

Selfo v Celenza

2010 NY Slip Op 31854(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 109943/08

Judge: Joan B. Lobis

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

-----X
ROVENA SELFO,

Plaintiff,

Index No. 109943/08

-against-

Decision and Order

DR. FRANK CELENZA and DR. DEVIN J. OKAY,

Defendants.

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition.

Defendants Dr. Devin J. Okay ("Dr. Okay") and Dr. Frank Celenza ("Dr. Celenza") both move, by orders to show cause, respectively, for orders pursuant to C.P.L.R. Rule 3211 (a) (7) and/or Rule 3212, dismissing plaintiff Rovena Selfo's ("Ms. Selfo") punitive damages claims.

This is an action sounding in dental malpractice. Ms. Selfo commenced this action on July 21, 2008. The pleadings allege, with respect to both dentists, departures from accepted standards of dental practice as well as the lack of an informed consent to treatment. The complaint seeks punitive damages from both defendants because they allegedly "willfully and wantonly with a reckless disregard for the health of the plaintiff extracted perfectly healthy permanent teeth," and because they failed to inform Ms. Selfo of the consequences of extracting three healthy teeth. No claim is set forth in any pleading that the teeth were extracted without Ms. Selfo's knowledge and consent.

Ms. Selfo, who was in her late twenties, consulted with a Dr. Glassman, a cosmetic dentist, because she wanted to remedy the condition of her mouth. Ms. Selfo had a congenital lack

of many permanent teeth, primarily in her maxilla, or upper jaw. As a result she still retained some baby teeth, which needed to be extracted. Her permanent upper teeth consisted of a wisdom tooth, four molars, two front incisors, and her two canine teeth. She was missing an incisor on either side of her two front teeth, and all four of her pre-molars. In addition, her two upper front teeth were located significantly to the right of her upper palate's midline, and her two upper canine teeth were located where her pre-molars should have been located. In fact, tooth 6, a canine, was next to tooth 3, a molar. Ms. Selfo had large spaces in her upper and lower palates due to missing teeth. For example, the distance between teeth 9 and 11, which had no teeth between them, was greater than the width of two teeth. The midline of Ms. Selfo's upper palate did not correspond to the midline of her face, but instead severely shifted about five millimeters to the right. The midline of her lower jaw was about one full tooth to the left of the middle of Ms. Selfo's face. Her bite was completely off, so that her upper teeth did not overlap her lower teeth, and she could not close her teeth without shifting her lower jaw to the left. This latter problem had in the past caused her pain and a clicking sound in her jaw.

Dr. Glassman advised Ms. Selfo that before he could deal with the cosmetics of her teeth she needed to have implants and orthodontia, so, he referred her to Dr. Celenza. Dr. Celenza devised a plan to make room for the maximum number of implants by attempting to shift Ms. Selfo's teeth closer to where they should have been, which would also aid in his attempt to correct the midline problem. He recommended that her baby teeth be extracted, since at least one was loose and the others would eventually come out, and space was needed for the implants. He also recommended that an upper and lower wisdom tooth be extracted. The recommended extractions were performed,

and Ms. Selfo seems to take no issue with that. Dr. Celenza began by doing some implants and by then putting braces on Ms. Selfo's upper and lower teeth. The upper braces were evidently placed on May 9, 2005. According to Ms. Selfo's deposition testimony, the upper braces were useless and did not cause her teeth to move. She was also concerned because she believed that Dr. Celenza placed at least one implant too close to a front tooth.

Ms. Selfo, evidently after her top braces were removed, asked Dr. Celenza to refer her to a cosmetic dentist to have her two front teeth capped, prosthetics placed where Dr. Celenza had installed implants, and to have her bite corrected so that her top teeth would overlap her bottom teeth. In October 2005, Dr. Celenza referred Ms. Selfo to Dr. Okay, a restorative dentist. Ms. Selfo saw Dr. Okay for a consultation and examination on November 4, 2005. He testified that it was his understanding that the patient's orthodontic treatment was moving toward its conclusion, and that Dr. Celenza referred Ms. Selfo to him so that he could give his opinion and recommendations for the patient, including about occlusal rehabilitation. His note of that day indicates that he would have to speak with Dr. Celenza to get background information. Dr. Celenza's chart note of November 7, 2005 and his deposition testimony reflect that he had a phone conversation with Dr. Okay.

On December 12, Ms. Selfo had an additional consultation with Dr. Okay in which he discussed the possibility of orthognathic surgery to realign Ms. Selfo's upper and lower jaws, a traumatic procedure which would likely involve cutting both jaw bones to correct her condition. Ms. Selfo refused that option, which had also been previously explained to her by Dr. Celenza. Dr. Okay's note of that day indicated that the patient would need full arch provisionals; that he needed

to create a diagnostic wax-up; and that Ms. Selfo might need to have teeth 8 and 9, her two off-centered front teeth, extracted. Dr. Okay testified that, on the same day, he told Ms. Selfo that those teeth may need to be extracted.

Dr. Celenza's chart entry of December 21, 2005 indicates that Dr. Okay was going to do a diagnostic wax-up, and that he was considering extracting teeth. Dr. Celenza's deposition testimony reveals that he was then aware that Dr. Okay was considering extracting teeth 8 and 9. Dr. Celenza, who apparently could not recall whether Dr. Okay had told him why he was contemplating such extractions, testified that if he had, then he would have said that he was doing so for "restorative reasons," and that he (Dr. Celenza) would have responded that those teeth were expendable if their extraction made the case restorable.

Ms. Selfo saw Dr. Okay on January 20, 2006. His note recites that the patient had a better understanding of her spacing problems and of occlusal rehabilitation, and that she still needed the wax-up. Dr. Celenza's note of January 23, 2006 recites that Dr. Okay was to do a wax-up and was considering extractions. The following day the wax-up was performed by Dr. Okay, which led him to conclude that extraction of teeth 8, 9, and 11 were necessary.

Ms. Selfo next saw Dr. Okay on February 9, 2006. Dr. Okay's chart entry of that day, as well as his deposition testimony, reflect that he discussed his treatment plan with the patient, including the extraction of teeth 8 and 9, and of the distally located incisor, tooth 11. He further testified that teeth 8 and 9 required extraction because the midline was off and because of

malocclusion, and that tooth 11 required extraction because it was in crossbite with a lower left molar, it had only one point of contact, and because it was "in a poor position for restoration of the arch and occlusal rehabilitation." Additionally, Dr. Okay testified that Dr. Celenza did not object to his plan to extract Ms. Selfo's teeth, and that he advised Dr. Okay that it was impossible to move tooth 8 the needed distance. Dr. Okay also testified that removing the implant which was too close to tooth 9, and then trying to shift teeth 8 and 9, was not a good idea, because the removal of the implant would have been "a very traumatic procedure," and that, in any event, teeth 8 and 9 were not in a good position.

Dr. Okay's note of March 13, 2006 indicates that the treatment plan was reviewed with Ms. Selfo and that she accepted it. Dr. Okay did not obtain Ms. Selfo's written consent to the extractions, asserting that it was not his practice to obtain written consents for extractions, but that he would orally obtain his patients' consents, explaining the advantages and disadvantages. Dr. Okay, after administering an anesthetic, extracted teeth 8, 9, and 11. Dr. Okay then inserted a provisional bridge, at which point Ms. Selfo expressed her displeasure over the aesthetics, which Dr. Okay noted in the patient's chart that day. Dr. Okay did not contemplate putting in implants in the spaces from which the teeth were extracted, because then he would be unable to correct Ms. Selfo's midline problem.

On March 16, 2006, Ms. Selfo consulted with Dr. Warren Boardman ("Dr. Boardman"), who specialized in aesthetic dentistry, and sought a second opinion because she was displeased with the aesthetics of the temporary bridge. Dr. Boardman told her that the next step

would be to have the temporary bridge remade by Dr. Okay or that, alternatively, he could remake the bridge.

Ms. Selfo returned to Dr. Okay the next day and, as reflected in the chart, expressed her displeasure regarding her change in appearance. She continued to be seen by him about 20 more times over the course of approximately two years, through March 31, 2008, on which date Dr. Okay noted in the chart that further treatment proposed that date was only an interim step.

Ms. Selfo paid Dr. Okay periodically over those two years, but on January 16, 2007, as reflected in Dr. Okay's chart and in his deposition testimony, Ms. Selfo and her husband informed Dr. Okay of financial problems they were experiencing and indicated that they were trying to sell their home so that they would have funds. According to Dr. Okay's deposition testimony, it appears that, because of those financial problems, Ms. Selfo decided not to have some restorative treatment previously planned. Therefore, according to Dr. Okay, who tried to work with Ms. Selfo's financial limitations, Ms. Selfo had provisional restoration of her upper and lower jaws, and never completed her treatment to obtain the aesthetics she desired.

Meanwhile, it appears from Dr. Celenza's records, that in about late 2005, i.e., before Dr. Okay began treating Ms. Selfo, she had difficulty making her payments to Dr. Celenza. Dr. Celenza's chart shows that Ms. Selfo was attempting to take out a home equity loan and then sell her house to continue with the payments, and so advised Dr. Celenza. Evidently she was unable to do so, and eventually stopped paying both dentists, owing them considerable sums.

Drs. Okay and Celanza, relying on the pleadings, Ms. Selfo's treatment charts, and the parties' deposition testimony, now seek an order dismissing the punitive damages claims on the grounds that Dr. Celenza did not extract the teeth in issue, and that nothing either one of them did or allegedly failed to do rose to the level that warrants the imposition of punitive damages. In opposition, Ms. Selfo, relying on her own affidavit and those of her husband, Edmond Duda ("Mr. Duda"), and her experts, Dr. Howard Marshall, ("Dr. Marshall"), a periodontist, and Dr. Robert Gottlieb ("Dr. Gottlieb"), an orthodontist, asserts that she has a valid claim for punitive damages.

Even though it does not appear that Dr. Okay decided that extraction was necessary until he performed the diagnostic wax-up in late January 2006, Dr. Gottlieb claims that Dr. Celenza's plan to move teeth 8, 9, and 11 was inexplicably abandoned five months after the upper braces were inserted on May 9, 2005 because there was a discussion of extracting teeth 8 and 9 five months later. Dr. Gottlieb, who does not state what period would be needed or that such a period would have produced the necessary results, asserts that five months is too short a period for braces to work. He opines that extracting the three healthy teeth because the orthodontic treatment failed to work was not a reason to extract those teeth. He concludes that Dr. Okay's and Dr. Celenza's decision to have the teeth extracted, rather than continue with orthodontia, was a departure from standards of good and accepted dental practice.

Dr. Marshall, who does not know why the midline was not corrected orthodontically, or why the three teeth were extracted, conclusorily asserts that the three teeth were healthy and were not expendable. Although he does not profess to have any expertise in orthodontics, he claims in

his affidavit that the original plan was appropriate, but that if the orthodontic objectives could not be achieved, there should have been a "consultation between Dr. Celenza and Dr. Okay to see why these objectives are not met and then further consultation with other orthodontists. Under no circumstances should teeth # 8, 9, and 11 be extracted." Dr. Marshall does not state why there should have been consultations with other orthodontists, or what treatment should have been recommended by those other orthodontists.

Ms. Selfo claims in her affidavit that Dr. Celenza never mentioned extraction of permanent teeth to her, other than of her wisdom teeth, that Dr. Okay suggested extraction, but that neither she nor her husband agreed to extraction, and that Dr. Okay agreed to proceed without extraction. She adds that at the next appointment, without discussing extraction, Dr. Okay gave her injections, and that when she asked what he was doing, he extracted her two front teeth "in a split second." At her deposition, Ms. Selfo testified that, at her "second" visit, Dr. Okay informed her that he had to change the initial plan of doing individual implants because an implant was too close to one of her teeth. She also testified that Dr. Okay told her that she needed to have bridges to acquire a proper bite. When asked whether at the "third" visit Dr. Okay had informed her that the extraction was necessary, she responded that, "[h]e told me that we are going to start this procedure today. He did the injections. I wasn't aware when he - he removed it. I said Doctor, what are you doing? He said I am removing your teeth right now. He removed [the two front teeth] like a split second." Ms. Selfo asserted that Dr. Okay extracted her teeth without her consent. Ms. Selfo did not indicate that she asked Dr. Okay why he was giving her injections, did not reveal how long Dr. Okay waited for the injections to become efficacious before he extracted her two front teeth, and did not mention the extraction of tooth 11 on that day.

Mr. Duda claims in his affidavit that Dr. Okay had informed them a week before the extractions that the implants were too close, and that his wife's two front teeth required extraction. Mr. Duda allegedly replied that extraction was unacceptable. Mr. Duda asserts that the following week, after Ms. Selfo's visit to Dr. Okay, she called and advised her husband that Dr. Okay had extracted the three teeth without giving her a chance to call or think about it. Mr. Duda also claims, contrary to Dr. Okay's chart and deposition testimony, that Dr. Okay ultimately placed a final restoration.

In reply, Dr. Okay provides the affidavit of Dr. Boardman, who saw Ms. Selfo three days after the extraction. Dr. Boardman asserts that, while Ms. Selfo complained about the aesthetics of the temporary bridge, she never complained of the teeth being extracted without her consent, nor did she express her belief that the extractions were contraindicated.

Punitive 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 Servs., Inc., 8 N.Y.3d 478, 489 (2007). In tort cases, conduct aimed at the public need not necessarily be shown. Giblin v. Murphy, 73 N.Y.2d 769, 772 (1988); Don Buchwald & Assoc. v. Rich, 281 A.D.2d 329 (1st Dep't 2001). Additionally, bad faith, an intent to harm, malicious motives, and an intentional violation of a party's rights are not always required to warrant a punitive damages award, particularly when a case involves an unintentional tort. See Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 203 (1990); Randi A. J. v. Long Is. Surgi-Center, 46 A.D.3d 74, 80 (2d Dep't 2007); Rey v. Park View Nursing

Home, 262 A.D.2d 624, 627 (2d Dep't 1999). More than mere negligence or carelessness is required to permit a punitive damages claim. Fordham-Coleman v. National Fuel Gas Distrib. Corp., 42 A.D.3d 106, 113 (4th Dep't 2007); Rey, 262 A.D.2d at 627; Gruber v. Craig, 208 A.D.2d 900, 901 (2d Dep't 1994).

To justify the imposition of punitive damages, the conduct must be "exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights [internal quotation marks and citations omitted]." Ross v. Louise Wise Servs., Inc., 8 N.Y.3d at 489. A conscious or reckless disregard of another's rights is necessary. Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d at 203; Welch v. Mr. Christmas, 57 N.Y.2d 143, 150 (1982); Zuckerman v. Goldstein, 71 A.D.3d 407 (1st Dep't 2010); Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 41-43 (1st Dep't 2009). Punitive damages are "considered expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another [internal quotations marks and citations omitted]." Home Ins. Co., 75 N.Y.2d at 203.

Whether an award of punitive damages is justified, and, if so, in what amount, are usually issues for the trier of fact. Nardelli v. Stamberg, 44 N.Y.2d 500, 503 (1978); Dobroshi v. Bank of Am., N.A., 65 A.D.3d 882, 884 (1st Dep't 2009); Swersky v. Dreyer & Traub, 219 A.D.2d 321, 328 (1st Dep't 1996). However, where punitive damages are "unavailable" as matter of law, summary judgment dismissing such claim can be granted. Graham v. Columbia-Presbyterian Med.

Ctr., 185 A.D.2d 753, 756 (1st Dep't 1992); see also Anzalone v. Long Is. Care Ctr., Inc., 26 A.D.3d 449 (2d Dep't 2006); Rev v. Park View Nursing Home, 262 A.D.2d at 627; Gravitt v. Newman, 114 A.D.2d 1000 (2d Dep't 1985).

In a 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). Punitive damages awards in malpractice cases have been vacated after verdict because the conduct did not rise to the requisite level. See e.g. Id., at 520; Charell v. Gonzalez, 251 A.D.2d 72 (1st Dep't 1998), modfg. 173 Misc. 2d 227 (Sup. Ct. N.Y. Co. 1997) (where sophisticated cancer patient rejected conventional treatment recommended by her oncologist, and instead chose to follow the treatment recommended by an alternative practitioner, the practitioner's conduct did not rise to the level warranting the imposition of punitive damages).

In malpractice and related actions, claims for punitive damages have been found to have been appropriately asserted where a doctor allegedly abandoned a patient (Graham v. Columbia-Presbyterian Med. Ctr., 185 A.D.2d at 754); a health center's nurse, allegedly, contrary to the patient's instructions, called the unmarried abortion patient at her home, which she shared with her devoutly Catholic parents, and provided information to the mother which revealed that the patient had just undergone an abortion (Randi A. J. v. Long Is. Surgi-Center, 46 A.D.3d at 75); and where a surgeon allegedly caused a plaintiff patient, as well as an unusually large number of other patients, to contract Hepatitis B, as a result of the physician contaminating multi-dose drug vials through unsanitary practices, and then injecting the patients with the contaminated drugs (see

Williams v. Halpern, 25 A.D.3d 467 [1st Dep't 2006]; Williams v. Halpern, 12 Misc. 3d 1156[A], N.Y. Slip Op 50923[U] [Sup. Ct. N.Y. Co. 2006]).

The record in the instant case fails to demonstrate conduct on either defendant's part which "smacks of intentional wrongdoing" or demonstrates a reckless disregard for Ms. Selfo's rights. Digiulio v. Gran, Inc., ___ A.D.3d ___, 2010 WL 2195747, *2, 2010 N.Y. Slip Op 04704, *3 (1st Dep't 2010) (internal quotation marks and citation omitted). Thus, Ms. Selfo's punitive damages claims must be, and hereby are, dismissed.

It should be noted that Ms. Selfo's assertion that the motions are unsupported by evidence favoring defendants' position that punitive damages are inappropriate in this case, is without merit, since the movants' applications are supported by the parties' deposition transcripts (see e.g. Williams v. Church Holmes Assoc., L.P., 49 A.D.3d 386 [1st Dep't 2008]; Malenda v. Great Atl. & Pac. Tea Co., Inc., 50 A.D.3d 972 [2d Dep't 2008]), as well as by copies of defendants' office records, the admissibility of which Ms. Selfo does not attack on these motions.

Although it is undisputed that the three teeth which were extracted by Dr. Okay were in fairly good condition, Ms. Selfo presented to both defendants with extensive problems, including congenitally missing teeth, teeth which significantly deviated from where they should have been in Ms. Selfo's upper and lower palates, large gaps between teeth, serious occlusal problems which prevented her from closing her mouth unless she shifted her lower jaw to the left, and an upper palate midline which deviated from the midline of her face. Also, Ms. Selfo presented to Dr. Okay with

implants already placed, which Dr. Okay believed could cause trauma if they were removed. Dr. Celenza attempted to address Ms. Selfo problems by trying to shift her teeth with braces so that a maximum number of implants could be placed, and by placing implants. While it is claimed that he placed the implants too close to the teeth which were ultimately extracted, and removed the upper braces too soon, these acts, and his decision to defer to Dr. Okay's plan to extract the three teeth so that Ms. Selfo's mouth could be restored, at most constituted ordinary dental malpractice. Similarly, where to Dr. Okay's knowledge, Dr. Celenza had essentially completed the upper orthodontia without favorable results, Dr. Okay's extraction of the three upper teeth, after speaking to Dr. Celenza, who did not object to Dr. Okay's plan to extract teeth, again, at most constituted ordinary malpractice, given the condition of Ms. Selfo's dentition and bite, and the placement of the implants when she presented to him.

Ms. Selfo's claims, raised in opposition to this motion, that she is entitled to punitive damages because the extractions were performed against her husband's express instructions to Dr. Okay, and without her consent, will not be considered here, since no such claims were raised in her complaint or in her bills of particulars. Abalola v. Flower Hosp., 44 A.D.3d 522 (1st Dep't 2007). Moreover, any claim that Ms. Selfo's teeth were extracted without her consent and against her expressed wishes would amount to an assertion of battery (Cerilli v. Kezis, 16 A.D.3d 363 [2d Dep't 2005]), which would be time-barred (see C.P.L.R. § 215[3]), since the teeth were extracted on March 13, 2006, and this action was commenced on July 21, 2008. Messina v. Matarasso, 284 A.D.2d 32 (1st Dep't 2001). The court further notes that such claims appear to be undercut by the entries in Dr. Okay's chart and by his deposition testimony.

Accordingly, it is hereby

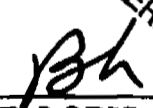
ORDERED that Dr. Devin J. Okay's motion (Sequence Number 001) for an order granting him summary judgment dismissing Rovena Selfo's claims for punitive damages is granted, and such punitive damages claims are severed and dismissed, and the Clerk is directed to enter judgment accordingly as to the punitive damages claims against Dr. Devin J. Okay; and it is further

ORDERED that Dr. Frank Celenza's motion (Sequence Number 002) for an order granting him summary judgment dismissing Rovena Selfo's claims for punitive damages is granted, and such punitive damages claims are severed dismissed, and the Clerk is directed to enter judgment accordingly as to the punitive damages claims against Dr. Frank Celenza; and it is further

ORDERED that the action continues against both defendants Dr. Frank Celenza and Dr. Devin J. Okay as to all other claims except the punitive damages claims; and it is further

ORDERED that counsel shall appear for a previously scheduled pre-trial conference on July 20, 2010, at 9:30 a.m.

Dated: July 9, 2010

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE
ENTER:

JOAN B. LOBIS, J.S.C.