

Schwimmer v Marder
2007 NY Slip Op 34190(U)
December 11, 2007
Supreme Court, New York County
Docket Number: 0107719/2006
Judge: Joan B. Carey
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

LOUIS SCHWIMMER,

Plaintiffs,

Index No.: 107719/06

MOTION DATE _____

-v-

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

MICHAEL Z. MARDER, D.D.S. and
ROBERT W. MARDER, D.M.D.,

Defendants.

The following papers, 1- 14, were read on this motion by defendant Michael Z. Marder, D.D.S for, Inter alla, summary judgment dismissing the complaint.

Notice Of Motion - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits _____

Papers Numbered
1-6
7-12
13-14

FILED

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Cross-Motion: Yes No

Plaintiff commenced the instant dental malpractice action on or about June 2, 2006 to recover damages for dental malpractice against defendants Michael Z. Marder D.D.S. and Robert W. Marder D.M.D. ¹ The crux of the plaintiff's complaint is that the defendant dentist, who plaintiff began to treat with in November of 1999, provided negligent dental treatment to plaintiff, in failing to diagnose and treat advanced tooth decay and a tooth infection, causing injury to plaintiff. Plaintiff further alleges that defendant was negligent in failing to take proper x-rays of his mouth. The plaintiff's complaint also contained a cause of action alleging lack of informed consent.

Defendant presently moves for summary judgment pursuant to CPLR §3212. "[T]he remedy of summary judgment is a drastic one, which should not be granted when there is any doubt as

¹ The action was discontinued as against Robert W. Marder D.M.D., and a Stipulation of Discontinuance as to Robert W. Marder D.M.D. was filed with the court on May 29, 2007.

to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court" (Byrnes v. Scott, 175 AD2d 786 [1st Dept. 1991], quoting Gibson v. Am. Export, 125 AD2d 65 [1st Dept. 1987]). Initially, "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 demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; see also Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). A failure by the movant in demonstrating, prima facie, its entitlement to judgment as a matter of law requires the denial of summary judgment, regardless of the sufficiency of the opposing papers (see Alvarez v. Prospect, supra; Winegrad v. New York Univ. Med. Center, supra). Where a prima facie showing of entitlement to judgment as a matter of law has been properly demonstrated, the burden then shifts to the party opposing the motion to produce evidence that establishes the existence of material issues of fact which require a trial in the action (see Alvarez v. Prospect, supra; Zuckerman v. City of New York, supra).

Defendant argues that the treatment that he provided to plaintiff was within the standard of care, and, thus, he is entitled to summary judgment. In support of his motion, defendant, who is licensed to practice dentistry in the State of New York, relies upon, among other things, an affidavit that he prepared setting forth that the treatment he provided to the injured plaintiff comported with good and accepted dental practice. Defendant states that when plaintiff first visited his office, he was missing eight (8) teeth and had root canal therapy on twenty-four (24) teeth, which is unusual and indicates that the nerves of his teeth had been damaged by trauma from grinding and/or decay. Defendant notes that plaintiff had a condition called pemphigus vulgaris, which is an autoimmune disease affecting the skin and membranes, and was ingesting Prednisone to treat this condition. Defendant also notes in his affidavit that plaintiff had a dry mouth condition that is conducive to the formulation of tooth decay.

In his affidavit, defendant discusses the treatment rendered to plaintiff and sets forth that such treatment was within the standard of care. Defendant further states that during the course of such treatment he did not fail to diagnose infections or decay present in plaintiff's mouth. Moreover, defendant sets forth that the x-ray machine in his office was in working order and passed inspection when used during the course of plaintiff's treatment. Defendant specifically states that on March 24, 2005 when plaintiff visited his office complaining of pain in his lower right quadrant, two (2) x-rays were taken of the area, which showed no sign of infection. According to defendant, "[t]hese x-rays were clear and sharp, and [he] was able to use them as a diagnostic aid." Another x-ray taken on March 30, 2005, when plaintiff visited his office again complaining of pain, also showed no sign of infection. Defendant further sets forth that plaintiff visited his office on April 25, 2005 and May 25, 2005 again complaining of pain in the lower right quadrant. There were no signs of swelling or infection during these visits. Nevertheless, on May 25, 2005 Robert Marder D.M.D. referred plaintiff to an oral surgeon, Dr. Enrique Lenchewski, for examination.

In opposition to defendant's motion, plaintiff submitted the affidavit, among other things, of Murray J. Nelson, D.D.S., who is licensed to practice dentistry in the State of New York and who has been treating plaintiff since July 27, 2005. Based upon a review of plaintiff's medical records, the pleadings in this action and the deposition testimony of the parties, as well as his treatment of the plaintiff, the expert opined that the defendant departed from good and accepted

dental practice in his treatment of the plaintiff. Plaintiff's expert states that defendant departed from good and accepted dental practice in failing to diagnose a tooth infection in tooth #28. According to plaintiff's expert, when plaintiff visited defendant's office on March 24, 2005, making complaints of mouth pain in the lower right quadrant, defendant took x-rays of plaintiff's mouth. However, these x-rays, according to the expert, were of such poor quality that they were non-diagnostic. Plaintiff's expert sets forth that if such x-rays were diagnostic, they would have revealed the infection. Plaintiff's expert further opined that plaintiff's continued complaints of pain for a prolonged period of time without any follow up by defendant (i.e., referral to an oral surgeon), was a departure from good and accepted dental practice; that when plaintiff was ultimately referred to an oral surgeon on May 31, 2005 it was "too late." According to this expert, these departures resulted in the extraction of tooth #28 and the insertion of a removable denture.

Additionally, plaintiff's expert opines that defendant failed to diagnose advanced tooth decay in several of plaintiff's teeth (#2, #3, #5, #6, #11, #19, #29 and #30), and that such a failure constituted a departure from good and accepted dental practice. Defendant's failure to diagnose plaintiff's tooth decay, according to the expert, resulted in the extraction of teeth #29 and #30, and the installation of implants; new crowns for teeth #4 and #5; and root canal and a new crown for tooth #6. Teeth #8 and #9 were diagnosed positive for the existence of a fistula and tooth #19 was diagnosed as having a defective margin.

Based upon the conflicting expert affidavits submitted by the parties, it appears that issues of fact and credibility exist in connection with whether the dental treatment provided by defendant deviated from good and accepted medical practice. Such issues cannot be resolved on this motion for summary judgment (see Bradley v. Soundview Healthcenter, 4 AD3d 194 [1st Dept. 2004]; Morris v. Lenox Hill Hosp., 232 AD2d 184 [1996]). Accordingly, defendant's motion for summary judgment, pursuant to CPLR §3212, dismissing the dental malpractice claims asserted against him is denied. Furthermore, as Dr. Marder has not produced any evidence to establish that the injured plaintiff provided informed consent prior to his performance of the various dental treatments at issue herein, summary judgment is denied with respect to plaintiff's informed consent claim.

Defendant, in the alternative, seeks partial summary judgment dismissing all claims in the complaint accruing more than two-years and six months prior to the commencement of this action, arguing that such claims are barred by the applicable Statute of Limitations. Defendant commenced the instant action on June 2, 2006, and, thus, any claims accruing more than two-years and six months prior to the commencement of this action, i.e., December 2, 2003², would be time-barred absent the application of some exception to the Statute of Limitations. The allegations of negligence alleged in the complaint, as amplified by plaintiff's bill of particulars occurred from approximately December 8, 2003 through July 27, 2005. Therefore, it appears that

² Defendant, in his moving papers, sets forth in various places that the instant action was commenced on June 2, 2006, September 6, 2006 and September 6, 2007. It appears that defendant incorrectly working off of the September 6, 2006 date, contends that all claims accruing prior to March 6, 2004 are time-barred. Plaintiff, in his opposition papers, adopts this incorrect commencement date. The complaint in this action, which was attached to defendant's moving papers as Exhibit "A", was filed on June 2, 2006, therefore, the Statute of Limitations would bar claims accruing prior to December 2, 2003.

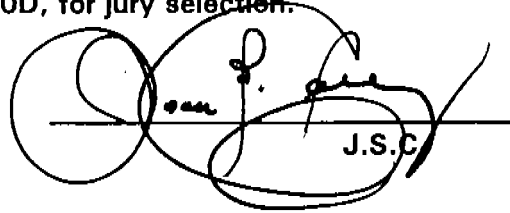
all of plaintiff's claims herein are timely. Accordingly, defendant's motion for partial summary judgment for dismissal of all claims accruing beyond the statute of limitations is denied.

Based on the foregoing, it is hereby

ORDERED that defendant's motion is denied in its entirety; and it is further,

ORDERED that counsel for all parties are to appear before the court on January 14, 2008, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for jury selection.

Dated: 12/11/2007


J.S.C.

Check one: FINAL DISPOSITION NON- FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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