

**Holder v Duka**

2013 NY Slip Op 31369(U)

June 24, 2013

Supreme Court, New York County

Docket Number: 800408/11

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

HOLDER, LAURA M.

INDEX NO. 800408/11

MOTION DATE 3/26/13

- v -  
ALEXANDER DUKA, DDS

MOTION SEQ. NO. 02

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

The following papers, numbered 1 to 13 were read on this motion to summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-8</u>
<u>9-12</u>
<u>13</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUN 27 2013

NEW YORK  
COUNTY CLERKS OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: June 24 2013

JBL  
JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
LAURA M. HOLDER,

Plaintiff,

Index No. 800408/11

-against-

ALEXANDER DUKA, D.D.S.,

Defendant.

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

Decision and Order

**FILED**

JUN 27 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendant Alexander Duka, D.D.S., moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules granting him summary judgment. Plaintiff Laura M. Holder opposes the motion. For the reasons stated below, the motion is denied in part and granted in part.

This dental malpractice case involves restorations that were administered to Ms. Holder by Dr. Duka in 2010. Plaintiff first saw Dr. Duka on January 5, 2010, for a check-up and cleaning. Although plaintiff's intake form maintained by Dr. Duka's office indicates that plaintiff experienced sensitivity to hot and cold temperatures, sweets and while biting, plaintiff disclaims these complaints. The intake form also indicates that plaintiff flossed rarely and brushed daily. Ms. Holder was first seen by a hygienist in the office, who recorded that plaintiff's hygiene "neede[ed] improvement." The hygienist also noted that plaintiff had heavy coronal calculus above her gum line and an inflamed gingival tissue that bled easily. Plaintiff later saw Dr. Duka. After reviewing plaintiff's dental x-rays and probing her teeth with a dental explorer, Dr. Duka found clinical and radiographic signs of decay and recommended that 16 teeth be filled or restored: teeth numbers 2 - 5, 12 - 14, 15, 18 - 20, 21, and 28 - 31. Plaintiff scheduled the restorations to be performed over two

visits. On January 12, 2010, Dr. Duka filled eight teeth on the right side of plaintiff's mouth. On January 27, 2010, the remaining eight teeth on the left side were restored. In March 2010, plaintiff had a follow-up visit, during which plaintiff complained of sensitivity, and Dr. Duka adjusted her restorations. Plaintiff testified that she continued to experience sensitivity and eventually saw two other dentists.

Plaintiff commenced this action on December 9, 2011, alleging that the restorations were unnecessary, that Dr. Duka negligently performed diagnostic procedures, and that Dr. Duka provided ill-fitting restorations. Plaintiff also alleges that Dr. Duka did not obtain her informed consent in performing these restorations. As a result, plaintiff suffered pain, mental anguish, occlusal disharmony, bone loss, and required further treatment.

Defendant seeks summary judgment on the grounds that no issues of fact exist that he rendered appropriate treatment. In support of his motion, defendant submits the expert affirmation of Barry C. Cooper, D.D.S., a dentist licensed to practice in New York. After reviewing plaintiff's dental records, the documents in the case, and examining plaintiff in December 2012, Dr. Cooper opines to a reasonable degree of dental certainty that Dr. Duka treated plaintiff in accordance with the applicable standards of dental care. Dr. Cooper avers that teeth numbers 2, 3, 15, and 31 had occlusal decays and either buccal or lingual decay, which are decays that impact the biting and chewing surfaces of the tooth and which are rarely visible on two-dimensional x-rays. Occlusal, buccal, and lingual decays can only be observed and diagnosed upon a visual or clinical evaluation of the teeth. The expert relays that it is impossible to refute Dr. Duka's findings of occlusal decay

by merely reviewing the x-rays, and Dr. Duka, as the treating dentist, must be accorded deference to the clinical findings with regard to these teeth.

Dr. Cooper declares that teeth numbers 4, 12, 13, 19, 20, 28, 29, and 30 had decays on their mesial or distal areas, which are observable by x-rays. According to the expert, the x-rays show that the decay on these teeth extended through the enamel and into the dentin, which is the softer part of the tooth. Dr. Cooper opines that treatment of these teeth were appropriate because if left untreated, the decay would spread quickly. Teeth numbers 5, 14, 18, and 21 showed signs of decay in the mesial or distal areas. Although the decay on these teeth had entered the enamel, Dr. Cooper could not readily determine from the x-rays whether the decay had also progressed into the dental-enamel junction. While it would have been acceptable to monitor these teeth at subsequent routine dental check-ups, the expert opines that Dr. Duka nonetheless showed sound clinical judgment by treating these teeth, given plaintiff's poor dental hygiene, the presence of coronal calculus, and her inflamed gingiva that easily bled.

Dr. Cooper further opines that plaintiff's claim for negligent diagnostic procedure is unwarranted, as Dr. Duka took diagnostic x-rays. He attests that specific testings for plaintiff's sensitivity to hot and cold temperatures and sweets were unnecessary for the conditions diagnosed by Dr. Duka. These testings would have been necessary only if Dr. Duka had determined that plaintiff's decay extended to or near her pulp nerves, in which case the tests would have been required to evaluate the pulp's vitality and the need for further endodontic treatment. Dr. Cooper also states that Dr. Duka's use of a dental explorer was appropriate, as occlusal decays are readily

observable by sight and are accessible with dental instruments. A dental explorer would enable the treating dentist to find the discolored or softer areas of the teeth, and can also be used to explore the lingual and buccal areas of the teeth. Additionally, radiographic examination is an appropriate way to examine interproximal surfaces.

Dr. Cooper states that when he examined plaintiff in December 2012, she still had 15 out of the 16 fillings that Dr. Duka placed, and Dr. Cooper found them to be acceptable and properly fitted. Although Dr. Duka adjusted plaintiff's restorations in March 2010, it is not uncommon for them to be adjusted since it involves subtle alterations on the surface of the restorations.

Addressing the issue of informed consent, Dr. Cooper opines that the standard of care does not require that any particular risk be advised for dental fillings, and that the risk of not treating plaintiff's teeth decays is permitting them to persist and worsen. He posits that a reasonable person with plaintiff's condition would not refuse treatment of this nature.

In opposition, plaintiff contends that summary judgment is unwarranted as there remain material issues of fact. In support of her opposition, plaintiff submits her own affidavit and expert opinions from Lawrence Simon, D.D.S, and Robert Gottlieb, D.M.D. In her affidavit, plaintiff states that she saw Dr. Duka in January 2010 for the limited purpose of getting a cleaning and for a routine check-up. She had no fillings prior to this first visit. She disputes the authenticity of the intake form, which indicates that she had been experiencing sensitivity. Plaintiff states that

she did not check off anything in the sensitivity portion of the form and was surprised to hear from Dr. Duka that she required restorations. After she completed her restorations, she then started experiencing sensitivity to the temperature, density, and texture of food. After complaining to Dr. Duka, he filled her teeth in a “trial and error [manner] to see if it helped.” She continued to experience sensitivity and eventually went to different dentists.

Lawrence Simon, D.D.S., indicates that he is a dentist licensed to practice in New York. Dr. Simon opines to a reasonable degree of dental certainty that the treatment plaintiff received was unnecessary and that plaintiff was not properly informed of the alternatives to treatment. Dr. Simon evaluated plaintiff prior to and after Dr. Duka’s treatment. He states that he examined Ms. Holder in 2006 and took x-rays of her teeth. At that time, he noted that she had a healthy, virgin dentition without any restorations. When he examined plaintiff in 2011, after Dr. Duka’s restorations, plaintiff complained of sensitivity. Dr. Simon disputes defendant’s expert’s view that eight of the sixteen teeth had decay into the dentin. Reviewing Dr. Duka’s x-rays, Dr. Simon found no decay requiring restoration and saw no decay into the dentin of any teeth, although there were incipient decays in some of the sixteen teeth that were restored. Dr. Simon opines that based on Ms. Holder’s general dental health, his x-rays and Dr. Duka’s x-rays, plaintiff did not require restorations on any of her teeth. Dr. Simon further states that Dr. Duka departed from the standard of care by not advising Ms. Holder that supervised surveillance was an alternative to the restorations, and that Ms. Holder’s supposed poor oral hygiene habit was no excuse for neglecting to inform her of this option. Dr. Simon further disputes that Ms. Holder had poor oral hygiene habits.

Robert Gottlieb, D.M.D., plaintiff's second expert, is a dentist licensed in New York. He is a pedodontist who routinely reviews x-rays for decays. He opines to a reasonable degree of dental certainty that defendant departed from the standard of care by restoring plaintiff's sixteen teeth. Dr. Gottlieb disputes defendant's expert's view that teeth numbers 4, 12, 13, 19, 20, 28, 29, and 30 had decay into the dentin. He indicates that none of the x-rays of Ms. Holder's teeth revealed decay that progressed into the dentin. He states that some of the teeth had E1 lesions, which means that the decay was in the first stage into the enamel, and one tooth had E2 lesion, where the decay had progressed slightly deeper into the enamel. Given that plaintiff had a clean, healthy mouth, the appropriate treatment, according to Dr. Gottlieb, would have been to re-mineralize the teeth by coating them with fluoride and to observe them periodically.

In reply, defendant argues that plaintiff's opposition is insufficient to defeat summary judgment. Defendant disputes Ms. Holder's statement that the intake form was altered. He notes that she did not raise this issue during her deposition when she viewed the form and attested that the handwriting on the form belonged to her. Defendant also posits that plaintiff's experts fail to rebut that Dr. Duka's treatment of teeth numbers 2, 3, 15, and 31 was proper, as the occlusal, buccal or lingual decays could only be observed clinically, and not by x-ray. Defendant contends that, regardless of whether the restorations were indicated, plaintiff fails to rebut that the restorations were appropriately placed.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303,

308 (1st Dep't 2007). A movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where a defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts "require a trial of any issue of fact." Id.

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming that the treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific, and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 206. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and should "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory medical affirmations or expert opinions that fail to address a plaintiff's essential factual allegations are insufficient to establish prima facie entitlement to summary judgment. 73 A.D.3d at 206. Once a defendant establishes a prima facie case, a plaintiff must then rebut that showing by submitting an affidavit from a medical

doctor attesting that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries. Id. at 207.

The Court finds that Dr. Duka has established a prima facie case for summary judgment on plaintiff's claim that Dr. Duka negligently performed diagnostic procedures and that Dr. Duka provided ill-fitting restorations. Plaintiff's experts' opinions fail to rebut this showing. The remainder of defendant's motion, however, is denied.

Defendant fails to establish his prima facie entitlement to summary judgment with regard to teeth numbers 2, 3, 15, and 31. His expert merely states that the occlusal, buccal, and lingual decays on these teeth cannot be could not be observed in x-rays and that deference must be accorded to the treating dentist's clinical findings. This statement is conclusory, as defendant's expert fails to articulate what type of clinical findings would indicate the need for restoration of these decays. Defendant's expert also adds that it would be impossible for plaintiff to refute Dr. Duka's clinical findings. It follows, however, that defendant's expert was similarly limited and was equally unable to evaluate Dr. Duka's clinical findings before rendering his expert opinion.

There are competing expert opinions as to the treatment of those twelve teeth, teeth numbers 4, 5, 12, 13, 14, 18, 19, 20, 21, 28, 29, and 30, each of which showed decay that, according to defendant's expert, are observable by x-rays. Plaintiff's and defendant's experts differ in their interpretation of the x-rays and whether plaintiff's teeth exhibited any signs of decay warranting restorations. The law is clear that a battle of experts raise credibility issues, which must be resolved

by a fact finder and which preclude summary judgment. Barnett v. Fashakin, 85 A.D.3d 823, 825 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep't 2009); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623, 624 (2d Dep't 2003).

The portion of defendant's motion seeking to dismiss plaintiff's lack of informed consent cause of action is denied. A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment, 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, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1). Defendant's statement that a reasonable person with plaintiff's condition would not refuse treatment, because the decay would spread if left untreated, is insufficient to satisfy this requirement. Defendant fails to establish that plaintiff was informed of the alternative treatments. Defendant's own expert opines that it was an option for Dr. Duka to monitor certain teeth at routine check-ups instead of rendering treatment, which option was not communicated to plaintiff. Furthermore, plaintiff's expert, Dr. Simon, posits that supervised surveillance was an alternative to the restorations and should have been communicated to plaintiff. Plaintiff's second expert, Dr. Gottlieb, adds that re-mineralizing the teeth by coating them with fluoride and observing them periodically was also an alternative to restorations. In light of the above, the Court need not address the remaining contention regarding the accuracy of plaintiff's intake form. Accordingly, it is

ORDERED that the portion of the motion seeking to dismiss plaintiff's claim that Dr.

[\* 1]

Duka negligently performed diagnostic procedures and that Dr. Duka provided plaintiff with ill-fitting restorations is granted; it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, July 23, 2013, at 9:30 a.m.

Dated: *June 24*, 2013

ENTER:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

**FILED**

JUN 27 2013

NEW YORK  
COUNTY CLERK'S OFFICE