

<b>Leighton v Lowenberg</b>
2011 NY Slip Op 31804(U)
June 30, 2011
Sup Ct, NY County
Docket Number: 115379/08
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
*Justice*

PART IA PART 16

Index Number : 115379/2008

**LEIGHTON, PATRICIA**

VS.

**LOWENBERG, MARC D.D.S.**

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

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

**FILED** PAPERS NUMBERED \_\_\_\_\_

**JUL 05 2011**

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

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

Cross-Motion:  Yes  No

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Upon the foregoing papers, it is ordered that this motion

*by defendant for partial summary judgment is granted and plaintiff's cross-motion is denied insofar as it seeks to amend the complaint but granted to the extent plaintiff seeks to amend the Bill of Particulars in accordance with the accompanying memorandum decision.*

**JUN 30 2011**

Dated: \_\_\_\_\_

*Alice Schlesinger*  
**ALICE SCHLESINGER** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X  
PATRICIA LEIGHTON,

Plaintiff,

Index No.115379/08  
Motion Seq. Nos. 006 & 007

-against-

MARC LOWENBERG, D.D.S., MARC G.  
LOWENBERG, D.D.S. & GREGG LITUCH,  
D.D.S. P.C.

Defendants.

**FILED**

**JUL 05 2011**

-----X  
SCHLESINGER, J.:

NEW YORK  
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This is an action that sounds in dental malpractice. Unfortunately, rather than having the matter proceed in a relatively straightforward manner as to discovery and motion practice and without ascribing fault to either party, discovery and motion practice has taken on a life of its own. It is not an exaggeration to say that hundreds of pages have been spent here on depositions of the parties as well as other witnesses and on motion practice. In fact, each of the parties here has been deposed several days each, even though Dr. Lowenberg's treatment of Patricia Leighton only occurred on two days, June 2, 2006 and June 8, 2006, although it is true that Ms. Leighton also saw Dr. Lowenberg with regard to a consultation on August 10, 2005, and finally on a presentation of the Today Show on June 19, 2006. But the only actual treatment days were June 2, which was taped for the Today Show presentation, and June 8.

I have before me a number of motions made by both parties which again have generated hundreds of pages. We also had extensive oral argument on these motions. My decision is as follows with regard to each of them.

Plaintiff essentially asks for two things in her first motion. She wants to add a cause of action for informed consent and she also wants her attorney to be able to continue and complete the deposition of Saida Corralizza. Ms. Corralizza was Dr. Lowenberg's office manager and did have contact with Ms. Leighton by phone and in person. I have allowed such a deposition, but pursuant to earlier motion practice I had put certain limitations on it. When the deposition occurred, defense counsel concluded it at the end of the business day and after 326 pages of testimony had been taken.

However, plaintiff's counsel says in his motion that that was not enough. Specifically, counsel discusses various other items, such as chart entries and billing questions and correspondence between the parties as well as correspondence between Dr. Lowenberg and third parties. Counsel says that he just did not have enough time to pursue these other areas. However, I will not allow an additional deposition, no matter how limited it might be, of Ms. Corralizza. As mentioned earlier, this Court believes there has been excessive deposition practice here by both sides and there comes a point where the Court has to say enough. The Court is now saying enough.

As to the other request by plaintiff's counsel, to add a new cause of action sounding in informed consent, that is denied as well. Despite an excessive amount of argument put forward by plaintiff's counsel in support of this request, what he should realize is lacking is an affirmation or affidavit from an expert which is needed to show that there is a meritorious cause of action sounding in lack of informed consent. For example, in the Court of Appeals case *Orphan v. Pilnik*, 15 NY3d 907 (2010), the Court did not allow this cause of action to go forward because although plaintiff did submit an expert's affirmation in opposition to defendants motion for summary judgement, that affirmation did not contain

any statement with certainty from the expert that the information the plaintiff allegedly received prior to the procedure was a departure from what a reasonable practitioner would have disclosed.

Further, in *Pagan v. Quinn*, 51 AD3d 1299 (3rd Dep't 2008), the plaintiff there, similar to the plaintiff here, wished to add a cause of action sounding in informed consent. This request was made four and a half years after the underlying surgery and more than two years after service of the original complaint. Here, the plaintiff wants to add this cause of action five years after the dental services were provided and three years after the action was commenced. Both the Supreme Court hearing the original motion in *Pagan* and the Appellate Division found that it would be an abuse of discretion for the court to allow an amendment at that late date, in that it would prejudice the defendant. One could say the same thing here, namely, that this cause of action which relies preliminary on the recollections of the parties and is a new allegation would be hard for the defendant to respond to. Finally, again there has been no expert affirmation, a necessary prerequisite to support the issue, as to what the standard of care is as to the information a dental practitioner must provide.

In another motion filed by the plaintiff, there is a request to further amend the complaint and bill of particulars to add a cause of action sounding in breach of contract and fraud. Allegedly the breach of contract claim is a failure to provide such treatment as was spelled out by Dr. Lowenberg in a treatment plan of May 2, 2006 (Exhibit K to plaintiff's motion). Ms. Leighton says that without her consent, Dr. Lowenberg deviated from that treatment plan. She goes into further details as to what those deviations were. These involve installing SPPD Dentures and interlocking double crowns. Ms. Leighton states that

Dr. Lowenberg promised her that he would do these things himself, but that in actuality, he referred her to another dentist. Additionally, deviations from the treatment plan are asserted, but it is not necessary to burden this decision by reciting those other alleged deviations.

As to the cause of action sounding in fraud, the plaintiff enumerates seven different areas where she says Dr. Lowenberg deceived her into believing certain things with regard to the treatment. Again without going into detail and naming what those seven allegations are, it should be noted that virtually all of them are duplicative of the allegations given to support the breach of contract claim (and in fact the malpractice claims as well).

Finally, the plaintiff wants to amend her Bill of Particulars to claim an additional injury from her not taking Bisphosphonate medication. Ms. Leighton indicates that she had been taking this medication, which is to build up one's bones, but had to stop taking it while Dr. Lowenberg performed his treatment. Ms. Leighton says that because of this interruption in taking this medication, she sustained a broken leg.

Also, It appears that Ms. Leighton wants to amend her pleadings with regard to the injury she suffered specifically in the extractions of tooth numbers 5, 12 and 13, which occurred after the action was commenced. She says Dr. Lowenberg was responsible for these extractions.

The defendant strenuously opposes the amendment of the complaint to add breach of contract and fraud as well as informed consent. Even though counsel for the plaintiff had brought an earlier motion to amend the complaint to add a cause of action for informed consent, not surprisingly in this second motion, besides wanting to add breach of contract and fraud, he again asks for permission to add a cause of action for informed consent.

Defense counsel opposes and argues that the treatment plan, which is the arguable predicate for the breach of contract cause of action was not in fact a contract. Rather, it was a cost estimate for her treatment. Further, he says that this treatment plan does not contain all of the material terms necessary to form a contract and a meeting of the minds between the parties.

As to the fraud, counsel dismisses that as ridiculous. And as to both, counsel argues they are duplicative of the malpractice claims.

Besides opposing plaintiff's motion, defense also wants to further depose the plaintiff with regard to her new theories of liability assuming I allow the amendments and injuries. He also wants an additional IME for Ms. Leighton.

Again I am denying the request to add an informed consent based on the decisions and law cited above. Similarly, I am denying the motion to amend the complaint to add a cause of action in breach of contract and in fraud. In *Scalisi v. NYU Medical Center*, 24 AD3d 143 (1<sup>st</sup> Dep't 2005), the Court refused to allow a breach of contract cause of action to be added to an action that basically sounded in medical malpractice. The Court said there that a breach of contract action is legally redundant to a malpractice claim and may not be pursued unless a plaintiff can prove that, within the context of medical treatment, the defendant expressed a specific promise to effect a cure or to accomplish some definite result.

Here, plaintiff is unable to do that. The same allegations which the plaintiff uses as her predicate for breach of contract and of fraud are also predicates for her actions sounding in dental malpractice. Therefore, there would be a redundancy here to allow plaintiff to add those new causes of action.

However, I will allow the plaintiff to amend her bill of particulars to include the additional injuries she is now claiming such as a broken leg and additional tooth extractions. However, along with this amendment, I will allow the defense to schedule an IME as to the broken leg claim and to depose Ms. Leighton on this narrow issue. The additional deposition will be limited to the broken leg injury and to the extent that it has not been gone into before during the days of her earlier depositions, the extraction of these three additional teeth.

Finally, there is a motion by the defendant for summary judgment as to the following causes of action. The first and second which sound in breach of contract (this is based on the assumption that the Court has allowed the amendment, which it has not), the third and fourth that sound in breach of expressed warranty, the fifth and sixth that sound in breach of implied warranty and fitness and the tenth through twelfth which sound in gross negligence. In other words the only causes of action which the defendant is not moving to dismiss are 7,8, and 9 which allege dental malpractice. They are not an issue in this motion.

As stated earlier in this opinion, I have found that the claims sounding in breach of contract are duplicative of the one's sounding in malpractice. So they will not be allowed. With regard to the causes of action which sound in expressed warranty or implied warranty to fitness, those will also not be allowed and are dismissed. Defense counsel correctly argues that the only "warranties" that the plaintiff says that the defendant made was that he would provide her with a "perfect smile" and/or make her teeth "drop dead gorgeous". With regard to any implied warranties, the allegations by Ms. Leighton here is that the work that he would be doing would last twenty years. But the work did not last twenty years.

These are not appropriate predicates for express or implied warranty claims. At best they are exaggerated claims or puffing. Assuming that these were promises made by Dr. Lowenberg, they are also duplicative of the claims sounding in dental malpractice.

I am also granting defendant's motion for dismissal of the tenth through twelfth causes of action, sounding in gross negligence. Defense counsel argues that these actually sound in punitive damages, which cannot be pled separately. While that principle of law is correct, plaintiff does not expressly assert punitive damages. Rather she claims Dr. Lowenberg was grossly negligent. However, if these causes of action were allowed, they could form a predicate for punitive damages. I find that the allegations alleged by Ms. Leighton in her affidavit opposing this aspect of defendant's motion do not sufficiently state anything other than dental malpractice claims. Essentially, relying in part on taped phone conversations with Dr. Lowenberg, she tries to show that he intentionally misrepresented what he intended to do for his own self interest. Irregardless of whether this is correct, what the case is about is the quality of care and treatment he provided. If that care was deficient and led to injuries which are provable, she will be compensated for those injuries. Ms. Leighton's degree of unhappiness and/or outrage does not lead to claims which are not legally supportable.

Accordingly, it is hereby

ORDERED that defendant's motion for partial summary judgment (seq. 006) is granted as provided herein; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint to add causes of action sounding in breach of contract and fraud is denied, but the cross-motion is granted insofar as plaintiff seeks to serve an amended Bill of Particulars to the extent provided

herein; and it is further


ORDERED that plaintiff's motion to amend the complaint to add a cause of action sounding in informed consent and to further depose Saida Corralizza (seq. 007) is denied; and it is further

ORDERED that defendant's cross-motion for a further deposition and physical examination of the plaintiff is granted to the extent the Bill of Particulars is amended as provided herein.

This decision constitutes the order of the Court.

Dated: June 30, 2011

**JUN 30 2011**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**FILED**

**JUL 05 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**