

**Barra v Johnson & Johnson**

2013 NY Slip Op 31057(U)

May 10, 2013

Supreme Court, New York County

Docket Number: 102065/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

BARRA, JOHN, ET AL.

INDEX NO.

102065/09

MOTION DATE

JOHNSON + JOHNSON, ET AL.  
-v-

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to 29 were read on this motion to  summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-17

18-21

22-29

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, ORDER & JUDGMENT

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/10/13

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  
JOHN BARRA and ANN BARRA,

Plaintiffs,

Index No. 102065/09

-against-

**Decision, Order and Judgment**

JOHNSON & JOHNSON, DEPUY SPINE, INC.,  
DEPUY ORTHOPAEDICS, INC., NEW YORK  
UNIVERSITY MEDICAL CENTER, and RAMESH  
P. BABU, M.D.,

Defendants.

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

This medical malpractice case arises out of back surgery that was performed on Plaintiff, John Barra. Barra sues, alleging medical negligence and lack of informed consent against Defendants New York University Langone Medical Center, sued here as New York University Medical Center (Hospital), and Ramesh P. Babu, M.D. Barra further sues Defendants Johnson & Johnson, Depuy Spine, Inc., and Depuy Orthopaedics, Inc., (Depuy), claiming design and manufacturing defects relating to the Expedium Spine System, which device Dr. Babu implanted into the plaintiff during surgery. Defendant Depuy and Defendants Hospital and Dr. Babu jointly move in motion sequence numbers 1 and 2, respectively, for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. These motions are consolidated for purposes of this decision, order, and judgment.

On August 3, 2006, Plaintiff John Barra consulted with Defendant Babu regarding back surgery. Dr. Babu diagnosed Barra with spinal stenosis and recommended surgery. He informed Barra that the procedure would include implanting a device with hardware, including

screws, that would provide temporary support until the patient's bones fused. In preparation for the procedure, Dr. Babu advised Barra to quit smoking, which Barra did.

On August 11, 2006, Dr. Babu operated on Barra at the Hospital. He used four five-millimeter titanium pedicle screws for insertion into Barra's vertebrae. Drilling holes, Dr. Barra implanted the screws and secured titanium rods to them. Barra was instructed to wear a lumbar corset during recovery for six weeks while out of bed and to progressively increase physical activity. He was told not to drive for two to three weeks, not to lift more than five pounds, and to limit sitting.

Barra saw Dr. Babu for a post-operative visit six weeks after the surgery. The doctor noted that Barra had put on weight and advised him to reduce. He also recommended physical therapy, which Barra began the following week. One month into the sessions, at the end of October, 2006, Barra heard a noise like a "rusty hinge" coming from his back.

Barra visited Dr. Babu on November 3, 2006, complaining of noise with bending. X-rays showed that two screws had broken. Dr. Babu recommended additional surgery to repair the problem.

Dr. Babu operated on Barra a second time at the Hospital on November 29, 2006. In that procedure he replaced all four screws with larger, six-millimeter ones.

On February 13, 2009, Plaintiffs sued Dr. Babu and the Hospital, alleging medical malpractice and lack of informed consent. They further sued Depuy, alleging design and

manufacturing defects with the Expedium Spine System, the implant device used in the surgery. Following disclosure and Plaintiffs' filing of a note of issue, the Defendants now move for summary judgment to dismiss the complaint on the grounds that there are no genuine issues of material fact.

In moving for summary judgment, Defendant Depuy offers the expert opinion of Hassan A. Serhan, Ph.D., a mechanical engineer who works for Depuy on its spinal implants. Dr. Serhan opines that the screws' breakage was not due to any design or manufacturing defect but rather to inappropriate loads, including the patient's weight and failed fusion, potentially due to the patient's smoking history. He opines that there was no proof that the hardware was defective at the time it left Depuy's control, and he swears that there have been no other complaints from the lot of the five millimeter screws that were included in the device that was implanted into Barra.

Plaintiffs oppose Depuy's motion by proffering the opinion of their own expert, metallurgist, Marc P. Zupan, Ph.D. Dr. Zupan opines that there was a manufacturing defect in the screws used, and that defect proximately caused Barra's injuries. He opines that the highest stress point for the screws would be where they exit the bone, the root of the cantilever. He examined the screws used in this case, however, and relates that the screw fracture was at the base of the head, where stress would not be at the highest. Plaintiffs further counter Depuy's claim that weight or smoking caused the fracture, citing the testimony of Dr. Babu that Barra's bone had been fusing well.

In moving for summary judgment, Dr. Babu and the Hospital offer the expert opinion of the board-certified neurosurgeon, Dr. Douglas Cohen. Dr. Cohen opines that the defendants did not deviate from accepted standards of care and any injury was not proximately caused by the

defendants' actions. Defendants Hospital and Dr. Babu further claim that because Dr. Babu is a private attending physician and not an employee of the Hospital, the Hospital is not liable for Dr. Babu's actions.

Lastly the Hospital and Dr. Babu contend that Plaintiffs' claim of lack of informed consent must be dismissed. They claim that the Hospital was not obligated to obtain Barra's informed consent under the circumstances in this case and that Dr. Babu properly obtained informed consent. They cite testimony that Dr. Babu discussed the procedure's risks during the consultation and the signed consent forms in this record. They offer Dr. Cohen's opinion that Dr. Babu's discussion and the forms properly informed Barra. They rely on Dr. Cohen's opinion that despite the risks and complications Barra would not have refused to consent to the procedure and note that Plaintiffs do not offer any expert testimony on this issue. And they aver that any lack of informed consent did not proximately cause Barra's injuries.

Plaintiffs oppose the Hospital's and doctor's motion for summary judgment by focusing on the claim of lack of informed consent. They aver that these defendants have not established a prima facie case regarding this claim. They cite the factual disputes in the record, including Barra's testimony, regarding the scope of information conveyed by Dr. Babu.

In considering a motion for summary judgment this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit

must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown “sufficient to require a trial of any issue of fact.” Id.

As an initial matter, this Court notes over the course of this motion practice, including oral argument, that the issues in this case have narrowed. Plaintiffs concede that their claim against Depuy lies in manufacturing defect only.<sup>1</sup> Nor are they pursuing their claims against the Hospital. And the only remaining claim against Dr. Babu lies with the issue of lack of informed consent. This Court addresses these two remaining claims, therefore, in turn.

This Court first considers Plaintiffs’ claim that the screws in this case were defectively manufactured. Depuy contends that this Court should not consider Plaintiffs’ expert opinion because it is untimely. This Court disagrees. The record reflects that Plaintiff’s expert inspected the broken screws back in 2010, and Plaintiff’s expert opinion has been provided well within any trial date to be established in this case. Nor can it be said that Dr. Zupan’s opinion is speculative. Summary judgment is not appropriate where parties adduce conflicting expert opinions. E.g., Griffin v. Cerabona, 103 A.D.3d 420, 420 (1st Dep’t 2013).

This Court next considers Plaintiffs’ claim of lack of informed consent. Claims of

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<sup>1</sup>In its memorandum of law Depuy claims that only Depuy Spine, Inc., is implicated in this cause of action. This Court expresses no opinion on that assertion, which may be raised with any evidentiary support at the appropriate opportunity.

lack of informed consent are statutorily defined. Pub. Health § 2805-d. The law requires persons providing professional treatment or diagnosis to disclose alternatives and reasonably foreseeable risks and benefits involved to the patient to permit the patient to make a knowing evaluation. *Id.* § 2805-d(1). Causes of action for lack of informed consent are limited to non-emergency procedures or other treatment and include diagnostic procedures that involve invasion or disruption to bodily integrity. *Id.* § 2805-d(2). To establish lack of informed consent, a claimant must show that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis had the patient been fully informed, and the claimant must show that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought. *Id.* § 2805-d(3).

This Court is not persuaded that Defendants have established a prima facie case of entitlement to summary judgment on Plaintiffs' claim of lack of informed consent. Defendants argue, for example, that their papers "rebut each claim made by plaintiffs in their Bill of Particulars." On its face their motion requires this Court to adopt defendants' version of the facts that the discussions surrounding the procedure during the consultation and in obtaining the signed consent forms were sufficient. Both Plaintiffs' deposition testimony and pleadings dispute these defendants' version. See Sanchez v. Nat'l R.R. Passenger Corp., 2013 WL 1759570 (Apr. 25, 2013) (verified complaint and bill of particulars are affidavits for purposes of motions for summary judgment under C.P.L.R. § 105(u)).

Defendants Hospital and Dr. Babu mischaracterize the law to suggest that expert testimony must rebut their claim that informed consent was provided. It is well-established that the summary judgment stage of litigation is dedicated to issue-finding rather than issue-determination.



[\* 8]

Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y. 2d 395, 404 (1957). Defendants' statutory authority and case law are inapposite, involving trial or post-trial motions. C.P.L.R. 4401-a (motion for judgment at end of plaintiff's case); Ewart v. Park Ave. Chiropractics, P.C., 86 A.D.3d 442 (1st Dep't 2011) (error to submit claim of lack of informed consent to jury where jury found no proximate cause on medical malpractice claim and even were there proximate cause established, lack of informed consent not established either through experts or on cross examination of defendants' witnesses); Briggins v. Chynn, 204 A.D.2d 158 (1st Dep't 1994) (lack of informed consent properly dismissed without presentation to jury where not established through expert). Accordingly, it is

ORDERED that in motion sequence no. 1, Defendant Depuy's motion for summary judgment is granted on all claims except for Plaintiffs' claim of manufacturing defect; and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that in motion sequence no. 2, Defendant Hospital is granted summary judgment in its entirety; and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that in motion sequence no. 2, Defendant Babu is granted summary judgment on all claims except for lack of informed consent; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties appear for a pretrial conference on June 11, 2013, at 9:30 am.

Dated: May 10, 2013

ENTER:

  
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JOAN B. LOBIS, J.S.C.