

Leonardi v Total Dental Care of Farmingville, LLP

2011 NY Slip Op 32120(U)

August 2, 2011

Sup Ct, Suffolk County

Docket Number: 09-13508

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5-9-11
ADJ. DATE 5-25-11
Mot. Seq. # 002 - MD

-----X
DANIEL LEONARDI, :
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 :
 Plaintiff, :
 :
 - against - :
 :
 TOTAL DENTAL CARE OF FARMINGVILLE, :
 LLP, and EUGENE G. HERMAN, D.M.D., P.C., :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18-2; Replying Affidavits and supporting papers 23-25; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (002) by defendants, Total Dental Care of Farmingville, LLP and Eugene G. Herman, D.M.D., P.C., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint is denied.

In this action for dental malpractice, the plaintiff, Daniel Leonardi, alleges that on or about June 5, 2007 through August 15, 2007, he came under the care of the defendants, Total Dental Care of Farmingville, LLP and Eugene G. Herman, D.M.D., P.C., for the purpose of having dental work performed on his teeth. It is claimed that the defendants negligently rendered dental care and treatment to him, causing him to suffer pain and injuries, including injury to his left lingual nerve, and further failed to provide him with proper informed consent.

The defendants seek summary judgment dismissing the complaint on the bases that they obtained the plaintiff's informed consent and that they did not depart from good and accepted standards of dental practice which proximately caused the injuries of which the plaintiff complains.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790

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[1979]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff’s injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert’s affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant’s acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In support of motion (004), the defendants have submitted, inter alia, an attorney’s affidavit, the expert affidavit of Allan Kucine, DDS; the affidavit of Eugene G. Herman, DMD; the affirmation of Jay Fensterstock DDS on behalf of Total Dental Care; copies of the summons and complaint, answer, and the plaintiff’s verified bill of particulars; letter date June 10, 2010; a copy of the plaintiff’s dental records; informed consent dated July 7, 2007 for oral surgery for the extraction of four wisdom teeth; the unsigned transcripts of the examinations before trial of Daniel Leonardi dated April 27, 2010 and Stacey Saturnino, DDS dated January 28, 2011 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]). are not in admissible form, are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. While the deposition transcript of Eugene Herman, dated August 18, 2010, is unsigned, it is considered by this court as adopted as accurate by the moving defendant (*see, Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Dr. Eugene Herman has submitted an affirmation instead of an affidavit as required pursuant to CPLR 2106, as he is a party to the action (*Slavenburg Corporation v Opus Apparel, Inc.*, 53 NY2d 799, 439 NYS2d 910 [1981]; *see also, In the Matter of Lisa Nazario v Ciafone*, 65 AD3d 1240, 887 NYS2d 117 [2d Dept 2009]; *Worthy v Good Samaritan Hospital Medical Center*, 50 AD3d 1023, 857 NYS2d 178 [2d Dept 2008]). The affirmation would be deemed inadmissible, however, it is

noted that it has been notarized, but Dr. Herman has not sworn to the truth of his statements contained therein. Even if the affirmation were in proper affidavit form, it is determined that Dr. Herman has not demonstrated entitlement to summary judgment dismissing the complaint asserted against him.

Eugene Herman testified to the extent that he is licensed to practice dentistry in New York State, but is not board certified, having three failed attempts at certification. In 2007, he worked as an independent contractor with a group of dentists in Farmingville, but was not a partner. His primary office is in Rockville Centre and he has other satellite offices. He had no independent recollection of Daniel Leonardi. Upon reviewing his office records, he continued that he first saw Mr. Leonardi as a patient on July 23, 2007. He reviewed a panoramic x-ray dated June 5, 2007 which revealed Mr. Leonardi had two lower wisdom teeth that were partially bony impacted, a full bony impaction of the right upper wisdom tooth, and a malposed non-functional upper left wisdom tooth. He did not note any complaints concerning a third molar. The treatment plan written in the chart, entered by another dentist in the practice, was to extract the four wisdom teeth. Dr. Herman testified that he obtained a signed consent from Mr. Leonardi. The consent contained the potential complications of the procedure, including the risk that "lower tooth roots may be close to the nerve and surgery may result in numb feeling of the chin, lips, gum, tongue, which may last for weeks and rarely be permanent." He stated he explained the reasons why the procedure was being recommended.

Dr. Herman testified that with respect to the lower third molar extraction, it was not acceptable, or within the standard of care, to use dental instruments on the lingual side of the tooth. He continued that he did not employ any instruments on the lingual side of Mr. Leonardi's mouth. During the extraction of the subject tooth, he used a surgical dental bur, a number 15 blade scalpel, a periosteal elevator, a dental or surgical hand piece with a round bur, an 11-A elevator, upper universal forceps, a dental curette, a needle holder, a suture, and scissor to cut the suture. He described the procedure and stated that the pressure of the forceps was applied on both the lingual and buccal side of the tooth, but the tooth was elevated above the gingival tissue. He did not remember if he sectioned tooth #17, and stated that he only sections the tooth if the tooth does not elevate after he makes the incision and removes the bone. The hand piece and the bur were used on the cheek side just to the back side of the tooth to give the tooth room to elevate. He did not use the hand piece or bur on the lingual side as the bone was not high on that side.

Dr. Herman testified that the lingual nerve is generally located within the soft tissue overlying the medial surface of the mandible, and that there are several causes for alteration of a lingual sensation. He stated that simply an injection can cause it if there is an anatomical variance in the position of the nerve, that is, whether the nerve is low or high. He continued that the for injection for this procedure is distally, behind the third molar. Manipulation of the tooth can also cause alteration of the lingual sensation if the nerve is high or if there is swelling in the area. Instruments can cause injury to the lingual nerve during extraction. Stretching can also cause injury to the lingual nerve during extraction. Once the tooth is removed, the bone can rub against the nerve, or the root of the tooth could touch the nerve. He continued that you won't see the nerve as it will always be encased. It is not visible on an x-ray.

Dr. Herman stated that a permanent loss of taste after extraction of a third molar could be caused by injury to the lingual nerve, but he thought that there could be other causes as well, such as a tumor or neuroma in the lingual nerve, which would be a pathological condition. He thought a neuroma could be caused by trauma or by a natural event. He stated that tooth # 17 is in the lower left side of the mouth and is the last molar at the back of the mouth. To avoid injury to the lingual nerve when extracting that tooth, instruments are not taken to the lingual side, the tooth is not elevated to the lingual, there is no cutting with a bur to the lingual, and the blade is not taken to the lingual when the incision is made. He did not note any anatomical anomalies prior

to the procedure. He assumed the lingual nerve was in its normal position with a ten percent variation. He stated that because the lingual nerve is covered by tissue, he does not look to observe the lingual nerve. Dr. Herman continued that he made no determination at any subsequent treatment or visit whether the lingual nerve was in a location other than its normal anatomical location. Mr. Leonardi's surgery was no more difficult than generally expected, and he did not record anything unusual that occurred during this particular surgery.

Dr. Herman further testified that Mr. Leonardi returned to the office on July 24, 2007, the day after the surgery, complaining of numbness of the "lower left." He did not see Mr. Leonardi at that visit, however. On July 27, 2007, Mr. Leonardi returned to the office and was seen by Dr. Herman. Sutures were removed and the site was noted to be healing well. Mr. Leonardi complained of "altered sensation, left tongue and lingual gingerol." He was to be followed up in one week. On August 10, 2007, Dr. Herman noted Mr. Leonardi to be much improved and that the numbness was getting better. His note indicated that "Point and feeling in the posterior third of the tongue." Dr. Herman stated that there was "[l]ess in the anterior half of the tongue...but responds." Mr. Leonardi never returned to the office after that visit. Dr. Herman testified that he did not have the opportunity to refer Mr. Leonardi to a health care practitioner concerning the altered sensation, but would have done so in a month's time if the condition continued.

Allan Kucine, DDS has set forth in his affirmation that he is a dentist duly licensed to practice dentistry in New York in the area of oral and maxillofacial surgery. He states he reviewed the plaintiff's dental records, deposition transcripts and the pleadings, and also conducted a physical examination of the plaintiff, Daniel Leonardi, on June 10, 2010. He sets forth his opinions with a reasonable degree of dental certainty. He states that Daniel Leonardi, a 28 year old male, presented to the offices of Total Dental Care of Farmingville, LLP on June 5, 2007 for an initial evaluation. On July 6, 2007, he was referred by the non-party treating dentist, Dr. Stacey Santornino to Dr. Eugene Herman for oral surgery consultation. Upon examination, Dr. Herman recommended that the plaintiff proceed with extraction of four impacted wisdom teeth, including tooth #17.

It is Dr. Kucine's opinion that Dr. Herman properly examined and evaluated the plaintiff during the consultation appointment and properly concluded that the plaintiff was a candidate for wisdom tooth extractions, and that it was within the standard of care to recommend extraction of the impacted teeth, including tooth #17. He further opines that Dr. Herman did not depart from acceptable standards of practice in his recommendation to extract asymptomatic impacted wisdom teeth to prevent periodontal disease, dental caries, and infection of the soft tissue in and around the area. Dr. Kucine opines that Dr. Herman obtained the plaintiff's informed consent prior to beginning the extraction procedure, and that the informed consent for oral surgery provided the plaintiff with the known risks of the procedure, which the plaintiff read, initialed, signed, and dated. Dr. Kucine continues that Dr. Herman disclosed to Mr. Leonardi the alternative treatment options and the reasonably foreseeable risks and benefits involved in the extractions.

Dr. Kucine opines that it was within the standards of care for Dr. Herman to proceed with the extraction procedure and that he did not depart from the standard of care in the administration of local anesthesia; that he properly anesthetized the area surrounding tooth #17; that he utilized a #15 blade scalpel and periosteal elevator to develop a full thickness mucoperiosteal flap about tooth #17; then, using a surgical hand piece with a round bur, 11-A elevator, upper universal forceps and surgical curette, that he surgically extracted tooth #17 without negligence or deviation from the standard of care. Dr. Kucine continues that Dr. Herman did not deviate from the standards of care during the one week follow-up examination of the plaintiff on July 27, 2007 in that he properly evaluated Mr. Leonardi, recorded the plaintiff's symptomology regarding altered sensation in the area governed by the left lingual nerve, and noted his findings in the plaintiff's chart. He further opines that Dr. Herman did not deviate from the standard of care during his examination of the plaintiff during the August 10,

2007 post-surgical appointment, and properly reported his findings of "much improved" sensation surrounding the left lingual nerve. A third post-surgical appointment was appropriately scheduled to monitor the plaintiff's condition and healing process, however, the plaintiff failed to attend that appointment. Dr. Kucine concludes that the plaintiff's alleged injuries, including damage to the lingual nerve resulting in altered sensation, was not caused by any departure or deviation from the standards of care, but was a known risk of the surgical procedure.

Dr. Jay Fensterstock, D.D.S. has submitted an affirmation in support of the application on behalf of Total Dental Care of Farmingville, LLP (Total Dental) and states that he is a general dentist duly licensed to practice dentistry in New York. In July 2007, he was the owner and principal of Total Dental Care of Farmingville, LLP, and is the sole shareholder of the corporation. In July, 2007, Total Dental retained the services of Dr. Herman pursuant to an independent contractor's agreement in which Dr. Herman agreed to provide Total Dental with defense and indemnification of any claims made pursuant to his treatment. A copy of that agreement has not been provided to this court in support of Dr. Fensterstock's affirmation. Dr. Fensterstock continues that at no time was Dr. Herman employed by, or a shareholder, in Total Dental, and Total Dental did not control, supervise, or review the means and methods employed by Dr. Herman in his rendering oral surgery services. He concludes that Dr. Herman was compensated for his services with a percentage of fees collected for services rendered.

Based upon the foregoing, the moving defendants have not established prima facie entitlement to summary judgment dismissing the complaint as asserted against them. Both Dr. Kucine and Dr. Herman have submitted conclusory opinions. Neither physician has set forth the standard of care, although they assert that Dr. Herman appropriately adhered to the standard of care. It has not been established if, and how, the left lingual nerve was identified prior to, or during, the extraction procedure, and how the left lingual nerve was protected, or avoided, to prevent injury from occurring to the nerve. Although Dr. Kucine has opined that Mr. Leonardi was provided informed consent, he has not set forth the risks involved in such extraction procedures, and how injury to the lingual nerve could occur in the absence of negligence.

Dr. Fensterstock has submitted an affirmation concerning Dr. Herman's employment status. He has referred to an employment contract with Dr. Herman, but has not submitted a copy of the contract to this court, or any other evidentiary proof, in support of his statements.

Additionally, the plaintiff's expert, who is licensed to practice dentistry in New York, and who is board certified in oral and maxillofacial surgery, has raised factual issues which preclude summary judgment. The plaintiff's expert has opined with a reasonable degree of medical certainty that Mr. Leonardi sustained a traumatic injury to his left lingual nerve. He states that while injury to the nerves adjacent to the wisdom teeth can occur in the absence of negligence, injury that does occur resulting in permanent loss of sensation and taste is a result of a departure from the accepted standard of care. He continues that this is so because the location of the lingual nerve is outside the necessary surgical field, in an inviolate area on the lingual aspect (tongue side) of the jawbone. The fact that injury occurred is, in and of itself, clear evidence of a departure from a dental standard of care.

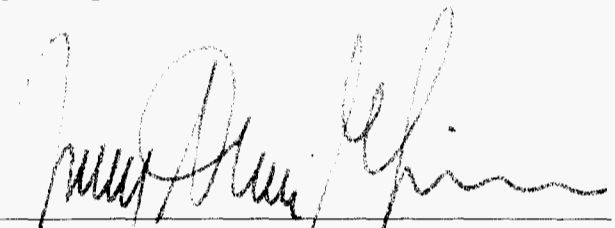
The plaintiff's expert continues that Dr. Herman testified to having performed 10 to 20 surgical procedures in a single afternoon and was unable to recall the details of the surgery he performed on Mr. Leonardi. The plaintiff's expert states that Dr. Herman testified to using forceps, which touched the lingual side of the tooth, and employed a surgical high-speed drill, in which he shaved the bone in which the lingual nerve resided, moving the drill from the buccal side and wrapping it slightly around the tooth at the back surface. The plaintiff's expert opines that both the forceps and the high-speed drill are capable of causing injury to the lingual

nerve, if improperly employed. He continues that an extraction of the lower third molar should be handled with the utmost and extreme care as the lingual nerve is unprotected by a boney canal or other hard protective substance, and is thus subject to injury. Anatomically, the lingual nerve is within close proximity to the third molar, binding the practitioner with a duty to stay well-clear of the nerve during the extraction of the third molar.

The plaintiff's expert states that the rule of dental practice is inviolate, that when performing an extraction of the third molar, the dentist shall not employ the use of any dental instruments, or in any way, work on the lingual side of the tooth, and shall confine the extraction procedure to the buccal (cheek) side of the tooth. To violate this rule, he states, is a departure from the standard of care. He continues that if the dentist stays away from the lingual side of the tooth, there is no chance of injuring the lingual nerve through the extraction of the tooth. The plaintiff's expert concludes that the lingual nerve was injured by the improper use of instruments on the lingual side of the tooth, and that Dr. Herman has not come forward with a non-negligent explanation for the lingual nerve injury. He also states that post-operatively when Mr. Leonardi complained of "altered sensation, left tongue, and lingual gingerol" that Dr. Herman had an obligation to refer him to an oral surgeon who could evaluate, and if necessary, surgically correct the injury to the lingual nerve. He states that Dr. Herman failed to do so during that one to three month window of opportunity following the injury to the nerve, and that Dr. Herman's failure to contact Mr. Leonardi, to advise him of the need to seek further treatment after he did not return for an appointment, was a departure from the standard of care.

Accordingly, motion (002) by defendant for an order granting summary judgment dismissing the complaint is denied.

Dated: AUG 02 2011



HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION