

Dimov v Rock

2023 NY Slip Op 34031(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 805317/2019

Judge: Erika M. Edwards

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

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MARINO DIMOV,

INDEX NO. 805317/2019

Plaintiff,

- v -

DECISION AND ORDER
AFTER INQUEST

DR. ALEXANDER ROCK, DR. ROBERT WINEGARDEN,
ROBERT F. WINEGARDEN, D.D.S., P.C., DR. TATYANA
BERMAN, and JERRY H. LYNN, D.D.S.,

Defendants.

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Plaintiff Marino Dimov ("Plaintiff") brought this dental malpractice action against Defendants Dr. Alexander Rock ("Dr. Rock"), Dr. Robert Winegarden ("Dr. Winegarden"), Robert F. Winegarden, D.D.S., P.C. ("Practice"), Dr. Tatyana Berman ("Dr. Berman") and Jerry H. Lynn, D.D.S. ("Dr. Lynn") (collectively, "Defendants").

In a decision and order, dated October 21, 2020 (NYSCEF Doc. No. 31), the court granted Plaintiff's motion and entered default judgments against Defendants Dr. Rock, Dr. Winegarden, the Practice and Dr. Lynn (collectively, "defaulting Defendants") and ordered an inquest and assessment of damages. The court found that Plaintiff demonstrated sufficient proof of the facts constituting Plaintiff's claim, as supported by an expert affidavit of Dr. Robert Vogel. Plaintiff advised the court that he resolved the matter against Dr. Berman.

As per the court's decision and order, dated August 9, 2023 (NYSCEF Doc. No. 37), the court scheduled an inquest for the assessment of Plaintiff's damages against the defaulting Defendants, Dr. Rock, Dr. Winegarden, the Practice and Dr. Lynn, on September 8, 2023, at 9:30 a.m. and the court directed Plaintiff to serve the defaulting Defendants with a copy of the

decision and order with Notice of Entry. Plaintiff duly served the defaulting Defendants on August 14, 2023. Subsequently, the court granted Plaintiff's request to appear virtually.

The inquest was held virtually on September 8, 2023, via Microsoft Teams. None of the defaulting Defendants appeared for the inquest, either in person in the courtroom, or virtually on Microsoft Teams. None of the Defendants contacted the court or Plaintiff's counsel to request an adjournment, nor did any of them request a link to appear virtually. Plaintiff and Plaintiff's counsel appeared virtually. The court permitted Plaintiff's expert to testify via affidavit and he was available should the court wish to question him.

Plaintiff's evidence consisted of the affidavit of Plaintiff's expert, Michael Chesner, D.D.S., dated September 5, 2023, portions of the deposition testimony of Dr. Berman taken on April 28, 2021, Plaintiff's testimony and a recent photograph of Plaintiff's mouth which was taken in August or September 2023.

In his affidavit, Dr. Chesner stated in substance that he has been in private practice in general dentistry for almost fifty years and that although he does not surgically place implants, he routinely restores them and places the prosthesis on the implants. Dr. Chesner stated in substance that upon a review of the facts, Plaintiff went to the Practice in March 2015 and Dr. Lynn presented a treatment plan consisting of extraction of Plaintiff's remaining teeth to be replaced by an upper and lower implant supported prosthesis for \$18,000. All of Plaintiff's teeth were extracted. Dr. Rock placed seven or eight implants on the upper arch and eight implants on the lower arch without a CT Scan. A lab technician, Raimone Perez, placed an upper and lower temporary prosthesis. Dr. Chesner further stated in substance that over the next few years, the temporary prosthesis continued to break and Mr. Perez repeatedly repaired it and replaced it, but it continued to break and fall out. Plaintiff continued to be treated until 2019, when the Practice

closed without any warning to Plaintiff. Plaintiff was left with seven implants on the upper and eight implants on the lower, but no prosthesis.

Upon review of Plaintiff's x-rays, dated August 5, 2021, which were not admitted into evidence, Dr. Chesner stated that Plaintiff had lost two or three upper implants. Upon his review of x-rays, dated February 10, 2022, Plaintiff lost an additional two upper implants and currently no upper implants remain. Dr. Chesner opined with a reasonable degree of dental certainty that the implants were angled improperly, they were short and have little bone support. He opined in substance that the lower implants were not placed in sufficient bone and two sets of implants on the lower left and right are too shallow and placed too close to each other to be restored. Therefore, he opined that they all need to be removed and replaced by new properly placed implants to support a functioning and successful prosthesis.

Dr. Chesner stated that Plaintiff will require an extensive implant supported prosthesis. He stated that Plaintiff needs eight new implants on each of his upper and lower arches, at \$4,000 each, for a total of \$32,000 per arch or \$64,000 total, a CT Scan at \$400, plus the cost to remove the lower implants, and an undetermined amount for potential additional costs for sinus surgery and bone grafts.

Plaintiff currently has an upper denture and lower temporary that he cements himself when it falls out, which grossly compromises Plaintiff's chewing experience and enjoyment.

In her deposition, Dr. Berman testified in substance that she was employed by Toothsavers as a general dentist and she knew that Dr. Lynn had surrendered his dental license at some point in or around 2001. Yet, despite having no license, Dr. Lynn continued to examine patients, develop their treatment plans and instruct her directly, or through Dr. Weingarden or Dr. Danziger, who had both run the Practice at various times, to instruct Dr. Berman on what to

do with the patients. Dr. Berman further testified in substance that at times, such treatment instructions were not healthy, nor beneficial for the patient.

Plaintiff testified in substance that he retained the services of the Practice beginning on April 5, 2015, for extractions and upper and lower implants for his entire mouth. Dr. Lynn examined Plaintiff and advised him in substance that the work would usually cost between \$25,000 to \$30,000, but he would do everything for the reduced price of \$15,000 to \$18,000. Plaintiff was told that he had to prepay the total amount and that they would start the work that same night. Plaintiff paid \$5,000 by credit card, \$3,000 in cash and he agreed to take out a high interest loan for \$10,000. Plaintiff testified in substance that although he paid the Practice \$18,000, the \$10,000 loan cost him \$16,000 to pay it off in full, so he actually paid a total of \$24,000.

Plaintiff further testified in substance that Dr. Lynn, Dr. Berman, Dr. Rock, a dental technician named Raimone, and possibly Dr. Weingarden, all performed some of the dental work on him. Dr. Lynn told Plaintiff that he would have to have most, if not all, of his teeth extracted because Plaintiff's mouth was in bad shape, he had gum disease and bad teeth. At the time, Plaintiff was missing about three or four teeth. He had all of his teeth extracted and Dr. Rock placed the temporary implants. Plaintiff testified in substance that Raimone took the impressions, fitted the prosthesis and repaired them. Plaintiff testified that he had numerous problems with the implants because they broke and fell out. He went to numerous appointments to have the broken temporaries repaired and replaced by Raimone and he was often forced to wait for several hours before being advised that they could not perform the work and he had to reschedule and come back on another day. Plaintiff went to the Practice's office in New Jersey and noticed two of the

same employees from the other office. Plaintiff was advised that it was a different business, so he would have to pay additional money to fix his problems. Plaintiff did not get the work done.

Plaintiff testified that all seven or eight of his implants fell out on the top and one fell out on the bottom. He had gone back and forth to the Practice for over four or five years. In about the end of 2019, without notice, Plaintiff found out that the Practice had closed. Plaintiff testified in substance that he was left with pieces of the temporary implants which had broken and fallen out. He said that it was difficult for him to eat and that he had to eat yogurt and liquids. He also testified that it was painful, but he did not elaborate as the nature or duration of the pain.

Plaintiff testified that he had to undergo additional treatment to have the upper dentures made, an implant extracted by an oral surgeon on the lower and a temporary prosthesis made for the lower. Plaintiff testified that he has to cement them into place and that they are uncomfortable when he chews. Plaintiff consulted with at least five or six other dentists who performed x-rays and provided estimates of \$65,000 to \$85,000 to replace the implants, but Plaintiff cannot afford to have the work performed.

The court notes that the photograph of Plaintiff's mouth shows that he has no implants remaining on his upper arch, but the photograph does not show his lower gums, so it is unclear as to whether there are any implants remaining in Plaintiff's lower arch.

In his summation, Plaintiff's counsel requested punitive damages and he cited another case he had against the Defendants, *Garber v. Lynn*, in which punitive damages were awarded (*Garber v Lynn*, 79 AD3d 401 [1st Dept 2010]). Plaintiff's counsel did not suggest a specific dollar amount for compensatory or punitive damages.

In *Garber v. Lynn*, the First Department effectively increased a jury's award of \$25,000 for past and future pain and suffering to \$90,000 for past pain and suffering and \$60,000 for future pain and suffering and reduced a punitive damages award of \$260,000 to \$100,000.

In *Ambrose v. Rock*, after an inquest against the same defendants, this court awarded the Plaintiff \$80,000 for past pain and suffering, \$18,000 for past expenses and \$100,000 for punitive damages, for a total of \$198,000 (*Ambrose v. Rock*, 2022 NY Slip Op 31334[U] [Sup Ct, New York County 2022]). Unlike in the instant matter, the court found that Plaintiff failed to demonstrate the specific cost for future expenses to correct the improper implants.

Here, the court finds that the defaulting Defendants were duly served with the court's order scheduling the inquest, yet they failed to appear for the inquest. As an initial matter, the court finds the witnesses to be credible. The court also finds that Plaintiff demonstrated that Dr. Lynn and Raimone Perez both performed dental work on Plaintiff without a dental license and that the other defaulting Defendants permitted, authorized, and/or directed such unlicensed dentistry services. Plaintiff demonstrated that the defaulting Defendants departed from good and accepted dental practice by improperly placing the dental implants and prosthesis in Plaintiff's upper and lower arches. The court also finds that such departures were substantial factors in causing Plaintiff to suffer damages, which included pain, inability to chew and eat solid foods at times, inability to comfortably chew at certain times, and the inability to have teeth in his mouth, which will require extensive future dental treatment to correct.

The court also finds that Plaintiff demonstrated that the defaulting Defendants willfully, wantonly and recklessly permitted Dr. Lynn, who was an unlicensed dentist, and Raimone Perez, who was a dental assistant, to illegally perform the improper dental work on Plaintiff. As such, "[b]y having Perez fabricate, place and adjust plaintiff's temporary bridge, Toothsavers was

engaging in exactly the sort of willful or wanton negligence or recklessness that evinces a gross indifference to patient care, warranting deterrence, and supporting submission of the issue of punitive damages to the jury” (*id.* at 403).

The court finds that Plaintiff demonstrated that his future damages to remove the remaining implants and replace them with new implants and prosthesis would cost Plaintiff a minimum of \$64,400.00 to \$85,000. Therefore, the court finds \$75,000 to be reasonable. However, since Plaintiff failed to state his age, the court cannot determine the estimated number of years for which to award any future damages. Additionally, Plaintiff failed to demonstrate future pain and suffering, except for the inability to chew comfortably but the court can infer some pain and suffering when undergoing the additional dental procedures and continued pain and inability to comfortably chew until such future procedure has been completed.

The court awards Plaintiff the following:

- 1) \$70,000 for past pain and suffering;
- 2) \$15,000 for Plaintiff's payments to the Practice (which is reduced, since there is no evidence that the extractions and any cleanings and diagnostic tests were improperly performed and the court will not credit Plaintiff for the interest paid on the loan);
- 3) \$10,000 for future pain and suffering;
- 4) \$75,000 for the cost of future dental treatment; and
- 5) \$100,000 for punitive damages.

Therefore, the total amount awarded to Plaintiff is \$270,000.

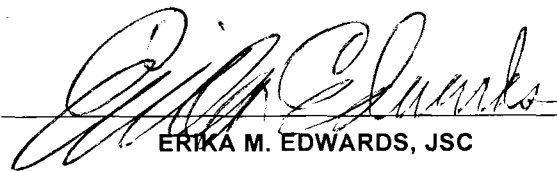
As such, it is hereby

ORDERED that after the inquest held before the court on September 8, 2023, the court awards Plaintiff Marino Dimov \$270,000 in damages as against Defendants Dr. Alexander Rock,

Dr. Robert Winegarden, Robert F. Winegarden, D.D.S., P.C. and Jerry H. Lynn, D.D.S.; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Plaintiff Marino Dimov in the amount of \$270,000 as against Defendants Dr. Alexander Rock, Dr. Robert Winegarden, Robert F. Winegarden, D.D.S., P.C. and Jerry H. Lynn, D.D.S., jointly and severally.

This constitutes the decision and order after inquest of the court.


ERIKA M. EDWARDS, JSC

DATE: 11/13/2023

Check One: Case Disposed Non-Final Disposition
Check if Appropriate: Other (Specify _____)