

Hutton v Aesthetic Surgery, P.C.

2024 NY Slip Op 30519(U)

February 13, 2024

Supreme Court, New York County

Docket Number: Index No. 800030/2011

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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KATHLEEN HUTTON,

Plaintiff,

- v -

AESTHETIC SURGERY, P.C., Individually and doing business as THE AESTHETIC SURGERY CENTER, ELLIOTT H. ROSE, M.D., Individually and doing business as THE AESTHETIC SURGERY CENTER, ALEX M. GREENBERG, D.D.S., P.C., and ALEX M. GREENBERG, D.D.S.,

Defendants.

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INDEX NO. 800030/2011
MOTION DATE 11/08/2023
MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 123, 125, 127, 130, 131, 134, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 167, 168, 169, 170, 171, 172, 173 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action to recover damages for medical and dental malpractice based on alleged departures from good and accepted medical and dental practice and lack of informed consent, the defendants Alex M. Greenberg, D.D.S., P.C., and Alex M. Greenberg, D.D.S. (the Greenberg defendants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted to the extent that the Greenberg defendants are awarded summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them and so much of the medical malpractice cause of action as was premised on alleged departures other than whether Greenberg improperly performed the chin implant procedure by employing an inappropriately sized implant and inappropriately sized screws. The motion is otherwise denied, as there are triable issues of fact as to whether the Greenberg defendants implanted an

excessively large prosthetic, whether they employed inappropriately sized screws to install the implant, and whether those departures caused or contributed to the plaintiff's injuries.

The facts of this dispute are set forth in detail in this court's February 13, 2024 order deciding Motion Sequence 012. In short, the plaintiff alleged, among other things, that the Greenberg defendants departed from good and accepted dental practice on November 17, 2008 by improperly performing a prosthetic chin implant procedure.

In support of their motion, the Greenberg defendants relied upon the same submissions as relied upon by their co-defendants in Motion Sequence 012, and also submitted the expert affirmation of oral and maxillofacial surgeon Christine Hamilton-Hall, D.M.D., M.D., who opined that the Greenberg defendants satisfied the applicable standard of care, that nothing that they did or did not do caused or contributed to any injuries, and that they obtained the plaintiff's fully informed consent to the chin-implant procedure.

Dr. Hamilton-Hall explained that Greenberg, in the course of performing his portion of the procedure that the plaintiff underwent, made an intraoral incision inside the plaintiff's lower lip through a pre-existing scar, exposed the bone and the musculature in that area, and inserted a custom-fabricated chin implant, employing two 1.3 mm x 8 mm Synthes screws to secure the chin implant. As she explained it, Greenberg thereafter drilled holes in the bone, re-suspended the mentalis muscles, and completed the closure of the incision, after which the defendant Elliot H. Rose, M.D., performed the latter portion of the procedure, involving, among other things, a lata facia sling procedure. According to Dr. Hamilton-Hall, it was appropriate for Greenberg to recommend the re-suspension of the mentalis muscle and the placement of a custom chin implant, since the mentalis muscle provides stability to the lower lip and, without re-suspension, it would not be possible to improve the lip ptosis. She asserted that the plaintiff was unhappy with the appearance of her square jaw, and that the placement of a custom silicone chin implant would help achieve a more rounded, aesthetically pleasing look.

Dr. Hamilton-Hall opined that Greenberg took a thorough history and performed a thorough examination of the plaintiff, both intraorally and extraorally, taking various films, including a cone-beam computed tomography (CBCT) scan, which was appropriate and in accordance with the standard of care. She asserted that Greenberg correctly diagnosed the plaintiff with lower lip incompetence and ptosis, and formulated a reasonable, correct treatment plan for the plaintiff. She further concluded that Greenberg took a sufficient number x-rays at appropriate angles, properly gleaned all relevant information and data from the plaintiff's photographs, fully appreciated that plaintiff had previously undergone a normal EMG test, performed a sufficient evaluation, and formulated a proper differential diagnosis and a proper primary and working diagnosis. Dr. Hamilton-Hall averred that Greenberg had obtained adequate records and that, although his chart did not include a note for July 29, 2008, "he did not do so because the purpose of that visit was to take molds and casts and not further evaluate the patient," while the care that was rendered had been documented by being included in the plaintiff's billing records. Additionally, she asserted that, while a December 8, 2008 note also was not contained in the chart, and appears to have been misplaced in the Greenberg defendants' office, there was no deviation from the standard of care in this regard, since the note had been generated in connection with a post-operative visit, of which Greenberg had a reasonable personal recollection.

As Dr. Hamilton-Hall explained it, Greenberg is an oral and maxillofacial surgeon, not a plastic surgeon, and that while a chin implant can be placed by physicians and dentists of varying specialties, the records here do not require the conclusion that Greenberg rendered plastic surgery services to plaintiff. Specifically, she averred that the placement of a chin implant is within the purview of an oral and maxillofacial surgeon, and that, since Rose, rather than Greenberg, performed the fascia lata sling portion of the surgery, there was no merit to the plaintiff's allegations that Greenberg should be held liable for failing to inform her that fascia lata sling surgery was inappropriate for the treatment of lip ptosis. She further rejected the plaintiff's

contention that Greenberg committed dental malpractice by inadequately charting and insufficiently probing the plaintiff's teeth, since Greenberg did not perform periodontal surgery.

Dr. Hamilton-Hall expressly rejected the plaintiff's claim that Greenberg lacked sufficient experience to perform the chin implant, failed to have read sufficient literature to perform the chin implant, or failed to have participated in sufficient continuing education to perform the chin implant, noting that, at his deposition, Greenberg testified that he continuously read various journals, gave lectures, and took continuing education classes. Nonetheless, she concluded that that taking continuing dental education courses and reading journal articles are not required to have the necessary experience to place a chin implant. Dr. Hamilton-Hall explained that Greenberg is an experienced oral and maxillofacial surgeon, who has performed many chin implant procedures, and had undergone appropriate residency training properly to perform the surgery that he performed on the plaintiff.

As described by Dr. Hamilton-Hall, Greenberg properly utilized silicone for the chin implant, as it is the most appropriate material to use for a chin implant due to its flexibility, which would enable a proper "aesthetic contour" and "conform nicely to the previously surgically altered chin contour." She contrasted the use of silicone with a chin implant fashioned from a harder material, noting that the latter would be rigid and would not have conformed to plaintiff's mandibular bone as snugly as the silicone implant. Dr. Hamilton-Hall expressly opined that Greenberg performed the placement of chin implant correctly and in accordance with the standard of care, and that the two 1.3 mm x 8 mm Synthes screws that he employed to secure the chin implant were of the proper size, and thus sufficient to stabilize the implant with the eventual formation of scar tissue. She further challenged the plaintiff's contention that Greenberg excised excessive tissue during the procedure and took measures insufficient to preserve the bone structure, as there was "no evidence of that noted in the operative report or by looking at the plaintiff." Dr. Hamilton-Hall further rejected the plaintiff's contention that Greenberg should have employed a chin implant that consisted of two pieces, a chin implant

that mimicked the inclination of the plaintiff's mandible, and/or a chin implant that provided flexibility in positioning the lateral extension of the chin implant. She noted, in this regard, that the plaintiff was making inherently inconsistent claims that the implant was both too rigid and too soft. In any event, she concluded that the installation of two-piece chin implants was not within the standard of care and are rarely, if ever, used.

In her bill of particulars as to the Greenberg defendants, the plaintiff alleged that Greenberg selected the wrong size for the chin implant, failed to provide her with a pointy chin, placed a chin implant of a size and shape to which she had not consented, failed to create an anatomically correct and stable mandibular contour from the chin implant, failed to educate her about the size of the chin implant that he would use, failed to use sizers, failed to use proper criteria to decide the size of the chin implant, and considered, without discussing with her, that a rounded chin would be more aesthetically pleasing than the chin which plaintiff had at the time that she saw Greenberg. Dr. Hamilton-Hall concluded that all of those claims lacked merit. She averred that Greenberg, both verbally and in writing, discussed the chin implant and lengthening with the plaintiff, and took appropriate steps to achieve the best result by fashioning a custom chin implant for a better contour than would be achieved using a stock implant. She further stated that, when using a custom chin implant, the use of sizers is not appropriate, as the size is already determined prior to the surgery. According to Dr. Hamilton-Hall, Greenberg also made a 3D model and "wax up," thus providing the plaintiff with a very good representation of what the implant would look like, including its shape and size.

Dr. Hamilton-Hall criticized the plaintiff for claiming that Greenberg departed from good practice both in failing to fashion a 3D model of her chin prior to the surgery, and ordering an acrylic 3D model when the plaintiff claimed it was unnecessary. She stated that, however, the

"plaintiff is also claiming that Dr. Greenberg failed to show plaintiff the fiberglass model and that he failed to make a plastic model. Dr. Greenberg testified that he transported the model to Dr. Rose's office to show plaintiff. Obviously, all these claims contradict one another and are without merit."

With respect to the mentalis muscle, Dr. Hamilton-Hall rejected the plaintiff's claims, set forth in her bill of particulars, that Greenberg damaged that muscle during the placement of the chin implant, failed to consider that the mentalis muscle had been stripped away or cut by dentist and oral and maxillofacial surgeon L. Douglas Trimble, M.D., D.M.D., during her August 8, 2006 surgery, failed to inform the plaintiff that the mentalis muscle can cause dimples to the skin when elevating and protruding the lower lip, failed to properly re-suspend the mentalis muscle, and failed to follow the "Zide-McCarthy standards" for re-suspending the mentalis muscle. She asserted that these claims "seem to contradict one another and they are all meritless." As Dr. Hamilton-Hall characterized it, following the surgery, the plaintiff's lower lip competence and ptosis had improved, thus defeating the claim that Greenberg had damaged her mentalis muscle function. She asserted that Greenberg correctly re-suspended it and, as such, it could not previously have been "stripped away or cut" by Dr. Trimble. Furthermore, she explained that, while the Zide-McCarthy technique can be utilized in the re-suspension of a mentalis muscle, "each patient is taken on a case-by-case basis and it is fully acceptable to use another technique to achieve the best result for the patient." Dr. Hamilton-Hall asserted that Greenberg appropriately employed his medical judgment in declining to employ the Zide-McCarthy protocol, which involves the surgical resuspension of the mentalis muscle by drilling holes through the alveolar bone, and then using sutures to tighten the lower mentalis muscles, and instead employing a technique that was within the applicable standard of care. She further opined that chin dimpling is an expected consequence of any chin implant surgery. Dr. Hamilton-Hall also rejected the plaintiff's contention that Greenberg committed malpractice by failing to fill the divot in the plaintiff's chin with bone or by screwing in solid material/medpor, as she "did not see any unacceptable bony defect, nor indication that bone grafting was indicated."

Dr. Hamilton-Hall opined that Greenberg obtained the plaintiff's fully informed consent to the chin implant procedure, as he discussed the risks and benefits of, and alternatives to, the procedure with her, and, prior to the surgery, the plaintiff wrote Greenberg a letter asking

questions and asking for further clarification, with respect to the shape and length of the chin. She stated that Greenberg answered the plaintiff's questions in writing, and further explained the procedure and reasoning to the plaintiff, specifically stating that he would be lengthening the chin. Moreover, Dr. Hamilton-Hall noted that the Greenberg defendants showed her a 3D stereolithographic model of her jaw and a prototype, and asserted that the plaintiff, in her deposition testimony, admitted that she signed Greenberg's consent form, which informed the plaintiff that there was a risk of retreatment or failure. Dr. Hamilton-Hall also concluded that "it was very likely for a reasonable person in plaintiff's position to consent to the procedure performed by Dr. Greenberg due to her severe lip ptosis and dissatisfaction with the appearance of her chin."

Dr. Hamilton-Hall evaluated the plaintiff on September 25, 2013, almost five years after the subject procedure, after which she concluded that the plaintiff's lip incompetence and chin symmetry "were improved compared with the pre-op photos" and that "[t]here was no evidence of any worsening of damage or a less aesthetic outcome when compared to the photos taken before and after the surgeries performed by Dr. Trimble." According to Dr. Hamilton-Hall, during her examination of the plaintiff, the plaintiff admitted that she "does not feel that she looks worse than when she came to New York to undergo maxillofacial surgery by Dr. Greenberg and was just disappointed that they had not improved her appearance as much as she would have hoped." Dr. Hamilton-Hall thus concluded that there was no merit to the plaintiff's claims that Greenberg performed surgery that left plaintiff with a severe deformity of her face and chin, made the plaintiff's chin too long and too wide, or failed to provide the plaintiff with a feminine chin. She further concluded that Greenberg provided appropriate and sufficient surgical care, and sufficiently cared for the plaintiff's facial structure, bone structure, and facial and dental condition. In this regard, Dr. Hamilton-Hall opined that none of the injuries claimed by the plaintiff were causally related to any treatment that Greenberg had rendered to her, and that any dissatisfaction with the cosmetic outcome was not indicative of malpractice.

In opposition to the Greenberg defendants' motion, the plaintiff submitted the same expert affidavit that she had submitted in opposition to the motion of their codefendants. The expert, who had performed chin implants and was board certified in facial plastic surgery, otolaryngology-head and neck surgery, and cosmetic surgery, opined that Greenberg, "despite preparing an expensive and unnecessary three-dimensional stereolithographic 3D model," departed from the standard of care by "surgically placing a grossly large improperly sized implant." The expert further concluded that Greenberg departed from the standard of care by using 1.3 mm x 8 mm screws for the mono-cortical fixation of the "grossly large and hideous chin implant placed by Dr. Greenberg." He averred that the post-operative photographs demonstrated not only the excessive size of the implant, but the indentation of the left cheek caused by the fascia lata slings surgically placed by Rose, as well as an unacceptable shift of the implant to the lower left side and "a palpable step-off on the left side of the chin." The plaintiff's expert concluded that Greenberg departed from the standard of care by choosing and installing an implant of excessive size, inadequately fixing the implant with screws of an improper length, and improperly performing the implant so as to cause delayed shifting. The plaintiff's expert also noted the presence of a "serious discrepancy" between Greenberg's operative note and the perioperative record in the Mount Sinai Hospital records, the latter of which states that Greenberg actually employed 6 mm, rather than 8mm, screws to fix the chin implant.

The expert concluded that these departures caused or contributed to an objectively improper appearance and a shifting of the implant. The plaintiff's expert, however, did not address any of the Greenberg defendants' other alleged departures, as set forth in the plaintiff's bill of particulars and as analyzed in Dr. Hamilton-Hall's affirmation. Nor did the plaintiff's expert address the issue of informed consent as it related to the Greenberg defendants, as analyzed in Dr. Hamilton-Hall's affirmation.

In reply, the Greenberg defendants submitted an additional affirmation from Dr. Hamilton-Hall, who essentially reiterated the opinions set forth in her initial affirmation, and disagreed with the conclusions and opinions set forth in the affidavit of the plaintiff's expert.

The legal standards applicable to summary judgment motions in dental malpractice actions, as well as the rules for vicarious liability that may be imposed upon a practitioner's professional corporation, were analyzed in great detail in this court's February 13, 2024 order deciding Motion Sequence 012. The Greenberg defendants established their prima facie entitlement to judgment as a matter of law in connection with both the medical malpractice and lack of informed consent causes of action. In opposition, the plaintiff only raised triable issues of fact as to whether the Greenberg defendants departed from good and accepted dental practice by employing an excessively large implant and improperly sized fixation screws, and whether those departures caused or contributed to the plaintiff's injuries. Hence, the Greenberg defendants' motion must be granted to the extent of awarding them summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them, and so much of the medical malpractice cause of action against them as was premised on claims other than the placement of an excessively large implant and the employment of improperly sized fixation screws, and the motion must otherwise be denied.

Accordingly, it is,

ORDERED that the motion of the defendants Alex M. Greenberg, D.D.S., P.C., and Alex M. Greenberg, D.D.S., is granted to the extent that they are awarded summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them, and so much of the medical malpractice cause of action insofar as asserted against them as was premised on claims other than the placement of an excessively large chin implant and the employment of improperly sized fixation screws, those claims are dismissed insofar as asserted against them, and the motion is otherwise denied; and it is further,

ORDERED that the parties to this action shall appear for an initial in-person pretrial conference on March 13, 2024, at 10:00 a.m., in Room 204, 71 Thomas Street, New York, New York 10013, at which time the court shall set a firm date for the commencement of jury selection, and at which time the parties shall be prepared to engage in preliminary discussions concerning the resolution of the action.

This constitutes the Decision and Order of the court.

2/13/2024
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE