Cosentino v Agban
2006 NY Slip Op 30822(U)
May 1, 2006
Supreme Court, New York County
Docket Number: 100938/04
Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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SALVATORE COSENTINO,

Plaintiff,

-against-

GALAA M. AGBAN, M.D.,

Defendants.

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Index No. 100938/04
Motion Date: 4/25/06
Motion Seq. No.: 003

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendant Galaa M. Agban, M.D. ("Dr. Agban") moves for summary judgment dismissal of the action commenced by plaintiff Salvatore Cosentino ("Mr. Cosentino"). There is no opposition to the motion.

Background

In December 1999, Mr. Cosentino presented to Dr. Agban for a consultation regarding corrective septorhinoplasty (corrective nasal surgery). Affirmation in Support of Motion ("Aff."), at ¶ 6. On November 20, 2000, Mr. Cosentino returned to Dr. Agban to further discuss septorhinoplasty and also to inquire about augmentation mentoplasty (chin augmentation). *Id.* Mr. Cosentino signed informed consent forms for both procedures at this visit. *Id.*

On January 3, 2001, Dr. Agban performed septorhinoplasty and augmentation mentoplasty on Mr. Cosentino at Park Ridge Hospital. Aff., at ¶ 7. Specifically, the medical

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records set forth that Dr. Agban inserted a silastic chin implant into Mr. Cosentino's chin. *Id.*

Mr. Cosentino last visited Dr. Agban on January 29, 2001. Aff., at ¶ 8. He claims that in 2003, he discovered foreign material – namely, bone – in his chin. Aff., at ¶ 19.

In this medical malpractice action commenced on January 21, 2004, Mr. Cosentino alleges that Dr. Agban negligently implanted bone in his chin, causing swelling and requiring corrective surgery. Aff., at ¶¶ 4,8.

Dr. Agban now moves for summary judgment dismissal of Mr. Cosentino's claims against him, arguing that they are barred by the statute of limitations because this action was commenced more than two years and six months from the date of Mr. Cosentino's last visit. Aff., at ¶ 15. Furthermore, Dr. Agban asserts that Mr. Cosentino's chin implant and its related material cannot be the basis for invoking the "foreign object" toll to the statute of limitations. Aff., at ¶ 17.

In support of his motion, Dr. Agban submits his own affidavit, in which he opines to a reasonable degree of medical certainty that he placed only silastic implant in Mr. Cosentino and did not implant epoxy, cement or bone. Aff., Ex. L, at ¶ 7.

Plaintiff submits no opposition in response to Dr. Agban's motion for summary judgment dismissal.

Indeed, over a nine-month period the Court adjourned the case five times to allow Mr. Cosentino time to find an expert or an attorney. On each occasion, the Court not only explained the process of prosecuting a medical malpractice action to Mr. Cosentino, who appeared *pro se*, the Court also adjourned the case to give him an opportunity to fully investigate his claim.

Finally, on April 25, 2006, Mr. Cosentino appeared *pro se* and explained that no attorney was willing to take his case, he did not wish to pursue the matter any further, and he had no opposition to the motion.

Analysis

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68

N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.*, at 324.

In response to the movant's *prima facie* showing, the opponent of summary judgment must present medical evidence that defendant physician departed from good and accepted medical practice, *Lyons v. McCauley*, 252 A.D.2d 516 (2d Dept. 1998), *lv denied* 92 N.Y.2d 814, and that defendants' wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dept. 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dept. 2003). This evidence must generally be adduced through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003).

An action for medical malpractice must be commenced within two years and six months from the date of the alleged malpractice except that when the action is "based on discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." CPLR 214-a. The statute goes on to explain that a "foreign object" does not include a "chemical compound, fixation device or prosthetic aid or device." CPLR 214-a. The Court of Appeals further explained in *Rockefeller v. Moront*, 81 N.Y.2d 560 (1993), that a "foreign object" is an item that is "introduced into the patient's body to serve a temporary medical function for the duration

of the surgery, but intended to be removed after the procedure's completion." *Id.*, at 564; *see also, LaBarbera v. New York Eye and Ear Infirmary*, 91 N.Y.2d 207, 208-09 (1998) (nasal stent left in patient for six years following nasal reconstruction surgery not "foreign object"); *Newman v. Keuhnelian*, 248 A.D.2d 258, 260 (1st Dept. 1998) (piece of broken catheter left in urethra for ten years constituted "fixation device," not "foreign object"), *lv denied* 92 N.Y.2d 804.

Here, Dr. Agban submitted sufficient proof to demonstrate a *prima facie* showing of entitlement to judgment as a matter of law by establishing that Mr. Cosentino last met with him on January 29, 2001, more than two-and-a-half years before filing the summons and complaint. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. Further, Dr. Agban concludes to a reasonable degree of medical certainty that he did not implant any foreign object into Mr. Cosentino's chin. He argues, therefore, that Mr. Cosentino's claims are not subject to the "foreign object" statute of limitations exception.

Plaintiff does not oppose this conclusion. Dr. Agban's clear showing of entitlement to judgment as a matter of law and the lack of opposition to the motion warrant granting the motion for summary judgment. Plaintiff's claims are thus dismissed.

Accordingly, it is

ORDERED that Dr. Agban's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 1, 2006

ENTER

Hon. Eileen Bransten