

White v Brisman
2013 NY Slip Op 33414(U)
December 3, 2013
Supreme Court, New York County
Docket Number: 800076/11
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART 1A PART 16

Index Number : 800076/2011
WHITE, LAWRENCE
VS.
BRISMAN, DAVID
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is denied in
accordance with the accompanying
memorandum decision.

FILED

DEC 06 2013

COUNTY CLERK'S OFFICE
NEW YORK

DEC 03 2013

Dated: December 3, 2013


ALICE SCHLESINGER J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

-----X
LAWRENCE WHITE,

Plaintiff,

Index No. 800076/11
Motion Seq. No. 001

-against-

DAVID BRISMAN, D.M.D., and
DAVID BRISMAN, D.M.D., P.C.

FILED

DEC 06 2013

Defendants.

-----X
SCHLESINGER, J.:

-----X COUNTY CLERK'S OFFICE
NEW YORK

Dr. David Brisman is a dentist. In this capacity, he provided treatment, specifically root canal treatment, on tooth #15 in Lawrence White's mouth in October and November of 2003. That is the only contact that these two individuals had with each other. However, about seven and a half years later, Mr. White, whose teeth were getting progressively worse and who had a great deal of difficulty with his sinuses, went to see another dentist, Richard L. Dennis. On February 10, 2011, during treatment, Dr. Dennis discovered a piece of a broken file, part of a rotary niti or endodontic instrument, in the distal canal of that same tooth #15. This piece was seen by Dr. Dennis in the digital x-rays that he took, which clearly showed the broken file.

Tooth #15 and tooth #14 were both extracted by Dr. Dennis. However, the predicate for this lawsuit was Dr. Dennis' conclusion that the root canal procedure done by Dr. Brisman on tooth #15 was responsible for an infection in that area, causing the need for the extraction, as well as causing White's many other health problems involving his sinuses. A month after Dr. Dennis' discovery, Lawrence White, the plaintiff here, commenced this action making two claims against Dr. Brisman in his complaint.

The first cause of action sounds in dental malpractice and is predicated on the allegation that Dr. Brisman had been negligent in the way that he performed the root canal on tooth #15 by leaving a part of an instrument in a canal and further by not sufficiently cleaning out the canals of the tooth so as to prevent an infection. The second allegation sounds in fraudulent concealment, that is, concealing from the patient the fact that part of the instrument had broken apart and was unintentionally left behind. In other words, Mr. White was claiming that not only was he not told about the tip coming off the instrument and remaining in the tooth, a place it was clearly not meant to be, but that he was assured by Dr. Brisman that the procedure had gone well and that the tooth and its roots had been thoroughly cleaned out.

Under the seminal case, *Simcuski v Saeli*, 44 NY2d 442 (1978), the Court found that in order to establish a cause of action establishing fraudulent concealment, the plaintiff must show several things. A patient who believes important information has been withheld from him by his doctor/dentist must show by clear and convincing evidence that the health care provider, here a dentist, knew or had reason to know of the fact of his malpractice and of the injury suffered by the patient in consequence. The patient must also prove that the dentist, knowing it to be false at the time, made material, factual misrepresentations to the patient as to the appropriate therapy, misrepresentations on which the patient justifiably relied. That is what Mr. White is claiming here, dental malpractice and fraudulent concealment.

Now before this Court is a motion by the defendants Dr. Brisman and his P.C. for summary judgment. The motion is accompanied solely by an affidavit from Dr. Brisman, the defendant. There he relates the procedure that he performed on Mr. White and opines

that everything that he did was in accordance with good and accepted dental practice. He says that when the procedure was completed, there were no complications. Further, he states that post-root canal x-rays were taken which confirmed that there were no complications. He also states that the two x-rays he has preserved in Mr. White's records fail to reveal any evidence of a broken file tip, although he acknowledges that there may have been more x-rays, which are now missing.

Dr. Brisman further opines that the extraction of tooth #15 over seven years later did not appear to be related to his work or to the file tip that was found in the root of that tooth. He says that a broken tip is known to be an acceptable risk of root canal work. Again, he opines that the Dennis extraction was caused by decay and the buildup of tartar on that tooth. He adds that this caused the bone in the tooth to become loose and painful. However, nowhere does he deal with Dr. Dennis' finding of infection in the area of tooth #15, which is prominently noted in his records. In opposition, counsel for the plaintiff comments on this omission.

Counsel for moving defendants argues that on the facts of the treatment provided by Dr. Brisman and opinions expressed by Dr. Brisman as to the quality of his own work, Mr. White will be unable to show either that the defendant was negligent and/or that his negligence caused any injury to the patient. Further, with regard to the fraudulent concealment allegation, counsel argues that on these facts and on the defendant's statement that his x-ray showed nothing of a broken instrument tip, the plaintiff will be unable to show by clear and convincing evidence that the defendant committed any fraud.

The opposition, a strong one, consists of two affirmations. One is from the aforementioned treating dentist, Dr. Richard L. Dennis, and the other is from a board

certified otolaryngologist whose name has been redacted. This doctor graduated from Columbia University Physicians and Surgeons Medical School and has practiced head and neck surgery for over 30 years in Massachusetts. Dr. Dennis deals with Mr. White's dental circumstances, while the head and neck surgeon, who has reviewed Mr. White's extensive medical records, deals with Mr. White's sinus problems.

Dr. Dennis, who graduated from the dental school at Case Western Reserve University in 1997, is a well-credentialed dentist who practices in New York City. As mentioned earlier, he began treating Mr. White on February 10, 2011. In his opposition to the defendant's motion, Dr. Dennis wears two hats, the first as Mr. White's treating dentist who is familiar with Mr. White's mouth during the last two years. In this regard, he has his own extensive records. The second hat is that of an expert. In this stance he has reviewed the defendants' records and x-rays, the examination before trial of both Mr. White and Dr. Brisman, as well as Dr. Brisman's affidavit in support of his motion. He says that all of his opinions expressed in his affirmation are given with a reasonable degree of dental certainty.

First, Dr. Dennis explains why a root canal procedure is performed in the first place. He says that it is done when a tooth becomes infected but the dentist still wants to save the tooth. So what is done is the removal of the nerve and all of the tissue and pulp of the tooth. The idea, Dr. Dennis says, is to get rid of everything, bacterial tissue and the like. He states that this is accomplished by "cleaning out, sterilization, shaping and obturation of the root canals and root canal system" (¶4). He relates that in doing this work, the dentist uses files and rotary niti files. He explains that a dentist has to properly shape the canals.

Most teeth have three canals. The dentist must properly and completely fill the spaces from which the material was taken, and a substance commonly used for such purpose is Gutta Percha. If there is a failure to adequately and properly clean, shape and fill the canals, then there is a high likelihood that the root canal will fail. Such failure leads to the continuation of the old infection or the beginning of a new one. Dr. Dennis concludes his explanation with the opinion that the failure of a dentist to completely clean and fill the canals is a departure from accepted standards of dentistry. Further, he says that failing to tell the patient that the canals could not be properly cleaned because of the broken tip left there, as Dr. Dennis believes was the situation here, is a second distinct departure.

Dr. Dennis further explains in his affirmation that when he examined Mr. White and reviewed numerous x-rays that he had taken, he decided that tooth #15 had to be removed. The infection in the tooth had created a periapical abscess. He continues: "I believe that the infection was causally related to the fact that the prior root canal that was performed on Tooth #15 was done on one canal only, the palatal canal, which was filled with Gutta Percha extending beyond the palatal canal by 3 mm. Meanwhile, there was a piece of broken file, which was part of a rotary niti or endodontic instrument, which was located, and continues to be located, within the distal canal" (¶15). He states further that his x-rays demonstrated that the distal canal was not properly or adequately filled with Gutta Percha. Further, he points out that the defendant did not fill any of the other canals in tooth #15, other than the palatal canal.

Dr. Dennis disagrees with Dr. Brisman, who suggests in his affidavit that the file was in the hard structure of the tooth. Dennis says that in fact the x-ray shows that the file was

in the distal canal, a canal not cleaned out. Dr. Dennis attributes the failure to thoroughly clean this canal and fill it with the proper substance to, in all likelihood, the breaking of the file which got in the way of a complete cleaning out of the canal.

Dr. Dennis opines that it is more likely than not that Dr. Brisman knew that the tip had been broken and left behind. Or if he truly did not know, he certainly should have. Why? Because when Dr. Brisman finished the procedure, he would have examined his instruments and seen the broken file. But Dr. Dennis believes that, in fact, Dr. Brisman failed to inspect his instruments because the broken file tip was an obvious defect that had to have been seen. If the defendant had noted the defect, which he certainly should have, he had an obligation to tell Mr. White what had happened, rather than assure him that all had gone well. He also had an obligation to attempt to retrieve the tip or attend to it in some way.

The otolaryngologist relates that he reviewed records of the Veterans Affairs Bureau, as well as records of other doctors and x-rays and films taken of Mr. White's maxillary sinus area. He also reviewed deposition transcripts and other court records. This doctor explains that the sinus is a roof into which the teeth fit and roots reach up into the floor. Dental roots can and often do go to the level of the maxillary sinus, which is under the cheek. Therefore, an infection in the tooth can often cause swelling in the sinus and lead to an infection there.

This doctor, who states that his opinions are all given within a reasonable degree of medical certainty, has reviewed Dr. Dennis' x-rays and states that it was obvious that the swelling within the maxillary sinus was related to the infection Mr. White had. He adds that the tooth #15 infection exacerbated the patient's sinus problems and caused nasal

drainage, post-nasal drip, congestion, coughing, respiratory difficulty, and other problems. Therefore, this doctor's opinion, with a reasonable degree of medical certainty, is that the infection in tooth #15 was a substantial factor in causing and/or exacerbating Mr. White's problem with his sinuses.

The opposition contains an affidavit from the plaintiff, Lawrence White, who is 66 years old. He says that he is making these statements to supplement his deposition testimony and oppose defendants' motion. He says that Dr. Brisman never informed him of any risk of breaking instruments or that the root canal might not succeed in that the infection would persist, worsen or redevelop. He emphasizes that he was never told that the tip of the instrument had actually broken off. Rather, he was told by Dr. Brisman that all went well, that he had cleaned out all the canals, and that the finished cap would be ready to be placed in a couple of weeks. So he made an appointment to return.

In the period after the treatment, White says, he began to develop worsening problems with his sinus. He felt increased pressure and pain in his left cheek and face. He was draining copious amounts of mucus from his left sinus, so much so that it went into his esophagus and lungs. He says that in the years following, he took extraordinary measures to find out what was wrong. He had x-rays and an MRI of his face done at NYU. He states that he never suspected that his tooth #15 was the cause. While he was told that the MRI showed a lot of infected material, the source of it was unknown. He then describes the tremendous release of pressure, consisting of blood and mucus, when Dr. Dennis injected this area of his mouth with a needle of novocaine.

The opposition papers conclude with counsel's discussion of the law pertinent to a fraudulent concealment claim. In addition to the three necessary criteria noted by the

Court in *Simcusi* (*supra*), counsel points out that plaintiff must also prove that he suffered some additional damage because he was diverted from an available remedy due to the defendant's concealment of his condition.

Counsel argues that Dr. Brisman's own testimony shows that it would have been impossible for him not to have known that his instrument had broken because he certainly could not have used it again with the tip part missing. He characterizes this as clear and convincing evidence that Dr. Brisman had knowledge that the file tip had broken off. At the worst, he urges, these circumstances create an issue of fact.

As to his misrepresenting the situation and not informing the patient about the complication, Mr. White says that he was told that "all went very well and that he [Dr. Brisman] cleaned out all the canals." But counsel argues that the defendant had to have been aware that a broken tip would or could cause a complication because it inhibits the dentist from navigating past the tip to get to the entire canal.

Certainly, counsel argues, Mr. White relied on Dr. Brisman's assurances. Finally, the plaintiff was diverted from seeking out and receiving proper treatment for his sinus problems, which worsened as time went by. Mr. White testified that his income was limited so he put off seeing another dentist as he believed that his tooth had been successfully treated.

Finally, counsel dismisses the importance of the defendant's post-procedure x-ray, which did not show the broken file. It was of very poor quality, and Dr. Brisman, as related earlier, testified that there may have been other x-rays that were no longer in the chart.

In Reply and for the first time, moving defense counsel raises the issue of the statute of limitations and specifically §214-a of the CPLR, the foreign object exception

which allows a person to commence an action within one year from the date of discovery of the foreign object. Here, that discovery occurred on February 10, 2011, when Dr. Dennis found the broken off tip. The action was commenced a mere month later, on March 10, 2011.

So what argument is counsel making? An interesting one, although newly brought to this motion. Moving counsel argues that any claimed dental malpractice here is separate from the leaving behind of the broken tip. He points to the statements of both Dr. Dennis and plaintiff's otolaryngologist and urges that the claimed injuries solely relate to the failure to properly clean and fill the canals, which caused continuing infection. This failure was not related to the retained foreign object and thus is not entitled to the additional one year set out in CPLR §214-a. Further, the foreign object was not tied to any injury by either of the plaintiff's experts. Therefore, all the claims of malpractice should be time-barred, defendant asserts.

Not surprisingly, this Reply met with a fierce response by plaintiff's attorney. He claimed in a letter that this was a new argument never before asserted and that therefore the Court should either not consider it or allow him to respond. Another letter, this time from defense counsel, quickly followed. This was not new, counsel urged; they were properly responding to what Mr. White's experts had said. In fact, such a defense as the statute of limitations was never waived. Rather, it was included in the Answer as the second affirmative defense.

At oral argument, it was agreed that the issue of how foreign objects were treated vis-a-vis claims of malpractice, an issue implicitly raised for the first time in Reply, would be addressed by permitting moving counsel to further elaborate on this point and then

plaintiff's counsel would be able to respond. Both sides were encouraged to cite relevant case law.

Moving counsel again argues that the claimed failure of the defendant to clean out all of the canals had nothing to do with the retention of the file tip. Specifically he says, "Plaintiff's experts have not narrowed the alleged injuries to anything caused solely and singularly by the retained file tip or instrument and, as such, the case in its entirety must be dismissed" (¶12). He continues that all of the specific allegations relating to Dr. Brisman's alleged failures in removing all pulp, nerve tissue, degradation products, bacteria and other materials, and in failing to adequately fill the canals with Gutta Percha and in not completing the root canal on two canals, should be time-barred because these alleged acts and omissions are founded exclusively upon Dr. Brisman's judgment or discretion. They have nothing to do with leaving the tip of the file behind (¶14).

In this regard, counsel refers to an old Second Department case, *Matter of Soto v Greenpoint Hospital*, 76 AD2d 928 (1980), in which the court denied permission to file an untimely notice of claim pursuant to §50-e of the General Municipal Law. There, the foreign object was a toy lodged in a child's esophagus. The doctors who the mother wanted to sue had examined the child and assured her that nothing was wrong. The Court said that was not a foreign object case as described in the line of cases beginning with *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427 (1969). The "foreign object" contemplated by the statute is not just any foreign object, but rather must be one unintentionally left behind by a doctor. Here, the cause of action did not rest so much on the toy swallowed by the child but instead on the diagnostic competence of the examining doctors. However, the tip of a file, which breaks off during a procedure unintentionally, as

is the allegation here, is most definitely a foreign object. See, *Polichetti v. Cohen*, 268 AD2d 417 (2nd Dep't 2000).

As to the second cause of action alleging fraudulent concealment, moving counsel argues that here Dr. Brisman unequivocally stated in his moving affidavit that upon completion of the root canal procedure and the post-procedure x-rays, there was no evidence of an object left behind. Nor did he know any such thing. Because of this assertion, defense counsel argues, plaintiff will not be able to establish by clear and convincing evidence the tort of deceit. He points out that not even Dr. Dennis says that the defendant's x-rays show the retained object. Finally, counsel argues that plaintiff will not be able to show any damages distinctly as a result of the alleged concealment.

In the final papers, plaintiff's counsel responds to all of these arguments and does so convincingly. First of all, he urges that the broken file tip here is clearly the kind of foreign object addressed by §214-a. No one really argues otherwise. Dr. Dennis discovered it in the distal canal of tooth #15 and no one, not even Dr. Brisman, disputes that the digital x-ray taken by Dr. Dennis shows it. Certainly, the file tip never had any treatment purpose once broken off, and certainly it was never intended to remain in the canals of the tooth.

With regard to causation, counsel points out first that the law does not require him to eliminate every other cause of the injury, which here is the infection. Rather, the foreign object and malpractice must be "a" cause of the injury. He points out that Dr. Dennis specifically said that "the presence and specific location of the file within the distal canal within tooth #15 prevented the proper completion of the root canal of tooth #15 and prevented the canal from being properly cleaned out, shaped and filled with Gutta Percha"

(Dennis ¶7). Thus, he urges that the presence of the file in a canal was a causal factor in why Dr. Brisman was unable to and did not then properly clean out, shape, fill and seal all of the canal and canal space of #15, which then caused the old infection to persist or a new one to begin. Finally, this all led to Dr. Dennis' decision that saving tooth #15 was not possible.

Plaintiff's attorney also argues that moving defendant fails even to make out a prima facie case in the first instance. I agree. As remarked upon earlier, the only support for summary judgment here is from the defendant himself. He exonerates himself from any and all negligence and says that the breaking of an instrument is a risk of the procedure. He opines that he met the applicable standard of care.

This kind of motion practice, supporting a dispositive motion with a self-serving affidavit from the defendant, has been accepted by some courts. However, Dr. Brisman completely fails to address the issue of Mr. White's infection. He points to the plaintiff's decay and plaque of tooth #15, but he never comments on how such a virulent infection, as the one here which caused an abscess to develop and a great deal of swelling that spread to his sinuses, occurred. Finally, on the issue of fraudulent concealment, counsel acknowledges that defendant's position is that since his own x-rays do not show the presence of the foreign object, the plaintiff will not be able to prove by clear and convincing evidence the required element of a knowing misrepresentation.

But as stated earlier, counsel argues that here there is a viable factual issue that rests in part on issues of credibility. It is pointed out that Dr. Brisman in his deposition acknowledges that he would have known about an instrument breaking because he would feel it as it broke. Here, we can assume that it was the defendant's instrument that broke because only he worked on White's tooth #15, a point no one challenges.

All agree as well that the digital x-ray showed the file tip. Therefore, there is a legitimate issue as to what Dr. Brisman actually knew both during and after the procedure. If the fact finders decide he knew of the broken instrument, they may well conclude that fraudulent concealment occurred because there is no dispute that White was told all went well and that the canals were cleaned out. This is the major point made by the plaintiff. Finally, there is enough here to show reliance on these statements made by the defendant to his patient, as well as plaintiff's allegation that this reliance diverted him from looking to this tooth as a cause of his sinus problems and led him to refrain from undertaking a more timely remedy and/or resolution of it.

The defendants' motion is in all respects denied. There is enough here to show that the foreign object was sufficiently connected to the malpractice to allow that claim to go forward. As to the fraudulent concealment claim, I find that there are legitimate issues of fact as to whether Dr. Brisman knew of the broken instrument and, if he did, whether he misrepresented the situation and Mr. White relied upon that misrepresentation to his detriment.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied. Counsel shall appear in Room 222 for a pre-trial conference on Wednesday, January 8, 2014 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: December 3, 2013

DEC 03 2013


J.S.C.
ALICE SCHLESINGER

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