

**Cordero v Yeung**

2014 NY Slip Op 31144(U)

April 30, 2014

Supreme Court, New York County

Docket Number: 401889/12

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
Justice

PART ~~A~~ PART 16

Index Number: 401889/2012  
CORDERO, MARY BETH  
vs.  
YEUNG, SAMMI  
SEQUENCE NUMBER: 002  
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**

MAY 02 2014

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: APR 30 2014

*Alice Schlesinger*  
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

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

-----X  
MARY BETH CORDERO,

Plaintiff,

Index No. 401889/12  
Motion Seq. No.002

-against-

SAMMI YEUNG, D.D.S., MICHAEL YEUNG, D.D.S.,  
YEUNG'S DENTAL, P.C. and YEUNG'S DENTAL  
CARE, P.C.,

Defendants.

**FILED**

MAY 02 2014

-----X  
SCHLESINGER, J.:

COUNTY CLERK'S OFFICE  
NEW YORK

The motion before me concerns an action sounding in dental malpractice. The motion is a somewhat unusual one because it is made by the plaintiff Mary Beth Cordero, rather than the defendant. Ms. Cordero is moving for summary judgment in her favor. The core issue here concerns the decision by the defendants not to take x-rays of Ms. Cordero's lower teeth at the time they first provided service to her on October 4, 2009, or at subsequent visits, that show the bone supporting the lower teeth.

Ms. Cordero sought treatment from the defendants pursuant to a dental insurance plan that she had. It was a "capitation plan", which means that the defendants would be paid a certain amount solely because Ms. Cordero was their patient, rather than charging based on the kinds of services specifically provided to her.

Ms. Cordero was 25 years old when she first visited Yeung's Dental Care in October 2009. Under her plan, she was entitled to examinations and cleanings every six months. As stated earlier, she began her treatment in October 2009 and she went back for examinations and related care until December 29, 2011.

On Ms. Cordero's last visit on December 29, 2011, she saw an associate dentist, Dr. Denise Mui. This was the first visit where she allegedly made specific complaints about a problem. In fact, it was those complaints which led her to move up the appointment so that the problem could be diagnosed and addressed. Up until that point, Ms. Cordero had come about every six months to the defendants' office. The dates included April 11, 2010, October 17, 2010, June 18, 2011, and then the final visit on December 29, 2011. No x-rays were taken of Ms. Cordero's lower mouth during any of those appointments which displayed pictures of the bone.

When Dr. Mui saw and examined Ms. Cordero on December 29, 2011, after hearing her complaints of a growth in her mouth, she did take an x-ray of her lower mouth, specifically of the lower anterior teeth. That is when the tumor was seen. After she was referred to a specialist for consultation, the plaintiff was diagnosed with an ameloblastoma of the mandible. This diagnosis resulted in the extraction of this young woman's teeth numbers 18, 20, 21, 22, 23, and 25, six permanent teeth.

It is on these facts that counsel for the plaintiff urges the Court to grant judgment in his client's favor. Counsel's position is that the failure to take readable x-rays of Ms. Cordero on the first visit or on any of the other visits was a clear departure from proper dental standards of care. Counsel, a former dentist himself, states that the "undisputed standard of care in dentistry in all new adult patients is to perform an initial examination which includes a cancer and tumor screening; the cancer and tumor screening requires a radiographic and clinical examination" (§7 of attorney's affirmation).

The motion is supported by an affidavit from Dr. Howard Marshall, who is a graduate of the University of Pennsylvania School of Dental Medicine in 1961 and a graduate, two

4]

years later, of that University's Periodontic program. He says that he is "presently engaged in the practice of general dentistry which includes prosthetic restoration and the treatment involved in this case" (¶2). He also states that for a number of years his practice was limited to periodontal treatment. Dr. Marshall first states that he has examined the x-rays and treatment of Ms. Cordero at the office of Yeung's Dental Clinic. He then refers to the December 29, 2011 x-ray of the plaintiff's lower anterior teeth. He then repeats what the diagnosis was found to be and the treatment Ms. Cordero received, the extraction of six teeth. He then discusses "the standard of care". He opines (at ¶6) that a dental examination of a patient of Ms. Cordero's age requires:

a comprehensive clinical examination including a cancer screening and full series of x-rays unless the patient brings a quality set of recent x-rays or the dentist obtains a quality set of recent x-rays from the previous dentist. The standard of care is to examine those x-rays for decay, periodontal disease and any pathology including tumors.

Here, Dr. Marshall points out that the patient did not bring any x-rays with her, nor was she asked when x-rays were last taken. The defendants' office took four bite-wing x-rays, three upper periapical x-rays, and one lower periapical x-ray. Dr. Marshall begins by saying that the numerical amount of these x-rays, in the first instance, does not satisfy the standard of care. Specifically, he says: "there is only one periapical x-ray of any lower teeth and the quality of this one x-ray is poor; it is elongated and does not show any bone below any lower teeth. This is a total violation of the standard of care" (¶7). Dr. Marshall believes that there is no justification for this lapse and that at the very least the treatment should have included the retaking of the lower x-ray so as to be able to see the bone supporting the teeth.

He then refers to the final visit, on December 29, 2011 when additional x-rays were taken which included a periapical x-ray of the lower anterior teeth. This x-ray was properly taken and revealed the tumor. Dr. Marshall adds (at ¶11) that:

I can say with reasonable dental certainty that not having or taking a lower x-ray that showed the bone below the anterior teeth is a clear violation of the standard of care and the standard of care was compounded and violated by not retaking the lower x-ray on 10/4/09, 4/11/09, 10/17/10 and 6/18/11.

Dr. Marshall tells the Court that this type of tumor is very aggressive. Therefore, he concludes his statement in this way: "I can say with reasonable dental certainty that the tumor was present prior to when first observed on the x-ray on December 29, 2011 and had the dentists at Yeung's Dental Clinic taking appropriate x-rays on 10/4/09, 4/11/09, 10/17/10, 6/18/11 the tumor would have been discovered earlier; it would be smaller; the surgery would be less; the injury would be substantially less" (¶12).

I conclude in the first instance that, despite the technical objections made by the defendants in their opposition papers, the plaintiff has in fact presented a prima facie case. Defense counsel argues that no prima facie case has been made out because moving counsel has not included all of the necessary papers in his motion, such as pleadings, deposition testimony and affidavits, if any. Defense counsel also accuses moving counsel of making references to numerous purported facts which he says are not necessarily supported by the record.

As stated above, these are technical deficiencies. However, nowhere in the opposition papers is issue taken with the facts from the record relied on by Dr. Marshall. Moving counsel in future papers should be prepared to submit a full record, including full transcripts of depositions, particularly when he is asking for dispositive judgment in his

[\* 6]

favor. However, I find that the records submitted along with the affidavit of the plaintiff's expert, Dr. Howard Marshall are sufficient in the first instance to convince me that the omission of x-rays showing the bone beneath the lower teeth was a departure from accepted standards of dental care and, with the knowledge that a tumor that was later found in the area not x-rayed caused the loss of six permanent teeth, there would certainly be an injury from this departure.

The question is, once a finding that a prima facie case has been made, does opposing counsel present enough in opposition to show that there are in fact legitimate issues requiring a trial. Here, in Exhibit E of the opposition papers, is a redacted affirmation from a dentist who says that he/she graduated from New York University College of Dentistry and that he/she is now a "clinical instructor at a local area hospital dental department".

He/she says that he/she has reviewed the verified pleadings, bill of particulars, the deposition transcripts of all parties, and the plaintiff's dental records from Yeung's Dental PC. He/she states additionally that he/she has reviewed the affidavit of Dr. Marshall, plaintiff's expert. He/she then states the following: "It is my opinion with a reasonable degree of certainty in the field of dentistry that the care and treatment of the plaintiff, including and particularly the taking of dental radiographs, by the defendants was within the applicable standard of care" (¶2). Additionally and specifically, this dentist disagrees with Dr. Marshall's opinion that the standard of care requires a full series of x-ray's to be taken of the mouth of a patient of plaintiff's age.

This dentist then discusses the initial visit that Ms. Cordero had with Sammi Yeung, D.D.S. Since this was a "young patient who presented without complaints and for a general checkup and cleaning, this would require an intra-oral exam and the taking of radiographs

but not necessarily a full mouth series, depending on the findings” (§ 4). The dentist adds that the care given to Ms. Cordero was minimal, that there were no significant findings, and no periodontal concerns.

In the next paragraph, this dentist says that specifically “the standard of care for an initial presentation would require posterior bitewings and periapical images.” He/she goes on to state that that was what was done here. This dentist again emphasized that this visit was for a “general check-up and cleaning on a patient without any complaints” (§ 5). The critical part of this dentist’s opinion concerns what a cancer screening should include. This dentist does acknowledge that a cancer screening is part of a typical clinical oral evaluation. However, he/she states that a “cancer screening, from a dental perspective requires a visual inspection and palpation of the structures of the oral cavity (including head and neck). Taking of radiographs is not per se part of the cancer screening. Although, suspicious pathology visible on radiographs should be considered for a further evaluation and/or referral to a specialist. This would be an incidental finding” (§ 5).

With even more specificity, this dentist says that Dr. Marshall’s opinion is not correct that the one lower anterior periapical radiograph did not meet the standard of care. This dentist seems to acknowledge that a non-elongated x-ray would typically show some level of bone below the tooth, which this one did not, but he/she still maintains that on October 4, 2009, the dental staff was not required to take a second, more revealing x-ray. This seems to be the case because there were no complaints about that or any other area.

This dentist goes on to discuss the second visit that Ms. Cordero had with Dr. Michael Yeung on April 11, 2010. Again, the purpose of that visit was a six month recall for cleaning and checkup. According to Dr. Yeung’s records and testimony, there were no complaints by the patient and she had “no pain and no problems” (§ 7). As is acknowledged, Dr. Yeung took no additional x-rays on April 11. Though, he states that he

did review the earlier ones taken. However, this defense expert finds no fault with the failure to take additional x-rays concerning the bone in the lower mouth because, again, there was no clinical decay or complaints reported. This dentist adds that the standard of care did not require Dr. Michael Yeung to take any new radiographs of the lower anterior periapical.

This expert goes on to discuss the next two visits by Ms. Cordero to the defendants' dental practice, both of which were had with Dr. Sammi Yeung. The first of these was on October 17, 2010, and the second was on June 18, 2011. These were again basic recall visits for cleaning, wherein the treating dentist received no complaints from his patient. So the expert opines that: "Based on the normal clinical exam and lack of complaints and findings, the standard of care did not require the taking or re-taking of additional dental radiographs" (§18).

On the last visit, on December 29, 2011, Ms. Cordero was seen by an associate dentist, Dr. Denise Mui. She noted that the patient had a "growth within the past six months" (§19). Ms. Cordero testified that she had noticed a growth on the lingual side within a few days before the actual visit and therefore moved up her recall appointment. X-rays were taken that day, showing the lower anterior bone and also showing a tumor there. The defense expert agrees that "this type of tumor is locally aggressive", but he/she says "only in the sense that it can and does destroy bone" (§19). However, this dentist disagrees with Dr. Marshall's depiction of the ameloblastoma as being "very aggressive." Although, this Court would think that a tumor that requires the extraction of six teeth from a young woman's mouth could be characterized as very aggressive, though necessary treatment at the time it was diagnosed.

This dentist also acknowledges agreement "with the obvious point that the tumor did exist before the December 29, 2011 visit." However, this expert disagrees with

Dr. Marshall that x-rays taken on earlier visits “would have necessarily resulted in an earlier discovery of the growth, particularly since this type of tumor usually originates near the angle of the mandible (3<sup>rd</sup> molar region). Further, this type of abnormality typically occurs in older patients 30-50 years of age” (¶10).

Critically the opinion of this dentist is that “the origin of the tumor can not be reasonably assumed based on 2011 radiographs and the subsequent treatment records.” His/her belief is that it “would not be reasonable to assume that, even had non-elongated films been taken on the first visit .... or at the second visit .... that the pathology would have been visible” (¶10). Further this dentist believes that Dr. Marshall incorrectly assumes that the growth started in the lower anterior area. But, this dentist opines that “it typically occurs in the posterior.” Presumably, that is this dentist’s rationale for opining that earlier radiographs in the anterior area would not have shown a smaller growth.

This dentist then repeats his/her earlier opinions that the standard of care was met here and there was no need to take additional radiographs. The opinion concludes with the following (at ¶12):

even if pathology can exist without symptoms, the standard of care does not require indiscriminate radiographs. Accordingly, I believe the frequency, quality and quantity of radiographs taken by the defendants were appropriate and within the standard of care and sound clinical discretion at all times, and, in sum, that the entirety of the care rendered was within a standard of care.

The reply affirmation attempts to focus the Court's attention on two x-rays and urges the Court to “ask itself one question and then ask the same question to the attorney for the defendant at oral argument.” The two x-rays which constitute Exhibit A show, in the first instance, the bone with a tumor, as seen on December 29, 2011. The second x-ray, taken on October 4, 2009, shows no bone below the anterior teeth. The question moving

counsel wants me to ask myself and opposing counsel is "How much more destruction of the jaw would have occurred if God forbid the same negligent sloppy poor quality x-ray was taken on December 29, 2011, and the tumor still not diagnosed" (§9).

However, the question does not convince this Court that counsel is deserving of judgment. The conditions on December 29, 2011 were materially different than at earlier visits. This is pointed out in the opposition papers and it is obvious that Ms. Cordero had very real symptoms, a growth in her mouth, which mandated her to seek an earlier appointment in order to diagnose the real symptom she experienced shortly before December 29, 2011.

On October 4, 2009, while it is clear that the undisputed elongated x-ray was worthless in detecting any pathology, it is unknown but constitutes a difference of opinions by the experts if there was any pathology in the bone then. The expert for the defendants however, insists that despite the lack of any radiographic information as to the lower bone, it was still not the standard of care to take additional x-rays in the face of no complaints.

I find that this is a close question. It is hard to accept the defendant's opinion that on balance additional x-rays would have hurt Ms. Cordero more than what would have been gained by the ability to have a clear view of her entire mouth including the lower bone. However, since granting summary judgment is such a drastic measure of relief, I choose not to do that here. I am relying on the opinions of a dental expert who insists that, despite what may seem to be appropriate, it is not the standard of care to take more x-rays with a patient such as this and not necessary for a cancer checkup to do more than what was done here.

Accordingly, it is hereby

ORDERED that the motion by the plaintiff for summary judgment is denied; and it is further

ORDERED that counsel shall appear in Room 222 for a conference on  
May 21, 2014 at 9:30 a.m.

Dated: April 30, 2014

APR 30 2014

*Alice Schlesinger*  
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J.S.C.  
ALICE SCHLESINGER

**FILED**

MAY 02 2014

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