

<b>Kirchner v Winegarten</b>
2013 NY Slip Op 30592(U)
March 25, 2013
Supreme Court, New York County
Docket Number: 800150/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

LISA KIRCHNER,

INDEX NO. 800150110

MOTION DATE 2/5/13

MOTION SEQ. NO. 004

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

- v -

DR. ROBERT WINEGARTEN,

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 ...

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

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

PAPERS NUMBERED
<u>1-12</u>
<u>13-16</u>
<u>17</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION  
*Order Judgment*  
UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3/25/13

Joan B. Lobis  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
LISA KIRCHNER,

Plaintiff,

Index No. 800150/10

-against-

**Decision, Order and Judgment**

DR. ROBERT WINEGARTEN, DR. JERRY LYNN,  
and SOL STOLZENBERG, D.M.D., D/B/A  
TOOTHSАVERS,

Defendants.

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

Defendants Dr. Robert Winegarten, s/h/a Dr. Robert Winegarten, Dr. Jerry Lynn, and Sol Stolzenberg, D.M.D., P.C., d/b/a TOOTHSАVERS, s/h/a Sol Stolzenberg, D.M.D., d/b/a/ TOOTHSАVERS, (TOOTHSАVERS) move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules in this dental malpractice action. In the alternative, Defendants Winegarten and TOOTHSАVERS seek partial summary judgment dismissing Plaintiff's claims of recklessness and wilful, wanton and conscious disregard for Plaintiff's health and her claim for punitive damages. Dr. Winegarten also seeks partial summary judgment on Plaintiff's claim that he is vicariously liable for actions of others. Plaintiff Lisa Kirchner opposes the motions, sequence numbers 3, 4, and 5, which are consolidated for purposes of this opinion, order and judgment.

On January 11, 2010, Plaintiff Lisa Kirchner went to TOOTHSАVERS complaining of a cavern in one of her lower teeth. A dentist, who is not a defendant in this case, examined her and took x-rays. The dentist told her that due to her grinding teeth problem she needed to have all her teeth restored. Ms. Kirchner balked at the cost. She did discuss financing with Defendant Lynn and recalls signing a document agreeing to pay \$10,000 for treatment. The dental records are

missing in this case. Ms. Kirchner has requested the files but TOOTHSAVERS has been unable to locate them. TOOTHSAVERS alleges that Ms. Kirchner removed the files while she was left unattended.

On that same day that Ms. Kirchner was examined, Dr. Winegarden, who works for TOOTHSAVERS, began preparing five of Ms. Kirchner's lower teeth for restoration. He took impressions and ground down her teeth numbered 20, 21, 28, 29, and 30. Ms. Kirchner received temporary crowns for those teeth.

The next day, Ms. Kirchner returned to TOOTHSAVERS. One of the temporary crowns had fallen out. The crown was re-cemented, and Dr. Winegarden tried out different shades for the tinting of her permanent crowns, which were prepared by the office's laboratory. She later returned two times for whitening treatments in anticipation of the placement of the permanent crowns. She did not return for any further care following those treatments.

In March 2010, she returned to her previous dentist, Dr. Elliott Follickman. Dr. Follickman criticized the dental work that TOOTHSAVERS performed. He redid the five crowns.

In November 2010, Plaintiff sued Dr. Winegarden, Dr. Lynn and TOOTHSAVERS. She alleges dental malpractice and lack of informed consent. Plaintiff complains, among other things, that based on Defendants' conduct she has incurred pain, suffering, mental anguish, occlusal disharmony, temporomandibular joint and neuromuscular problems, bone loss, and loss of tooth structure.

In support of his claim for summary judgment, Dr. Winegarten submits the affirmation of David Abelson, D.D.S. Dr. Abelson has been a New York-licensed dentist since 1971. Based on his review of this case, which includes the models of Plaintiff's mouth prior to and subsequent to the preparation at TOOTHTSAVERS, as well as the bill of particulars and transcripts of party witnesses, he opines that Dr. Winegarten did not depart from proper standards of care, did not proximately cause Plaintiff's alleged injuries, and did not fail to obtain informed consent for treatment of Plaintiff.

In support of its motion for summary judgment, TOOTHTSAVERS submits the affirmation of Dr. Arnold Jutkowitz. Dr. Jutkowitz is qualified in prosthodontics, periodontics, and endodontics, and has a private practice in prosthodontics. He opines that TOOTHTSAVERS did not depart from proper standards of care, did not proximately cause Plaintiff's injuries and obtained fully informed consent from Plaintiff in providing treatment. Defendant Lynn in turn moves for summary judgment on the grounds that there are no triable issues of material fact showing that he rendered any dental treatment to the Plaintiff, and, therefore, he similarly is not liable.

Plaintiff opposes all three motions. In opposing Dr. Winegarten's and TOOTHTSAVERS' motions she submits the affirmation of her subsequent treating dentist, Dr. Follickman. Dr. Follickman is a New York-licensed dentist. His opinion is limited to the temporary restorations. He does not discuss Plaintiff's whitening treatment. He opines that the temporary restorations departed from proper standards of care: the temporary crowns were ill-fitting, and the preparations, including margins, were not proper. He does not address proximate cause. He

addresses Plaintiff's claim of lack of informed consent by stating that he lacks sufficient information to opine but would opine that it would be a departure if "they did not discuss alternative treatments the reason for treatment and risks."

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 medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). To satisfy that burden, defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, Id. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Expert opinion must "explain 'what [the physician] did and why.'" Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010)(quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)).

If a movant makes a prima facie showing, the burden then 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." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted dental practice and that the departure was the proximate cause of the injuries alleged. See Roques, 73 A.D.3d at 207. Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009). A defendant moving for summary judgment on a lack of informed consent claim

\* 6]

must demonstrate that the plaintiff was informed of the alternatives to the treatment and its reasonably foreseeable risks and benefits and "that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]" Koi Hou Chan v. Young, 66 A.D.3d 642, 643-44 (2d Dep't 2009); see also Public Health Law § 2805-d(1).

This Court finds that Defendants Winegarden and TOOTHSAVERS through their experts have established a prima facie case to support their motions. Moreover Plaintiff's expert in turn has failed to rebut the Defendants' experts' claims that any negligence did not proximately cause Plaintiff's alleged injuries or that Defendants failed to provide Plaintiff with informed consent.

In addition, this Court finds that Defendant Lynn has also established that he is entitled to summary judgment. Plaintiff admits that Dr. Lynn did not examine her. Their conversations addressed financing and payment for services. Her expert, Dr. Folickman, does not mention Dr. Lynn in the opinion accompanying Plaintiff's opposition to the other two Defendants' motions, and Plaintiff offers no expert opinion in opposing the Lynn motion for summary judgment. Because this Court grants Defendants' motions for summary judgment, it need not address their motions for partial summary judgment, in the alternative. Accordingly, it is

ORDERED that Defendants' motions are granted, and the Clerk is directed to enter judgment accordingly.

Dated: March 25, 2013.

ENTERED:

  
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JOAN B. LOBIS, J.S.C.