

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 10-00141

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ.

FRANK G. CYZOWSKI,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM J. ELKOVITCH, D.D.S.,
DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (David Michael Barry, J.), entered January 4, 2010 in a dental malpractice action. The order denied the respective motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint in this dental malpractice action. In support of the motion, defendant submitted his own deposition as well as the deposition of plaintiff, which present differing versions of the symptoms allegedly presented by plaintiff at an August 11, 2003 examination. Moreover, the experts who submitted affidavits on behalf of defendant address the issue of alleged malpractice based on defendant's description of the symptoms presented by plaintiff, without taking into account plaintiff's version of his symptoms. As defendant correctly concedes in his brief on appeal, the nature of plaintiff's symptoms is central to the issue of whether defendant properly diagnosed plaintiff's disease or referred him to a specialist in a timely fashion. Thus, defendant is not entitled to summary judgment dismissing the complaint at this juncture of the litigation (*see Fagan v Panchal*, 77 AD3d 705; *Padilla v Verczky-Porter*, 66 AD3d 1481, 1482-1483; *Matter of Kreinheder v Withiam-Leitch*, 66 AD3d 1485). Finally, we note that plaintiff's cross appeal from the order insofar as it denied his cross motion for

a ruling in limine and for partial summary judgment was deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b).

Entered: April 1, 2011

Patricia L. Morgan
Clerk of the Court