

Peck v Kadoe

2009 NY Slip Op 30472(U)

March 2, 2009

Supreme Court, New York County

Docket Number: 118539/06

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 29

ALICIA PECK,

INDEX NO. 118539/06

Motion Sequence No.: 3-4

Plaintiff,

-v-

DANIEL DAVID KADDOE, DDS, DR. KIM,
DR. MARGUERITE, and COSMETIC
DENTISTRY OF NEW YORK, LLC,

Defendants.

The following papers, 1- 44, were read on this motion by defendant Klodiana Margariti, D.D.S. s/h/a Dr. Marguerite for summary judgment dismissing the complaint; and separate motion by Seok Kim, D.D.S. s/h/a Dr. Kim for summary judgment dismissing the complaint.

Motion Sequence No. 3

Notice of Motion - Affidavits - Exhibits
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation -

FILED
MAR 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers Numbered
1-18 _____
19-27 _____
28 _____

Motion Sequence No. 4

Notice of Motion - Affidavits - Exhibits - Memo of Law
Affirmation in Opposition - Affidavits - Exhibits
Replying Affirmation -

Papers Numbered
29-43 _____
(19-27) _____
44 _____

Cross-Motion: Yes No

Plaintiff, Alicia Peck, commenced the instant dental malpractice action against defendants with the filing of a summons and complaint on or about December 14, 2006. Plaintiff alleges that defendants were negligent in their performance of dental treatment rendered from September 2004 through April of 2005, resulting in various injuries, including but not limited to, loss of teeth, the need for the placement of implants, as well as the need for corrective dental work relating to the placement of crowns. Discovery has been completed, a note of issue/certificate of readiness has

been filed, and this action is now ready for trial. Defendants Klodiana Margariti, D.D.S. s/h/a Dr. Marguerite and Seok Kim, D.D.S. s/h/a Dr. Kim, respectively move for summary judgment dismissing the complaint, 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 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*.

In support of her motion, defendant Dr. Margariti relies upon, *inter alia*, the expert affidavit of a licensed dentist, who, based upon a review of plaintiff's dental records, as well as documents relating to the instant litigation, *i.e.*, deposition transcripts and the bill of particulars, opined that Dr. Margariti did not depart from the standard of care and provided proper dental treatment to plaintiff. According to Dr. Margariti's expert, when plaintiff first presented to the Cosmetic Dentistry, LLP, facility on September 7, 2004, she was properly treated by Dr. Margariti, who, during this visit, treated plaintiff jointly with defendant Dr. Daniel David Kadoe, the owner of Cosmetic Dentistry, LLP. The expert states that the appropriate diagnostic films were taken during this initial visit, and the treatment plan, which called for the placement of crowns on teeth numbers 4, 5, 10, 11, 12, 13 and 20 was appropriate. Dr. Margariti's expert sets forth that "[s]ome of these teeth had prior root canal treatments and all of them had large amalgam/composite fillings which confirmed that these were appropriate teeth upon which to place crowns." With respect to any allegations that Dr. Margariti failed to address plaintiff's periodontium prior to proceeding with the aforementioned dental plan, the expert opines that a periodontal consultation was performed at Cosmetic Dentistry, LLP, on October 5, 2004, approximately one month after plaintiff's initial visit, revealing no significant periodontal disease. Moreover, according to this expert, plaintiff's dental records, including those of all subsequent treating periodontists/dentists indicate a total absence of periodontal disease.

Dr. Margariti's expert also opines that there is no evidence in plaintiff's dental records that plaintiff's teeth were negligently prepared for the placement of the crowns. Furthermore, with respect to any allegations that the crowns placed in plaintiff's mouth were ill fitting, the expert states that, with the exception of tooth number 20, Dr. Margariti never placed the crowns on plaintiff's teeth and had no opportunity to evaluate the fit of the crowns on the underlying teeth. As the expert explains, Dr. Margariti had left the employment of Cosmetic Dentistry, LLP, by the time the crowns were fitted on all of plaintiff's teeth, with the exception of tooth number 20; and it's the responsibility of the dentist who performs the final fitting of the crowns to make sure they fit properly. As far as any malpractice alleged in connection with the placement of the crown on tooth number 20, Dr. Margariti's expert states that although the crown at that tooth had a short margin, the dental records reveal that the cause of the margin was the shrinking of the gum around the tooth over time, and not the result of any treatment by Dr. Margariti.

Dr. Margariti's expert addresses plaintiff's allegations that Dr. Margariti caused plaintiff's cavities in teeth numbers 4 and 5, and that she failed to diagnose and treat cavities on teeth numbers 11, 14, 19, 20 and 30. First, with respect to the allegations that Dr. Margariti caused any cavities in plaintiff's mouth, the expert contends that it is impossible for a dentist to cause cavities. Moreover, plaintiff's dental records do not indicate any decay at these teeth six months after Dr. Margariti ceased her treatment of plaintiff. With respect to any allegation that Dr. Margariti failed to diagnose and treat cavities at the other teeth, *i.e.*, teeth numbers 11, 14, 19, 20 and 30, the expert sets forth that the records indicate that there were no signs of decay at these teeth while plaintiff treated with Dr. Margariti.

Additionally, Dr. Margariti's expert states that she did not fail to diagnose and properly treat periapical pathology at tooth number 10. According to the expert, the dental records indicate that plaintiff presented to Cosmetic Dentistry, LLP, with a pre-existing root canal at tooth number 10. That root canal appeared well done. The expert explains that although the films showed dark radiolucency around the tip of the root, it appeared only to be a symptom of healing, and was not indicative of any problem at the location. Dr. Margariti's expert also sets forth in the affidavit that despite plaintiff's allegations to the contrary, Dr. Margariti appropriately performed an emergency root canal treatment on tooth number 5 and there is no evidence to demonstrate that Dr. Margariti used an inappropriate material to fill the root canal.

In opposition to Dr. Margariti's motion, plaintiff submitted, *Inter alia*, the expert affidavit of a licensed dentist. With respect to the treatment rendered to plaintiff by Dr. Margariti, plaintiff's expert opines that Dr. Margariti had several departures from the standard of care, which caused injury to the plaintiff. Plaintiff's expert first opines that Dr. Margariti failed to diagnose and properly treat periapical pathology at tooth number 10. The expert states that defendants' own x-rays reveal a black area around the apex of the tooth, which is consistent with periapical pathology. According to this expert, the failure to timely deal with this condition resulted in the loss of tooth number 10 and the placement of an implant. With respect to the cavities in teeth numbers 4 and 5, plaintiff's expert states that contrary to the opinion of Dr. Margariti's expert, dentists can and do sometimes cause decay in a patient's teeth. The expert sets forth that root based decay was caused by the careless use of drill tips in the treatment of plaintiff. Plaintiff's expert adds that tooth mobility and significant gum pocketing, which, according to the expert, were caused by overly bulked crowns placed on teeth numbers 4 and 5 by Dr. Margariti, resulted in the need to extract these teeth and required plaintiff to undergo bone grafting and implants.

Plaintiff's expert further states that the treatment rendered to plaintiff by Dr. Margariti resulted in periodontal problems requiring the need for corrective dental work. The expert sets forth that the evidence establishes that periodontal scaling was performed around the time of her initial visit, but prior to the time the crown work was performed, there was a failure "to re-probe the gums to see if the crown work was at this stage indicated." According to the expert, significant periodontal problems were revealed on x-rays taken subsequent to the subject treatment, specifically 5 mm pocket depths were observed on teeth numbers 2, 3, 4 and 20. In the opinion of this expert, such adverse gum conditions were caused by the negligent treatment of Dr. Margariti in addressing plaintiff's periodontal condition. Lastly, with respect to the treatment rendered to plaintiff by Dr. Margariti, plaintiff's expert opines that the crown at tooth number 20 had a short margin, which was a result of Dr. Margariti's malpractice. Subsequent films show that there was a failure to have the crown margins properly set and sealed around the prepared portion of the tooth. The expert states that despite the opinion of Dr. Margariti's expert, the gingival height has no bearing on the short margins of a prepared tooth, therefore, the short margin was not caused by gum recession over time. According to the expert the dental work on tooth number 20 will need to be redone.

Based upon the conflicting expert affidavits submitted by the parties, it appears that several issues of fact and credibility exist in connection with whether Dr. Margariti departed from good and accepted dental practice in her treatment of plaintiff, and whether such departures were a substantial factor in causing injury to plaintiff. 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]). Furthermore, despite Dr. Margariti's argument to the contrary, the Court does not find the affidavit of plaintiff's expert to be insufficient to defeat the instant motion. Accordingly, defendant Dr. Margariti's motion for summary judgment is denied. Notwithstanding, the Court notes that although plaintiff's expert sets forth in his affidavit that the crowns placed on teeth numbers 4 and 5 were placed there by Dr. Margariti, this does not appear to be the case. Therefore, the Court does not find that a triable issue of fact exists with respect to the issue of whether the tooth mobility and significant gum pocketing at teeth numbers 4 and 5 was allegedly caused by overly bulked crowns placed on those teeth by Dr. Margariti.

In support of his motion for summary judgment, defendant Dr. Kim relies upon, *inter alia*, the expert affidavit of a licensed dentist. According to this expert, Dr. Kim only rendered treatment to plaintiff in connection with teeth numbers 4, 5, 11 and 13, and that such care and treatment did not cause any permanent damage to plaintiff's teeth because the treatment was never completed. Dr. Kim's expert states that Dr. Kim saw plaintiff after she had been treating with Dr. Margariti for some time. Dr. Kim did a try-in of crowns on teeth numbers 4, 5, 11 and 13, and, thereafter, temporarily inserted crowns on teeth numbers 4 and 5. The expert expressly sets forth that:

"[i]t is my opinion within a reasonable degree of dental certainty that performing try-ins of crowns on teeth [numbers] 11 and 13 cannot cause any permanent damage whatsoever to the plaintiff especially since the crowns were never inserted or cemented. It is also my opinion that temporarily cementing permanent crowns for a trial period does not cause any permanent damage since treatment is not complete. The purpose of temporarily cementing crowns is so that the dentist can observe and evaluate them over a period of time and make adjustments prior to permanently cementing them in place. In this case, plaintiff did not return to Cosmetic Dentistry, LLP after Dr. Kim temporarily cemented the crowns, and, as such, Dr. Kim was unable to perform any further modifications that may have been needed."

In opposition to Dr. Kim's motion, plaintiff's expert states that the evidence demonstrates that Dr. Kim took over the care and treatment of plaintiff from Dr. Margariti, and, therefore, his responsibility to her as a patient was not simply limited to the try-in of crowns on teeth numbers 4, 5, 11 and 13, and the temporary crowns placed on teeth numbers 4 and 5. Dr. Kim was required to do a complete examination of plaintiff, and was responsible for recognizing and treating plaintiff's dental problems. According to the expert, at the time of Dr. Kim's treatment of plaintiff he should have recognized and treated decay at teeth numbers 4 and 5; periapical pathology and significant mobility at tooth number 10; decay in teeth numbers 14 and 19; and an open contact area in tooth number 30 with food impaction.

Although plaintiff's expert opines that Dr. Kim should have recognized and treated decay at teeth numbers 4, 5, 14 and 19 and an open contact area in tooth number 30 with food impaction, the court finds these opinions to be conclusory, as the expert provides no factual basis for such opinions. Furthermore, plaintiff's expert does not address what, if any, injuries were proximately caused by Dr. Kim's failure to recognize and treat these conditions. Notwithstanding, with respect to plaintiff's expert's opinion that Dr. Kim should have recognized and treated periapical pathology at tooth number 10 when he took over the care and treatment of the plaintiff,

this court finds that such opinion is based upon the expert's view of the evidence, *i.e.*, the x-rays taken at the defendant facility. Moreover, plaintiff's expert adequately sets forth in his affidavit that the failure to timely deal with this condition resulted in the loss of tooth number 10 and the placement of an implant. Therefore, defendant Dr. Kim's motion for summary judgment must be denied.

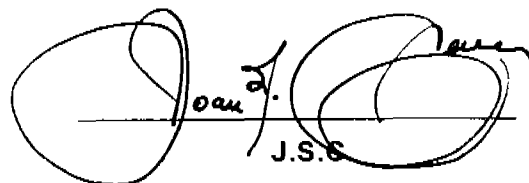
Based on the foregoing, it is hereby

ORDERED that defendant Klodiana Margariti, D.D.S. s/h/a Dr. Marguerite's motion for summary judgment dismissing the complaint is denied; and it further is

ORDERED that defendant Seok Kim, D.D.S. s/h/a Dr. Kim's motion for summary judgment dismissing the complaint is denied; and It is further

ORDERED that counsel for all parties are to appear before the court on April 13, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for jury selection.

Dated: 3/2/2009


Joan J.S.S.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

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REFERENCE

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