

Barlotta v Datson

2021 NY Slip Op 33017(U)

December 13, 2021

Supreme Court, Richmond County

Docket Number: Index No. 151339-2020

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

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

IAS PART 6

_____ x
DANIELLE BARLOTTA,

ORDER

Plaintiffs,

- against -

Index Number:
151339-2020

MOSES D. DATSON, D.D.S and ADVANCED
ORAL SURGERY OF STATEN ISLAND, P.C.,

Hon. Justice
Judith N. McMahon

Defendants.
_____ x

Defendants' motion (sequence # 001), pursuant to CPLR § 3212, for an Order granting summary judgment in favor of and dismissing all claims against Defendants, Moses D. Datson, D.D.S. and Advanced Oral Surgery of Staten Island, P.C., is granted in part and denied in part as detailed herein.

This is an action seeking damages for personal injuries resulting from alleged dental malpractice. Plaintiff's claims are that Defendant, Dr. Moses D. Datson, unnecessarily and negligently extracted Plaintiff's tooth #17 (lower left wisdom tooth). Plaintiff also made claims for lack of informed consent. Plaintiff's claimed injuries include: transection injury to the left lingual nerve as evidenced by hypoesthesia, dysesthesia and anesthesia of the left anterior tongue; fracture of the left lingual cortical plate; micro-neurosurgical repair of the left lingual nerve; left lingual nerve neuropathy, loss of sensation and loss of taste to the left side of the tongue.

Defendants now move for summary judgment to dismiss Plaintiff's case as against them.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted standard of care and evidence that the deviation or departure was a proximate cause of injury or damage. In order to establish prima facie entitlement to judgment as a matter of law, a defendant in a medical malpractice action must negate either of these two elements." *Arocho v. Kruger*, 110 A.D.3d 749, 973 N.Y.S.2d 252 (N.Y.A.D. 2nd Dept 2013).

Defendants established a prima facie entitlement to judgment by showing there was no departure from good and accepted medical practice via the Affirmation of Dr. Andrea Schreiber. *See Stukas v. Streiter*, 83 A.D.3d 18, (N.Y.A.D. 2nd Dept. 2011); *See also Joyner-Pack v. Sykes*, 54 A.D.3d 727, (N.Y.A.D. 2nd Dept. 2008).

In support of Defendants' motion, Dr. Schreiber opined "that when plaintiff presented to Dr. Datson on June 6, 2019, with a referral from her general dentist, it was entirely appropriate for Dr. Datson to recommend the extraction of tooth #17. Plaintiff had complaints of pain in the lower left quadrant and her general dentist referred her for the extraction of teeth #16 and 17. Pain is certainly an indication for the extraction of a tooth...Dr. Datson properly performed the extraction of tooth #17."

Dr. Schreiber elaborated that, "Dr. Datson used a buccal approach to extract tooth #17, which was designed to protect the lingual nerve. Furthermore, Dr. Datson testified that his instruments did not cross over to the lingual side of the operative field and he described his technique in removing the crown, which was specifically done to protect the lingual nerve."

As to the nature of the procedure performed, Dr. Schreiber explained "that an oral surgeon, when performing a tooth extraction, always has the option to leave the roots in, thereby performing a coronectomy or an intentional partial odontectomy. As much as a surgeon can prepare ahead of time with physical examinations and films, intra-operative conditions can dictate a different course of action. Therefore, the surgeon has the discretion to change the operative course to protect the patient. Nevertheless, Dr. Datson did have a discussion with plaintiff regarding a possible coronectomy. Further, a coronectomy is not a benign procedure and carries with it its own risks, which include the risk of having the roots removed in a further surgery and possible nerve damage from that surgery."

Dr. Schreiber concluded, "that there are multiple non-negligent reasons why permanent lingual nerve damage can occur during the extraction procedure including the extraction of the tooth itself because of proximity to the nerve and the positioning of the lingual nerve. The lingual nerve is sometimes located in a position that is anatomically uncommon or unusual as to be in the operative field and even in the same person the position is not identical on the left and right sides. Permanent tongue numbness is a known risk of the procedure, which is noted in the written consent form and does not suggest negligence on the part of Dr. Datson."

"Once this showing has been made [by Defendants], a Plaintiff, in opposition, need only demonstrate the existence of a triable issue of fact as to those elements on which the Defendant met the prima facie burden." *Reid v. Soultz*, 138 A.D.3d 1087, 31 N.Y.S.3d 527 (N.Y.A.D. 2nd Dept. 2016); *See also Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718 (1980).

Accordingly, the burden shifts to Plaintiffs "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986). In a medical malpractice action, this requires that a plaintiff

"submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant['s]... summary judgment motion." *Id.*

"A plaintiff's expert opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 833 N.Y.S.2d 89 (N.Y.A.D. 1st Dept. 2007).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Rosario v. Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 A.D.3d 1426, 128 N.Y.S.3d 906 (N.Y.A.D. 2nd Dept. 2020); *see also Boston v. Weissbart*, 62 A.D.3d 517, 879 N.Y.S.2d 108 (N.Y.A.D. 1st Dept. 2009).

It should be noted that Plaintiff affirmatively stated that they did not oppose that portion of Defendants' motion seeking dismissal of Plaintiff's allegations related to a lack of informed consent. Therefore, that portion of Defendants' motion is granted unopposed. Additionally, at oral argument on the motion, Plaintiff stated that they did not oppose the dismissal of Plaintiff's allegations against Defendant Advanced Oral Surgery of Staten Island, P.C., so that portion of Defendants' motion is also granted unopposed.

As to the remainder of Defendant's motion, Plaintiff submitted an Affirmation from a Dentist specializing in oral and maxillofacial surgery and also an Affirmation from a Dentist specializing in oral and maxillofacial radiology in Opposition to Defendants' motion.

Plaintiff's Dental Surgeon opined "that Dr. Datson negligently severely injured Ms. Barlotta's left lingual nerve during the lower left wisdom tooth partial extraction, based on my review of his records, deposition and Ms. Barlotta's subsequent medical and dental treatment records. Although Dr. Datson denies negligently injuring Ms. Barlotta's left lingual nerve, it is my opinion that the only way such an injury can occur during a lower wisdom tooth extraction, is if sharp dental instrumentation such as a dental bur, is placed on the lingual [tongue] side of the mandible or the lingual aspect of the mandibular alveolar region, and the operator failed to protect adjacent vital anatomy including the lingual nerve which is located in the lingual soft tissue. If the lingual nerve is not properly protected to avoid injury, it is a departure from the standard of care. Based on the [Cone Beam Computed Tomography Scan taken of Plaintiff on January 13, 2020] images that I reviewed, there is evidence of iatrogenic injury to the lingual cortical plate, consistent with a bur strike that occurred during the partial extraction procedure."

Plaintiff's Dental Surgeon explained that, "Dr. Ziccardi, the subsequent treating physician who performed micro-neurosurgical repair of Ms. Barlotta's left lingual nerve, documented the removal a neuroma which was described in the pathology report as being 'traumatic'. Based on the intra-operative findings and the pathology report, the injury was caused when Dr. Datson negligently permitted sharp a dental instrument, more likely than not the bur of his drill, to come into contact with the lingual soft tissue that contains the lingual nerve, causing a severe injury that required surgical reconstruction of the injured lingual nerve. It is my opinion that the left lingual nerve injury described in the operative report is consistent with a drill injury. In my opinion, an injury such as this can only occur if the surgeon operates out of bounds and fails to protect the lingual nerve from serious injury, and constitutes a departure from the standard of care."

As to the opinion of Dr. Schreiber in support of Defendants' motion concerning the location of Plaintiff's lingual nerve, Plaintiff's Dental Surgeon stated, "that Ms. Barlotta's left lingual nerve was not located in a position that was anatomically 'uncommon or unusual' as posited without evidence by Dr. Schreiber. Based on Dr. Ziccardi's operative report, Ms. Barlotta's left lingual nerve was well within its normal range of positions...If the procedure was performed in the manner that Dr. Datson described in his deposition, which Dr. Schreiber solely relies upon in formulating the opinions expressed [in] her affirmation, it would be anatomically impossible to severely injure Ms. Barlotta's left lingual nerve."

Finally, Plaintiff's Dental Surgeon opined, "that there was no indication for the extraction of Ms. Barlotta's lower left wisdom tooth. The preoperative panoramic x-ray taken by Dr. Datson on June 6, 2019, shows that tooth #17 was a non-pathologic full boney impacted lower wisdom tooth. Even if we accept the testimony of Dr. Datson and the conclusions of his expert that Ms. Barlotta had pain in the lower left quadrant of her mouth before the extraction, there is no evidence that any such pain was necessarily coming from tooth #17. The tooth was asymptomatic and non-pathologic. Pain alone is not an indication for the surgical extraction of a lower wisdom tooth."

In opposition to Defendants' motion, Plaintiff's Dental Radiologist opined that, "Based on my reading and interpretation of the [Cone Beam Computed Tomography Scan taken of Plaintiff on January 13, 2020] in conjunction with the operative report and surgical pathology report, it is my opinion that Ms. Barlotta sustained damage to her left lingual cortical plate during the lower wisdom tooth extraction procedure, consistent with mechanical trauma caused by a dental bur, at the location where the post traumatic neuroma and lingual nerve injury were described by Dr. Ziccardi in the operative report."

"In opposition, Plaintiff[s] raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that Defendant[s] departed from the

accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902, 48 N.Y.S.3d 420 (N.Y.A.D. 2nd Dept. 2017).

In Reply, Defendants argue that Plaintiff’s Dental Surgeon’s opinions regarding the necessity of removing Plaintiff’s tooth #17 is based on an incorrect understanding of the facts. Defendants argue that Plaintiff was referred by her general dentist for the extraction of tooth #17. However, Defendants provide no factual basis to support this claim. Defendants did not submit any documents from the referring dentist, Dr. Ohevshalom.

Also on Reply, Defendants correctly assert that Plaintiff did not respond to or put forth arguments opposing that portion of Defendants’ motion seeking the dismissal of Plaintiff’s claims related to *res ipsa loquitor*. At oral argument on the motion, Plaintiff cited cases that Plaintiff argued stood for the proposition that *res ipsa loquitor* can be inferred in cases with fact patterns similar to this matter and need not be explicitly argued. The Court reviewed the cases cited by Plaintiff, and while those cases support a finding that there are questions of fact such that portions of the motion must be denied, the cases cited do not support the denial of that portion of Defendants’ motion to dismiss Plaintiff’s *res ipsa loquitor* claims. Accordingly, that portion of Defendants’ motion is granted without opposition.

There are questions of fact created by Plaintiff’s Dental Surgeon and Dental Radiologist including, but not limited to, whether or not the extraction of the wisdom teeth was necessary and the manner in which the extraction was performed, including safety precautions implemented.

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Joyner v. Middletown Med., P.C.*, 183 A.D.3d 593, 123 N.Y.S.3d 169 (N.Y.A.D. 2nd Dept. 2020).

ORDERED that those portions of Defendants’ motion seeking to dismiss Plaintiffs’ claims related to a lack of informed consent are granted unopposed; and it is further

ORDERED that Plaintiffs’ claims related to a lack of informed consent are severed and dismissed; and it is further

ORDERED that those portions of Defendants’ motion seeking to dismiss Plaintiffs’ claims related to *res ipsa loquitor* are granted without opposition; and it is further

ORDERED that Plaintiffs’ claims related to *res ipsa loquitor* are severed and dismissed; and it is further

ORDERED that those portions of Defendants' motion seeking to dismiss Plaintiffs' claims against Defendant Advanced Oral Surgery of Staten Island, P.C., are granted unopposed; and it is further

ORDERED that Plaintiffs' claims against Defendant Advanced Oral Surgery of Staten Island, P.C., are severed and dismissed; and it is further

ORDERED that the remainder of Defendants' motion (sequence # 001), for summary judgment in favor of and dismissing all remaining claims against Defendant Moses D. Datson, D.D.S., is denied; and it is further

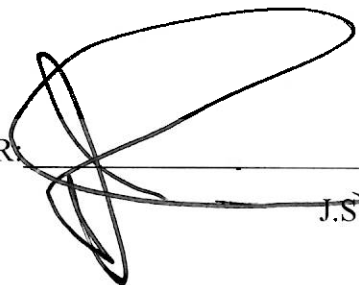
ORDERED that any and all other requested relief is denied; and it is further

ORDERED that all parties shall appear for a conference, to be conducted via Microsoft Teams, on February 15, 2022, at 10:00 AM; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: December 13, 2021

So Ordered.

ENTER  J.S.C

**Hon. Judith N. McMahon
J.S.C.**