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

PRESENT: BRANSTEN Justice

PART 6

Index Number : 109541/2005

ERDOGAN, NEDIM

VS

TOOTHSAVERS DENTAL SERVICES

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 109541/05

MOTION DATE 6/19/07

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/5/07

HON. EILEEN BRANSTEN

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

NOTICE OF APPEARANCE

October 12, 2007

Case Name: *Erdogan v Toothsavers et al*

Index Number: 109541/05

Nature of Appearances: Pre-Trial Conference

Date & Time: Tuesday, October 23, 2007 at 9:30 a.m.

Trial is to begin on Monday, November 5, 2007.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

NEDIM ERDOGAN,

Plaintiff,

-against-

TOOTHSAVERS DENTAL SERVICES, P.C.,
SOL S. STOLZENBERG, D.M.D.,
SOL S. STOLZENBERG, D.M.D., P.C.
doing business as
TOOTHSAVERS DENTAL SERVICES, P.C.,
SOL S. STOLZENBERG, D.M.D., P.C.
doing business as TOOTHSAVERS,
ROBERT WINEGARDEN, D.D.S.,
and MANUEL BARRY GORDON, also known as
BARRY GORDON, D.D.S.,

Defendants.

----------X

Index No.109541/05
Motion Dates: 6/19/07
Motion Seq. Nos.:
003,004,005

SOL S. STOLZENBERG, D.M.D.;
SOL S. STOLZENBERG, D.M.D., P.C. d/b/a
TOOTHSAVERS; and SOL S. STOLZENBERG,
D.M.D., P.C. d/b/a TOOTHSAVERS s/h/a
"SOL S. STOLZENBERG, D.M.D., P.C. d/b/a
TOOTHSAVERS DENTAL SERVICES, P.C.",

Third-Party Plaintiffs,

-against-

BARRY GORDON, D.D.S.,

Third-Party Defendant,

----------X

Third-Party Index No.:
590794/06

PRESENT: EILEEN BRANSTEN, J.

Motion Sequences numbers 003, 004, and 005 are consolidated for disposition.

In the instant action, plaintiff Nedim Erdogan ("Mr. Erdogan") brings dental malpractice claims against defendants Toothsavers Dental Services, P.C. ("Toothsavers"); Sol S. Stolzenberg, D.M.D. ("Dr. Stolzenberg"); Sol. S. Stolzenberg, D.M.D., P.C., d/b/a Toothsavers and as Toothsavers Dental Services, P.C.("Stolzenberg/Toothsavers"); Robert Winegarden, D.D.S. ("Dr. Winegarden"); and Manuel Barry Gordon, D.D.S., a/k/a Barry Gordon, D.D.S. ("Dr. Gordon"). Third Party Plaintiffs Toothsavers, Dr. Stolzenberg, and Stolzenberg/Toothsavers (collectively "Third Party Plaintiffs") bring claims for indemnification and contribution against Dr. Gordon.

In motion sequence number 003, Dr. Winegarden moves pursuant to CPLR 3212 for summary judgment dismissal of the complaint as pled against him. Third Party Plaintiffs also move for summary judgment under CPLR 3212 in motion sequence number 004. In motion sequence number 005, Dr. Gordon moves to dismiss the complaint under CPLR 3211(a)(5) and CPLR 214-a based on Mr. Erdogan's alleged failure to comply with the applicable statute of limitations and pursuant to CPLR 3212, arguing that there are no triable issues of material fact regarding his commission of malpractice. He also moves under CPLR 3212 for summary judgment dismissal of the indemnification and contribution claims brought by the Third Party Plaintiffs, and for sanctions and costs against them under 22 NYCRR § 130-1.1 and CPLR 8106, alleging that the third-party action is frivolous.

BACKGROUND

On May 19, 2003, Mr. Erdogan visited the Toothsavers office seeking an implant consultation, new dentures, and a fixed consultation. Dr. Winegarden, a New York-licensed dentist with an office at Toothsavers, met with him.

Dr. Winegarden took a Panoramic x-ray of Mr. Erdogan's teeth. Mr. Erdogan only had seven teeth on his upper jaw and eight teeth on his lower jaw. He had no molars or front teeth. He was missing teeth numbered one, two, four, eight, nine, 13, 14, 15, 16, 17, 18, 19, 24, 25, 30, 31, and 32. At the time of the visit, Mr. Erdogan wore a partial upper and lower denture. He did not provide Dr. Winegarden with his relevant medical history.

Dr. Winegarden presented Mr. Erdogan with various treatment options. Mr. Erdogan chose a treatment plan costing approximately $10,000.00, which included implant models, crowns, and other corrective mechanisms. He signed a consent form, which authorized Dr. Winegarden to perform the procedures. Mr. Erdogan did not discuss treatment with anyone else at Toothsavers.

Dr. Winegarden prepared Mr. Erdogan's upper teeth (numbers three, five, six, seven, 10, 11, and 12), and lower teeth (numbers 20, 21, 22, 23, 26, 27 and 28) for crowns; performed a curettage, which is the removal of growths or other material from the wall of a cavity of his gums; and conducted a root canal on teeth numbers seven and 10, which were protrusive. Dr. Winegarden then made a temporary metal (cantilever) bridge for Mr.

Erdogan to connect tooth 12 with the implant to be placed at the site of tooth 13. During this treatment, Dr. Winegarden administered the anesthetic Lidocaine, and 3 carpules.

On May 21, 2003, Mr. Erdogan returned to Toothsavers for additional treatment. Dr. Winegarden found the upper temporary case to be too tight after being tried. It split between teeth numbers eight and nine, and Dr. Winegarden applied a Duralay pickup to connect the two pieces and reduce the metal's tightness.

On May 22, 2003, Dr. Winegarden tried the lower metal and made adjustments. The lower metal was split between teeth numbers 24 and 25 and a new impression was taken on the lower right side of Mr. Erdogan's mouth.

On May 28, 2003, Dr. Winegarden tried the lower-right side and applied a Duralay pickup to connect the two pieces of metal. Mr. Erdogan complained of pain on the upper right side of his mouth, but Dr. Winegarden could not find the discomfort's cause.

On May 29, 2003, the lower metal was tried again and fit well. Mr. Erdogan still complained of pain on the upper-right side.

On June 9, 2003, Mr. Erdogan met with Dr. Gordon, a New York-licensed periodontist, at Toothsavers. According to The Third Party Plaintiffs, Dr. Gordon joined then as an Independent Contractor pursuant to an oral agreement, and was to make his own decisions as to patient-treatment plans. *See*, Gordon Notice of Motion ("Gordon Supp."), Browne Aff., Ex K at 8-9, ¶ 17-19. The Third Party Plaintiffs, moreover, allege that Dr.

Gordon promised to indemnify them in the event of an adverse malpractice judgment. Id, ¶ 18.

At Toothsavers, Dr. Gordon reviewed Mr. Erdogan's medical history, took his blood pressure, and administered two-percent Lidocaine with epinephrine and three carpules. He made a crestal incision from teeth numbers 7-10, and performed a full thickness flap, which is pulling back the gums. He then conducted an osteotomy, a surgical cutting of the bone, on teeth numbers eight and nine; an implant was put into each site. A throat screen was put in place, cover screws were put on, and the site was closed with 30 silk sutures. After this procedure, Mr. Erdogan had primary stability and hemostasis, but was not bleeding. Dr. Gordon gave him 500 mg of Amoxicillin, Chlorhexidine to rinse his mouth, 600 mg of Ibuprofen, and 20 tablets of Tylenol #3 for pain relief.

Later that same day, Dr. Patel, a New York-licnesed general dentist with Toothsavers, performed a root canal on teeth numbers five and six to find the cause of Mr. Erdogan's pain. Dr. Patel cleaned and shaped the canal for these teeth.

Mr. Erdogan returned to Toothsavers on June 16, 2003 for a post-operative check-up with Dr. Gordon. Dr. Gordon examined the implants, removed the sutures, and noted that the implant sites appeared to be healing well.

On June 24, 2003, Mr. Erdogan visited Dr. Patel. The latter tried the temporary porcelain, which was fused onto the metal bridges as the implants healed. On July 1, 2003,

Dr. Winegarden inserted temporary bridges on Mr. Erdogan's upper and lower arches. The first temporary bridge was inserted for teeth numbers three, five, six, seven, 10, 11 and 12. The second one was for teeth numbers 20, 21, 22, 23, 27, 28 and 29.

On July 14, 2003, Dr. Gordon examined the implants on Mr. Erdogan's lower teeth numbers 19, 24 and 25. He administered Lidocaine with epinephrine (three carpules). Crestal incisions were made from teeth numbers 20 and 23 - 26. Implants were placed on teeth numbers 19, 24 and 25, achieving primary stability. Dr. Gordon placed a throat cover screen and a screw, and silk sutures were closed. After this procedure and primary hemostasis' completion, Dr. Gordon gave Mr. Erdogan a prescription for amoxicillin (500 mg); one bottle of extra-strength Chlorhexidine, Vicodin (extra strength); and 600 mg of Ibuprofen.

On July 23, 2003, Mr. Erdogan visited Dr. Gordon for a post-operative examination. The sites appeared well, and Dr. Gordon removed the sutures. That same day, Dr. Winegarden adjusted the pontics, which are the existing teeth over which the implants were placed, and used temporary cement to secure temporary bridges.

On August 18, 2003, Dr. Gordon examined Mr. Erdogan's implants for teeth numbers eight and nine, 19, 24 and 25. He noted that the implant sites were within normal limits and healing well. At that visit's conclusion, Mr. Erdogan was scheduled to return for an

additional implant of tooth number 30, but he never returned to Toothsavers from that day forward.

Dr. Stolzenberg, a New York-licensed dentist, is the sole shareholder of Sol S. Stolzenberg, D.M.D., P.C. It bought Toothsavers around December 2001/January 2002. Dr. Stolzenberg treated patients at the Toothsavers office located on West 96th Street. He never treated Mr. Erdogan.

Mr. Erdogan sought care from other dental professionals prior to, during, and subsequent to his treatment at Toothsavers. In early 2003, he was under the care of Dr. Todd Kshonz ("Dr. Kshonz"). During his tenure as Toothsavers' patient, he saw another dentist whose name is unknown. In June 2006, general-dentist David Y. Jones, D.D.S. ("Dr. Jones") began to treat Mr. Erdogan. To date, Dr. Jones completed upper and lower bridges on Mr. Erdogan using the implants installed by the professionals at Toothsavers, as well as those he implemented.

On or about July 11, 2005, Mr. Erdogan commenced the instant medical malpractice action against Dr. Winegarden and Toothsavers. Pursuant to CPLR 3025(a), on September 19, 2005, Mr. Erdogan amended his summons and complaint as of right to add Stolzenberg, Stolzenberg/Toothsavers and "Barry Gordon" as party-defendants.

Mr. Erdogan served a discovery notice, by which he sought the full names and addresses of the newly-named defendants. He came to believe that Dr. Gordon's proper

name was "Barry Gordon, D.D.S.", but was unable to locate him. This belief was confirmed on February 16, 2006, when Toothsavers and Dr. Stolzenberg identified Dr. Gordon's full name as the same. Mr. Erdogan located a "Barry Gordon, M.D." and served him, but this was the incorrect individual. *See,* Lutfy Aff. in Oppn. to Gordon at 6. On May 16, 2006, Toothsavers and Dr. Stolzenberg for the first time provided an address for Dr. Gordon. Mr. Erdogan used what is known as a reverse address trace, and discovered that Dr. Gordon's proper name was "Manuel Barry Gordon, D.D.S."

On August 2, 2006, the Third Party Plaintiffs filed a third-party complaint against Dr. Gordon seeking indemnification and contribution in the event Mr. Erdogan prevails on his claims. While they maintain that neither they nor Dr. Gordon committed malpractice, they aver that he performed the majority of Mr. Erdogan's treatment. *See,* Gordon Supp., Browne Aff, Ex K at 5, ¶ 15. Moreover, they allege that Dr. Gordon was an independent contractor, pursuant to an alleged oral agreement. Id at 8, ¶ 19.

On September 18, 2006, Mr. Erdogan amended his complaint a second time to include Dr. Gordon's proper, formal name. Mr. Erdogan finally served Dr. Gordon on September 26, 2006.

On October 20, 2006, Dr. Gordon served a Verified Answer, which included the affirmative defense that "this Court lacks personal jurisdiction over defendant based upon insufficient service of process." Gordon Supp., Ex. P, at 4.

In the first cause of action, Mr. Erdogan alleges that the defendants were negligent and guilty of dental malpractice. As for the second claim, Mr. Erdogan avers that all said defendants

> "failed to inform [him] of the reasonable risks, complications, consequences, and danger of the care, treatment and procedures that Defendant undertook to perform, specifically implant surgery and the preparation of his teeth with a drill, which invaded the integrity of these teeth, and failed to inform [him] of the reasonable risks and alternatives of treatment applicable to [his] condition."

Gordon Supp., Ex L at 7, ¶ 39.

Drs. Winegarden and Stolzenberg now move for summary judgment pursuant to CPLR 3212, averring that there are no triable issues of material fact regarding malpractice. Dr. Gordon seeks summary judgment dismissal of the underlying complaint, on the grounds that he did not depart from accepted dental-practice standards, and of the third-party claims brought against him. In addition, he moves under CPLR 3211(a)(5) to dismiss Mr. Erdogan's complaint on statute of limitations grounds, and seeks sanctions against the Third Party Plaintiffs for commencing a purported frivolous action against him.

ANALYSIS

CPLR 3211: Dr. Gordon's Motion to Dismiss

Pursuant to CPLR 3211, on April 3, 2007, Dr. Gordon made this motion for dismissal of the complaint against him on the ground that the claims are barred by the applicable two-and-one-half year statute of limitations. *See*, CPLR 214-a. Dr. Gordon explains that Mr.

Erdogan "last treated with [him] on August 18, 2003, therefore, plaintiff was required to assert any malpractice claims against Dr. Gordon by February 18, 2006." Gordon Supp., at ¶ 37. Dr. Gordon urges that Mr. Erdogan "filed a Summons and Complaint against Dr. Gordon, Toothsavers, and Dr. Winegarden on July 11, 2005,[1] however, [he] never served the complaint on Dr. Gordon." *Id.*, at ¶ 38. Dr. Gordon points out that the Amended Summons and Complaint was not filed or served on him until August 2006 and that dismissal is warranted because "plaintiff's counsel failed to perform any due diligence in an attempt to locate and serve Dr. Gordon in a timely manner." *Id.*, at ¶ 41 (emphasis added).

At the outset, Dr. Gordon's motion itself must be denied as untimely because it was not made at "any time before service of the responsive pleading" was required. *See*, CPLR 3211(e).

Even if this Court were to treat the motion as one for summary judgment (and it cannot do so without notice to the parties, *see*, CPLR 3211[c]), it would nonetheless be denied. The CPLR makes plain that the "time within which an action must be commenced * * * shall be computed from the time the cause of action accrued to the time the claim is interposed." CPLR 203(a). In Supreme Court actions are commenced by filing a summons and complaint, *see*, CPLR 304(a); *Matter of Spodek v. New York State Commn. of Taxation*

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[1] Dr. Gordon incorrectly states that the action against him was filed on July 11, 2005. According to plaintiff it was not filed until September 19, 2005.

and Finance, 85 N.Y. 2d 760 (1995) ("The moment of commencement by filing constitutes the crucial date for determining whether the Statute of Limitations is satisfied"), and in "an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant * * * when the action is commenced." *See*, CPLR 203(c).

According to Dr. Gordon himself the Summons and Complaint setting forth claims against him was filed in 2005. *Gordon Supp.*, at ¶ 38. Thus, Dr. Gordon's motion does not present a statute of limitations dilemma. Dr. Gordon's argument that plaintiff failed to "locate and serve [him] in a timely manner" is misplaced since it is an objection based on improper service that is waived if not acted upon within 60 days after service of the answer. *See*, CPLR 3211(e); *see also*, Siegel, NY Prac § 63, at 94 (4th ed.).

Because Dr. Gordon's motion does not establish that dismissal on statute of limitations grounds is proper, it must be denied.

CPLR 3212: Summary Judgment

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue of fact. *See, Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also, Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition serves to deprive a party of her/his day in court, relief should not be granted where an issue of fact is even arguable. *See, Henderson v. City of New York*, 178

A.D.2d 129, 130 (1st Dept. 1991) Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision must be made on the version of the facts most favorable to [plaintiff]." *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *See, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial. Id.

General allegations of medical malpractice that are unsupported by competent medical evidence are insufficient to defeat a motion for summary judgment. *See, Mendez v. City of New York*, 295 A.D.2d 487 (2d Dept. 2002); *Neuman v. Greenstein*, 99 A.D.2d 1018 (1st Dept. 1984). Thus, on a motion for summary judgment where a medical malpractice defendant demonstrates that treatment was provided in accordance with accepted standards of medical practice, the plaintiff must respond with medical evidence establishing a departure from accepted medical procedure. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 327; *see also, Whalen v. Victory Memorial Hosp.*, 187 A.D.2d 503, 503 (2d Dept. 1992); *Echeverri v. Flushing Hosp. & Medical Center*, 123 A.D.2d 818, 818-19 (2d Dept. 1986).

Dr. Winegarden's Motion

Dr. Winegarden argues that the care and treatment rendered by him was entirely appropriate. In support of his contention, he proffers the affidavit of Dr. Jay Goldsmith ("Dr. Goldsmith"). Dr. Goldsmith, a dentist licensed in the State of New York, attests that

> "[T]o a reasonable degree of dental certainty. . .Dr. Winegarden did not depart from accepted standards of dental practice with regard to his care and treatment of the plaintiff herein and, further, that nothing that Dr. Winegarden did or did not do, in any way caused or contributed to the injuries alleged by plaintiff in this action."

Winegarden Aff in Support ("Winegarden Supp."), Ex A, Goldsmith Aff'd, at ¶ 2.

Furthermore, Dr. Goldsmith opines that Dr. Winegarden's dental care was "appropriate" and within the accepted standards of dental practice. *Id.*, at ¶ 3-20. With respect to Mr. Erdogan's allegation that Dr. Winegarden's treatment caused him injuries, Dr. Goldsmith attests

> "With regard to the injuries alleged in plaintiff's Amended Verified Bill of Particulars, none of these alleged 'injuries' are causally related to the treatment rendered by the defendants. The first injury listed in the bill of particulars, 'defective upper and lower bridges' cannot be said to relate to the care rendered by the defendants as the defendants never built plaintiff permanent upper or lower bridges due to the fact that plaintiff left the care of Dr. Winegarden and Toothsavers while still wearing temporary PFM upper and lower bridges. With regard to the second alleged injury, the need for replacement of these bridges, as the bridges made by Toothsavers were temporary bridges, they, by definition, needed to be replaced and as such, replacement of the temporary bridges is not an injury, but merely the next step in the process of completing the restorations. With regard to the third injury, 'inadequate maxillary and mandibular implants; need to replace maxillary and mandibular implants,' as Dr. Jones has now utilized all of the implants placed at Toothsavers, those implants are clearly adequate. Further, as Dr. Jones has not

replaced any of the implants, the allegation that implants need to be replaced is without basis.

* * *

"As to the allegations of root canal therapy at #5, 6, 7, 10, 20, 26, and 27. All of these root canals was necessary either due to decay or the need to properly prepare these teeth to support the planned final bridge...each of the above was necessary in the course of completion of the treatment plan. The alleged loss of maxillary bone is without basis.

* * *

"Finally, the need for any sinus lift or bone graft surgery was not related to the care provided by the defendants. The sinus lift and bone graft was not performed to address any injury, but was performed to create sufficient bone mass in plaintiff's upper rear to permit the placement of additional implants by the subsequent oral surgeon, Dr. Halpern."

Id., at ¶ 24.

Dr. Goldsmith further opines that Mr. Erdogan's claims are unfounded, stating:

"Based on the foregoing, it is my opinion to a reasonable degree of dental certainty that the care by Dr. Winegarden was appropriate. Further, upon reviewing the records of Dr. Kshonz, it confirms that plaintiff had treated with Dr. Kshonz prior to going to Toothsavers and returned to Dr. Kshonz in October of 2003 after leaving Toothsavers. Notably, Dr. Kshonz repaired or modified the preparations on all of the teeth that had been prepared by Dr. Winegarden and Dr. Patel. Dr. Kshonz also did substantial work on and made several modifications to the temporary PFM bridge that had been supplied by Toothsavers. Dr. Kshonz continued treating plaintiff throughout 2004 and 2005 up through September 19, 2005. Dr. Kshonz's work appears to have materially altered or obliterated the work done by Dr. Winegarden.

* * *

> "Based on the foregoing, it appears that, in fact, Dr. Jones has now successfully completed the plan and, given the success of Dr. Jones, not only is plaintiff without any apparent permanent injury, but there is no reason to believe that this case could not have been completed had plaintiff stayed at Toothsavers and not returned to the care of Dr. Kshonz."

Id., at ¶ 22, 25.

Based on his submissions, Dr. Winegarden, the movant, has established a *prime facie* showing of entitlement to judgment as a matter of law; thus the burden shifts to Mr. Ergodan, the opponent, to raise triable issues of fact warranting the motion's denial. In opposition, Mr. Ergodan offers a four-page expert affidavit from a board-certified, New York-licensed dentist. The expert attests that Dr. Winegarden departed from the standard of care because

> "[H]e should not have prepared all of the plaintiff's teeth for crowns on the first visit without consulting with a surgeon on an overall restorative treatment plan; he failed to justify his reason to prepare the plaintiff's teeth for crowns, as he did not explain why the plaintiff's teeth could not be restored without crowns; he failed to advise the plaintiff that the implants placed by Dr. Gordon were too close to teeth 24 and 25 and too close to each other; by having a treatment plan for a roundhouse bridge on the upper and lower arches, which lacked sufficient support of the plaintiff's natural teeth; by failing to prepare a diagnostic wax-up of the plaintiff's upper and lower arches; by failing to offer the plaintiff with the reasonable alternatives to the treatment provided by the defendants Toothsavers and Winegarden; by failing to take an x-ray of the plaintiff's upper and lower arches after the implants were placed; by failing to provide the plaintiff with proper posterior support, so that he could chew adequately; by performing root canal therapy on teeth 7 and 10 without advising the plaintiff of the need to do so; by failing to obtain an informed consent for the root canal therapy on teeth 7 and 10; by failing to obtain an informed consent for the crowns on all of the plaintiff's teeth; by failing to obtain an informed consent for the

> implants, as they were never part of an overall treatment plan; by lacking proper records to justify the treatment plan of preparing all of the plaintiff's teeth with crowns and placing implants.
>
> * * *
>
> "[b]y placing the implants at 24 and 25 too close together and too close to the adjacent teeth, which put them at risk for root canal therapy and to be lost; by failing to advise Mr. Erdogan that teeth 24 and 25 were placed too close together and too close to the adjacent teeth; by failing to work in conjunction with the general dentist in establishing a treatment plan for Mr. Erdogan's upper and lower arches; by failing to obtain an informed consent for the implants, as they were never part of an overall treatment plan.
>
> * * *
>
> "In my opinion, the treatment plan from Toothsavers was rushed, and it deprived the plaintiff of the opportunity to evaluate his options, which included restoring his mouth with individual implants, while maintaining his natural teeth. Mr. Erdogan's visit to Toothsavers was not an emergency visit. He did not need crowns and implants on May 19, 2003, his first visit to Toothsavers. Moreover, there is nothing in the record to show the need for the crowns on all of the plaintiff's teeth. Because Dr. Winegarden was overly aggressive in his treatment, Mr. Erdogan underwent root canals for four teeth, 5, 6, 7, and 10. Additionally, because crowns were placed [on] all of Mr. Erdogan's teeth unnecessarily, these crowns will need to be replaced every ten to fifteen years or so."

Ergodan Memo in Oppn. to Winegarden Motion, Ex. A, at 1, ¶ 2-4.

Here, Mr. Erdogan's opposition papers contain a sufficient expert affidavit that contradicts Dr. Winegarden's expert opinion. Since this Court is presented with conflicting affidavits from equally competent authorities, the motion for summary judgment must be denied. *See, Prigorac v. Park*, 20 A.D.3d 363 (1st Dept. 2005); *See also, Frobose v. Weiner*,

19 A.D.3d 258 (1st Dept. 2005); *Santiago v. Brandeis*, 309 A.D.2d 621, 622 (1st Dept. 2003).

Dr. Gordon's Motion

In support of his motion that he is entitled to judgment as a matter of law regarding Mr. Erdogan's malpractice claims, Dr. Gordon offers the affidavit of Mitchell J. Bloom, D.M.D ("Dr. Bloom"), a periodontist licensed to practice in New York, New Jersey, and Connecticut. See, Gordon Supp., Ex A, Bloom Aff'd at 1, ¶ 1. Dr. Bloom attests that

> "Dr. Gordon's treatment of plaintiff over the course of five visits consisted of placing five implants ([two] upper and [three] lower) in his mouth at the sites of teeth numbers [eight], [nine], 19, 24 and 25. Based on my review of the pre-operative x-rays, plaintiff was a candidate to receive implants at these five sites because he had adequate bone to support them. Implants were a completely feasible option available to plaintiff as part of an overall comprehensive plan to restore his mouth. It is my opinion that plaintiff's informed consent was properly obtained because he discussed the implants with both Dr. Winegarden and Dr. Gordon at length, he himself had requested them and he signed two written consent forms. Both the description of the implant surgery as outlined in the treatment records and in Dr. Gordon's deposition testimony indicates that the surgery was properly performed and clinical measures interoperatively, as related by Dr. Gordon, were consistent with standard Biolok guidelines. This is completely proper in placing implants."

Id at 2, ¶ 5-8.

In opposition to this motion, Mr. Erdogan submits an affidavit from a board-certified dentist licensed to practice in New York State. The dentist opines that Dr. Gordon deviated from the normal dental-care standard

- "by placing the implants at teeth 24 and 25 too close together. . .
- "by failing to advise Mr. Erdogan that teeth 24 and 25 were placed too close together
- "by failing to work in conjunction with the general dentist in establishing a treatment plan for Mr. Erdogan's upper and lower arches
- "by failing to obtain an informed consent for the implants, as they were never part of an overall treatment plan."

Lutfy Aff in Opp'n to Gordon Motion, Ex A at 3-4.

Once again, conflicting affidavits preclude summary judgment disposition. While Dr. Gordon made a *prime facie* showing that the care he provided Mr. Erdogan was consistent with acceptable-dental standards, Mr. Erdogan presents contrary evidence from an equally-competent expert. Accordingly, his motion for summary judgment disposition action is denied.

Dr. Stolzenberg, Toothsavers, and Stolzenberg/Toothsavers' Motion

Mr. Erdogan alleges that Drs. Winegarden and Gordon committed malpractice while acting within the scope of their employment with the Third Party Plaintiffs. *See,* Gordon Supp., Ex L at 3-4, ¶ 20 & 26. Due to the alleged employment relationship, Mr. Erdogan contends that the Third Party Plaintiffs can be held vicariously liable for Drs. Winegarden and Gordon's actions. *Id.* at page 7, ¶ 36.

The Third Party Plaintiffs aver that they cannot be vicariously liable for any injuries Mr. Erdogan may have sustained because Drs. Winegarden and Gordon were independent contractors, and not under their control. Dr. Stolzenberg attests that

> "I, Sol S. Stolzenberg, D.M.D. never personally saw or treated plaintiff, Nedim Erdogan. I was never consulted regarding Mr. Erdogan's care. My name and handwriting appear no where in plaintiff's chart (Exhibit "L"). In fact, I treated patients only at the West 96th Street office; and, upon information and belief, plaintiff, Nedim Erdogan, was treated only at the 57 West 57th Street office. . .In light of my non-involvement with this patient, I, as an individual, should have the case dismissed against me.

* * *

> "The treating dentists were all responsible, under their own licenses, to render appropriate care within the standards of practice of dentistry. The dentists treating patients at Toothsavers, including those treating plaintiff, were hired to perform services for Toothsavers, according to his or her own skill and judgment as to the manner and method of performance. They were free from the control and direction of myself or Toothsavers in all matters connected with the manner or method of performance. They were skilled workers. They were in business for themselves. They were hired to perform a specific job for Toothsavers, particularly Dr. Gordon who was an implantologist, but the others too were hired specifically to exercise their individual and professional judgment in treating patients. The work required of them was such as to require skill and judgment.

* * *

> "The individual treating dentist, rather than Toothsavers, was the one to decide, and who in fact made the decisions concerning the methods, means or procedures of accomplishing the work. The dentists treating plaintiff were not subject to the direction and control of myself or Toothsavers as to the manner or method of performing the work. The treatment plan for plaintiff was not made by me. The treatment plan was made by co-defendant, Dr. Winegarden. . .It was made clear to the patient, from the outset, that he or she would be treated by different dentists

> who would all exercise their own independent judgment and be individually" responsible."

Stolzenberg Aff., Ex A, ¶¶ 12-13, 15-17.

A party that retains an independent contractor is not vicariously liable for the independent contractor's negligent acts, unlike negligent acts of an employee, servant or agent. The rationale is that the party has no right to control the manner in which the independent contractor performs the work; therefore it should be liable. *See, Kleeman v. Rheingold*, 81 N.Y.2d 270 (1993). "However, [an employer] may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent [contractor] where [the latter] was provided for by the [former] or was otherwise acting on the [former's] behalf, and the patient reasonably believed that the [latter] was acting in the [former's] behalf." *Sarivola v Brookdale Hospital and Medical Center*, 204 AD 2d 245 (1st Dept. 1994).

Here, the Third Party Plaintiffs fail to meet their initial burden that they are entitled to judgment as a matter of law. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 327. While Dr. Gordon confirms that he was an independent contractor, See, Gordon Reply Aff, at page 2, ¶ 4, Dr. Winegarden does not proffer an identical statement regarding his employment status. Moreover, even if Drs. Winegarden and Gordon were independent contractors, this does not negate the possibility that the Third Party Plaintiffs could be vicariously liable under an

agency by estoppel theory. Accordingly, that portion of the Third Party Plaintiff's motion pertaining to the vicarious liability claim must also be denied. [2]

Dr. Gordon's Motion for Summary Judgment Disposition of the Third-Party Complaint

The Third Party Plaintiffs seek both indemnity and contribution from Dr. Gordon in the event that Mr. Erdogan prevails on his claims. Dr. Gordon moves for summary judgment dismissal of the third-party action, arguing that as an independent contractor, he cannot be held liable for indemnification and contribution.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another who should more properly bear responsibility for that loss because it was the actual wrongdoer." *Trump Village Section 3, Inc v New York State Housing Finance Agency*, 307 AD 2d 891 (1st Dept. 2003). When the alleged injuries are the result of an independent contractor's actions, an employer is not entitled to common-law indemnification. *See, Kleeman v Rheingold,* 81 NY 2d 270 (1993). This is because the latter has no right to control the manner in which the former performs her/his work. *Id.*

2

The Third Party Plaintiffs also move for summary judgment disposition of Mr. Erdogan's complaint on the grounds that there are no triable issues of fact as to whether Drs. Winegarden and Gordon committed malpractice. This motion, proffers identical arguments as those found in the doctor's own motions, and is denied.

"[T]wo or more persons who are subject to liability for damages for the same personal injury. . .may claim contribution among them. . ." (*CPLR 1401*) Contribution applies to parties "who in fact share responsibility for causing the accident." *D'Ambrosio v City of New York,* 55 NY 2d 454 (1982).

Here, the Third Party Plaintiffs base their indemnification and contribution claims on an alleged oral agreement, and not the common law. Therefore, Dr. Gordon's burden as the movant is to proffer evidence that the purported oral agreement does not exist.

Dr. Gordon simply avers that an oral contract "never existed." Gordon Supp., Browne Reply Aff at 2, ¶ 4. Such a self-serving and conclusory statement does not satisfy a movant's burden in a summary judgment motion. *See, Tucker v Tishman Const. Co of New York*, 36 AD 3d 417 (1st Dept. 2007). Questions of fact remain whether Dr. Gordon was indeed an independent contractor and whether an oral indemnification agreement existed between the Third Party Plaintiffs and him. Accordingly, his motion for summary judgment disposition of the Third Party Plaintiffs' indemnification claim is denied.

Dr. Gordon's Motion for Fees and Sanctions

Finally, Dr. Gordon moves for fees and sanctions against the Third-Party Plaintiffs for allegedly filing a frivolous complaint. Dr. Gordon alleges that the Third Party Plaintiffs prolonged the instant litigation by refusing to discontinue their claims against him and forcing him to file a summary judgment motion.

In general, CPLR § 8106, provides that "costs upon motion may be awarded. . .in the discretion of the court." A court may impose sanctions and costs when a party's conduct is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass and maliciously injure another." *22 NYCRR § 130-1.1(c)2.* In addition, sanctions and costs may be imposed when a party "asserts material factual statements that are false." *Id*, §130-1.1(c)(3)

Dr. Gordon has not established that he is entitled to dismissal of the Third Party complaint or that the action against him is frivolous. He alleges that the Third Party Plaintiffs prolonged the instant litigation by refusing to discontinue their claims against him and forcing him to file a summary judgment motion. But their failure to abide by Dr. Gordon's request cannot be deemed malevolent. They asserted the claims they believe to be valid, and chose not to discontinue premised on said belief. In the context of litigation, this does not constitute harassment.

Moreover, Dr. Gordon avers that the Third Party Plaintiffs made material, false statements in their complaint when they repeated Erdogan's malpractice allegations. *See*, Gordon Supp., Browne Aff at 14, ¶ 56. But this is not a false statement: they stated the claim in the underlying complaint and allege that if a jury finds for Mr. Erdogan, Dr. Gordon is to indemnify them. In fact, the Third Party Plaintiffs share the same contention with Dr. Gordon

that malpractice was not committed by any of the defendants. Dr. Gordon's motion for fees and sanctions is denied.

IV. Conclusion

Accordingly, it is

ORDERED that Gordon's motion to dismiss is denied; and it is further

ORDERED that Winegarden's motion for summary judgment is DENIED; and it is further

ORDERED that the Third Party Plaintiffs' motion for summary judgment is DENIED; and it is further

ORDERED that Gordon's motion for summary judgment is DENIED; and it is further

ORDERED that Gordon's motion for costs and sanctions is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 5, 2007

ENTER

HON. EILEEN BRANSTEN

Hon. Eileen Bransten, J.S.C.