of departures center around inadequate pre-operative diagnosis and treatment planning that subsequently resulted in performance of simultaneous extraction, bone-grafting, and implant placement- all in one day; a failure to obtain informed consent; negligent post operative care; failure to diagnose and treat a post-operative neuropathic complication or refer for same; and lack of documentation of essential elements of care.

He opines that based on the x-rays of plaintiff’s previous dental providers which showed that teeth nos. 13 and 14 underwent root canal in the past and showed inflammation and bone loss at the apex of the roots, “plaintiff was not a candidate for a simultaneous extraction and implant placement, within the same day, because of infection and inadequate bone support for the implants. Simultaneous performance of these procedures was a substantial factor in osseointegration complications, plaintiff’s neuropathic pain resulting from traumatic injury to her trigeminal nerve, and ultimately failure that required surgical removal of the implants by

Dr. Glickman on September 13, 2011.”

He further states that during the surgical removal of the implants, “Dr. Glickman observed and documented infection of the maxillary sinus and bone immediately surrounding the implants, dehiscence of implants threads through the supporting buccal cortical bone, extensive perforation of the implants into the maxillary sinus, and the absence (loss) of any bone graft material.” He opines that “[t]hese complications were avoidable. Dr. Langer should have offered plaintiff the alternative option of a 2-stage approach with the goal of stage 1 being healing and restoration of the infected and atrophic bone prior to implant placement.”

As for the issue of informed consent, Dr. Sirois states that “there is no evidence that Dr. Langer informed plaintiff of the heightened risk of performing teeth extractions, bone grafting, and implantation- all within the same day. Dr. Langer's boilerplate consent form was inadequate, and there is no doubt that if plaintiff had been adequately informed, she would have chosen a more predictable and safer approach: extraction followed by grafting and infection resolution with implantation four months later.” He also points to plaintiff's deposition testimony that Dr. Langer did not talk to her about risks associated with implants, or infection, or the possibility that implants may not take to the bone after he placed them, or of risk of anesthesia.

In addition, Dr. Sirois states that Dr. Langer failed to obtain informed consent regarding “the benefits and risks associated with autogenous versus allogenic bone graft. Dr. Langer testified that he placed de-mineralized human bone graft material, but failed to document its placement, source and product- identification number.” He opines that this “failure to comply with documentation standards and requirements makes it impossible to identify the type and the source of the graft material that he used.” According to Dr. Sirois:

“[t]his failure is particularly relevant to plaintiff’s extensive post-operative complications that are consistent with hypersensitivity, allergic reactions or other immune responses that any bone graft material can potentially cause. The risk for these complications is increased when bone grafts contain additional biological materials to enhance bone growth, such as in Infuse ®bone graft. Dr. Langer’s failure to document the graft source, and his failure to recognize plaintiff’s complications as potential adverse effects from the graft, deprived plaintiff of an opportunity for proper investigation and treatment for her post-operative complications [and]... clearly increased the risk for plaintiff’s prolonged sufferings, and caused her to spend thousands of dollars in search of relief.

Dr. Sirois opines that “Langer also failed to recognize obvious signs and symptoms of nerve irritation such as pain and numbness that extended across the top of plaintiff’s cheek bone, below her eye, across her cheek and the bridge of her nose including her upper lip. It is my opinion that plaintiff should have been referred to a clinician with expertise in nerve injury diagnosis and treatment, who could offer effective treatment for neuropathic pain.” He also opines that the departures by Dr. Langer were a substantial factors in causing plaintiff’s damages and permanent injuries, including nerve injuries

With respect to the uncovering procedure on June 9, 2011, he opines that Dr. Langer “failed to recognize that plaintiff was not a candidate for the uncovering stage of the implant procedure ...[g]iven plaintiff’s continued complaints, the additional irritation and injury associated with the uncovering surgery could only worsen her condition.” He further opines that “the procedure further exacerbated plaintiff’s condition resulting in hours of postoperative bleeding and increased pain that was so severe, Dr. Langer prescribed Percocet-a narcotic pain killer.” He opines that Dr. Langer “should have considered additional imaging studies such as a CAT scan or MRI when plaintiff stated her complaints: he single intraoral X-ray taken that day

by Dr. Langer was insufficient alone to adequately assess the health of the implants.”

Dr. Sirois further opines that contrary to the opinion of defendants’ expert, there is “no reasonable anatomical basis” for Dr. Langer to suggest that plaintiff’s post-operative pain and complications were the result of the ongoing pathology of teeth nos. 18 and 19.

Discussion

A defendant moving for summary judgment in a dental malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by demonstrating that “in treating the plaintiff there was no departure from good and accepted [dental] practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010) (citations omitted). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion “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 NY2d 320, 324 (1986) (citation omitted).

Specifically, in a dental malpractice action, a plaintiff opposing a summary judgment motion must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.... In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d at 207 (internal citations omitted); see also Koss v. Bach, 74 AD3d 472, 472 (1st Dept 2010).

Here, while the opinion defendants' expert is sufficient to meet defendants' burden of showing that Dr. Langer did not depart from accepted dental practice in his treatment of plaintiff and, in particular, the treatment provided in connection with plaintiff's teeth nos. 13 and 14, plaintiff has controverted this showing. Specifically, plaintiff's expert has raised triable issues of fact as to whether Dr. Langer departed from accepted standards of dental practice in his treatment of plaintiff, including by simultaneously performing extraction, bone-grafting, and implant placement with respect to teeth nos. 13 and 14; by failing to document the graft source; failing to recognize plaintiff's complications as a potential adverse effects from the graft; failing to timely recognize plaintiff's potential nerve injury due to his treatment and to refer plaintiff for treatment of her apparent nerve injury; failing to assess the implants with a CAT scan or MRI based on plaintiff's complaints; and performing the uncovering procedure on June 9, 2011 despite plaintiff's complaints.¹

Moreover, plaintiff's expert affidavit is sufficient to raise factual questions as to whether these departures were a substantial factor in causing plaintiff's injuries. That said, however, as there is no evidence that plaintiff was treated by defendant Dr. Laureen Langer, the claim for medical malpractice asserted against this defendant must be dismissed.

The court will next address the claim for lack of informed consent. "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have

¹On the other hand, plaintiff's expert does not provide an opinion supporting her allegation in her supplemental bill of particulars that Dr. Langer departed from accepted standards of dental care, and injured plaintiff through the penetration of the drill into bone.

disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” Public Health Law § 2805–d(1), and “that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought” (Public Health Law § 2805–d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003)(defendant entitled to summary judgment where “documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment”).

Here, defendants have met their burden with respect to this claim based on the informed consent form signed by plaintiff and their expert's opinion that plaintiff was adequately informed of the risks and alternatives to the implant procedures with respect to teeth nos. 13 and 14. Thus, the burden shifts to plaintiff to controvert this showing.

In this connection, once a defendant has met his burden on claim based on the lack of informed consent, in order to make out a lack of informed consent, plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). “Expert medical

testimony is required to prove the insufficiency of the information disclosed to the plaintiff.”

Orphan v. Pilnik, 15 NY3d at 908.

Here, plaintiff provides evidence including expert opinion that she was not adequately informed of the risks and alternatives of the implant procedure. In particular, her expert opines based on the record, including plaintiff’s deposition testimony, that plaintiff was not informed of the added risk of performing of performing teeth extractions, bone grafting, and implantation in one day, and that if plaintiff had been adequately informed, she would have chosen a safer approach of extraction followed by grafting and infection resolution with implantation four months later. Plaintiff’s expert also opines that Dr. Langer failed to obtain informed consent regarding “the benefits and risks associated with autogenous versus allogenic bone graft.” Accordingly, plaintiff has raised an issue of fact as to her claim for lack of informed consent.

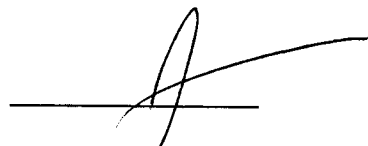
Conclusion

In view of the above, it is

ORDERED that defendants’ motion for summary judgment is denied except to the extent of dismissing the claim against defendant Laureen Langer, DDS; and it is further

ORDERED that parties shall appear for a previously scheduled pre-trial conference on March 28, 2019 at noon for a pre-trial conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: March 14, 2019



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