

Jones v Lascano
2024 NY Slip Op 35327(U)
March 11, 2024
Supreme Court, Bronx County
Docket Number: Index No. 25833/2017E
Judge: Joseph E. Capella
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23**

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CHRISTOPHER JONES,

Plaintiff,

-against-

ARMANDO LASCANO D.P.M., JOHN A. DEBELLO D.P.M.,
CAILIN MAKAR D.P.M., NEW YORK FOOT CARE
SERVICES, PLLC, and SURGI CARE AMBULATORY
CARE CENTER, INC.,

Defendants.
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Index No.: 21614/14E

Decision/Order

PAPERS	NUMBERED
Notice of Motion and Affidavit Annexed -----	1
Answering Affidavit and Exhibits -----	2
Replying Affidavit and Exhibits -----	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DECIDED AS FOLLOWS:

By notice of motion defendant, Armando Lascano, D.P.M. (Dr. Lascano), moves for summary judgment (CPLR 3212) dismissal of plaintiff's complaint as against him. Plaintiff alleges causes of action for podiatric malpractice by Dr. Lascano in his treatment and performance of a surgery on August 11, 2015, and lack of informed consent. Plaintiff first sought treatment from Dr. Lascano for pain related to his bunions on May 18, 2015. After months of conservative treatment, plaintiff chose to proceed with the following surgical procedures: closing base wedge osteotomy with screw and k-wire fixation of the first metatarsal of the right foot, arthrodesis with k-wire fixation of the second right digit, fluoroscopy and post-operative injection to the right foot, and application of a below knee cast. Plaintiff alleges that the care provided by Dr. Lascano

deviated from the accepted standards of podiatric medical practice causing him to suffer serious and permanent personal injuries. The initial burden is on defendant to make a prima facie showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If he does, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*id.*), and denial of summary judgment.

According to movant's expert, Dr. Michael Trepal, D.P.M., a physician who is a Diplomate of the American Board of Podiatric Surgery, the care Dr. Lascano rendered to plaintiff comported with good and accepted podiatric practice, did not deviate from the standard of care and was not a proximate cause of the alleged injuries. Movant's expert opines that Dr. Lascano complied with good and accepted standards of podiatric medicine in identifying a painful bunion deformity on plaintiff's right foot, along with a painful hammertoe deformity in the second right digit. Dr. Trepal also opines that Dr. Lascano used good and proper surgical technique in the August 11 surgery and that the surgery was appropriate to address Dr. Lascano's objective findings and plaintiff's complaints. Dr. Trepal details the reasoning behind the August 11 surgery, explaining that a closing base wedge osteotomy with screw and k-wire fixation of the first metatarsal realigns and stabilizes the metatarsal in the transverse plane, arthrodesis with k-wire fixation of the second digit is designed to realign and stabilize the toe, fluoroscopy is utilized to provide real time visualization of the intraoperative corrections, post-operative

injection of medication is intended to manage post-operative pain, and application of a below the knee cast is necessary to protect and stabilize the surgical correction. Dr. Trepal avers that Dr. Lascano acted in accordance with podiatric medical standards in his post-operative treatment of plaintiff, who presented as a normal post-operative patient with no signs of substantive or significant complications.

Dr. Trepal opines that any attempt to attribute the alleged medical problems, conditions, or foot injuries allegedly sustained by plaintiff to the care and treatment provided by Dr. Lascano is entirely without medical basis or foundation. Furthermore, he opines that any number of complications and even disability can occur in any patient as the result of having undergone surgery, despite the use of proper surgical technique and proper post-operative care. Finally, in his expert opinion, Dr. Trepal indicates that Dr. Lascano discussed the complications, risks and alternatives with plaintiff and provided conservative treatment options. In Dr. Trepal's expert opinion, plaintiff executed a consent form indicating that he understood the August 11 surgery and Dr. Lascano obtained the necessary informed consent for the procedures. Based on the aforementioned, the court is satisfied that movant has met his burden of producing evidentiary proof in admissible form sufficient to establish an entitlement to summary judgment. (*Zuckerman v City of NY*, 49 NY2d 557 [1980].) The burden now shifts to plaintiff to submit proof in admissible form sufficient to create issues of fact to warrant a trial (*Sillman v Twentieth Century-Fox*, 3 NY2d 395 [1957]).

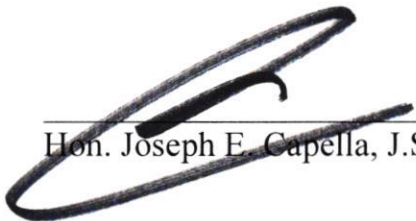
In opposition, plaintiff provides an expert affirmation by a physician who is a Diplomate of the American Board of Podiatric Surgery. At the outset, as plaintiff failed to address or oppose the portion of defendant's motion regarding informed consent, that claim is deemed abandoned and dismissed. (*Saidin v Negron*, 136 AD3d 458 [1st Dept 2016].) Plaintiff's expert alleges new theories of liability for the first time in plaintiff's opposition; specifically, that Dr. Lascano should have performed an Akin and metatarsal osteotomy and that he failed to achieve a four- or five-degree post-operative angle. These new theories of liability were not set forth in the complaint or bills of particulars. Accordingly, they are being improperly raised for the first time in opposition to the instant summary judgment motion and are insufficient to meet plaintiff's burden to create issues of fact to warrant a trial. (*Ostrov v Rozbruch*, 91 AD3d 147 [1st Dept 2012].) The remainder of plaintiff's opposition fails to rebut Dr. Lascano's prima facie showing of entitlement to summary judgment. Plaintiff's expert fails to provide any evidence as to why the procedures performed by Dr. Lascano departed from good and accepted podiatric practice, instead the expert repeatedly engages in hindsight reasoning. For example, according to plaintiff's expert, "...the following actions represent deviations from the standard of care: In causing and allowing there to be an intermetatarsal angle of one degree following the performance of surgeries...." However, this opinion appears to be based on the end result, without any description as to what was done, or not done, negligently to create this issue. The affirmation of plaintiff's expert is devoid of analysis or reference to scientific data and offers no opinion as to causation. (*Rodriguez v*

Waldman, 66 AD3d 581 [1st Dept 2009].) Plaintiff failed to create a triable issue of fact sufficient to warrant a trial (*id.*), accordingly, the instant summary judgment motion is granted and the complaint is dismissed as against Dr. Lascano.

Movant is directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. The county clerk is directed to enter judgment accordingly. This constitutes the decision and order of this court.

March 11, 2024

Dated



Hon. Joseph E. Capella, J.S.C.