SHORT FORM ORDER

INDEX No. 04-27262
CAL. No. 06-01637-DM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-4-06
ADJ. DATE 2-23-07
Mot. Seq. # 001 - MD
002 - MD
003 - MD

BERNADETTE LISSKE and ROBERT LISSKE,

Plaintiffs,

- against -

FRANK GUARDALA, D.D.S.,

Defendant.

SCHOEN & STRASSMAN, LLP
Attorneys for Plaintiffs
52 Elm Street, Suite 6
Huntington, New York 11743

CHESNEY & MURPHY, LLP
Attorneys for Defendants
2305 Grand Avenue
Baldwin, New York 11510

Upon the following papers numbered 1 to 63 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 10 Notice of Cross Motion and supporting papers (002) amend bp, strike ans 11-18; Answering Affidavits and supporting papers 19-31; Replying Affidavits and supporting papers ; Notice of Cross Motion and supporting papers (003) VNI 32-47; Answering Affidavits and supporting papers 47-49; Replying Affidavits and supporting papers 50-53; Other 54-61; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Frank Guardala, D.D.S. pursuant to CPLR 3212 and CPLR 214-a for an order granting summary judgment against plaintiffs, Bernadette Lisske and Robert Lisske, dismissing the complaint as timed barred as it pertains to treatment dates prior to May 23, 2002, opposed by plaintiffs, is denied. It is further

ORDERED that this motion (002) by plaintiffs Bernadette Lisske and Robert Lisske pursuant to CPLR 3025(b) for an order permitting plaintiffs leave to serve a Third Amended and Supplemental Verified Bill of Particulars; and pursuant to CPLR 3126(3) for an order striking defendant's answer for spoliation of critical evidence, opposed by defendant, is denied. It is further

ORDERED that this motion (003) by defendant Frank Guardala, D.D.S. pursuant to CPLR 3042, CPLR 3025(b), and 22 NYCRR 202.21(e) for an order vacating the Note of Issue and striking this matter from the trial calendar, opposed by plaintiffs, has been rendered academic by the denial of motion (002) and is accordingly denied as moot.

This is an action sounding in dental malpractice wherein the complaint dated November 9, 2004 alleges plaintiff Bernadette Lisske was a patient of defendant Frank Guardala, D.D.S. from approximately 1985 through 2002 for general dental health care. A derivative claim was asserted by plaintiff's husband Robert Lisske. The Bill of Particulars (Defendant's Exhibit C) asserts the negligent acts and omission took place from approximately September 1997 through December 2002 at defendant's office in Fort Salonga wherein defendant, inter alia, inappropriately performed root scaling, rinses, antibiotic therapy, periodontal surgery, placement of pins and cementing the molar crown, causing plaintiff pain and discomfort, loss of enjoyment of life, severe and extreme emotional injuries, anxiety and distress, having to undergo unnecessary dental procedures, incurring dental expenses, development of a digestive condition resulting in medical treatment and aggravation and exacerbation of a cervical condition. An amended and supplemental bill of particulars (defendant's Exhibit D) was served September 7, 2005, wherein plaintiff alleges, inter alia, defendant failed to properly and timely diagnose her condition, failed to timely refer her to a specialist on June 27, 2001 when plaintiff presented with a bone defect around teeth #29-31, failed to formulate a treatment plan, failed to obtain an informed consent, took unnecessary x-rays, failed to properly seal and cement a molar crown on tooth #31 (mandibular right second molar), performing periodontal surgery on tooth #31 and placing a costly bridge on tooth #28 (right mandibular second bicuspid) and tooth #31, inappropriately placing porcelain veneers on upper lateral incisors on teeth #7 and #10, inappropriately performing periodontal surgery on June 1, 1999 on teeth #29 and 31 and cementing those teeth prior to healing, inappropriately fitting the bridge at teeth #29-31 and placing pins in tooth #31 and performing a bit (sic) adjustment on June 3, 2002, inappropriately cementing a post hole for a loosened bridge on December 23, 2002 at teeth #29-31, inappropriately placing a new bridge on June 6, 1999 on tooth #29-31 when it need extraction one year prior, in failing to document tooth #11's crown removal on July 27, 1998, and in ill-fitting and improperly seating post/crown #11 on April 21, 2003.

Turning to motion (001), defendant seeks an order granting summary judgment dismissing plaintiffs' complaint as it pertains to treatment dates prior to May 23, 2002 as time barred pursuant to CPLR 214-a. In support of motion (001), defendant has submitted, inter alia, copies of the pleadings, verified bill of particulars, amended and supplemental bill of particulars; unsigned, unsworn copy of defendant Gardala's deposition transcript; copy of the Note of Issue and Certificate of Readiness dated June 23, 2006; an uncertified copy of plaintiff's dental records; and in the Reply, the Affidavits of defendant Frank Guardala and Dr. Richard Rausch, D.D.S..

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented ***(Sillman v Twentieth Century-Fox Film Corporation***, 3 N.Y.2d 395, 165 N.Y.S.2d 498). The movant has the initial burden of proving entitlement to summary judgment ***(Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***(Winegrad v N.Y.U. Medical Center***, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact." (CPLR 3212(b); ***Zuckerman v City of New York***, 49 NY2d 557, 427 N.Y.S.2d 595). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form ***(Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790). CPLR §214-a provides in pertinent part that "An action for medical, dental or podiatric malpractice must be commenced within two yeas and six months of the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure;..." While the mere existence of a hiatus between office visits does not, as a matter of law, preclude a finding of continuous treatment, the independent nature of the respective treatments afforded could render it inappropriate to invoke the continuous treatment doctrine (***Catherine Ciciless et al v. Jules V. Lane et al*** 129 AD2d 759, 514 NYS2d 752).

In the instant action, there is a factual issue as to whether the defendant provided a continuous course of treatment for the specific condition which gave rise to the action (***Debra Cantor et al v S G Visvikis et al,*** 233 AD2d 286, 649 NYS2d 801). Where it has not been established as a matter of law that the dental care provided to the patient was for treatment of a condition separate and distinct from the condition allegedly negligently treated, the issue of whether or not the continuous treatment doctrine could be applied remains a question of fact for a jury's resolution (***Kenneth Yelin v. American Dentral Center and Mark Rothman,*** 184 AD2d 693, 585 NYS2d 95). Defendant has submitted the affidavit from defendant's expert witness, Richard Raush, D.D.S., in support of this motion (001) on the issue of whether there was continuous treatment or treatment of a condition separate and distinct from the condition allegedly negligently treated. Defendant's own affidavit setting forth that the treatment was not continuous but separate and distinct is self-serving. Dr. Raush avers the treatment was separate and distinct. However, the affidavit of plaintiff's expert witness, Dr. Paul Apfel, D.D.S., sets

forth that the specific treatments were continuous and not separate and distinct. The Court concludes there exist factual issues concerning whether the treatment rendered by defendant was continuous or separate and distinct, and thus summary judgment and dismissing all treatment dates prior to May 23, 2002 is not warranted.

Accordingly, defendant's motion (001) for an order granting summary judgment dismissing the complaint as time barred as to all treatment dates prior to May 23, 2002, is denied.

Turning to motion (002) brought pursuant to CPLR 3025(b) for an order permitting plaintiffs leave to serve a Third Amended and Supplemental Verified Bill of Particulars; and pursuant to CPLR 3126(3) for an order striking defendant's answer for spoliation of critical evidence, plaintiff argues entitlement to serve a Third Supplemental and Amended Bill of Particulars because, inter alia, defendant did not appear for his examination before trial until May 16. 2006.

While the general rule in deciding motions for leave to amend a bill of particulars is that leave to amend is to be freely given in the absence of a showing of prejudice, judicial discretion in allowing such an amendment on the eve of trial must be discreet, circumspect, prudent and cautious ***(Leon et al v Central General Hospital***, 156 AD2d 338; 548 NYS2d 291). Once a Note of Issue has been filed, a plaintiff may not serve an amended bill of particulars without obtaining leave of the court; such leave should be freely given in the absence of prejudice or surprise to the opposing party (***Carmella Romanello v Barry Jason,*** 303 AD2d 670, 756 NYS2d 657). It is determined that the proposed Third Supplemental and Amended Bill of Particulars, served long after the Note of Issue and Certificate of Readiness dated June 23, 2006, were served, and long after Plaintiff's Expert Witness Disclosure, dated August 3, 2006, was served after defendant's deposition (Defendant's aff. in opp., exhibit G), does not address any departures outside the dates alleged in the Second Amended Bill of Particulars, and is highly prejudicial to defendant because it expands the period of the alleged malpractice by six and one half years as it alleges the malpractice commenced April, 1991 instead of September, 1997. The Third Supplemental and Amended Bill of Particulars is not consistent with the Expert Witness Disclosure previously exchanged by plaintiffs. No reasonable delay in making this application since May, 2006, after defendant appeared for his deposition, has been demonstrated by plaintiff (***Carmella Romanello v Barry Jason,*** supra.). And lastly, there are factual issues concerning whether the treatment rendered to plaintiff was continuous or separate and distinct.

Accordingly, that part of plaintiffs motion (002) which seeks an order granting plaintiff leave to serve the proposed Third Supplemental and Amended Bill of Particulars is denied.

Plaintiff also seeks an order pursuant to CPLR 3126(3) striking defendant's answer for spoliation of critical evidence, namely, dental x-rays relating as follows; PA films of tooth 30-August 25, 1992 tooth #8- August 12, 1997; tooth #31-May 25, 1999; and a PA film of tooth

#10- January 23, 2003. Defendant argues that as the case is pled, only the one January 23, 2003 film argued to be missing by plaintiff relates to this action. Defendant also asserts sixty eight other x-rays have been produced by defendant. This is not disputed and plaintiffs's assertions about what may have happened to the missing film at issue is merely speculative. Additionally, Dr. Guardala sold his business upon retirement in the summer of 2003 to Gentle Dental, who then became custodian of plaintiff's chart and x-rays. Also, it is argued that defendant may have sent the January 23, 2003 x-ray to the insurance company on a claim. Based upon the foregoing, it is determined plaintiff has not demonstrated an intentional attempt to hide or destroy evidence, or negligent destruction of evidence which defendant had a duty to preserve (***Weiss v Industrial Enterprises, Ltd.***, 7AD3d 518, 776 NYS2d 322). Here, it cannot be presumed that defendant is the party responsible for the disappearance of such x-ray, or, more importantly, that it was discarded by the sanctioned party in an effort to frustrate discovery (***John O'Reilly III et al v Leonid Yavorsky,*** 300 AD2d 456, 755 NYS2d 81).

Accordingly, that part of plaintiffs' motion (002) which seeks an order striking defendant's answer based upon the spoliation of evidence is denied.

Turning to motion (003), defendant seeks an order pursuant to CPLR 3042, CPLR 3025(b), and 22 NYCRR 202.21(e) vacating the Note of Issue and striking this matter from the trial calendar. However, this application has been rendered academic by denial of that part of motion (002) which seeks an order permitting plaintiff to serve a Third Amended and Supplemental Bill of Particulars.

Accordingly, defendant's motion (003) for an order pursuant to CPLR 3042, CPLR 3025(b), and 22 NYCRR 202.21(e) for an order vacating the Note of Issue and striking this matter from the trial calendar is denied as moot.

Dated: MAR 27 2007

J.S.C.

____ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**