

Holliday v Milord

2013 NY Slip Op 33154(U)

November 19, 2013

Sup Ct, Suffolk County

Docket Number: 09-36781

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MotD
004 - MotD; CASEDISP

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KENNETH HOLLIDAY,		TANTLEFF & KREINCES, LLP
	Plaintiff,	Attorney for Plaintiff
		170 Old Country Road, Suite 316
		Mineola, New York 11501
	- against -	CHESNEY & NICHOLAS, LLP
		Attorney for Defendant Milord
		2305 Grand Avenue
		Baldwin, New York 11510
FABIOLA MILORD and IDEAL DENTAL		TROMELLO MCDONNELL & KEHOE
SERVICES, LTD.,		Attorney for Defendant Ideal Dental
	Defendants.	P.O. Box 9038
		Melville, New York 11747
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30-33; Replying Affidavits and supporting papers 34-37; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendant, Richard Freedman d/b/a Ideal Dental Services s/h/a Ideal Dental Services, LTD, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the cross claims asserted against co-defendant Milord are dismissed; and the branches of the motion for conditional common law indemnification in favor of Richard Freedman d/b/a Ideal Dental Services s/h/a Ideal Dental Services, LTD from Fabiola Milord, or pursuant to CPLR 3126 precluding plaintiff from receiving any award for damages as to past or future medical expenses based upon plaintiff's failure to provide discovery, or pursuant to CPLR 3101 (d) precluding plaintiff from calling an expert witness, have been rendered academic by dismissal of the complaint as asserted against him and are denied as moot; and it is further

ORDERED that this motion (004) by the defendant, Fabiola Milord, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against her is granted and the complaint is dismissed; and the branch of the motion pursuant to CPLR 3126 for an order precluding plaintiff from receiving damages

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as to past or future medical expenses for the failure to provide discovery, or pursuant to CPLR 3101 (d) precluding plaintiff from producing expert witness testimony at trial, have been rendered academic by dismissal of the complaint and are denied as moot.

In this dental malpractice action, the plaintiff, Kenneth Holliday, alleges that the defendants, Fabiola Milord and Ideal Dental Services, negligently departed from good and accepted standards of dental practice in the care and treatment rendered to him on February 7, 2009 through February 9, 2009. It is alleged that Fabiola Milord improperly performed a root canal on tooth # 31, resulting in an unfavorable result, causing and permitting an infection to spread from that site to his jaw. Causes of action for negligence, lack of informed consent, and a derivative claim on behalf of Sara Holliday, which was withdrawn, have been asserted. Richard Freedman d/b/a Ideal Dental Services has asserted cross claims against defendant Fabiola Milord for contribution and judgment over for indemnification.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851[1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]).

In support of motion (003), defendants Richard Freedman and Ideal Dental Services have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claim by Richard Freedman and Ideal Dental Services, and plaintiffs' verified and amended verified bills of particulars; stipulation discontinuing the cause of action asserted on behalf of Sara Holliday; unsigned but certified copy of the transcript of the examination before trial of Kenneth Holliday dated February 10, 2011 which is considered (see Zalot v Zieba, 81 AD3d 935 [2d Dept 2011]); the unsigned transcripts of Fabiola Milord, D.D.S., dated September 28, 2012, and Richard Freedman dated December 7, 2012 which is considered as adopted as accurate by the moving defendants (see Ashif v Won Ok Lee, 57 AD3d 700 [2nd Dept 2008]); affidavit of Richard Freedman dated January 5, 2013; and copy of demand dated February 27, 2012 served by defendant Ideal Dental Services and response dated January 8, 2013.

In support of motion (004), defendant Fabiola Milord has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claim by Richard Freedman and Ideal Dental Services, and plaintiffs' verified and amended verified bills of particulars; unsigned but certified copy of the transcript of the examination before trial of Kenneth Holliday dated February 10, 2011; the unsigned transcripts of Fabiola Milord, D.D.S., dated September 28, 2012 and Richard Freedman dated December 7, 2012; record of Ideal Dental Services; and the affidavit of James R. Nemeth, D.D.S.

The plaintiff opposes this motion with an attorney's affirmation; expert affirmation; and response pursuant to CPLR 3101 (d).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (Holton v Sprain Brook Manor Nursing Home, 253 AD2d 852 [2nd Dept 1998], app denied 92 NY2d 818). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see Derdiarian v Felix Contracting Corp., 51 NY2d 308 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see Fiore v Galang, 64 NY2d 999 [1985]; Lyons v McCauley, 252 AD2d 516 [2nd Dept 1998], app denied 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759 [2nd Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2nd Dept 1997]).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions as such credibility issues can only be resolved by a jury" (Bengston v Wang, 41 AD3d 625 [2nd Dept 2007]; see also Shields v Baktidy, 11 AD3d 671 [2nd Dept 2004]; Barbuto v Winthrop Univ. Hosp., 305 AD2d 623 [2nd Dept 2003]; Halkias v Otolaryngology-Facial Plastic Surgery Assoc., 282 AD2d 650 [2nd Dept 2001]).

Kenneth Holliday, the then sixty year old plaintiff, testified that his legal name is Kenneth Holliday, however, Kene Holliday is his stage name as well as his "persona." He is not currently employed but lectures about theatrical skills at speaking engagements to people who want to become actors. In the late 1980s, he had one or two root canals on two lower molars on the left side by Dr. Geogiculous in California for troublesome teeth. At that time, he was having the crowns and veneers placed on his teeth, but he did not know how many teeth were involved. In 2008, he saw Dr. Tolleson in Texas for bonding repair of a front central incisor which broke when he bit his fork. He was in the process of having a partial crown on his upper left molar repaired by Tolleson in 2008 when he moved. Thus, in 2009, he did not have a regular dentist. He discussed his sporadic dental care regarding four prior lower teeth extractions, two on the left and two on the right. Only one tooth in the right rear was extracted in the last ten years. In about January of 2012, Dr. Jaber bonded a crown on his upper right incisor which fractured when he bit a walnut shell.

In about January of 2009, the plaintiff was experiencing pain in his lower right tooth, so he saw Dr. Tabees in Amityville. He did not recall how long he had the pain prior to seeing Dr. Tabees. At that time, he had a combination of crowns and dental veneers on his teeth, but he did not know how many. He stated that Dr. Tabees did not take x-rays at that visit and told him that he needed a root canal which would cost \$800. He tried to talk him down in price, but was unsuccessful. He had previously seen Dr. Tabees one to two years before for repair with bonding of a tooth on the upper right side. He stated that Dr. Tabees wanted to give him a new full set of crowns. The plaintiff testified that in 2006, he had gone to Ideal Dental for cosmetic repair by Dr. Kim. When he presented again at Ideal Dental on February 7, 2009, Dr. Kim was not there so he

was seen by Dr. Milord for pain in his right rear lower tooth, for which he had already seen Dr. Tabees in January. He did not receive any treatment with any dentist for the pain in his right rear lower tooth and jaw from the time he saw Dr. Tabees in January 2009 until he saw Dr. Milord on February 7, 2009. However, the plaintiff testified that he was prescribed an antibiotic by his internist, Dr. Polofsky in January 2009, then stated that he believed it was Dr. Tabees who prescribed the antibiotic which he took for a week with relief for about two weeks.

The plaintiff testified that he had been off the antibiotics for about one week when he was seen by Dr. Milord on Saturday, February 7, 2009. X-rays were taken. Dr. Milord examined his oral cavity, and advised him that a root canal on the lower right tooth adjacent to the wisdom tooth would be a "complementary procedure." He testified that he told Dr. Milord that he was trying to save the molar. Dr. Milord performed the procedure at that visit and advised him that he had an infection for which she prescribed an antibiotic. He continued that Dr. Milord told him to return after taking the antibiotic. He then testified that he was not told he had to return unless he had further problems. On Sunday evening, he had some tenderness and noticed it was getting puffy. He called Dr. Milord's office, but upon reaching the answering machine, did not leave a message as he felt he could wait until Monday. On Monday morning, the lower right side of his face (jaw) was swollen, and his gum was inflamed, so he spoke to the receptionist at the Ideal Dental office about 9 a.m. He was seen immediately by a male dentist who referred him to an oral surgeon at Suffolk County Dental Surgeons where he was seen by Dr. Guariglia. The plaintiff testified that Dr. Guariglia drained the area and started him on a new regiment of antibiotics. The next day his face tripled in size, so Dr. Guariglia sent him to the emergency room for a CT scan and admitted him to St. Catherine of Sienna Hospital for intravenous medication and surgery. He stated that it was very difficult for the doctors to identify the type of bacteria and that they devised a "neutralizing cocktail." He believed he was admitted for twenty two days. Some time after discharge, he saw Dr. Webber, an endodontist, as his tooth was still tender but he still wanted to save the tooth. Dr. Webber did a root canal after another course of antibiotics had been taken. However, the plaintiff fractured the tooth when he bit a hard piece of candy and the tooth had to be extracted.

Fabiloa Milord testified to the extent that she is a general practitioner in the field of dentistry and is licensed to practice in New York State. In 2009, she was employed by Catholic Charities Dental Services and was also an independent contractor with Ideal Dental Services where she worked Saturdays from 9 a.m.-2 p.m. and saw Ideal Dental patients. She was paid per diem and was provided with a 1099 form at the end of the year. She had no written contract with Ideal Dental. She stated that Dr. Freedman is the owner of Ideal Dental Services. She stated that she has never held herself out as an endodontist who specializes in root canal therapy. She described root canal therapy as instrumenting the nerves to the apex, then drying the canals and filling them to the apex. She described the pulp as the nerve center of the tooth. A pulpectomy is when the canal is debulked or debrided of the nerve, but does not go to the apex. The purpose of a pulpectomy is to make the patient comfortable. The apex of a canal is determined by periapical x-ray wherein measurements are taken from the top of the tooth to the bottom of the apex, but such measurements are not taken with a pulpectomy.

Dr. Milord testified that she first saw the plaintiff on February 7, 2009 as a walk-in patient, and examined him on an emergency basis for complaints of pain and swelling which he had for two days in his lower right quadrant. Dr. Milord testified that she did not discuss her treatment of the plaintiff with any other dentists at Ideal Dentists or Dr. Freedman, and all the decisions she made relative to the plaintiff's care and treatment were her personal decisions. She stated that a periapical x-ray was taken and revealed deep caries extending into the pulp at tooth # 31, which is the lower right second molar located just before the wisdom tooth. She did not take a panorex as it does not provide the ideal image. It is too distorted for a root canal

because it gives more of a broad view of skeletal structure. She diagnosed the plaintiff with irreversible pulpitis at #31, and noted in the office record that the plaintiff agreed to having a pulpectomy to make him more comfortable because the nerve would be taken out of the tooth. Dr. Milord testified that she considered a little bit that the infection in tooth # 31 could pass the apex into the bone as there was some slight radiolucent changes at the apex, which was the whole basis for discussing root canal with the plaintiff. She stated that the file that is used for the pulpectomy is a big file that does not go down to the apex. She also discussed with the plaintiff that he should have a root canal as the final treatment. She advised him that the root canal needed to be done right then and there, but he told her that he had financial problems and that he would come back for the root canal. He also told her that he did not want the tooth pulled.

Dr. Milord described the procedure used during the pulpectomy. She prescribed Clindamycin, a broad spectrum antibiotic used for patients who cannot tolerate Penicillin, and stated that the plaintiff was allergic to Tetracycline. Her note indicated that at his next visit, the plaintiff was to have root canal therapy on tooth #31. He was told to go to the front desk where the appointment would be made for the root canal which was needed as soon as possible. Dr. Milord testified that she learned from Dr. Freedman that the plaintiff returned two days later with facial swelling, that he saw the oral surgeon and had complications for which he was admitted to the hospital for incision and drainage on the buccal and submandibular areas. Dr. Milord testified that the plaintiff did not have swelling on the buccal and submandibular areas when she saw him.

Richard Freedman testified to the extent that he is licensed to practice general dentistry in New York State. He set forth in his supporting affidavit that he is his the sole owner of Ideal Dental Services which opened in 1980. In 2009, Fabiola Milord was a general practitioner at Ideal Dental Services and worked as an independent contractor seeing patients of Ideal Dental Services. He provided Dr. Milord with a 1099 form at the end of the year. They had no written agreement. He first saw the plaintiff on Monday, February 9, 2009 with huge swelling of his lower jaw, which he attributed to infection. He stated that Dr. Milord treated tooth # 31 with x-rays and pulpectomy and gave a prescription for Clindamycin on a precautionary basis for infection. He stated that Dr. Milord appropriately placed the plaintiff on a strong antibiotic regimen, Clindamycin 300 mg, which is a very strong dosage. He testified that this medication was the treatment of choice for swelling. He noted that the record indicated that the plaintiff had pain and swelling on February 7, 2009. Dr. Freedman testified that when he saw the plaintiff on February 9, 2009, he thought that the swelling was due to the antibiotic not working fast enough, so he immediately referred the plaintiff to an oral surgeon and made the appointment for him. The plaintiff then saw Dr. Guariglia, the oral surgeon, who performed an incision and drainage around the infection. Dr. Freedman testified that judging by the x-ray which Dr. Milord took, the decay or infectious process had been there for a while, possibly a year, two years, or even longer. It was his opinion that the performance of a root canal on February 7, 2009 would not have resolved the infectious process that Mr. Holliday had because the swelling and infection had to be gotten under control first, and a root canal would have only exacerbated the condition. He stated that it was not standard protocol as of February 7, 2009 to perform root canal therapy on a patient with the swelling the plaintiff had.

Based upon the forgoing, it has been established that Dr. Milord was not an employee of Dr. Freeman and that he was not vicariously liable for her actions. Dr. Milord was provided with a 1099 form for compensation for seeing patients of Ideal Dental Services. Issuance of a 1099 form reflects earnings realized by defendant Milord as "nonemployee compensation" (see Peck v Real Estate Strategies, Ltd, 2008 NY Slip Op 30748U [Sup Ct, Nassau County]). Liability in negligence generally rests on a defendant's own fault. Under the doctrine of vicarious liability, liability is imputed to a defendant for another person's fault, based on the defendant's relationship with the wrongdoer. Under this theory, the person in a position to exercise some general authority or control over the wrongdoer must do so or bear the consequences. A classic

example is liability of an employer for the acts of its employees within the course of employment, evidencing the public policy foundation of allocating risk to an employer because it is better able than the innocent plaintiff to bear the consequences of employees' torts. By the imputation of liability, an employer is also encouraged to act carefully in the selection and supervision of its employees. The doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of employment. Conversely, an employer who hires an independent contractor is not liable for the independent contractor's negligent acts (see generally Feilberty v Damon, 72 NY2d 112 [1988]) .

The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the important consideration (see Chuchuca v Chuchuca, 67 AD3d 948 [2nd Dept 2009]). The common-law distinction between "servants" and "independent contractors," whose wrongdoing generally did not give rise to liability on the part of those who hired them, is advanced because an employer cannot control the manner in which work is performed by an independent contractor, as it can the work of a servant. In such circumstance, the independent contractor itself is properly chargeable with preventing, bearing, and distributing the attendant risks. The principle that an employer is not liable for the acts of independent contractors remains the general rule (see Feilberty v Damon, 72 NY2d 112 [1988]).

Here, it has been established prima facie that Dr. Milord was hired as an independent contractor, and that she was provided 1099 forms pursuant to her agreement with Dr. Freedman to work as an independent contractor. The plaintiff raises no factual issues that defendant Milord's employment status was anything but that of an independent contractor. Additionally, no factual issue has been raised under a theory of apparent or ostensible agency upon which to base vicarious liability against Dr. Freedman, as the unrefuted admissible evidence establishes Dr. Milord was an independent contractor, that she did not act as Dr. Freedman's agent, that Dr. Freedman did not exercise control over Dr. Milord or the results produced (see Nilsen v Franklin Dental Health, 34 Misc3d 1, 2011 NY Slip Op 21362 [Sup Ct Appellate Term 2d Dept 2011]; Schacherbauer v University Associates in Obstetrics & Gynecology, P.C., 56 AD3d 751 [2nd Dept 2008] citing Mduba v Benedictine Hosp., citations omitted), and that Dr. Milord did not consult with Dr. Freedman or any other dentist at Ideal Dental Services concerning the care and treatment she rendered to the plaintiff. Thus, it is determined as a matter of law that Dr. Freedman is not vicariously liable to the plaintiff for the acts of Dr. Milord.

Dr. Freedman set forth in his supporting affidavit that it is his opinion that the examinations, evaluation and treatment of the plaintiff at Ideal Dental were in no way negligently performed, and were performed within the appropriate standards of dental care and treatment for the plaintiff's conditions as he presented on February 7, and February 9, 2009. Dr. Freedman stated that the plaintiff did not sustain any injury to either tooth # 31 or any other part of his mouth or body as a result of the treatment that he received at Ideal Dental, but rather the plaintiff presented with an infection when he was initially seen on February 7, 2009, which infection was not caused or exacerbated by the treatment the plaintiff received. Dr. Freedman continued that Dr. Milord did not deviate from the standard of care in her treatment rendered to the plaintiff; the proper and correct x-rays were taken; and the treatment plan by Dr. Milord was correct and proper. He stated that a root canal was not performed on tooth # 31 by Dr. Milord on February 7, 2009, and that she performed a pulpectomy, prescribed a strong regimen of antibiotic for the plaintiff, and instructed him to return for a root canal. Dr. Freedman stated that not referring the plaintiff to a medical or dental specialist was appropriate. He concluded that when the plaintiff presented to Ideal Dental Services on February 9, 2009, due to his observations, referral to an oral surgeon was then appropriate, and such referral was scheduled.

Based upon the forgoing, Dr. Freedman has established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the issues of liability and proximate cause of the alleged injuries. The plaintiff has not submitted an expert affirmation in opposition to Dr. Freedman's motion for summary judgment and has thus failed to raise a factual issue to preclude summary judgment from being granted to him and Ideal Dental Services.

Accordingly, that part of motion (003) for summary judgment dismissing the complaint as asserted against Ideal Dental Services is granted and the complaint is dismissed. Based upon the foregoing, the branches of motion (003) for conditional common law indemnification in favor of Richard Freedman d/b/a Ideal Dental Services s//h/a Ideal Dental Services, LTD from Fabiola Milord, and for an order pursuant to CPLR 3126 precluding plaintiff from receiving any award for damages as to past or future medical expenses based upon plaintiff's failure to provide discovery, or pursuant to CPLR 3101 (d) precluding plaintiff from calling an expert witness, have been rendered academic by dismissal of the complaint as asserted against Ideal Dental Services and are denied as moot.

In support of motion (004), Fabiola Milord submitted the affidavit of her expert, James R. Nemeth, D.D.S., a dentist duly licensed to practice medicine in New York State since 1974. Dr. Nemeth set forth the materials, records, and films which he reviewed. It is Dr. Nemeth's opinion that Dr. Milord's diagnosis of irreversible pulpitis was correct and the clinical examination was rendered in accordance with good and accepted dental practice. The x-ray of tooth #31 was obtained and correctly interpreted with the diagnosis of irreversible pulpitis rendered by Dr. Milord. He continued that the broad spectrum antibiotic, Clindamycin, ordered by Dr. Milord, was appropriate and in accordance with good and accepted dental practice. He stated that the plan for a pulpectomy was appropriate and that the pulpectomy was performed in accordance with good and acceptable dental practice.

Dr. Nemeth stated that the periapical x-ray documented deep caries extending into the pulp, for which Dr. Milord discussed pulpectomy and root canal, and that the plaintiff elected to have the pulpectomy. He continued that Dr. Milord instrumented the mesiobuccal, mesiolingual, distal buccal and distal lingual canals to a 40K file; irrigated and used dry eugenol pellet and cavit; and debulked the nerves. Dr. Nemeth stated that Dr. Milord did not perform a root canal. He concluded that the treatment rendered by Dr. Milord did not cause the plaintiff to have an infection or to exacerbate any pre-existing infection, and was not a substantial factor in causing any of the injuries alleged by the plaintiff.

In opposing this motion, the plaintiff has submitted the redacted and unsigned affirmation of his expert physician, and has failed to provide an unredacted and signed copy of the expert's affirmation to this court as required pursuant to Marano v Mercy Hospital, 241 AD2d 48 [2nd Dept 1998]. A redacted version of an expert affidavit lacks evidentiary value. A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses (see Marano v Mercy Hospital, supra). The party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (Marano v Mercy Hospital, supra). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (Rubenstein v Columbia Presbyterian Medical Center, 139 Misc.2d 349 [NY County 1988]). Because an unredacted copy of the affidavit with the expert's name and signature has not been provided to this court under separate cover, the plaintiff's expert affidavit is not in admissible form and

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is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (Rose v Horton Medical Center, 29 AD3d 977 [2nd Dept 2006]).

Additionally, even if the court were to consider the plaintiff's expert affirmation, it is determined that the expert's opinion is conclusory and fails to establish that the care and treatment rendered by Dr. Milord was the proximate cause of the injuries claimed by the plaintiff. While the plaintiff's expert opined that prescribing Clindamycin was a departure from the accepted standards of care in that a broader spectrum antibiotic such as Penicillin should have been prescribed, the plaintiff could not tolerate Tetracycline antibiotic, which the testimony supports is the reason Clindamycin was prescribed. The plaintiff's expert does not dispute that Clindamycin is a broad spectrum antibiotic, as established by Dr. Milord, Dr. Freedman, and Dr. Nemeth. The plaintiff's expert opined that when Dr. Milord saw the plaintiff on February 7, 2009, the infection was already past the apex and into the bone. The plaintiff's expert does not opine that the plaintiff should have been referred to any other specialists or health care providers for treatment on February 7, 2009, or that even if Penicillin or another antibiotic was ordered by Dr. Milord on February 7, 2009, that the plaintiff would not have developed the injuries claimed by him, or that the plaintiff would not have required the treatment necessitated by the infection which plaintiff's expert stated was present on February 7, 2009. The plaintiff's expert does not address the delay by the plaintiff in seeking medical care or treatment on February 8, 2009 when the plaintiff called Ideal Dental Services and did not leave a message concerning his complaints, but instead waited an additional day to obtain treatment. The plaintiff's expert failed to discuss the plaintiff's delay in having the root canal done in January 2009 when Dr. Tabees advised him that tooth # 31 needed treatment consisting of a root canal and placed him on an antibiotic. Nor does plaintiff's expert address the plaintiff's testimony that his face tripled in size on February 10, 2009, the day after Dr. Guariglia incised and drained the area and started him on a new regimen of antibiotics, after stopping the Clindamycin on February 9, 2009.

Accordingly, motion (004) is granted and the complaint as asserted against Dr. Milord is dismissed.

Dated: November 19, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION