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

PRESENT: LOBIS Justice PART 6

COREY-MONROE, VERNIE

-v-

SALVATORE SCORSESE, DDS, ET AL

INDEX NO. 115439/07

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-16
Replying Affidavits	17-18

Cross-Motion: Yes ✓ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 1/22/10

J.S.C.

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

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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VERRIE GREY-MONROE

Plaintiff,

-against-

Index No. 115439/07

SLAVATORE SCORSESE, D.D.S., ALEX BARATS, D.D.S., UNITED WIRE METAL & MACHINE HEALTH & WELFARE FUND, and UNITED WIRE METAL & MACHINE DENTAL CENTER,

Decision and Order

Respondents.

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

Defendant Alex Barats, D.D.S., moves, by order to show cause, for an order, pursuant to C.P.L.R. Rule 3212, granting summary judgment in his favor. Plaintiff opposes the motion.

Plaintiff commenced this action sounding in dental malpractice by the filing of a summons and verified complaint on November 19, 2007. Issue was joined on or about December 21, 2007, by Dr. Barats' service of a verified answer. Plaintiff alleges that Dr. Barats was negligent in failing to treat decay and infection of the root system of plaintiff's tooth number 9 ("tooth 9"); improperly recementing a crown on tooth 9 and leaving an infection present in the tooth; failing to refer plaintiff to a specialist for treatment of tooth 9; improperly monitoring the condition of tooth 9; and, improperly diagnosing or ignoring the signs and symptoms of tooth infection, thereby allowing the infection to fester and spread to other parts of plaintiff's body. Plaintiff also alleges lack of informed consent related to the alleged dental malpractice. As a result of the alleged malpractice, plaintiff claims to suffer from the loss of tooth 9 and endocarditis.

In or about 2000, plaintiff underwent a root canal at tooth 9. The dentist who performed the root canal[1] placed a crown on tooth 9. About six years later, in June 2006, plaintiff presented to defendant United Wire Metal and Machine Dental Center (the "Dental Center") for a general check-up. Non-party dentist Kenneth Schwartz, D.D.S., performed the initial evaluation at the Dental Center. During this visit, plaintiff reported no complaints with tooth 9.

Plaintiff received dental care at the Dental Center unrelated to tooth 9 over the summer and early autumn of 2006. Some of this care was provided by Dr. Barats, who only worked at the Dental Center on Saturdays. The first incidence of a problem related to tooth 9 occurred on Saturday, November 4, 2006. Plaintiff presented for an emergency visit at the Dental Center after the crown and post on tooth 9 fell out. Dr. Barats examined tooth 9 and visually determined that tooth 9 had a fractured root structure at least three millimeters below the gum on the cheek side of the mouth. A periapical x-ray of the tooth was obtained, which indicated to Dr. Barats that the fracture was quite deep and below the gingival margin. He observed that the periapical area of the tooth, or the tip of the root, had a small area of radiolucency, or a dark area on the x-ray, indicating that periapical pathology was present at the apex. Dr. Barats speculated that this abnormality could be scar tissue from the former root canal procedure in 2000, or that it could be a sign of a widened periodontal ligament space due to occlusal or periodontal trauma. Dr. Barats testified at his deposition that he did not believe that the radiolucency represented infection, because radiolucency due to an infection would be larger in size than that on the x-ray, more circular than the radiolucency on the x-ray, and would not have continuity with the periodontal ligament space as the radiolucency

[1] Plaintiff could not recall the name of the dentist who performed the root canal in 2000.

on the x-ray did. He determined that the radiolucency represented an asymptomatic condition by his clinical examination of the area, his clinical visual observation of non-inflamed tissue, and a lack of sensitivity on percussion or palpation. The notes from the November 4, 2006 visit indicate that Dr. Barats recemented tooth 9 with a temporary bond and developed a treatment plan which included re-evaluation, possible extraction, and possible replacement with an implant. Dr. Barats delegated the ultimate treatment decision to co-defendant Salvatore Scorsese, D.D.S., who was the director and supervising dentist at the Dental Center.

On November 7, 2006, plaintiff presented to Dr. Scorsese, who determined at that time that tooth 9 was restorable. Dr. Scorsese removed the post on tooth 9 and placed a new post. He noted that plaintiff would need a new crown. He recemented the existing crown with temporary cement. Over the next two months, plaintiff presented to the Dental Center for treatment related to tooth 9 and other teeth. Dr. Barats saw plaintiff on December 2 and 16, 2006, for treatment of an unrelated tooth, tooth number 18, which was eventually extracted on December 28, 2006, by another dentist. On January 26, 2007, plaintiff presented to Dr. Scorsese with complaints that the temporary crown on tooth 9 was loose. There was no reported sensitivity at the site or swelling of the gum tissue. Dr. Scorsese recemented the crown. On February 6, 2007, Dr. Scorsese prepared teeth 8 and 9 for crowns.

On February 17, 2007, plaintiff presented to Dr. Barats for an emergency visit after the temporary crowns on teeth 8 and 9 fell out. Dr. Barats did not notice decay at the site or any observable changes from the first time he saw plaintiff in November 2006. Dr. Barats recemented

the temporary crowns and noted on plaintiff's chart that the permanent crowns would be inserted on plaintiff's next visit. On February 28, 2007, Dr. Scorsese permanently inserted crowns on teeth 8 and 9. Plaintiff presented to the Dental Center three times in March 2007 for treatment unrelated to tooth 9. She did not report complaints with respect to tooth 9 at those visits.

On April 5, 2007, plaintiff was admitted to New York Downtown Hospital with persistent fevers and severe back pain. She was diagnosed with bacterial endocarditis. She received daily intravenous antibiotic treatment for her bacterial endocarditis. On May 3, 2007, plaintiff was transferred to St. Vincent's Catholic Medical Center ("St. Vincent's") for cardiac catheterization and mitral valve regurgitation. On May 4, St. Vincent's Oral and Maxillofacial Service performed an evaluation of a lost dental crown on tooth 9. The oral examination revealed a remaining root tip at tooth 9. There were no active signs of infection. But, due to plaintiff's cardiac condition, the root tip was extracted on May 5, 2007. The culture for the extraction grew Enterococcus Faecalis, Viridans Streptococcus, and yeast. On May 10, plaintiff's doctors at St. Vincent's determined that the mitral valve was no longer necessary, and she was discharged home on intravenous antibiotics on May 11, 2007.

The party moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "[B]are allegations which do not refute the specific factual allegations of medical malpractice in the bill of particulars are insufficient to establish entitlement to judgment as a matter

of law." Grant v. Hudson Val. Hosp. Ctr., 55 A.D.3d 874 (2d Dep't 2008). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d 324 (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

> must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

In support of Dr. Barats' motion for summary judgment, he provides an expert affirmation from David Greene, D.D.S., a dentist duly licensed in the State of New York. He opines that Dr. Barats' care of plaintiff was proper and in accordance with good and accepted dental practice, and that Dr. Barats' care was not the cause of, nor did it contribute to, the injuries plaintiff alleges. Dr. Greene opines that tooth 9 had no signs of clinical infection. He states that clinical signs of infection are inflammation, swelling at the apex, and fistula. Based on his review of the November 4, 2007 x-ray of tooth 9, he maintains that the periapical area did not represent a tooth infection; rather, Dr. Greene opines that the periapical area represented scar tissue from plaintiff's prior root canal procedure. Additionally, Dr. Barats' clinical evaluation of plaintiff showed no signs of infection, since neither inflammation nor sensitivity were present, and plaintiff did not complain

of pain at the site, only that the crown was loose. During the treatment plaintiff received over the fall of 2006 and winter of 2007, none of the dentists at the Dental Center identified any inflammation or sensitivity. Dr. Barats' expert also states that there were no signs of clinical infection on February 17, 2007, when Dr. Barats recemented plaintiff's crown at tooth 9 during an emergency walk-in visit. Dr. Greene further sets forth that the plaintiff's records from St. Vincent's do not support a claim of infection at tooth 9, because on May 4, 2007, the Oral and Maxillofacial Service documented that there were no active signs of infection at tooth 9. Thus, he concludes to a reasonable degree of dental certainty that plaintiff's claim that Dr. Barats failed to diagnose or ignored signs of infection at tooth 9 is without merit. Further, since there were no signs or symptoms of infection during the course of Dr. Barats' treatment, Dr. Greene sets forth that any subsequent infection can not be attributed to Dr. Barats.

Dr. Greene states that Dr. Barats' recementing of the crown on November 4, 2007 was not contraindicated and comported with the standard of care, and that since tooth 9 is a front tooth, it was appropriate for Dr. Barats to temporarily recement the crown rather than have plaintiff walk around with no tooth. There was no indication for pre-medicating plaintiff since recementing a tooth does not require pre-medication and plaintiff had no pre-existing medical conditions warranting pre-medication. Further, since Dr. Barats did not perform invasive dental procedures such as extractions, it was appropriate for Dr. Barats to refer plaintiff's care to Dr. Scorsese with respect to tooth 9. Finally, Dr. Greene opines that plaintiff's claims as to lack of informed consent as to Dr. Barats cannot be substantiated, since his treatment only involved recementing the crown, which is noninvasive.

Dr. Barats has satisfied his initial burden as the proponent of summary judgment. He submitted a detailed affirmation from an expert who opines, to a reasonable degree of medical certainty, that Dr. Barats' dental care and treatment of plaintiff comported with the standard of care. The burden shifts to plaintiff to demonstrate that material issues of fact exist as to preclude summary judgment.

In opposition to the motion, plaintiff submits the opinion of her expert, Stanley Lane, D.D.S., a dentist licensed to practice dentistry in the State of New York. Dr. Lane disagrees with Dr. Barats' and Dr. Greene's conclusion that no infection was visible on the November 4, 2006 x-ray. He sets forth that periapical radiolucency lesions "most often represent infection as the cause of the bone destruction, especially in view of the presence of a fracture on [tooth 9], as fractures are a very common reason for the development of infections at the tips of tooth roots." Dr. Lane opines that, while there are other reasons besides infection for the development of periapical radiolucency, infection was certainly the cause in this case. He maintains that Dr. Barats departed from the standard of care because he took no action towards treating the infection other than recementing the crown. Dr. Lane states that the fact that Dr. Barats considered that the tooth may need to be extracted indicates that Dr. Barats suspected that an infection was present. In Dr. Lane's opinion, Dr. Barats was thus obligated to act by prescribing an antibiotic, performing root canal therapy, eliminating the fracture portion of the tooth by way of a partial resection, extracting the tooth immediately, or providing a combination of those treatments. Dr. Lane opines that leaving the periapical radiolucency—which he says is presumed to be an infection unless proven otherwise—untreated was improper. The fact that Dr. Barats saw no active signs of infections was

not important, Dr. Lane maintains, because many infections are present without showing active signs.

Dr. Lane sets forth that bacterial endocarditis, which is an infection of the heart valves, is well known to arise from dental infections. His review of the hospital records indicates to him that plaintiff did develop bacterial endocarditis, and that the "clear cause of it was bacteria from a dental infection." Dr. Lanes sees "no basis for the infection to have spread from any area of the mouth other than from tooth # 9," and opines that had Dr. Barats acted properly in timely treating the periapical radiolucency, there would not have been a spread of infection into the bloodstream and heart. He opines that Dr. Barats' failure to properly treat tooth 9 on November 4, 2006, was a substantial factor in causing plaintiff's subsequent bacterial endocarditis.

Defendant's expert opines that the November 4, 2006 x-ray did not show signs of infection, that plaintiff's clinical presentation on the same date did not indicate infection, and that the periapical area represented scar tissue from plaintiff's prior root canal procedure. Plaintiff's expert opines that the x-ray does show infection, because a periapical radiolucency is presumed to be an infection unless proven otherwise. The fact that the records from St. Vincent's, annexed to defendant's motion, indicate that the Oral and Maxillofacial Service found no active signs of infection at tooth 9 on May 4, 2007, but after removal of the root tip on May 5, a culture from the wound grew bacteria, lends support to plaintiff's expert's opinion that a clinical presentation of "no active infection" is not determinative. Further, plaintiff's expert maintains that a decision to take no action to treat what is presumed to be an infection is a departure from the standard of care, and

he relates this departure to plaintiff's later injuries. The experts differ as to whether Dr. Barats properly determined that plaintiff had no infection at the November 4, 2006 visit, and as to whether recementing the crown was contraindicated. Although Dr. Barats raises an issue in his reply that plaintiff's expert failed to specifically rebut or opine on any departures from the standard of care related to the February 17, 2007 visit, the court finds Dr. Lane's opinions regarding the alleged impropriety of recementing the crown sufficiently broad enough to encompass the February 17 date of treatment. Questions of fact are raised by the experts' conflicting opinions as to whether Dr. Barats departed from the standard of care and as to whether the alleged departures led to plaintiff's injuries, thereby precluding summary judgment on the dental malpractice claim. See Erdogan v. Toothsavers Dental Servs. P.C., 57 A.D.3d 314, 315-16 (1st Dep't 2008); Darwick v. Paternoster, 56 A.D.3d 714, 715 (2d Dep't 2008). Issues with respect to the credibility of the experts are properly left to the trier of fact.

Plaintiff did not rebut or even address defendant Dr. Barats' assertion that the recementing of a crown is not an invasive procedure that can form the basis of a claim for lack of informed consent. Dr. Barats is entitled to partial summary judgment in his favor on plaintiff's claim sounding in lack of informed consent, as well. Accordingly, it is hereby

ORDERED that the motion for summary judgment in favor of defendant Alex Barats, D.D.S. is partially granted, with respect to the cause of action against Dr. Barats for lack of informed consent, and these claims are hereby severed and dismissed as against Dr. Barats. The dental

malpractice claim against Dr. Barats survives except with respect to Dr. Barats' treatment on February 16, 2007. The clerk of the court is directed to enter judgment accordingly.

The parties shall appear for a pre-trial conference on February 2, 2010, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: January 22, 2010

JOAN B. LOBIS, J.S.C.