

Feuerring v Golub-Evans

2010 NY Slip Op 31339(U)

May 13, 2010

Sup Ct, NY County

Docket Number: 107059/08

Judge: Joan B. Lobis

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

8
5-17-10

PRESENT: Joan B. Lobis
Justice

PART 6

Marlene Feverring

INDEX NO. 107059/08

MOTION DATE 3/9/10

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

Dr. Jeffrey Golub-EVANS

The following papers, numbered 1 to _____ 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

1-14
15-17
18

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 17 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/13/10

JBL

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
MARLENE FEUERRING,

Plaintiff,

Index No.: 107059/08

- against -

DR. JEFFREY GOLUB-EVANS,

Defendant.

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

FILED
MAY 17 2010
NEW YORK X
COUNTY CLERK'S OFFICE

Decision and Order

Defendant Dr. Jeffrey Golub-Evans moves, pursuant to C.P.L.R. Rule 3212, for an order granting him summary judgment dismissing this matter in its entirety or in the alternative, pursuant to C.P.L.R. Rules 3212(e) and (g), for partial summary judgment dismissing plaintiff's claims for punitive damages; for partial summary judgment dismissing plaintiff's claims based on acts or omissions of other dentists; and for partial summary judgment dismissing plaintiff's claims as to treatment rendered before November 21, 2005 on statute of limitations grounds.

This action, sounding in dental malpractice, concerns dentistry performed on plaintiff over the course of approximately twelve (12) years during which, plaintiff alleges, defendant failed to treat tooth decay and failed to fit her with appropriate prosthetic restorations. Plaintiff first presented to defendant on April 20, 1995. According to her self-evaluation in the medical records, plaintiff was unhappy with the shape and color of her teeth. Defendant examined plaintiff and noted that she needed root canal therapy on one tooth and two new crowns. Defendant developed a treatment plan by which he would perform the root canal therapy; install the new crowns; and affix laminates to five upper teeth and eight lower teeth. The next day, a dentist in defendant's office

began root canal therapy. By late June and early July 1995, defendant had inserted the crowns and laminates on all but one tooth; defendant inserted a laminate on that tooth on September 27. On December 5, 1995, defendant performed maintenance. According to the dental records, plaintiff was feeling sensitivity in an upper tooth; a lower left tooth needed a crown; and another tooth needed a new laminate. Plaintiff returned to defendant's office on June 17, 1996 for a cleaning and an examination, which was conducted by defendant. On January 8, 1997, plaintiff complained of pain in a lower tooth and defendant placed a sedative on it. X-rays were taken on June 26, 1997 with normal results. On December 2, 1997, a cleaning was performed. On April 30, 1998, defendant inserted a new crown on an upper tooth. In September and October 1998, defendant inserted three new crowns.

On April 22, 1999, plaintiff was probed for periodontitis with normal results, but teeth 4 and 12 had decay. On June 17, 1999, defendant inserted a new crown on tooth 4 and the decay on tooth 12 was removed. On May 18, 2000, a cleaning was performed. On May 7, 2001, plaintiff returned for a polishing and cavity treatment on one tooth. The records indicate that she refused to allow x-rays to be taken. During the cleaning, light bleeding and light plaque were encountered. On July 17, 2001, a laminate was affixed to a lower tooth. On September 24, 2002, plaintiff returned for a cleaning. Two teeth were chipped and one tooth had an abnormal lean. On February 6, 2003, plaintiff underwent a cleaning, but refused x-rays. Upon examination, three teeth were noted to be decaying. On February 19, defendant noted that two more teeth showed signs of decay. Defendant took x-rays on March 10, 2003, and planned new fillings for two upper, right teeth. On September 23, 2004, a cleaning was planned, but since plaintiff failed to take antibiotics,

it did not occur and the cleaning was rescheduled. An exam revealed a possible cavity at tooth 6, a missing crown, and two more decaying teeth. Plaintiff also wanted new laminates and crowns, but she refused x-rays. On October 28, 2004, cleaning was done amid light plaque and light bleeding. On November 11, fillings were done on three teeth. On June 8, 2005, plaintiff was seen by Dr. Charles Silk, a dentist associated with defendant. Gum recession was noted at three upper left teeth. Dr. Silk also performed fillings on three teeth. Further fillings were done on July 18. On July 21, 2005, defendant proposed new veneers for plaintiff's upper and lower teeth. On December 2, 2005, a scaling and a cleaning were performed. On September 12, 2006, plaintiff returned to defendant's office and defendant prescribed a new antibiotic. On December 2, plaintiff returned for a cleaning. Defendant performed an exam and found possible cavities in seven teeth. On December 8, defendant noted that two more teeth showed signs of decay. On May 16, 2007, defendant designed a treatment plan for replacing fillings and crowns. On her last visit, June 8, defendant prepped three teeth for crowns.

Plaintiff commenced this action against defendant on or about May 21, 2008 by the filing of a summons and verified complaint. Plaintiff later alleged in her bill of particulars that defendant ignored signs of tooth decay and infections and failed to provide her with appropriate prosthetic restorations. There are no allegations of vicarious liability. Plaintiff asserts that defendant acted willfully, wantonly, and recklessly and seeks punitive damages. Defendant seeks summary judgment on the issue of malpractice, seeks partial summary judgment dismissing claims for punitive damages, seeks partial summary judgment on the grounds that a number of treatments are foreclosed by the statute of limitations, and partial summary judgment dismissing any claims of vicarious

liability.

As a preliminary matter, defendant's contention that the dentists in his office are independent contractors is nonjusticiable. Allegations of vicarious liability have not been raised in any of plaintiff's pleadings.

In support of the branch of his motion seeking dismissal of plaintiff's dental malpractice and punitive damages claims, defendant acts as his own expert. In his affidavit, defendant asserts that his cosmetic treatments lasted eight years without any sign of decay. He asserts that any replacement to the restorations resulted from ordinary "wear and tear." Defendant contends that he performed cosmetic work only, and informed plaintiff of that fact. He contends that other dentists were there to diagnose and treat decay. Defendant further sets forth that his cosmetic treatment did not cause the decay in plaintiff's teeth. He alleges that any decay is due to plaintiff's poor oral hygiene "toward the end [of her treatment]." Defendant further alleges that plaintiff's excessive smoking and drinking interfered "with the healing of, and [broke] down gum tissue; and it can lead to recurrent decay, as it did herein." He sets forth that plaintiff's failure to take antibiotics and refusal to allow x-rays inhibited her treatment.

Plaintiff relies on an affidavit from her subsequent treating dentist, Joel A. Hirsch, D.D.S. Dr. Hirsch sets forth that he has proposed full mouth prosthetic rehabilitation for plaintiff that would require two extractions, implants, and root canal therapy. Dr. Hirsch contends that plaintiff's condition was not the result of alcohol consumption, smoking, poor oral hygiene, or her

refusal to allow x-rays. Dr. Hirsch opines that it was defendant's duty as the "treating dentist who made laminates and crowns" to monitor and treat plaintiff's tooth decay. Dr. Hirsch asserts that defendant's failure to monitor and treat plaintiff's deteriorating condition was a deviation from the standard of care. He further contends that it was not the duty "of the hygienist and other independent dentists in [defendant's] office to monitor and maintain the deteriorating condition." Dr. Hirsch maintains that defendant's deviation caused loss and weakening of plaintiff's teeth and necessitated subsequent treatment.

The party moving for summary judgment in a dental malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted [dental] practice or that any departure was not the proximate cause of the injuries alleged." Rogues v. Nobel, 2010 N.Y. Slip Op. 3177, ___ A.D.3d ___ (1st Dep't 2010) (citations omitted). To satisfy their burden, defendants in dental malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If 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 v. Prospect Hosp., 68 N.Y.2d 320, at 324 (1986) (citation omitted). "Where the moving party, however, has failed to establish that no issues of material fact exist, the motion must be denied regardless of the sufficiency of the opposing papers." Silverman v. Perlbiner, 307 A.D.2d 230, 231 (1st Dep't 2003) (citation omitted).

Defendant has not met his prima facie burden for summary judgment on the issue of dental malpractice. His argument that cosmetic dentists are not responsible for monitoring and treating tooth decay is belied by the record. On several occasions, defendant was the dentist that examined plaintiff. Defendant even admits that on December 2, 2006, he personally conducted a dental exam and found signs of possible cavities. He further admits that on one of plaintiff's final visits, he wrote up a treatment plan for new fillings. Defendant has therefore not eliminated all allegations of material fact as to his deviation. Furthermore, defendant offers no contentions about the lack of causation, other than arguing that the cosmetic procedures he performed did not cause decay. He fails to address how the non-cosmetic, documented care that he rendered on plaintiff's teeth on several occasions did not contribute to her alleged injuries. The branch of the motion seeking dismissal of plaintiff's malpractice claims is, therefore, denied.

With respect to plaintiff's claim for punitive damages, such damages are not intended to compensate a plaintiff, but instead serve to punish the wrongdoer and deter that individual and those in a similar situation from engaging in the same behavior in the future. Ross v. Louise Wise Services, Inc., 8 N.Y.3d 478, 489 (2007). In a dental malpractice action, punitive damages are "not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep't 2007). To demonstrate this conduct, the plaintiff must generally rely on a dental expert. See Figueiroa v. Flatbush Women's Services, Inc., 201 A.D.2d 613, 613-14 (2d Dep't 1994); Sultan v. King's Highway Hosp. Ctr. Inc., 167 A.D.2d 534 (2d Dep't 1990).

Defendant has met his prima facie burden for summary judgment on the issue of punitive damages. He has set forth that he did not act wantonly or maliciously. The record supports his contention that he was not indifferent to plaintiff's care. As noted above, on several occasions, he was actively involved in examining and monitoring plaintiff's teeth. Since plaintiff's own expert has not contended that defendant went beyond mere dental malpractice, the plaintiff has not raised a triable issue of material fact with regards to defendant's alleged willful, wanton, or reckless conduct. Accordingly, the branch of the motion seeking summary judgment on punitive damages is granted.

With respect to the statute of limitations defense offered by defendant, C.P.L.R. § 214-a states, in pertinent part, that

[a]n action for . . . dental . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure[.]. . . For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.

"A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*, that the time in which to sue has expired." Gravel v. Cicola, 297 A.D.2d 620, 620-21 (2d Dep't 2002) (citations omitted). A dental malpractice action accrues on the date of the incident causing the plaintiff's alleged harm. Massie v. Crawford, 78 N.Y.2d 516, 519 (1991). Applying C.P.L.R. § 214-a to this case, plaintiff cannot litigate any claims of malpractice that occurred prior to November 21, 2005

unless there has been “continuous treatment.” Two elements must be met for a treatment to toll the statute: the treatment must relate to the original condition or complaint, and the further treatment must be “explicitly anticipated by both physician and patient.” Richardson v. Orentreich, 64 N.Y.2d 896, 898-99 (1985). The second element can be manifested when “the physician and patient reasonably intend the patient’s uninterrupted reliance upon the physician’s observation, directions, concern, and responsibility for overseeing the patient’s progress.” Id. “Although routine followup[s] do[] not support the application of the continuous treatment toll the monitoring of an abnormal condition may be sufficient to do so.” Cherise v. Braff, 50 A.D.3d 724, 726 (2d Dep’t 2008) (citations omitted); see also Ramirez v. Friedman, 287 A.D.2d 376, 377 (1st Dep’t 2001).

According to the records, plaintiff showed signs of tooth decay as early as 1999. Over the next several years, the decay expanded to new teeth and, in some teeth, decay reoccurred. Defendant undertook to monitor and treat the decay. This undertaking, from as early as 1999 the up until 2008, creates a genuine issue of material fact as to continuous treatment for tooth decay. Therefore, that branch of defendant’s motion that seeks summary judgment on statute of limitations grounds is denied.

Accordingly, it is


ORDERED that defendant’s motion for summary judgment is granted only as to punitive damages, and that branch of plaintiff’s complaint is hereby severed and dismissed as against

defendant and the Clerk of the Court is directed to enter judgment accordingly as to the claim of punitive damages only. The remainder of plaintiff's claims shall continue.

The parties are to appear for a pre-trial conference on June 1, 2010 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: May 13, 2010



JOAN B. LOBIS, J.S.C.

FILED
MAY 17 2010
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