

**Wilson v Massapequa Oral & Maxillofacial Assoc.,
L.L.P.**

2014 NY Slip Op 32722(U)

October 22, 2014

Supreme Court, Suffolk County

Docket Number: 12-15008

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
 Acting Justice Supreme Court

MOTION DATE 2-13-14
 MOTION DATE 5-1-14
 ADJ. DATE 6-26-14
 Mot. Seq. # 001 - MD
 # 002 - XMD

-----X	
CHRISTOPHER WILSON,	LUTFY & SANTORA, ESQ.
	Attorney for Plaintiff
Plaintiff,	1405 Clove Road
	Staten Island, New York 10301
- against -	
MASSAPEQUA ORAL & MAXILLOFACIAL	RAWLE & HENDERSON LLP
ASSOCIATES, L.L.P. and KENNETH D.	Attorney for Defendants
MORRIS, DMD,	14 Wall Street
	New York, New York 10005
Defendants.	
-----X	

Upon the following papers numbered 1 to 28 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001)1-14; Notice of Cross Motion and supporting papers (002) 15-19; Answering Affidavits and supporting papers 20-23; Replying Affidavits and supporting papers 26-28; Other 24; 25; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants, Massapequa Oral & Maxillofacial Associates, LLP and Kenneth D. Morris, DMD, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is

ORDERED that cross motion (002) by plaintiff, Christopher Wilson, pursuant to CPLR 3212 for summary judgment in his favor on the cause of action for lack of informed consent is denied.

This action for dental malpractice is premised upon the alleged negligent departures from good and accepted standards of dental care and practice by defendants Massapequa Oral & Maxillofacial Associates, LLP and Kenneth Morris, DMD, and the failure to provide informed consent related to extraction of three of plaintiff's wisdom teeth. On November 19, 2009, defendant Dr. Morris extracted

24

plaintiff's wisdom teeth located on the upper right (#1), upper left (#16), and lower left (#17). The plaintiff, Christopher Wilson, alleges he sustained traumatic neuropathy of the left inferior alveolar nerve, left lingual nerve, and left chorda tympani nerve, and that he now has loss of sensation and taste on the left side of his tongue.

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]).

In support of motion (001), defendants Massapequa Oral & Maxillofacial Associates, LLP and Kenneth Morris, DMD, submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint; defendants' answer; plaintiff's verified bill of particulars; transcripts of the examinations before trial of Christopher Wilson and Kenneth Morris, DMD; the sworn report of Allan J. Kucine, DDS dated August 19, 2013; defendants' office record; and the unsigned letter of Salvatore Ruggiero, DMD, M.D. dated September 1, 2010 which is not in admissible form. It is noted that defendants did not serve an expert affidavit with the moving papers, and instead, submitted the affidavit of defendant Morris in opposition to plaintiff's cross motion.

It is noted that plaintiff's cross motion (002) was not timely served. The note of issue and certificate of readiness were filed with this Court on December 6, 2014. Pursuant to CPLR 3212, motions for summary judgment must be filed within 120 of filing of the note of issue. Therefore, the parties' summary judgment motions were to be served by April 7, 2014. Plaintiff's motion (002) was not served until April 24, 2014, and plaintiff's counsel offers no excuse or good cause for the untimely submission of the motion. "Good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (see *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *First Union Auto Finance, Inc.*, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005]; *Tucci v Colella*, 26 Misc 3d 1234A, 907 NYS2d 441 [Supreme Court New York, Kings County 2010]). However, 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]). In that the defendants seek dismissal of the causes of action for dental malpractice and lack of informed consent, and plaintiff seeks summary judgment in his favor on the issue of informed consent, this Court will consider and determine motion (002), although it is untimely.

In support of motion (002), Christopher Wilson submitted an attorney's affirmation and the redacted affirmation of plaintiff's expert. In his reply, counsel for the plaintiff affirmed that he had "decided not to reveal the name of the redacted expert oral surgeon until the time of trial." Summary judgment, however, is the equivalent to a trial (*S.J. Caplin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and therefore, an unredacted expert affirmation should have been provided to the Court. The redacted version of the expert affidavit submitted by the plaintiff lacks evidentiary value (*Gaudet v Hershfeld*, 277 AD2d 422, 716 NYS2d 714 [2d Dept 2000]; *Fuller v Strober*, 259 AD2d 662, 686 NYS2d 831 [2d Dept 1999]; *Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). "A party may successfully oppose a summary judgment motion without disclosing the names of the party's expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert's affirmation as long as an unredacted original is provided to the court for its in camera inspection (*Marano v Mercy Hospital, supra*). This procedure preserves the confidentiality of the name of plaintiff's medical expert while also preserving plaintiff's obligation in opposing defendant's motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (*Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc 2d 349, 527 NYS2d 680 [Sup Ct NY County 1988]).

Although a party opposing a summary judgment motion in a medical, dental, or podiatric malpractice case may do so without disclosing the identity of the medical experts upon whose opinions that party relies, a party moving for summary judgment may not do so without revealing the identity of that party's experts (*Marano v Mercy Hospital, supra*). A copy of the affirmation with the expert's name and signature have not been provided to this Court under separate cover by counsel for the plaintiff with the moving papers in motion (002), either in support of plaintiff's motion or in opposition to defendants' motion. Accordingly, plaintiff's expert affirmation is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant's alleged malpractice (*Rose v Horton Medical Center*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]), or to support plaintiff's application for summary judgment.

Christopher Wilson testified to the extent that in 2009, his regular dentist office was the American Dental Center. He had been seen there one other time for x-rays and fillings. He had a lower right wisdom tooth removed by another dentist years before. He first knew he had a problem with his three wisdom teeth when, one morning, he took a bite out of a bagel and both sides of his mouth "blew up" in the cheeks. He could see swelling and he had pain and discomfort on both sides, but no bleeding. He went to American Dental and was given antibiotics for redness and inflammation, both on the left top and bottom, and on the right upper side.

The plaintiff testified that he followed up with Dr. Morris at Massapequa Oral Surgery in November 2009 for consultation concerning removal of the three wisdom teeth. Dr. Morris, upon examination, advised him that his three remaining wisdom teeth had to be removed. The plaintiff continued that Dr. Morris explained to him what normally happens when the wisdom teeth are removed, and apprised him of some of the risks, such as swelling or bruising, and numbness anywhere in the mouth, which would improve with time. He did not remember signing a consent. He stated that no x-rays were taken. He was not awake for the surgery which was done several days later. He followed with another dentist at Massapequa Oral Surgery postoperatively, about two days later with complaints of numbness on the bottom left side of his lip, chin, tongue, teeth and bottom of his mouth. There was no numbness on his right side. Thereafter, he followed up with Dr. Morris, and expressed concern about the continuing numbness, which Dr. Morris advised him would take time to go away. Several weeks later, he returned to Dr. Morris and expressed concerns about the numbness on the lower left side of his lip, chin, tongue and teeth. He stated that Dr. Morris told him that his mouth was healing well and that it would take time for the numbness to go away. Two to three weeks later, he experienced less numbness in his bottom left lip and teeth as the feeling began to return. The plaintiff testified that Dr. Morris advised him that the tongue would be the last place to which feeling would return.

Several weeks later, when the plaintiff returned to Dr. Morris, he noted that he had more feeling in his left lower lip and mouth. The plaintiff added that several weeks later when he saw Dr. Morris, the lip, teeth and chin were "all mostly back at that point." He stated that feeling was about 90% returned, but he still experienced numbness in his tongue. About a month later, 100% of feeling returned to this lip, chin, and mouth, but he still had numbness to the left side of his tongue. He had no pain. He stated that Dr. Morris told him that he did not believe he would be getting any feeling back in the left side of his tongue, and referred him to Dr. Ruggerio. The plaintiff stated that he saw Dr. Ruggerio, who performed sensitivity and taste testing to his mouth, but took no x-rays. He stated Dr. Ruggerio advised him that he was not a candidate for surgery on his nerve because he had very limited sensory injury on the left side of the tongue, and that he thought the nerve might have been severed at the gumline. At the time of his deposition, he believed he had 5% return of sensation to the left side of his tongue. He also stated, that when shown the consent form, which he signed, that the form reflected his conversations with Dr. Morris.

Dr. Morris testified to the extent that he has been board certified in oral surgery since 1980. He is a partner in Massapequa Oral and Maxillofacial Surgery, LLP. He first saw the plaintiff on November 16, 2009 on a general referral from the office of Drs. Sperber & Portnoy, who provided Panorex x-ray films for his review, and which films he returned after making copies. Because Panorex films were provided, he did not repeat Panorex studies. Dr. Morris stated that the plaintiff presented with pain and swelling in the upper right quadrant of his mouth. His notes indicated the he did a full consult for extractions, indicated the teeth (right upper) #1, (left upper) #16 and (left lower) #17 for extraction, discussed intravenous sedation, local anesthesia, and the postoperative course. He advised the plaintiff of potential future problems associated with increased age if the teeth are not extracted in the teens or twenties.

Dr. Morris stated that he discussed with the plaintiff the nerves located in the surgical area and potential injury to those nerves, and marked the nerve on the x-ray at #17. He explained that there are a

couple of nerves in the area, and the interior alveolar nerve runs through the bone and gives feeling to the lower lip, chin, gums, teeth and that area. There is also a nerve that runs to the tongue which can be affected. Injury could be numbness which lasts for a couple days, weeks, or can be permanent. He also discussed the risks of infection, dry socket, and jaw fracture. The risks were set forth on the consent form signed by the plaintiff.

Dr. Morris testified that he thought the lower tooth root may be close to the nerve, which he underlined on the x-ray. Dr. Morris testified that he might have underlined it “[perhaps I felt with this case that there was more chance of it happening than in other routine, more routine cases where the nerve is not where it is, where the tooth is not as bulky as it is, where the age is not as much a factor.” He concluded with regard to tooth # 17 that there was an increased risk of nerve injury to the plaintiff due to the very big boxy rooted tooth with curves to the roots, and because the bone is denser as the plaintiff was beyond a teenager. He continued that the tooth was somewhat distally angular, which makes it a more difficult extraction. Dr. Morris testified that he did not apprise the plaintiff of the increased risk, but laid out for him that it was a risk. Dr. Morris testified that the procedure he performed on the plaintiff would not have benefitted by the use of a cone beam x-ray because the surgery would be the same, and the approach is the same, whether the nerve is two inches away or two microns away. He thought he resected tooth #1 and assumed he had to remove some bone. Tooth #17 on the lower left was a tough extraction due to the curved, fused roots, he stated.

Dr. Morris testified that with regard to the surgery to extract tooth #17, located in the lower left, he could not conclude that the extraction caused the nerve injury to either the inferior alveolar nerve or the lingual nerve, because numbness can be caused by the injection of local anesthetics, suturing, or postoperative swelling which puts pressure on the nerve. He could not determine which of the differential was more likely. He also stated that even if he does everything right, numbness is still a risk. He always considers that there could be a risk of nerve injury when he does surgery. Dr. Morris stated that postoperatively, when the plaintiff indicated that there was less numbness on his lip and chin, and some response on his tongue, he thought there should be a gradual resolve.

In the sworn report of Allan J. Kucine, DDS, dated August 19, 2013, Dr. Kucine stated that he reviewed plaintiff’s medical records from the defendants, American Dental office records, including radiographs; and records from Drs. Salvatore Ruggiero, Richard Valinotti, and Sperber & Portnoy. Dr. Kucine stated that the plaintiff advised him he has numbness and cannot taste on the left side of his tongue. Upon examination, the plaintiff reported, *inter alia*, that in response to soft touch with a cotton swab, he was unable to detect the stimulus on the dorsal and ventral surfaces of the left side of his tongue, the left lateral border of the tongue, the left floor of the mouth, and the left lingual gingiva. The same findings were reported when the plaintiff was tested for direction sense with a cotton swab, and sharp stimulus with a dental explorer. When tested for the sense of taste with salt and sugar, the plaintiff reported he was unable to detect these tastes on the left side of his tongue. He reported equal response on the right and left with soft touch of the cotton swab, and sharp stimulus with a dental explorer, to the right and left sides of his lower lip, chin, mandibular labial mucosa, mandibular buccal, and labial gingiva. Dr. Kucine continued that there was no sign of trauma, speech was normal, there was no drooling of saliva, and the plaintiff could sip water from a cup and swallow normally. He exhibited full range of motion and normal lateral excursions of the mandible, without popping, clicking, or crepitus.

Dr. Ruggerio's letter to Dr. Morris indicated that the neurosensory examination was consistent with a traumatic neuropathy of the left lingual nerve. There was some level of protective sensation intact suggesting that there has been some level of recovery of that nerve. He continued that, at the present time, the plaintiff's level of function is somewhat comparable to what it would be if he had done a surgical repair, and therefore, Dr. Ruggerio did not believe exploration would be of benefit. Dr. Ruggerio stated that he does not believe the plaintiff will experience any type of dysesthesia since this has not been a major component of his symptoms to this point.

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]).

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]).

Turning to motion (001), defendants seeks summary dismissal of the complaint on the basis that defendants comported with the standard of care; a nerve injury can occur in the absence of negligence; that the defendants did not cause injury to the plaintiff's nerves; and that informed consent was provided to the plaintiff for the extraction of his wisdom teeth.

Dr. Morris submitted an affidavit in opposition to plaintiff's cross motion and in further support of his motion for summary judgment. He stated that on November 16, 2009, the plaintiff came to him complaining of problems with his wisdom teeth in the upper right quadrant, and sought consultation concerning removal of three wisdom teeth, which had not fully erupted. He advised the plaintiff that he would probably have problems as there was not enough room in his mouth to accommodate them. He stated that it was the plaintiff's decision alone to remove the teeth. He reviewed the options for local and general anesthesia, and the expected post-operative course. The plaintiff signed his health history and informed consent form in front of a witness. Dr. Morris stated that the consent form explicitly discloses chin, lip, gum, and tongue numbness as risks to surgery, lasting weeks, months, or rarely, permanently. Dr. Morris stated that he also orally explained the risk of nerve damage with the plaintiff prior to the extractions. He added that it was his usual custom and practice that all patients he treated were apprised of the potential risks, benefits, and available alternatives before surgery is conducted.

Dr. Morris averred that there was a discussion on potential injury to the nerves near the area in which the surgery would be performed, as confirmed by his notes, and by the markings on the x-rays. He explained what he told the plaintiff concerning the inferior alveolar nerve and the lingual nerve. On November 19, 2009, the plaintiff presented to Dr. Morris' office, at which time teeth Nos. 1, 16 and 17 were extracted without incident, and in accordance with the standard of care of oral and maxillofacial surgeons, without complications or untowards effect. Dr. Morris continued that in addition to surgery, there are other possible causes of numbness, including the injection of local anesthetics, suturing, or postoperative swelling. He stated that it is also possible to have injury to a nerve even though everything was done right, as the surgery can cause inflammation which can irritate the nerve and cause temporary or permanent numbness. Injuring a nerve, he added, is not necessarily a mistake.

It is noted that neither Dr. Kucine nor Dr. Ruggerio have set forth the standard of care concerning the care and treatment provided by the defendants, and have offered no opinion concerning whether or not the defendants comported with such standard of care. They offer no opinion concerning the proximate cause of plaintiff's alleged nerve injury. The defendants have not submitted an expert affirmation or affidavit with the moving papers setting forth the standard of care and how the defendants comported with the same. Therefore, defendants have not established *prima facie* entitlement to summary judgment dismissing the complaint.

Accordingly, motion (001) by the defendants for summary dismissal of the complaint is denied.

Turning to motion (002) wherein plaintiff seeks summary judgment in his favor on the issue that he was not provided informed consent, it is determined that even if plaintiff's expert's affidavit were considered, plaintiff has not demonstrated *prima facie* entitlement to summary judgment in his favor relating to the cause of action premised upon the defendants' alleged failure to provide informed consent. Plaintiff's expert, who has not provided a curriculum vitae or otherwise qualified as an expert, stated he is a board certified oral surgeon licensed to practice oral and maxillofacial surgery in New York. He set forth the materials and records which he reviewed. Plaintiff's expert opined that Dr. Morris failed to obtain an informed consent with respect to the subject extractions as he did not inform the plaintiff that there was an increased risk of nerve injury, and the consent form does not advise of increased risk of nerve injury or loss of taste. It is noted, however, that defendant Morris submitted a

Wilson v Massapequa Oral & Maxillofacial Associates, LLP

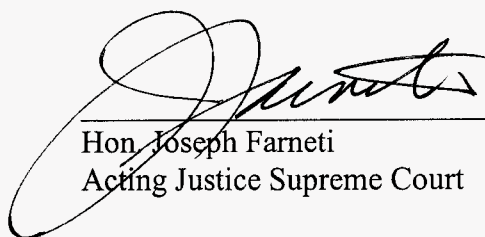
Index No. 12-15008

Page No. 8

copy of his dental records in exhibit A, which contains the consent form dated November 19, 2009, signed by the plaintiff. As set forth in item 3, “[lower tooth roots may be very close to the nerve and surgery may result in a numb feeling of the chin, lip, gums or tongue which may last for weeks, months or rarely, be permanent. On upper teeth whose roots are close to the sinus, a sinus infection may develop, a root tip may enter the sinus, and/or an opening from the mouth to the sinus may occur which could require later medication or surgery.” At item 4, it is set forth that “[local anesthesia risks include soreness, bruising, infection, or prolonged numbness.” Based upon the foregoing, plaintiff’s expert opinion does not comport with the evidentiary proof presented in the record and contained on the consent form signed by the plaintiff. Therefore, even if plaintiff’s expert’s affirmation were in admissible form, factual issues concerning whether proper informed consent was provided to the plaintiff precludes summary judgment.

Accordingly, motion (002) by the plaintiff for summary judgment on the issue of informed consent is denied.

Dated: September 22, 2014



Hon. Joseph Farneti

Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION