

Avec v Galligan

2011 NY Slip Op 33778(U)

May 17, 2011

Supreme Court, Richmond County

Docket Number: 12754/04

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 12754/04
Motion No.: 006**

LISA BATES PRISTAVEC,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**THOMAS GALLIGAN,
DRS. GALLIGAN AND VILLA, LLP, and
JANE DOE,**

Defendants

The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

This action arises out of injuries sustained as a result of Britesmile teeth whitening procedure performed on the plaintiff at the office of the defendants. The issue before the court is whether teeth whitening is a dental procedure which establishes a dentist patient relationship creating an action sounding in malpractice; or alternatively is this a cause of action sounding in ordinary negligence.

On November 22, 2005 this court issued a decision granting the defendants motion pursuant to CPLR § 3012(b) to dismiss the plaintiff's action for failure to timely serve a complaint to the causes of action alleging dental malpractice only. That same decision granted the plaintiff's cross-motion to extend her time to serve the complaint that contained negligence causes of action. On September 12, 2006 the Appellate Division, Second Department affirmed

this court's decision. In affirming this court's decision allowing the plaintiff to serve her complaint the Appellate Division, Second Department stated ". . . the plaintiff adequately demonstrated potential merit of those of her causes of action which are predicated upon ordinary negligence rather than dental malpractice, and there is no indication that the appellants were prejudiced by her relatively short delay in serving a complaint."

On February 23, 2009 this court issued an amended decision and order of clarification which stated that the prior order dismissing those causes of action sounding in dental malpractice also dismissed the cause of action concerning informed consent. At that time this court acknowledged that the plaintiff settled her claims against Britesmile, Inc and discontinued her causes of action of Dr. Gerard Villa. The court further held that the only remaining causes of action sounded in negligence. However, at no time did this court rule on the merits of the plaintiff's claim of ordinary negligence as against Dr. Galligan.

On September 7, 2005 the defendants served a demand for a verified bill of particulars. Paragraph 3 requested, "a statement of each and every act of negligence, commission, or omission which you will claim as the basis of the alleged malpractice of Dr. Galligan." After this court dismissed the plaintiff's claims for dental malpractice the plaintiff served a verified bill of particulars on the defendants. In response to paragraph 3 on April 23, 2007, the plaintiff responded that "Plaintiff has not set forth a claim for dental malpractice as to the defendants." On October 18, 2007 the plaintiff amended her verified bill of particulars. The plaintiff then stated in pertinent part that "Jane Doe, an agent, servant, and employee of the defendants Dr. Galligan, Drs. Galligan and Villa, LLP and Dr. Gerard Villa, negligently administered the Britesmile Whitening Treatment . . . by negligently inserting a retractor inside plaintiff Lisa Bates Pristavec's mouth and negligently placing a protective sheath on the skin around plaintiff's mouth."

Now, the defendant moves to dismiss this plaintiff's complaint arguing that the teeth whitening procedure created a dentist patient relationship and must be dismissed along with the other causes of action for dental malpractice. The plaintiff argues that a teeth whitening procedure “. . . most closely resembles the application of a spa treatment as opposed to dental treatment.” In support, the plaintiff directs the court's attention to the numerous teeth whitening products available over-the-counter at stores around the country.

The Appellate Division, Second Department has held that there is a subtle difference between ordinary negligence and malpractice. That court addressed the mechanics of such an inquiry in *Halas v. Parkway Hosp., Inc.*,¹ wherein it stated: “The critical question in determining whether an action sounds in medical malpractice or simple negligence is in the nature of the duty to the plaintiff which the defendant is alleged to have breached. . . . When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence.”² Recently, in *Speigel v. Goldfard*, the Appellate Division, Second Department put a finer point on this rule stating that “. . . an alleged negligent act constitutes medical malpractice when it can be characterized as a ‘crucial element of diagnosis and treatment’ and ‘an integral part of the process of rendering medical treatment to [the plaintiff].”³

Here the plaintiff sought dental treatment for stained teeth from a dentist. The Britesmile procedure required specialized training for the dentist and dental assistants performing the procedure. It is this specialized training that separates this teeth whitening procedure from those available over-the-counter. Here the failure to use the proper retractor on the plaintiff does not sound in ordinary negligence, but rather it sounds in dental malpractice. Since the malpractice actions were dismissed for failure to file the complaint timely, the remaining actions, which are really malpractice actions wrongly characterized as negligence, should similarly be dismissed.

¹ 158 AD2d 516, [2d Dept 1990].

² *Id.*

³ 66 AD3d 873, [2d Dept 2009].

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: May 17, 2011

Joseph J. Maltese
Justice of the Supreme Court