

Angeli v Mass

2010 NY Slip Op 32428(U)

August 13, 2010

Sup Ct, NY County

Docket Number: 112049/08

Judge: Joan B. Lobis

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SCANNED ON 8/23/2010

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

PRESENT: COBIS
Justice

PART 6

KIRSTEN ANGELI

- v -

DR. MICHAEL MABS

INDEX NO. 112049/08
MOTION DATE 6/1/10
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

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

1-19
20-22
23

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
and Order

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/13/10.

JZh
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

KRISTEN ANGELI,

Plaintiff,

Index No. 112049/08

Decision and Order

-against-

DR. MICHAEL MASS,

Defendant.

-----X

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

In this dental malpractice action, defendant Dr. Michael Mass ("Dr. Mass") moves for an order granting him summary judgment dismissing plaintiff Kirsten Angeli's ("Ms. Angeli") complaint.

On January 22, 2003, Ms. Angeli first presented to Dr. Mass. Ms. Angeli filled out an intake sheet, indicating that she was there for a chipped tooth and possible cavities. At the time she presented to Dr. Mass, Ms. Angeli had a set of veneers, which had been placed on her teeth by her prior dentist, was missing some wisdom teeth, and had a crown on tooth number 30.¹ The chart entry of January 22 recites "[i]ncisal comp," (evidently composite) of a lower left incisor, either tooth number 24 or 23, but the chart entry is illegible. That day's chart entry also recites "set up FMX [full-mouth x-rays] and pro [prophylaxis]."

¹ The evidence submitted on this motion is somewhat confusing because two systems of tooth numbering are used in the various exhibits. Dr. Mass's records use a system whereby a mouth is divided into four quadrants, each of which has teeth numbered 1-8, starting from the mouth's midline. Some of the records of other dental providers, as well as most of the deposition testimony, use a system in which teeth are numbered from 1-32, starting on the upper right back at number 1, continuing along to number 16, dropping down to number 17 at the left rear of the lower jaw, and continuing toward the right to number 32 in the right, rear, lower jaw. For consistency and to avoid confusion, I will use the latter system's numbering method when referring to Ms. Angeli's teeth.

FMX [full-mouth x-rays] and pro [prophylaxis].”

For reasons that are unexplained, the next entry is about a year later, January 14, 2004, at which time a full-mouth x-ray series was taken. The x-rays revealed about 20 cavities, at least some of which² were noted on the chart’s tooth diagram for teeth numbers 3, 4, 5, 6, 7, 8, 11, 12, 19, 20, 21, 22, 24, 25, and 30. The tooth diagram also had, among its notations, “watch” with respect to teeth numbers 4, 5, and 11, “sign” (presumably, significant) with respect to tooth number 24, and “frac Inc.” (evidently, fractured incisor) with respect to tooth number 23. Tooth number 6 was excavated that day, glass “ionomer” was placed as a “temp”, and “will follow” was noted in the chart. At the next visit of January 26, 2004, Dr. Mass performed prophylaxis in the form of a deep cleaning of Ms. Angeli’s teeth.

Dr. Mass saw Ms. Angeli eight more times between February 10, 2004 and October 25, 2005. During those visits, he excavated teeth numbers 4 and 5; referred Ms. Angeli to an endodontist who performed root canal on tooth number 5 and advised Dr. Mass that tooth number 6 would likely need root canal; found severe cavities on tooth number 4; repeatedly placed crowns on teeth numbers 4 and 5 with temporary cement; and characterized tooth number 5 as having a guarded prognosis. Additionally, Dr. Mass determined that two hours would be needed to treat tooth number 12, and a note recited “[i]ncisal comp[s]” as to teeth numbers 23 and 24.

At the next visit of April 3, 2006, the first visit within the two and one half-year statute of limitations, the patient’s oral health was noted to be “very poor,” with significant cavities

² Dr. Mass testified that the cavities were noted on the chart and/or on the x-rays.

throughout her mouth. Ms. Angeli advised Dr. Mass of her sweet-tooth problem,³ which was noted in the chart that day. It was further noted that full-mouth x-rays demonstrated the need for at least three root canals and multiple composites, and that Dr. Mass had advised Ms. Angeli that he would reduce his fee to help her "control this problem." Additionally, the chart entry of that day indicated that Ms. Angeli would come in when Dr. Mass advised her that he had a cancellation. The entry also recited that the patient would need two hours for root canals on teeth numbers 4 and 20 and for composites on teeth numbers 23 and 24.

Following that visit, Dr. Mass saw Ms. Angeli about 30 more times, through May 22, 2008, over the course of about two years, for her dental decay and recurrent cavities, during which period, he formulated various treatment plans and repeatedly treated teeth numbers 4, 5, 6, 7, 8, 11, 23, 24, and 30; treated tooth number 9; performed numerous root canal treatments,⁴ including performing repeat root canals; placed crowns; excavated many teeth; and referred Ms. Angeli for the extraction of teeth numbers 5, 21, and 30 in November 2007.

According to Ms. Angeli's deposition testimony, Dr. Mass's treatment plan was always changing and was never finalized, until he presented his last one in March 2008 for a total reconstruction of her mouth for a price of about \$33,000. Dr. Mass testified that all of Ms. Angeli's

³ Ms. Angeli's prior dentist noted in his chart entry of September 22, 1997 that Ms. Angeli had cavities, that he had reviewed her diet, that it included excessive sugar, and that she needed to cut back.

⁴ Dr. Mass's expert states that, over the entire time Dr. Mass treated Ms. Angeli, he performed root canal treatment on teeth numbers 4, 5, 6, 11, and 30.

extant teeth at that time, except tooth number 18, were decayed, and that it was his plan to rehabilitate all of her teeth by removing the decay and then restoring those teeth with the appropriate prosthetics, which would include bridges, and laminates and/or crowns. Ultimately, as a result of his March 2008 plan, he placed two lower bridges, an upper bridge between teeth numbers 4 and 6, crowned all the lower teeth, except tooth number 18, and crowned upper teeth numbers 7-13.

Ms. Angeli was dissatisfied with the prosthetics because she claimed that their color was off, they were chunky and unnatural looking, made her look horsy, and caused her to lisp. She also testified that the final time she was in Dr. Mass's office, it was her understanding that the work was permanent and complete.

It appears from Dr. Mass's chart that, on June 9, 2008, Ms. Angeli reported her displeasure with the prosthetics, that Dr. Mass asked her to come in to see what could be done, and that he had set up several appointments, the last of which was for June 11, 2008, but that she never came. By letter dated June 16, 2008, Dr. Mass advised Ms. Angeli that patients would often have a hard time adjusting to the aesthetics of rehabilitative treatment and that such patients would come in to work out any issue. He further advised Ms. Angeli that her case was far from being concluded, that most of the work was in a temporary state, that he was concerned about her, and that she should come in to complete the work.

Meanwhile, at the end of May 2008, Ms. Angeli sought a second opinion from Dr. Robert Vogel ("Dr. Vogel"), who testified that when he first saw Ms. Angeli, she was quite

uncomfortable, had mouth pain, and expressed dissatisfaction with the aesthetics of Dr. Mass's work. Dr. Vogel examined Ms. Angeli's mouth and found that all of the prosthetics were of a permanent nature, but that it was his recollection that they were largely affixed with temporary cement. Dr. Vogel found that Ms. Angeli's gums were inflamed because the prosthetics were bulky and ill-fitting and had inadequate embrasure spaces, making cleaning difficult. Dr. Vogel did not perform any periodontal probing. However, on the visit of June 24, 2008, he referred Ms. Angeli to a periodontist, Dr. S. Lawrence Simon ("Dr. Simon"), for a periodontal exam to check Ms. Angeli's inflamed gums, and for the extraction of tooth number 6, which Dr. Vogel had determined was necessary.

Dr. Simon saw Ms. Angeli that day, determined that teeth numbers 4 and 6 had "soupy decay," extracted them on July 29, 2008, and eventually placed implants in their place. It further appears from his records that, in January 2009, Dr. Simon extracted teeth numbers 23, 24, 25, and 26. In the interim, Dr. Vogel removed much of the prosthetic work placed by Dr. Mass, and began to redo it.

Ms. Angeli commenced this action on September 4, 2008. The complaint asserts two malpractice causes of action against Dr. Mass. The first cause of action asserts departures from standards of good and accepted dental practice, in particular, that Dr. Mass negligently performed diagnostic procedures; provided defective, ill-fitting prosthetic restorations; ignored signs of dental infections and ill-fitting prosthetics; negligently prepared teeth for restorations; and "willfully and wantonly" unnecessarily capped teeth. The second cause of action alleges a lack of informed consent

to the "prescribed treatment." As a result of the claimed malpractice, the pleadings allege, that, among other injuries, Ms. Angeli has suffered pain, infection, occlusal disharmony, loss of tooth structure, loss of teeth, future loss of tooth vitality, and the need for kidney surgery. While it is not entirely clear, since the demand for a bill of particulars has not been provided, the bill of particulars also mentions "calcium," which Dr. Mass apparently interprets as an injury involving a calcium deficiency. The complaint seeks compensatory and punitive damages.

Dr. Mass now moves for an order granting him summary judgment dismissing the complaint. Specifically, he seeks dismissal of all claimed damages regarding a calcium deficiency and kidney problems, on the ground that discovery has concluded, and Ms. Angeli has failed to provide any evidence regarding these two items of damages; all claims of malpractice accruing more than two and one half years before this action's commencement, on the ground that they are time-barred; all malpractice claims based on a lack of informed consent and on departures from accepted dental standards, since none of those claims is substantively supportable; and the punitive damages claim on the ground that Dr. Mass did not engage in any intentional, reckless or wanton conduct.

Initially, since Ms. Angeli does not oppose that branch of Dr. Mass's motion which seeks summary judgment dismissing Ms. Angeli's claims relating to alleged injuries in the form of a calcium deficiency or kidney problems, including the need for kidney surgery, and since it is undisputed that she has never, during discovery, presented any evidence of such injuries, that branch of Dr. Mass's motion is granted, and such claims are dismissed. This leaves the balance of Dr. Mass's summary judgment motion.

On a summary judgment application, the movant has the initial burden of prima facie establishing his entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Kuri v. Bhattacharya, 44 A.D.3d 718 (2d Dep't 2007). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. However, where the movant demonstrates his prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. Alvarez v. Prospect Hosp., 68 N.Y.2d at 324. 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 [internal citations omitted]." Gibson v. American Export Isbrandtsen Lines, 125 A.D.2d 65, 74 (1st Dep't 1987).

Dr. Mass moves to dismiss all of Ms. Angeli's claims accruing more than two and one half years before this action was commenced. Ms. Angeli opposes the motion, and urges that the continuous treatment doctrine applies.

The statute of limitations in a dental malpractice action is two and one half years, and runs from "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." C.P.L.R. § 214-a. The statute of limitations on malpractice claims usually starts to run when the doctor believes the patient's treatment is finished and does not ask the patient to come back

for additional treatment. McDermott v. Torre, 56 N.Y.2d 399, 405 (1982). The burden of prima facie demonstrating that a malpractice claim is barred by the two and one half-year statute of limitations is on the defendant. Texeria v. BAB Nuclear Radiology, P.C., 43 A.D.3d 403, 405 (2d Dep't 2007). Where that burden is met, the burden then shifts to the plaintiff to establish an exception to the usual accrual rule (Valenti v. Trunfio, 118 A.D.2d 480, 483 [1st Dep't 1986]), including the applicability of the continuous treatment doctrine. Massie v. Crawford, 78 N.Y.2d 516, 519 (1991); Texeria, 43 A.D.3d at 405. In the instant case, all claims of dental malpractice accruing before Ms. Angeli's visit to Dr. Mass's office on April 3, 2006 are barred by the two and one half-year statute of limitations unless Ms. Angeli has raised an issue as to the applicability of the continuous treatment doctrine.

That doctrine is based on the policy which "seeks to maintain the [doctor]-patient relationship in the belief that the most efficacious [dental] care will be obtained when the attending [doctor] remains on a case from onset to cure [internal citation omitted]." McDermott v. Torre, 56 N.Y.2d at 408. The doctrine's toll "was created to enforce the view that a patient should not be required to interrupt corrective . . . treatment by a [doctor] and undermine the continuing trust in the [doctor]-patient relationship in order to ensure the timeliness of a [dental] malpractice action" Young v. New York City Health & Hosps. Corp., 91 N.Y.2d 291, 296 (1998). The doctrine requires that a course of treatment has been established regarding the condition giving rise to the lawsuit. Nykorchuck v. Henriques, 78 N.Y.2d 255, 258-259 (1991). Consequently, the failure to diagnose a condition, and to therefore establish a course of treatment, does not constitute continuous treatment. Trebach v. Brown, 250 A.D.2d 449 (1st Dep't 1998); Chesrow v. Galiani, 234 A.D.2d

9, 11 (1st Dep't 1996). Neither the patient's general continuing relationship with the doctor (id. at 11), periodic routine examinations of a patient who seems to be in good health (Massie v. Crawford, 78 N.Y.2d at 520), nor complete, discrete, and isolated treatment constitutes continuous treatment. Nykorchuck v. Henriques, 78 N.Y.2d at 259; see also Marrone v. Klein, 33 A.D.3d 546 (1st Dep't 2006); Wehle v. Giovanniello, 137 A.D.2d 680 (2d Dep't 1988) (dentist's treatment of various discrete, unrelated dental conditions over about 15 years did not amount to continuous treatment); Ciciless v. Lane, 129 A.D.2d 759, 759 (2d Dep't 1987) ("disparate procedures on different teeth performed after substantial time gaps," did not constitute continuous treatment).

However, "a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment," constitutes continuous treatment. McDermott v. Torre, 56 N.Y.2d at 406; see e.g. Yelin v. American Dental Center, 184 A.D.2d 693 (2d Dep't 1992) (where tooth that had been filled and capped by dentist continued thereafter to decay, and required repair, issues of fact existed as to applicability of continuous treatment doctrine). Also, monitoring "for a specific . . . condition to ensure that it improves or at least does not deteriorate (as opposed to a general . . . examination)" can constitute continuous treatment. Ganess v. City of New York, 85 N.Y.2d 733, 736 (1995); Ramirez v. Friedman, 287 A.D.2d 376, 377 (1st Dep't 2001).

While the absence of evidence as to why it took almost a year after the initial visit for Ms. Angeli to return is somewhat troubling, and although the return visit on January 14, 2004 may ultimately be found to represent a renewal of treatment (see generally O'Donnell v. Siegel, 49 A.D.3d 415 [1st Dep't 2008]), rather than part of any continuous course of treatment, the evidence

submitted on this motion, particularly Dr. Mass's chart and deposition testimony, warrants the denial of this branch of Dr. Mass's motion.

Dr. Mass testified at his deposition that Ms. Angeli initially presented with a host of problems, principally, a "very severe cavity problem" which was "in her whole mouth"; that he had discussed this many times with Ms. Angeli from the very first visit; and that with her assistance, he was attempting to determine the cause of her tooth decay problem. He also testified that he could not possibly treat all of her teeth at once, even though he knew that they had decay. So, according to Dr. Mass, he essentially performed "triage" by addressing the more serious problems first. He further testified that, in light of Ms. Angeli's decay condition, which worsened and recurred during his treatment of Ms. Angeli, he used temporary products, because he was attempting to stabilize the decay problem before he reassessed her teeth and "saw where [the] case was going." Therefore, Dr. Mass was not going to permanently restore the teeth until he "could control the decay and the pain and the other issues." Dr. Mass also testified, in response to why it took him a long time to treat certain decay problems which he had diagnosed from the initial x-rays, that Ms. Angeli would not let him, and that he only treated emergencies, a claim which Ms. Angeli firmly denies.

All of the teeth, which were treated by Dr. Mass prior to the April 3, 2006 visit, were thereafter treated on multiple occasions by Dr. Mass, and, at least teeth numbers 4, 5, and 6 were treated with temporary products. In light of Dr. Mass's testimony that he was performing triage on Ms. Angeli's mouth; was treating a mouth-wide condition of severe dental decay, which was worsening and recurring; and was using temporary products until he could stabilize the decay

problem and reassess Ms. Angeli's dental needs; and since the teeth treated before April 3, 2006 were repeatedly treated thereafter, it cannot be said, as a matter of law, that Dr. Mass's treatment before April 3, 2006 constituted discrete and complete treatment. Accordingly, Dr. Mass's application to dismiss any malpractice claim accruing more than two and one half years before this action was commenced 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 support of this branch of his motion, which seeks dismissal of the lack of informed consent cause of action, Dr. Mass offers the affidavit of his expert, Dr. Leslie Seldin ("Dr. Seldin"), who asserts that Ms. Angeli lacks a basis for claiming that she was not informed of the risks and benefits of the procedures performed, since she signed a consent form on March 13, 2008 for a full-mouth rehabilitation. Dr. Seldin further observes that Dr. Mass testified in this regard that he had informed Ms. Angeli that he would remove all of her dental decay and then give her "appropriate restoration." Dr. Seldin also notes that Ms. Angeli was aware that she was going to have a full-mouth rehabilitation. Additionally, Dr. Seldin opines that the risks associated with restoration "were minimal."

This branch of Dr. Mass's motion is denied, since he has failed to prima facie establish his entitlement to summary judgment on the lack of informed consent claim. First, Dr. Seldin's affidavit on this issue only refers to treatment rendered on or after March 13, 2008, when the consent form was signed. Second, the March 13, 2008 consent form does not mention the risks and benefits of, and the alternatives to, any specific treatment. Third, the form, which is primarily a letter explaining Dr. Mass's fees, does not mention any specific procedure, such as root canal, or the placement of crowns or bridges, that Dr. Mass was to perform, nor does Dr. Seldin on the issue of informed consent refer to any specific procedure. Fourth, it appears that Ms. Angeli was under "laughing gas" when Dr. Mass had her sign this form, in which Dr. Mass had Ms. Angeli acknowledge that her dental problems were caused by her candy-eating habits. Fifth, while Dr. Seldin claims that the risks were minimal, he does not identify the risks that were required to be revealed to Ms. Angeli before any procedure, nor does he identify any alternatives to the proposed treatment. Sixth, while Dr. Mass has offered his affidavit in support of this motion, it is silent on the issue of informed consent, as was his deposition testimony. Finally, even if Dr. Mass had prima facie established his entitlement to summary judgment on this issue, Ms. Angeli has offered her affidavit in which she asserts that Dr. Mass never discussed any risks or informed her of alternatives to the proposed treatment.

In a malpractice case, a doctor who seeks summary judgment bears the burden of establishing that he did not depart from accepted standards of practice, or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, 70 A.D.3d 654, 654-655 (2d Dep't 2010).

Dr. Mass, relying on Dr. Seldin's affidavit, among other evidence, seeks an order dismissing Ms. Angeli's first cause of action, which alleges that Dr. Mass departed from accepted standards of dental practice. Dr. Seldin conducted an independent dental examination of Ms. Angeli, after she had first been seen by Dr. Vogel, who by that time had removed much of Dr. Mass's prosthetic work, re-prepared teeth and replaced that prosthetic work with his own temporary prosthetics. Dr. Seldin opines that Dr. Mass took an adequate amount of x-rays; properly prepared Ms. Angeli's teeth; appropriately performed indicated root canal treatment; and properly made those restorations which were still in Ms. Angeli's mouth when Dr. Seldin examined Ms. Angeli, which restorations were not, in any event, intended to be permanent. Dr. Seldin further maintains that there was no occlusal disharmony when he examined the patient; the inflammation of Ms. Angeli's gums, which he observed, could have been due to Dr. Vogel's temporary restorations, which Dr. Seldin characterized as bulky with tight embrasure spaces; and that the loss of some teeth and breakdown of tooth structure was caused by Ms. Angeli's "rampant [tooth] decay," rather than by Dr. Mass's treatment.

Ms. Angeli opposes this branch of Dr. Mass's motion, and relies principally on the deposition transcripts provided with Dr. Mass's motion and on Dr. Vogel's affidavit. Dr. Vogel opines that, when he examined Ms. Angeli, the crowns in her mouth were bulky, poorly made, and ill-fitting with insufficient embrasure spaces, making it difficult to clean, thereby causing inflammation. Consequently, Dr. Vogel concludes that Ms. Angeli required extensive restoration of her mouth.

Dr. Vogel's affidavit, as amplified by his deposition testimony, raises at least an issue of fact as to whether Dr. Mass's restorations were improperly made, thereby resulting in inflammation and the need to have new restorations made. In this regard, I note that Dr. Seldin did not observe all of Dr. Mass's restorations, since many were removed before he examined Ms. Angeli's mouth. That Dr. Seldin believed that those crowns still remaining at the time of his examination were adequate, simply raises an issue of fact in view of Dr. Vogel's opinion to the contrary. Also, since, by the time of Dr. Seldin's examination, Dr. Vogel had re-prepped at least those teeth on which he had installed temporary replacement prosthetics, Dr. Seldin lacks personal knowledge as to whether those teeth were properly prepared by Dr. Mass. Further, since much of Dr. Mass's prosthetics were removed and replaced at the time of Dr. Seldin's examination of Ms. Angeli's teeth, Dr. Seldin lacks a basis upon which to conclude that Dr. Mass did not cause occlusal disharmony. Therefore, the branch of Dr. Mass's motion which seeks dismissal of Ms. Angeli's first cause of action on substantive grounds is denied.

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). 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]." Id.

Whether a punitive damages award is justified, and, if so, in what amount, are usually issues for the trier of fact. Nardelli v. Stenberg, 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 and Traub, 219 A.D.2d 321, 328 (1st Dep't 1996). But, where punitive damages are "unavailable" as matter of law, summary judgment dismissing such claim may 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); Rey v. Park View Nursing Home, 262 A.D.2d 624, 627 (2d Dep't 1999); Gravitt v. Newman, 114 A.D.2d 1000 (2d Dep't 1985).

That the prosthetics provided by Dr. Mass were allegedly improperly made is unavailing. Rudolph v. Jerry Lynn, D.D.S., P.C., 16 A.D.3d 261 (1st Dep't 2005) (claim of bulky, unsightly and ill-fitting crowns did not give rise to punitive damages claim). Ms. Angeli's claim, raised in opposition to this motion, that she is entitled to punitive damages because of Dr. Mass's alleged sexual overtures, will not be considered here, since no such claim was raised in Ms. Angeli's complaint or in her bills of particulars. Abalola v. Flower Hosp., 44 A.D.3d 522 (1st Dep't 2007). Nor is there any specific claim in her pleadings that Dr. Mass was negligent, or that he acted willfully and wantonly, in failing to clean Ms. Angeli's teeth for four years after the January 26, 2004 visit.

Even if the pleadings' allegation, that Dr. Mass was negligent in ignoring infections, was intended to relate to the lack of cleanings, causing gum inflammation and infections, a proposition which is dubious, since Dr. Mass was not asked about infections at his deposition, Dr. Mass testified that he did periodontal probing, that there were no pockets of significant depth, and

that the case was not a periodontal one, but rather, was one involving severe cavities. Also, Dr. Vogel, who never performed periodontal probing of Ms. Angeli's gums, attributed, in his chart and at his deposition, Ms. Angeli's gum inflammation solely to the bulky crowns with inadequate embrasure spaces, which were installed, at most, several weeks before Ms. Angeli first saw Dr. Vogel and left Dr. Mass's care. Dr. Vogel's statement in his affidavit, that he was informed, by an unidentified source, that Ms. Angeli had a deteriorating periodontal condition from 2003-2008, while under Dr. Mass's care, is pure hearsay. No affidavit is provided from Ms. Angeli's periodontist, Dr. Simon, supporting this claim. At best, Dr. Mass failed to diagnose a periodontal condition, or caused infections through the placement of ill-fitting prosthetics, clearly not willful or reckless acts. In view of the foregoing, the pleadings' assertion that Dr. Mass negligently ignored infections does not warrant punitive damages.

The sole claim of willful and wanton behavior on the part of Dr. Mass set forth in the complaint and bill of particulars was that he unnecessarily capped teeth. According to Ms. Angeli's counsel, when Ms. Angeli presented to Dr. Mass, the x-rays taken by him "showed that [Ms. Angeli] appeared to have a very healthy dentition," but by the time she concluded treating with Dr. Mass, Ms. Angeli allegedly had "mutilated dentition." Ms. Angeli's counsel later in his affirmation conclusorily asserts that it was willful and wanton to unnecessarily crown teeth, a claim that Ms. Angeli's expert, Dr. Vogel, does not urge.

The record on the instant motion fails to show that Dr. Mass's placement of crowns on Ms. Angeli's teeth "smacks of intentional wrongdoing" or demonstrates a reckless disregard for Ms. Angeli's rights (internal quotation marks and citation omitted). Digiulio v. Gran, Inc., ____

A.D.3d ___, 2010 N.Y. Slip Op 04704, *3 (1st Dep't 2010). Ms. Angeli's counsel wholly ignores the fact that the initial full-mouth series showed at least 20 cavities and severe decay throughout Ms. Angeli's mouth. Ms. Angeli's counsel does not dispute that Ms. Angeli required numerous root canals, or that her tooth decay problem persisted. Nor, does Ms. Angeli contradict Dr. Mass's deposition testimony that, when he formulated his full-mouth rehabilitation plan in March 2008 to remove all of the tooth decay in Ms. Angeli's mouth, and then, with whatever tooth structure remained, restore it to good dental health using "proper restorations," it was "[m]ost likely" that "most" of her teeth would in fact require crowns. Under these circumstance, it cannot be said that Dr. Mass's decision to crown Ms. Angeli's teeth was willful and wanton. Thus, Ms. Angeli's claim for punitive damages must be, and hereby is dismissed.


Accordingly, it is

ORDERED that Dr. Michael Mass's motion seeing an order granting him summary judgment dismissing the complaint is granted solely to the extent that the claim for punitive damages and all claims for damages related to a calcium deficiency or to kidney problems, including the need for kidney surgery, are dismissed; the motion is otherwise denied.

Dated: August 13, 2010

ENTER:

FILED
 AUG 23 2010
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 JOAN B. LOBIS, J.S.C.