

Mancuso v Irizarry

2023 NY Slip Op 31130(U)

April 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 522578/2021

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 7th day of April, 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

SALVATORE MANCUSO,

Index No. 522578/2021

Plaintiff,

-against-

KENDRA M. IRIZARRY, DMD,

Defendant.

The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Motion, Affidavits (Affirmations) Annexed And Exhibits.....	16-28
Answering Affidavit (Affirmation) and Exhibits	30-33
Reply Affidavit (Affirmation) and Exhibits	35-36
Stipulations of Adjournment.....	29, 34
Letters.....	37-38

In an action to recover damages for medical malpractice and lack of informed consent, defendant Kendra M. Irizarry, DMD, moved, in motion sequence #1, for summary judgment dismissing the complaint. Plaintiff Salvatore Mancuso opposed the motion.

Facts

On December 14, 2020, plaintiff saw general dentist Dr. Danielle D’Amato for pain and sensitivity in tooth #19, a molar located on the bottom left jaw. Dr. D’Amato noted plaintiff had pain to percussion and a distal

marginal ridge fracture. She took a periapical x-ray, prescribed antibiotics to plaintiff to treat a lesion encroaching on the inferior alveolar nerve canal, and referred plaintiff to defendant.

Plaintiff presented to defendant on December 18, 2020, with a referral for extraction of tooth #19. Defendant took a panorex x-ray and performed extraoral and intraoral exams on plaintiff. The panorex x-ray revealed a periapical radiolucency, a lesion, on tooth #19. The lesion was close to the inferior alveolar nerve, violating the superior border of the neural canal. The extraoral exam found no swelling, tenderness to pressure, erythema, lumps, or lesions. The intraoral exam noted no purulence, swelling, or lesions, but defendant found a root-level fracture on tooth #19 and tenderness to pressure. The fracture was not visible on the panorex or the periapical x-rays. Defendant did not order a three-dimensional scan.

Defendant recommended plaintiff extract tooth #19. She documented that she discussed the risks, benefits, and alternatives with plaintiff, including restoration, a fixed bridge, and implants to replace the extracted tooth. However, defendant later acknowledged that she did not offer plaintiff an endodontic referral for a root canal as an alternative to save the tooth. Plaintiff disputed that defendant discussed the risks or alternatives with him. He alleged that a dental assistant gave him a consent form, told him it was “just routine” for the procedure, and instructed him to sign it. Plaintiff signed the form, but could not read it because he did not have his glasses.

The same day, defendant administered two local anesthesia injections at the start of the extraction procedure. Plaintiff experienced significant pain and

“flew” out of his seat during one of the injections. Defendant used a dental elevator and forceps to remove the tooth, then curetted (cleaned out) the tooth socket, placed a graft into the site, and closed it. Plaintiff was given post-operative instructions and returned to see defendant on December 22, 2020.

On the first post-operative visit, plaintiff expressed concerns about numbness from the middle of his lip to his chin on the left side of his jaw. Defendant examined plaintiff and noted that there were no signs of infection, but that plaintiff had decreased sensation in the area of concern. Defendant told plaintiff that he had hypoesthesia (decreased sensation), explained that it could take three to six months for the inflammation and swelling to subside, prescribed a Medrol pack of steroids, and instructed him to follow up in one week.

Plaintiff returned to defendant on January 5, 2021 and reported that the numbness from the left side of his lower lip to the upper portion of his chin persisted. Defendant noted that there were still no signs of infection at the extraction site, that plaintiff’s numbness was improving compared to his last examination, and that the hypoesthesia was “much improved” compared to his previous visit. Plaintiff disagreed.

Plaintiff’s last visit with defendant was on February 5, 2021. Defendant noted that there were signs of improvement, such as tingling and pain sensations, but plaintiff indicated that his condition remained the same. Defendant informed plaintiff again that swelling could take three to six months to go down and instructed him to follow up with another appointment in one month, but plaintiff did not return.

Plaintiff developed eating issues and experienced continued sensation loss on the left side of his lower lip and chin. In July 2021, he sought treatment from a neurologist who could not assist him with his hypoesthesia.

Law

In an action for dental malpractice, the required elements for proof are a deviation or departure from accepted standards of dental practice and that such departure proximately caused plaintiff's injuries. *See Kozlowski v. Oana*, 102 A.D.3d 751, 959 N.Y.S.2d 500 (2d Dept. 2013). When moving for summary judgment, a movant bears the initial burden of establishing that they did not depart from accepted practice, or if there was such a departure, it was not the proximate cause of plaintiff's injuries. *See Kelapire v. Kale*, 189 A.D.3d 1197, 134 N.Y.S.3d 255 (2d Dept. 2020). If the movant shoulders the burden, then it shifts to the nonmoving party, who need only raise a triable issue of fact concerning the element or elements that movant made a prima facie showing. *See Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). "In determining a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party." *Fagan v. Panchal*, 77 A.D.3d 705, 909 N.Y.S.2d 127 (2d Dept. 2010).

"[L]ack of informed consent is a distinct cause of action [which] requir[es] proof of facts not contemplated by an action based merely on allegations of negligence." *Jolly v. Russell*, 203 A.D.2d 527, 611 N.Y.S.2d 232 (2d Dept. 1994). To establish a cause of action for 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 the proximate cause of the injury.” *Spano v. Bertocci*, 299 A.D.2d 335, 749 N.Y.S.2d 275 (2d Dept. 2002). “The mere fact that [a] plaintiff signed a consent form does not establish defendants’ prima facie entitlement to judgment as a matter of law.” *Godel v. Goldstein*, 155 A.D.3d 939, 64 N.Y.S.3d 127 (2d Dept. 2017), quoting *Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016).

Analysis

Dental Malpractice

Defendant established prima facie entitlement to summary judgment by proffering plaintiff’s dental records, deposition testimony from both parties, and the expert opinion of a licensed oral and maxillofacial surgeon, Michael Schwartz, DDS, who opined that defendant did not deviate from the standard of care in her treatment of plaintiff. Dr. Schwartz agreed with defendant’s recommendation to extract tooth #19 because it was hopeless and unsalvageable due to a fracture down to the root. Though the tooth had good bony support and lacked a widened periodontal ligament on the distal root, swelling, or purulent discharge, these factors were not definitive in deciding to extract tooth #19 when, as is the case here, x-rays showed two large black dark areas at the tooth’s roots, reflecting a long-term infection, and a dark area between the tooth’s roots, representing bone loss generally due to fracture. As

a result, an endodontic referral was unnecessary, and if plaintiff received a root canal, the tooth would have later required extraction.

Dr. Schwartz further opined that defendant used the appropriate anesthetic and properly administered anesthesia. In addition, it was acceptable for defendant to extract the tooth before plaintiff completed the antibiotic prescription. According to Dr. Schwartz, defendant properly addressed plaintiff's infection by debriding the infected site after the tooth extraction. In response to the allegation that the debridement, or cleaning out, of the infected area was contraindicated, Dr. Schwartz indicated that failing to clean an infected site properly could have led to a post-operative infection, which plaintiff did not develop. It would be rare for the instruments used in debridement to reach the inferior alveolar nerve canal. Dr. Schwartz stated that grafting was reasonable in this situation and that defendant did not need to perform an ostectomy, a procedure where the bone is surgically removed from the jaw, to view plaintiff's inferior alveolar nerve as it would have increased the chances of injury to that nerve. Likewise, Dr. Schwartz opined that defendant did not need to request a pre-extraction three-dimensional scan of the area because the panoramic and periapical x-rays were sufficient according to accepted standards of dental practice.

Dr. Schwartz concluded that there are multiple non-negligent reasons why permanent inferior alveolar nerve damage can occur during an extraction procedure, including administering local anesthesia and extracting the tooth itself because of proximity to the inferior alveolar nerve, swelling, and normal post-operative intramedullary bleeding. Therefore, he indicated that the

administration of local anesthesia likely caused permanent damage to plaintiff's inferior alveolar nerve. However, Dr. Schwartz opined that even if anesthesia was the cause of the damage, it does not inherently suggest that defendant was negligent, as there are multiple non-negligent reasons why permanent nerve damage can occur during extraction.

In opposition, plaintiff's expert opined that tooth #19 should not have been extracted, and defendant deviated from the standard of care by extracting it rather than offering plaintiff an endodontic referral as an alternative to save the tooth. He agreed with defendant that, when possible, it is in a patient's best interest to keep a natural tooth. He also indicated that tooth #19 was salvageable as there was no mobility, bleeding, or puss discharge on the tooth and no widened periodontal ligament of the distal root. Moreover, x-rays did not show a bifurcation fracture, and even assuming a superficial ridge fracture existed, as indicated by Dr. D'Amato, defendant stated at deposition that it would not necessarily render the tooth "hopeless."

Plaintiff's expert further opined that defendant deviated from the standard of care by failing to take additional three-dimensional scans, as plaintiff was a high-risk presentation due to the infected lesion encroaching on the inferior alveolar nerve. Moreover, defendant caused plaintiff's injuries by curetting and grafting into the tooth socket immediately after extraction and without a three-dimensional scan. Although defendant's expert opined that curettes "rarely" reach down into the inferior alveolar nerve canal, plaintiff's expert concluded that by proceeding without the three-dimensional scans, defendant did not have the proper three-dimensional visualization of the

extraction site and the proximity to the inferior alveolar nerve, and thus damaged it. In her deposition, defendant acknowledged that if the post-extraction site for tooth #19 is over-curetted, it can cause harm to the inferior alveolar nerve. Plaintiff's expert also stated that defendant deviated by placing a graft into an infected site before plaintiff completed his antibiotics, as the infection should have been controlled before the procedure.

Based upon his expert affirmation as well as the facts in the record, plaintiff raised triable issues of fact as to whether plaintiff's tooth was salvageable and thus a candidate for a root canal and whether defendant's actions or inaction fell below the standard of care by not taking three-dimensional scans before extracting the tooth and performing debridement and curetting procedures, resulting in injury to the inferior alveolar nerve canal and plaintiff's numbness. *See Many v. Lossef*, 190 A.D.3d 721, 137 N.Y.S.3d 128 (2d Dept. 2021); *Schmidt v. Bangiyev*, 210 A.D.3d 924, 178 N.Y.S.3d 212 (2d Dept. 2022). As the parties have produced conflicting expert testimony on the issue of medical malpractice, the matter must be submitted to a jury. *See Palmeiro v. Luchs*, 202 A.D.3d 989, 163 N.Y.S.3d 558 (2d Dept. 2022); *Loaiza v. Lam*, 107 A.D.3d 951, 968 N.Y.S.2d 548 (2d Dept. 2013).

Res Ipsa Loquitur

On the cause of action for medical malpractice, plaintiff's Bill of Particulars indicated that he would rely on the theory of *res ipsa loquitur*. Plaintiff's papers did not address this doctrine. Thus, it is dismissed.

Lack of Informed Consent

Defendant failed to establish entitlement to judgment as a matter of law on plaintiff's informed consent claim. Defendant's records indicated that she discussed the risks, benefits, and alternatives to extraction with plaintiff, including replacement options such as restoration, implants, and a fixed bridge. However, she admitted that she did not mention a root canal or an endodontic referral as an alternative because plaintiff's tooth was not a candidate for root canal therapy due to the fracture. Defendant also proffered a consent form, signed by both parties and a witness, which included the risk of permanent pain or numbness in the lip and chin, to show that she obtained plaintiff's consent. But while the consent form included potential risks of extraction, it did not mention debridement or bone grafting, which defendant also performed. Dr. Schwartz suggested that defendant informed plaintiff of these procedures based on line 10 of the consent form, which stated, "[t]he hole where the tooth had been may need more care, or small pieces of the tooth root may be left there to prevent damage to very important things like nerves" However, this line did not adequately inform plaintiff of the additional procedures.

Finally, in plaintiff's deposition transcript, which was submitted in support of defendant's motion, he indicated that defendant never discussed the risks, benefits, or alternatives to the extraction. Instead, he was told by a dental assistant that the paperwork was "just routine" for the procedure and he was instructed to sign it. In addition, plaintiff posited that he could not

read the consent form and would not have undergone the tooth extraction if defendant had informed him that a root canal was an alternative measure.

Thus, the conflicting deposition testimony of the parties and the consent form present questions as to whether defendant adequately informed plaintiff of the risks of the extraction procedure as well as the bone grafting and debridement, warranting denial of the motion as to this cause of action. See *Walker v. Saint Vincent Catholic Medical Centers*, 114 A.D.3d 669, 979 N.Y.S.2d 697 (2d Dept. 2014); *Mathias v. Capuano*, 153 A.D.3d 698, 60 N.Y.S.3d 327 (2d Dept. 2017); *Xiao Yan Ye v. Lam*, 191 A.D.3d 827, 141 N.Y.S.3d 125 (2d Dept. 2021); *Silveri v. Glaser*, 166 A.D.3d 1044, 87 N.Y.S.3d 254 (2d Dept. 2018).

Conclusion

Accordingly, defendant's motion for summary judgment dismissing the complaint is decided as follows: it is

ORDERED that defendant is granted summary judgment as to the doctrine of *res ipsa loquitur* as plaintiff did not address same, and it is further

ORDERED that summary judgment as to the medical malpractice and lack of informed consent causes of action are denied.

The parties shall appear for an Alternative Dispute Resolution conference on June 15, 2023, at 12:30 PM.

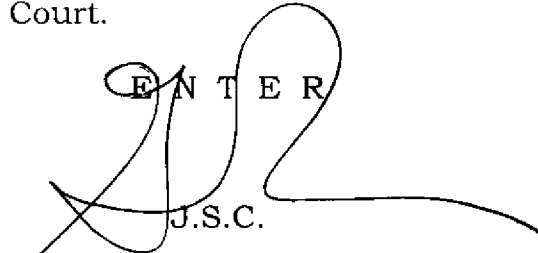
This constitutes the Decision and Order of this Court.

For Clerks use only

MG___

MD___

Motion Seq.#: 1

ENTER

 J.S.C.
HON. GENINE D. EDWARDS