

Beatrice v Biondo

2012 NY Slip Op 30423(U)

February 24, 2012

Supreme Court, New York County

Docket Number: 106235/09

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

MARIESE BEARDUCI

- v -

RONALD BIONARDI, DAS

INDEX NO. 106235/09

MOTION DATE 11/22/11

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1314

15-18

19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

FEB 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/24/12

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
NANETTE BEATRICE,

Plaintiff,

Index No. 106235/09

-against-

Decision and Order

RONALD BIONDO, D.D.S.,

Defendant.

-----X
RONALD BIONDO, D.D.S.,

Third-Party Plaintiff,

FILED

FEB 27 2012

-against-

NEW YORK
COUNTY CLERK'S OFFICE

THEODORE AARONSON, D.D.S.,

Third-Party Defendant.

-----X
JOAN B. LOBIS, J.S.C.:

By this motion, third-party defendant Theodore Aaronson, D.D.S., moves, by order to show cause, for an order granting him summary judgment, pursuant to C.P.L.R. Rule 3212, on the basis that there is no evidence that he departed from accepted standards of care and that there is no evidence that the treatment he rendered was the proximate cause of any injury sustained by plaintiff Nanette Beatrice. Defendant and third-party plaintiff Ronald Biondo, D.D.S., opposes the motion, alleging that the work done by Dr. Aaronson was improper and a proximate cause of plaintiff's injuries. Plaintiff has taken no position on Dr. Aaronson's motion.

Plaintiff began consulting with Dr. Aaronson on December 4, 2006, for problems she had with ill-fitting upper dentures. She was dissatisfied with her removable denture, so Dr. Aaronson suggested that she consider dental implants. She consulted with dentists at the New York

University Dental Clinic in January 2007. Dissatisfied with the course of treatment suggested there, she sought out other dentists. Through an organization called Care Credit, a financing company that provides health care loans, she obtained the name of Dr. Biondo. She first saw him on February 1, 2007, and agreed to have him place four implants in her mouth which would enable her to have non-removable dentures. Early in the treatment, Dr. Biondo questioned whether plaintiff could have the necessary implants done without a bone graft because of significant bone loss in her upper jaw. Plaintiff opposed the procedure involving a bone graft, so Dr. Biondo devised a plan for four (4) implants at the locations of teeth numbers 5, 6, 11, and 12, but ultimately placed the implants at teeth numbers 5, 7, 9, and 10¹ due to the quality and quantity of her upper maxilla, without utilizing a graft. Dr. Biondo performed the surgery on March 15, 2007, and plaintiff was to follow up with him.

As the work was being done by Dr. Biondo, plaintiff was also treating with Dr. Aaronson. Plaintiff's removable dentures needed to be adjusted for fit while Dr. Biondo's work was ongoing. While the implants were healing, Dr. Aaronson performed a soft relining adjustment, by putting silicone padding inside plaintiff's denture, so that plaintiff would be more comfortable. Once the implants were established, Dr. Aaronson would do the restorative dentistry, creating a new denture that would attach to the implants.

After several follow-up appointments in April, May, and June 2007, the implant at tooth number 5 failed and Dr. Biondo removed it on July 5, 2007. On August 20, 2007, a fractured

¹ At times, the record refers to implants at different teeth locations. The numbers assigned to the implants are not always consistent. There is no significance to the different teeth numberings for the purposes of this motion.

screw was replaced and a healing abutment at tooth number 8 was also replaced. During visits in October and November 2007, plaintiff seemed to be progressing without incident. On December 17, 2007, however, plaintiff returned to Dr. Biondo with a fractured healing abutment. On plaintiff's next visit on January 2, 2008, fractured threads were removed and the healing abutment was replaced at tooth number 9 and an additional implant was done at the location of tooth number 5. On a return visit on January 28, 2008, another healing abutment, probably at tooth number 10, was missing, and new cover screws were inserted. Visits on February 13 and March 11 were unremarkable. On May 1, 2008, a healing abutment was placed at the location of tooth number 5. In June, plaintiff was scheduled for a follow-up for a new healing abutment. She was seen twice in July, but it is not clear from the record whether a new abutment was inserted. She had her last appointment with Dr. Biondo on July 19, 2008, and Dr. Aaronson began fashioning the new prosthetic.

From the period after the implants in March 2007, Ms. Beatrice was seen by Dr. Aaronson for adjustments of her old upper denture approximately fifteen times. Once Dr. Aaronson started the new restorative work, impressions were taken and fittings were done using three of the four implants to support the new denture. Dr. Aaronson was unable to use the implant at tooth number 8 because of the angle. On October 2, 2008, a new final upper denture was placed. By October 21, 2008, plaintiff returned and advised Dr. Aaronson that the implant at tooth number 5 had failed. Because of bleeding at teeth numbers 9 and 10, Dr. Aaronson referred plaintiff to Dr. Maurice Edwards, a periodontist, on or about October 27, 2008. In a referral letter back to Dr. Aaronson, Dr. Edwards indicated the possible loss of the implants and the continuation of bone loss associated with two implant fixtures. Ms. Beatrice's next visit to Dr. Aaronson was on March 2,

2009, because her upper denture had fractured. By this time, only two implants supported her denture. On June 9, 2009, a crack in the upper denture was repaired. The denture was returned to the lab on August 3, 2009, and placed back in plaintiff's mouth on August 12, 2009. Adjustments were made on August 28, 2009. On October 12, 2009, Dr. Aaronson noted that plaintiff was a "grinder" and that she kept her upper denture in her mouth overnight. On November 19, 2009, Dr. Aaronson noted that the implant at tooth number 9 was falling. Plaintiff was referred to Dr. Clifford Salin for extraction of the implant. At a visit on February 8, 2010, plaintiff advised Dr. Aaronson that another implant had been removed. By a visit on March 24, 2010, the upper denture was supported by only one implant. On May 25, 2010, plaintiff complained that the implant at tooth number 10 was loose and she called Dr. Aaronson on June 1, 2010, to inform him that the fourth implant had fallen out.

In support of Dr. Aaronson's motion, he offers the affidavit of Stewart K. Lazow, D.D.S., M.D., F.A.C.S., a diplomat of the American Board of Oral and Maxillofacial Surgery. Having reviewed the relevant medical and dental records, x-rays, pleadings, and party depositions, he opines that the implants failed because of the poor quality of plaintiff's bone. In support, he points out that the first implant in tooth number 5 had failed before Dr. Aaronson had begun his restoration work. Moreover, Dr. Biondo had identified plaintiff's bone quality as an issue and he advised plaintiff that the replacement could also fail due to poor quality of the bone. Dr. Lazow asserts that the failure of the implants was not caused by anything done by Dr. Aaronson.

While not conceding that Dr. Aaronson has made a prima facie showing and continuing his objection to the timeliness of this motion, in opposition, Dr. Biondo offers the opinion

of his expert (name redacted), a board certified oral and maxillofacial surgeon. Dr. Biondo's expert also reviewed the relevant dental records and party depositions. It is Dr. Biondo's expert's opinion that the concurrent and subsequent restorative care by Dr. Aaronson was designed and executed in breach of accepted standards of care, and that those breaches proximately caused plaintiff's injuries. The expert opines that the attachment between the upper denture and the implants was improperly designed, placing undue stress on the implants and causing them to fail. The expert further opines that Dr. Biondo's claim that Dr. Aaronson's care deviated from the standard of care and proximately caused injury to plaintiff is supported by plaintiff's repeated removal of the dentures, the number of adjustments done shortly after the implantation, and the continuing need for adjustments. The expert opines that Dr. Aaronson also used an improper attachment in fashioning the prosthetic. For all those reasons, Dr. Biondo argues that Dr. Aaronson should not be granted summary judgment.

In reply, Dr. Aaronson argues that Dr. Biondo's expert has failed to defeat his motion for summary judgment. He points out that Dr. Biondo's expert never saw Ms. Beatrice. Further, he argues that the expert's opinions are mere conclusions unsupported by authority or evidence. Dr. Aaronson argues that the lack of merit to the claims against him is underscored by Dr. Biondo's own deposition testimony, in which he stated that causation was impossible to discern. Therefore, Dr. Aaronson argues that Dr. Biondo's expert's opinions are speculative and insufficient to create a factual dispute for trial.

As established by the Court of Appeals in Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) and Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and as has

recently been reiterated by the First Department, it is “a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [he or she] is entitled to judgment as a matter of law.” Ostrov v. Rozbruch, ___ A.D.3d ___, 2012 N.Y. Slip Op. 22, **9-10 (1st Dep’t January 3, 2012), citing Winegrad, 64 N.Y.2d at 853. In a malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, 70 A.D.3d 654 (2d Dep’t 2010). The failure to meet this burden mandates the denial of the application, “regardless of the sufficiency of the opposing papers.” Winegrad, N.Y.2d at 853. However, once a movant meets this burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, at **10, citing Alvarez, 68 N.Y.2d at 324. Summary judgment is a drastic remedy, “which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court.” Gibson v. American Export Isbrandsten Lines, Inc., 125 A.D.2d 65, 74 (1st Dep’t 1987) (internal citations omitted).

Here, Dr. Lazow opines that the cause of plaintiff’s injuries was the failure of the implants due solely to the condition of her maxillary. The record has repeated mention of the problems with the quality and quantity of her bone. This opinion is sufficient to make out a prima facie claim of entitlement to summary judgment. However, Dr. Biondo’s expert has expressed sufficient detail regarding the number of adjustments and the history of failure of the new prosthetic to raise factual issues that are the province of a jury. It is well settled that a battle of experts, such

as is presented here, raises issues that must be resolved by a fact finder and which preclude summary judgment. Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009); Barnett v. Fashakin, 85 A.D.3d 832 (2d Dep't 2011); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623, 624 (2d Dep't 2003). Accordingly, it is hereby

ORDERED that defendant Theodore Aaronson, D.D.S.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on March 20, 2012, at 9:30 a.m.

Dated: February 24, 2012

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

FEB 27 2012

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