

**Benevento v Krantz**

2013 NY Slip Op 32230(U)

September 4, 2013

Sup Ct, New York County

Docket Number: 150372/2011

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

NICHOLAS BENEVANTO  
- v -  
JEFFREY KRANTZ, D.P.S.  
et al.

INDEX NO. 150372/11  
MOTION DATE 8/20/13  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 16 were read on this motion to for summary judgment

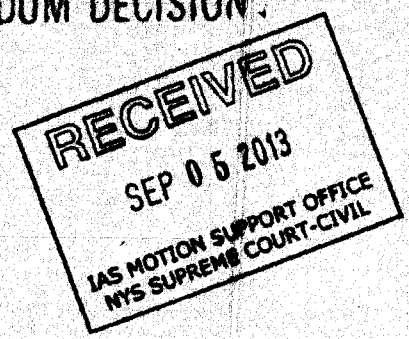
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-12</u>
<u>13-15</u>
<u>16</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION.  
and Order



Dated: 9/4/13

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):

THE METHOD IS DESCRIBED IN SECTION 10  
FOR THE ACCOUNTING INFORMATION SYSTEM

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

-----X  
NICHOLAS BENEVENTO,

Plaintiff,

Index No. 150372/11

-against-

**Decision and Order**

JEFFREY KRANTZ, D.D.S., and EAST VILLAGE  
DENTAL ASSOCIATES, P.L.L.C.,

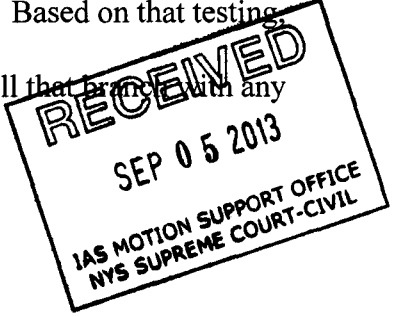
Defendants.

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**JOAN B. LOBIS, J.S.C.:**

Defendants Dr. Jeffrey Krantz, D.D.S., and East Village Dental Associates, P.L.L.C., which is Dr. Krantz’s medical practice, move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules in this dental malpractice action. Plaintiff Nicholas Benevento opposes the motion. For the following reasons, the motion is granted in part and denied in part.

On August 16, 2010, Nicholas Benevento saw Dr. Krantz for a cleaning and consultation. The doctor examined Mr. Benevento and took x-rays. The dentist told the patient that he needed root canal treatment on tooth #28, due to a cavity extending to the pulp of the tooth. The patient would further need a post, core buildup and a crown. Mr. Benevento came in twice further for planing and scaling in preparation for the root canal procedure.

On August 30, 2010, Dr. Krantz performed the root canal treatment. He noted that the tooth’s root was bifurcated at approximately 2/3rds of the length of the root. Using a colored rinse, Dr. Krantz did not find any opening for the second branch of the root. Based on that testing, he determined that the second branch of the root was calcified and did not fill that branch with any



cement. He took x-rays following the procedure.

Mr. Benevento appeared for a follow-up appointment on September 7, 2010. The doctor noted that the patient was asymptomatic. He placed a post in the tooth in preparation for installing a crown.

On September 13, 2010, Mr. Benevento contacted Dr. Krantz's office to complain about billing. He refused to return for treatment. Instead, he testified that at that time he saw another dentist, Dr. David Blaustein, who pulled tooth #28 approximately one week later, due to bone infection. Dr. Blaustein subsequently placed an implant at that site.

Plaintiff sued Dr. Krantz for dental malpractice in September 2011. Mr. Benevento complained that Dr. Krantz had negligently performed the root canal treatment on tooth #28 and failed to refer him to an appropriate specialist. Plaintiff further claimed that the dentist's negligence caused infection, breakdown of bone and loss of the tooth. As a result of these alleged injuries, Plaintiff claimed that he required an implant, suffered pain and anguish, as well as "emotional shock and angst."

Defendants now move for summary judgment. In support, they submit the affirmation of Paul D. Verdi, D.D.S. Dr. Verdi is a dentist who has been licensed in New York since 1987. Based on his review of this case, Dr. Verdi opines that Dr. Krantz did not depart from proper standards of care and did not proximately cause Plaintiff's alleged injuries. In particular, the defense expert opines that Dr. Krantz properly filled the root canal to the extent accessible. He concurred

that the x-rays showed calcification. He noted that any exploration of the calcified branch of the root risked perforation of the side of the root. Dr. Verdi further opined that the post was placed within proper standards of care. Lastly he noted that root canal treatment affects only a patient's tooth and gum, not any underlying bone, and therefore, he rejected the notion that the procedure caused any breakdown of bone.

Plaintiff opposes the motion, claiming that there are triable issues of fact and conflicting expert opinion. In support, he submits the affirmation of Kenneth S. Kurtz, D.D.S., a dentist who has been licensed in New York since 1983. Dr. Kurtz affirms that he "routinely work[s] on difficult cases with endodontics." In his opinion, Dr. Krantz deviated from the proper standard of care in several ways. Dr. Kurtz opines that it was negligent for Dr. Krantz to fail to refer this patient to a specialist following the finding that the root was bifurcated. The nature of that type of root, the Plaintiff's expert avers, requires an endodontist's expertise, as well as specialized equipment and instrumentation. The expert notes that this type of root would be treated by an endodontist with a microscope and path finder, which facilitate accessing narrow canals. In his opinion, calcification is only able to be definitively diagnosed through use of a microscope.

Plaintiff's expert further opines that Dr. Krantz was not only negligent in failing to refer the Plaintiff to an endodontist, but also, Dr. Krantz was negligent in performing the root canal treatment. The expert opines that in proceeding with the treatment notwithstanding the bifurcated root, Dr. Krantz should be held to the standard of care for an endodontist. Dr. Krantz deviated from that standard in failing to use a microscope and path finder, and failing either to fully fill the root or properly seal it or both. Lastly, Dr. Kurtz opines that Dr. Krantz deviated in proceeding once he

could not find any opening to the second branch of the root. At that point, Dr. Kurtz indicates, Dr. Krantz should have stopped the procedure and referred the patient to an endodontist.

In reply, Defendants contend that Plaintiff failed to rebut their prima facie case for summary judgment. They argue that Plaintiff's expert's opinion is conclusory and should be disregarded. They note that Dr. Kurtz affirmed that in forming his opinion he reviewed the dental records of Dr. Krantz and Dr. Blaustein. He did not indicate that he had reviewed any litigation materials, such as pleadings or deposition transcripts. Plaintiff also failed to annex his dental records from Dr. Blaustein, his subsequent treater.

Defendants further dispute any rebuttal by Plaintiff regarding his allegations of breakdown of bone. They note that Plaintiff's expert opinion, in identifying that condition, refers generally to "subsequent x-rays," without indicating when those x-rays were taken or by whom. The movants further claim that Plaintiff failed to rebut their showing that there was no infection. Nor has Plaintiff rebutted proof that post-operative x-rays were taken by Dr. Krantz, notwithstanding Plaintiff's claim otherwise. Lastly Defendants contend that Plaintiff's expert, as a dentist, is not qualified to testify regarding endodontic standards of care.

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 material issues of disputed fact, 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).

This Court finds that Defendants have generally established a prima facie case to support their motion for summary judgment. Dr. Verdi’s affirmation supports each of the contentions of no deviation or causation except on the issue of infection. His failure to refer to having reviewed any litigation papers does not preclude the Court’s finding that he has personal

knowledge of Plaintiff's essential allegations in the case. E.g., Roques, 73 A.D.3d at 205.<sup>1</sup> In claiming that there was no infection following the root canal treatment, the defense expert merely cites Dr. Krantz's dental record in which the Defendant indicates that upon the initial follow-up visit after the root canal procedure, Mr. Benevento was asymptomatic. The defense expert fails, however, to address testimony that conflicts with that proof. For example, Plaintiff, in his deposition, testified that, at that time that Dr. Krantz placed the post in tooth #28, the Plaintiff was experiencing discomfort and pain in that area. Under these circumstances, Defendants have failed to show as a prima facie case that there are no disputed issues of fact regarding Plaintiff's allegations of infection and attendant tooth loss. Nor have they established a prima facie case to support summary judgment as a matter of law on these issues.

Lastly, this Court notes that it is well-established that dental experts may opine regarding standards of care outside their areas of expertise, provided that they show personal knowledge. As Dr. Kurtz affirmed, he is well-familiar with endodontic care and treatment, and therefore this Court finds that he is qualified to testify regarding those standards of care. See, e.g., Hoagland v. Kamp, 155 A.D.2d 148, 150 (3d Dep't 1990); see also N.Y. Pattern Jury Instruction 1:90 (jury weighs expert's qualifications in field).

Plaintiff, in turn, has failed to rebut certain issues for which Defendants have established a prima facie case. On the issue of breakdown of bone, this Court is persuaded that Plaintiff has failed to offer proof in admissible form to support that claim. While Plaintiff testified

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<sup>1</sup>In making that claim, moreover, Defendants fail to cite any authority in support.

that Dr. Blaustein diagnosed him as having infection of the bone, Plaintiff has not annexed any evidentiary proof to support that contention, which Plaintiff's expert specifically cites in support for his opinion.

This Court further finds that there is no genuine issue of fact that Dr. Krantz took post-operative x-rays. The movants' papers attach Plaintiff's deposition of Dr. Krantz, which shows that Plaintiff's counsel used these in deposing the doctor. Under these circumstances, Plaintiff's contention as alleged in the complaint and supplemental bill of particulars that these x-rays were not taken is unfounded. Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted in part on Plaintiff's allegations that Defendants' actions caused breakdown of bone and that Dr. Krantz failed to take post-procedure x-rays; the motion is denied on all remaining claims; and it is further

ORDERED that the parties appear for a pre-trial conference in Room 345 on September 24, 2013, at 9:30 am.

Dated: September 4, 2013

ENTERED:

  
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JOAN B. LOBIS, J.S.C.