

Kasatova v Pace

2011 NY Slip Op 32890(U)

October 27, 2011

Sup Ct, NY County

Docket Number: 112420/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

NATALYA KASATOVA,

- v -

GEORGE PACE, D.P.M.,

INDEX NO. 112420/09
MOTION DATE 8/16/11
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

PAPERS NUMBERED

1-12
13-16
17-18

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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
and Order

FILED

NOV 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/27/11

[Signature]
JOAN B. LOBIS
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
NATALYA KASATOVA,

Plaintiff,

Index No. 112420/09

-against-

Decision and Order

GEORGE PACE, D.P.M., MANHATTAN
FOOTCARE and GEORGE PACE DPM PLLC,

FILED

Defendants.

NOV 01 2011

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

NEW YORK

COUNTY CLERK'S OFFICE

In Motion Sequence Number 002, defendants George Pace, D.P.M. (Dr. Pace) and

George Pace DPM PLLC (the "PLLCC") move for summary judgment and dismissal of the complaint under C.P.L.R. Rule 3212 on the grounds that there are no triable issues of fact and under Rule 3211 on the grounds that plaintiff has failed to state a cause of action against the PLLC. Plaintiff Natalya Kasatova opposes the motion on the grounds that triable issues of fact remain. The complaint was previously dismissed against defendant Manhattan Footcare in this court's decision and order signed on March 11, 2010, on Motion Sequence Number 001.

This cause of action sounding in podiatric malpractice and lack of informed consent arises out of Dr. Pace's surgery to and treatment of Ms. Kasatova's right fifth toe in 2007. Dr. Pace's medical chart for plaintiff reflects that on March 10, 2007, plaintiff presented to Dr. Pace with complaints of pain at her right fourth interspace secondary to a callus or abscess buildup. She reported experiencing pain in all shoes for a number of months. Dr. Pace observed a soft corn on her right fifth digit. He took x-rays of both feet. He discussed with plaintiff conservative treatment versus surgical treatment to address her painful corn. Dr. Pace's notes reflect that plaintiff desired

surgical removal of the corn as soon as possible. He scheduled plaintiff for a hammertoe repair to the right fifth digit.

On March 21, 2007, Dr. Pace provided plaintiff with a consent form for a repair to her hammertoe by removing soft tissue, bone, and skin from the fifth toe on her right foot. The consent form sets forth that the nature and purpose of the operation, alternative treatments, risks, possible consequences, and possible complications had been explained to Ms. Kasatova in non-medical language that she understood. The form further recites that plaintiff was given no guarantee or assurance as to the results, and that complications could arise. The form then lists possible complications of the procedure, including swelling, scarring, disability, delayed healing, no improvement to the condition, and the possibility of further surgery. Dr. Pace testified at his examination before trial ("EBT") that he reviewed the contents of the consent form and discussed the possible complications with plaintiff prior to administering the anesthesia, showed her on a diagram what he was going to do, and asked her if she had any questions. Plaintiff's signature is on the consent form twice, and witnessed.

Dr. Pace then administered the anesthesia and performed the hammertoe procedure (also known as an arthroplasty). He testified that he retracted the skin and tendon and gauged with his finger how much bone to remove. He testified that plaintiff has a short metatarsal so he did not want to be too aggressive with the amount of bone removed. He removed the bone, sutured the wound, wrapped it with a compression bandage, and applied a surgical shoe.

Plaintiff was seen by Dr. Pace approximately once a week for six weeks after the surgery. On March 26, 2007, the records reflect that plaintiff continued to wear the surgical shoe, and that Dr. Pace observed no pain, swelling, or infection. On April 2, 2007, Dr. Pace debrided the surgical area and removed plaintiff's sutures. On April 9, 2007, Dr. Pace noted no pain, mild swelling, and no infection. On April 16, 2007, plaintiff complained of a lot of pain on the inside of the fifth right digit and described the pain as the same way it felt prior to the surgery. Dr. Pace took an x-ray on that day and noted good alignment. On April 23, 2007, Dr. Pace noted decreased swelling and pain. On April 30, 2007, Dr. Pace noted no pain and that plaintiff was wearing a dress shoe with an open back. He noted mild swelling at the toe. He showed plaintiff how to massage the area at home to reduce the swelling. Plaintiff was to return in two weeks for her eight-week post-operative appointment. Dr. Pace testified that the pain and swelling that plaintiff experienced in the weeks following the surgery was normal.

Plaintiff did not return for her eight-week appointment. She returned to Dr. Pace on August 6, 2007, and he noted that she came to the office in two-and-one-half inch heels that she reported as comfortable. Dr. Pace noted that the digit was still mildly swollen so he administered an injection of Lidocaine and Dexamethasone at the base of the digit to reduce the swelling. His assessment was that plaintiff's condition was normal for a four-month post-operative follow up. Dr. Pace noted that the hammertoe at the right fourth interspace had completely resolved. He told plaintiff to continue to massage the area and reschedule an appointment in another two months.

Dr. Pace's notes reflect that on October 11, 2007, plaintiff telephoned his office and was very upset because she felt that the problem with her toe had come back. She wanted to be seen

right away regarding the pain and swelling at the surgical site. Dr. Pace saw plaintiff that day at his office, and his notes reflect that she was unconsolable about the state of her right fifth toe. He examined her foot and his notes reflect that he found mild swelling on the fifth right toe and mild tinea and intertriginous maceration, or what appeared to be athlete's foot, at the fourth right interspace. Dr. Pace took an x-ray that day, the results of which indicated to him that plaintiff was having slight bone regeneration at the surgical site. He testified that the appearance was normal for six months post-arthroplasty. Dr. Pace prescribed physical therapy to aid in decreasing the swelling, administered an injection of Lidocaine and Dexamethasone, prescribed Loprox cream for the fungal infection, and told plaintiff to return in four weeks.

On October 15, 2007, plaintiff returned to Dr. Pace's office and saw his associate, Dr. Lisa Shah. Dr. Shah did blood work and cultured the surgical area and found no infection. On October 22, 2007, plaintiff presented to Dr. Pace, and his notes reflect that she was "not feeling too bad" that day. She complained that the Loprox was not helping. She reported that she had seen her primary care physician, who told her to use Betadine on the area. Dr. Pace testified that he did not agree with administering Betadine because it has no antifungal properties. He reviewed plaintiff's blood work results with her from the prior week, which he testified were all normal. Since there was no infection, he administered another Lidocaine/Dexamethasone injection for the swelling and instructed plaintiff to continue to massage the area. She reported that she had not started physical therapy. Dr. Pace told plaintiff to return in two weeks. On November 5, 2007, Dr. Pace's notes reflect that plaintiff arrived to her appointment wearing a two-and-one-half inch heel with a closed toe and reported that she was feeling better. The pain and swelling had decreased. Dr. Pace

observed a mild flaking callus at the fourth right interspace. Plaintiff still had not started physical therapy. He gave plaintiff another injection and removed the flaking skin. He advised her to continue the massage and begin physical therapy. This was plaintiff's last appointment with Dr. Pace.

Plaintiff presented to Galli Podiatric Foot & Ankle Associates, P.C. ("Galli P.C.") on November 20, 2007, and reported that her toe was still painful and swollen. On that day, Galli P.C. took x-rays of plaintiff's foot. She returned to Galli P.C. on December 10, 2007, but failed to keep an appointment scheduled for January 15, 2008, and thereafter did not return to Galli P.C. for ten months. On October 9, 2008, plaintiff presented to Galli P.C. with complaints of pain. Notes from November 4, 2008, indicate that plaintiff was to see Elisa Kavanagh, D.P.M., for a second opinion. Plaintiff was next seen at Galli P.C. on November 12, 2008, complaining of severe pain, and an examination revealed edema and erythema. On January 19, 2009, she presented to Galli P.C. with complaints of increased pain and edema at the right fourth interspace with mild erythema with maceration. On January 24, 2009, Dr. Kavanagh excised a hypertrophic bone spur from the right fourth interspace. On February 12, 2009, plaintiff reported that her pain was decreased and on March 9, 2009, she was noted as much improved. By March 28, 2009, plaintiff reported that she was free of pain.

On May 19, 2010, plaintiff presented to defendants' independent medical examiner Ivan Herstik, D.P.M., who took x-rays and examined her. In his report, Dr. Herstik concluded that plaintiff has a full range of motion, has no permanent disability or dysfunction on the right fifth toe,

[* 7]

has no adverse gait changes, and is not limited in any activity or job function. He reported that she complained that she has to wear a larger size shoe on her right foot and has to be careful which style of shoes she wears. Dr. Herstik's report indicates that plaintiff reported no pain and that she can exercise on a treadmill without complaint.

Plaintiff alleges that Dr. Pace improperly and ineffectually performed the hammertoe repair; mismanaged her post-surgical care and ignored her complaints of pain, gait change, and lesions; caused her condition to progress and caused her to need further surgery; and failed to advise her of the risks associated with his treatment. She alleges that Dr. Pace's negligent care proximately caused, *inter alia*, adverse changes to her gait; pain; physical deformity; the need to undergo further surgery; and burning, bruising, and scarring at the surgical site.

Defendants move for summary judgment, contending that there are no triable issues of fact. A defendant moving for summary judgment in a podiatric malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted [podiatric] practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). See also Koi Hou Chan v. Yeung, 66 A.D.3d 642 (2d Dep't 2009). To satisfy the burden, the defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Roques, 73 A.D.3d at 206; Koi Hou Chan, 66 A.D.3d at 642. Conclusory statements which do not address the allegations in the pleadings are insufficient to demonstrate entitlement to summary judgment. See

Cregan v. Sachs, 65 A.D.3d 101, 108 (1st Dep't 2009). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposition papers. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). If the defendant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Id. (citation omitted). Specifically, in a podiatric malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in podiatric care] attesting that the defendant departed from accepted [podiatric] practice and that the departure was the proximate cause of the injuries alleged.

Rogues, 73 A.D.3d at 207 (internal citations omitted).

In support of their motion, defendants submit an expert affidavit from Edwin W. Wolf, D.P.M., M.S., a board certified podiatric surgeon licensed in New York and New Jersey. Dr. Wolf states that he reviewed the pleadings, plaintiff's medical records and films, Dr. Herstik's report and films, and the parties' EBT testimony. In Dr. Wolf's opinion, neither Dr. Pace nor the staff at his practice departed from the standard of care in treating plaintiff, nor did their care in any way cause plaintiff's alleged injuries. He opines that the records indicate that Dr. Pace had an appropriate informed consent discussion with plaintiff prior to the arthroplasty which included advising her of the possibility that she would need further surgery or that she may have no improvement. He opines that based on plaintiff's presentation, the arthroplasty was performed appropriately and in the proper

location, and the appropriate amount of bone was removed. Dr. Wolf further opines that the post-operative care was appropriate, including the administration of injections to reduce swelling and alleviate discomfort, and the recommendation for physical therapy and massage. The records reflect, to Dr. Wolf, that plaintiff's post-operative complaints were documented and appreciated, and that appropriate care was rendered in a timely manner. Further, Dr. Wolf sets forth, the records reflect that plaintiff was improving between October 22, 2007 and November 5, 2007, and that she never returned to Dr. Pace's practice after November 5, 2007. As such, Dr. Pace did not have a further opportunity to discuss the matter of a subsequent procedure or any further treatment with plaintiff. Dr. Wolf points out that the records indicate that plaintiff was not compliant with Dr. Pace's recommendations for physical therapy and for follow-up appointments. He opines that plaintiff's failure to follow Dr. Pace's recommendations negatively affected her condition.

Dr. Wolf opines that plaintiff's bone regrowth was a known and unpredictable complication and that it occurred in the absence of negligence. Based on his review of the preoperative and postoperative films of plaintiff's foot, Dr. Wolf opines, with a reasonable degree of podiatric medical certainty, that the October 11, 2007 film demonstrates a regrowth of bone whereas the April 16, 2007 film does not. Further, given the gap between the time plaintiff first presented to Galli, P.C. and the time the bone spur was removed over one year later, Dr. Wolf opines that there is no basis for plaintiff's claim that Dr. Pace failed to timely diagnose her condition. He opines that Dr. Kavanagh only removed the regrowth of bone, nothing further, during the procedure on January 24, 2009.

In opposition to defendants' motion, plaintiff maintains that issues of fact exist that preclude summary judgment. She further maintains that Dr. Pace's records and EBT testimony do not accurately reflect her complaints of pain and swelling. She avers that she testified at her EBT that she telephoned Dr. Pace in the days following her surgery to complain of pain and swelling. Portions of Ms. Kasatova's EBT transcript are annexed to the opposition papers, although the copy is truncated, excerpted, and is neither signed nor certified; the context of Ms. Kasatova's testimony cannot be readily discerned from the portions annexed to her papers.

Plaintiff submits an opposing affidavit from her expert (name redacted), a board certified podiatric surgeon licensed in New York. The expert states that he/she has reviewed the pleadings, the parties' and non-parties' EBT transcripts, plaintiff's podiatric records and diagnostic tests, and defendants' summary judgment motion papers. Plaintiff's expert contends that Dr. Pace "attached no significance" to plaintiff's complaints of pain and swelling on April 16, 2007 or her complaint of continued swelling on April 30, 2007. The expert further sets forth that the x-ray taken on October 11, 2007, confirmed "swelling and the presence of excess bone." The expert states that "[a]s a result of inadequate bone removal she had redeveloped a callus in the same interspace on which Dr. Pace had previously operated." The expert sets forth that during the original surgery, Dr. Pace should have removed the bone that Dr. Kavanagh later excised on January 24, 2009. The expert that defendants deviated from good and accepted practice in failing to remove an adequate amount of bone during the arthroplasty, which caused plaintiff's unnecessary pain, suffering, and further surgery. The expert further opines that Dr. Pace failed to provide plaintiff with informed consent because he failed to inform her that the arthroplasty may not be performed in a complete

manner, that she may require additional surgery to complete the procedure, and that she may be in worse condition after the arthroplasty. Finally, plaintiff's expert opines that Dr. Pace's failure to appreciate and heed plaintiff's post-operative complaints enabled "her debilitating condition to fester and prevent[ed] her from making a complete recovery when the appropriate corrective surgery was finally performed by Galli [P.C.]." The expert states that plaintiff required corrective surgery, not physical therapy, and that [b]y the time she presented to Galli [P.C.], the damage to her gait had occurred, the urgency had past [sic] and no amount of surgery could fully correct the damage to her gait."

In reply, defendants argue that plaintiff's expert's opinion is not supported by any evidence. They contend that plaintiff's expert is vague on his/her opinion that Dr. Pace removed an inadequate amount of bone, and that the expert never specifies how much bone should have been removed as opposed to how much bone Dr. Pace actually removed. In a supplemental affidavit, Dr. Wolf sets forth that it is well known in the practice of podiatric surgery that removing too much bone during an arthroplasty will result in a significantly poor result which could lead to flail toe or other unacceptable outcomes. Dr. Wolf states that the amount of bone removed is a subjective decision made by the surgeon, but that in his opinion, Dr. Pace removed the appropriate amount of bone to resolve plaintiff's condition. Dr. Wolf again sets forth his opinion that plaintiff experienced a regrowth of bone following the arthroplasty, which he states occurred due to the known but unpredictable ability of human tissue to regenerate following surgery. Further, he states that there is no evidence to support plaintiff's expert's statements that plaintiff has suffered any damage to her gait, was in a worse condition after the arthroplasty than before, or has been unable to make a complete recovery following Dr. Kavanagh's surgery.

Defendants have met their prima facie burden for summary judgment by submitting a detailed expert affidavit, supported by plaintiff's medical records, in which their expert opines that Dr. Pace's care did not depart from the standard of care, that plaintiff experienced a recurrence of the bone growth after the arthroplasty, and that defendants' care did not proximately cause the recurrence. Plaintiff's opposition papers do not sufficiently demonstrate that a material issue of fact exists to preclude summary judgment. While plaintiff's expert states that he/she reviewed plaintiff's diagnostic studies, he/she fails to address Dr. Wolf's opinion that the April 16, 2007 film does not show the regrowth of bone present on the October 11, 2007 film. If, as plaintiff's expert opines, the bone that Dr. Kavanagh removed in January 2009 should have been removed in the original surgery, the excess bone should be visible on the April 16, 2007 x-ray. Plaintiff did not raise an issue of fact sufficient to rebut defendant's showing on this pivotal issue. Further, there is nothing in the record to support plaintiff's expert's contention that plaintiff never made a full recovery or that her gait has been adversely affected. Accordingly, the malpractice claim must be dismissed.

As to the informed consent cause of action, defendants have met their burden of showing their prima facie entitlement to summary judgment because there is undisputed evidence that after having been explained the reasonably foreseeable risks, alternatives, and possible complications, plaintiff signed a detailed informed consent form prior to undergoing the arthroplasty. Orphan v. Pilnik, 66 A.D.3d 543, 544 (1st Dep't 2009), aff'd, 15 N.Y.3d 907 (2010). Plaintiff failed to rebut this showing. The risk she contends was not disclosed—the possibility that a future surgery would be required—is clearly disclosed on the consent form. Even if the court accepted the excerpted transcripts of her EBT testimony as admissible, her denial that she was informed of the

risk is insufficient to demonstrate that a reasonable person would have opted against the procedure. Orphan, 66 A.D.2d at 544; Public Health Law § 2805-d. Accordingly, the lack of informed consent claim is dismissed.

Finally, plaintiff does not dispute that she has failed to state a cause of action against the PLLC, a corporate entity which rendered no treatment to plaintiff. Although during the pleading stage of this matter there may have been a question of the corporate entity's vicarious liability for the acts of its employees or Dr. Pace, given the disposition of this motion, there does not appear to be any independent claims remaining against the PLLC and plaintiff has not identified such in opposition to the motion.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: *Oct. 27, 2011*

FILED

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JOAN B. LOBIS, J.S.C.