

**Connolly v Berman**

2008 NY Slip Op 30172(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0108407/2007

Judge: Eileen Bransten

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

PRESENT: Eileen Bransler

PART 6

Index Number : 108407/2007

**CONNOLLY, PATRICIA**

VS.

**BERMAN, TATYANA**

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

7

Justice

INDEX NO. 108407-07

MOTION DATE 10-30-07

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

read on this motion <sup>and cross-motion</sup> to/for Summary Judgment

PAPERS NUMBERED

1, 2

3, 4, 5

6, 7

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

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

**FILED**

JAN 22 2008

NEW YORK

COUNTY CLERK'S OFFICE

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

Dated: 1-14-08

Eileen Bransler

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

-----X  
PATRICIA CONNOLLY,

Plaintiff,

-against-

Index No.108407/07  
Motion Date: 10/30/07  
Motion Seq. No.: 01

TATYANA BERMAN, D.D.S., JERRY LYNN, D.D.S.,  
TOOTHSAVERS, SOL STOLZENBERG, D.M.D. d/b/a  
TOOTHSAVERS, MR. RAIMONE PEREZ,  
and DR. GORDON,

Defendants.

**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3212, defendants Toothsavers and Sol Stolzenberg, D.M.D., P.C. d/b/a Toothsavers sued herein as Sol Stolzenberg, D.M.D. d/b/a Toothsavers (collectively "Toothsavers") move for summary judgment dismissal of the complaint. Defendant Jerry Lynn, D.D.S. ("Dr. Lynn") cross-moves for dismissal. Plaintiff Patricia Connolly ("Ms. Connolly") opposes the motions and defendant Tatyana Berman, D.D.S. ("Dr. Berman") partially opposes Toothsavers' motion.

Background

Ms. Connolly, age 54, presented at Toothsavers on April 9, 2007, allegedly interested in obtaining implants and crowns. Affirmation in Support ("Supp."), at ¶ 8(a). According to her, Dr. Lynn performed an examination "he put his hands in [her] mouth, diagnosed the

condition prescribed the treatment, presented the fee, [and] ordered x-rays.” Supp., Ex. I, at ¶ 30(d); Affirmation in Opposition dated September 17, 2007 (“Opp.”), Affidavit of Patricia Connolly (“Connolly Aff.”), at 1.

Jason Gordon, D.D.S. (“Dr. Gordon”) reviewed Ms. Connolly’s medical history. Supp., at ¶ 8(a). Full mouth x-rays were taken and revealed that Ms. Connolly was missing eight teeth. Supp., at ¶ 8(a). Dr. Gordon discussed treatment options, which included removable full or partial dentures, bridges, implants, or no treatment. *Id.*

Ms. Connolly chose full dentures (bridges with implants). She signed a consent form.

Dr. Berman saw Ms. Connolly that very same day. She reviewed the medical history, x-rays and treatment plan with Ms. Connolly. Supp., at ¶ 8(b). In an effort to explain the planned procedures she used sample models. Under local anesthesia, posts and cores were made for several of Ms. Connolly’s upper teeth. *Id.* A bridge would be made for temporary use until a permanent one would be completed after the implants. *Id.* Dr. Berman then removed Ms. Connolly’s old upper bridge and re-prepped the remaining upper teeth. *Id.* Next, Dr. Berman made and inserted a temporary acrylic upper bridge. She noted the future need to extract roots of two teeth for periodontal treatment. *Id.*

Dr. Gordon then saw Ms. Connolly again. Supp., at ¶ 8(c). More local anesthesia was administered, this time on the lower arch. *Id.* Several lower teeth--numbers 18, 20, 29 and 31--were prepped. A post and core were made for tooth number 29. Dr. Gordon made a

temporary acrylic lower bridge. Ms. Connolly's bite was checked. The lower temporary bridge was inserted with temporary cement and a final impression was taken. *Id.*

According to Ms. Connolly, at some point after one of the dentists drilled her teeth, a laboratory technician, Mr. Raimone Perez ("Mr. Perez"), "came in and finished treatment." Opp., Connolly Aff., at 2.

Ms. Connolly paid \$500.

It was anticipated that at Ms. Connolly's next visit "there would be metal try-in and an implantologist consult." Supp., at ¶ 8(c).

Ms. Connolly, however, never returned and stopped payment on her \$500 check. Supp., at ¶ 8(c).

In June 2007, Ms. Connolly commenced this dental malpractice action. She alleges, among other things, that defendants "negligently performed the diagnostic procedures to determine the extent and nature of plaintiff's dental problems; they provided prosthetic restorations which were ill fitting, had defective margins, were poorly contoured, and destructive to her health and well being; \* \* \* they negligently removed perfectly good caps \* \* \* they negligently began treatment without a treatment plan \* \* \* they failed to advise plaintiff of the alternatives and the destructive nature of her treatment \* \* \* they negligently permitted unlicensed people to treat." Supp., Ex. I, at ¶ 3.

### Analysis

#### Toothsavers' Motion

Toothsavers now moves for summary judgment dismissal of the complaint. It argues that it is not vicariously liable for the conduct of Dr. Lynn, who was unlicensed at the time, and the conduct of Mr. Perez, a “non-dentist tech or assistant.” Supp., at ¶¶ 8(e), 10. Toothsavers further argues that the treating dentists were independent contractors, not employees, and therefore, that it cannot be vicariously liable for their conduct. Supp., at ¶ 26. Finally, Toothsavers argues that it cannot be liable for punitive damages as a matter of law, urging that the alleged malpractice does not constitute gross negligence. *Id.*, at ¶ 42.

Ms. Connolly opposes the motion. She contends that summary judgment is premature at this stage since there has been virtually no disclosure (not a single deposition has been held). Opp., at 1. Ms. Connolly asserts, for example, that there are questions of fact as to whether the treating dentists were independent contractors and contends that she needs an opportunity to depose the witnesses. *Id.*, at ¶ 3. She asserts that Toothsavers allows Dr. Lynn to treat patients, and therefore, it can be liable.

Dr. Berman also partially opposes the motion. In an affidavit, she attests that in “or about April 9, 2007 and at all relevant times with respect to plaintiff, Patricia Connolly’s treatment, I have been an employee of Sol Stolzenberg d/b/a as Toothsavers.” Affirmation Partial Opposition (“Berman Opp.”), Ex. B., at ¶ 3 (emphasis added).

Summary judgment is a “drastic remedy” that should not be granted if there is any doubt as to the existence of a triable issue. *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 its day in court, relief should not be granted where an issue of fact is even “arguable.” *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).

CPLR 3212(f) provides:

“Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit \* \* \* disclosure to be had.”

In this case discovery remains outstanding. Not a single defendant has been deposed. Although Toothsavers contends that, Dr. Berman, among others, is not its employee, there is evidence--significantly Dr. Berman’s own affidavit--that establishes to the contrary. That alone warrants allowing plaintiff an opportunity for disclosure here. *See, Nelson v. Bestway Coach Express*, 36 A.D.3d 488, 489 (1st Dept. 2007); *Global Minerals and Metals Corp. v. Holme*, 35 A.D.3d 93, 103 (1st Dept. 2006) (opponent of summary judgment should be

permitted discovery when there is a proper evidentiary basis supporting the request), *lv. denied*. 8 N.Y.3d 804 (2007).

Thus, Toothsavers' motion for summary judgment is denied.

Cross-Motion by Dr. Lynn

Dr. Lynn cross-moves for summary judgment, arguing that Ms. Connolly has "come to the court with only empty statements." Affirmation in Support of Cross-Motion for Summary Judgment ("Cross"), at ¶ 4. Dr. Lynn contends that Ms. Connolly has failed to support her allegations against him with expert evidence and that he did not examine or prescribe treatment for her.

Ms. Connolly opposes Dr. Lynn's cross-motion. She submits an affidavit attesting that:

"At Toothsavers, I was examined by Dr. Jerry Lynn. He examined and told me he could cap my teeth and perform the implants for \$13,000 ."

Opp., Connolly Aff., at 2.

Ms. Connolly has established a question of fact as to whether Dr. Lynn provided treatment. At this early stage, particularly since Dr. Lynn did not make a prima facie showing that assuming he treated Ms. Connolly (as she alleges) there was no malpractice, it is not incumbent on her to come forward with expert evidence establishing malpractice or to otherwise prove the viability of her action.


Accordingly, it is

ORDERED that Toothsaviers' motion and Jerry Lynn D.D.S.'s cross-motion for summary judgment are denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
January 14, 2008

ENTER

  
\_\_\_\_\_  
Hon. Eileen Bransten

**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE