

<b>McQuown v Rosenbaum</b>
2011 NY Slip Op 30829(U)
April 4, 2011
Supreme Court, New York County
Docket Number: 112600/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOBIS  
*Justice*

PART 6

*McQuown, Judith*

INDEX NO. 112600/08

MOTION DATE 2/8/11

MOTION SEQ. NO. 001

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

*Edward Rosenbaum*

- v -

The following papers, numbered 1 to 18 were read on this motion to/for Summary judgment

PAPERS NUMBERED

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

1-12

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

13-17

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

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**

APR 06 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/4/11

JBL  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

-----X  
JUDITH MCQUOWN,

Plaintiff,

Index No.: 112600/2008

- against -

**Decision and Order**

EDWARD ROSENBAUM, D.D.S., DR. BABAK  
ZARGARI, DR. ABED ALKHATIB, and  
NEW YORK PRESBYTERIAN HOSPITAL,

**FILED**

Defendants.

APR 06 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

In Motion Sequence Number 001, defendant New York Presbyterian Hospital ("NYPH") moves, pursuant to C.P.L.R. Rule 3212, for an order granting it summary judgment and dismissing this matter as against it. In the same motion, NYPH also requests that the court so-order two separate stipulations of discontinuance as to Dr. Barak Zargari and Dr. Abed Alkhatib; the stipulations are unsigned by counsel for defendant Edward Rosenbaum, D.D.S. In Motion Sequence Number 002, Dr. Rosenbaum moves, pursuant to C.P.L.R. Rule 3212, for an order granting him summary judgment and dismissing this matter as against him. The motions are hereby consolidated for disposition. For the reasons discussed below, the Dr. Rosenbaum's motion is denied and NYPH's motion is granted to the extent of dismissing the case against Dr. Barak Zargari and Dr. Abed Alkhatib and denied as to all other relief requested.

This action, sounding in dental malpractice, concerns the treatment of multiple jaw fractures sustained by plaintiff. On June 26, 2006, plaintiff, a diabetic, presented to NYPH's emergency room after a fall due to a hypoglycemic episode, her second such fall in nearly two

months. She had pain in her mouth and jaw; teeth missing; and a laceration on her chin. Plaintiff was diagnosed with a left subcondylar fracture of the mandible and a symphysis fracture of the mandible. Oral maxillofacial surgery was indicated. According to Dr. Rosenbaum's examination before trial ("EBT") testimony, both fractures were fully displaced.

Dr. Rosenbaum performed the surgery on June 27, 2006, assisted by Drs. Zargari and Alkhatib, who were residents at NYPH. Plaintiff entered the operating room at 4:41 p.m. and was placed under general anaesthesia. According to Dr. Rosenbaum's EBT testimony, plaintiff had trouble opening her mouth and severe malocclusion. Dr. Rosenbaum further testified that in his review of a panoramic x-ray taken on June 26, 2006, plaintiff's left condyle was not in her left fossa. The fossa is a U-shaped portion of the temporal bone right above the condyle into which the top of the condyle fits.

According to the surgical operative report, at 5:16 p.m., Erich arch bars with interdental wires were placed from right molar to left molar on plaintiff's maxilla. Mandibular arch bars were placed with interdental wire from tooth number 19 to tooth number 30. Plaintiff was then "placed into maxillomandibular fixation with three . . . intermaxillary wires." Dr. Rosenbaum then checked the occlusion and noted it as centric.

For the fracture of symphysis, Dr. Rosenbaum visualized the bone segments using an incision through plaintiff's laceration from the fall. According to the surgical operative report, he then "mobilized and manually reduced [the fragments] to approximate at about the inferior border

and buccal cortex." A plate was placed over the fracture and secured with six screws. This procedure started immediately after the intermaxillary fixation was completed at 6:00 p.m.

Dr. Rosenbaum then attempted to reduce (position) plaintiff's left condylar. According to Dr. Rosenbaum's EBT testimony, he did so externally by placing his finger along her cheek until he felt the condylar segment. Once he felt it, he moved it superiorly and laterally. Dr. Rosenbaum testified that it was not reduced fully, but the position was appropriate. According to Dr. Zargari's EBT testimony, the reduction was not successful. The surgical report indicates that plaintiff was taken out of intermaxillary fixation and her bite was examined and noted to be centric. She was then placed back into intermaxillary fixation with the use of rubber bands and the incision on her chin was irrigated with saline and sutured. The entire surgery ended at 7:02 p.m. Plaintiff was taken to the recovery room at 7:24 p.m.

At his EBT, Dr. Rosenbaum reviewed a panoramic x-ray dated June 28, 2006. He testified that it revealed that the head of the condyle was not in the fossa. Dr. Rosenbaum further testified that he did not treat plaintiff post-operatively nor did he discuss her post-operative care with NYPH staff. Plaintiff remained at NYPH until June 28, 2006. She was discharged with instructions to, inter alia, rinse her mouth with Peridex twice daily; take Augmentin twice daily for a week; adhere to a diet of blended foods for six to eight weeks; and follow-up with NYPH's Oral Surgery Clinic in a week. Plaintiff presented to the Oral/Dental Clinic on July 2, 2006. According to the record from that visit, she had a mandibular edema, but her occlusion was stable and the sutures and rubber bands were in place. She reported back to the Oral/Dental Clinic on July 13, 2006,

complaining that a rubber band had popped off. Two bands were placed in her mouth. On July 17, Oral/Dental Clinic staff noted that plaintiff was recovering well and her occlusion remained stable and reproducible. Plaintiff presented to the Oral/Dental Clinic again on July 27, 2006, at which time a rubber band that had broken was replaced. According to the records, a panoramic x-ray taken on that day revealed that the condylar head was migrating towards the fossa. Her occlusion was noted to be stable and reproducible. On August 7, 2006, plaintiff presented to Janice Wu, D.D.S., of NYPH's Department of Oral and Maxillofacial Surgery. Dr. Wu noted that plaintiff was recovering well and had stable and reproducible occlusion. A panoramic x-ray revealed a displaced subcondylar fragment. At a second visit with Dr. Wu, on August 21, 2006, plaintiff again had a stable and reproducible occlusion and the subcondylar fragment remained displaced. A week later, on August 28, Dr. Zargari removed the arch bars, which at that point were the only remaining surgical appliances. According to his EBT testimony, a week after removal from intermaxillary fixation, plaintiff's occlusion was stable and reproducible, but, upon closing of her jaw, her left upper and lower teeth were contacting each other before her right upper and lower teeth. On October 9, 2006, plaintiff again presented to Dr. Zargari, who noted that her bite deviated toward her left condyle and premature occlusal contact on the left side.

Plaintiff commenced this action with the filing of a summons and verified complaint on or about September 16, 2008. As against Dr. Rosenbaum and NYPH, plaintiff alleges that they, inter alia, failed to properly repair her left mandibular fractures; failed to ensure that her condyle was in her fossa; and failed to render adequate and proper postoperative care. Plaintiff alleges that these departures from the standard of care caused, inter alia, malocclusion; deviation of the mandible to

the left upon opening her mouth; dysfunction of her temporomandibular joint (“TMJ”); and attendant pain, discomfort, and difficulty in eating, drinking, and speaking. NYPH is sued both for its alleged independent acts of malpractice regarding treatment at the Oral/Dental Clinic and on the basis of vicarious liability for Dr. Rosenbaum under Mduba v. Benedictine Hosp., 52 A.D.2d 450 (3d Dep’t 1976).

On October 23, 2009, plaintiff underwent an independent medical examination (“IME”) conducted by Daniel Buchbinder, D.M.D., M.D. According to a letter written to counsel for Dr. Rosenbaum dated September 21, 2010, the IME “did not reveal any objective findings consistent with the severity of [plaintiff’s] symptoms and complaints.” Dr. Buchbinder acknowledged that the left condylar head was displaced and that her mouth deviated to the left on opening, but set forth that her mandibular range of motion was normal and that examination of her TMJ did not reveal any clicking or popping.

As to that branch of NYPH’s motion seeking the court to so-order stipulations of discontinuance as to Drs. Zargari and Alkhatib, the court does not so-order stipulations that are not signed by all parties as required of a voluntary discontinuance under C.P.L.R. Rule 3217(a). Counsel for Dr. Rosenbaum has not signed the stipulations, but neither has Dr. Rosenbaum opposed this branch of NYPH’s motion. Therefore, this branch of NYPH’s motion is granted, to the extent that the court will permit the discontinuances under Rule 3217(b).

As to those branches of the motions seeking summary judgment, a defendant 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.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, a defendant in a dental malpractice action 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, 324 (1986) (citation omitted). Specifically, in a dental malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted).

In its motion, NYPH submits the affirmation of Raymond J. Fonseca, D.M.D., who states that he is a dentist and oral surgeon board certified in Oral and Maxillofacial Surgery. Dr. Fonseca maintains that upon reviewing the depositions, plaintiff’s medical records and panoramic x-rays, and the pleadings, NYPH acted within the standard of care. Dr. Fonseca maintains that the subcondylar fracture was appropriately treated in a closed procedure, because none

of the "absolute indications" for open fixation were present, such as displacement of the fracture into the fossa; mechanical blockage of the jaw by the fracture; debris in the area of the fracture; or fractures on both sides of the TMJ in conjunction with other facial fractures. Dr. Fonseca further sets forth that it was not necessary to place the condyle into the fossa. Instead, it was important to stabilize the fracture and ensure that occlusion was centric. Dr. Fonseca asserts that occlusion was consistently noted to be centric at plaintiff's surgery and during her post-surgical course. As to the bite deviation noted in NYPH's records and observed by Dr. Zagari, Dr. Fonseca asserts that any bite deviation is a "natural consequence of the fall that was severe enough to fracture [plaintiff's] jaw in two locations."

In his separate motion, Dr. Rosenbaum relies on the affirmation of Allan Kucine, D.D.S., who states that he is a dentist and oral and maxillofacial surgeon board certified in Oral and Maxillofacial Surgery. Dr. Kucine opines that after reviewing the depositions, plaintiff's medical records and films, and the IME findings, Dr. Rosenbaum did not deviate from the standard of care. Dr. Kucine maintains that Dr. Rosenbaum reviewed a detailed medical history and, given plaintiff's medical status, including diabetes, appropriately decided to treat her condylar fracture in a closed procedure. Dr. Kucine asserts that an attempt to reduce the condylar fracture in an invasive procedure with internal fixation would take two to three hours longer. The additional hours, combined with an invasive procedure, would have exposed plaintiff to increased risk of infection and "other potential healing complications." Dr. Kucine further opines that open reduction with internal fixation was indicated for plaintiff's symphysis fracture, because plaintiff already had a laceration in the area. In reviewing plaintiff's post-operative course, Dr. Kucine asserts that plaintiff

was healing normally and her occlusion was stable and reproducible. Dr. Kucine further maintains that Dr. Rosenbaum did not participate in her post-operative course. As to the injuries alleged, Dr. Kucine states that the IME revealed no clinical findings consistent with the "severity" of plaintiff's complaints.

In opposition to Dr. Rosenbaum's motion, plaintiff argues that it is untimely and should be denied. Plaintiff maintains that, as per the preliminary conference order dated January 20, 2009, Dr. Rosenbaum was required to move for summary judgment no later than sixty (60) days after the filing of the note of issue. The note of issue was filed on October 20, 2010. Dr. Rosenbaum's order to show cause was filed with the court on December 17, 2010 and signed on December 20, 2010. Plaintiff argues that the motion was not made until December 20 and, as such, was one day late. The court notes that the order to show cause was not served upon plaintiff until December 21, 2010, making it more than one day late. See C.P.L.R. § 2211. Nevertheless, since the order to show cause was filed with the court within the time period allowed and was served a mere two days after the sixty day period and plaintiff has not articulated any prejudice from the delay, the court will consider the delay de minimus and reach the merits of the motion.

In opposition to the substance of both motions, plaintiff submits two affirmations of a dentist and oral surgeon who is board certified in oral and maxillofacial surgery, whose name has been redacted.<sup>1</sup> The expert sets forth that, upon reviewing the depositions, plaintiff's medical records and films, and defendants' experts' affirmations, it is the expert's opinion that both NYPH

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<sup>1</sup> Unredacted affirmations have been submitted to the court for *in camera* review.

and Dr. Rosenbaum committed malpractice. The expert maintains that the goal of fracture management is to ensure normal positioning. Here, plaintiff's condyle was out of its position in the fossa before surgery. The expert maintains that defendants' attempt to reduce the condyle non-invasively failed, requiring an open reduction and internal fixation procedure. This procedure would have immobilized the fracture and ensured that it was in its proper anatomical position. According to the expert, the failure to pursue this course was a deviation from the standard of care. The expert maintains that despite suffering from diabetes, plaintiff was in good overall health and was an acceptable surgery candidate. The expert further asserts that every surgery comes with the risk of infection and that such risk can be addressed by appropriate antibiotic treatment. The expert also sets forth that "opening two surgical sites as opposed to one" does not create an increased risk of infection. Even if the risk of infection was too great, the expert maintains that defendants should have scheduled plaintiff for an open reduction and fixation surgery at a later date. As to the post-operative care, the expert sets forth that plaintiff's post-surgical panoramic x-rays revealed that the condyle was not in its proper position, yet NYPH staff did nothing to correct the displacement. The failure to correct the displacement was a deviation from the standard of care. The expert asserts that even though Dr. Rosenbaum was not involved in post-surgical treatment, as the attending surgeon, he should have been. The expert contends that plaintiff's injuries, as documented by Dr. Zargari on October 9, 2006, would not have occurred had the condyle been reduced to its normal position. The expert asserts that the findings of stable and reproducible occlusion from July through August 2006 were not significant because her bite was forced to stay in place by the surgical appliances. The expert contends that Dr. Buchbinder's finding of bite deviation to the left is "neither normal nor subjective" and sets forth that plaintiff's dental records support her claims of malocclusion and TMJ

disorder

Defendants have met their prima facie burden. Their experts set forth that closed reduction surgery was proper and successful in that plaintiff's occlusion was stable and reproducible during her surgery and recovery period. Nevertheless, the affirmation of plaintiff's expert adequately disputes this opinion, contending that the closed reduction was unsuccessful and that the position of the condyle was never corrected causing plaintiff avoidable injuries. In light of the conflicting expert opinions, summary judgment is denied. See Boston v. Weissbart, 62 A.D.3d 517, 518 (1st Dep't 2009); Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008). Accordingly, it is hereby

ORDERED that New York Presbyterian Hospital's motion for summary judgment is denied; and it is further

ORDERED that Edward A. Rosenbaum, D.D.S.'s motion for summary judgment is denied; and it is further

ORDERED that plaintiff's case against Dr. Barak Zargari and Dr. Abed Alkhabt be discontinued and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

ORDERED that the parties shall appear for a previously scheduled pre-trial conference on July 19, 2011 at 9:30 a.m.

Dated: April 4, 2011

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

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