Mastro v Kaye
2019 NY Slip Op 31366(U)
May 10, 2019
Supreme Court, New York County
Docket Number: 805616/15
Judge: Joan A. Madden

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

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MARK MASTRO and NANCY MASTRO, INDEX NO. 805616/15

Plaintiffs,

-against

ALLAN KAYE, DDS and STANLEY E. MATTHEWS, DDS,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for dental malpractice, defendant Dr. Stanley E. Matthews, DDS moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against him. Plaintiffs and co-defendant Dr. Allan Kaye oppose the motion.[1]

On November 18, 2014, when `defendant Dr. Kaye was injecting local anesthesia into the area of plaintiff Mark Mastro's (hereinafter "plaintiff") right lower jaw, the needle broke off and a fragment was lodged in his mouth. Dr. Kaye immediately referred plaintiff to an oral surgeon, Dr. Matthews, who examined and treated plaintiff that same day. Dr. Matthews attempted to remove the needle surgically, but was unable to do so. His notes indicate that he informed plaintiff that "we would close and observe and wait for the object to become surrounded granulation tissue. If the area becomes symptomatic, will attempt to retrieve at a later date, but for now observe." According to Dr. Matthews' notes, he examined plaintiff the

[1]In opposition, Dr. Kaye submits only an attorney's affirmation stating that a "review of the moving papers and the opposition filed by plaintiff Mastro reveal several issues of fact, including sharply conflicting expert testimony, with respect to the claims against co-defendant Matthews."

next day and a week later, and continued monitoring plaintiff over the next few months. On February 2, 2015, he noted that plaintiff had a CT scan which "indicates that the 30 gauge needle appears to be tracking posteriorly. Informed pt and showed him CT scan. Will discuss case with hospital for surgical intervention under general anesthesia." On February 5, 2015, Dr. Matthews noted that "case is currently being consulted with other oral surgeon and ENT physicians for next course of action." On February 6, 2015, Dr. Matthews noted informing plaintiff that an ENT was reviewing the case along with the "directors of Woodhull and Brooklyn Hospital." On February 16, 2015, Dr. Matthews gave plaintiff two prescriptions. One reads: "Maxillofacial CT with contrast of right masseter muscle extending to the lateral pharyngeal region. Purpose 30-gauge needle broken by general dentist." The other reads: "Referral. Please consult and treat 56 y/o with 30 gauge needle broken in medial _____ muscle extending _____. Pt is asymptomatic currently. General dentist broke the needle."[2]

On February 26, 2015, plaintiff went to Regional Radiology, an affiliate of NYU Langone Medical Center located in Staten Island, and had a CT scan of the "neck without IV contrast," which showed an "approximately 2 cm linear radiopaque foreign body adjacent to the right mastoid process embedded within the posterior belly of the right digastric muscle." On March 5, 2015, plaintiff was examined by non-party Dr. Adam S. Jacobson, a specialist in head and neck surgery at NYU Hospitals Center. On March 20, 2015, Dr. Jacobson performed surgery on the right side of plaintiff's neck and removed the needle.

According to plaintiff's expert, Dr. Matthews departed from the standard of care for

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[2]The missing words are not legible on the copy of the prescription annexed to the motion papers.

removal of sharp foreign objects by "waiting and hoping that the needle would spontaneously leave plaintiff's body," and as a result of the delay, the needle traveled and lodged in a location that required a "significantly more invasive" and "extensive surgery which included a muscle dissection in the neck." Plaintiff's expert opines that Dr. Matthews further departed from the standard of care by failing to obtain an "appropriate" informed consent, as the option of "waiting and watching was outside the standard of care" and plaintiff should never have been offered that option.

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. Id; see 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).

Here, Dr. Matthews has established his prima facie entitlement to judgment as a matter of law, by submitting the expert affirmation of Dr. Harry Dym, a board certified oral and maxillofacial surgeon, who reviewed the bill of particulars, the parties' depositions, the dental records of defendants Dr. Kaye and Dr. Matthews, and other relevant dental and medical records. At the outset, Dr. Dym explains that his "review of the relevant scholarly literature reveals that there is no single standard of care for the treatment of a dental needle that breaks off in a patient during an anesthetic injection," which is a "rare event and has been reported only a few times." He opines that there are "three equally acceptable" treatment options when a needle breaks: "1) do nothing and leave it alone; 2) remove the needle immediately; and 3) wait and watch."[3]

Dr. Dym avers that since retrieving the needle can "lead to neurological and tissue damage, " it is "completely acceptable" for the oral surgeon to "consider removal only if the patient develops symptoms or the needle migrates and poses a danger to internal structures." He opines that when plaintiff first presented to Dr. Matthews on November 18, 2014, he "appropriately" took a CT scan and attempted to remove the needle, and that his "method of

[3]Dr. Dym provides no clarification as to the difference between options one and three, which essentially appear identical.

attempted removal was proper." He opines that when Dr. Matthews could not retrieve the needle, he "appropriately explained the options to plaintiff including the removal of the needle in a hospital setting, removal of the needle in the office, or let the needle become surrounded by scar tissue and observe." Dr. Dym opines that the "wait and watch" approach that plaintiff "opted for" was a "reasonable choice" and "in this instance is not outside accepted dental and/or maxillofacial surgical practices."

Dr. Dym opines that Dr. Matthews "appropriately examined" plaintiff on November 19, November 25, December 9, and January 2, and that based on the "lack of symptoms," it was "appropriate" for Dr. Matthews to continue observing plaintiff without attempting another removal of the needle. He opines that on February 2, 2015, a CT scan was "appropriately taken" and since it showed that the "needle appeared to be tracking posteriorly," it was "appropriate for Dr. Matthews to consult with other specialists about surgical intervention under general anesthesia." He opines that Dr. Matthews "referred plaintiff to specialists in a timely manner," it was "appropriate" for plaintiff to have the needle surgically removed, and the surgery was "timely performed."

In opposition, plaintiffs submit an expert affirmation from Dr. Scott Goldstein, a board certified oral and maxillofacial surgeon, who reviewed the pleadings, the bill of particulars, the dental records annexed to defendant's motion papers, the parties' depositions, and the records from New York University Hospitals Center. Dr. Goldstein explains that although it is "rare for a needle to break off, it is not "unheard of" for a "sharp foreign object" to enter the body "via the oral cavity," and that such a sharp foreign object is a "danger to the patient and must be removed as expeditiously as possible." He opines that the "treatment of a foreign body by waiting and

defendant Matthews hoping that the foreign object will spontaneously leave the body of the plaintiff is outside the standard of care." Dr. Goldstein opines that the standard of care required that "within a day or two of the of the failure to be able to remove locally in the office, that the patient be put under anesthesia in a hospital setting with appropriate monitoring and a surgical removal through the oral cavity of said foreign object be performed once localized with appropriate radiographical studies." He states that this "must be done before migration of the sharp foreign object," but this was "not done and was not recommended."

Dr. Goldstein also opines that the departures continued on plaintiff's subsequent visits with Dr. Matthews, as accepting Dr. Matthews' "premise that he was going to wait and watch, then each and very visit should have included a 3D CT scan," and "more frequent office visits" were required. He explains that 3D CT scans were required to determine the location of the foreign body, and that "[o]ne cannot just see the patient and do a 2D panorex or examine the patient to determined the location and what is going on with the foreign body."

Dr. Goldstein opines that the standard of care required plaintiff to be "seen in a hospital setting so that surgery could be performed through the oral cavity to remove the foreign object prior to its traveling and lodging in a location that required significantly more invasive surgery than was necessary had the appropriate care been rendered." He explains that the records from NYU Hospitals Center show that plaintiff was told in March 2015, that the "foreign object had progressed deeper and deeper into his tissue and now he was in danger of there being a puncture to this carotid artery." Dr. Goldstein avers that at that point, it was necessary for plaintiff to undergo an "extensive" and "major" surgery at NYU, which included a muscle dissection in the neck to remove the needle, and that the "NYU procedure was only performed as a result of the

standard of care not being met."

Dr. Goldstein opines that Dr. Matthews further departed from the standard of care by failing to obtain the "appropriate" informed consent, as offering plaintiff the option of "waiting and watching was outside the standard of care and he should never have been offered that option." He opines that the consent Dr. Matthews obtained was "fatally defective" and that a "reasonable person would need to know that there are only two acceptable options and that discussion needs to be had before treatment is undertaken."

Based on the foregoing, plaintiffs have made a sufficient showing to raise triable issues of fact as to both the dental malpractice and the lack of informed consent claims. The experts offer sharply divergent opinions as to whether Dr. Matthews departed from the standard of care by delaying surgery to remove the needle in a hospital setting, and instead taking a "wait and watch" approach and monitoring plaintiff's condition. See Frye v. Montefiore Medical Center, supra; Cruz v. St Barnabas Hospital, supra. The parties also sharply dispute precisely what Dr. Matthews told plaintiff about the available treatment options. See Mathias v. Capuano, 153 AD3d 698 (2nd Dept 2017); Schussheim v. Barazani, 136 AD3d 787 (2nd Dept 2016); Santiago v. Filstein, 35AD3d 184 (1st Dept 2006); Eppel v. Fredericks, 203 AD2d 152 (1st Dept 1994). Dr. Matthews testified that on November 18, 2014, he reviewed three options with plaintiff: 1) he could try to remove the needle in his office; 2) if that was not successful, the needle could be surgically removed at the hospital; or 3) let the needle "fibrose," i.e. the "body treats the needle as a foreign object and tissue collects around the area and keeps its steady." Plaintiff on the other hand testified that on November 18, 2014, Dr. Matthews never mentioned referring him to a head and neck surgeon to have the needle surgically removed in a hospital setting. Rather, plaintiff

testified that the first time Dr. Matthews spoke to him about having surgery at the hospital was after the CT scan in January 2015.

Dr. Matthews argues that the lack of informed consent claim fails, as the doctrine applies only to actual "procedures," and here the "wait and watch" approach did not involve a "procedure." Dr. Matthews provides no legal authority directly on point to support this argument. While he cites a litany of cases in which the defendant doctor performed a "procedure," none of the cases holds that a lack of informed consent claim is not viable in the absence of an actual procedure. To the contrary, Public Health Law §2805-d expressly provides that a "claim based on lack of informed consent is limited to those cases involving . . . non-emergency treatment, procedure or surgery." Here, Dr. Matthews clearly provided "treatment" to plaintiff for the broken needle, by first attempting to remove the needle in his office on November 18, 2014, and then taking the "wait and watch" approach by continuing to examine plaintiff and monitor his condition over the next few months.

Thus, for the foregoing reasons, Dr. Matthews is not entitled to summary judgment.

Accordingly, it is

ORDERED that Dr. Mathews' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for the pretrial conference previously scheduled for May 23, 2019 at noon, in Part 11, Room 351, 60 Centre Street.

DATED: May 10, 2019

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C

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