

McGrath v Winegarten
2014 NY Slip Op 32559(U)
September 24, 2014
Supreme Court, New York County
Docket Number: 805308/12
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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KATHLEEN MCGRATH,

Plaintiff,

Index No. 805308/12

-against-

Decision and Order

DR. ROBERT WINEGARTEN, DR. JERRY H.
LYNN, and SOL STOLZENBERG, D.M.D., d/b/a
TOOTHSAVERS,

Defendants.

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

In this dental malpractice action, the Defendants, Robert Winegarten, D.M.D., sued here as Dr. Robert Winegarten, Dr. Jerry H. Lynn, and Sol Stolzenberg, D.M.D., P.C., d/b/a Toothsavers, sued here as Sol Stolzenberg, D.M.D., d/b/a Toothsavers, move for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules. The Defendants' motions, motion sequence numbers 2, 3, and 4, have been consolidated for purposes of this decision and order. Plaintiff Kathleen McGrath opposes the motions. For the following reasons, the motions are denied.

Construing the evidence in the light most favorable to Ms. McGrath, as the non-moving party, the record shows that in August 2003, Kathleen McGrath visited Toothsavers seeking implants. She was unhappy with her upper and lower partial dentures. A treatment plan was devised to replace her dentures with implants and fixed permanent bridges that screwed in. The fee was set for \$10,000, which Ms. McGrath paid in full.

Ms. McGrath first went to Toothsavers on August 12, 2003. She met with Dr. Jerry H. Lynn, who identified himself as a dentist, although Dr. Lynn was no longer licensed during the

events in this case. That same day, Ms. McGrath also saw Dr. Robert Winegarden. Ms. McGrath testified that both Dr. Lynn and Dr. Winegarden looked in her mouth. She further testified that, in Dr. Winegarden's presence, Dr. Lynn showed her how a dental implant worked, using a plastic prop, and she recalled him telling her it would "be great." At the same time, Dr. Winegarden also examined Ms. McGrath's mouth using instruments and ordered x-rays. Ms. McGrath testified that, in treatment planning, Dr. Winegarden discussed her lower bridge, and he and Dr. Lynn discussed work on her upper arch.

The following week, Ms. McGrath began receiving implants. On August 18, 2003, she executed a consent form and had seven implants placed in her upper arch. Ms. McGrath had a preexisting condition of mitral valve prolapse for which she required that prophylactic antibiotics be administered prior to surgical proceedings. She testified that Dr. Lynn gave her penicillin in preparation for the implantations, and he also may have given her painkillers after the procedure. In addition, she recalled him discussing the healing process with her.

Dr. Lynn did not perform the implant procedure, however. Ms. McGrath described the surgeon as a young, blonde, curly-haired man. Ms. McGrath was then seen in several additional post-operative visits to the procedure.

By December of 2003, work was begun on placing implants in her lower arch. That month, two implants at sites 29 and 31 were placed. A consent form dated December 8, 2003, for "Implant, Bridgework" appears in her chart. Four additional lower implants were placed on March 1, 2004, and two more were placed at sites 25 and 28 that August.

In addition to having implants placed, Ms. McGrath also underwent other procedures. She had root canal therapy at several sites, which Dr. Winegarden personally performed, and, in August 2004, Dr. Gordon extracted several lower teeth. Impressions were also made of Ms. McGrath's upper and lower arches. She testified that "a little Spanish guy did a lot of impressions," as well as Dr. Winegarden.

By the fall of 2004, Dr. Winegarden began to fit Ms. McGrath for prosthetics. On September 22, 2004, an upper prosthetic was noted to be a "tight fit." The following month, adjustments continued to be made to the prosthetic. By November, both an upper porcelain fused to metal bridge and a lower one had been inserted with temporary cement. These were reinserted the following month. Shortly thereafter, however, in February 2005, Ms. McGrath's implants at sites 25 and 28 were uncovered.

That spring, Dr. Winegarden inserted a permanent lower bridge. He used temporary cement, however. In addition, the chart indicates that Ms. McGrath rejected that prosthetic, which was redone. That summer, another permanent lower bridge was installed with temporary cement.

By late fall of 2005, however, two lower left implants at sites 18 and 20 had failed. Dr. Ki-Sung Sung, another Toothsavers dentist, removed these.¹ Their removal, however, left the crowns for sites 18 and 20 cantilevered on Ms. McGrath's lower prosthetic. In his deposition, Dr.

¹The chart entry for that date refers to an x-ray indicating "significant amount of bone loss." That x-ray is missing from Ms. McGrath's chart, however, which Dr. Winegarden conceded in his deposition should have been maintained.

Winegarden noted that Dr. Sung had indicated on Ms. McGrath's chart that at the next visit Dr. Sung would stage implant surgery on the lower left to replace the failed implants. Dr. Winegarden estimated that Ms. McGrath should have had the replacement surgery in the following four to six-month period.

At Ms. McGrath's next visit, however, on January 25, 2006, Dr. Winegarden could not remove her lower bridge. He also noted that the crown at site 22 was chipped. He wrote that Ms. McGrath was to return when the bridge loosened.

Ms. McGrath next visited Tothsavers two months later on March 30, 2006. At that time, however, her gum at site 22 was sore, and Dr. Winegarden did not try to remove the bridge to fix the porcelain. Replacement of the lower bridge and repair of the #22 crown was to be addressed "when #22 feels better."

Ms. McGrath recalled telephoning Tothsavers several times to see Dr. Winegarden. She told the office that she was calling because her teeth were not fixed. She recalled being put on hold, and each time she was told "[t]hey couldn't do anything for me," to come in when the bridge loosened. She estimated that on one occasion she was put on hold for ten minutes. Dr. Winegarden testified that he had no knowledge of Ms. McGrath calling the office nor did he know if the office followed up with Ms. McGrath to determine if her bridge had loosened. In his deposition, Dr. Winegarden conceded that he could have repaired Ms. McGrath's porcelain prosthetic without it loosening, but he opined there was a "better cosmetic result" if it were repaired when the bridge was removed.

Finally, in May 2011, Ms. McGrath went to Toothsavvers with a loose lower bridge. In filling out her registration form, she listed her missing implant under oral complaints. She testified that at the visit the office addressed replacements for her two lower left implants. She recalled being seen at the appointment by a dentist whom she described as a tall, Russian man. When asked at her deposition why she had not seen another dentist in the interval, Ms. McGrath testified, "I paid them the money. I thought I would wait for them to finish the job and they would say it is finished." She was quoted a price of \$22,000 following her examination and was asked "what took her so long to come back." Following the price quotation, Ms. McGrath declined further treatment and did not return to Toothsavvers. This action followed.

In her lawsuit, Ms. McGrath asserts claims of dental malpractice and lack of informed consent. Among her allegations, she claims that she was treated by an unlicensed dentist and dental technicians. She further contends that Toothsavvers and Dr. Lynn are vicariously liable for those individuals who treated her. She complains that Dr. Winegarden ignored signs of ill-fitting crowns, poorly designed her prostheses, and was negligent in not monitoring her implants. He abandoned Ms. McGrath in refusing to properly treat her implants and prostheses.

In moving for summary judgment, the movants assert that Plaintiff's claims relating to her treatment predate two and a half years before the filing of the summons and complaint, and, therefore, they are barred by the statute of limitations. See C.P.L.R. § 214-a. They claim that Ms. McGrath abandoned her treatment before it was completed in not coming in for an appointment between March 2006 and May 2011. In addition, Dr. Lynn claims that he is entitled to summary

judgment because he did not treat Ms. McGrath. And even if he did, he asserts that he did not proximately cause her injuries. Dr. Winegarden claims that he is entitled to summary judgment because he did not place the implants. Citing an affidavit by Dr. Stolzenberg, which Toothsavers attached to its moving papers, Toothsavers also claims that because the dentists at Toothsavers are independent contractors, it is not vicariously liable for any dental malpractice that may have occurred. Lastly, it claims that punitive damages are improper because, even if there were unlicensed treatment in this case, there was no evidence that unlicensed treatment caused Ms. McGrath any injury. Dr. Winegarden seeks, in the alternative, dismissal of Ms. McGrath's request for punitive damages.

Only Toothsavers offered an expert opinion in support of its moving papers. It attached the affirmation of Arnold Jutkowitz, D.M.D. In his expert opinion, Dr. Jutkowitz related that he is New York-licensed dentist with a private practice in prosthodontics. He affirmed that in preparing his opinion he reviewed Plaintiff's deposition as well as the original and supplemented bills of particulars. He did not indicate whether he had reviewed Dr. Winegarden's deposition testimony. In Dr. Jutkowitz's opinion, he opined that fixed bridgework was "almost always preferable to removable partial dentures." In expressing his opinion, he did pause at Dr. Winegarden's plan involving "tying natural teeth to implants to some degree." Dr. Jutkowitz explained that generally dentists "try not to place crowns supported by natural teeth and crowns supported by implants in the same fixed bridge." That design would create movement that would allow the cementation bond on natural teeth to break down. Dr. Jutkowitz noted that in this case, however, Ms. McGrath never got permanently cemented restorations. Those would entail, in his opinion, separate, natural teeth-supported bridges with separate implant-supported bridges and/or

some partial dentures. Dr. Jutkowitz further noted that it “could be argued” that Dr. Gordon placed the #10 implant “a bit too close,” but, in his opinion, the problem did not cause Ms. McGrath harm. Ms. McGrath’s implant failures on her lower arch were accepted complications that occur in about 5% of cases and, moreover, Toothsavers planned to replace her two failed implants.

Dr. Jutkowitz opined that Toothsavers did not depart from proper standards of care.² He denied that Dr. Lynn treated Ms. McGrath. Rather, in his opinion, Dr. Lynn’s conduct only involved “essentially” financing of the treatment plan. The defense expert further contended that Dr. Winegarden was an independent contractor. He based these contentions on Dr. Stolzenberg’s affidavit, which accompanied the moving papers. Even if there were unlicensed treatment, Dr. Jutkowitz opined that the treatment was appropriate and did not cause Plaintiff injury; moreover, he claimed that Dr. Lynn and the dental technicians were not employees of Toothsavers.

Dr. Jutkowitz further opined that Toothsavers did not proximately cause Ms. McGrath’s injury. He acknowledged that based on the chipped crown and the crowns at the sites of the failed implants that were “temporarily cantilevered,” at the March 30, 2006, the practice intended for Ms. McGrath to return “in the near or immediate future, to replace the lower bridge.” He conceded that the lower left crowns “could have been cut off any time.” While Dr. Jutkowitz contended that Toothsavers would repair or replace the cantilevered bridge “after a reasonable amount of time” when “the patient fe[lt] better,” no repair was made because Plaintiff “chose” not

²Dr. Jutkowitz also opined that there was informed consent. He cited the signed consent forms in Plaintiff’s chart and the notation in her chart that the doctor explained the implants and “Patient understands procedure.” Toothsavers did not argue this issue in its moving papers, however, and, therefore, it is not properly before this Court.

to return for five years. At that time, he contended a new plan was devised that would include lower left replacement implants for the two implants that had previously failed. In Dr. Jutkowitz's opinion, Ms. McGrath's "unilatera[l]" decision to leave with only temporary restorations and with temporary cement while in mid-treatment was "unreasonable, non-compliant, and negligent."³ Moreover, her return he argued was merely "a routine visit for exam or checkup."

Ms. McGrath filed one opposition to all of the motions. In that opposition, Plaintiff avers that her claims relating to the movants' treatment predating two and a half years before the filing of the summons and complaint are timely for purposes of this action under the continuous treatment doctrine. See C.P.L.R. § 214-a. She argues that her treatment for the same condition was in progress: both she and her treaters anticipated continued treatment, including replacement of the two failed implants and the repair to her lower prosthesis. Ms. McGrath did not abandon treatment, but rather she contends that Toothsavers deferred her treatment. She asserts that it would be unfair for this Court to reward Defendants for their delay in completing her treatment plan, and the record presents questions for the jury to determine. Additionally, Plaintiff claims that Toothsavers and Dr. Lynn are vicariously liable for her treatment.

In further support of her opposition, Ms. McGrath offers the medical expert opinion of Robert Vogel, D.D.S., a New York-licensed dentist. Dr. Vogel opines that there was no medical basis to wait for the lower bridge to loosen. Instead, the prosthesis should have been cut off to allow replacement of the failed implants and a replacement bridge inserted. Indeed, plaintiff's expert

³Notwithstanding, later in the opinion, the defense expert characterized the initial treatment plan as "essentially completed."

opined that it was improper to leave the two cantilevered pontics hanging off of implant #22. Moreover, the crown for #22 was chipped as of January 25, 2006. Ms. McGrath had paid in full for these services. Instead, Dr. Vogel contended that she was left with a defective bridge that placed additional pressure on her remaining implants and natural teeth. In his view, every day that the lower bridge remained in her mouth caused destruction of bone to both the implants and her natural teeth. Lastly, Plaintiff's expert opined that it would have been a departure to permit an unlicensed dentist to diagnose or plan a patient's treatment or to permit technicians to take impressions.

“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.” Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). The Court reviews the record in a light most favorable to the non-moving party. E.g., Chestnut v. Bobb-McKoy, 94 A.D.3d 659 (1st Dep't 2012). To establish entitlement to summary judgment, a defendant must further demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). Expert medical testimony is required for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause. Roques, 73 A.D.3d at 206. If the movant makes a prima facie showing, the burden then shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted).

This Court first considers Dr. Lynn's contention that he should be dismissed from the action because he did not treat Ms. McGrath. His affidavit that accompanies his motion papers, in which he denies Plaintiff's material allegations in her pleadings and deposition that Dr. Lynn examined her, planned her treatment or supervised her treatment presents an issue of disputed material fact. Indeed, in that affidavit, he concedes that he "likely would have looked at" Ms. McGrath's teeth. His motion papers further acknowledge that Ms. McGrath has claimed that he administered penicillin to her. Rather he quarrels with her claim that he examined her by qualifying that he "never examined her with instruments." This Court, however, does not resolve disputes of material facts in determining summary judgment motions. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994). Accordingly, Dr. Lynn has failed to establish entitlement to summary judgment on this issue.⁴

This Court next considers Dr. Winegarden's defense that he is entitled to summary judgment because he did not place any of Ms. McGrath's implants. That begs the question whether he negligently treated Plaintiff for those tasks that she alleges that he did perform, such as making prosthetics, placing and adjusting those, as well as Plaintiff's claim that he negligently failed to monitor her implants. In moving for summary judgment, Dr. Winegarden did not proffer any medical expert opinion. Any failure to see Ms. McGrath on her return in 2011 raises a jury question whether his conduct constituted abandonment, as Plaintiff alleges. Meanwhile the record before this Court includes Dr. Winegarden's concession that Ms. McGrath's lower bridge, including the #22 crown, required repair, and she was supposed to have implants replaced within months following

⁴This Court further notes that, in claiming that he did not proximately cause Ms. McGrath's injuries, Dr. Lynn failed to attach any medical expert opinion.

the failure of the lower two. Dr. Winegarden further conceded that he lacked knowledge whether Ms. McGrath tried to make subsequent appointments with him or whether his office had tried to reach her to complete the repairs. Under these circumstances, jury questions remain.

Nor have the movants shown that they are entitled to this Court striking Ms. McGrath's claim for punitive damages. Toothsavers' contention that there was no real unlicensed treatment since Dr. Winegarden was present during any such unlicensed treatment is a non sequitur. Toothsavers' contention that even assuming Dr. Lynn or a dental technician examined, prescribed treatment or treated Ms. McGrath is not malpractice, begs the question whether that unlicensed treatment exposes a defendant to relief for punitive damages. See, e.g., Garber v. Lynn, 79 A.D.3d 401, 403 (1st Dep't 2010) (upholding awarding of punitive damages where jury question presented that defendant was "callous in its indifference" to unlicensed person, among other things, making impression for bridge).

This Court next turns to whether Plaintiff's claims of dental malpractice and lack of informed consent are timely. Section 214-a of the Civil Practice Law and Rules provides in pertinent part that an action for dental malpractice "must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition" Continuous treatment, where provided by more than one doctor, will be imputed to the others in the presence of an agency relationship or other relevant association that continues the nexus between the providers. Ganapolskaya v. V.I.P. Med. Assocs., 221 A.D.2d 59, 62 (1st Dep't 1996).

While movants contend that, for purposes of the continuous treatment doctrine, treatment of Ms. McGrath ended in 2006, the record shows that there are disputed facts whether an act, omission or failure relating to Ms. McGrath's original treatment plan continued into the two and one half years prior to the commencement of this lawsuit. See C.P.L.R. § 214-a. Dr. Lynn, in his affidavit accompanying his moving papers, admits that Ms. McGrath complained in 2011 that her "lower crown or bridge had fallen off." Moreover, none of the Defendants refute Ms. McGrath's allegations that she continued to seek treatment, but the office failed to schedule an appointment until her lower bridge was loose.⁵ See, e.g., Chan v. Young, 66 A.D.3d 642, 643 (2d Dep't 2009) (in establishing prima facie case in support of summary judgment movant must address and rebut Plaintiff's specific allegations). Moreover, the movants inconsistently assert that Ms. McGrath abandoned her initial treatment plan in failing to promptly return for continued care while also claiming that the 2011 visit was for a new treatment plan.

The First Department recently clarified law surrounding the continuous treatment doctrine. Devadas v. Niksarli, 2014 WL 4355908 (1st Dep't Sept. 4, 2014). In Devadas, the patient failed to see the treater for nearly three years following the last treatment. Id. at *3. In assessing the trial verdict, the court found that the continuous treatment doctrine applied, however, because the record showed that the patient was seen for what the court concluded was the same condition as the earlier visits: blurry vision in the left eye. Id. at *4. In addition, the treater had guaranteed that the earlier treatment would correct the condition. Id. Similarly, in this case, Plaintiff claims, and the

⁵At one point in its moving papers, Toothsavers contends that Ms. McGrath "gave up" on Toothsavers. That quotation, this Court notes, is taken out of context, referring to treatment by a subsequent provider following the events in this case.

jury is entitled to consider, that her initial treatment plan for \$10,000 included, among others, a permanent lower prosthesis, which incorporated implants. Thus, as Devadas instructs, a jury question remains whether Ms. McGrath remained under the continuous care of the Defendants for statute of limitations purposes until they completed that care or determined that any further efforts to do so “would be futile.” Id. at *5.

In addition to clarifying what constitutes the “same illness, injury or condition” under Section 214-a, the Devadas court addressed how to construe delay between treatment visits for purposes of considering whether the statute of limitations under Section 214-a is tolled. A key factor, the Appellate Division determined, is whether the patient and treater subjectively believed that an ongoing relationship existed. 2014 WL 4355908, at *5. In Devadas, the patient met with his treater in a single visit nearly three years after his earlier treatment. In finding that the statute of limitations was tolled, the First Department noted that Devadas believed that he was “under the active treatment of defendant at all times so long as the [earlier treatment] did not result in an appreciable improvement” of his condition. Id. Another factor included whether the patient sought treatment and whether there was “an ongoing relationship of trust and confidence between” the parties. Id. (quoting Ramirez v. Friedman, 287 A.D.2d 376, 377 (1st Dep’t 2001)).

In this case, Ms. McGrath asserts that she continued to reach out to her treaters to complete her treatment, but she was not given an appointment until the bridge loosened in 2011. Defendants either do not dispute or profess they lack knowledge regarding whether she contacted the office for that purpose and admit that her initial treatment plan was incomplete. Plaintiff’s

expert, Dr. Vogel, asserts that it was medically unnecessary to wait for the bridge to loosen, but the movants do not dispute that Ms. McGrath followed their advice in appearing in 2011, at which time the bridge was loose. When an additional charge of \$22,000 was proposed at the 2011 visit, that visit indeed became a single visit within the two and one half year window provided under Section 214-a. Under these circumstances, a jury question remains. See 2014 WL 4355908, at *3 (trial court denied summary judgment on whether continuous treatment doctrine applied to Devadas's claim).

This Court next considers whether Toothsavers has met its prima facie burden of showing that it is not vicariously liable for Ms. McGrath's treatment. See, e.g., Malcolm v. Mount Vernon Hosp., 309 A.D.2d 704, 705-06 (1st Dep't 2003) (movant must demonstrate the absence of any material facts regarding vicarious liability to prevail on summary judgment). Plaintiff's bills of particulars allege in pertinent part that Toothsavers is vicariously liable for her treatment, including the conduct of Dr. Winegarten, the laboratory technicians and other dentists in the office. In Dr. Stolzenberg's affidavit, he conclusorily asserts that "it was "clearly understood by" Ms. McGrath that her treating dentists were independent contractors but he fails to offer any evidence to show how she knew that. Toothsavers' medical expert's opinion relies on Dr. Stolzenberg's affidavit, as well, to contend that the dentists and dental technicians were not employees of Toothsavers. Nor does Toothsavers establish that even assuming there was vicarious liability, there was no departure. The defense expert failed to affirm that he reviewed either Plaintiff's summons and complaint or the deposition of Dr. Winegarten in opining that Toothsavers did not depart. Moreover, Dr. Jutkowitz credits the movants' version of the events over Plaintiff's claims. See 73 A.D.3d at 206 (expert cannot ignore complainant's essential factual allegations in expressing an opinion). Dr. Jutkowitz

lacks knowledge to “opine” that Dr. Lynn did not treat Ms. McGrath. Accordingly, Toothsavers has failed to establish it is not vicariously liable for others’ conduct in this case.⁶ Accordingly, it is

ORDERED that Defendants’ motions for summary judgment, motion sequence numbers 2, 3, and 4 are denied; and it is further

ORDERED that the parties shall appear for a pretrial conference on October 28, 2014.

Dated: September 27, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

⁶In its papers, Toothsavers also seeks summary judgment on behalf of Dr. Stolzenberg individually. Even assuming without deciding whether that individual is a defendant in this action, Toothsavers lacks standing to raise any such claim on that individual’s behalf.