

Torres v Sol S. Stolzenberg, D.M.D., P.C.

2010 NY Slip Op 30051(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 114970/2007

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

TORRES, ANGELES

Plaintiff(s),

- v -

SOL. S. STOLZENBERG, D.M.D., P.C., ET AL.

Defendant(s)

INDEX NO. 114970/07

MOTION DATE 10/20/09

MOTION SEQ. NO. 002

MOTION CALL NO.

The following papers, numbered 1 to 26 were read on this motion to/for summary judgment

Notice of Motion / Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

PAPERS NUMBERED

1-15

16-21, 26

22-24, 26

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/8/10

JOAN B. LOBIS, J.S.C.

Check one: [] FINAL DISPOSITION

[X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X
ANGELES TORRES,

Plaintiff,

Index No. 114970/2007

-against-

**Decision, Order,
and Judgment**

SOL S. STOLZENBERG, D.M.D., P.C.
d/b/a TOOTHSAVERS, TOOTHSAVERS
DENTAL CARE, INC., and TOOTHSAVERS
DENTAL SERVICES, P.C.,

Defendants.

-----X

SOL S. STOLZENBERG, D.M.D., P.C.
d/b/a TOOTHSAVERS, and SOL S.
STOLZENBERG, D.M.D., P.C. d/b/a
TOOTHSAVERS s/h/a TOOTHSAVERS
DENTAL CARE, INC. and
ATOOTHSAVERS DENTAL SERVICES, P.C.,

Third-Party
Index No. 590270/2008

Third-Party Plaintiffs,

-against-

JENNIFER PARKER, D.D.S.,

Third-Party Defendant.

-----X
JOAN B. LOBIS, J.S.C.:

In this dental malpractice action, third-party defendant Jennifer Parker, D.D.S. (Parker) moves by order to show cause for an order, pursuant to CPLR 3212, granting her summary judgment, dismissing the third-party complaint of defendant/third-party plaintiff, Sol S. Stolzenberg, D.M.D., P.C. d/b/a Toothsaunders (Toothsaunders).

Toothsaunders is a professional corporation which renders dental services at several locations, including at West 57th Street, where plaintiff Angeles Torres (Torres) was treated. Its

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sole shareholder is Sol S. Stolzenberg, D.M.D., who allegedly purchased the practice from non-party Jerry Lynn (Lynn) and works in a Toothsavvers' office, other than the one on West 57th Street.

Torres, having read about Toothsavvers in a newspaper, first went, on August 23, 2005, to the 57th Street office, allegedly because she had a complaint with one tooth. After talking to the receptionist, Torres was initially seen by "Dr. Lynn," who looked into her mouth, put his fingers into it, saw her upper bridge and told her that it was old, did not look good, and that she needed a new one. Lynn told Torres that the treatment would cost \$10,000, and insisted that it be paid at once; therefore, Torres paid in full the next day. Lynn then, at the first visit, turned Torres over to Parker, who had just completed her dental residency, obtained her dental license in July 2005, and had started at Toothsavvers at the end of that month, after she had been interviewed and hired by Lynn's son whom she did not believe was a dentist, but was involved with some "business aspect" of Toothsavvers.

Parker testified that she was a Toothsavvers' employee, rather than an independent contractor, that she was paid directly by Toothsavvers, which withheld taxes, and that she received a W-2 or W-4, rather than a 1099 form. Stolzenberg, who never met Parker, claimed that she and all dentists working at Toothsavvers were independent contractors, pursuant to alleged oral agreements. Stolzenberg asserted that Parker was required to maintain her own liability coverage.

Parker testified that the reason she, rather than another Toothsavvers' dentist, saw Torres on her first visit, was that whichever dentist was available was assigned to the patient. According to Torres, Parker and Lynn spoke, x-rays were taken, and Parker just started to give her

injections and work on her mouth. It was Torres's impression that Lynn told Parker that the bridges were to be removed and replaced by new ones, that Parker simply followed what Lynn told her, and that Parker had no conversation with her about the nature of the treatment before she began it, including the risks and benefits of and the alternatives to the treatment. Torres was unaware that part of the treatment included root canals on two teeth.

At the first visit, Parker removed the upper bridges and crowns, scaled all upper (maxillary) teeth, prepped all of Torres's extant upper teeth, started the root canal treatment, had a temporary acrylic upper bridge fabricated and inserted it, and then sent Torres to Dr. Sullivan (Sullivan), an oral surgeon, who worked at the practice, for extraction of a tooth, and to see whether Torres was a viable candidate for some implants in her upper jaw. Dr. Sullivan believed that implants were warranted, and had Torres sign a consent form, but according to Torres, she was told not to read it, since it was just an authorization for the work. Parker's August 23, 2005 chart entry recited that Torres's lower jaw was to be reevaluated at a future appointment.

Contrary to Torres's deposition testimony, Parker claimed that the reason for Torres's first visit was not that she had pain in a tooth, but that she did not like the appearance of her front teeth, and that it was she (Parker) who devised Torres's treatment plan, after discussing it with Torres and presenting her with several options. Parker testified that, on August 23, 2005, she had Torres sign a consent form for bridges, root canals, posts and cores and implants. Parker claimed that Torres was seen by Sullivan before she (Parker) devised the treatment plan. According to Parker, after Sullivan advised that implants were possible in the spaces where several upper teeth were missing, "we decided to go with the bridge" option.

Parker asserted that at the first visit, a Panorex, as well as a full mouth x-ray series, were taken of Torres's mouth. Parker testified based on a review of the Panorex, that tooth number 30 in the lower jaw had distal cavities, but that the extent of those cavities could not be determined from that type of film. She then claimed at her February 2009 deposition, about three and a half years after Torres first presented to Toothsavers and after treating "possibly" hundreds of additional patients, that she (Parker) recalled from other x-rays, allegedly taken at the initial visit yet were not produced at her deposition, that the condition of that tooth at Torres's first visit was such that it was not restorable.

Parker next saw Torres on August 30, 2005, when she completed the root canals and repaired the temporary bridge. Torres testified that the temporary bridge was loose on the very first visit, uncomfortable, cheaply made, and constantly broke or came off. She further testified that she was always eating soft food, was afraid to bite, could not go out to eat with anyone and was afraid to eat in front of anyone, while her temporary bridges were in. Torres then saw Parker on October 28, 2005, who again repaired, adjusted and replaced the temporary bridge.

Parker testified that Torres kept having problems with her temporary bridge breaking and coming loose. Parker could not come to a definitive conclusion as to why the bridge kept breaking and coming loose. Thus, she decided, on the November 4, 2005 visit, to have a porcelain fused to metal temporary bridge fabricated for Torres. Parker took an impression for that new bridge that day, and recemented in the acrylic bridge. Meanwhile, Torres saw Sullivan in connection with the implants. Parker next saw Torres on November 11, 2009, and tried in the

framework for the new temporary bridge, which needed to be sent back to the lab for correction; therefore, the original temporary bridge was recemented.

Torres then presented to the office on November 21, 2005 complaining about occasional pain in tooth number nine. Dr. Parker was not in that day, and Torres was seen by a Dr. Sung, a periodontist at Toothsavvers, who, according to his chart entry of that day, found her gingiva to be healthy, but indicated that her occlusion had to be adjusted. Parker next saw Torres on December 6, 2005, when she again tried in the metal framework for the new temporary bridge, sent it to the lab to have the porcelain applied, and recemented in the temporary bridge. The next and last time that Parker saw Torres was on December 13, 2005, when she tried in the new temporary bridge, noted a problem, sent it back to the lab for correction, and recemented in the original temporary bridge.

Parker then left Toothsavvers on December 15 to start officer's training school. At that time, Torres was still not done with her implant work, and she continued to be seen about 30 more times by a number of dentists at Toothsavvers. At a March 27, 2006 visit, a periapical film was taken of tooth number 30, and it was determined that it was not salvageable and had to be extracted. Torres continued to be seen at Toothsavvers in connection with the maxillary implants and bridgework. A permanent bridge was placed in her mouth in February 2007, about a year and a half after treatment had begun, but Torres was dissatisfied with the bridge, returned several more times, and then terminated her treatment at Toothsavvers in April 2007.

Torres commenced this action against Toothsavvers in November 2007. The complaint only asserted a cause of action based on departures from accepted standards of dental practice. As a result of the alleged departures, it was claimed, among other injuries, that all of the bridgework will have to be replaced, that tissue in various upper teeth was inflamed, that gingiva was lost, that teeth and surrounding bone required restoration, that Torres suffers from tooth and gum pain, and that she lost tooth number 30. The plaintiff's bill of particulars, as is relevant to Parker, alleged that Toothsavvers' agents, servants and employees were negligent in installing poorly fitting bridgework, and in failing to create an adequate treatment plan, properly prepare Torres's teeth, and treat tooth number 30, including referring Torres for root canal treatment.

Shortly after Torres commenced the instant action, Toothsavvers served Parker with a third-party complaint alleging that she was or would be "deemed" an independent contractor pursuant to an oral agreement, which allegedly provided for indemnification, and that in the event that Torres sustained any injury due to Parker's negligence in her treatment of Torres or in her failure to obtain Torres's informed consent, Toothsavvers would be entitled to receive contribution from Parker and/or be indemnified by her. The third-party bill of particulars incorporated by reference plaintiff's pleadings, and incorrectly alleged that plaintiff had asserted a lack of informed consent claim. It is not entirely clear from the third-party complaint and bill of particulars whether Toothsavvers was independently asserting a lack of informed consent claim against Parker and whether it was limiting its indemnity claim to a contractual one, or was also seeking to be indemnified under the common law.

Parker now seeks an order granting her summary judgment dismissing Toothsavers' third-party complaint. While Parker's counsel notes in her moving affirmation that Parker was Toothsavers' employee, the two grounds raised for dismissal of the third-party complaint were that Parker did not depart from accepted dental standards in treating Torres and that she appropriately obtained Torres's informed consent. Parker's counsel did not refer to the fact that Torres had not asserted a lack of informed consent cause of action, nor did counsel's moving affirmation specifically mention contribution or indemnity, seek to relate those claims to Parker's employment status, distinguish between the indemnity and contribution claims set forth in the third-party pleadings, or refer to the issue of Toothsavers' vicarious liability for any of Parker's malpractice.

In support of her application, Parker relied on, among other things, the affirmation of her expert, Leslie Seldin, D.D.S. (Seldin), who reviewed Toothsavers' dental records, including its films, and Parker's and Torres's deposition transcripts, and concluded that Torres had been properly informed of the risks and benefits of, and the alternatives to the proposed treatment, and that Parker appropriately obtained Torres's consent to the treatment which Parker rendered.

Seldin further opined that Parker appropriately decided a course of treatment for the upper dentition, that it was proper for Parker to place temporary bridges in Torres's mouth to "stabilize" her teeth and "maintain [her] dental health and well-being", and that, since Parker had not placed final crowns or bridges, she could not be held negligent regarding the construction, planning, or placement of the final crowns and bridges. Seldin also asserted that it was "within the standard of care to wait until the upper jaw was stabilized before treating tooth number 30", and that

since Parker testified that, on the first visit, x-rays showed that such tooth was not restorable, the tooth could not have been saved.

Toothsavers and Torres, relying on Toothsavers' papers, which include Stolzenberg's affidavit, the redacted affidavit of its dental expert, and a copy of a redacted affirmation of Torres's expert,¹ oppose Parker's application. Initially, Toothsavers asserts that Parker's application might not be viewed as one for summary judgment, but rather as one for leave to file a late summary judgment application, because of some inartful language in the order to show cause. If it was viewed as such an application, Toothsavers asserts that it should be summarily denied, because no reasonable excuse has been shown for the delay.

Alternatively, Toothsavers claims that, if the application is viewed as one for summary judgment, it must be denied because there are issues of fact as to whether Parker provided some of the information she claimed to have provided with respect to the informed consent claim, and because she failed to address some of the information she was required to impart on that claim. Similarly, Toothsavers asserts that Parker failed to address some of the third-party pleadings' material allegations regarding departures from accepted standards of dental practice, so as to meet her prima facie entitlement to summary judgment.

Stolzenberg, who has no personal knowledge, claims in his affidavit that Parker was an independent contractor, pursuant to an alleged oral agreement, and that such agreement provided for Toothsavers' indemnification by Parker. Toothsavers' counsel, apparently in response to

¹ I have reviewed the original, unredacted versions of these, in camera.

Parker's counsel's statement that Parker was a Toothsavers employee, claims that Parker was an independent contractor because of the alleged oral agreement, and because she allegedly exercised her own, independent judgment, free from the control of others, in rendering dental services to Torres. Toothsavers also claims that since Parker orally agreed to indemnify Toothsavers for any liability predicated on her malpractice, the third-party claim for indemnity has merit. Additionally, Toothsavers' counsel claims that if Toothsavers is held liable for Parker's malpractice, then Parker is liable to it for contribution.

Torres opposes Parker's motion, adopts Toothsavers' arguments on liability, and claims that there are at least issues of fact with respect to Toothsavers' claims of negligence, thereby warranting the denial of summary judgment. Torres, relying on Mduba v Benedictine Hospital, 52 AD2d 450 (3d Dep't 1976), further maintains that, irrespective of Parker's actual legal employment status, Toothsavers is vicariously liable for any malpractice on Parker's part, since Parker was "furnished to plaintiff by defendants and was employed at their facility," and thus, should be considered Toothsavers' apparent or ostensible agent. Finally, Torres asserts that whether Parker was an employee or independent contractor raises a triable factual issue that warrants the denial of Parker's motion.

In reply, Parker's counsel states that Parker's application was timely, having been served fewer than 60 days after the filing of the note of issue, and that, in any event, it was clearly an application for summary judgment, rather than an application for leave to serve a late summary judgment motion. Parker's counsel then seemingly adopts Torres's argument, which argument was not raised by Parker in her initial moving papers, that Toothsavers would be vicariously liable to

plaintiff, since Parker was, irrespective of her actual employment status, Toothsavers' ostensible or apparent agent, and asserts that summary judgment "should be granted as to Dr. Parker on this issue alone." Parker's counsel also claims that she had adequately established that her client did not commit malpractice.

Toothsavers' claim that Parker's application is actually one for leave to serve a late summary judgment motion under C.P.L.R. 3212 (a) is without merit. It is readily apparent that the application was not untimely, and that it sought summary judgment, as evidenced by the fact that Toothsavers submitted its expert's affidavit and substantively addressed Parker's application. Thus, the substance of the motion shall be addressed.

To the extent that Parker raises new grounds in her reply papers for summary judgment, namely that there should be a determination that Parker was Toothsavers' apparent or ostensible agent, and that therefore, it would be vicariously liable for any of Parker's malpractice (see Hill v St. Clare's Hospital, 67 NY2d 72 (1986); Finnin v St. Barnabas Hospital, 306 AD2d 189 (1st Dep't 2003), and that the third-party complaint should be dismissed, evidently because Parker claims that Toothsavers is not entitled to indemnity or contribution from such an ostensible or apparent agent, that application is denied. It is well settled that new arguments in support of a summary judgment application raised for the first time in reply papers are unavailing. Dannasch v Bifulco, 184 AD2d 415 (1st Dep't 1992); Ritt v Lenox Hill Hospital, 182 AD2d 560 (1st Dep't 1992). The theory of ostensible/apparent agency was raised or alluded to only in Torres's opposition and in Parker's reply, both of which were served after Toothsavers served its opposition

papers. Thus, Toothsavers did not have a chance to respond to this argument, and it will, therefore, not be considered.

Regarding the issue of whether Parker was Toothsavers' actual employee, as previously noted, this was not a ground specifically raised by Parker in her moving papers for summary judgment; rather, she moved on only two grounds, denominated in her counsel's moving affirmation as "A" and "B", i.e., that Parker had not departed from accepted standards of dental practice, nor had she failed to obtain Torres's informed consent.

Whether one is an independent contractor or an employee "is an ultimate fact to be determined from the evidence itself ... [including from] the contract itself, the attitude of the parties toward each other, the nature of the work and all relevant circumstances [internal quotation marks and citation omitted]" (Nobel v Ambrosio, 120 AD2d 715, 716 (2d Dep't 1986), and is generally an issue for the trier of fact. Carrion v Orbit Messenger, Inc., 82 NY2d 742 (1993) (issue of fact as to whether person was an independent contractor, even though that person was given a check cashing card describing him as an "employee"). The withholding of taxes or Social Security "is significant, but not controlling." Carr v Woods, 69 AD2d 964 (3d Dep't 1979); Gennarelli v Spruce-up Cleaners, Inc., 34 AD2d 1075 (3d Dep't 1970). "[A] critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability" is "[c]ontrol of the method and means by which the work is to be performed." Melbourne v New York Life Insurance Co., 271 AD2d 296, 297 (1st Dep't 2000); Berger v Dykstra, 203 AD2d 754 (3d Dep't 1994).

Here, notwithstanding that there is some evidence supporting an employment relationship, such as Parker's deposition testimony, her W-4 and pay stub, the fact that Parker was not hired for one specific limited job, and was apparently provided with the tools of her job by Toothsavvers, and Weingarten's testimony that he was a Toothsavvers' employee, since there is a dispute as to whether Parker controlled the method and means by which the dental work was to be performed on Torres, and where Parker has not specifically refuted the pleadings' contention (See Kuri v Bhattacharya, 44 AD3d 718 [2d Dept 2007]), via an affidavit or deposition testimony, that there was an oral agreement that she was or was to be deemed an independent contractor or Stolzenberg's assertion that she was required to provide her own liability insurance, a factual issue exists as to whether Parker was Toothsavvers' actual employee. Thus, to the extent that Parker seeks in her reply papers a determination that Toothsavvers is vicariously liable for Parker's claimed malpractice, and maintains that she is, therefore, entitled to summary judgment dismissing the third-party complaint, her application is denied.

Although it is quite possible that Parker will be found to have been Toothsavvers' actual, ostensible, or apparent agent, and that contribution for the same injury, if any, caused by any independent malpractice on the parts of Toothsavvers and Parker (see generally Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp., 71 NY2d 599, 602 [1988]; Cresswell v Warden, 164 AD2d 855, 856 [2d Dep't 1990]) will not lie² (Bailer v Perez-Veridiano, 266 AD2d 249 [2d Dep't 1999]), Toothsavvers would in such case be entitled at least to common law indemnity (Mas v Two Bridges Associates, 75 NY2d 680 [1990]) in the event that Toothsavvers were to be

² In the event that contribution does not lie, and Toothsavvers is limited to indemnity, Toothsavvers' lack of informed consent claim will fail, since it has not been asserted by Torres against Toothsavvers.

found vicariously liable to Torres for any malpractice on Parker's part. Common law, or implied indemnity often arises in cases where vicarious liability is involved, and "is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Id.* at 690. In general, it is available to a party held liable by operation of law because of that party's relationship to the "actual wrongdoer." *Id.*

Turning now to the grounds actually raised in Parker's moving papers, i.e., that she obtained Torres's informed consent and did not depart from accepted standards of dental practice, the law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing her entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York University Medical Center, 64 NY2d 851 (1985); Kuri v Bhattacharya, 44 AD3d at 718. The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 NY2d at 853. Also, "the remedy of summary judgment is a drastic one, which should not be granted where 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." Gibson v American Export Isbrandtsen Lines, 125 AD2d 65, 74 (1st Dep't 1987) (internal citations omitted).

To the extent that Parker seeks summary judgment because she allegedly obtained Torres's informed consent, Parker's application is denied. "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have disclosed, in a manner permitting the

patient to make a knowledgeable evaluation.” Public Health Law § 2805-d (1). In the instant case, Parker has not offered her affidavit as to whether she had disclosed the risks and benefits of the alternatives, nor does her deposition reveal that she disclosed all of this information to Torres. In addition, the consent form merely recites in bald and conclusory terms that the risks and benefits were discussed. Thus, it is unavailing. Moreover, Torres’s deposition testimony, as indicated above, was to the effect that Parker, before beginning treatment, did not obtain her informed consent to the treatment. Accordingly, Parker has not met her burden of establishing her entitlement to summary judgment based on the lack of informed consent claim raised by the third-party complaint.

Similarly, to the extent that Parker seeks summary judgment, because she allegedly has established that she did not depart from accepted standards of dental practice, the application is denied. She has failed, in the first instance, to establish her entitlement to dismissal of the third-party complaint, because she has not addressed all of the material allegations raised by the pleadings. Kuri v Bhattacharya, 44 AD3d at 718. In a malpractice case, Parker would have to establish that she did not depart from accepted standards of practice, or that, even if she did, she did not proximately cause injury to Torres. Erye v Montefiore Medical Center, -AD3d-, 2009 NY Slip Op 07963 (1st Dep’t 2009).

Here, Seldin has not addressed the claim in the pleadings that she negligently prepared Torres’s teeth, which preparation she did on the first visit. Also, while Seldin testified that Parker could not be liable for any negligently constructed permanent crowns and bridges placed by others after her departure from Toothsavvers, the pleadings did not limit the placement of negligently

16] constructed bridgework to permanent fixtures, and therefore, Seldin, who opined that temporary bridges serve to stabilize teeth and maintain dental health and well-being, failed to fully address the pleadings' claim of negligence in the placement of poorly fitting bridgework. Toothsavers' expert confirmed that ill-fitting temporary bridgework can cause pain and poor occlusion. In addition, as previously noted, Torres testified about her complaints with respect to the initial temporary bridge, which caused her discomfort and was constantly breaking or falling off, and Dr. Sung's November 2005 note recited that Torres's occlusion needed to be adjusted.

Finally, Seldin's opinions are inadequate to demonstrate, as a matter of law, that Parker was not negligent with respect to tooth number 30, and that such negligence did not result in the loss of that tooth. Seldin's opinion, regarding the allegedly unsalvageable condition of tooth number 30 on the first visit, was not based on his review of a Toothsavers' x-ray (as opposed to the Panorex) of that tooth allegedly taken at that visit, even though he stated that he had reviewed Toothsavers' films. His opinion was based solely on Parker's recollection on the day of her deposition, years after the first visit, that she had, on the day of that visit, reviewed an x-ray, allegedly taken that day, which supposedly showed the tooth in that condition. There was, however, no entry in the chart supporting the lack of the tooth's viability on August 23, 2005. Summary judgment is inappropriate where the issue is one of credibility (Jones v New York City Housing Authority, 293 AD2d 371 [1st Dep't 2002]; Santos v Temco Service Industries, Inc., 295 AD2d 218 [1st Dep't 2002]), or is one peculiarly within the movant's knowledge (Vitiello v Mayrich Construction Corp., 255 AD2d 182, 184 [1st Dep't 1998]), and here Parker's claim at her deposition that the tooth was not salvageable at the first visit is one of credibility, especially where it is unclear whether such an x-ray, which she allegedly reviewed years before, exists now or ever

existed. In addition, Seldin's opinion that it was permissible to wait until the upper jaw was stabilized before treating tooth number 30 was deficient, in that he did not indicate any particular length of time it would have been permissible to wait before addressing any issue in the lower jaw. Here, the delay in anyone at Toothsavars dealing with tooth number 30 amounted to about seven months, not, on its face, an insignificant period of time. Moreover, it is not readily ascertainable whether tooth number 30 would have been salvageable had Parker treated it, or referred Torres for treatment during the approximately four months Parker treated Torres.

Since there are issues as to Parker's employment status, and whether Parker departed from standards of accepted dental practice and failed to obtain Torres's informed consent, her application for summary judgment dismissing the third-party complaint is denied.

Accordingly, it is

ORDERED that Parker's application for an order granting her summary judgment dismissing the third-party complaint is denied.

The parties are advised that they shall appear for a pre-trial conference on Tuesday January 26, 2010 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: January 4, 2010

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JOAN B. LOBIS, J.S.C.