

Oviedo v Weinstein

2011 NY Slip Op 32390(U)

August 24, 2011

Sup Ct, Nassau County

Docket Number: 679/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

ARISTOBULO OVIEDO,

Plaintiff(s),

Index No. 679/09

-against-

**Motion Submitted: 7/6/11
Motion Sequence: 001, 002, 003**

**ERIC WEINSTEIN, DDS, SULTAN SALEM, DDS,
ISLAND DENTAL ASSOCIATES PLLC and
ISLAND SMILE DENTAL ASSOCIATE PLLC,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

This motion by the defendant Sultan Salem DDS, for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint against him in its entirety or, in the alternative, an order pursuant to CPLR § 214-a dismissing all malpractice claims which occurred prior to July 14, 2006, is determined as provided herein.

This motion by the defendants Eric Weinstein, DDS and Island Dental Associates, LLC ("Island Dental") for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint against them is determined as provided herein.

This motion by the plaintiff Aristobulo Oviedo for an order pursuant to CPLR § 3215 granting him a default judgment against defendant Island Smile Dental Associate PLLC is determined as provided herein.

[2]

The plaintiff in this action seeks to recover damages for dental malpractice, lack of informed consent and breach of warranty. Succinctly put, the plaintiff maintains that the defendants unnecessarily surgically removed seven of his teeth and negligently recommended and performed surgical implants all of which failed because of his insufficient bone structure.

The defendants seek summary judgment dismissing the complaint against them. The plaintiff seeks a default judgment against the defendant Island Smile Dental Associate PLLC.

The plaintiff's motion for a default judgment against Island Smile Dental Associate PLLC is denied. There is no proof that notice of this application as is required by CPLR § 3215(g) has been provided. In any event, the motion is untimely: Island Smile Dental Associate PLLC was allegedly served on January 26, 2009 and this motion was not made until on or about May 11, 2011. (*CPLR §3215[c]*). And, a reasonable excuse for the plaintiff's delay and the existence of a potentially meritorious cause of action, which are required to avoid dismissal pursuant to CPLR § 3215(c), have not been established. (*Ryant v. Bullock*, 77 A.D.3d 811, 908 N.Y.S.2d 884 (2d Dept., 2010); *115-41 St. Albans Holding Corp. v. Estate of Harrison*, 71 A.D.3d 653, 894 N.Y.S.2d 896 (2d Dept., 2010); *Butindaro v. Grinberg*, 57 A.D.3d 932, 871 N.Y.S.2d 317 [2d Dept., 2008]). There is no evidence of a viable claim against Island Smile Dental Associate PLLC. Plaintiff never testified to being treated there. (See, *Durr v. New York Community Hosp.*, 43 A.D.3d 388, 840 N.Y.S.2d 430 [2d Dept., 2007]). The plaintiff's attempt to establish that Island Smile Dental Associates PLLC is united in interest with Island Dental fails. Island Dental's website indicates a possible relationship between it and Island Smile Dental Group, not Island Smile Dental Associate PLLC. Nor does the Department of State printout indicate a relationship between Island Smile Dental Associates and Island Dental. There has not been any relationship between the defendant Island Dental and Island Smile Dental Associate, PLLC warranting the imposition of liability on Island Smile Dental Associate PLLC for Island Dental's actions. In view of the foregoing, the complaint against Island Smile Dental Associate, PLLC is dismissed. (*CPLR § 3215[c]*).

The facts pertinent to the determination of the defendants' motions are as follows:

The plaintiff began treatment at Island Dental with Dr. Salem on October 2, 2004. Island Dental is owned by defendant Eric Weinstein, DDS and Dr. Salem is an independent contractor there. At his examination-before-trial, Dr. Salem testified that upon presentation, the plaintiff was missing several upper teeth and wore an ill-fitting upper denture, which was over 20 years old. Maxillary and mandibular impressions were taken. His examination of the plaintiff's remaining maxillary teeth revealed that they were in poor condition. He observed tissue and bone loss and concluded that the plaintiff's upper teeth were non-restorable. His

proposed plan was to remove the plaintiff's remaining seven upper teeth, to insert four implants and to fabricate a maxillary implant overdenture. Dr. Salem testified that he told the plaintiff about two alternatives: a completely fixed appliance, which necessitated bone grafting and additional implants in the bilateral posterior of his upper jaw or a removable full upper denture without any implants. The plaintiff testified at his examination-before-trial that he was told that the partial implants were his best option and that that was what he wanted. He accordingly agreed to a removable implant overdenture supported by four implants.

The extractions and implants were performed by Dr. Salem on April 2, 2005. The plaintiff testified that he signed three consent forms that he discussed with Dr. Salem but he did not read. The first consent form was for surgical extractions with immediate implant and full upper denture. It noted "tissue loss and bone loss around teeth and are non-restorable." The second consent form was for full upper dentures and noted "immediate full upper denture, extract all upper remaining teeth. Patient to wear full upper denture until implants have integrated completely and initial overbar denture is to be fabricated." The third consent form was for implants and stated "implants to be placed in maxillary anterior region." The implant consent form lists known risks including possible implant failure. It stated "no guarantees or assurance as to the outcome or results of treatment or surgery can be made." On April 2nd, Dr. Salem extracted seven upper teeth and inserted three, not four, implants and made and placed a full temporary upper denture, provided post-operative instructions and prescribed Amoxicillin.

Visits to Dr. Salem on April 9th and May 14th revealed that the plaintiff's healing was within normal limits. On May 28, 2005, Dr. Salem attempted to add another implant in the plaintiff's anterior maxilla but was unable to do so due to a lack of maxillary bone. The plaintiff was accordingly advised that the maxillary overdenture would be set on three implants. At his visit on July 2, 2005, three radiographs were taken. The plaintiff was seen six times in August and September to have the overdenture fabricated. On October 8, 2005, the overdenture was in its final stages. Dr. Salem noted that the plaintiff was not happy or realistic. Dr. Salem made further adjustments on October 15, 2005 but noted that the plaintiff was bitter and remained unrealistic.

On October 26, 2005, Dr. Salem planned on inserting the overdenture, however he discovered that implant site no. 9 was mobile. A radiograph revealed that the implant had not osseointegrated and so it was removed under local anesthesia. The overdenture framework was tried on. Dr. Salem noted that the plaintiff desired "a complete seal for water [and] small food particles not to get under the denture" and that he advised him that that was not possible but that he would discuss it with the laboratory technician. Dr. Salem noted that the plaintiff remained unrealistic and lacked understanding. He also noted that the plaintiff accepted the overdenture, which would be supported by the implants and tissue.

On November 8, 2005, the overdenture was tried on again. The plaintiff complained about blowing bubbles through the dentures and requested adjustments. On December 3, 2005, the plaintiff was seen by Dr. Weinstein for the first time. The wax set up of the overdenture was tried on. On December 6, 2005, Dr. Salem saw the plaintiff, he noted that the plaintiff no longer wanted the overdenture but wanted a fixed non-removable appliance. Dr. Salem accordingly referred the plaintiff to oral surgeon Dr. Rossman for evaluation. On December 17, 2005, Dr. Rossman informed Dr. Salem that the plaintiff required a bilateral autogenous graft from his hip to augment his inadequate posterior maxillary alveolar bone for a completely fixed upper bridge. The plaintiff saw Dr. Salem on December 29, 2005 and they discussed Dr. Rossman's recommendation. While the plaintiff believed that Dr. Salem should pay for the bone graft procedure, Dr. Salem denied responsibility for that but he agreed to further discuss the option with Dr. Rossman. Upon learning that Dr. Rossman did not perform the type of bone grafting that the plaintiff required himself, Dr. Salem referred the plaintiff to Dr. Sachs. On January 14, 2006, the plaintiff requested that Dr. Salem pay for his consultation with Dr. Sachs as well as the recommended bone graft procedure. Dr. Salem refused but offered to adjust the plaintiff's current denture. The plaintiff refused treatment and declared that "he would do things his way." He accused Dr. Salem of "messing up" and declared that he no longer wanted to be treated by him. In fact, at his examination-before-trial, the plaintiff testified that he told Dr. Weinstein that he did not want to see Dr. Salem anymore.

Nine months later, the plaintiff returned to Island Dental and was seen by Dr. Weinstein. The plaintiff complained about the implant site of tooth no. 11 but a radiograph revealed nothing of any significance. Dr. Weinstein adjusted the plaintiff's denture and suggested that it be relined or remade. He also referred the plaintiff to oral surgeon Dr. Panossian for a consultation regarding additional implants to complete the restoration to the plaintiff's satisfaction. The plaintiff returned to discuss Dr. Panossian's recommendations with Dr. Weinstein on December 23, 2006 and January 27, 2007. On February 22, 2007, the plaintiff contacted Dr. Weinstein and asked that he pay for a bone grafting procedure but Dr. Weinstein only offered a credit of \$3,150. Subsequently, on October 20, 2007, the plaintiff resumed treatment by Dr. Weinstein requesting a new upper denture, which was fabricated, delivered and installed over six visits, the last one on January 11, 2008.

In August, 2008, the plaintiff consulted with oral surgeon Dr. Menashian at Long Island Oral and Maxillofacial Surgery, who referred the plaintiff to Dr. Heisler, a prosthodontist at Elite Dental Spa, in September, 2008. Dr. Heisler gave the plaintiff two alternative treatment options to restore his upper arch.

"The requisite elements of proof in a dental malpractice action are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries." (*Zito v. Jastremski*, 84 A.D.3d 1069, 925

N.Y.S.2d 91 (2d Dept., 2011), citing *Sharp v. Weber*, 77 A.D.3d 812, 813, 909 N.Y.S.2d 152 (2d Dept., 2010); *Koi Hou Chan v. Sammi Yeung*, 66 A.D.3d 642, 887 N.Y.S.2d 164 (2d Dept., 2009); *Cohen v. Kalman*, 54 A.D.3d 307, 863 N.Y.S.2d 63 [2d Dept., 2008]). “Consequently, on a motion for summary judgment, a defendant has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such a departure, that it was not a proximate cause of the plaintiff’s injuries.” (*Zito v. Jastremski, supra, citing Myers v. Ferrara*, 56 A.D.3d 78, 83, 864 N.Y.S.2d 517 (2d Dept., 2008); *Larsen v. Loychusuk*, 55 A.D.3d 560, 866 N.Y.S.2d 217 (2d Dept., 2008); *Terranova v. Finklea*, 45 A.D.3d 572, 845 N.Y.S.2d 389 [2d Dept., 2007]). “To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s bill of particulars.” (*Zito v. Jastremski, supra, citing Koi Hou Chan v. Sammi Yeung, supra*, at p. 643; see also, *Ward v. Engel*, 33 A.D.3d 790, 791, 822 N.Y.S.2d 608 (2d Dept., 2006); *Johnson v. Ladin*, 18 A.D.3d 439, 794 N.Y.S.2d 441 [2d Dept., 2005]).

“To defeat summary judgment, the non-moving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party’s prima facie showing.” (*Zito v. Jastremski, supra, citing Stukas v. Streiter*, 83 A.D.3d 18, 21-26, 918 N.Y.S.2d 176 [2d Dept., 2011]). “However, mere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the claim at issue, are insufficient to defeat summary judgment.” (*Zito v. Jastremski, supra, citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Rebozo v. Wilen*, 41 A.D.3d 457, 838 N.Y.S.2d 121 (2d Dept., 2007); *Gargiulo v. Geiss*, 40 A.D.3d 811, 812, 836 N.Y.S.2d 276 [2d Dept., 2007]).

Dr. Salem has submitted the affirmation of a board-certified oral and maxillofacial surgeon, Dr. Kucine. Having reviewed the pertinent legal and dental records, he opines that the malpractice claims against Dr. Salem are without merit. He opines that “the plaintiff was given all of the necessary information in order for him to give informed consent to the extraction of teeth . . . and the insertion of implants” as well as “the treatment plan implemented by Dr. Salem to restore his maxillary arch with an implant-supported removable upper denture.” He opines that the plaintiff’s consent to extractions and implants conformed with acceptable standards of dental care: Dr. Salem’s pre-operative discussions with the plaintiff regarding the risks, complications and alternatives as documented in his records and confirmed at his deposition were appropriate. He further notes that the consent forms themselves for the extractions and implants explicitly detailed the underlying condition and the risks. He notes that the plaintiff acknowledged signing the forms and discussing everything with Dr. Salem. Dr. Kucine also opines that the plaintiff was given all of the necessary information to give informed consent for the treatment plan. Again, the alternatives were all documented in the plaintiff’s records and confirmed by Dr. Salem at his deposition. Furthermore, the form itself, which the plaintiff signed, outlined the purpose and

functionality of a full denture as well as the complications associated with its wear. He explains “the plaintiff testified that it was his understanding that his upper denture would be attached to a bar, or piece of metal that was screwed into his implants, and that the denture would be put on top. In layman’s terms, the plaintiff’s testimony essentially defines what an overbar denture is, and mirrors Dr. Salem’s testimony regarding the definition of an overbar denture.” Accordingly, Dr. Kucine finds the plaintiff’s lack of informed consent claim to be without merit.

As for the treatment provided, Dr. Kucine opines that the radiographs of October 2, 2004, clearly reveal that the plaintiff’s upper teeth could not be used to anchor a new prosthesis because they were severely weakened periodontally. Accordingly, their extraction was required. He further opines that Dr. Salem’s reliance on a panoramic radiograph to diagnose and formulate a treatment plan was appropriate and that no further testing was indicated. Dr. Kucine also opines that Dr. Salem’s visualization and measurement of the available bone for the placement of implants and Dr. Salem’s exposure of the maxillary alveolar bone to determine where three implants would be placed was appropriate. Dr. Kucine also opines that while Dr. Salem appropriately planned a four implant supported overdenture, that the placement of three implants rather than the four planned was appropriate, too, since Dr. Salem discovered the lack of adequate bone structure during the procedure. He opines that an implant supported overdenture can be successfully restored on two to four implants; that as reflected in the plaintiff’s radiographs and per Dr. Salem’s testimony at his examination-before-trial, the implants were solid when first inserted on April 2, 2005; and, that, the plan to do the maxillary overdenture on three implants was appropriate. Dr. Kucine further opines that the fact that the implants ultimately failed is not indicative of negligence: That is a known risk that can occur absent a departure from the standard of care. Finally, Dr. Kucine opines that Dr. Salem never reinserted any implants so he could not have acted negligently in doing so.

Via Dr. Kucine’s affirmation Dr. Salem has established his entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

In any event, the claims against Dr. Salem have established that the complaint against him is untimely. An action sounding in medical malpractice must be commenced within two years and six months of the date of accrual. (*CPLR § 214-a*). A medical malpractice claim accrues on the date(s) that the alleged malpractice takes place. (*Massie v. Crawford*, 78 N.Y.2d 516, 583 N.E.2d 935, 577 N.Y.S.2d 223 (1991), *rearg den.*, 79 N.Y.2d 978 (1992), *citing Nykorchuck v. Henriques*, 78 N.Y.2d 255, 258, 577 N.E.2d 1026, 573 N.Y.S.2d 434 [1991]). However, CPLR § 214-a “has a built in toll that delays the running of the limitations period ‘where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure.’ ” (*Gomez v. Katz*, 61 A.D.3d 108, 111, 874

N.Y.S.2d 161 (2d Dept., 2009), quoting CPLR § 214-a, citing *Nykorchuck v. Henriques*, *supra*, at p. 255; *Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d 291, 295, 693 N.E.2d 196, 670 N.Y.S.2d 169 (1998); *Allende v. New York City Health & Hospitals Corp.*, 90 N.Y.2d 333, 337, 683 N.E.2d 317, 660 N.Y.S.2d 695 (1997); *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 [1982]). “The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor’s skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself.” (*Gomez v. Katz*, *supra*, at p. 111, citing *Massie v. Crawford*, *supra*, at p. 519; *Coyne v. Bersani*, 61 N.Y.2d 939, 940, 463 N.E.2d 371, 474 N.Y.S.2d 970 (1984); *Siegel v. Kranis*, 29 A.D.2d 477, 480, 288 N.Y.S.2d 831 (2d Dept., 1968). The continuous treatment doctrine contains three principal elements. First, the plaintiff must have continued to seek and obtained an actual course of treatment from the defendant during the relevant period. (*Gomez v. Katz*, *supra*, at p. 111-112 (citations omitted). Second, the course of treatment provided by the defendant must have been for the same condition or complaints underlying the plaintiff’s medical malpractice claim. (*Gomez v. Katz*, *supra*, at p. 112 [citations omitted]). Third, the defendant’s treatment must have been “continuous.” (*Gomez v. Katz*, *supra*, at p. 112 [citations omitted]).

“Continuity of treatment is often found to exist ‘when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during th[e] last visit in conformance with the periodic appointments which characterized the treatment in the immediate past (citations omitted).’ ” (*Gomez v. Katz*, *supra*, at p. 112 quoting *Richardson v. Orentreich*, 64 N.Y.2d 896, 898-899, 477 N.E.2d 210, 487 N.Y.S.2d 731 [1985]). “Regardless of the absence of physical or personal contact between them in the interim, where the physician and patient reasonably intend the patient’s uninterrupted reliance upon the physician’s observation, directions, concern and responsibility for overseeing the patient’s progress, the requirement for continuous care and treatment for the purposes of the Statute of Limitations is certainly satisfied.” (*Richardson v. Orentreich*, *supra*, at p. 899; *see also*, *Allende v. New York City Health & Hospitals Corp.*, *supra*, at p. 339. Furthermore, “a discharge by a physician does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment (citations omitted).” (*Gomez v. Katz*, *supra*, at p. 113). Indeed, in evaluating whether the doctrine applies “as a practical matter, it is not always possible to know at the conclusion of one visit with a physician whether a further visit with the physician may become indicated for the same condition within a reasonable time thereafter.” (*Gomez v. Katz*, *supra*, at p. 114.

Nevertheless, “[w]hether or not a patient’s consultation with a new physician constitutes a severance of continuous treatment with an earlier physician depends upon the reasons underlying the new consultation.” (*Gomez v. Katz, supra*, at p. 115). The continuing “trust and confidence” is determinative. (See, *Gomez v. Katz, supra*, at p. 115; see also, *Allende v. New York City Health & Hospitals Corp., supra*, at p. 939). Therefore, treatment for related conditions, i.e., interim check-ups and teeth cleaning by the plaintiff’s other doctors like a primary dentist even if the defendant physician’s specialty work is discussed does not alone sever the continuity of treatment. (*Gomez v. Katz, supra*, at p. 116, citing *Rudolph v. Jerry Lynn, D.D.S., P.C.*, 16 A.D.3d 261, 792 N.Y.S.2d 410 [1st Dept., 2005]). Nor do consultations for second opinions (*Gomez v. Katz, supra*, at p. 116, citing *Marmol v. Green*, 7 A.D.3d 682, 777 N.Y.S.2d 512 [2d Dept., 2004]) or treatments by others for different ailments or conditions (*Gomez v. Katz, supra*, at p. 116, citing *Melup v. Morrissey*, 3 A.D.3d 391-392, 771 N.Y.S.2d 8 [1st Dept., 2004]). However, if the plaintiff’s continuing trust and confidence in the physician is lost, the toll does not apply. (See, *Allende v. New York City Health & Hospitals Corp., supra*, at p. 339; see also, *Parisi v. DeVita*, 54 A.D.3d 319, 862 N.Y.S.2d 575 (2d Dept., 2008); *Sposato v. DiGiacinto*, 247 A.D.2d 267, 668 N.Y.S.2d 612 [1st Dept., 1998]).

The plaintiff’s last treatment by Dr. Salem personally took place on January 14, 2006. In fact, the plaintiff declared his outright dissatisfaction with Dr. Salem and clearly severed his relationship with him as well as Island Dental. Because this action was not commenced until January 14, 2009, unless they are saved by the continuous treatment doctrine, the plaintiff’s claims against Dr. Salem and Island Dental that accrued prior to July 14, 2006 are time barred.

The plaintiff’s reliance on his return to the defendants’ care in October 2006 to establish the required continuum of treatment fails. First of all, his return does not constitute continuing treatment but rather, was a return to or resumption of treatment, which does not qualify for the application of the continuous treatment doctrine. (See, *Capece v. Nash*, 70 A.D.3d 743, 897 N.Y.S.2d 124 (2d Dept., 2010); *McDermott v. Torre, supra*; *O’Donnell v. Siegel*, 49 A.D.3d 415, 854 N.Y.S.2d 45 (1st Dept., 2008); *Marabello v. City of New York*, 99 A.D.2d 133, 472 N.Y.S.2d 933 (2d Dept., 1984); *Barrella v. Richmond Memorial Hosp.*, 88 A.D.2d 379, 453 N.Y.S.2d 444 [2d Dept., 1982]). In any event, he did not return to Dr. Salem during that time period but sought treatment from Dr. Weinstein. Dr. Salem’s minimal participation via observation is an inadequate predicate for a finding of continuity and liability. Finally, the plaintiff has not advanced a theory of negligence grounded upon his treatment by Dr. Salem or any of the defendants during that time period.

In support of his motion, Dr. Weinstein has submitted the affirmation of dentist Dr. Margolies, a member of the American Academy of Cosmetic Dentistry, the International College of Oral Implantology, the American Academy of Osteointegration and the Academy

of General Dentistry. Having reviewed the pertinent legal and dental records, he opines that Dr. Weinstein did not depart from good and accepted practice in caring for the plaintiff. He notes that the plaintiff's allegations of negligence are premised upon the extraction of the his teeth and the implants, none of which Dr. Weinstein meaningfully participated in. He notes that Dr. Salem prepared the treatment plan, extracted the teeth and performed the implant surgeries. Dr. Margolies notes that Dr. Weinstein's interaction with the plaintiff was not only very limited but occurred long after the alleged acts of negligence were committed. His only involvement with the plaintiff was for a wax impression for the provision of a temporary denture, which is not an alleged act of negligence and subsequent adjustments of an existing denture and a referral to an oral surgeon, again, none of which are involved in the plaintiff's allegations of negligence. Dr. Weinstein has also established his entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

The plaintiff's expert's affidavits are not in admissible form. As an affidavit executed outside of New York State, it does not comply with CPLR § 2309. It is also inadmissible in affirmation form as an out of state dentist may not affirm his statement pursuant to CPLR § 2106. *See, Worthy v. Good Samaritan Hosp. Medical Center*, 50 A.D.3d 1023, 857 N.Y.S.2d 178 [2d Dept., 2008]). It will nevertheless be considered in the interest of judicial expediency. Even then, the plaintiff has failed to establish the existence of a material issue of fact as to either Dr. Salem or Dr. Weinstein.

The plaintiff's expert completely fails to attribute any acts of negligence to Dr. Weinstein. He opines that Dr. Salem's treatment plan was contraindicated due to a lack of bone support. The theory underlying the plaintiff's negligence theory cannot be attributed in any way to Dr. Weinstein's limited role in his treatment of the plaintiff. And, there is no evidence that Dr. Weinstein had or exercised any control over Dr. Salem's course of treatment of the plaintiff. Accordingly, vicarious liability does not lie. (*Cf., Ross v. Mandeville*, 45 A.D.3d 755, 756-757 (2d Dept., 2007), *citing Kavanaugh v. Nussbaum*, 71 N.Y.2d 535, 547, 523 N.E.2d 284, 528 N.Y.S.2d 8 (1988); *Hill v. St. Clare's Hosp.*, 67 N.Y.2d 72, 79, 490 N.E.2d 823, 499 N.Y.S.2d 904 (1986); *Reeck v. Huntington Hosp.*, 215 A.D.2d 464, 465-466, 626 N.Y.S.2d 516 (2d Dept., 1995); *Graddy v. New York Med. Coll.*, 19 A.D.2d 426, 429, 243 N.Y.S.2d 940 (1st Dept., 1963). The plaintiff has failed to establish the existence of a material issue of fact as to Dr. Weinstein. The complaint against him is dismissed.

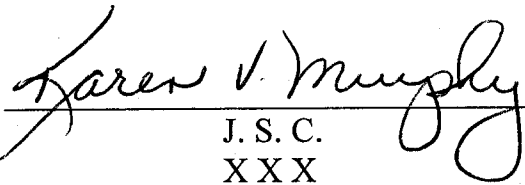
As for Dr. Salem, while the plaintiff has established the existence of a material issue of fact as to his negligence, more specifically, his dental plan and its implementation without adequate testing of his bone structure, he has failed to establish an issue of fact as to the bar posed by the Statute of Limitations: He has not established the existence of an issue of fact

concerning the applicability of the continuous treatment doctrine. The complaint against Dr. Salem is dismissed.

In view of the foregoing, the complaint against Island Dental is also dismissed. In addition, the court notes that Island Dental cannot be held vicariously liable to the plaintiff for negligence committed by Dr. Salem because he was not its employee but was rather an independent contractor. (*Tereshchenko v. Lynn*, 36 A.D.3d 684, 686, 36 A.D.3d 684, 828 N.Y.S.2d 185 (2d Dept., 2007), citing *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273, 614 N.E.2d 712, 598 N.Y.S.2d 149 [1993]).

The foregoing constitutes the Order of this Court.

Dated: August 24, 2011
Mineola, N.Y.



J. S. C.
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ENTERED
AUG 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE