

**Schwartz v Wolf**

2009 NY Slip Op 31312(U)

June 17, 2009

Supreme Court, New York County

Docket Number: 103564/08

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

MATTHEW SCHWARTZ,

Plaintiff,

Index No.: 103564/08

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 01

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

LOUIS R. WOLF, D.M.D. and  
METROPOLITAN ORAL SURGERY  
ASSOCIATES, P.C.,

Defendants.

The following papers, 1- 19, were read on this motion by defendants for, inter alia,  
summary judgment dismissing the complaint.

Notice Of Motion - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**

JUN 18 2009

Papers Numbered  
1-16 \_\_\_\_\_  
17-18 \_\_\_\_\_  
19 \_\_\_\_\_

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

On November 14, 2006, plaintiff, Matthew Schwartz, accompanied by his mother, Diane Schwartz, presented to Louis R. Wolf, D.M.D., at Metropolitan Oral Surgery Associates, P.C. for a consultation and exam. Plaintiff's general dentist, Dr. Michael Klein, had referred plaintiff to Dr. Wolf, an oral surgeon, with the recommendation that plaintiff have a wisdom tooth or multiple wisdom teeth extracted. Defendant performed an examination and an x-ray that indicated that plaintiff had four impacted malposed wisdom teeth. Dr. Wolf advised plaintiff and Mrs. Schwartz that all four teeth were malposed and impacted and needed to be removed and provided them with options on how to proceed. Following a discussion relating to Dr. Wolf's diagnosis and proposed courses of treatment, plaintiff decided to have all four wisdom teeth extracted. During this examination, Dr. Wolf noted that plaintiff had large tonsils, but determined that they were not infected, and should not impact the surgical removal of plaintiff's wisdom teeth. Notwithstanding Dr. Wolf's testimony, Mrs. Schwartz testified, at her deposition, that Dr. Wolf advised her and her son that "he noticed pus on his tonsils and that they were swollen."

On November 27, 2006, the plaintiff presented for the extractions of teeth numbers 1, 16, 17 and 32. Prior to the extraction surgery, Dr. Wolf discussed the risks of the procedure with the patient and plaintiff signed the informed consent form for the extraction of all four teeth. The informed consent form listed "post-operative infection requiring additional treatment" as a risk of the procedure. On the day of the subject surgery, Dr. Wolf again noted that plaintiff had enlarged tonsils. The surgery was completed without complication but, while in the recovery room, Dr. Wolf observed bleeding at the surgical site of tooth number 17 and placed additional sutures at that site. Dr. Wolf gave plaintiff post-operative care instructions and prescribed Vicodin for pain and the antibiotic Zithromax to prevent infection.

On November 28, 2006, at around 3:30 p.m., Mrs. Schwartz spoke with Dr. Wolf and advised him that her son had a sleepless night, was in distress, was drooling blood and mucous, and that his face was swollen. Dr. Wolf advised Mrs. Schwartz that these symptoms were typical, to continue the medication, and to bring her son to his office the next morning. According to Mrs. Schwartz deposition testimony, her son's symptoms worsened and, at approximately 10:00 p.m., she telephoned Metropolitan Oral Surgery Associates, P.C. Mrs. Schwartz spoke with Dr. Rubin, advising him that plaintiff had a fever, was in a great deal of pain, and that she was worried about his tonsils. Mrs. Schwartz testified that Dr. Rubin then advised her that the fever was probably due to a secondary condition of the tonsils, but that if the fever became worse to bring plaintiff to a hospital. According to Mrs. Schwartz, the plaintiff's symptoms progressively got worse during the night and, after telephoning her son's internist, she brought him to Mt. Sinai Hospital. The plaintiff was admitted to Mt. Sinai Hospital on November 29, 2006 and diagnosed with edema of the larynx and postoperative infection. During the hospitalization, plaintiff had an incision and drainage of a left mandibular abscess. Plaintiff was discharged on December 6, 2006, with a diagnosis of a left mandibular abscess.

Plaintiff commenced the instant dental malpractice action against defendant Louis R. Wolf, D.M.D., with the filing of a summons and complaint on or about March 10, 2008. Thereafter, on or about April 3, 2008, plaintiff served an amended complaint, naming Metropolitan Oral Surgery Associates, P.C. as a defendant in the action. Plaintiff alleges that Dr. Wolf, an employee of Metropolitan Oral Surgery Associates, P.C., was negligent in his performance of dental treatment rendered in November of 2006, resulting in a severe infection requiring hospitalization. It appears that plaintiff alleges, *inter alia*, that the subject surgery was improperly performed in the presence of inflamed tonsils, and that defendants failed to prescribe a pre-operative antibiotic. Plaintiff contends that defendants malpractice resulted in his post-operative infection. The amended complaint also contains a cause of action for lack of informed consent, as asserted against the respective defendants. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial. Defendants Dr. Wolf and Metropolitan Oral Surgery Associates, P.C. presently move for summary judgment, dismissing the complaint.

"[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 their motion, defendants Dr. Wolf and Metropolitan Oral Surgery Associates, P.C. rely upon, *inter alia*, the expert affidavit of a dentist specializing in oral and maxillofacial surgery. Based upon a review of plaintiff's dental and medical records, as well as documents relating to the instant litigation, *i.e.*, deposition transcripts and bill of particulars, defendants' expert opined that Dr. Wolf did not depart from the standard of care and provided proper dental treatment to plaintiff. Defendants' expert sets forth that on November 14, 2006, plaintiff first presented to Dr. Wolf, and that based upon plaintiff's clinical presentation and panorex films, Dr. Wolf suggested the surgical extraction of teeth numbers 1, 16, 17 and 32. The expert opines that the surgical extraction of teeth numbers 1, 16, 17 and 32 was indicated and appropriate.

With respect to any allegations that Dr. Wolf failed to prescribe pre-operative antibiotics, defendants' expert opines that there was no indication that the plaintiff had any infection that would require prophylactic antibiotics to be administered, as plaintiff's dental records and films did not reveal anything in the clinical presentation that necessitated the use of pre-operative antibiotics. Defendants' expert also sets forth that on November 14, 2006, there were no symptoms present that indicated there was anything wrong with the plaintiff's tonsils. According to the expert, the fact that plaintiff had enlarged tonsils on that date was not an impediment to extracting four wisdom teeth, “[a]s enlarged tonsils in and of themselves do not indicate that there is an infection.” Additionally, this expert opines that the records indicate that, not only were the plaintiff's tonsils not infected, but that the culture of the wound demonstrated that the infection did not arise from the tonsils. The expert notes in his affidavit that the organism cultured from the wound during plaintiff's hospitalization at Mt. Sinai Hospital is usually seen with an infection in the oral cavity or skin, and did not arise from plaintiff's tonsils.

With respect to plaintiff's lack of informed consent cause of action, the expert opines that the plaintiff was sufficiently informed of the risks, benefits and alternatives associated with the procedure, so that he could make an informed decision whether or not to undergo the procedure. The expert explains that the consent form clearly outlined the risk and complications associated with the procedure and highlighted potential complications of the surgery, including post-operative infection.

Defendants' expert next addresses the post-operative care of plaintiff, stating that following the surgery of November 27, 2006, Dr. Wolf properly placed additional sutures at the surgical site of tooth number 17 post-operatively, while plaintiff was in the recovery room. The expert opines that it is within the standard of care to place additional sutures if bleeding is noted post-operatively. The expert adds that the additional sutures did not make any difference in the course the infection took. Additionally, according to defendants' expert, Dr. Wolf adequately prescribed antibiotics to plaintiff following the surgery. The expert notes that it would not have been a departure if an antibiotic was not prescribed post-operatively, thus, Dr. Wolf went beyond the standard to ensure the health of his patient. The expert further noted that although Penicillin is the drug of choice to prescribe following an extraction, the plaintiff's reported allergy to Penicillin made it appropriate for Dr. Wolf to prescribe Zithromax.

Defendants' expert states that based upon discussions between plaintiff's mother and Dr. Wolf on November 28, 2006, relating to plaintiff's condition and post surgical care, plaintiff was directed to come to the office to see Dr. Wolf the following morning, *i.e.*, November 29, 2006. However, plaintiff's mother called Dr. Wolf's office later in the evening on November 28, 2006, because plaintiff had a fever of 100.2 degrees. She spoke to Dr. Rubin and informed him of plaintiff's condition, and that plaintiff had an appointment to see Dr. Wolf the next morning. Dr. Rubin advised plaintiff's mother to bring plaintiff in to see Dr. Wolf in the morning, but if the fever became worse to take him to an emergency room. According to defendants' expert, based upon the signs and the symptoms conveyed to Dr. Wolf and Dr. Rubin, there was no indication to proceed in any other manner. The expert opines that the care provided to plaintiff during this period was within acceptable standards of care. The expert also adds that if the infection was diagnosed late in the afternoon on November 28, 2006, the course of the infection would not have been any different.

Defendants' expert affidavit is sufficient to make a *prima facie* showing of entitlement to judgment as a matter of law, demonstrating the absence of any material issues of fact with respect to the adequacy of the medical treatment provided by Dr. Wolf, as well as Dr. Rubin. See Suib v. Keller, 6 AD3d 805 [3rd Dept. 2004]; Juba v. Bachman, 255 AD2d 492 [2d Dept. 1998]; See also Alvarez v. Prospect Hospital, *supra*. The burden, therefore, shifts to plaintiff to come forward with evidentiary proof in admissible form sufficient to establish 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 opposition to defendants' motion, plaintiff submitted the expert affidavit of a licensed dentist. Based upon a review of plaintiff's dental and medical records, as well as documents relating to the instant action, the expert offered the following opinion, which is set forth in its entirety:

"I conclude that the defendant Dr. Wolf deviated from accepted practice of oral surgery in the following manner. There were inadequate office notes of plaintiff Matthew Schwartz as to his dental condition prior to the surgery. Matthew's infection as documented in the Mt. Sinai Hospital records developed far too quickly to be a

normal post up [sic] infection. I can conclude that there had to be some pre existing inflammation in the area surrounding the plaintiff's third molar. There were no antibiotics given by defendant prior to surgery. Plaintiff's surgery should not have gone forward under those circumstances. This led directly to the rapid progression of the infection necessitating the 8 day hospitalization; plaintiff's need for treatment in the intensive care department of the hospital as well as the surgery which he required. These are damages the plaintiff sustained directly due to the above described deviation."

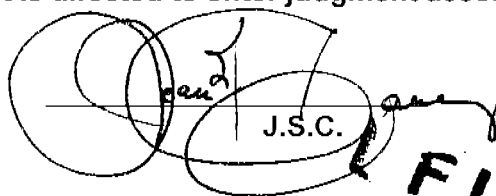
Viewing the evidence in a light most favorable to plaintiff, the Court concludes that the expert affidavit submitted on behalf of plaintiff fails to raise a triable issue of fact. It is well settled that general conclusory assertions of negligence in an expert affidavit, which are unsupported by evidence, are insufficient to defeat a motion for summary judgment in which a *prima facie* case has been established. See Diaz v. New York Downtown Hospital, 99 NY2d 542 [2002]; Kaplan v. Hamilton Medical Associates, P.C., 262 AD2d 609, [2d Dept. 1999]; Marinaccio v. Society of the New York Hospital, 224 AD2d 595 [2d Dept. 1996]; Rosado v. Lutheran Medical Center, 202 A.D.2d 412 [2d Dept. 1994]. As the Court of Appeals stated in Diaz v. New York Downtown Hospital, *supra*, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, [ ] the opinion should be given no probative force and is insufficient to withstand summary judgment." The expert's opinion herein that, prior to the subject surgery, plaintiff had a pre-existing "inflammation," and, therefore, his surgery should not have gone forward, is speculative as the expert does not set forth any factual basis for this conclusion. The expert simply sets forth "that infection as documented in the Mt. Sinai Hospital records developed far too quickly to be a normal post up [sic] infection." The expert does not point to any particular information contained within the Mt. Sinai Hospital records that he relied upon in reaching this conclusion. Furthermore, even though the expert opines that plaintiff's infection developed far too quickly to be a normal post-op infection, the expert fails entirely to address at what rate the infection developed. This conclusory and speculative affidavit of plaintiff's expert, which does not provide any factual basis for the opinions contained therein, is insufficient to defeat defendants' motion for summary judgment. Accordingly, defendants' motion for summary judgment is granted.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 6/17/2009

 J.S.C.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

**FILED**  
JUN 18 2009  
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