

Mihalo v Patel

2011 NY Slip Op 30898(U)

April 7, 2011

Supreme Court, Suffolk County

Docket Number: 08-30804

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9-1-10
ADJ. DATE 1-26-11
Mot. Seq. # 003 - MD

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JOHN MIHALO and JOAN MIHALO, :
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 Plaintiffs, :
 :
 - against - :
 :
 SURESH A. PATEL, D.M.D., :
 :
 :
 Defendant. :
-----X

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SURESH A. PATEL, D.M.D., :
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 Third-Party Plaintiff, :
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 - against - :
 :
 :
 MICHAEL TUCKER, D.D.S., :
 :
 :
 Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 33; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 34-38; Replying Affidavits and supporting papers 39 - 40; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant/third-party plaintiff Suresh A. Patel, D.M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint and any and all cross claims asserted against him is denied.

This is an action commenced by John Mihalo wherein it is alleged that the defendant/third-party plaintiff Suresh A. Patel, D.M.D. was negligent and otherwise departed from good and accepted standards of dental care on the basis that he failed to heed the plaintiff's condition of oral lichen planus when the plaintiff apprised him of the condition. It is further claimed that Patel failed to provide proper informed consent concerning the risks and perils associated with the dental procedures being employed. A derivative claim has been asserted by the plaintiff's spouse, Joan Mihalo. By way of his bills of particulars, the plaintiff claims that Dr. Patel failed to

properly diagnose and treat a necrotic tooth, caused him to sustain a chemical burn on his gum and upper lip causing scarring and swelling and nerve damage, and further caused a foreign material, gutta percha, to become lodged in the apex above tooth # 8, causing perforation requiring extraction of the tooth and restoration.

In his third-party complaint, Dr. Patel seeks contribution and indemnification from Dr. Tucker based upon their oral agreement wherein he agreed to cover Dr. Tucker's emergency patients while Dr. Tucker was on vacation. It is further claimed that Dr. Tucker concealed from the plaintiff the performance of an incomplete repeat root canal and that such procedure perforated the plaintiff's tooth and ultimately caused or exacerbated the alleged injuries to the plaintiff's face, tooth and jaw.

A prior motion, (002), by Dr. Tucker for summary judgment dismissing the third-party complaint asserted against him was denied on the basis that, although Dr. Tucker's expert established by way of his expert affidavit that Dr. Tucker did not deviate from accepted dental practice and did not perform any of the procedures that allegedly gave rise to the plaintiff's injuries, Dr. Patel's expert raised material triable factual issues warranting denial of the motion.

Dr. Patel now seeks summary judgment dismissing the complaint on the bases that the plaintiff did not inform him of his oral lichen planus condition until after dental treatment had commenced; that the root canal therapy on tooth #8 was indicated and properly performed; the chemical leak and burn was an accepted risk and complication of the procedure he performed and was properly treated; that the plaintiff was given proper informed consent; that he caused no foreign bodies or perforation or any gutta percha to go outside the canal; and that he did not cause any injuries to the plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdarian v Felix*

Contracting Corp., 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [2d Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see, *Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]).

In support of this motion, Dr. Patel has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, verified answer, plaintiff's verified bill of particulars as to Patel, third-party complaint, third-party defendant's answer, verified bill of particulars as to Tucker; copies of uncertified dental records and films; affidavits of Suresh A. Patel, D.M.D. dated August 5, 2010 and Arnold Jutkowitz, D.D.S. dated August 9, 2010; incomplete affirmation of Leslie Seldin, D.D.S. previously submitted in support of Michael Tucker, D.D.S.; uncertified report of Paul Markowitz, D.M.D. dated May 8, 2009; and the unsigned copies of the transcripts of the examinations before trial of John Mihalo dated March 4, 2009, Michael Tucker dated July 27, 2009 and May 21, 2010, and Suresh Patel dated May 14, 2009 and May 20, 2009, which are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion.

Dr. Patel has set forth in his supporting affidavit that he is a dentist duly licensed to practice medicine in the State of New York. He states that on March 14, 2008, while covering for Dr. Michael Tucker who was away on vacation, John Mihalo, a 76 year old male who was a patient of Dr. Tucker, presented to him for the first and only time on an emergency visit for pain and sensitivity in tooth #8 (right upper central incisor). Dr. Patel continues that Gina Wilson, the hygienist at his office, performed a cleaning of Mr. Mihalo's teeth before he saw Mr. Mihalo. Dr. Patel states that there was no significant history proffered to him or his hygienist by Mr. Mihalo. It was only until after material treatment was rendered to Mr. Mihalo did he provide information concerning a history of oral lichen planus, which condition Dr. Patel described as an auto-immune disease. Dr. Patel indicates that at that visit, Mr. Mihalo did not exhibit any signs or symptoms such as inflammation or intraoral irritation or lesions, nor did Mr. Mihalo advise him that he was taking any medications. Upon oral examination, tooth #8 was found to be sensitive to palpation and percussion, and teeth #8 and #9 were found to be covered by old splinted crowns. A periapical x-ray of tooth # 8 revealed tooth decay. He diagnosed Mr. Mihalo's condition as a necrotic tooth or dying nerve and stated he advised Mr. Mihalo that he would need root canal therapy to that tooth to which Mr. Mihalo consented after the risks of the procedure were provided, including perforation, nerve disturbances such as temporary or permanent numbness, itching, burning or tingling of the lip, tongue chin, teeth and/or mouth tissues. Dr. Patel continues that he explained to Mr. Mihalo that it would be better to remove the existing crown over the tooth rather than going through it to perform the procedure because the crown was ill-fitting, had an open margin, was allowing food impaction, and would have to be replaced anyway, but Mr. Mihalo refused to allow the crown to be removed.

Dr. Patel then continues that he utilized a protective rubber dam, testing it with water to ensure it was sealed, confirmed the length of the canal as 21 mm by sonic apex locator and a file in the canal via the mid-op x-ray. Sodium hypochlorite, the most common irrigating solution (described as Clorox bleach diluted with water 1:1) was used for irrigation; however, the solution leaked through due to the decay and opening caused by Dr. Tucker's pervious pin procedure there. This leakage, he states, caused a slight chemical burn of the upper lip near tooth # 8. He states he removed the rubber dam and immediately flushed the area with water and advised Mr. Mihalo of the chemical burn. He continues that he advised Mr. Mihalo that he could close the tooth up and he could wait for Dr. Tucker to return to finish the treatment, or he could perform an amalgam core buildup to seal the opening/space and complete the root canal therapy. After Mr. Mihalo consented, he then sealed the defect with amalgam and filled the canal with gutta percha 21 mm to the apex, then adjusted the bite. He prescribed Penn VK 500mg as an antibiotic, as well as "magic mouthwash" described as Benadryl, Maalox and a local anesthetic, and dispensed Chlor rinse. It was then, states Dr. Patel, that Mr. Mihalo advised him about the oral lichen planus. Dr. Patel states he told Mr. Mihalo to continue his medications prescribed by his physicians. Dr. Patel states that in December 2008, Dr. Tucker advised him that an x-ray taken by him showed that the gutta percha was missing from tooth #8.

Dr. Patel opines to a reasonable degree of dental certainty that he did not depart from good and accepted standards of practice of dentistry in his care and treatment of Mr. Mihalo in that he did not perforate the tooth as there was an undetectable pre-existing space between the tooth and the old crown created by Dr. Tucker's misuse of pins there; that he used a rubber dam which was removed for the first mid-op x-ray, at which time he suspected there may have been a leakage of the sodium hypochlorite; that the sodium hypochlorite was the proper and standard irrigation agent with the correct percentage of dilution; that he did not suspect a leakage of the solution beforehand because the pre-op x-ray did not show the defect or space from the angle it was taken, through the crown with decay not yet removed; and that the defect/space first showed up on the mid-op x-ray with a file in place which is where the solution leaked though and not through the rubber dam which has a pre-measured hole punched for the tooth. Dr. Patel continues that the space was actually caused by Dr. Tucker's prior use of tiny pins to try to retain an old ill-fitting crown instead of just re-doing the crown. He states he promptly apprised Mr. Mihalo of the burn and leakage. He continues that even if a patient has oral lichen planus, as did Mr. Mihalo, that sodium hypochlorite would still be used as the rubber dam would prevent leakage. He states that the root canal was indicated due to the decay in the tooth and nerve. He opines no referral to an endodontist was required and the procedure could be readily done by a general practitioner such as himself as this was simple and straight-forward, one root, with no curvature and no calcification. He states that the root canal procedure was performed appropriately and he described the procedure used. He further states that he did not cause the gutta percha to be pushed past the apex or cause any foreign bodies as he used the crown down technique with titanium files, master cones and then accessory cones to fill the canal, which cones have a stop at 21 mm so they can not possibly go beyond the apex, which is demonstrated on his post-op x-ray. It is Dr. Patel's opinion that when Dr. Tucker redid the root canal (as per the December 15, 2008 statement to the dental insurer), that in the process of removing the gutta percha, placing a post or placing new gutta percha, that the gutta percha or the post was pushed past the apex. Dr. Patel states that the gallium scan found that the foreign bodies were metallic and twice the width of his #40 gutta percha cone, and that he did not use anything metallic during the root canal. Dr. Patel also opines that the subject tooth had an uncertain prognosis to begin with, and any root canal therapy treated tooth has a risk of being lost; it had approximately 30-40% bone loss of both the vertical and horizontal with generalized periodontitis; he did not treat teeth #7 or #9 and could therefore not caused the need for their extraction; and he did not make or insert the crown on tooth #8 that lead to food impaction, decay and the chemical burn.

Dr. Patel's expert, Arnold Jutkowitz, D.D.S. states in his supporting affirmation that he is duly licensed to practice dentistry in the State of New York and opines with a reasonable degree of dental certainty that Dr. Patel did not depart from good and accepted standards of practice of dental care in his care and treatment of the plaintiff and that he did not proximately cause the injuries claimed by the plaintiff. His review of the relevant medical records and x-rays comports with the facts set forth by Dr. Patel in his supporting affidavit. He continues that on March 17, 2008, Dr. Tucker saw the patient and took an x-ray of tooth #8 that demonstrated a completed root canal therapy, filled to the apices. He continues that although Dr. Tucker denies redoing the root canal or attempting to place a post on tooth #8, on December 15, 2008, Dr. Tucker's office completed a statement to the dental insurer indicating that a redone root canal therapy and post had in fact been completed by him that day, and Dr. Tucker's note of December 16, 2008 says "Cont. redo endo & place post." An x-ray of 12/08, for the first time, showed gutta percha¹ no longer in the canal. A radiology/Galileo scan report of Dr. Angelopoulos dated January 3, 2009 indicates the appearance of a foreign body that appears to be metallic akin to a fixation pin, which, states Dr. Patel's expert, was not used by Dr. Patel.

Dr. Jutkowitz states he examined tooth #8 after it was removed from the plaintiff and that he saw metal sticking out of the tooth at an angle. He continued that it was one of Dr. Tucker's pins, which, when the crowns fell off in 2007 and there was decay present, Dr. Tucker tried used the pins to hold the crown on. He states that the pins went into the tooth structure but were not strong enough to support the crown, and that one fell out and the other is still present. The plaintiff's expert states that the pin is at an angle because Dr. Tucker attempted to avoid the nerve of the tooth. He continues that the silver "screw like" device seen next to the tooth is an endo file which indicates the file path insertion wherein the canal was instrumented by Dr. Patel to a size 40 and which went to the apex revealing Dr. Patel did not miss the canal and that there was no perforation. Dr. Jutkowitz further opines that the root canal therapy by Dr. Patel was indicated as there was some decay or black areas seen on the distal side of the tooth margin, and further because Mr. Mihalo presented with pain and sensitivity to percussion. He continues that it was not a departure from good and accepted standards of dental practice not to do a pulp vitality test before the root canal therapy because that is not done when a crown is on the tooth; and it is not a departure to fail to do a panorex or full mouth series because a periapical x-ray of the subject tooth is what the dentist needs before performing a root canal therapy. The plaintiff's expert continues that because there was a periapical abscess, a pulpotomy was not done and it would not have relieved the pain, therefore, opines the plaintiff's expert, it was not a departure for Dr. Patel to complete the root canal therapy instead of merely doing a pulpotomy, placing a medication, and awaiting the return of Dr. Tucker from his vacation.

Dr. Jutkowitz continues that it was not a departure for Dr. Patel to continue the root canal after the burn occurred as the patient wished to continue and if the root canal was not completed, he would have pain due to the problems with his tooth. He continues that a chemical burn from the irrigation solution, sodium hypochlorite, is a risk and complication of the procedure, and the solution would have been used even if it were known that Mr. Mihalo had oral lichens planus, and that Dr. Patel properly treated the burn which resolved within the month. Dr. Jutkowitz further opines that Dr. Patel did not perforate the tooth or cause a hole through which the solution leaked as there was evidence of a space between the crown and root of #8 created by Dr. Tucker's previously misguided use of pins with no core build up to retain the old crown, instead of doing a whole new crown. It is Dr. Jutkowitz's opinion that Dr. Patel did fill the canal with gutta percha to the apex and

¹ The plaintiff's expert sets forth that gutta percha is a filler material that is non-metallic and resembles more the texture and substance of a pencil eraser, it is inert, and it does not cause infection.

did not push gutta percha out a hole. He continues that this is demonstrated by the mid-op x-ray showing an instrument/file in the canal, a post-op x-ray showing gutta percha in the canal to the apex, and an x-ray on March 17, 2008 by Dr. Tucker, showing gutta percha in the canal filled to the apex. He continues that there are only two potential viable means by which the gutta percha that had been filled inside the canal to the apex by Dr. Patel became missing: the gutta percha point/cone pulled out with the #8-#9 bridge when the bridge fell out before the 12/15/08 visit to Dr. Tucker; or Dr. Tucker, in attempting to place a post or in redoing the root canal therapy, started to evacuate the gutta percha to place a post and the whole point/cone came out, and Dr. Tucker covered it up telling the patient the gutta percha was mysteriously missing.


In opposing this motion by Dr. Patel, the plaintiff has submitted the affidavit of his expert, Richard Kobak, a dentist duly licensed to practice dentistry in the State of New York. The plaintiff's expert sets forth that upon Mr. Mihalo's presentation to Dr. Patel, that the oral hygienist performed a cleaning, followed by a peri-apical x-ray of tooth # 8 and the diagnosis of a necrotic tooth or dying nerve was made by Dr. Patel who suggested root canal therapy and provided the risks and alternatives to the treatment. The plaintiff's expert continues that Mr. Mihalo was offered removal of the existing crown, but this was refused. The plaintiff's expert then states that during the procedure sodium hypochlorite diluted with water was used for irrigation, but leaked into the mouth causing a chemical burn to the lip and mouth. The expert continues that Dr. Patel had written in his treatment note that Mr. Mihalo had facial opening #8 (decay) and was advised that the burn on the upper lip was due to decay/leakage and that an amalgam core build-up was placed to seal the facial opening. The plaintiff's expert states that Dr. Patel testified that he must have used a rubber dam as he does for every root canal procedure he does, and that Mr. Mihalo testified that he can definitely say there was no rubber dam put in his mouth.

The plaintiff's expert opines with a reasonable degree of dental certainty that the defendant Dr. Patel departed from the standard of care in the treatment of Mr. Mihalo and that a direct consequence of the departure was the chemical burn sustained to the lip and mouth of the patient. The plaintiff's expert states that there is a factual dispute regarding whether or not a dental dam was used during the procedure performed by Dr. Patel and that his failure to use the protective barrier is a departure from the standard of care and could result in the development of the type of injury sustained by Mr. Mihalo.

Based upon the foregoing, there are conflicting expert reports submitted by the parties which precludes summary judgment dismissing the complaint as asserted against Dr. Patel. "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]).

Accordingly, motion (003) by Dr. Patel for summary judgment dismissing the complaint as asserted against him his denied.

Dated: 7 April 2011



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION