

Krawczyk v DeFeo

2008 NY Slip Op 30264(U)

January 18, 2008

Supreme Court, Nassau County

Docket Number: 5669-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

SOL KRAWCZYK,

Plaintiff,

-against-

ROBERT DEFEO and ANTHONY DISANTI,

Defendants.

**Motion Sequence #1
Submitted November 8, 2007**

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The following papers were read on this motion:

Notice of Motion.....1

Requested Relief

Defendant, ROBERT DeFEO (hereinafter referred to as "Dr .DeFEO), moves for an order, pursuant to CPLR §3212, granting him summary judgment dismissing the plaintiff's complaint on the ground that there exists no triable issue of fact as to said defendant. An Affidavit of Service reflects service of the instant motion and supporting papers on counsel for the plaintiff, SOL KRAWCZYK, and co-defendant, ANTHONY DiSANTI, on September 7, 2007, but, despite several adjournments, no papers are submitted in connection with the motion, which is determined as follows:

Background

This is an action for dental malpractice. The plaintiff alleges, in essence, that Dr. DeFEO negligently evaluated plaintiff's complaints of pain when he recommended a surgical plan for root canal therapy on tooth #14 and referred plaintiff to co-defendant, Dr. DiSANTI for said surgery without properly testing for the vitality of tooth #14, and failed to properly diagnose that the cause of plaintiff's pain was tooth #15. The complaint asserts that tooth #14 was sound and healthy and did not need root canal therapy and that plaintiff continued to have the same pain he had prior to treatment of tooth #14, which was relieved only after root canal therapy to tooth #15. Plaintiff claims that as a result of defendant's malpractice, he sustained permanent pain and suffering, including infection, decay and bone loss to his teeth, #14 and #15.

In support of the motion to dismiss, counsel for Dr. DeFEO reviews the course of treatment provided to plaintiff by defendants, commencing on October 13, 2004 when plaintiff sought Dr. DeFEO's treatment for pain in the upper left side of his mouth and the doctor performed an examination, x-rayed plaintiff's mouth and administered selective anesthesia to tooth #14 with favorable results. Based on his findings, Dr. DeFEO referred plaintiff to Dr. DiSANTI, an endodontist affiliated with Dr. DeFEO's office, who performed the root canal surgery. Counsel asserts that, based upon the verified pleadings and the sworn deposition testimony of the parties, said treatment was at all times appropriate and within the accepted standards of dental practice. Moreover, he claims that plaintiff's purported injuries were not caused by any negligence on the part of Dr. DeFEO and that plaintiff cannot meet the burden necessary to maintain an action in dental malpractice.

The Law

To establish a *prima facie* case of liability in a medical malpractice action, a plaintiff must prove 1) the standard of care in the locality where the treatment occurred, 2) that defendant breached that standard of care and 3) that the breach of the standard was the proximate cause of the injury. (*Texter v Middletown Dialysis Center, Inc.*, 22 AD3d 831, 803 NYS2d 687 [2nd Dept. 2005]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2nd Dept. 2003]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. (*Gargiulo v Geiss*, 40 AD3d 811, 836 NYS2d 276 [2nd Dept. 2007]; *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2nd Dept. 2004]). In opposition, plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury. (*Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2nd Dept. 2007]).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]). Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J.*

Capelin Associates, Inc. v Globe Mfg. Corp., 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

Discussion

After a careful reading of the submissions herein, the Court finds that a *prima facie* showing has been made for the granting of summary judgment in favor of Dr. DeFEO. There being no opposition, it is hereby

ORDERED, that Dr. DeFEO's motion for summary judgment is granted and the action against him is dismissed; and it is further

ORDERED, that the action is severed and continued against co-defendant, ANTHONY DiSANTI, and the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

SOL KRAWCZYK,

Plaintiff

-against-

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ANTHONY DISANTI,

Defendant.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 18, 2008



WILLIAM R. LaMARCA, J.S.C.

ENTERED

JAN 28 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

TO: Finkin & Finkin, Esqs.
Attorneys for Plaintiff
118-21 Queens Boulevard, Suite 616
Forest Hills, NY 11375

Fumuso, Kelly, DeVerna, Snyder, Swart & Farrell, LLP
Attorneys for Defendant Robert DeFeo
110 Marcus Boulevard
Hauppauge, NY 11788

Neill DeTolla, Esq.
Attorney for Defendant Anthony DiSanti
425 Broad Hollow Road, Suite 400
Melville, NY 11747

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