

Bostancioglu v Varano

2023 NY Slip Op 31262(U)

April 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 512279/2018

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 St., Brooklyn, New York, on the 14th day of April, 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

ESIN BOSTANCIOGLU,

Index No. 512279/2018

Plaintiff,

-against-

PATRICIA R VARANO, DDS,

Defendant.

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion and Affidavits (Affirmations) and Exhibits.....	17-34
Answering Affidavit (Affirmation) and Exhibits.....	38-41
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In an action to recover damages for dental malpractice and lack of informed consent, defendant moved, in motion sequence # 2, for summary judgment dismissing the complaint.¹ Plaintiff opposed the motion.

This cause of action arose from two injections that defendant administered to plaintiff on January 8, 2018 and January 16, 2018. Plaintiff began treatment with defendant on May 3, 2016, where she indicated in her medical history form that she was allergic to Levaquin, an antibiotic. Defendant next saw plaintiff on November 3, 2017,

¹ Any language with respect to premises liability was withdrawn, pursuant to a January 11, 2019 preliminary conference order. Any language in the Bill of Particulars with respect to negligently hiring employees was not addressed by plaintiff and thus is dismissed.

where she identified a tooth requiring root canal therapy and gave plaintiff a temporary zinc oxide filling. While filling plaintiff's tooth, defendant administered Carbocaine, an anesthetic, without an adverse reaction to plaintiff.

Plaintiff returned on January 8, 2018, to have the temporary filling removed from her tooth. Defendant administered two capsules of 3% Carbocaine during the filling removal. She documented that plaintiff began to shake after the administration of Carbocaine, but her heart was not racing. She attributed the cause to plaintiff being a nervous patient. Plaintiff alleged that defendant told her she experienced an allergic reaction to the injection. Plaintiff's shaking started to go away and defendant completed the treatment. She returned home without assistance.

On January 16, 2018, plaintiff returned to have the filling removed from a different tooth. Defendant did not discuss potential side effects with plaintiff or alert plaintiff to the possibility of any adverse reactions. Again, defendant used Carbocaine as an anesthetic and administered half a capsule of 3% Carbocaine. Plaintiff experienced cold and numbness in her feet, shaking in both legs, hands, and her entire body as well as uncontrolled tooth chattering. Her hands locked. She felt faint and was hyperventilating. Plaintiff recalled defendant saying, "oh, you are the one with the shaky legs," after she injected the Carbocaine. Defendant stopped the procedure and took plaintiff's pulse, which was at 60 beats per minute. Defendant offered to call an ambulance. Plaintiff declined the ambulance and instead called her sister, who came to defendant's office to pick up plaintiff. Defendant noted that plaintiff "carried on a normal conversation" with the front desk secretary, "stopping her leg shaking and starting, hands never shook nor her head." Defendant thought plaintiff had a possible panic attack.

After leaving defendant's office on January 16, 2018, plaintiff's sister brought her to the emergency room at Maimonides Hospital.² On the way to the hospital, plaintiff reported that she had trouble breathing and her shaking increased. Upon arrival, plaintiff almost passed out and was wheelchaired into a hospital room. The attending staff at the hospital treated plaintiff with Benadryl and Solumedrol. Minutes after receiving Benadryl, plaintiff noticed that her shaking decreased, and her hands began to unlock. Nursing staff documented that plaintiff appeared visibly calmer and had stopped shaking. The hospital listed the final diagnosis as an allergic reaction and advised plaintiff to add Carbocaine to her list of allergies.

Following plaintiff's discharge from the hospital, she experienced pain and numbness in her left shoulder and left arm. Plaintiff underwent additional blood testing, received an x-ray of her left shoulder and arm, and cervical spine, and took a venous doppler exam of her left arm. All the subsequent exam results were normal.

Medical Malpractice

The requisite elements in a dental malpractice action are a deviation or departure from accepted standards of dental practice, and that such a 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 defendant 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 id.* The burden then shifts to the nonmoving party, who need only raise a triable issue of fact concerning the element or elements that defendant established prima facie. *See Stukas*

² Plaintiff's record from Maimonides Hospital indicated she arrived "via police vehicle from home," but plaintiff testified that she arrived in her car driven by her sister.

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). Mere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the cause of action, are insufficient to defeat summary judgment. *See Alvarez v. Prosp. Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). If the moving party fails to establish their prima facie entitlement to judgment, the motion should be denied regardless of the sufficiency of plaintiff’s opposing papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *Kozlowski v. Oana*, 102 A.D.3d 751, 959 N.Y.S.2d 500 (2d Dept. 2013).

Defendant did not establish prima facie entitlement to summary judgment. In support of the motion, she proffered expert testimony from Dr. Howard Atlas, D.D.S, deposition testimony from both parties, plaintiff’s dental records, radiological test results, and medical records from plaintiff’s primary care physician William B. Hebda, M.D. and Maimonides Hospital. Dr. Atlas opined with a reasonable degree of dental certainty that defendant did not deviate from good and accepted standards of dental care. He stated that the standard of care required a treating dentist to perform an intraoral examination, take x-rays, review the patient’s medical history, including any existing allergies, consider various treatment options, and suspend treatment and immediately respond to any reaction a patient experiences. Defendant completed all the required steps, including noting plaintiff’s known allergy to Levaquin, an antibiotic, and selecting an anesthetic, Carbocaine, for plaintiff’s procedure, which had no cross-reactivity to her allergy. Further, while treatment was completed on January 8, 2018, on January 16, 2018, when plaintiff began to shake and reported feeling numbness in

her feet, defendant appropriately responded when she immediately suspended treatment, checked plaintiff's pulse, which was normal at 60 beats, offered to call an ambulance for plaintiff, and stayed by plaintiff's side until her sister came to pick her up.

Dr. Atlas averred that there was no medical history or indication to avoid using Carbocaine since it was administered on November 3, 2017, without issue, and defendant administered a smaller dose on January 16, 2018, than she administered on January 8, 2018. He opined that the 3% dosage of Carbocaine administered on January 8, 2018 was normal and defendant's decision to administer 75% less on January 16, 2018 was appropriate. He concluded that plaintiff did not have an allergic reaction to Carbocaine because plaintiff did not exhibit symptoms of a drug-induced allergic reaction, including difficulty breathing and shaking in the hands, arms, or upper body, while in defendant's presence. Moreover, regarding plaintiff's claims of continued pain and need for physical therapy, plaintiff's subsequent medical tests had normal results, and plaintiff did not indicate that she experienced any physical injury besides her reactions on January 8th and January 16th. Dr. Hebda's records also indicated that a previous doctor advised plaintiff that she had a heart murmur, pre-dating the 2018 treatments with defendant.

Despite the foregoing, Dr. Atlas contradicted his own opinion. Though he indicated that plaintiff was not allergic to Carbocaine, he also stated that "plaintiff did not have a serious systemic reaction to Carbocaine . . ." and "plaintiff had a very temporary reaction which completely resolved." Indeed, Maimonides' records concluded plaintiff had an allergic reaction, directly contradicting Dr. Atlas. Defendant's treatment notes and deposition testimony as well as plaintiff's deposition testimony confirm that defendant witnessed plaintiff's symptoms, the numbness in her

feet and shaking legs, manifested on January 8, 2018, after the Carbocaine injection. One week later, on January 16, 2018, defendant treated plaintiff again, administered Carbocaine again and witnessed plaintiff's more severe shaking. A reasonable inference could be made that defendant should have anticipated that plaintiff would have some response on January 16, 2018, based upon the reaction she witnessed from plaintiff on January 8, 2018. As such, the records indicated that there is a triable issue as to whether defendant knew or should have known that plaintiff would react to the Carbocaine after she witnessed plaintiff's symptoms on January 8, 2018 and whether defendant deviated from the standard of care by treating plaintiff with Carbocaine again on January 16, 2018. Finally, Dr. Atlas did not discuss his qualifications or experience to render an opinion on the symptomatology of an allergic reaction to Carbocaine nor did he expound on the side effects of Carbocaine. Thus, summary judgment on the medical malpractice cause of action is denied regardless of the sufficiency of the opposing papers.

Lack of Informed Consent

“[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 (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

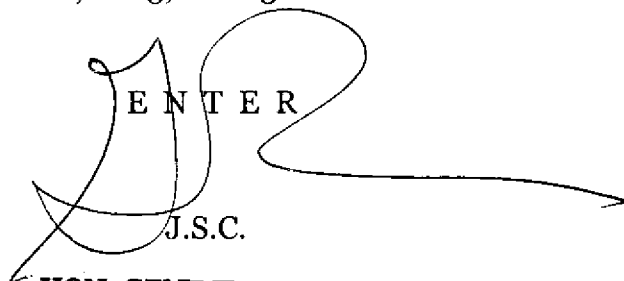
of informed consent is the proximate cause of the injury.” *Spano v. Bertocci*, 299 A.D.2d 335, 749 N.Y.S.2d 275 (2d Dept. 2002).

Here, defendant failed to submit sufficient proof to establish entitlement to judgment as a matter of law dismissing the lack of informed consent cause of action. Defendant’s submissions failed to establish, prima facie, that plaintiff was informed about the risks and benefits of Carbocaine, and the available alternatives thereto.

Conclusion

Accordingly, defendant’s motion for summary judgment dismissing the complaint is denied as to the medical malpractice and lack of informed consent claims. Defendant’s motion is granted as to the remaining claims. The parties shall appear for an Alternative Dispute Resolution Conference on June 20, 2023, at 10:30AM.

For Clerks use only
MG____
MD____
Motion Seq.#: 2


E N T E R
J.S.C.
HON. GENINE D. EDWARDS