

**Barrett v Azar**

2010 NY Slip Op 32042(U)

July 29, 2010

Sup Ct, NY County

Docket Number: 113306/07

Judge: Joan B. Lobis

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

PRESENT: COBLS  
*Justice*

PART 6

TANYA BARRETT

INDEX NO. 113306/07

MOTION DATE 6/22/10

MOTION SEQ. NO. 6

DAVID AZAR, DAS

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

The following papers, numbered 1 to 31 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-19

Answering Affidavits — Exhibits \_\_\_\_\_

20-30

Replying Affidavits \_\_\_\_\_

31

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION &  
*ORDER*

**FILED**

AUG 03 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/29/10

*JBL*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
TANYA BARRETT,

Plaintiff,

Index No. 113306/07

-against-

DAVID E. AZAR, DDS and  
DALE D. GOLDSCHLAG, DDS,

Defendants

Decision and Order

**FILED**

AUG 03 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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

Defendant Dale E. Goldschlag, D.D.S. ("Dr. Goldschlag"), moves, pursuant to C.P.L.R. Rule 3212, for summary judgment on the ground that the statute of limitations bars plaintiff from bringing claims for alleged malpractice that occurred prior to March 12, 2005. This is Dr. Goldschlag's second motion for summary judgment based on the his defense of the statue of limitations. His first motion for summary judgment was brought before discovery commenced and was denied with leave to renew after discovery in a decision and order of this court dated March 19, 2009 (the "March 2009 Decision").

This action sounds in dental malpractice and lack of informed consent. Plaintiff alleges that defendants improperly placed two dental implants and crowns into her upper right jaw at teeth numbers 4 and 5, and that the implants penetrated her sinus cavity, resulting in persistent sinus infections, a fistula leading to bone and tissue loss, and subsequent surgery to remove the implants and repair the damage to her upper jaw.

The facts pertinent to the issue of the statute of limitations and Dr. Goldschlag's treatment are as follows. On August 3, 2004, plaintiff had her first dental appointment with co-

defendant David E. Azar, D.D.S. That appointment included an examination, x-rays, and a cleaning. She also indicated that she was interested in smile reconstruction. Dr. Azar determined that plaintiff needed dental work at the site of teeth numbers 4 and 5. His treatment plan included the extraction of tooth number 5 (tooth number 4 was already missing), the placement of implants in both of the spaces where teeth 4 and 5 were, and the installation of permanent crowns onto the implants. The extractions and implants were to be done on the same day, at the end of which plaintiff was to be fitted with temporary crowns until permanent crowns could be placed.

On the evening of September 9, 2004, plaintiff presented to Dr. Azar's dental offices. She had been prescribed a prophylactic antibiotic, which she started taking the day before the scheduled surgery. Plaintiff testified that she was under the impression that Dr. Azar would perform the implant procedure until he informed her, the day of the procedure, that Dr. Goldschlag—"his partner" or "associate"—would be performing the implants. Dr. Azar denies that he waited until the day of the surgery to discuss Dr. Goldschlag's role in the treatment plan. He also denies that he introduced Dr. Goldschlag as his partner or associate; rather, he testified that he introduced Dr. Goldschlag as a doctor who performs implants at his (Dr. Azar's) office. Dr. Azar proceeded to extract tooth number 5 under local anesthesia. Immediately thereafter, Dr. Goldschlag placed the implants. Finally, Dr. Azar placed the temporary crowns.

Plaintiff saw Dr. Azar for two follow-up appointments on September 27, 2004, and October 20, 2004. On September 27, plaintiff reported some pain and the surgical site had some inflammation, so Dr. Azar prescribed an antibiotic. On October 20, it appeared to Dr. Azar that the

implants were healing well. An x-ray taken on October 20 showed some radiolucency at the surgical site. On October 28, 2004, Dr. Goldschlag saw plaintiff at Dr. Azar's offices for a follow-up appointment, and he noted that plaintiff had "possible sinusitis" and prescribed an antibiotic. Dr. Azar saw plaintiff for all other follow-up appointments and treatment. On November 11, 2004, and January 11, 2005, Dr. Azar noted that there was no swelling, pain, or inflammation at the site. Plaintiff had a cleaning at Dr. Azar's offices in February 2005. In March 2005, Dr. Azar noted that the implant was ready to be restored and impressions were made for the final crowns. On April 12, 2005, Dr. Azar attempted to affix the permanent crowns to plaintiff's implants but number 5 was rotating, which indicated a poor fit. Dr. Azar put the temporary crowns back on and told plaintiff to come back for a second attempt. Plaintiff came back two days later, on April 14, 2005, and the fit for the permanent crown was worse—it was now spinning. Dr. Azar put the temporary crowns back on and sent the permanent crowns back to the laboratory where they were manufactured. On May 10, 2005, Dr. Azar cemented in the permanent crowns. The next day, plaintiff reported by phone that she was experiencing swelling in her right cheek. Dr. Azar prescribed an antibiotic and Motrin, and directed plaintiff to come in to his office for observation. May 10, 2005, was the last date that Dr. Azar treated plaintiff. Plaintiff commenced this action on September 12, 2007.

Dr. Goldschlag now moves for summary judgment on the ground that the statute of limitations expired before plaintiff commenced this suit against him because his treatment occurred more than two and one half years prior to the commencement of the lawsuit. The party moving for summary judgment 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. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324

(1986). Dr. Goldschlag has sufficient demonstrated that his treatment of plaintiff occurred more than two and one half years prior to the commencement of the lawsuit. See C.P.L.R. § 214-a.

Once the movant satisfies his burden on a summary judgment motion, 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 at 324 (citation omitted). Plaintiff disputes Dr. Goldschlag’s entitlement to summary judgment, contending that issues of fact exist as to whether the continuous treatment doctrine applies to toll the running of the statute of limitations against Dr. Goldschlag until plaintiff’s treatment with Dr. Azar ended in May 2005. Plaintiff contends that Dr. Azar and Dr. Goldschlag were either partners or agents, such that Dr. Azar’s treatment through May 2005 may be imputed to Dr. Goldschlag in order to establish continuous treatment. Plaintiff primarily relies on the parties’ testimony from their depositions to support her position that there are disputed issues of fact that preclude summary judgment.

The continuous treatment doctrine, set forth in C.P.L.R. § 214-a, provides that the time to commence a dental “malpractice action is stayed ‘when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint.’” McDermott v. Torre, 56 N.Y.2d 399, 405 (1982), quoting Borgia v. City of New York, 12 N.Y.2d 151, 155 (1962). “The doctrine rests upon the belief that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, as ‘the [existing provider] not only is in a position to identify and correct his or her malpractice, but

is best placed to do so.” Rudolph v. Jerry Lynn, D.D.S., P.C., 16 A.D.3d 261, 262 (1st Dep’t 2005) (brackets in original), quoting McDermott, 56 N.Y.2d at 408. If there is more than one treater involved in caring for the same injury, illness, or condition, “the continuing treatment by one will be imputed to the other in the presence of an agency relationship, or some other relevant association which continues the nexus between the two providers.” Ganapolskaya v. V.I.P. Med. Assocs., 221 A.D.2d 59, 62 (1st Dep’t 1996) (citations omitted).

A review of the deposition transcripts and treatment records indicates that material questions of fact remain as to the applicability of the continuous treatment doctrine to Dr. Goldschlag’s treatment. Already described earlier in the decision is the dispute over whether Dr. Azar and/or Dr. Goldschlag represented to plaintiff that they were associates or partners; plaintiff testified that they did represent that they were somehow affiliated, and defendants testified that they did not. Additionally, Dr. Goldschlag testified that he performs implants for Dr. Azar’s patients approximately ten times a year, pursuant to an oral contract, and has done so for about ten years. At the time of plaintiff’s treatment, Dr. Goldschlag did not independently bill for his services; rather, Dr. Azar billed the patient for the total amount of the work, and then paid Dr. Goldschlag his portion by check, minus the rent or overhead that Dr. Goldschlag owed Dr. Azar per patient. Neither did Dr. Goldschlag maintain independent notes on his treatment of Dr. Azar’s patients; rather, his notes were recorded alongside Dr. Azar’s notes in Dr. Azar’s chart.

Further, while both doctors testified that the implant procedure is separate and distinct from the extraction procedure and the restoration procedure, it is clear that in certain ways they

coordinated their treatment. Dr. Goldschlag only treated plaintiff because he had an oral agreement with Dr. Azar to perform the implant portions of Dr. Azar's cosmetic restorations. Dr. Goldschlag testified that he usually relies on Dr. Azar's evaluation of patients as good candidates for implants, without conducting his own independent consultations, because Dr. Azar is an excellent dentist and he trusts Dr. Azar's evaluation. The cosmetic treatment plan developed by Dr. Azar encompassed and specifically called for Dr. Goldschlag to perform implant surgery. Dr. Azar's extractions immediately prior to the implants, and his commencement of the restoration process immediately after the implants, hinged on the implant treatment provided by Dr. Goldschlag. Dr. Goldschlag testified that his treatment ended when Dr. Azar informed him plaintiff had a full resolution of her symptoms on November 18, and that plaintiff "chose not to see" him after that. However, Dr. Goldschlag also testified that after six weeks of healing, the restorative dentist is capable of performing the postoperative evaluations. If Dr. Azar had performed the implants, instead of Dr. Goldschlag,<sup>1</sup> there would be little question that the implant procedure was part of the restorative treatment plan and that continuous treatment doctrine would serve to toll the statute of limitations as to the treatment provided on September 9, 2004, until plaintiff's treatment ended in May 2005.

The merits of the action have not been argued here, and no expert opinions have been submitted. This summary judgment motion essentially comes down to one person's testimony against another person's testimony. The court cannot, as a matter of law, declare that there is, or is not, a "strong" enough or "sufficient nexus" (Ganapolskaya, 221 A.D.2d at 63) between Dr. Azar and Dr. Goldschlag so as to toll the limitations period until plaintiff stopped the cosmetic restoration

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<sup>1</sup> Indeed, Dr. Azar testified that he now does implants himself.

treatment with Dr. Azar. This issue turns on questions of fact and credibility, which must be left to the fact finder. Accordingly, it is hereby

ORDERED that defendant Dale E. Goldschlag, DDS's motion for summary judgment is denied.

Dated: July 29, 2010

ENTER:

  
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JOAN B. LOBIS, J.S.C.

**FILED**  
AUG 03 2010  
NEW YORK  
CLERK'S OFFICE