

**Dyckes v Stabile**

2015 NY Slip Op 30602(U)

April 9, 2015

Supreme Court, Suffolk County

Docket Number: 16869/2011

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

Paul Dyckes,

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Plaintiff,

Motion Sequence No.: 004; MGMotion Date: 10/1/14

-against-

Submitted: 10/1/14Dr. Richard Stabile, Dr. Geore Manolarakis  
and Dr. Anthony Maresca,Motion Sequence No.: 005; MGMotion Date: 10/1/14Submitted: 10/1/14

Defendants.

Attorney for Plaintiff:Attorney for Defendant  
Dr. Anthony Maresca:Joel M. Kotick, Esq.  
501 East 79<sup>th</sup> Street  
New York, NY 10075Wilson, Elser, Moskowitz,  
Edelman & Dicker, LLP  
150 East 42<sup>nd</sup> Street  
New York, NY 10017Attorney for Defendant  
Dr. George Manolarakis:Clerk of the CourtAhmuty, Demers & McManus, Esqs.  
200 I.U. Willets Road  
Albertson, NY 11507

Upon the following papers numbered 1 to 61 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 22; 23 - 52; Answering Affidavits and supporting papers, 53 - 57; Replying Affidavits and supporting papers, 58 - 59; 60 - 61; it is

**ORDERED** that the motion (#004) by defendant Anthony Maresca, DDS, and the motion (#005) by defendant George Manolarakis, DDS, for summary judgment are consolidated for purposes of this determination; and it is further

**ORDERED** that motion (# 004) by defendant Anthony Maresca, DDS, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is further

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**ORDERED** that motion (#005) by defendant George Manolarakis, DDS, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted.

The plaintiff commenced this action to recover damages for injuries allegedly sustained due to the defendants' alleged negligent departures from good and accepted dental practice in connection with certain dental treatment rendered to him during the period of April 2002 through September 2010. It is alleged that the defendants were negligent, *inter alia*, in ignoring "signs of an unphysiologic occlusion, ankylosis, bone loss, root resorption, and failure to respond to treatment."

Defendant Dr. Anthony Maresca now moves for summary judgment dismissing the complaint as asserted against him on the grounds that he was not negligent in his treatment of the plaintiff and that, in any event, any alleged negligence on his part did not cause the plaintiff's injuries. In support, Dr. Maresca submits, *inter alia*, the pleadings; the bill of particulars; his affidavit, dated August 26, 2014; the transcript of his deposition testimony; the transcript of the plaintiff's deposition testimony; and the affirmation of his expert, Steven Luccarelli, DDS.

The requisite elements of proof in a dental malpractice action are (1) a deviation or departure from accepted standards of dental or medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*see Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 2015 NY Slip Op 02136 [2d Dept 2015]; *Kozlowski v Oana*, 102 AD3d 752, 959 NYS2d 500 [2d Dept 2013]; *Sharp v Weber*, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]). To establish a claim for dental malpractice based on lack of informed consent, a plaintiff must prove (1) that the dental professional providing the treatment failed to disclose alternatives to such treatment and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable dental practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks, and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see Schilling v Ellis Hosp.*, 75 AD3d 1044, 1046, 906 N.Y.S.2d 187 [3d Dept 2010]; *Cole v Tischler*, 68 AD3d 1595, 893 NYS2d 303 [3d Dept 2009]; *see also Mangaroo v Beckman*, 74 AD3d 1293, 904 NYS2d 212 [2d Dept 2010]).

On a motion for summary judgment dismissing a dental malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted dental practice or that, if there was a departure, it was not the proximate cause of the plaintiff's injury (*see Sharp v Weber, supra; LaVecchia v Bilello*, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; *Starr v Rogers*, 44 AD3d 646, 843 NYS2d 371 [2d Dept 2007]). "To sustain this burden, the defendant must make address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Terranova v Finklea*, 45 AD3d 572, 572; *see LaVecchia v Bilello, supra*). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact as to whether appropriate care was rendered (*see Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]; *see also Alvarez v Prospect*

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*Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 903 NYS2d 521 [2d Dept 2010]).

At his deposition, the plaintiff testified that during an appointment for a general check-up and dental cleaning, Dr. Stabile discussed possible orthodontic treatment to create room for an impacted tooth on the left side of the plaintiff's mouth. The plaintiff testified that he was referred to Dr. Maresca, an orthodontist, for treatment of the impacted tooth, and that at the consultation Dr. Maresca explained "there was going to be a chain put on the tooth which would be brought in." The plaintiff testified that after the consultation he saw Dr. Maresca monthly for the orthodontic treatment. The plaintiff had no recollection as to whether any risks associated with the planned course of orthodontic treatment were discussed or whether he made any complaints to Dr. Maresca during his course of treatment from 2002 to 2007. While the plaintiff was treating with Dr. Maresca, Dr. Manolarakis became his dentist and performed regular dentistry treatments, including check-ups and cleaning, from 2002 or 2003 to 2010. The plaintiff testified that Dr. Manolarakis never rendered any orthodontic treatment. The plaintiff testified that in 2003, he discussed with Dr. Maresca that it was very hard to move his impacted tooth down, and that he noticed his teeth were uneven after the braces were removed in 2006 or 2007. Although no one indicated that the orthodontic treatment caused bone loss and root resorption, the plaintiff testified he believed that "this is what brought it on," because he did not previously have those conditions. The plaintiff also testified he had no recollection as to how Dr. Manolarakis responded to the complaint that he made regarding the orthodontic treatment.

At his deposition, Dr. Maresca testified that the plaintiff was referred to him by Dr. Stabile for an impacted canine tooth, located in the upper left side of his mouth, and that he treated the plaintiff from April 2002 to 2010. Dr. Maresca testified that when the plaintiff wanted to bring the tooth into place by orthodontic treatment, he told the plaintiff that he had a 50/50 chance of success. Dr. Maresca testified that Dr. Polemeni, a periodontist, suggested an implant for the plaintiff based on the poor prognosis of his tooth in October 2006, and that he took the plaintiff's braces off in March 2007.

In his affidavit, Dr. Maresca stated that when the plaintiff was first referred to him for treatment of the impacted cuspid (tooth #11), he offered the following treatment alternatives to the plaintiff: (1) accept the loss of tooth and pursue an implant; (2) keep the impacted cuspid in place; or (3) attempt orthodontic repositioning of the cuspid. Dr. Maresca also averred that he orally advised the plaintiff of all possible side effects of the treatment options, including possible bone loss, unphysiologic occlusion, root resorption, ankylosis and the general risks of possible periodontal disease, and that the plaintiff ultimately chose to pursue orthodontic repositioning of the cuspid. According to the affidavit, during the active treatment period, the plaintiff cancelled or missed 24 appointments. Dr. Maresca further stated that he and the plaintiff engaged in ongoing communication about the risks and alternatives to treatment throughout the treatment period, and that the plaintiff did not indicate that he wanted to cease orthodontic repositioning of the cuspid prior to 2010.

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In his affirmation, Dr. Steven Luccarelli, DDS, affirmed that he is a board certified orthodontist duly licensed to practice in New York State. He set forth his education and training, and stated that he currently maintains his own private dental and orthodontic practice. He set forth the records which he reviewed, and opined that the plaintiff was an appropriate candidate for orthodontic treatment when he presented to Dr. Maresca in 2002. Dr. Luccarelli opined that there was proper oral informed consent for the orthodontic treatment provided by Dr. Maresca to the plaintiff, and that the treatment was in keeping with the applicable standard of care despite the known risks of treatment, including bone loss, compromised occlusal result, root resorption, and ankylosis. Dr. Luccarelli also affirmed within a reasonable degree of medical certainty that the treatment rendered by Dr. Maresca was not the proximate cause of the damages allegedly complained of by the plaintiff.

Based upon the foregoing, it is determined that Dr. Maresca established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the basis he did not depart from good and accepted standards of dental practice, did not fail to provide proper informed consent to the plaintiff, and did not proximately cause the plaintiff's alleged injuries.

To rebut Dr. Maresca's prima facie showing of entitlement to an order granting him summary judgment, 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]).

In opposition, the plaintiff submits, *inter alia*, his affidavit wherein he stated that at no time prior to the orthodontic treatment did Dr. Maresca discuss the serious risks of the treatment or a 50% chance of success with the treatment. According to the affidavit, when the plaintiff was referred to Dr. Polemini, a periodontist, in 2006, Dr. Maresca did not discuss the plaintiff's severe symptoms including external resorption, loss of tooth vitality, and bone loss. The plaintiff stated in his affidavit that he would not have had the procedure, if he knew that there was only a 50% chance of success. He also stated that he would not have continued the treatment, if he knew that he had those symptoms.

The plaintiff also submits an affidavit, dated September 22, 2014, from Laurance Jerrold, DDS, stating that he is a dentist duly licensed to practice dentistry in New York State and a diplomat of the American Board of Orthodontics. Dr. Jerrold, however, has not qualified as an expert as he has not set forth his qualifications, education, training, or work experience (*see Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196, 998 NYS2d 502 [3d Dept 2014]; *McNee v ShopRite*, 116 AD3d 742, 982 NYS2d 898 [2d Dept 2014]). In any event, even if he qualified as an expert, Dr. Jerrold has not set forth the standard of care concerning the dental care and treatment provided by Dr. Maresca to the plaintiff, or how Dr. Maresca departed from that standard of care. There is no opinion proffered with regard to the proximate cause of the plaintiff's claimed injuries.

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resulting from any departure from the standard of care by Dr. Maresca. While Dr. Jerrold stated that it was a departure from good and accepted practice for Dr. Maresca to have undertaken to treat the plaintiff when there was only a 50% chance of success, Dr. Jerrold offered no basis for such opinion.

Based upon the foregoing, the plaintiff has failed to submit sufficient evidentiary proof to raise a triable factual issue to preclude summary judgment. Accordingly, Dr. Maresca's motion is granted, and the complaint as asserted against him is dismissed.

Defendant Dr. George Manolarakis also moves for summary judgment dismissing the complaint as asserted against him on the grounds that he was not negligent in his treatment of the plaintiff, and that, in any event, any alleged negligence on his part did not cause the plaintiff's injuries. In support, Dr. Manolarakis submits, *inter alia*, the pleadings; the bill of particulars; his affidavit, dated February 6, 2013; the transcript of his deposition testimony; the transcript of the plaintiff's deposition testimony; and the affirmation of his expert, Mark Heller, DMD.

In his affidavit, Dr. Manolarakis stated that he purchased the dental practice of Dr. Stabile in April 2003, that he first treated the plaintiff with a general check-up and dental cleaning in May 2003, and that he formulated a treatment plan at a visit on July 14, 2003 for dental restorations on three teeth. He stated that on September 27, 2006, he "evaluated the external resorption on the distal aspect of tooth #11," and that on October 18, 2006, when the plaintiff returned for a cleaning, teeth #10, #11, and #12 were pulp tested. Dr. Manolarakis stated that the plaintiff continued to seek dental care from him on multiple occasions from 2003 through 2007. After October 2007, he only rendered care and treatment to the plaintiff on June 12, 2009, when a check-up and cleaning were performed.

At his deposition, Dr. Manolarakis testified that on September 26, 2006, an endodontist asked him to check the restorability of the plaintiff's tooth #11, because external resorption had been detected. The next day, he saw the plaintiff and referred him to Dr. Polemeni, a periodontist, to evaluate the salvageability of tooth #11. Dr. Manolarakis, who had no recollection as to whether the plaintiff's teeth were slanted, testified that when he pulp tested a few of the plaintiff's teeth on October 18, 2006, he found that tooth #11 was non-vital and that its nerve was necrotic, and that he told the plaintiff the findings of the pulp testing. Dr. Manolarakis testified that he observed very significant bone loss and root resorption when reviewing x-rays of the plaintiff's mouth taken in 2007, and it was a reasonable inference that the plaintiff already had considerable bone loss by 2006. Dr. Manolarakis testified that he did not have any discussion with the plaintiff's orthodontist regarding the plaintiff's loss of dental bone in 2006. He also testified that he was "going back and forth with the endodontist, periodontist and oral surgeon" to figure out a solution for tooth #11.

In his affirmation, Dr. Mark Heller, DMD, affirmed that he is a dentist duly licensed to practice in New York State. He set forth his education and training, and stated that he is currently an attending dentist at Long Island Jewish Medical Center Dental Clinic, and that he maintains his own private dental practice. He set forth the records which he reviewed, and opined that Dr.

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Manolarakis's treatment was comprised of general check-ups, cleaning and placement of restorations, and that the plaintiff's alleged injuries are not causally related to the care and treatment rendered by Dr. Manolarakis. Moreover, Dr. Heller opined that while the plaintiff's complaints in this action, including bone loss, root destruction, periodontal breakdown and neuromuscular problems concentrated on the upper anterior part of his mouth, there is no dental foundation to support a claim that the placement of the restorations in the posterior areas of the plaintiff's mouth contributed to the condition in the upper anterior part of the mouth. Dr. Heller affirmed within a reasonable degree of medical certainty that the treatment rendered by Dr. Manolarakis was at all times appropriate and within the accepted standards of dental care, and that the care and treatment rendered by Dr. Manolarakis was not the proximate cause of the damages alleged by the plaintiff.

Based upon the foregoing, it is determined that Dr. Manolarakis established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the basis he did not depart from good and accepted standards of dental practice, did not fail to provide proper informed consent to the plaintiff, and did not proximately cause the plaintiff's alleged injuries.

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.*, *supra*; *Domaradzki v Glen Cove OB/GYN Assocs.*, *supra*).

In opposition, the plaintiff submits, *inter alia*, his affidavit wherein he stated that although Dr. Manolarakis treated him for crowns, fillings and cleaning and referred him to Dr. Polemini, a periodontist, Dr. Manolarakis never discussed his poor prognosis including external resorption, bone loss, and root resorption. The plaintiff also stated that Dr. Manolarakis never conveyed to him Dr. Polemini's opinion that the orthodontic treatment should be discontinued. The plaintiff further stated that he would not have continued the orthodontic treatment if he knew that he had those symptoms or that Dr. Polemini recommended the treatment be discontinued.

The plaintiff submits the affidavit dated September 22, 2014 from Laurance Jerrold, DDS, stating that he is a dentist duly licensed to practice dentistry in New York State and a diplomate of the American Board of Orthodontics. Dr. Jerrold has not qualified as an expert as he has not set forth his qualifications, education, training, or work experience (*see Flanger v 2461 Elm Realty Corp.*, *supra*; *McNee v ShopRite*, *supra*). Dr. Jerrold has not provided a copy of his curriculum vitae. In any event, even if he qualified as an expert, Dr. Jerrold has not set forth the standard of care concerning the dental care and treatment provided by Dr. Manolarakis to the plaintiff, and how Dr. Manolarakis departed from that standard of care. There is no opinion proffered with regard to the proximate cause of the plaintiff's claimed injuries resulting from any departure from the standard of care by Dr. Manolarakis.


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Based upon the foregoing, the plaintiff has failed to submit sufficient evidentiary proof to raise a triable factual issue to preclude summary judgment. Accordingly, Dr. Manolarakis's motion is granted and the complaint as asserted against him is dismissed.

Dated: 4/9/2015

  
**HON. WILLIAM B. REBOLINI, J.S.C.**

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION