Neuner v Huntington Hosp.
2014 NY Slip Op 32404(U)
September 11, 2014
Supreme Court, Suffolk County
Docket Number: 10-20204
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 10-20204
CAL. No. 13-00398MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-31-13 (#002)
MOTION DATE 8-1-13 (#003 & #004)
ADJ. DATE 7-29-14
Mot. Seq. # 002 - MG
003 - MG
004 - MG; CASEDISP

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CHRISTINE NEUNER and ROBERT NEUNER,

Plaintiffs,

- against -

HUNTINGTON HOSPITAL, DAVINA HARKEY, M.D., DAVID GABBAIZADEH, M.D., NURSE WENZEL, NURSE C. CASEY, NORTH AMERICAN PARTNERS IN ANESTHESIA, LLP and HUNTINGTON MEDICAL GROUP, P.C.,

Defendants.

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Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002)1-19; (003) 20-47; (004) 48-51; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers __; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants David Gabbaizadeh, M.D. and Huntington Medical Group, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that motion (003) by defendants Huntington Hospital, Yvonne Weigel, R.N. s/h/a Nurse Wenzel, and Carol Casey, R.N. s/h/a Nurse C. Casey, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that motion (004) by defendants Davina Harkey, M.D. and North American Partners in Anesthesia, LLP, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted.

Christine Neuner seeks damages for personal injuries she alleges to have sustained on February 25, 2010 while a patient at Huntington Hospital. Causes of action for medical malpractice, negligent hiring, and a derivative claim have been asserted. The plaintiff underwent an endoscopy procedure performed by defendant gastroenterologist, David Gabbaizadeh, M.D. of the Huntington Medical Group, P.C. Anesthesia was administered by defendant Davina Harkey, M.D. of North American Partners in Anesthesia, LLP. A bite block was placed in the plaintiff's mouth prior to passing the endoscope into plaintiff's mouth for the purpose of obtaining biopsies and exploring the plaintiff's esophagus. Upon completion of the procedure, and prior to removal of the bite block, the plaintiff was transferred from the operating room to recovery. While being attended by the anesthesiologist and nursing staff in the recovery room, five of plaintiff's upper anterior teeth broke off prior to removal of the bite block. The plaintiff seeks damages for the loss of those teeth.

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 (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). 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 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 general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***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 2005]). Uncertified medical records are not in admissible form.

In support of motion (002), defendants David Gabbaizadeh, M.D. and Huntington Medical Group, P.C. submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants's

answers, and plaintiff's verified bill of particulars; uncertified copies of the plaintiff's Huntington Hospital records which are not in admissible form pursuant to CPLR 3212 and 4518 (*see* ***Friends of Animals v Associated Fur Mfrs***., *supra*); unauthenticated photographs; unsigned but certified copies of the examinations before trial of Christine Neuner, Robert Neuner, Davina Harkey, M.D., Carol Casey, R.N., and Yvonne Weigel, R.N., which are not objected to and are considered (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); signed and certified transcript of the examination before trial of David Gabbaizadeh, M.D.; and the affidavit of David Gabbaizadeh, M.D.

In support of motion (003), Huntington Hospital, Yvonne Weigel, R.N., and Carol Casey, R.N. submitted, inter alia, an attorney's affirmation; memorandum of law; affirmation of Mark Abel, M.D.; affirmation of Louis Bartimmo, Doctor of Dental Medicine; copies of the summons and complaint, defendants' answers, plaintiffs' verified bill of particulars and supplemental verified bill of particulars; signed and certified transcripts of the examinations before trial of Christine Neuner, Robert Neuner; unsigned but certified copies of the examinations before trial, with proof of service for Davina Harkey, M.D., David Gabbaizadeh, M.D.; unsigned but certified copies of the examinations before trial of Yvonne Weigel, R.N. and Carol Casey, R.N. which are considered (*see* ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); signed and certified copies of the examinations before trial of Tom Heft, Michael Grosso; certified copy of the Huntington Hospital record; and an uncertified copy of Arch Dental of Huntington records which is not in admissible form pursuant to CPLR 3212 and 4518.

In support of motion (004), defendants Davina Harkey, M.D. and North American Partners in Anesthesia, LLP, submitted, inter alia, an attorney's affirmation, incorporating those exhibits submitted on behalf of defendants Huntington Hospital, Nurse Wenzel and Nurse C. Casey.

It is noted that the anesthesiology note in the Huntington Hospital record, written by Davina Harkey, M.D., dated February 25, 2010, sets forth, "[u]pon arrival in recovery room pt was biting on bite block. Instructed to open her mouth. Upon removal of the bite block by nurse, one tooth dislodged. Pt was pushing with her tongue the bite block + an additional 4 teeth came out. Dr. Gabbaizadeh was informed + a dental consult was called."

CHRISTINE NEUNER

Christine Neuner testified that she had an endoscopy performed by Dr. Gabbaizadeh prior to the February 25, 2010 endoscopy by Dr. Gabbaizadeh. She stated that Dr. Gabbaizadeh did not inform her of the risks of the procedure with the first endoscopy. She testified at her continued deposition that, in 2009, with the prior endoscopy, the anesthesiologist explained to her what was going to occur, and asked her to open her mouth as wide as she could. On February 23, 2010, she presented to Huntington Hospital with severe vomiting and was seen on consult by Dr. Gabbaizadeh who advised her that she should have an endoscopy to rule out Barrett's disease. She stated Dr. Gabbaizadeh did not advise her of the risks for the endoscopy and no one ever informed her of the risk of her teeth dislodging associated with anesthesia or endoscopy. She was given anesthesia. Her last recollection was of something being placed in her mouth. She stated that she was woken up by a nurse apologizing to her, handing her a pink container with a white top. The nurse told her that when they took the bite plate out of her mouth, her five front teeth came out with it. Her teeth were in the container. She did not know what the object was that was placed in her mouth or who placed it. When she looked into the mirror she saw jagged little pieces of teeth by the gum.

Ms. Neuner continued that the hospital administrator apologized to her, and gave her the name of a dentist to see in Huntington, Dr. Tracy Stewart, and advised that the hospital would take care of the cost. Dr. Stewart examined her, and had a denture with five teeth made. The remaining teeth were never removed. She stated that the appliance hurt as it pushed up on her remaining teeth. She couldn't wear the denture, so she wore a surgical mask over her mouth. In May, 2010, she saw Dr. Singh, who pulled all the front teeth, did some bone grafts, and fitted her with top dentures after advising her she could have dentures or implants. She decided on implants. Dentures would have required removal of all her teeth. She told Dr. Singh that the two teeth on either side of the five teeth were totally loose after the endoscopy.

Ms. Neuner stated that, commencing in about October 2005, for a two year period, she began seeing Dr. Ayoub, a dentist. He took care of some cavities and pulled one tooth in the upper back because it was loose. Prior to seeing Dr. Ayoub, she did not have a dentist and did not recall who her prior dentist was, or when she was last seen by a dentist. She was asked in December 2007 by Dr. Ayoub to stop seeing him because her face was numb. She stated that due to trigeminal neuralgia, she could not clean her teeth well. Toothpaste with menthol was a trigger for the pain, and she could not open her mouth to brush. From December 2007 to February 2010, she brushed her teeth once a week, maybe. She could not floss. After Dr. Ayoub, she saw Dr. Avasion twice for an upper front tooth which chipped when she was eating a Sugar Daddy. Dr. Avasion bonded the tooth and recommended that she see an oral pathologist, Dr. Fantasia, whom she saw once and who recommended that she use mouth wash. She had dry mouth from the medications she was taking, which Dr. Fantasia said was causing poor dentition.

DAVID GABBAIZADEH, M.D.

David Gabbaizadeh testified to the extent that he was first licensed to practice medicine and was board certified in gastroenterology in the late 1990s. He is a shareholder in Huntington Medical Group. He saw the plaintiff, Christine Neuner, on consultation on February 22, 2009 and performed an endoscopy on her, after advising of the alternatives, benefits and risks. His note did not indicate whether or not he observed a problem with her teeth, and he wouldn't necessarily chart if he observed a problem. He was aware at the time that she had trigeminal neuraglia. He did not recall if he advised her of the risks of performing the procedure on someone with trigeminal neuralgia. He was aware that dental and other procedures can exacerbate the condition.

Dr. Gabbaizadeh stated that in 2009, he had a custom and practice that a bite block would almost always be placed when he performed an endoscopy, a patient is edentulous. He stated that there are different types of block bites. Huntington Hospital purchased the bite blocks and provided the bite block used for the plaintiff. He did not know who decided what type of bite block was used. He described the bite block as a plastic device that has an opening in the middle and a strap that straps around the neck to hold it in place. He sometimes places the bite blocks, and sometimes it may be placed by someone else. He did not know if the anesthesiologist would place it before the endoscopy. He continued that the bite block is placed before the administration of anesthesia before the surgery in the endoscopy room, and covers the bottom and top teeth and lips. The bite block is used to keep the mouth open, and to keep the scope and the teeth away from each other, as the scope can cause trauma to the teeth. He believed the bite block is usually removed in the recovery room; he assumed, by the nurses. He did not recall if he ever removed bite blocks, but would not as a routine matter. He would not stay with the patient the entire time the patient is in the endoscopy room or when taken to the recovery room. He would not give instructions to the nurses as to how to remove the bite

block. He usually checked a patient's teeth before the endoscopy. He used a different bite block from a different company when he performed endoscopies in his office, but stated that it functions in the same way.

Dr. Gabbaizadeh stated that in the morning of February 25, 2010, after the plaintiff's endoscopy, a nurse called him advising "that she had broken some teeth." He did not recall the details. When he went to the hospital later that evening, he saw the plaintiff who had her face covered with something. He did not know the circumstances surrounding the plaintiff's teeth coming out. Although he spoke to nurse Carol and the nurse manager, he did not recall what happened. He indicated that Dr. Davina Harkey was the anesthesiologist for the endoscopy procedure. He spoke with Dr. Grosso and suggested, for patient relations, that the hospital should consider paying for the plaintiff's replacement teeth. He stated that the plaintiff had a history of trigeminal neuralgia, and did not recall her having an aggravation of the condition after her teeth broke. Dr. Gabbaizadeh stated that Dr. Christina Pruzan wrote in her patient summary that the plaintiff had a traumatic removal of the full front teeth. He did not agree with that summary and stated, "[essentially, around the time of the bite block manipulation in the recovery room, her teeth broke." When asked what he meant by bite block manipulation, he stated it was "[w]hatever was happening with the bite block at that time, her teeth broke."

Dr. Gabbaizadeh stated that he would remove a bite block by asking the patient to open up their mouth, and he would then take the bite block out. Sometimes, this would be done after the anesthesia wore off, and sometimes, when the patient was still either unconscious or under the influence of anesthesia, if needed. He could not think of why it would be removed while the patient was still either unconscious or under the influence of anesthesia. Dr. Gabbaizadeh stated that he was not sure if there were any risks associated with keeping the bite block in after the endoscopy for any period. The bite block would be removed by grabbing it and taking it out. He stated that it was beyond his expertise if the bite block, when in place, would affect the trigeminal neuralgia nerve. He did not have a custom and practice on or before February 25, 2010 concerning whether or not he would tell the nurses to be careful when removing the bite block when he had a patient with trigeminal neuralgia.

Dr. Gabbaizadeh testified that the endoscopy did not have any part in fracturing the teeth. In the integrated progress note, the oral surgeon who saw the plaintiff on consult wrote, "had endoscopy today resulting in 5 in fractured teeth upper anterior." He wrote in his note, as communicated to him, "Upon removal of the bite block, apparently few of the patient's teeth broke." Dr. Gabbaizadeh testified that he had a vague recollection that the plaintiff had difficulty opening her mouth fully before the endoscopy. He did not recall if he had any difficulty inserting the bite block into her mouth.

DAVINA HARKEY, M.D.

Davina Harkey, M.D. testified to the extent that she is licensed to practice medicine in New York State and is board certified in anesthesiology since 2007. She is not, and has never been, employed by Huntington Hospital. On February 1, 2010, she became an employee of North American Partners in Anesthesia. On February 25, 2010, she first saw the plaintiff in the procedure room being prepped by a nurse for surgery. She went over the plaintiff's history with her, including whether she had any loose teeth. She could not recall whether Dr. Gabbaizadeh or the nurse placed the bite block, but stated it was placed immediately prior to the procedure. She was not involved in placing the bite block, and usually the gastroenterologist would place it and be in control of it before the procedure. She described the bite block as

a circular piece of plastic that has a hole in it so that the endoscopy scope can fit through the hole. It does not go up to the gums and does not cover the teeth, but the teeth sit on the bite block. Nothing attaches the bite block to the teeth. It stays in place with a strap that goes around the neck and it is secured on two little prongs which are outside the mouth. The teeth will not touch with the bite block in place. After the endoscopy, usually the nurse, or the physician who performed the procedure, would remove the bite block. She stated that as a matter of custom, the bite block is not removed before the anesthesia wears off, and that it is a matter of preference for the gastroenterologist to keep it in place until the effects of anesthesia are over.

Dr. Harkey noted during her physical exam that the plaintiff had limited mouth opening secondary to pain, and indicated the same in the chart. She also wrote that the plaintiff's teeth were intact." She stated that the plaintiff had no loose teeth. She continued that during the procedure, the plaintiff was breathing on her own naturally. She testified that the plaintiff was confused as she coming out of anesthesia, and was sitting up in the recovery, with her eyes open, clenching down, biting down hard, with her tongue doing a thumbing motion as if to expel the bite block. She was standing there, giving the plaintiff instructions to open her mouth when she saw one of the plaintiff's teeth fall out. The plaintiff continued to clench down, and she saw three, four more teeth come out. When she saw the teeth come out, the bite block was still in the plaintiff's mouth. She did not remove the bite block. There was no bleeding. She saw stubs or roots where the teeth had come out. She stated that the recovery room nurse, Yvonne, was also present and that Yvonne's hand was on the bite block holding it for about five to fifteen seconds. When she took her hand off the bite block, the plaintiff's teeth came out. Dr. Harkey continued that Yvonne was telling the plaintiff to open her mouth. The plaintiff did not open her mouth. She did not think the plaintiff was fully awake at the time because she was not opening her mouth, but was biting down instead. Yvonne secured the teeth so the plaintiff wouldn't aspirate and choke on them. Dr. Harkey testified that either the nurse or the gastroenterologist decides when to take out the bite block; some feel comfortable taking it out in the procedure room, and some wait.

In her anesthesia addendum, Dr. Harkey wrote, "[p]rior to procedure patient was asked if she had any loose teeth. Patient replied, 'No. I had loose teeth in the past, but they came out.' I asked again, 'are you sure you don't have any loose teeth?' Patient felt with her tongue and said, 'No, but the drugs I have had make my teeth bad.' Patient was noted having poor dentition." She had not written that note prior to the procedure as she did not feel it was necessary. She stated she saw no loose teeth when she looked in the patient's mouth prior to the procedure. Dr Harkey described poor dentition as meaning that the plaintiff's teeth did not look like they had been maintained and that she was missing several teeth. She discussed the plaintiff's poor dentition with Dr. Gabbaizadeh prior to the procedure. Dr. Harkey stated that in her second anesthesia note in the integrated progress note, she wrote that upon arrival to the recovery room, the patient was biting on the bite block, and was instructed to open her mouth. Upon removal of the bite block by the nurse, one tooth dislodged, but the patient was pushing with her tongue and the bite block and four additional teeth came out. She testified that Yvonne removed the bite block after the teeth came out. Dr. Harkey requested a dental consult which was done by Dr. Pruden, the oral surgeon. In reading Dr. Pruden's note, Dr. Harkey stated that Dr. Pruden's impression was that the plaintiff had decayed fractured roots.

CAROL ANN CASEY, R.N.

Nurse Casey testified that she has had a New York State license as a registered nurse since 1970. She has been employed at Huntington Hospital since 1974 and in 2010, worked full time as a staff nurse in the

endoscopy unit providing patient care. She assisted with endoscopies, among other things. On occasion, she would put a bite block on the field, or insert or remove a bite block. There is one type of adult bite block used, which she described as a hard piece of plastic, oval in shape, with a half inch raised area on each end of the oval, and a strap to hold it in place. The strap goes around the back to the patient's head and attaches to the other side of the bite block. When it is in place, it is in between the teeth, touching the front teeth. Bite blocks are placed in the procedure room, but are removed in either the procedure room or in recovery when the patient is able to fully open his mouth.

Nurse Casey testified that she participated in the plaintiff's endoscopy procedure. She did not know if Dr. Gabbaizadeh inserted the bite block. It is her custom and practice to remove a bite block when the plaintiff is able to fully open their mouth. She would tell the patient, "open your mouth." If the mouth opens enough to clear the bite block, she removes it by grabbing the front of the bite block itself. She did not remove the plaintiff's bite block and did not see anyone remove it. She stated that she was not in the room when the bite block was removed. After the procedure, she told Nurse Weigel in the recovery room, while the plaintiff was still unresponsive, that she left the bite block in because the plaintiff was not yet able to open her mouth.

YVONNE WEIGEL, R.N.

Yvonne Weigel testified to the extent that she is a registered nurse licensed to practice in New York State since 1993. In 2003 she began part time employment at Huntington Hospital in I.C.U., then worked the recovery room from 7 p.m. to 3 a.m., two nights a week, and also worked in endoscopy for some additional hours. In February 2010, she worked in endoscopy from 8 a.m. to 12 noon, two to three days a week. She had two weeks training with another nurse when she started working in endoscopy. Her training included removal of the bite block. For some patients who awoke in the endoscopy room, the bite block would be removed before the patient came to recovery. Other patients, who were asleep upon arrival to recovery, would wake up and naturally spit it out by themselves. Disoriented patients would be told to open their mouth and the bite block would come out. The same type of bite block was always used in the endoscopy procedure room.

Nurse Weigel described the bite block as a circular plastic piece of equipment which is inserted into the patient's mouth, locks behind the teeth and covers about six or eight front teeth, but not the gums. It goes in front of the patient's lips and is secured with some straps. It is a little wider on the inside so it doesn't slide out during the endoscopy procedure. It does not touch the roof of the patient's mouth. There is an opening into which the scope could be placed. She stated that the bite block will not slide out and the patient's mouth must be open for it to come out. She testified that when the plaintiff came into recovery, she was told by nurse Casey that the plaintiff's teeth were not in great shape and to let her spit the bite block out herself. She felt this would be the safest way because the patient would wake up and spit it out. She stated the plaintiff was lying on her left side, and was not conscious upon arrival into the recovery room as she was sedated from the anesthesia. When she first saw the plaintiff and put her on oxygen, she did not see the plaintiff's teeth because the bite block was in.

Nurse Weigel testified that when the incident occurred, she and Dr. Harkey were present, and she saw the plaintiff's teeth dislodge. The plaintiff had been in recovery less than five minutes, and was awake, sitting up, but was not coherent at the time of the incident. No one told the plaintiff to sit up or prevented her

from doing so. She stated the plaintiff seemed startled and bolted upright on the bed, biting the bite block. She could not remember if she or anyone else touched the bite block before the plaintiff's teeth dislodged. She saw the plaintiff biting down on the bite block. She was concerned because patients shouldn't bite on any kind of instrument because it can cause injury to the patient's teeth or tongue. When she told the plaintiff to open her mouth, the strap was not around her neck as it had been removed in the endoscopy room. The plaintiff's closed mouth kept the bite block in place, but, she continued, the plaintiff would be able to open her mouth without the removing the bite block. Because the bite block had been placed in the plaintiff's mouth, she assumed the patient was able to open her mouth wide enough for it to have been placed.

Nurse Weigel testified that when she and Dr. Harkey told the plaintiff to open her mouth, she did not do so. The teeth were dislodged and the bite block came out after, but she later testified that the plaintiff pushed the bite block from behind with her tongue, and it all came out together. She stated that patients are not to push the bite block with their tongue because the block locks behind the teeth. She saw the teeth break away from their roots. There was one on the right and then the other three came out more or less as a bridge. There was no bleeding from the gums. The plaintiff was trying to push the bite block out with her tongue. There was a space and she pushed it out. When she told the plaintiff to open her mouth, she did not expect her to push the bite block out. Dr. Harkey took the teeth out of the plaintiff's mouth so she would not swallow them. Nurse Weigel stated that when she spoke to the plaintiff in the recovery room about her teeth becoming dislodged, the plaintiff told her she was not surprised as her teeth were in a bad way.

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 [1999]). 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* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 224 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, 675 NYS2d 375 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; ***Bloom v City of New York***, 202 AD2d 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]; *see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Machac v Anderson***, 261 AD2d 811, 690 NYS2d 762 [3d Dept 1999]).

MOTION (002)

In motion (002), David Gabbaizadeh, M.D. and Huntington Medical Group, P.C. seek summary judgment dismissing the complaint asserted against them. Dr. Gabbaizadeh avers that he rendered appropriate medical care to the plaintiff and exercised sound medical and clinical judgment in making

treatment decisions in accordance with good and accepted medical practice. He continued that the plaintiff had been admitted to Huntington Hospital through the emergency room on February 23, 2010 for intractable nausea and vomiting for three days. He set forth her medical history, including a rhizotomy for intractable trigeminal neuralgia, performed two weeks prior. However, after that neurosurgical procedure, her left-sided facial pain reoccurred, and she started experiencing intense nausea and intractable diarrhea, for which she was admitted to Huntington Hospital on February 23, 2010. She had diffuse tenderness in her upper abdomen and reflux. The impression in the emergency room was to rule out gastroenteritis. Common bile duct stones were unlikely due to her normal liver function tests. She had a history of esophagitis, so a gastroenterology consult was called for which she was seen by Dr. Gabbaizadeh.

Dr. Gabbaizadeh stated that he documented that the plaintiff had a history of severe erosive esophagitis, that she had a previous endoscopy procedure, but had not returned for a follow-up repeat endoscopy in 2009, as instructed, to evaluate her for the possibility of Barrett's metaplasia, a pre-cancerous condition of the esophagus. Because the plaintiff's abdominal examination was negative, and based upon her symptoms, Dr. Gabbaizadeh stated his impression was erosive esophagitis, even with the use of medication to reduce gastric acid production. He set forth his plan and stated that he discussed with her the necessity to perform an endoscopy, which he stated was medically indicated. The endoscopy procedure was performed on the plaintiff on February 25, 2010 at Huntington Hospital by Dr. Gabbaizadeh after the plaintiff was evaluated by anesthesiologist Davina Harkey, M.D. Consistent with the standard of care, and as a matter of custom and practice, he typically discusses the procedure and medical history with the anesthesiologist. He continued that he properly obtained informed consent from the plaintiff for the procedure with which she was familiar from her prior endoscopy. He stated that he would have discussed various risks, including complications such as infection, perforation, and missed cancer; complications much more severe than missing teeth. Dr. Gabbaizadeh continued that it was not the standard of care, nor is it his custom and practice, to advise patients that an endoscopy procedure could exacerbate trigeminal neuralgia.

Dr. Gabbaizadeh testified that the plastic bite block was placed into the patient's mouth, and strapped around her neck, prior to performing the endoscopy to create a channel for the scope to be placed into the patient's upper GI tract. He continued that it keeps the mouth open, and also protects the scope and keeps the teeth away from the scope. He stated that the bite block used, which was available at the hospital, was consistent with the standard of care for the time frame at issue, was one purchased by Huntington Hospital, and was one of the accepted bite blocks used in the gastroenterology community at the time. Dr. Gabbaizadeh stated that even if a patient has poor dentition, he still uses a bite block because the mouth needs to be open during the procedure and prevents the scope from causing trauma to the teeth. Dr. Gabbaizadeh stated that he did not recall who placed the bite block, but according to the operative note, there was no difficulty placing the bite block or introducing the diagnostic endoscope into the oral cavity or esophagus.

Dr. Gabbaizadeh stated that he performed the endoscopy procedure within the standard of care. There was no untoward event which happened during the endoscopy procedure, and the placement of the bite block did not cause any problems or complications in the patient during the procedure. Dr. Gabbaizadeh continued that it is not his custom and practice to remove the bite block, nor was it the standard of care for a gastroenterologist to remove a bite block on all occasions, and it did not require him to remove the bite block. Following the procedure, the plaintiff was brought to the recovery room by hospital staff. Dr. Harkey was present in the recovery room. Good and accepted practice did not require him to accompany the patient to

the recovery room, and it is consistent with the standard of care for the hospital staff to bring the patient to recovery. Dr. Gabbaizadeh stated that he was not present when the plaintiff awoke. He stated that he was not in possession of firsthand knowledge concerning how the plaintiff lost her teeth in the recovery room, although he was subsequently advised that upon removal of the bite block, the patient lost a few teeth. Dental and oral surgery consults were obtained in accordance with good and accepted practice.

Based upon the foregoing, it is determined that Dr. Gabbaizadeh and Huntington Medical Group, P.C. have demonstrated prima facie entitlement to summary dismissal of the complaint as asserted against them.

MOTION (003)

In motion (003), defendants Huntington Hospital, Yvonne Weigel, R.N. and Carol Casey, R.N. seek summary judgment dismissing the complaint as asserted against them, and have submitted the affirmation of Mark Abel, M.D. and Louis Bartimmo, D.D.M.

Dr. Abel affirms that he is a physician licensed to practice medicine in New York State and is board certified in anesthesiology. He set forth the materials and records he reviewed and opined within a reasonable degree of medical certainty that Huntington Hospital, Yvonne Weigel, R.N. and Carol Casey, R.N. acted in accord with good and accepted medical practice in the care and treatment of the plaintiff from February 23, 2010 through February 28, 2010. Dr. Abel set forth the plaintiff's medical history and presentation to Huntington Hospital, including that Dr. Gabbaizadeh determined that an esophagogastroduodenscopy (EGD) was necessary to investigate the plaintiff's complaints, which was done on February 25, 2010.

Dr. Abel opined that to perform the EGD, a bite block is utilized on the patient to protect the scope and facilitate a smooth passage. It keeps the patient's mouth open and the scope and teeth apart so that the scope does not cause trauma to the teeth. He continued that it is difficult, if not impossible, to perform an endoscopy if the patient's mouth is closed, or to do it through the teeth. The bite block is placed in the patient's mouth prior to commencement of the procedure, and was placed in the patient without any difficulty. Nor was there any difficulty experienced during the procedure. Dr. Abel continued that it is routine for a patient to be transferred to the recovery room with the mouthpiece, and upon completion of the procedure, the plaintiff was taken to the post-anesthesia care unit, still sedated under Propofol. Once in recovery, the plaintiff suddenly awoke, and began biting the bite block. Both Dr. Harkey and Nurse Weigel immediately and repeatedly oriented the plaintiff, and repeatedly directed her to open her mouth in order to release the bite block. However, he continued, the plaintiff continued to bite down on the bite block, resulting in the fracture of the plaintiff's top front anterior teeth from the gumline. Dr. Able stated that the bite block is typically removed by the anesthesiologist, nurse, or surgeon. It cannot be removed when the patient is biting down on the bite block and not releasing it. The plaintiff did not follow prompts and continued biting down.

Dr. Abel stated that it is the responsibility of the anesthesiologist to take a proper preoperative evaluation of the patient which would include a dental examination, and that Dr. Harkey did so appropriately and properly. Physical examination revealed no loose teeth, and the plaintiff advised Dr. Harkey that she had no loose teeth. Dr. Able continued that the nurses and staff at Huntington Hospital properly followed the directions and orders of the doctors, properly documented the plaintiff's vital signs, and documented the

plaintiff's condition in the medical chart. Dr. Abel opined that the fractured teeth were not caused by any negligence by the nursing or hospital staff, and that fracture of teeth is a known risk associated with EGD. He concluded that these defendants did not depart from the standard of medical practice and did not cause the plaintiff to fracture her teeth.

Dr. Bartimmo stated that he is a doctor of dental medicine and is licensed to practice in New York State. He set forth the records and materials he reviewed and opined within a reasonable degree of dental/medical certainty that Huntington Hospital, Yvonne Weigel, R.N. and Carol Casey, R.N. at all times acted in accord with good and accepted dental practice in the care and treatment of the plaintiff, and did not proximately cause the plaintiff's injuries. Dr. Bartimmo set forth the plaintiff's medical history and medications, and noted she was scheduled for an esophagoscopy on February 25, 2010 by Dr. Gabbaizadeh. Prior to the procedure, the plaintiff was examined by Dr. Harkey, an anesthesiologist, who discussed the plaintiff's dental history, and noted that she had no loose teeth. She smoked 30 cigarette packs per year and told Dr. Harkey that she had bad teeth from the various narcotic medication she was taking. He set forth the events which followed, consistent with the testimonies and other expert affirmations and affidavits.

Dr. Bartimmo stated that a review of the plaintiff's dental history revealed she did not have any dental care or treatment with respect to denial hygiene since December 18, 2007, over two years prior to February 25, 2010, and her records demonstrate multiple gaps in dental hygiene treatment from a dentist. He continued that the plaintiff was taking narcotics for the treatment of pain, and that narcotics can weaken the teeth, in combination with smoking cigarettes, which can cause weakness and damage to an individual's dental health. She testified that she brushed her teeth once a week and did not floss, however, the records of Arch Dental of Huntington indicate that the plaintiff was neither brushing nor flossing her teeth on a routine or daily basis, had evidence of poor oral hygiene with a high decay rate, and multiple missing and/or restored teeth.

Dr. Bartimmo continued that the x-rays taken at Dr. Ayoub's office in about 2007 reveal she had eight missing teeth, bone loss, and poor hygiene, extensive decay and severe dental caries on multiple sites. When the plaintiff went to Arch Dental in March 2010, after the subject incident, those records confirmed her poor dental condition and the recommended extraction of all 23 remaining teeth. Teeth # 1, 3, 5, 6, 7, 8, 9, 10, 11, and 12, were hopeless, and five of the thirteen teeth were fractured at the gumline.

Dr. Bartimmo stated that the plaintiff's teeth fractured at the gumline with no bleeding due to the extensive decay in those teeth. The extensive decay caused weakness in the teeth, and they fractured due to the decay and the excessive force of the plaintiff biting down on the bite block, and not due to improper usage of the bite block. He continued that the plaintiff had very fragile teeth due to the decay, dental caries, and restorations. It is Dr. Bartimmo's opinion that there is no care and treatment rendered by the Huntington Hospital staff, Yvonne Weigel, R.N., and Carol Casey, R.N. which was the proximate cause of the injuries claimed by the plaintiff.

Based upon the foregoing, Huntington Hospital, Yvonne Weigel, R.N. and Carol Casey, R.N. have demonstrated prima facie entitlement to summary dismissal of the complaint as asserted against them.

MOTION (004)

It is noted that the note of issue and certificate of readiness were filed on March 1, 2013. Pursuant to CPLR 3212, a motion for summary judgment must be made withing 120 days of the filing of the note of issue. Motion (004) by defendants Davina Harkey, M.D. and North American Partners in Anesthesia was served on July 12, 2013, well beyond the 120 days in which it was permitted to be served. Counsel for the moving defendants offers no good cause for the delay in filing motion (004), and instead asserts entitlement to having the motion considered in that it seeks relief identical to that sought in motion (002). A cross motion for summary judgment made more than 120 days after the filing of a note of issue may be considered on its merits if there is a timely pending motion for summary judgment made by another party on nearly identical grounds (***Bicounty Brokerage Corp. v Burlington Company***, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]. In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court; and thus, the nearly identical nature of the grounds may provide the requisite good cause under CPLR 3212 (a) to review the untimely motion or cross motion on the merits (***Grand v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]).

While summary judgment is sought in both motion (002) and (003), the parties are different. In motion (004), it is noted that Davina Harkey, M.D. incorporated by reference those expert affirmations and exhibits submitted in the prior motions, including the affirmations of Dr. Abel and Dr. Bartimmo, and the affidavit of Dr. Gabbaizadeh. At issue is whether or not there were departures from the standard of care concerning the bite block, and whether such departures were the proximate cause of the fracture of the plaintiff's anterior upper teeth. Here, it has been established that the plaintiff's teeth fractured due to extensive decay which caused their weakness and fracture when the plaintiff bit down on the bite block. Therefore, the defendants established that plaintiff's injuries were not proximately caused by any care and treatment the plaintiff may have received. Therefore, summary judgment must be granted to defendants Davina Harkey, M.D. and North American Partners in Anesthesia.

Dr. Abel, an anesthesiologist, gave his opinion that it is the responsibility of the anesthesiologist to take a proper preoperative evaluation of the patient which would include a dental examination, and that Dr. Harkey did so appropriately and properly. Physical examination by Dr. Harkey revealed no loose teeth, and the plaintiff advised Dr. Harkey that she had no loose teeth. Dr. Abel also opined that the fractured teeth were not caused by any negligence by the nursing or hospital staff, and that fracture of teeth is a known risk of the procedure. Dr. Bartimmo opined that the plaintiff's teeth fractured without bleeding at the gumline because the teeth were weakened from decay. Due to the force of the plaintiff biting down on the bite block, combined with the weakened condition of the teeth from decay, the teeth fractured. He added that the fractured teeth were not due to improper usage of the bite block.

Although no expert has submitted an opinion concerning the standard of care for an anesthesiologist relative to the use and removal of a bite block, because it has been demonstrated that the proximate cause of plaintiff's fractured upper anterior teeth was due to the extensive decay which caused weakness in the teeth, and that those teeth fractured due to the decay and the excessive force of the plaintiff biting down on the bite block, and not due to improper usage of the bite block, the lack of proximate cause of the injuries requires that summary judgment be granted to Davina Harkey, M.D. and North American Partners in Anesthesia.

Based upon the foregoing, it is determined that Davina Harkey, M.D. and North American Partners in Anesthesia have demonstrated prima facie entitlement to summary dismissal of the complaint as asserted against them.

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]).

The plaintiffs have not opposed these motions or provided an expert opinion, and, therefore, have failed to raise a material factual issue to preclude summary judgment as to liability or proximate cause.

Accordingly, motions (002), (003) and (004) are dismissed with prejudice.

Dated: SEP 11 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION