

Finkenagel v Perry

2014 NY Slip Op 31728(U)

June 27, 2014

Sup Ct, Suffolk County

Docket Number: 09-6934

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-20-13
ADJ. DATE 4-21-14
Mot. Seq. # 001 - MG; CASEDISP

-----X
BRENDA LYNN FINKENAGEL and EDWARD
FINKENAGEL,

Plaintiffs,

- against -

FRANK C. PERRY, D.D.S., and FRANK C.
PERRY, D.D.S., P.C.,

Defendants.
-----X

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-24; Replying Affidavits and supporting papers 25-31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants, Frank C. Perry, D.D.S., and Frank C. Perry, D.D.S., P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

Plaintiffs Brenda Lynn Finkenagel and Edward Finkenagel, derivatively, commenced this action to recover for injuries allegedly sustained by Brenda Lynn Finkenagel as a result of the defendants' negligent departures from good and accepted standards of care and practice during the dental treatment provided to her. It is alleged that defendant Dr. Frank C. Perry failed to provide informed consent and used excessive force to remove and extract an upper anterior fixed dental bridge on August 28, 2008. It is alleged that as a result of these departures, plaintiff was caused to sustain injuries consisting of disc herniations at C3-4, C4-5, and C7-T1; degenerative changes at C5-6 and C6-7; neural foramina narrowing at C5-6 and C6-7 with cervical radiculopathy; bilateral carpal tunnel syndrome greater on the right than on the left side; and right shoulder pain due to a partial tear of the articular surface of the distal supraspinatus tendon; right rotator cuff tear causing right elbow and arm pain; post traumatic headaches secondary to nerve damage to the cervical spine; sensory deficit in the upper extremity and weakness and

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tingling in both arms; myofascial pain syndrome; loss of strength and ability; and aggravation of pre-existing conditions of the cervical spine and shoulder and soft tissues and bilateral wrists.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). 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, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and 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, 435 NYS2d 340 [2d Dept 1981]).

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, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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 Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d 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, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

“The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care” (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

Brenda Finkenagel testified to the extent that in 1978, when she was about 18 years of age, Dr. Benson in Central Islip placed a dental bridge on her front upper teeth. In 1991, she had a car accident and hit her mouth on the steering wheel, causing the bridge to break. Dr. Winter, located in Centereach, made a replacement bridge on five or six teeth in 1992. She also treated with Dr. Wechtermann and Dr. Patel, who placed two additional bridges on her lower back teeth and one additional bridge on her right upper back teeth, due to teeth extractions. She saw Dr. Perry in the 1990s, but stopped treating with him

as he did not accept her husband's insurance. She then returned to Dr. Wechtermann. She saw Dr. Markovitz for teeth cleaning in April, 2008.

The plaintiff continued that on August 7, 2008, she returned to Dr. Perry for dental treatment because he was a good dentist. She had a bad tooth under her front upper bridge which was causing sensitivity to heat and cold. That was the bridge that had been placed by Dr. Winter in 1992 and which remained in place until she was seen in 2008 by Dr. Perry. The bridge, she stated, was not loose. The plaintiff stated that she did not discuss with Dr. Perry at any time that she had neck or shoulder pain. She described Dr. Perry's examination and stated that he advised her she needed gum surgery and a root canal underneath the bridge, so the bridge needed to be removed. He referred her to Dr. Berman for gum surgery, root canal, and a tooth extraction. She saw Dr. Perry on August 11, 2008, and Dr. Berman on August 21, 2008.

The plaintiff testified that she saw Dr. Perry again to have the bridge removed on August 28, 2008. Dr. Perry, she stated, administered novocaine and sweet air, but she could not recall whose decision it was to use sweet air. The plaintiff testified that Dr. Perry told her he was going to "wack" the bridge out. She stated that he removed the bridge with a chisel and hammer while she was sitting up with her head against a headrest, but she really did not remember because of the sweet air. Before she left his office to go home for a while before her appointment with Dr. Berman that afternoon, Dr. Perry placed a temporary bridge. She did not tell Dr. Perry that she had pain in her neck, or shoulder, or anywhere before or after the removal of the bridge. That afternoon, Dr. Berman performed surgery on the upper front of her mouth with novocaine and sweet air while she was in a reclined position for a couple of hours. She did not tell him before or after the surgery that she had neck or shoulder pain. She described the subsequent visits with Dr. Perry and Dr. Berman, including an extraction by Dr. Berman, but did not recall many specifics. She never complained to Dr. Perry or Dr. Berman about pain in her neck, shoulder, or arm at any time. She last saw Dr. Perry as a patient on September 16, 2008 and Dr. Berman on October 27, 2008.

The plaintiff also testified that she was prescribed Vicodin for pain associated with her oral surgery, however, because she could not take the medication while driving the school bus at work, she stopped taking Vicodin on September 11, 2008. After that, she began having a lot of shoulder and neck pain and could not sleep. She saw Dr. Spinnato on September 20, 2008 for the pain in her neck and shoulder, which was then constant, and made worse by opening and closing the bus door with her right arm, and gardening and other things at home. The pain radiated down her right arm, but she could not remember which part of her arm. When she saw Dr. Spinnato, she did not relate to him that there was any specific event that precipitated the pain in her neck and shoulder and arm, and he had no idea what caused her pain. Dr. Spinnato referred her to Dr. Mulrad who saw her on October 29, 2008. Dr. Mulrad told her that she had a neck injury, but she did not tell him of any particular event which preceded the pain, and he offered no opinion as to the cause of the trauma. She also followed up with Dr. Firouztale, a neurologist, who never offered her an opinion as to the cause of the herniated discs in her neck and the shoulder pain. Thereafter, she was out of work on private disability for five months. When she later applied for Social Security Disability, her claim was denied.

The plaintiff also testified that she had a bus accident in 2001 and experienced pain in her back and underwent physical therapy for a couple of months. She came under the care of Dr. Firouztale in

2001. In 2007, she was treating for her back pain with Dr. Xian of South Shore Neurology. She stated that Dr. Firoutzale told her that some x-ray studies showed, among other things, a herniated disc in her back. In 2007, she had EMG testing performed by Dr. Besser, but she could not remember the results of the testing. In 2009, she began to see Dr. Firouztale again, and as well as Dr. Grant from Dr. Firouztale's office. She could not recall if she had any CAT scans, MRI studies, or x-rays of her neck or back prior to 2008. The plaintiff testified that prior to seeing Dr. Perry in August 2008, she never had pain in her neck. She did not remember being told that she had herniated or bulging discs, or any other abnormalities in her neck prior to 2008. In August, 2011, she was involved in an accident when the bus she was driving was struck in the rear. She started seeing Dr. Kleeman, an orthopedist, for a worker's compensation claim resulting from a knee injury she sustained in that accident, and for which she had surgery in January 2012. She has not worked since that accident. She takes Vicodin and Flexeril every night for pain in her neck, right arm, lower back, both knees, and her "whole body." The plaintiff stated that she has arthritis everywhere in her body, including her neck and back. She applied for Workers' Compensation and had a case pending at the time of her second continued examination before trial.

Dr. Perry testified to the extent that he saw the plaintiff in his office on August 7, 2008, at which time she told him she was having pain under the bridge. She told him that her bridge was loose and she was afraid it was going to fall out. He gave her a prescription for penicillin, took x-rays, and saw her again on August 11, 2008. He stated that after reviewing the full mouth series x-rays, they would have had a discussion because the bridge was loose and there were indications of periodontal problems. He explained to her that he would remove the bridge so it would not fall out, make a temporary bridge, and refer her to Dr. Berman, the periodontist, for periodontal treatment. He sent a letter dated August 11, 2008, to Dr. Berman advising him regarding the plaintiff's referral. Dr. Perry also wrote a lab prescription for an acrylic provisional temporary to be made to replace the plaintiff's front teeth. He made a primary suggested treatment plan. Referencing exhibit 7, he stated that his office note stated "existing upper bridge is mobile." Dr. Perry testified that he saw the plaintiff on August 28, 2008, to remove the existing PFM (porcelain-fused-to metal) bridge, located at teeth number 6 to 11, and to seat custom temps 6 to 11 with Temrex. Dr. Perry continued that he removed the plaintiff's bridge with a bridge remover, which has a handle with a little ledge on the edge of it, so a catch can be found on the patient's bridge to enable removal of the bridge. A little weight is used to pull the bridge off. He thought the visit took about 20 minutes in total. He stated that there was nothing in exhibit 1 to indicate how he removed the bridge. He did not administer sweet air or give a novocaine injection to the plaintiff, or else it would have been entered on the record.

In support of this motion, the defendants submitted, inter alia, the affirmations of Mark G. Pancotto, D.D.S., and Stephen Marcus, M.D.

Dr. Pancotto stated that he is licensed to practice dentistry in New York State. He set forth his education, training and work experience, and the materials and records he reviewed. It is Dr. Pancotto's opinion within a reasonable degree of dental certainty that the care and treatment by Dr. Perry and his P.C. was at all times appropriate and within prevailing standards of care, and that it was not a substantial factor in causing the damages alleged by the plaintiff. He set forth the care and treatment by Dr. Perry, including Dr. Perry's notation of August 11, 2008 that the bridge was very loose and that the plaintiff was concerned it would fall out. Dr. Perry took an impression for laboratory fabricated temporaries which did not involve removal of that fixed bridge. Upon referral by Dr. Perry, the plaintiff saw Dr.

Berman on August 21, 2008 for an initial periodontal evaluation. Dr. Berman noted that the plaintiff had extensive decay beneath the existing abutments for the maxillary anterior splint, and the teeth were of different heights.

Dr. Pancotto continued that Dr. Perry then removed the anterior bridge on August 28, 2008 from teeth # 6 through 11, and a new temporary was inserted with temporary cement. He stated that based upon the records and testimony of Dr. Perry, the bridge was removed with a bridge remover as it was loose secondary to extensive decay beneath the bridge, which involves gentle tapping with the weighted side of the tool against a rubber buffer after placing the curved end underneath. The plaintiff testified that her head was against the headrest while she was seated in the dental chair. This, Dr. Pancotto stated, would not cause undue stress on the patient's neck, back, shoulder or wrists. Later that day, the plaintiff underwent extensive periodontal flap surgery at teeth # 12 and 13, and crown lengthening of teeth #6, 9,10 and 11, and extraction of tooth #8 by Dr. Berman.

Dr. Pancotto opined that Dr. Perry's use of a bridge remover to remove the anterior bridge was entirely reasonable and within prevailing standards of dental care. Dr. Pancotto stated that in his teaching capacity, he instructs the use of a bridge remover when a fixed bridge is loose. In all of his years of teaching, he has never observed or been aware of the use of the bridge remover causing a patient to suffer trauma to the neck, back, shoulder, arm or wrist. The force exerted by the tool used by Dr. Perry is distributed through the teeth, such that if excessive force were used, as plaintiff claims, one would expect to see trauma to the teeth that the bridge is attached to, such as tooth fractures or root damage, or trauma to the adjacent teeth and soft tissue injury, which were not observed and did not exist in this case.

Dr. Pancotto stated that the plaintiff did not report a prior history of neck, back, shoulder, arm, or wrist pain to Dr. Perry or Dr. Berman at any time, and at no time did she report injury or pain from the use of the bridge remover. Neither did she report that either dentist observed any difficulty with her sitting through the dental treatment and surgery secondary to pain in her neck, shoulder, arm, back or wrist. She presented to treatment at Brookhaven Memorial Hospital emergency room, and did not relate any precipitating event for her pain. When she followed up care with Dr. Spinnato on September 20, 2008, she told him that she had no idea what caused her to develop neck and shoulder pain. The plaintiff did testify, however, that the pain in her neck on the right side and shoulder pain was aggravated by opening and closing the door on the school bus.

Dr. Pancotto continued to describe the dental care and treatment provided by Dr. Perry and Dr. Berman. He set forth in the record those discussions with the plaintiff and plan set forth, as well as the plaintiff's desire to complete the anterior maxilla as finances were getting out of hand. These discussions, stated Dr. Pancotto, clearly represent an appropriate informed consent of the patient to the procedures to be done and the need for the same. He continued that given the decaying condition of the plaintiff's teeth, it was appropriate for Dr. Perry to refer the plaintiff for periodontal care with Dr. Berman, on a team approach. It was necessary for Dr. Perry to remove the bridge to fully determine which teeth beneath it were, and were not, salvageable and to institute periodontal treatment to those teeth. He stated that Dr. Perry's discussion with the plaintiff about the bridge removal and the plan was clearly within the standard of care. Dr. Pancotto continued that Dr. Perry's records and radiological studies, as he set forth, were made within prevailing standards of practice.

Defendants' medical expert, Stephen Marcus, M.D., affirmed that he is a physician licensed to practice medicine in New York State, and that he is board certified in orthopedic surgery in which he has practiced. He set forth his education and training and the materials and records which he reviewed. Dr. Marcus opined within a reasonable degree of medical certainty that the use of the bridge remover utilized by Dr. Perry could not have caused the injuries the plaintiff alleges in the instant case, to wit, cervical disc herniations, right rotator cuff tear, or bilateral carpal tunnel syndrome in her wrists. Based upon his review of the plaintiff's medical records, the plaintiff had been suffering from, and was diagnosed with, neck, shoulder, and arm pain, confirmed on radiologic studies several years prior to her treatment with Dr. Perry on August 28, 2008, and the plaintiff failed to accurately report her prior medical condition to him.

Based upon the foregoing, the defendants have established prima facie entitlement to summary judgment dismissing the complaint.

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, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In opposing this motion, the plaintiff submits, inter alia, her affidavit wherein she stated to the extent that at no time prior to the bridge dental work did Dr. Perry discuss the procedure or alternate procedures with her, or advise her he was going to hit her with any force. She continued that prior to the dental work and bridge removal, she had problems with her neck, experienced pain, and had received treatment for her neck injuries. When she presented to defendants, she was not experiencing pain in her neck, and she would not have had the procedure, if she knew removal could cause soft tissue trauma. Following the procedure, which she asserts was done under anesthesia with nitrous oxide, she developed pain and stiffness in her neck and headaches for which she treated with Stephen J. Caroli, D.C. and Paolo Coppola, M.D. After August 2011, she was unable to continue work as the symptoms prevented her from performing her job. She set forth her complaints, including marital discord as a result of her injuries.

The plaintiff submitted the affirmed letter dated March 17, 2014 from Arnold E. Ray, D.D.S., addressed to her attorney. Dr. Ray has not qualified as an expert as he has not set forth his qualifications, education, training, or work experience, and he does not indicate whether or not he is licensed in any state, or whether he is board certified in any specialty. Dr. Ray has not provided a copy of his curriculum vitae. Even if he qualified as an expert, Dr. Ray has not set forth the standard of care concerning the dental care and treatment provided by defendants to the plaintiff, and how the defendants departed from that standard of care. There is no opinion proffered with regard to the proximate cause of the plaintiff's claimed injuries resulting from any departure from the standard of care by the defendants.

Dr. Ray does state that there was a lack of informed consent by defendant Dr. Perry on August 28, 2008, as the plaintiff denied Dr. Perry told her how he would remove the maxillary anterior bridge and that Dr. Perry did not mention in his record the risk of mild to moderate oral soft tissue injury as a potential outcome of bridge removal. However, Dr. Ray does not opine with regard to the plaintiff's claims of herniated discs, radiculopathy, bilateral carpal tunnel syndrome, shoulder injuries, and other injuries, and whether or not those injuries should have been mentioned as risks of the procedure, in addition to mild to moderate oral soft tissue injury. While Dr. Ray stated that lack of informed consent by a patient for a proposed procedure falls below an acceptable standard of care, he did not set forth what that informed consent should have included. His statement that a lack of informed consent for a proposed procedure falls below an acceptable standard of care is conclusory. Dr. Ray offered no opinion concerning how the bridge was removed, the standard of care for removing a bridge, and whether or not Dr. Perry comported with the standard of care. Dr. Ray does not opine that there is anything which Dr. Perry did during the removal of the bridge which was the proximate cause of the plaintiff's alleged injuries.

The plaintiff has submitted a narrative report from PTC Medical, P.C., signed by Paolo Cappola, M.D. and Stephen J. Saroh., D.C., which is not affirmed by Dr. Cappola, or notarized on behalf of Dr. Saroh. It is not revealed why two signatures appear on the unsworn narrative, or which physician is responsible for the report, or any part thereof. Neither Dr. Cappola nor Dr. Saroh have submitted copies of their respective curriculum vitae or otherwise qualified as experts in this matter. Even if the narrative report were in admissible form, it is determined that the plaintiff has not raised factual issues to preclude summary judgment and dismissal of the complaint.

Either Dr. Cappola or Dr. Saroh opined that the accident of August 28, 2008 is the competent producing cause of the plaintiff's conditions of post traumatic cervical spine disc herniation at C3-4, C4-5, and C6-T1; EMG confirmed radiculopathy; post traumatic neurogenic dysfunction affecting the muscles of the right upper extremity; post traumatic cervical sprain/strain; post traumatic cervical spine loss range of motion and headaches. Their report sets forth that the EMG/NCV testing of March 14, 2007 of the upper extremities revealed bilateral carpal tunnel syndrome, and an MRI exam of April 2, 2007, demonstrated small disc herniations at C3-4, tiny central disc herniation at C4-5, and mild to moderate at C5-6 and C6-7, with degenerative changes at C7-T1. Both of these studies pre-date the August 28, 2008 alleged occurrence involving removal of the subject bridge. The MRI of November 7, 2008 revealed three disc herniations at C3-4, C4-5, and C6-T1, with degenerative changes at C5-6 and C6-7.

It is noted that none of reports of the MRI studies and EMG/NCV testing have been provided as required pursuant to *Friends of Animals v Associated Fur Mfrs.*, *supra*. Expert testimony is limited to facts in evidence. (*see also Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.*, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Such reports are not in evidence. Even if they were properly submitted, it has been established by plaintiff's submissions that the injuries alleged by the plaintiff pre-date the alleged occurrence of August 28, 2008.

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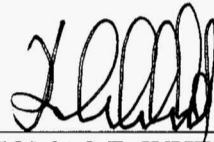
It is further noted that the plaintiff's physician and chiropractor have not set forth the basis for the opinion that plaintiff's injuries were proximately caused by the removal of the subject bridge on August 28, 2008. Instead, they state that the plaintiff advised that there was a "forceful procedure" to remove the bridge, and this eventually caused Mrs. Finkenagel to develop discomfort in her neck which progressed as the day passed. However, it is noted that the plaintiff testified that she did not develop pain until September 11, 2008, when she stopped taking Vicodin for pain from the oral surgery performed by Dr. Berman, that she did not have neck, arm or shoulder pain prior to that, and that opening the bus door caused her to experience pain. Thus, plaintiff's treating physicians' report does not coincide with plaintiff's testimony concerning when she developed pain, and how it progressed thereafter, or the reason why the plaintiff underwent EMG/NCV testing and cervical MRI studies in March 2007, more than a year prior to the alleged incident. The plaintiff's physician and chiropractor have not set forth the standard of care or opined as to the departures from the standard of care by the defendants in removing the bridge and how such departures proximately caused the plaintiff's alleged injuries.

Based upon the foregoing, the plaintiff has failed to submit sufficient evidentiary proof to raise a triable factual issue to preclude summary judgment.

Accordingly, motion (001) by defendants is granted and the complaint is dismissed.

Dated: _____

6/27/14



THOMAS F. WHELAN, J.S.C.