

Lopez v Alfonso Dental Office, P.C.

2013 NY Slip Op 33155(U)

February 7, 2013

Sup Ct, New York County

Docket Number: 109440/11

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOBIS
Justice

PART 6

LOPEZ, RAISA, ETAL.

INDEX NO. 109440/11

MOTION DATE 11/18/12

- v -
ALFONSO DENTAL OFFICE, P.C.,
ETAL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to for summary judgment

	PAPERS NUMBERED
Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-10</u>
Replying Affidavits _____	<u>11</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS RECEIVED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

FILED

FEB 11 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/7/13

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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
RAISA LOPEZ and JUAN S. LOPEZ,

Plaintiffs,

Index No. 109440/11

-against-

Decision and Order

ALFONSO DENTAL OFFICE, P.C., and
CARLOS ALFONSO, DDS,

Defendants.

FILED

FEB 11 2013

NEW YORK
COUNTY CLERKS OFFICE

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

Defendants Alfonso Dental Office, P.C., and Carlos Alfonso, DDS, move for summary judgment pursuant to C.P.L.R. Rule 3212 in this dental malpractice action. Plaintiffs Raisa Lopez and Juan S. Lopez oppose the motion. For the reasons stated below, the motion is denied.

Defendants treated Plaintiff Raisa Lopez from July 2008 through January 5, 2011. On July 9, 2008, a treatment plan was formulated that included root canal therapy, removal of crowns and bridge restorations, as well as crowns, bridge and cap work for teeth 9-11. The treatment plan also included a crown for tooth 31 and provisional restorations.

Root canal therapy was begun in July 2008. It is uncontroverted that while over the course of treatment Ms. Lopez signed several consent forms, there is no executed consent form for root canal therapy for teeth 9-11. Dr. Sophia Khan participated in Ms. Lopez's root canal therapy although Dr. Khan was not licensed in New York until July 31, 2008. In the course of her participation Dr. Khan perforated the side of tooth 9. On August 6, 2008, Dr. Alfonso determined that therapy would not be successful on tooth 9 and extracted it. That same day, he placed a dental

implant at that site. He also told Ms. Lopez that teeth 10 and 11 would have to be pulled. In October, Dr. Alfonso began root canal therapy on tooth 31, which was completed the next month.

On November 7, 2008, Dr. Alfonso extracted tooth 10 and placed a dental implant at that site. Later that month a post and core was placed for tooth 31.

Root canal therapy was started on tooth 11 on January 23, 2009, and completed on January 31. Within two weeks, Ms. Lopez was experiencing sensitivity. Additionally on February 13, 2009, she was retreated by Dr. Alfonso for root canal therapy on tooth 4, which retreatment was finished later that month. On March 10, 2009, Dr. Alfonso extracted tooth 11 and on the same day placed a dental implant at that site.

That summer and fall of 2009 Dr. Alfonso treated Ms. Lopez by placing healing abutments at sites 9-11. He referred her to an endodontist for a second round of root canal therapy on tooth 31. Ms. Lopez continued to have sensitivity in that tooth following therapy.

In January 2010, Ms. Lopez consented to crown lengthening at tooth 31, which was performed. Additional treatment relating to provisional restorations continued. The following January Ms. Lopez ended treatment with Defendants. Within a few months her subsequent treater extracted tooth 31.

Plaintiffs sued in August 2011 alleging in pertinent part dental malpractice and lack of informed consent over injuries allegedly flowing from the treatment. In their bill of particulars

Plaintiffs refer to numerous injuries including injuries relating to the various extractions, implants, grafting, bone loss, provisional restorations, and root canal therapy.

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. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the 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. If the movant makes a prima facie showing, the burden then shifts to the non-moving party “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) (citation omitted). To meet that burden, plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged. Roques, 73 A.D.3d at 207 (internal citations omitted). 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 must demonstrate that the plaintiff was informed of the alternatives to 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, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Pub. Health Law § 2805-d(1).

After reviewing all of the submissions and arguments of counsel, this Court finds that material issues of fact exist regarding treatment relating to all teeth in contention. The experts disagree whether the Defendants acted within good and accepted dental practice in treating Ms. Lopez and whether any departure caused Ms. Lopez's alleged injuries. Plaintiffs' expert further alleges that using an unlicensed dentist to perform root canal is illegal and a deviation from good practice. Defendants do not address that point. Plaintiffs' expert further criticizes Defendants for piercing the apex in the gum of Ms. Lopez's teeth during root canal therapy on teeth 9-11. According to Plaintiffs' expert, Ms. Lopez should have been referred to an endodontist for an apicoectomy, which procedure would have removed the perforated tip of the apex and replaced it with biocompatible material, sealing the perforation. Plaintiffs' expert disputes the necessity of extractions, arguing there was enough bone support to restore the teeth had they been treated properly. He further opines that implantation on the same day of extraction was improper because the implantation was performed before the site had adequately healed. He criticizes the bridgework as improper, requiring excessive recementations. On this record genuine issues of material fact remain regarding whether Defendants committed dental malpractice.

Regarding Ms. Lopez's claim of lack of informed consent, this Court also finds genuine issues of material fact remain. Defendants point to several consents to treatment that were obtained from Ms. Lopez over time. Plaintiffs point out, however, that none of those involved root canal therapy on teeth 9-11. This dispute over informed consent presents a question for the fact-finder.

Defendants further allege that the statute of limitations bars consideration of treatment occurring more than two and a half years prior to the commencement of this action. In particular they contend that would preclude Plaintiffs' claims relating to root canal therapy for teeth 9-11 and 31. Notably Defendants do not raise any statute of limitations bar for the root canal therapy performed on tooth 4, which their records show Dr. Khan participated in prior to being licensed and was performed even prior to the treatment of the other teeth. Defendants claim that subsequent treatments to teeth 9-11 and 31, such as extractions, were merely resummptions of treatment and therefore the continuous treatment doctrine does not apply. See C.P.L.R. § 214-a.

This Court rejects Defendants' contentions. The treatment plan itself contemplates both root canal therapy as well as crowns for teeth 9-11 and 31. The root canal therapy was not stand alone treatment. Indeed, Defendants' own expert at paragraph 10 of his opinion related that "the initial treatment plan called for the restoration of teeth #9, #10 and #11 with root canal therapy, posts and crowns." Defense counsel's affirmation also acknowledges this interconnection at paragraph 14: when Plaintiff was first seen "[s]he was treatment planned on the upper arch for the . . . placement of crown and bridgework on teeth #2 through #14, performance of root canal therapy and posts onto teeth #9, #10 and #11." The continuous treatment reflected in this record relating to teeth 9-11 and 31 brings the entirety of that activity before the Court in this action. Accordingly, it is

FILED

ORDERED that Defendants' motion for summary judgment is denied.

Dated: February 7, 2013

NEW YORK COUNTY CLERKS OFFICE

ENTERED:

JBL

 JOAN B. LOBIS