

Scarano v Vafiadis

2017 NY Slip Op 31159(U)

May 23, 2017

Supreme Court, New York County

Docket Number: 805132/2012

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

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

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EDWARD SCARANO and SUSAN SCARANO,

Plaintiffs,

-against-

Index No. 805132/2012

DEAN VAFIADIS, D.D.S., Individually and d/b/a
NEW YORK SMILE INSTITUTE, GARY GOLDSTEIN,
D.D.S., GARY RUTH, D.D.S., MAXILLOFACIAL
SURGERY SERVICES, L.L.C., GEORGE
ANASTRASOV, M.D., D.D.S., BABAK GHALILI,
D.D.S., and MARK KOVALEVSKIY, M.D.,

Defendants.

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

In this dental malpractice action, defendants have moved by separate motions for dismissal of various causes of action and other relief. Motions 4, 5, 6, and 7 are hereby jointly decided. In sequence 4, defendant Gary Ruth, D.D.S. moves pursuant to CPLR §§ 3211(a)(7) and 3312 to dismiss plaintiffs' claim for punitive damages and pursuant to CPLR 3024(b) to strike allegedly prejudicial language, namely "wanton, reckless and recklessly," from plaintiffs' complaint and bill of particulars. In sequence 5, defendant Gary Goldstein, D.D.S. seeks dismissal with prejudice of the claims asserted against him. In sequence 6, defendant Babak Ghalili, D.D.S. seeks dismissal with prejudice pursuant to CPLR § 3212 of the claims for dental malpractice, lack of informed consent and punitive damages. In sequence 7, defendants George E. Anastossov, M.D., D.D.S. (sued herein as Anastrassov) and Maxillofacial Surgery Services seek dismissal with prejudice pursuant to CPLR §§ 3211(a)(7) and 3212 of all claims for punitive damages, patient abandonment, and breach of contract as well as an order striking prejudicial language pursuant to 3024, namely "wanton, reckless and recklessly," from the complaint and bill of particulars. Since the submission of the papers the matter against Dr. Goldstein was discontinued, rendering motion

sequence 5 moot. Previously the action was discontinued as to Dr. Mark Kovalevskiy. The plaintiffs have offered no contest to that portion of Dr. Ghalili's motion seeking judgment dismissing claims arising from dental malpractice.¹ Consequently, that branch of Dr. Ghalili's motion is moot as well.

Plaintiff first saw Dr. Dean Vafiadis, a prosthodontist, in 2006. By that time, he had lost a total of twenty teeth, four of which were lost as a result of a serious motorcycle accident he sustained in 2004. A treatment plan was devised to remove all his remaining teeth and replace them with implants and Mr. Scarano was referred to Dr. Gary Ruth, an oral surgeon. Plaintiff's initial visit to Dr. Ruth was on August 3, 2009. In early 2010, a treatment plan was discussed which included the possibility for bone grafts and sinus lifts to augment the upper jaw. According to Dr. Ruth the possibility of implant failure was discussed. Dr. Gary Goldstein, after examining Mr. Scarano, confirmed that it was necessary to extract all of his remaining teeth.

On February 3, 2010, Dr. Ruth extracted fifteen teeth and allegedly performed sinus lifts and bone grafts. There were two or three more appointments that year to check on the progress of Mr. Scarano's gums and jaw. The implants were placed by Dr. Ruth on January 31, 2011. Several follow-up appointments occurred in February and March. By May of 2011, two of the implants had failed and by August 2011, three more had failed. On the recommendation of one of Susan Scarano's customers, the plaintiffs made an appointment to see Dr. Babak Ghalili. Dr.

¹ I spoke to counsel after I saw an affirmation from Dr. Roger Bronstein and said that I would have to recuse myself if his affirmation had to be considered in determining any aspect of this case. Since plaintiffs were not proceeding on the dental malpractice claims, which include informed consent, Dr. Bronstein's affirmation was withdrawn and my recusal was not necessary.

Ghalili introduced them to Dr. George Anastossov who took the x-rays. According to Mr. Scarano, Dr. Anastossov told him that the x-rays showed no signs of bone grafts and sinus lifts. Plaintiff confronted Dr. Ruth with the x-rays taken by Dr. Anastossov. Dr. Ruth refunded \$24,000 to plaintiff.

Thereafter Mr. Scarano continued dental treatment with Dr. Anastossov and agreed to undergo surgery on September 21, 2011 to remove bone from his skull to be prepared for use as graft material. The plaintiffs believed that the fees would be \$45,000 for Dr. Anastossov's surgical fee and \$1,000 for the anesthesiologist. The implants by Dr. Ghalili would be \$15,000. On the day of the surgery plaintiffs learned that the anesthesiologist was billing at \$1,000 per hour, not a flat rate of \$1,000 and that an additional \$15,000 would be necessary for the implants, bringing the total to \$30,000.

The motions remaining before the Court all seek dismissal of the punitive damages claims. In addition, Drs. Ruth and Anastossov seek orders striking prejudicial language from plaintiffs' pleadings. The arguments advanced are basically the same for all defendants. They argue that nothing done by defendants rises to the level of conduct that permits an award of punitive damage. They argue there are no allegations of gross recklessness, intentional wanton or malicious conduct aimed at the public, or actively evil or reprehensible motives, absent which punitive damages are not proper. Similarly, the words denoting defendants as wanton and reckless and their variants have no place in these pleadings. In addition, Dr. Anastossov seeks dismissal of

all other non-malpractice causes of action in the complaint. The defendants do not seek dismissal of the claims for dental malpractice.

The plaintiffs' opposition consists of an affirmation of counsel and an affidavit of Edward Scarano. The contentions are that Dr. Ruth never performed bone grafts and sinus lifts and that Dr. Ghalili's demand for an additional \$15,000 while Mr. Scarano was under general anesthesia is an act justifies the imposition of punitive damages. Plaintiffs argue that these acts demonstrate the necessary elements of willful, wanton, malicious, reckless, and even criminal conduct, and that requires denial of defendants' motions. The only legal arguments made by plaintiffs' counsel in the opposition papers are directed to the issue of punitive damages.

Dr. Ruth argues, in reply, that there is no evidence in the record to support the claim for punitive damages. At best there is a dispute about the quality of Dr. Ruth's care. He argues that plaintiffs do not support their claims by expert opinion, relying solely on plaintiff's recollection of statements by Dr. Anastossov and his own conclusions that x-rays taken in 2011 show no evidence that Dr. Ruth did bone grafts and sinus lifts. Dr. Ruth argues that this is not evidence that the work was never performed because grafts can "melt away" from natural forces. Nothing argued by plaintiffs takes this case out of the realm of dental malpractice. The dispute is not about grossly reckless, intentional, wanton, or malicious conduct but whether the oral surgeon's services were within the standard of care. Defendant argues that plaintiffs' claim for punitive damages should be dismissed and all references to wanton, reckless, and recklessly be stricken from the complaint and the bill of particulars.

In his reply Dr. Ghalili argues that punitive damages is not a cause of action. Instead, it is a mechanism to enhance damages predicated upon a finding of underlying wrong. With the withdrawal of the malpractice claim as against him, no basis to impose punitive damages is present.

To justify the imposition of punitive damages, the conduct must be “exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.” Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 489 (2007) (internal quotation marks and citations omitted). In a malpractice action, punitive damages are “not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless.” Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep’t 2007). Where punitive damages are unavailable as a matter of law, summary judgment dismissing such claim can be granted. Anzolone v. Long Is. Care Ctr., Inc., 26 A.D.3d 449 (2nd Dep’t 2006). Even resolving all the factual disputes in favor of plaintiffs, nothing takes the case out of the realm of normal dental malpractice so as to allow a jury to consider punitive damages against the remaining defendants. Plaintiffs offered no opposition to the branches of defendants’ motions seeking to strike language from the complaint and bill of particulars.

Therefore, the motions are granted dismissing all claims for punitive damages with prejudice against Drs. Ruth and Anastossov and striking all mention of wanton, reckless, and recklessly from plaintiffs’ pleadings. The complaint is dismissed with prejudice in its entirety as

to Dr. Ghalili, and the caption shall be amended to reflect the dismissal of Drs. Goldstein, Ghalili, and Kovalevskiy. The new caption shall read:

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

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EDWARD SCARANO, SUSAN SCARANO,

Plaintiffs,

-against-

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DEAN VAFIADIS, D.D.S., Individually and d/b/a
NEW YORK SMILE INSTITUE, GARY RUTH,
D.D.S., MAXILLOFACIAL SURGERY,
SERVICES L.L.C., GEORGE ANASTRASOV,
M.D., D.D.S.,

Defendants.

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The Clerk of Court shall enter judgments of dismissal accordingly. The parties are directed to appear for a pre-trial conference on June 20, 2017 or any date thereafter to be determined by the Justice to whom this matter is transferred upon my upcoming retirement.

Dated: *May 23*, 2017

ENTER:



JOAN B. LOBIS, J.S.C.