

Hamilton v Zelig

2010 NY Slip Op 33474(U)

December 17, 2010

Sup Ct, NY County

Docket Number: 112601/08

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

IA PART 16
PART _____

Index Number : 112601/2008

HAMILTON, CATHY

vs.

ZELIG, JOSEPH

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion is for

FILED

PAPERS NUMBERED

DEC 1 2010

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*by defendants
for summary judgment dismissing
this action with prejudice is
granted in accordance with the
accompanying memorandum decision.*

Dated: DEC 17 2010

Alice Schlesinger
ALICE SCHLESINGER 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
COUNTY OF NEW YORK

-----X

CATHY HAMILTON,

Plaintiffs,

-against-

JOSEPH ZELIG, D.D.S. and SMILE IN THE CITY
DENTAL GROUP, PLLC,

Defendants.

-----X
SCHLESINGER, J.:

Index No. 112601/08
Motion Seq. No. 001

FILED

DEC 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

The defendants in this medical malpractice action are moving for summary judgment pursuant to CPLR §3212 in a timely fashion since all discovery has been completed. The main defendant Dr. Joseph Zelig, who has a partnership in co-defendant Smile in the City Dental Group, PLLC, treated Cathy Hamilton the plaintiff with regard to tooth #14.

Dr. Zelig first examined Ms. Hamilton on September 26, 2007, when she complained of pain in that tooth. She wanted an extraction of that tooth and it did appear that there might be a fracture in that tooth. Dr. Zelig, with the consent of Ms. Hamilton, extracted that tooth without any complications. His plan was to place an implant in about 6-8 weeks after the healing from the extraction had occurred. After the extraction, there were various follow-up visits where Dr. Zelig noted that healing was taking place.

On November 19, 2007, again with the consent of the plaintiff, Dr. Zelig placed an implant in the space previously occupied by tooth #14. He also prescribed antibiotics on that date. There was a follow-up visit on December 3, 2007, where healing appeared to be taking place. However, on December 16, 2007, Ms. Hamilton sent a text message to Dr. Zelig to the effect that she believed there was an infection in the implant area and that

the implant should be removed. Dr. Zelig asked her to come into the office where he examined her on December 21, 2007. Although he saw no problems, he felt that it would be prudent to refer her to Dr. Chen, an oral surgeon, for further evaluation. On December 26, 2007, Dr. Chen examined Ms. Hamilton and found the implant to be placed appropriately. He suggested that she might have a sinus infection and therefore referred her to an otolaryngologist.

Ms. Hamilton made further complaints and in connection with these complaints went to the NYU Dental Clinic, where on January 4, 2008 Dr. Baruch Tetri removed the implant under the supervision of Dr. Robert Schoor and at the request of the plaintiff who complained of severe pain in the area.

Accompanying the motion for summary judgment in the first instance is an affirmation from Edward Jutkowitz, DMD. He is a dentist specializing in periodontics and has been doing this work for twenty-five years. He has done hundreds of tooth extractions and implants. He reviewed all the records, as well as the X-rays, and opines that Dr. Zelig's entire treatment of Ms. Hamilton and her problems with tooth #14 was in accordance with acceptable standards of dental care. This includes the placement of a 10 mm implant, which size was selected because Dr. Zelig had taken X-rays and, together with the aid of a software program, obtained a measurement of 12 mm of space in that area. Dr. Jutkowitz specifically says that there was no requirement for a dentist to use a CAT Scan to measure this space before placement of an implant.

Dr. Jutkowitz also says that Dr. Zelig properly referred Ms. Hamilton to Dr. Chen. Finally, he points out that Dr. Schoor confirmed that there was no perforation of the sinus. However, he points out that there was a diagnosis of a hard enlargement above the sinus

floor which did indicate that there could well have been a sinus infection. However, Dr. Jutkowitz concludes his affirmation by stating that there was nothing to show that the implant below the sinus had anything to do with an infection in the sinus, as there was no communication between the implant and the sinus cavity.

Also included as part of the motion papers are affidavits from Dr. Schoor and Dr. Tetri, both from New York University. Dr. Schoor, the supervising dentist at The Dental Clinic, describes what occurred when he and Dr. Tetri removed the implant in January 2008. He states that there were no signs of an infection or inflammation. Nor was there fever or glandular swelling. Further, he says that two X-rays which he had taken showed a well placed implant below the sinus floor with no communication or connection to the sinus cavity. He also says that the implant did not perforate the cortical plate into the sinus and did not extend into or above the cortical plate. He says further that the implant appeared to be well integrated and there was no evidence of problems or complications. He also says that there was no remaining tooth left behind. Finally, he concludes that the implant was not the cause of Ms. Hamilton's pain or any infection in her sinus. He did see a pinhole which was well above the implant site and above the sinus floor which was not in any way connected to or caused by the implant.

Dr. Tetri, in his affidavit, confirms what he and Dr. Schoor saw and stated. By their papers, the moving defendants most certainly have established a prima facie case. Therefore, the burden shifts to the plaintiff to show both malpractice and an injury caused by that malpractice.

But the affirmation submitted by the plaintiff's expert fails to do that. There is no question that the plaintiff's expert has the proper credentials to opine on the issues in this

case. He is board certified in oral and maxillofacial surgery and has practiced oral surgery for a number of years. He has also been involved in numerous extractions and placements of implants such as this one.

His sole complaint on the issue of proper standards of dentistry is in the planning that led to the placement of the implant. It is his position that the standard of care required that Dr. Zelig first order a CAT Scan, which shows three dimensions and allows for the proper measurement of the space. The traditional, usual type of X-ray is not an appropriate diagnostic tool in these circumstances. He states this is so because such X-rays are subject to distortion, causing apparent shortening or elongation and therefore providing an inaccurate assessment of the amount of bone available for implant placement. He explains that an accurate assessment is particularly necessary when the maxillary sinus is close by, as it was in this case.

Therefore, plaintiff's expert concludes that Dr. Jutkowitz is wrong when he says that Dr. Zelig documented 12 mm of available space for implant placement in the #14 space, as no one could be certain of the correct placement since a two dimensional X-ray was used to assess a three dimensional space. Further, he notes that since the sinus slopes, there is even a greater need for a three dimensional measuring tool. Finally, he points out that the calibration and measurement data relied upon by Dr. Zelig is now gone and not available for him to inspect. Therefore, he opines that if Dr. Zelig had done a proper measurement with a CAT Scan, he would not have used a 10 mm implant which was too large for the space.

He then discusses the removal of the implant and the pinhole into the sinus seen by Dr. Schoor, which was draining blood and fluid. The expert then concludes by opining

that this hole must have been caused by the insertion of the implant cylinder or by excessive drilling. However, there is no evidence of either.

All of the above appears to make out a case of malpractice on liability, but the failure is as to the causation element. This expert simply jumps to the conclusion, without any evidentiary predicate for this conclusion, that the hole that Dr. Schoor noted, the pinhole, was in fact caused by the implant perforating the sinus (or drilling, a theory never before espoused by the plaintiff).

But in fact, as pointed out by moving counsel in his Reply, Dr. Schoor made it absolutely clear by his own observation that the pinhole that he saw was in a different area from the implant and had no connection to the implant at all. Therefore, the plaintiff's expert has absolutely no basis on which to conclude that the failure to measure with a CAT Scan led to the placement of an oversized implant that perforated the sinus, where there is simply no evidence that a perforation ever occurred.

It should also be noted that all of the post-implant X-rays show a well-placed implant below the sinus floor. Therefore, the plaintiff's papers are deficient in that they rely exclusively on an expert's speculation that the pinhole found by Dr. Schoor was somehow created by the implant, although there is no evidence to support that conclusion. Rather, it is Dr. Schoor's conclusion that the infection caused the pinhole.

In sum, I find that the plaintiff has failed to sustain its burden to show that there are issues of fact sufficient to keep this action alive.

Accordingly, it is hereby

ORDERED that the motion by the defendants Joseph Zelig and Smile in the City Dental Group, PLLC, for summary judgment is granted and the Clerk is directed to enter judgment dismissing this action with prejudice.

Dated: December 17, 2010
DEC 17 2010



J.S.C.
ALICE SCHLESINGER

FILED
DEC 21 2010
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