

**Merk v Kaplan**

2011 NY Slip Op 32970(U)

November 4, 2011

Supreme Court, New York County

Docket Number: 111448/09

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

SUE MERK

INDEX NO. 111448/09

- v -

MOTION DATE 8/30/11

ANDREW S. KAPLAN DMD

MOTION SEQ. NO. 2

The following papers, numbered 1 to 17, were read on this motion to for summary judgment

Notice of Motion / Order to Show Cause - Affidavits - Exhibits \_\_\_\_\_

No(s) 1-12

Answering Affidavits - Exhibits \_\_\_\_\_

No(s) 13-14

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

No(s) 15-17

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

**FILED**

NOV 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/4/11

JOAN B. LOBIS J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
SUE MERK,

Plaintiff,

Index No. 111448/09

-against-

**Decision and Order**

ANDREW S. KAPLAN, DMD, MARK J. GROSS,  
D.D.S. and DENTAL PARTNERS OF FIFTH  
AVENUE,

**FILED**

Defendants.

NOV 09 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Andrew S. Kaplan, DMD ("Dr. Kaplan"), Mark J. Gross, D.D.S. (Dr.

Gross), and Dental Partners of Fifth Avenue ("Dental Partners") move, by order to show cause, for an order pursuant to C.P.L.R. Rule 3212, granting summary judgment against plaintiff Sue Merk and dismissing plaintiff's complaint in its entirety, or in the alternative, for an order pursuant to C.P.L.R. Rule 3211(a)(5), dismissing claims for treatment provided prior to February 12, 2007, or two and one-half years prior to the filing of this dental malpractice lawsuit, as barred by the statute of limitations.

Ms. Merk first saw Dr. Kaplan on September 15, 2005, at the offices of Dental Partners. She complained of irritated gums related to a crown placed at tooth number 3 (third upper right molar) by a prior treating dentist. In addition to recommending new crowns for her right molars, Dr. Kaplan recommended that plaintiff replace the gold crowns on her left lower molars, teeth numbers 18 and 19, because x-rays showed decay in the margins between her natural teeth and the crowns. On November 7, 2005, impressions were made, and the crowns were temporarily cemented on November 15, 2005. Plaintiff returned to Dr. Kaplan on December 5, 2005, with a

complaint regarding the cosmetic appearance of tooth number 19. Dr. Kaplan remade the crown for number 19 and it appears that he permanently cemented the crowns on January 2, 2006.

On November 29, 2007, plaintiff presented with increased sensitivity in the left upper premolar region. X-rays indicated that her old silver fillings in teeth numbers 12 and 13 were fractured and leaking decay. Dr. Kaplan recommended that plaintiff have crowns placed at those teeth and advised her of the need for a possible root canal. On December 13, 2007, Dr. Kaplan fitted crowns on teeth numbers 12 and 13 and temporarily cemented them in place. Plaintiff complained that the underlying metal capping was visible on tooth number 13. Dr. Kaplan suggested three possible solutions: he could redo the crown at 13; adjust the opposing tooth to accommodate plaintiff's bite; or leave it alone. Plaintiff elected to redo the crown. Dr. Kaplan took bite films and decreased the occlusion height on the new impression. On December 20, 2007, Dr. Kaplan fit the new crown for tooth number 13. Plaintiff complained that the new crown did not fit properly. On January 3, 2008, Dr. Kaplan tried in a new crown on tooth number 13, and planned to permanently cement the crowns at 12 and 13 at a future visit.

On January 15, 2008, plaintiff complained that her bite was sensitive at teeth numbers 18 and 19. Dr. Kaplan took x-rays, adjusted her bite, and recommended that she return for a follow-up examination in three weeks.

On January 28, 2008, plaintiff presented to Kenneth W. Aschheim, D.D.S., for a consultation regarding the pain she was experiencing on the left side of the back of her mouth upon

biting. Dr. Aschheim was able to elicit pain on biting at tooth number 15 only (left top molar). His notes reflect that he recommended that plaintiff have the crowns at numbers 12 and 13 permanently cemented and that he would try adjusting her occlusion at tooth number 18 to see if it alleviated the pain at tooth number 15.

On February 4, 2008, plaintiff returned to Dr. Kaplan. His notes reflect that she was upset because she felt that the crown at tooth number 12 was too short. The notes reflect that he showed her that the tooth was short in order to accommodate lateral movement and that there was no room to add length. At this visit, plaintiff also complained that Dr. Kaplan had broken a filling on tooth number 21. Plaintiff testified that Dr. Kaplan broke the filling on tooth number 21 as he was filing down the teeth around it in adjusting her bite. The notes reflect that Dr. Kaplan showed plaintiff, on February 4, 2008, that the filling at tooth number 21 was worn but still intact. He also noted that the filling on tooth number 21 was not work that his office had done. At this appointment, Dr. Kaplan checked plaintiff's bite occlusion again and slightly adjusted the "B cusp" length of number 19 to decrease lateral contact. Dr. Kaplan's notes indicate that he reminded Ms. Merk that her crowns at numbers 12 and 13 needed to be permanently cemented and recommended that she return in three weeks for a follow-up appointment regarding the occlusal comfort. Plaintiff did not return to Dr. Kaplan after February 4, 2008.

Plaintiff commenced this action by the filing of a summons and complaint on August 12, 2009. Issue was joined by defendants' service of answers on or about November 6, 2009. In her bills of particulars and supplemental bills of particulars, plaintiff alleges that Dr. Kaplan departed

from accepted dental practice, custom, and standards in failing to properly insert crowns for teeth numbers 18, 19, 12, and 13, thereby causing pain at her gums, a cracked tooth at tooth number 21,<sup>1</sup> and the need to undergo subsequent corrective surgery. Plaintiff further alleges that Dr. Gross and Dental Partners are vicariously liable for the acts of Dr. Kaplan by virtue of New York Partnership Law and General Obligations Law. She maintains that defendants' malpractice proximately caused the following permanent injuries: pain, swelling, and numbness to gums; a cracked canine tooth; chronic inflammation of gums; obliterated surface anatomy and flattened occlusal surface of the lower right second molar; and exacerbation of prior pain, swelling, and numbness at the lower right second molar.

Defendants now move for summary judgment dismissal of the claims against them on the grounds that their expert affirmation establishes that all of the care rendered by Dr. Kaplan comported with accepted standards of dental care and did not cause or contribute to any claimed injury to plaintiff. 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). See also Koi Hou Chan v. Yeung, 66 A.D.3d 642 (2d Dep't 2009). 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

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<sup>1</sup> Plaintiff's bill of particulars identifies the cracked tooth to be tooth number 19, although her treatment records and the parties' deposition testimony identify the cracked tooth to be tooth number 21.

\* 6]

in the bill of particulars. Roques, 73 A.D.3d at 206; Koi Hou Chan, 66 A.D.3d at 643. Conclusory statements which do not address the allegations in the pleadings are insufficient to demonstrate entitlement to summary judgment. See Cregan v. Sachs, 65 A.D.3d 101, 108 (1st Dep't 2009). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposition papers. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). 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." Id. (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).

Annexed to defendants' motion as exhibits to their moving papers are the pleadings; Ms. Merk's and Dr. Kaplan's deposition transcripts; and dental records from Dr. Kaplan, Bruce E. Ettinger, D.D.S. (plaintiff's treating dentist prior to Dr. Kaplan), and Dr. Aschheim. Defendants also submit an affirmation from Victor M. Badner, D.M.D., who sets forth that he is a dentist duly licensed to practice dentistry in the State of New York. He states that his opinion is based on his review of plaintiff's dental records and radiographic films; the parties' deposition testimony; the pleadings; and his expertise in the field of dentistry. Dr. Badner provides a summary of Dr. Kaplan's

treatment of plaintiff and opines, within a reasonable degree of dental certainty, that all of the care and treatment that Dr. Kaplan provided comported with the standard of care and that there was no act or omission that caused plaintiff's alleged injuries. He asserts that an initially ill-fitting or uncomfortable crown can and does occur in the absence of negligence. Accordingly, he states, it is standard practice to fit the crowns temporarily and adjust them as needed. He opines that plaintiff's condition was even more complicated because the angle and relatively short length of her teeth caused a tight occlusion and limited the dentist's ability to adjust the crowns. Dr. Badner opines that Dr. Kaplan did not depart from the standard of care in manufacturing or fitting the crowns, and that a patient's dissatisfaction with the cosmetic appearance of the crown does not give rise to a departure. Regardless, Dr. Badner further opines that Dr. Kaplan properly responded to plaintiff's complaints and provided her with options as to how to address her issues. Dr. Badner sets forth that plaintiff deprived Dr. Kaplan of the opportunity to complete the work on teeth numbers 12 and 13 by failing to return after February 4, 2008. He states that plaintiff's subsequent treating dentist, Dr. Aschheim, correctly surmised that the crowns that Dr. Kaplan placed at teeth numbers 12 and 13 were functionally adequate and that redoing them would only be for cosmetic reasons.

Additionally, Dr. Badner opines that Dr. Kaplan did not depart from the standard of care for teeth numbers 18 or 19. He states that plaintiff's complaints in 2007 or 2008 regarding these teeth are not attributable to Dr. Kaplan's treatment. Further, her x-rays show that teeth numbers 12 and 13 do not oppose teeth numbers 18 or 19; thus, the placement of the crowns at teeth numbers 12 and 13 could not and did not have any effect on plaintiff's bite sensation in her lower molars.

Finally, Dr. Badner sets forth that Dr. Kaplan did not break plaintiff's tooth number 21, that Dr. Kaplan did not provide treatment to this tooth, and that Dr. Kaplan's examination showed that the old filling on that tooth was still on and intact.

Dr. Badner opines that none of Dr. Kaplan's treatment caused any of the injuries set forth in plaintiff's bills of particulars, particularly those injuries concerning the right side of her mouth, as the allegedly negligent treatment was performed on the left side of her mouth. He states that, even assuming that plaintiff meant to plead that those injuries had occurred on left side of her mouth, where the treatment occurred, there is no evidence that plaintiff sustained such injuries. Dr. Badner maintains that the crowns on the lower left were properly fit and adjusted, and that any complaints as to those teeth were purely cosmetic.

In opposition to defendants' motion, plaintiff argues that Dr. Badner's opinion should not be considered by the court because he never personally examined plaintiff's teeth and because his opinions are based on inadmissible evidence, as Dr. Kaplan's deposition transcript is unsigned and the dental records are uncertified. Plaintiff also puts forward her own statement that Dr. Badner's understanding of the work that Dr. Kaplan performed is inaccurate. Plaintiff's attorney maintains that plaintiff's statement demonstrates disputed facts requiring denial of summary judgment.

In reply, defendants argue that plaintiff's opposition was untimely, as there is a court order directing that plaintiff's opposition papers be served by August 9, 2011, and they were not

served until August 15, 2011. However, since the order to show cause on this motion was not signed until August 17, 2011, the court will consider plaintiff's opposition on the merits. Defendants further argue that Dr. Kaplan's deposition transcript is admissible since it was certified by the court reporter, and that the records submitted with their motion were properly considered by their expert as Dr. Kaplan's records were authenticated by Dr. Kaplan at his deposition, and Dr. Ettinger's and Dr. Aschheim's records are documents accepted in the dental profession as a basis for forming a professional opinion.

On a summary judgment motion, the First Department has determined that the court may consider an unsigned deposition transcript as admissible evidence as long as it is certified by the court reporter as accurate. See, e.g., Martin v. City of N.Y., 82 A.D.3d 653, 654 (1st Dep't 2011); White Knight Ltd. v. Shea, 10 A.D.3d 567, 567-68 (1st Dep't 2004); Morchik v. Trinity Sch., 257 A.D.2d 534, 536 (1st Dep't 1999); Zabari v. City of N.Y., 242 A.D.2d 15, 17 (1st Dep't 1998). Here, Dr. Kaplan's deposition transcript is certified by the court reporter. Accordingly, although Dr. Kaplan himself did not sign the transcript, the court may consider it as admissible evidence for the purposes of this summary judgment motion.

As to the issue of whether the court should discount Dr. Badner's opinion based on uncertified records, "an expert may rely on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion . . . ." Hambusch v. New York City Tr. Auth., 63 N.Y.2d 723, 726 (1984) (internal quotation marks and citation omitted). "In order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-

of-court material.” Id. In this case, during his deposition Dr. Kaplan confirmed that the records in question were of his treatment of plaintiff, which plaintiff has never disputed. The cases on which plaintiff relies, in arguing that the court should not consider Dr. Badner’s opinion, are distinguishable because the records in question were made by a non-party to the suit. See Holloman v. City of New York, 74 A.D.3d 750 (2d Dep’t 2010); Shafi v. Motta, 73 A.D.3d 729 (2d Dep’t 2010). Accordingly, Dr. Kaplan’s records of his treatment of plaintiff may be considered by his expert in preparing his opinion. Furthermore, Dr. Badner did not rely on the records of Drs. Aschheim or Ettinger in forming his opinions regarding the treatment by Dr. Kaplan, so whether or not these records are certified is essentially a non-issue. The court notes, however, there is no dispute that these records are the types of records that medical professionals use as a basis for forming an expert opinion.

Accordingly, the court finds that defendants established a prima facie case for their entitlement to summary judgment by submitting expert opinion evidence supporting their position that Dr. Kaplan did not depart from the standard of care. Plaintiff has failed to come forward with expert opinion evidence demonstrating the existence of a material issue of fact. Her own affidavit is insufficient to raise an issue of fact in opposition to the expert opinion testimony offered by defendants. Dr. Kaplan is entitled to summary judgment and the complaint shall be dismissed against him in its entirety. Furthermore, given that Mark J. Gross, D.D.S. and Dental Partners are sued only under a theory of vicarious liability for the acts of Dr. Kaplan, they are also entitled to summary judgment and the complaint shall be dismissed against them as well. The court need not reach defendants’ alternative argument that certain claims for treatment are barred by the statute of limitations. Accordingly, it is hereby

