SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 18

_____X

ELLYN MEYERS and DAVID MYERS,

Plaintiffs,

-against-

DOUGLAS R. FRIE, D.D.S.,

Defendant.

_____X

Index No.: 023199/07
Motion Sequence...02
Motion Date...11/29/10
XXX

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, Douglas R. Frie, D.D.S., (hereinafter "Dr. Frie"), for an order pursuant to CPLR § 3212 and CPLR § 214-a granting him summary judgement dismissing the complaint against him is decided as hereinafter provided.

The Plaintiffs in this action seek to recover for dental malpractice, lack of informed consent, breach of contract, unjust enrichment, punitive damages and loss of consortium. The Plaintiff, Ellyn Meyers, alleges that from May 2005 until February 2006 Dr. Frie acted negligently in his treatment of her causing her to sustain severe injuries, which resulted in pain and suffering, requiring her to undergo further dental procedures and incur

out of pocket expenses. Dr. Frie seeks summary judgment dismissing the allegations of the complaint claiming they fall outside the applicable Statute of Limitations and denies that he departed from the requisite standard of care.

The Plaintiffs commenced this personal injury dental malpractice action against the Defendant, Dr. Frie upon the filing of the Summons and Complaint with the Nassau County Clerk's Office on December 28, 2007. Discovery in this action is complete, the Plaintiff filed a Note of Issue on May 11, 2010 certifying that all discovery was complete and the case is on the trial calendar.

In support of his motion for summary judgment, Dr. Frie submitted the Plaintiffs' summons and complaint (Exhibit A), his answer (Exhibit B), the Plaintiffs' Bill of Particulars (Exhibit C), his Affidavit in support of the motion, sworn to on July 2, 2010 (Exhibit D), his office records regarding his treatment of the Plaintiff, beginning on November 14, 1983 and ending on July 7, 2005 (Exhibit E), and the Plaintiff's deposition transcript (Exhibit F).

In opposition to the motion, the Plaintiff submitted an Affidavit in Opposition, sworn to on September 14, 2010, an unsworn letter from Linda Sarett, DDS, dated June 5, 2006 (Exhibit A) and the Affidavit of John Frankis, DDS sworn to on October 26, 2010 (Exhibit B).

The Defendant submitted an affirmation and his Affidavit, sworn to on November 23, 2010 (Exhibit A) in reply.

Based upon the allegations contained in both the Plaintiffs' complaint and Bill of Particulars, the acts of alleged dental malpractice occurred between May 2005 and February 2006. The Plaintiffs' Bill of Particulars allege dental malpractice in reference to the Plaintiff's teeth #2, #6, #8, #9, #13, #18 and #19.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facia* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 (2nd Dept. 2004), aff'd as mod., 4 N.Y.3d 627 (2005), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med Ctr.*, 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facia* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v. King*, supra at 74; *Alvarez v. Prospect Hosp.*, supra; *Winegrad v. New York Univ. Med Ctr.*, supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v. Prospect Hosp.*, supra at 324. The evidence presented by the opponent of summary judgement must be accepted as true and must be given the benefit of every reasonable inference. See, *Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 521 (2nd Dept. 2006) citing *Secof v. Greens Condominium*, 158 A.D.2d 591 (2nd Dept. 1990).

With respect to the branch of the Defendant's motion contending that all treatment of the Plaintiff prior to June 28, 2005, is time barred, it is well settled that "[a]

defendant who seeks dismissal of a complaint ... on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facia*, that the time in which to commence an action has expired. The burden then shifts to the plaintiff to aver evidentiary facts establishing that his or her cause of action falls within an exception to the statute of limitations , or raising an issue of fact as to whether such and exception applies." *Texeria v. BAB Nuclear Radiology, P.C.*, 43 A.D.3d 403,405 (2nd Dept. 2007). A dental malpractice claim generally accrues on the date of the wrongful act or omission, and a two and one-half statute of limitations applies (CPLR § 214-a).

Based upon Dr. Frie's medical records (Exhibit E) and his Affidavit (Exhibit D) he treated the Plaintiff on only three occasions between May 2005 and February 2006. On May 5, 2005, he continued a root canal procedure on the Plaintiff's Tooth # 2, that was also continued on May 9, 2005. All treatment by Dr. Frie of the Plaintiff on May 5 and May 9 was in reference to Tooth # 2. Dr. Frie's records do not indicate any treatment of Tooth # 2 after May 9, 2005 and Dr. Frie affirmatively asserted in his Affidavit that he never treated that tooth after May 9, 2005.

The only other treatment rendered by Dr. Frie to the plaintiff, in the time period alleged, was on July 7, 2005 with reference to the Plaintiff's Tooth # 18. Dr. Frie asserted that with regard to the Plaintiff's complaint of pain in the area of that tooth, on that day he placed a bonded seal in that tooth to address a possible leakage and took x-rays which were radiographically clear. Dr. Frie asserts that the treatment he afforded to the Plaintiff on July

7, 2005 was limited to the treatment of Tooth # 18, and that it met the standard of care and that Tooth # 18 was in no way damaged as a result of the dentistry he performed on that date. The Plaintiff testified at her deposition that the last time she treated with Dr. Frie was in July 2005 (Exhibit F at p.60).

The Defendant's evidence shows that during the period alleged between May 2005 and February 2006, Dr. Frie's treatment of the Plaintiff was limited to Tooth # 2 and Tooth #18. No treatment was rendered to the Plaintiff during that period in reference to Teeth #6, #8, #9 #13, and #19. Moreover, the Defendant has established that the only treatment rendered to the Plaintiff after June 28, 2005 was on July 7, 2005 and solely involved Tooth # 18.

Accordingly, based upon the Defendant's moving papers, he met his burden of establishing that treatment prior to June 28, 2005 is time barred as it occurred over two and one half years prior to the commencement of this action on December 28, 2007 (CPLR § 214-a).

The burden thereby shifts to the Plaintiffs to establish that the treatment falls into an exception. It is initially noted that the Plaintiff did not oppose any portion of the Defendant's motion with regard to Teeth #6, #8, #9, #13, and #19. The Plaintiff's opposition is limited solely to the treatment rendered to the Plaintiff referable to Teeth #2 and #18. With reference to Tooth # 2, the Plaintiff contends that since the treatment of Tooth #18 was within the applicable Statute of Limitations that all the treatment dates for Teeth #

2 and # 18 would be actionable under the continuous treatment exception since it is unknown if the Defendant treated Tooth # 2 on July 7, 2005 since he never testified at a deposition.

"Under the continuous treatment doctrine, the two and one-half year Statute of Limitation for a medical or dental malpractice action is tolled until after the plaintiff's last treatment 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." *Grippi v. Jankunas*, 230 A.D.2d 826, 826 (2nd Dept. 1996); *Kaufmann v. Fulop*, 47 A.D.3d 682, 684 (2nd Dept. 2008).

In order for the continuous treatment doctrine to toll the statute of limitations, the burden is on the Plaintiff to establish that Dr. Frie rendered an actual course of treatment during the applicable period for the same conditions or complaints underlying the Plaintiff's dental malpractice claims. *Chambers v. Mirkinson*, 68 A.D.3d 702, 705 (2nd Dept. 2009). "Essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit. Neither the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the requirements of the doctrine" *Grippi v. Jankunas*, supra at 830, citing *Nykorchuck v. Henriques*, supra, at 258, 259.

Here, the Plaintiff failed to raise a viable issue of fact regarding continuous treatment despite the Plaintiff's counsel's contention to the contrary. The Affidavit of Dr. Frie (Exhibit D), his office records (Exhibit E) and his Affidavit sworn to on November 24,

2010 (Exhibit A in Reply) clearly establishes that he did not provide any treatment to the Plaintiff in reference to Tooth # 2 after May 9, 2005 and that his treatment of the Plaintiff on July 7, 2005 was limited to the treatment of Tooth # 18.

The Plaintiff also contends that her causes of action for breach of contract and unjust enrichment should not be dismissed as time barred and that the Defendant is liable under a theory of negligence and for a new cause of action for fraud and concealment.

Those arguments are without merit as the Plaintiff did not allege a cause of action for fraud or concealment nor did she move to amend her complaint. Moreover, the Plaintiff cannot avoid the Statute of Limitations by attempting to phrase the claim as one based upon breach of contract as she has failed to allege damages for breach of contract that are distinct from those of her malpractice claim. *Keselman v. Webber*, 56 A.D.3d 728,729 (2nd Dept. 2008); see *Robins v. Finestone*, 308 N.Y.543, 546 (1955); see also *Catapano v. Winthrop University Hosp.*, 19 A.D.3d 355 (2nd Dept. 2005); *Clarke v. Mikail*, 238 A.D.2d 538 (2nd Dept. 1997).

Therefore, all the allegations by the Plaintiffs against the Defendant, Dr. Frie, for dental malpractice for treatment rendered prior to June 28, 2005, are hereby dismissed as time barred.

The Defendant's motion also seeks summary judgment on the Plaintiff's allegations of dental malpractice for treatment rendered after June 28, 2005. That was for the treatment of the Plaintiff on July 7, 2005 with reference to Tooth # 18.

It is well settled that in order to establish a *prima facie* case of medical malpractice or in the instant action, of dental malpractice, "a plaintiff must prove that the defendant deviated from accepted practice, and that such deviation proximately caused his or her injuries." *Dehaarte v. Ramenovsky*, 67 A.D.3d 724,725 (2nd Dept. 2009) citing *Novik v. Dodec*, 58 A.D.3d 703 (2nd Dept. 2009); *Monroy v. Glavas*, 57 A.D.3d 631(2nd Dept. 2008); *Rabinowitz v. Elimain*, 55 A.D3d 813 (2nd Dept. 2008); see also, *Castro v. New York City Health and Hospitals Corp.*, 74 A.D.3d 1005 (2nd Dept. 2010); *Ellis v. Eng*, 70 A.D.3d 887 (2nd Dept. 2010).

"On a motion for summary judgment dismissing the complaint in a [dental] malpractice action, a defendant physician has the burden of establishing the absence of any departure from good and accepted medical practice, or, if there was a departure, that the plaintiff was not injured thereby." *Shectman v. Wilson*, 68 A.D.3d 848, 849 (2nd Dept. 2009), citing *Murray v. Hirsch*, 58 A.D.3d 701 (2nd Dept. 2009), lv den., 12 N.Y.3d 709 (2009); *Shahid v New York City Health & Hospitals Corp.*, 47 A.D3d 800 (2nd Dept. 2008); *Alvarez v. Prospect Hosp.*, supra, see also, *Castro v. New York City Health and Hospitals Corp.*, supra; *Ellis v. Eng,* supra. "[B]are allegations which do not refute the specific factual allegations of [dental] 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 (2nd Dept. 2008); *Drago v. King*, 283 A.D.2d 603, 603-604 (2nd Dept. 2001); *Terranova v. Finklea*, 45 A.D.3d 572 (2nd Dept. 2007); *Kuri v. Bhattacharya*, 44 A.D.3d 718 (2nd Dept.

2007).

The Defendant contends that he did not deviate from accepted medical/dental standards and practices in the treatment he rendered to the Plaintiff on July 7, 2005 which treatment was limited to Tooth # 18. Pursuant to Dr. Frie's medical records and Affidavits, his treatment of the Plaintiff on July 7, 2005 was limited to Tooth # 18. Dr. Frie asserts that he treated the Plaintiff with regard to her complaint of pain in the area of Tooth # 18, placing a bonded seal in that tooth to address a possible leakage and took x-rays which were radiographically clear. Dr. Frie asserts that the treatment he rendered to the Plaintiff on July 7, 2005 was limited to the treatment of Tooth # 18, and that it met the standard of care and that Tooth # 18 was in no way damaged as a result of the dentistry he performed on that date.

Based upon Dr. Frie's Affidavit and his medical records, he has set forth that his treatment of the Plaintiff after June 28, 2005 (on July 7, 2005) was within the requisite standard of care and as such he established a *prima facia* entitlement to summary judgment dismissing the remaining allegations of the complaint against him.

Upon the moving defendant meeting his burden, "[i]n opposition, a plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries." *Shectman v. Wilson*, supra, citing *Sweezey v. Montague Rehab & Pain Mgt., P.C.*, 59 A.D.3d 431 (2nd Dept. 2009); *Murray v. Hirsch*, supra; *Shahid v. New York City Health & Hospitals Corp.*, supra; see also, *Ellis v. Eng*, supra.

"[G]eneral allegations of medical [dental] malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical [dental] malpractice do not suffice." *Shectman v. Wilson*, supra, citing *Alvarez v. Prospect Hosp.*, supra, *Shahid v. New York City Health & Hospitals Corp.*, supra; see also, *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542 (2002); *Romano v. Stanley*, 90 N.Y.2d 444 (1997); *Amatulli v. Delhi Const. Corp.*, 77 N.Y.2d 525 (1991). The plaintiff's expert must set forth the medically accepted standards of care or protocol and explain how it was departure from that standard. *Geffner v. North Shore Univ. Hosp.*, 57 A.D.3d 839, 842 (2nd Dept. 2008) citing *Mustello v. Berg*, 44 A.D.3d 1018,1019 (2nd Dept. 2007, lv den., 10 N.Y.3d 711 (2008); *LaMarque v. North Shore Univ. Hosp.*, 227 A.D.2d 594, 594-595 (2nd Dept.1996). The plaintiff's expert must address all of the key facts relied upon by the defendant's expert. See *Kaplan v. Hamilton Med.Assocs. P.C.*, 262 A.D.2d 609 (2nd Dept. 1999) see also, *Geffner v. North Shore Univ. Hosp.*, supra; *Rebozo v. Wilen*, 41 A.D.3d 457 (2nd Dept. 2007).

The Plaintiff has failed to rebut the Defendant's *prima facia* establishment of his entitlement to summary judgment, in that she has failed to provide sworn evidentiary proof attesting to the Defendant's departure from good and accepted practice, and that the alleged departure was a competent producing cause of the Plaintiff's injuries.

The Plaintiff's Exhibit A in opposition, the letter of Linda Starett, DDS, dated June 5, 2006, is unsworn and as such lacks any evidentiary consideration. In addition, the sworn assertions of the Plaintiff's expert, John Frankis, DDS (Exhibit B) is based upon

speculation and conjecture wherein he opines that Dr. Frie may have misdiagnosed wholly Plaintiff with reference to Tooth # 18 but that he cannot make that affirmative determination without reviewing the x-rays taken at that time. Dr. Frankis also makes an alternative assertion, based upon the unsworn records of Linda Starrett, DDS (which he himself says, "if Doctor Sarett's records are accurate" see Plaintiff's Exhibit B, para. 8), that Dr. Frie misdiagnosed the Plaintiff with either a sinus infection or TMJ. The assertion that Dr. Frie diagnosed the Plaintiff with either a sinus infection or TMJ on July 7, 2005 is entirely speculative. Additionally, the assertion is contradicted by the Plaintiff's deposition testimony and Dr.Frie's medical records and his sworn assertions contained in his Affidavits.

"[E]xpert opinions that are conclusory or unsupported by the record are insufficient to raise triable issues of fact." *Micciola v. Sacchi*, 36 A.D.3d 869, 871 (2nd Dept. 2007), citing *Schrader v. Sunnyside Corp.*, 297 A.D.2d 369, 371 (2nd Dept. 2002), lv dism., 100 N.Y.2d 553 (2003); see *Fhima v. Maimonides Med. Ctr.*, 269 A.D.2d 559 (2nd Dept. 2000). Simply put, "hindsight reasoning... is insufficient to defeat summary judgment." *Miccola v. Sacchi*, supra at 871, citing *Zawadzki v. Knight*, 76 N.Y.2d 898 (1990).

Based upon the proof presented, the Defendant, Dr. Frie's motion for summary judgment is **GRANTED** and the complaint against him, as to any allegations after June 28, 2005, is **DISMISSED**.

Accordingly, it is hereby

ORDERED, that the portion of the Defendant's motion that requests summary

judgement pursuant to CPLR § 214-a, is hereby **GRANTED**, and it is further

ORDERED, that the Plaintiffs' complaint is **DISMISSED** with respect to all allegations of dental malpractice prior to June 28, 2005; and it is further

ORDERED, that the portion of the Defendant's motion that requests summary judgment, pursuant to CPLR § 3212, with respect to the treatment rendered after June 28, 2005, is **GRANTED**, and it is further

ORDERED, that the Plaintiffs' complaint is dismissed with respect to all allegations of dental malpractice after June 28, 2005, and it is further

ORDERED, that the Plaintiffs' complaint is **DISMISSED** in its entirety.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 2, 2011

Hon. Randy Sue Marber, J.S.C.
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