

Christiansen v Menna
2022 NY Slip Op 30541(U)
February 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 515033/19
Judge: Genine D. Edwards
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At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of February 2022.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

-----X

ISABELA CHRISTIANSEN,

Plaintiff,

-against-

STEVE MENNA, DPM, FACFAS, and
STEVE MENNA, DPM, PC,

Defendants.

-----X

DECISION AND ORDER

Index No. 515033/19

Mot. Seq. No. 2

The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmations, and Exhibits Annexed _____
Opposing Affirmation (Affidavit) and Exhibits Annexed _____
Reply Affirmation _____

31-47
52-68
70

In this action to recover damages for podiatric malpractice and lack of informed consent, defendants move for summary judgment dismissing the complaint.

Background

In the two-week interval between March 16, 2019 and March 30, 2019,¹ Dr. Steve Menna (“Dr. Menna”) administered to plaintiff (then one month shy of her 34th birthday) a total of three trigger-point steroid injections (the first injection on March 16th; the second, on March 23rd; and the third injection on March 30th) into the third intermetatarsal space of her left foot. The three injections, all into the same space between the third and fourth toes, were part of Dr. Menna’s

¹ Unless otherwise indicated, all year references are to 2019.

treatment (as complemented by the off-the-shelf insoles) of plaintiff's interdigital (Morton's) neuroma – a non-malignant nerve thickening that is similar to neuropathy secondary to a nerve entrapment or compression. Whereas the first and second injections alleviated all (or nearly all) of the neuroma-related symptoms (*i.e.*, those symptoms which, upon plaintiff's initial presentation to Dr. Menna, were limited to and around her third interspace), the third injection allegedly caused her to suffer several immediate injuries encompassing her entire left foot. In that regard, the record (when viewed in a light most favorable to plaintiff, as it must be at this stage of litigation) supported her allegations of the iatrogenic injury shortly following the third injection. Plaintiff's subsequent treating podiatrist, non-party Hillary Brenner, DPM ("Dr. Brenner"), found on examination of her left foot on April 9th and, again on April 23rd (that is, on the 10th and 24th day, respectively, following the third injection), that she was suffering, in each instance, from: (1) pain in her left third-digit interspace; (2) a burning/tingling sensation in the second-to-fifth interspaces/toes; and (3) a localized erythema/edema.² Dr. Brenner addressed plaintiff's complaints with the combination of: (1) a left-foot CAM (controlled ankle motion) walker, a compression stocking, and neuroma cushions, as dispensed/prescribed by Dr. Brenner; and (2) rest, ice, compression, and elevation of her left foot (coupled with the use of an as-needed OTC pain reliever).³ Further, on April 25th, an MRI of plaintiff's left forefoot, as ordered by Dr. Brenner, found (aside from confirming the neuroma's presence) an "[e]dema signal along the course of the first and second plantar and third dorsal interossei [muscles]," with the alternative etiology, as interpreted by the film-reading radiologist, of either a "low-grade muscle strain" or a "recent [*i.e.*, the third] injection and possibly acute denervation."⁴

² Dr. Brenner's records at pages 000007 and 000003.

³ Dr. Brenner's records at pages 000007 and 000003.

⁴ Dr. Brenner's records at page 000009.

More fundamentally, however, plaintiff's subsequent course of treatment at non-party NYU Langone Medical Center – initially with one of its staff neurologists and thereafter with two of its pain specialists (with the concurrence, in consultation, by one of its foot/ankle surgeons) – radically switched the focus of her treatment from her left foot to her then-diagnosed (and actually, a more significant) dysfunction in her lower back; namely, her lumbosacral radiculopathy, with nerve compression, at the L5-S1 level. The ensuing administration of three separate epidural spinal blocks (the first on May 28th, the second on November 11th, and the third on June 29, 2020) – all uneventful⁵ – as augmented, at the time of plaintiff's deposition on September 24, 2020, by oral anticonvulsant Topamax – appeared (as relevant herein) to have restored and maintained her left foot to the level of functioning she had exhibited prior to the third injection, albeit subject to occasional flare-ups (which she described during her deposition as the “foot on fire,” “pins and needles,” and “broken bones”).⁶

On July 10th, or approximately two months following her first epidural spinal block, plaintiff commenced this action. On August 27th, Dr. Menna interposed his answer. Approximately two years later, plaintiff filed a note of issue and certificate of readiness. On November 18, 2021, this Court reserved decision on defendant's timely served motion.

Discussion

Preliminary Matters

On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence in admissible form demonstrating the absence of any material issue of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851,

⁵ NYU pages 000046-000047, 000044-000045, 000042-000043.

⁶ Plaintiff's EBT tr at page 96, line 2 to page 97, line 20.

487 N.Y.S.2d 316 (1985). Here, the affirmation of defendant's expert podiatrist, Edwin W. Wolf, DPM, MS (the "defense expert"), suffers from two evidentiary deficiencies. First and less important for purposes immediately at hand, the defense expert's affirmation fails to comply with CPLR 2106 (a), inasmuch as podiatrists (like the defense expert here) may not submit affirmations. *See e.g. Pierson v. Edwards*, 77 A.D.3d 642, 909 N.Y.S.2d 726 (2d Dept., 2010); *Casas v. Montero*, 48 A.D.3d 728, 853 N.Y.S.2d 358 (2d Dept., 2008).⁷ Nonetheless, plaintiff waived this evidentiary deficiency by her failure to object to the form of the defense expert's submission. *See Scudera v. Mahbubur*, 299 A.D.2d 535, 750 N.Y.S.2d 644 (2d Dept., 2002); *see also Lefkowitz v. Kelly*, 170 A.D.3d 1148, 96 N.Y.S.3d 642 (2d Dept., 2019).

Second and more important to this case, the defense expert failed to lay the requisite foundation to establish that, while New York State podiatrists are only licensed to treat *below* the ankle,⁸ he also possessed sufficient training and experience in diagnosing and treating orthopedic conditions *above* the ankle. *Cf. Steinbuch v. Stern*, 2 A.D.3d 709, 770 N.Y.S.2d 106 (2d Dept., 2003).⁹ In that regard, the defense expert's affirmation merely described his qualifications within the narrow scope of the traditional practice of podiatry. NYSCEF Doc No. 34, ¶ 1.

Without the requisite foundation, however, the defense expert was not qualified (at least, at this

⁷ CPLR 3212 (b) requires that a summary judgment motion "be supported by affidavit." The exception in CPLR 2106 (a) that attorneys, physicians, osteopaths, and dentists may submit an affirmation "with the same force and effect as an affidavit" manifests the legislative intention that no other class of witnesses be granted that privilege. *See Doumanis v. Conzo*, 265 A.D.2d 296, 696 N.Y.S.2d 201 (2d Dept., 1999).

⁸ Education Law § 7001 (a) defines the practice of the profession of podiatry, in relevant part, "as diagnosing, treating, operating and prescribing for any disease, injury, deformity or other condition of the foot, and may include performing physical evaluations in conjunction with the provision of podiatric treatment." In that regard, the Court of Appeals noted that "[a] podiatrist . . . is not a medical doctor and thus cannot be medical board certified." *Matter of Belmonte v. Snashall*, 2 N.Y.3d 560, 780 N.Y.S.2d 541 (2004).

⁹ To the same effect are *Escobar v. Allen*, 5 A.D.3d 242, 774 N.Y.S.2d 28 (1st Dept., 2004), and *Parese v. Shankman*, 300 A.D.2d 1087, 752 N.Y.S.2d 503 (4th Dept., 2002).

stage of litigation) to opine (outside the limited scope of his practice as a podiatrist) regarding the condition of plaintiff's lumbar spine, as well as regarding the causative effects of that condition, as more fully set forth in the margin.¹⁰ With that limitation on the scope of the defense expert's opinion, this Court turned to the consideration of plaintiff's podiatric malpractice and informed consent claims.

Podiatric Malpractice Claim

"The requisite elements of proof in a . . . podiatric malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage." *Paone v. Lattarulo*, 123 A.D.3d 683, 997 N.Y.S.2d 694 (2d Dept., 2014). A podiatrist moving for summary judgment dismissing a complaint alleging podiatric malpractice must establish, prima facie, either that "there was no departure from accepted practice, or that any departure was not a proximate cause of the plaintiff's injuries." *Capobianco v. Marchese*, 125 A.D.3d 914, 4 N.Y.S.3d 127 (2d Dept., 2015).

¹⁰ By way of illustration, the following opinions of the defense expert extended beyond his limited licensure as a podiatrist: (1) "the cause of [the] plaintiff's current complaints is lumbar radiculopathy at L5-S1" (¶ 24); (2) "[t]he nerve root exiting the L5-S1 vertebral space is clearly being compressed by the vertebral bodies, L5 and S1" (¶ 24); (3) "plaintiff had her L5 vertebral body forward over S1. This condition can cause low back pain because it compresses the nerve root exiting the spine at the L5-S1" (¶ 25); (4) "[n]erve root compression is exactly what is happening in [the] plaintiff's case" (¶ 26); (5) "[h]er nerve roots exiting L5-S1 are being compressed by spondylolisthesis at that level" (¶ 26); (6) "she has degenerative disc disease at L5-S1, which means the disc between these two vertebral bodies, is not providing proper cushioning because it has dried out and flattened" (¶ 27); (7) "[p]laintiff[s] symptoms following the third injection . . . was due to a concomitant sciatica at L5-S1, which was confirmed by neurologist" (¶ 33); (8) "[a]ny muscle weakness and pain in her left foot . . . [were] attributable to . . . sciatica caused by L5-S1 nerve compression" (¶ 37); (9) "pain and any discomfort after the third injection was due to . . . the concomitant L5-S1 radiculopathy extending from the back down to her foot" (¶ 39); and (10) "[p]laintiff's subsequent left foot pain was due to the . . . low back lumbar radiculopathy from spinal/vertebral abnormalities diagnosed by subsequent treating neurologists and orthopedists" (¶ 41).

Boiled down to its essentials, plaintiff's podiatric malpractice claim is premised on her contention that the defendant deviated from the accepted standards of podiatric care by administering a total of three injections into the third interspace of her left foot within the two-week period (in each instance, without the ultrasound guidance), and that she suffered multiple injuries as a result of those injections.¹¹ Combining the three injections as part of the same theory of liability is somewhat misleading, however, because the record is undisputed (as reflected in plaintiff's deposition testimony) that she suffered no injuries from either the first injection, or the second injection, or the combination of the two.¹² Rather, the record presented a triable issue of fact as to whether the *third* injection, either on its own or in combination with the potentially aggravating factors (as more fully set forth in the margin¹³), constituted a deviation from the accepted standards of podiatric practice and proximately caused (at a minimum) those injuries that plaintiff's subsequent treating podiatrist, Dr. Brenner, documented in the April 9th and 23rd office notes. Contrary to defendant's contention, his expert's opinion regarding the allegedly proper *technique and dosage* of the third injection¹⁴ sidestepped the critical issue of

¹¹ Verified Bill of Particulars, dated February 12, 2020; Supplemental Verified Bill of Particulars, dated July 1, 2021 (NYSCEF Doc Nos. 37 and 38, respectively).

¹² Plaintiff's EBT tr at page 44, lines 14-15 ("super happy with the second shot"); page 44, lines 23-24 ("The first and second shot[s] worked so well."). Defendant's Statement of Undisputed Facts, dated August 6, 2021, ¶ 21, as so admitted in Plaintiff's Counterstatement of Undisputed Facts, dated October 8, 2021, ¶ 21 (NYSCEF Doc Nos. 33 and 54, respectively).

¹³ The potentially aggravating factors as related to the third injection included: (1) no complaint of pain at the March 30th visit (plaintiff's EBT tr at page 44, line 10 to page 45, line 15); (2) the administration of a total of three injections in the single two-week period into the same (third) interspace and, in each instance, without the ultrasound guidance; (3) the polypharmacy in treatment: a short-acting steroid in the first injection, a long-acting steroid in the second injection, and a combination of Vitamin B-12 with the same long-acting steroid in the third injection; and (4) defendant's concession in his deposition testimony of the adverse side effects of excessive ("abusive") steroid injections (defendant's EBT tr at page 18, lines 10-20; page 29, lines 20-23).

¹⁴ Compare Defense Expert's Affirmation, ¶ 9 ("It was reasonable and within good and accepted practice of podiatric medicine for [the defendant] to offer the third injection. . . ."); ¶ 22 ("the
(footnote continued)

whether the third injection (rather than the first and second injections¹⁵) was appropriate as the initial matter, and, if not, whether the third injection (either alone or in combination with the aforementioned potentially aggravating factors) proximately caused at least those injuries that were documented by Dr. Brenner.

Informed Consent Claim

“[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence.” *Jolly v. Russell*, 203 A.D.2d 527, 528, 611 N.Y.S.2d 232 (2d Dept., 1994). To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove: “(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.” *Spano v. Bertocci*, 299 A.D.2d 335, 749 N.Y.S.2d

amount of each . . . injection administered by [the defendant] was a reasonable, appropriate, and acceptable dose”); ¶ 31 (“[the defendant] *performed each injection* without complication, and therefore did not injure [the] plaintiff”); ¶ 33 (“Plaintiff[’s] symptoms following the third injection had nothing to do with [the defendant’s] injection *technique*”); ¶ 34 (“*Each injection* was uneventful.”); ¶ 39 (“[T]here is no indication *the three injections* were negligently performed.”); ¶ 40 (“[The defendant] gave small *dosages* of steroids three times, at well-spaced, one-week intervals. These *dosages* were well within the standard of care of podiatric medicine.”) (emphasis added).

¹⁵ The defense expert placed undue emphasis on the first and second injections to the exclusion of the third injection. See Defense Expert’s Affirmation, ¶ 22 (“The *first two* injections resulted in excellent responses and relieved a significant amount of the plaintiff’s pain.”); ¶ 23 (“after the *first two* injections plaintiff’s pain was greatly relieved and much less”); ¶ 31 (“she experienced significant improvement in her symptoms following the *first and second* injections”); ¶ 32 (“After the *first and second* injections, there was no need or reason to call in a ‘consultant’ as plaintiff[’]s symptoms were less and she was improving.”); ¶ 33 (“there was [a] significant reduction of symptoms after the *first and second* injection[s]”) (emphasis added).

275 (2d Dept., 2002) (internal quotation marks omitted); *see* Public Health Law § 2805-d (1), (3).

Contrary to defendant's position, he may not rely on his custom and practice to establish *on summary judgment* that he obtained plaintiff's informed consent.¹⁶ Although evidence of custom and habit is admissible to establish that a patient was properly advised of the risks and options attendant to a medical procedure involving the invasion/disruption of the integrity of the body, such evidence merely provides a basis for the fact-finder to draw a permissible inference, but cannot constitute the basis for summary judgment. *See Rigie v. Goldman*, 148 A.D.2d 23, 543 N.Y.S.2d 983 (2d Dept 1989).¹⁷ Even assuming (without deciding) that defendant could rely on his self-serving deposition testimony to establish that he obtained plaintiff's informed consent, the remaining branch of defendant's motion on the informed consent claim would still have to be denied because he failed to establish that a reasonably prudent person in plaintiff's position, when fully informed, would have undergone the third injection. Significantly, the defense expert failed to opine in his affirmation that a reasonably prudent person in plaintiff's position would *not* have declined to undergo the third injection if he or she had been fully informed. *See Baez v. Lockridge*, 259 A.D.2d 573, 686 N.Y.S.2d 496 (2d Dept., 1999); *see also Haggerty v. Wyeth Ayerst Pharmaceuticals*, 11 A.D.3d 511, 782 N.Y.S.2d 842 (2d Dept., 2004).

¹⁶ Defendant did not use written consent forms to document his patients' consent to steroid injections.

¹⁷ *See also Viera v. Khasdan*, 185 A.D.3d 405, 126 N.Y.S.3d 462 (1st Dept., 2020); *Lindeman v. Slavin*, 184 A.D.2d 910, 585 N.Y.S.2d 568 (3d Dept., 1992).

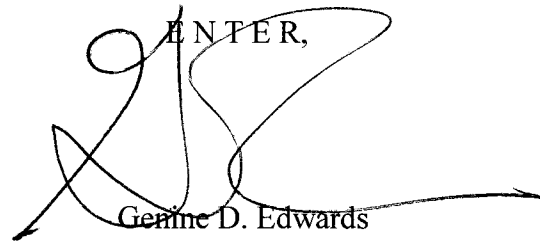
Conclusion

Accordingly, it is

ORDERED that defendant's motion in Seq. No. 2 is *denied in its entirety*; and it is further

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order on defendant's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of this Court.

ENTER,

Geraine D. Edwards
J. S. C.