

**Cohen v Kalman**

2007 NY Slip Op 31206(U)

April 25, 2007

Supreme Court, Queens County

Docket Number: 0009368/2005

Judge: David Elliot

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## Short Form Order

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

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RHODA COHEN, No. 9368/05  
  
Plaintiff, Motion  
-against- Date February 20, 2007  
  
DORON KALMAN, D.D.S., Motion  
Defendant. Cal. No. 8  
----- Motion  
Seq. No. 2

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This is an action by plaintiff Rhoda Cohen to recover for injuries alleged to have been sustained as a result of the negligence of defendant Doron Kalman, D.D.S., (Kalman), in performing an apicoectomy on January 5, 2004.

Defendant moves for summary judgment pursuant to CPLR § 3212 on the ground that there is no evidence that he departed from the standard of care in the manner in which he administered anesthesia and performed the procedure and in that he had a detailed discussion with the patient about the risks involved.

In support of the motion defendant Kalman presents his own affidavit in which he details the procedure and states that to a reasonable degree of dental certainty he did not depart in the manner in which he performed the apicoectomy and in that he provided plaintiff with information as to the risks and benefits of the procedure. Also provided to the court is the affidavit of Allan J. Kucine, D.D.S., a dentist and board certified oral and maxillofacial surgeon who opines, "with a degree of dental certainty", that Dr. Kalman did not depart from the standard of care in his "administration of anesthesia and his follow-up care, which

included a timely referral to a nerve repair specialist for consultation." Dr. Kucine continues: "Finally, parasthesia or, numbness is a known risk of this procedure, which was fully disclosed to the patient, both verbally and in writing through the consent form. In other words, the patient can be left with permanent numbness from an apicoectomy of tooth #19 under the best circumstances and without any negligence on the part of the oral surgeon, which is, with a reasonable degree of dental surgery, what happened in this case."

In opposition to the motion, plaintiff presents the affirmation of Robert A. Corwin, a dentist for over forty years, who asserts, based on a reasonable degree of dental certainty, that the defendant was negligent with respect to the procedure and caused the numbness; that the defendant's negligent technique caused permanent nerve damage and that a retrograde filling was actually placed in the wrong place. He asserts that his opinion is based on his experience as well as a review of records and a physical exam.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

Here, although the affidavit of defendant Kalman is self-serving, defendant sustains his burden on the motion by expert affidavit setting forth that the defendant was free of negligence in the performance of the apicoectomy and that plaintiff was fully informed of the risks of the procedure.

In response, plaintiff's expert's affidavit is sufficient to create an issue of fact as to the issue of negligence. In reply, defense counsel asserts that the affidavit of plaintiff's expert is insufficient, as the expert does not indicate that he is an oral and maxillofacial surgeon and does not set forth any skill, education, knowledge or experience in performing apicoectomies, citing Behar v. Coren, 21 AD3d 1045. However, plaintiff's expert does sufficiently set forth that his opinion is based on his forty years of experience, as well as a review of records and a physical exam performed by

him. An expert need not be a specialist in a particular field in order to testify about accepted practices in the field. The court notes that neither defendant's expert in support of the motion nor plaintiff's expert in opposition speak of "accepted practices" or "departures". Calabro v. Hescheles, 22 AD3d 622.

As to the second cause of action asserting a lack of informed consent, defendant set forth a prima facie case of entitlement to an award of summary judgment by his affidavit and the documentary evidence submitted to the court. The document entitled "Consent for Dental-Alveolar Surgery", which is dated January 5, 2004, is signed by the parties and a witness in two places and is initialed by the plaintiff on seventeen lines. Line 10 of the document specifies, among other things, that numbness may persist "for weeks, months, or in remote instances, permanently." Consent is specifically given for an apicoectomy.

Plaintiff does not address the issue of lack of informed consent. In her deposition, plaintiff acknowledged having signed and initialed the document although she also asserted that certain handwritten portions were not there when she signed it.

Accordingly, the motion is granted to the extent that the second cause of action asserting a lack of informed consent is dismissed. The motion, in all other respects, is denied.

Dated: April 25, 2007

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HON. DAVID ELLIOT