| **Solis v Winegarten** |
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| 2014 NY Slip Op 30336(U) |
| January 24, 2014 |
| Supreme Court, New York County |
| Docket Number: 800294/11 |
| Judge: Joan B. Lobis |
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6

*Justice*

LORRAINE SOLIS

Plaintiffs,

- v -

DR. ROBERT WINEGARDEN et al

Defendants.

INDEX NO 800294/11

MOTION DATE 11/27/2013

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion for summary judgment..

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion / Order to Show Cause – Affidavits – Exhibits | 1-2 |
| Answering Affidavits – Exhibits | 3 (MS#3) |
| Replying Affidavits | 4 |

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

Dated: 1/24/14

JOAN B. LOBIS, *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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

RECEIVED JAN 27 2014 COUNTY CLERK'S OFFICE NEW YORK COUNTY - CIVIL

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

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LORRAINE SOLIS,

Plaintiff,

Index No. 800294/11

-against-

**Decision, Order and Judgment**

DR. ROBERT WINEGARTEN, SOL STOLZENBERG, D.M.D., D/B/A TOOTHSAVERS, and RAIMONE PEREZ,

Defendants.

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SOL STOLZENBERG, D.M.D., P.C., D/B/A TOOTHSAVERS, s/h/a "SOL STOLZENBERG, D.M.D., d/b/a TOOTHSAVERS,"

Third Party Plaintiff,

Third Party Index No. 590256/12

-against-

DR. GENE SHEINKMAN,

Third Party Defendant.

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LORRAINE SOLIS,

Plaintiff,

-against-

DR. GENE SHEINKMAN,

Third Party Defendant.

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

Defendants Sol Stolzenberg, D.M.D., P.C., d/b/a TOOTHSAVERS, s/h/a Sol Stolzenberg, D.M.D., d/b/a/ TOOTHSAVERS, (TOOTHSAVERS) and Dr. Robert Winegarden, s/h/a Dr. Robert Winegarten, and Third Party Defendant, Dr. Gene Sheinkman, move in this dental malpractice action in motion sequence nos. 1, 2, and 3 for summary judgment pursuant to Rule 3212

of the Civil Practice Law and Rules. Plaintiff Lorraine Solis opposes the motions, which are consolidated for purposes of this opinion, order and judgment. For the following reasons, the motions are granted.

On October 4, 2010, Lorraine Solis, age 53, went to TOOTHSAVERS complaining of missing and loose teeth. She was examined by Dr. Robert Winegarden. A treatment plan was made for $15,000, which, in pertinent part, consisted of extracting teeth no. 4, 6, and 8, placing implants, and ultimately upper and lower fixed bridges over the implants. In the meantime, Plaintiff would have a full upper denture and partial lower denture. X-rays and impressions were taken. Ms. Solis met the dental technician, Raimone Perez, who would assist with her plan.

Ms. Solis also met with Mitchell Lynn on October 4. Mr. Lynn is an employee of the non-party corporation, Shermit II. He assisted Ms. Solis with obtaining financing for her dental work. She signed for an $11,000 loan through Chase Health Advantage. She planned to obtain the remaining $4,000 from her brother.

When Ms. Solis returned to TOOTHSAVERS the next day she notified Dr. Winegarden that she wanted to change her treatment plan. It was agreed that the plan would proceed with the upper work as before and only an implant for tooth number 25 on the lower. The revised figure for services was reflected on her chart as $10,000 for the upper and a $1,000 credit.

Ms. Solis last returned to TOOTHSAVERS one week later, on October 12, 2010. At that appointment, Dr. Gene Sheinkman pulled teeth numbers 4, 6, and 8, and according to her

chart, inserted her dentures. Ms. Solis signed a consent for extractions, which is dated October 5, 2010. Ms. Solis claims that, during her last visit on October 12, she got into an argument with Mr. Lynn over the delay in getting her prosthetics and was told by Mr. Lynn that "treatment was off the table." She claims that she was simply handed her prosthetics by the dental technician, Mr. Perez. She did not return for further treatment.

On August 29, 2011, Ms. Solis sued TOOTHSAVERS, Dr. Winegarden, and Mr. Perez. She alleges dental malpractice and lack of informed consent. In asserting dental malpractice, Plaintiff's first cause of action, she complains, among other things, that Defendants negligently performed diagnostic procedures, negligently extracted teeth that did not require extraction, and willfully and wantonly extracted teeth, which extraction was "not necessary without a total treatment plan." She further claims that Defendants "permitted unlicensed dentists to diagnose and treat," negligently fabricated a temporary prosthesis, permitted an unlicensed technician to treat her, and "took her money for treatment that they promised but never delivered." Based on Defendants' conduct, Plaintiff alleges that she has incurred pain, suffering, mental anguish, occlusal disharmony, temporomandibular joint and neuromuscular problems, bone loss, and loss of teeth.

In asserting a claim for lack of informed consent, Plaintiff's second cause of action, Plaintiff claims that "defendant" did not inform her of the risks and consequences of the "prescribed treatment," alternatives to that treatment, the availability of specialists, and "misrepresented that the technician was legally permitted to treat." Plaintiff claims that she or "any other reasonable person" in her position if so informed would not have consented to the treatment. She seeks money damages, including punitive damages.

Plaintiff subsequently amplified her summons and complaint. In a bill of particulars, dated October 15, 2011, however, the challenged conduct by Defendants remained the same. In a supplemental bill of particulars, dated April 27, 2012, though, Plaintiff changed that to claim the negligence arose from the extraction of teeth numbers 4, 6, and 8 and from Mitchell Lynn "diagno[sing] and treatment plan[ning.]" The document further claims that Raimone Perez "took the impression and placed the temporary bridge." It lists negligent treatment as including "implants and full upper reconstruction," permitting an unlicensed dentist and technicians to perform treatment that requires a licensed professional, and challenges the readapting of Plaintiff's old partial denture as a temporary prosthesis, adding more teeth.

Following Plaintiff's service of these bills of particulars, Plaintiff joined the third-party action that had been brought by TOOTHSAVERS, which seeks indemnification and contribution against Dr. Sheinkman, by suing Dr. Sheinkman. Plaintiff's summons and complaint and bill of particulars against Dr. Sheinkman tracks the allegations made against the Defendants in the principal action.

TOOTHSAVERS, Dr. Winegarden, and Dr. Sheinkman answered Ms. Solis's complaints, but Mr. Perez has not appeared in this case. In prosecuting this case, Plaintiff has only deposed Dr. Winegarden. The Defendants deposed Plaintiff Solis and third-party Defendant Dr. Sheinkman. Plaintiff waived participation in Dr. Sheinkman's deposition, even though she sued him in the third-party action. An independent dental examination (IDE) was conducted on July 17, 2013. Plaintiff was still wearing the temporary prosthesis provided to her at her third and last visit to

TOOTHSAVERS on October 12, 2010. The examiner who conducted the 2013 IDE found the prosthesis "presently ill fitting."

In support of its motion for summary judgment, TOOTHSAVERS submits the affidavit of Arnold Jutkowitz, D.M.D. Dr. Jutkowitz has been a New York-licensed dentist since 1966. In preparation for this action, he affirms that he has reviewed, among others, the bills of particulars, deposition transcripts, chart and x-rays, and IDE report. He opines that TOOTHSAVERS did not depart from proper standards of care or proximately cause Plaintiff's injuries and obtained fully informed consent from Plaintiff in providing treatment. TOOTHSAVERS further contends that it is not vicariously liable for any conduct of the dentists, Drs. Winegarden and Sheinkman, and avers that Plaintiff has failed to state a cause of action for any misrepresentation that Plaintiff was being treated by unlicensed dentists and technicians. TOOTHSAVERS also argues that Plaintiff has failed to state a cause of action for breach of contract and moves for summary judgment on the issue of punitive damages. Lastly TOOTHSAVERS contends that it is not liable for any unlicensed treatment by non-party Mitchell Lynn or Raimone Perez.

Dr. Winegarden moves for summary judgment in motion sequence number 2. He offers the affirmation of David Abelson, D.D.S. Dr. Abelson has been a New York-licensed dentist since 1971. Based on his review of this case, which includes the dental records and films, as well as the bills of particulars and deposition transcripts, Dr. Abelson opines that Dr. Winegarden did not depart from proper standards of care, did not proximately cause Plaintiff's alleged injuries, and did not fail to obtain informed consent for treatment of Plaintiff. Dr. Winegarden further contends that

he did not have a duty to monitor or supervise Dr. Sheinkman, and he challenges any claim for punitive damages. Lastly he argues that he is not vicariously liable for Raimone Perez because he is not Mr. Perez's employer.

In motion sequence number 3, movant Dr. Sheinkman contends that his role in Plaintiff's treatment did not involve any departures, did not proximately cause any injuries, and there is no support for any claim for lack of informed consent. In support he submits the affirmation of Theodore Jenal, D.D.S. Dr. Jenal is a New York-licensed dentist, who began practice in 1989. Based on his review of this case, which includes Ms. Solis's dental records and x-rays, as well as the bills of particulars and deposition transcripts, Dr. Jenal opines that Dr. Sheinkman did not depart from proper standards of care, did not cause Plaintiff's alleged injuries, and did not fail to obtain informed consent for treatment of Plaintiff. The expert notes that Ms. Solis had previously consulted another provider regarding implants prior to seeking treatment at TOOTHSAVERS and remains an appropriate candidate for implants.

Plaintiff opposes all three motions in a single paper. Her opposition includes, among others, an affirmation by her attorney and the affidavit of a medical expert, Howard Marshall, D.D.S. Dr. Marshall indicates that he reviewed Plaintiff's chart and x-rays in preparation for his opinion. In that opinion, he challenges Dr. Sheinkman's alleged performance on October 12, 2010, of an alveoplasty, a procedure involving smoothing of the bone, not denoted in Plaintiff's chart or referenced either in Plaintiff's pleadings or bills of particulars. Dr. Marshall further faults the lack of a CT scan, which he opines would be required for implants. He conditionally opines that if unlicensed treatment were to have been performed on Ms. Solis, it would be improper. On the issue

of lack of informed consent, he opines that "no reasonable person would consent to an alveoplasty causing the destruction of bone if they wanted implants." He does not express any opinion on the fees in this matter.

In reply to Plaintiff's opposition, the movants contend that Plaintiff has failed to rebut their prima facie cases and no genuine issues of material fact remain. They condemn Plaintiff's opposition as failing to distinguish among the conduct of the movants. They claim that Plaintiff's counsel's affirmation is unsubstantiated and without foundation. Dr. Winegarden is not mentioned at all by name in Plaintiff's expert affidavit. Movants claim that Dr. Marshall failed to properly familiarize himself with the record at hand and has proffered an opinion that is vague, speculative and conclusory. The expert's opinion relating to "proximate injury" is insufficient to constitute any opinion of proximate cause. Most importantly, they contend, the opposition is premised on a new theory of the case, raised for the first time in opposition to the motions for summary judgment, claiming that Dr. Sheinkman allegedly performed an alveoplasty.

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 issues of material 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). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to the 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 v. Young, 66 A.D.3d 642, 643-44 (2d Dep't 2009); see also Public Health Law § 2805-d(1).

Having reviewed the record in this case, this Court finds that the movants have established a prima facie case to support their motions. Through their experts they demonstrate that the movants did not deviate from standard of care or proximately cause Plaintiff's alleged injuries. Moreover their experts opine that informed consent was obtained. The Court further finds that

Plaintiff in turn has failed to rebut the movants' showing by raising any triable issue of fact. The affidavit from her expert did not raise an issue of dental malpractice because the expert did not set forth how each movant departed in his care of Ms. Solis or whether any departure proximately caused her alleged injuries. Nor does he opine sufficiently regarding any lack of informed consent.

Addressing the motions' specific claims in turn, this Court first considers whether TOOTHSAVERS is vicariously liable in this case. In his deposition, Dr. Sheinkman admitted getting a 1099 form, did not have any withholdings from payments and was paid at a daily rate. Dr. Winegarden, however, testified in his deposition that he was an employee and did have withholding taken out of his pay. Accordingly, this Court finds that TOOTHSAVERS would only be vicariously liable for any liability established against Dr. Winegarden. See, e.g., Mrachek v. Sunshine Biscuit, Inc., 308 N.Y. 116, 120 (1954). In her opposition, Plaintiff, in fact, claims that a Dr. Jerry Lynn is the owner of TOOTHSAVERS, rather than Dr. Stolzenberg, undermining any claim that Defendant Stolzenberg in doing business as TOOTHSAVERS bears any responsibility for Dr. Winegarden.[1] Lastly, in opposing the motions for summary judgment, Plaintiff fails to dispute claims that neither Mitchell Lynn nor Raimone Perez were employees of TOOTHSAVERS. Indeed, Plaintiff concedes in her papers that Mr. Perez is employed by Toothsavers Dental Laboratory, Inc.

Next, this Court considers TOOTHSAVERS' claim that Plaintiff has failed to state a cause of action in fraud. It is uncontroverted that no separate cause of action lies for that claim.

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[1]This claim, however, is made through Counsel of Plaintiff's affirmation in a section entitled "Preliminary Statement" that is devoid of evidentiary citation. An attorney's affirmation does not constitute "evidentiary proof in admissible form," which must be submitted to defeat a motion for summary judgment. Friends of Animals v. Associated Fur Mfrs., 46 N.Y. 2d 1065, 1067-68 (1979).

At this stage of the proceedings, however, where disclosure has been completed, the issue becomes whether Plaintiff has established fraud. E.g., Murphy v. Kuhn, 90 N.Y.2d 266, 272 (1997). In response to the motions, Plaintiff fails to allege with any specificity evidence to support her allegations, including any detrimental reliance. E.g., Nam Tai Electronics, Inc. v. UBS PaineWebber Inc., 46 A.D.3d 486, 488 (1st Dep't 2007). Moreover, fraud claims in medical malpractice actions merge into the malpractice claim unless the claim involves subsequent fraud giving rise to separate and distinct damages from those arising from the malpractice. Spinosa v. Weinstein, 168 A.D.2d 32, 42 (2d Dep't 1991). Under the circumstances, the movants are entitled to summary judgment on the issue of misrepresentation.

TOOTHSAVERS also disputed Plaintiff's allegations of breach of contract. As this Court noted, the complaint consists of two causes of action. In the first cause of action, pertaining to dental malpractice, Plaintiff claims, without more, that Defendants "took her money for treatment that they promised but never delivered." But Plaintiff in opposing the motions for summary judgment fails to cite with any specificity evidence to support that a contract had been entered into. E.g., Winegrad v. Jacobs, 171 A.D.2d 525, 525 (1st Dep't 1991) (breach of contract claim in relation to medical services must be premised on "express special promise to effect a cure or to accomplish some definite result"). Under the circumstances, the movants are further entitled to summary judgment on the issue of breach of contract.

This Court next turns to Plaintiff's claim for punitive damages. Nothing in this record supports that extraordinary remedy. E.g., Rocanova v. Equitable Life Assurance Soc'y, 83 N.Y.2d 603, 613 (1994). The record consists of three visits of treatment. Plaintiff signed a consent form

for the extractions. While it is uncontroverted that Plaintiff's treatment plan is incomplete, no implants have yet been implanted, nothing in the record shows willful or wanton behavior. Nor does Plaintiff's opposition cite to any particulars in the record to support these mere allegations. For example, at most Plaintiff claims that Lynn "led" her to believe he was a dentist, but does not claim in her opposition that he treated her.[2] While she does allege that the dental technician, Mr. Perez, "examined her and took impressions," she never deposed Mr. Perez, and he has not appeared as a defendant in this case. Plaintiff's expert, more importantly, does not allege that even assuming Plaintiff's bare allegations are true, that Mr. Perez's conduct in any way proximately caused Plaintiff's alleged injuries.

Turning to the matter whether any departures have been shown, this Court finds no issue of fact remains. The Plaintiff's expert affidavit is vague and speculative, failing to rely on the record before this Court. He affirmed that his opinion is based on his review of the chart and x-rays. There is no mention of any pleadings or deposition transcripts. See Roques, 73 A.D.3d at 206 (opinion may only be based on record and expert's personal knowledge). Notwithstanding, Dr. Marshall premises his theory of liability on the performance of an alveoplasty, presumably by Dr. Sheinkman. That procedure is not denoted in Plaintiff's chart, the depositions, or bills of particular as having been done. It is well-settled that new theories of liability may not be asserted in opposing motions for summary judgment. E.g., Abalola v. Flower Hosp., 44 A.D.3d 522, 522 (1st Dep't 2007). Even were that theory to have been timely raised, there is nothing to suggest that Dr.

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[2]Plaintiff contends that she and non-party Mitchell Lynn, who it is uncontroverted is not employed by any of the movants, had a dispute on October 12, 2010, which was her motivation for not returning for further treatment. That dispute, however, is beyond the scope of the allegations raised by Plaintiff against the movants, claiming dental malpractice and lack of informed consent.

Winegarden or TOOTHSAVERS were in any way involved in that conduct that is newly alleged to have been performed on October 12, 2010, by Dr. Sheinkman, as an independent contractor at TOOTHSAVERS.[3] Moreover, the only source in the record for Plaintiff's late claim that an alveoplasty was performed is an item of correspondence between TOOTHSAVERS and Chase Health Advantage, listing that procedure among services provided to Plaintiff. Plaintiff maintains in testifying at her deposition, however, that Dr. Sheinkman "did nothing to the bone," and the itemization was "make believe." Turning to the malpractice theories that Plaintiff had previously raised, there is nothing in Plaintiff's opposition to claim that Plaintiff's dental condition was misdiagnosed or that her teeth were extracted unnecessarily.

Nor does Dr. Marshall even address proximate cause. See Roques, 73 A.D.3d at 207. There is simply no link in the expert opinion between any specific departures in this case and any specific injuries. At most, the record shows that at the independent dental examination conducted in 2013, almost three years after treatment in this case was provided in 2010, the examiner found that the temporary prosthesis, concededly not intended for long-term use, was "presently ill-filling." That fact fails to raise a triable issue of fact over the temporary prosthesis's fit at the time of the events of this case.

Lastly this Court considers the issue of lack of informed consent. No triable issue remains. Dr. Marshall fails to opine that a reasonable patient in Plaintiff's circumstances if fully informed would not have consented to the treatment or that the lack of informed consent proximately

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[3]Notably Plaintiff never even deposed Dr. Sheinkman; participation was waived, even after Plaintiff had filed her amended summons and complaint to include claims against him.

caused Plaintiff's alleged injuries. Pub. Health Law § 2805-d(3). Accordingly it is

ORDERED that motion sequence nos. 1, 2, and 3 are granted, and the complaint is dismissed in its entirety against the movants; it is further

ORDERED that the action is severed and continued against the remaining defendant; it is further

ORDERED that the caption be amended to reflect the dismissal of the movants and that all future papers filed with the Court bear the amended caption; it is further

ORDERED that the third-party action is dismissed in its entirety; it is further

ORDERED that the Clerk is directed to enter judgment in favor of the movants accordingly; and it is further

ORDERED that counsel for the movants shall serve copies of this order with notice of entry upon the County Clerk and the Clerk of Trial Support Office who are directed to mark the Court's records to reflect the change in the caption.

Dated: January 29, 2014

ENTERED:

JOAN B. LOBIS, J.S.C.