

<b>Hampton v Universal Dental</b>
2015 NY Slip Op 31005(U)
June 9, 2015
Supreme Court, New York County
Docket Number: 805088/12
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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KYLE HAMPTON,

Plaintiff,

Index No. 805088/12  
Motion Seq. Nos. 005, 006 & 007

-against-

UNIVERSAL DENTAL, SOL STOLZENBERG, D.M.D.,  
d/b/a TOOTHSAVERS, and JERRY H. LYNN, D.D.S., et al.,

Defendants.  
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LAURENCE R. DANZINGER, D.M.D., P.C., d/b/a  
UNIVERSAL DENTAL and SOL STOLZENBERG, D.M.D., P.C.,  
d/b/a TOOTHSAVERS s/h/a SOL STOLZENBERG D.M.D.  
d/b/a TOOTHSAVERS,

Third-Party Plaintiffs,  
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-against-

DAVID COHEN as EXECUTOR of the ESTATE of  
MORTON COHEN, D.D.S., DAN ADOFO-MENSAH, D.D.S.,  
MORTON COHEN, PA and DAN ADOFO-MENSAH, D.D.S., P.A.,  
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SCHLESINGER, J.:

This is an action sounding in dental malpractice. Originally, Kyle Hampton, the patient/plaintiff, brought suit against Universal Dental, Sol Stolzenberg, D.M.D., d/b/a ToothSavers and Jerry H. Lynn, D.D.S. When Mr. Hampton first sought treatment from ToothSavers pursuant to an ad he had seen in a New York tabloid, it was on December 17, 2008. At that time, he went to a ToothSavers' office on 57<sup>th</sup> Street in Manhattan. ToothSavers was subsequently transferred or sold to Laurence Danziger, D.M.D., P.C. and did business as Universal Dental.<sup>1</sup>

<sup>1</sup>On October 16, 2013, counsel for the plaintiff withdrew all claims against Danziger and Universal and these parties withdrew their third-party action. It appears that the practice was sold to Danziger on January 1, 2012, and no dental work was

Sol Stolzenberg never personally treated Mr. Hampton, but when the plaintiff first consulted with ToothSavers and began treatment, the practice was associated with him. Jerry H. Lynn was, at one point, a licensed dentist, but he had surrendered his license in late 2001 or in early 2002. Dr. Lynn practiced under the name of ToothSavers.

According to all those familiar with what occurred here, Mr. Hampton was at some point referred to a New Jersey ToothSavers for continued dental care. He received that care from a Dr. Dan Adofo-Mensah, D.P.S., P.A. and Morton Cohen D.D.S., P.A. This led to a third-party action by Danziger d/b/a Universal Dental and the Stolzenberg defendants against Dr. Adofo-Mensah and Dr. Morton Cohen and their PA's.<sup>2</sup> In any event, Dr. Cohen and his PA answered. Subsequently, the plaintiff amended his complaint and added Dr. Cohen as a direct defendant. The complaint against all the defendants included a claim for punitive damages.

On September 19, 2013, Dr. Cohen died. Therefore, a substitution was made and the caption amended in both the direct action and third-party action to reflect the party's name as David Cohen, as Executor of the Estate of Morton Cohen, D.D.S., P.A.

Before the Court now is a plethora of motions - all asking for dispositive relief. Specifically, there are motions by Jerry Lynn, by Stolzenberg d/b/a/ ToothSavers, by the Estate of Morton Cohen for summary judgment to dismiss the complaint in its entirety, or alternatively, for dismissal of the punitive damage claim. Further, there is a cross-motion

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being provided then by the N.Y. ToothSavers.

<sup>2</sup>Professional Associations are called this in New Jersey, whereas their equivalents, "PC's" are called Professional Corporations in New York.

by Kyle Hampton, the plaintiff, also for summary judgment in his favor on liability. Frankly, it is unclear to this court whether, in Mr. Hampton's cross motion, he is also asking for such relief against Dr. Cohen or his estate. But, it is clear that Mr. Hampton is opposing the Cohen motion for dismissal.

For the reasons to be discussed forthwith, I am granting Jerry H. Lynn's motion for summary judgment and I am denying the other motions, including the plaintiff's. Further, I am dismissing claims of punitive damages against all the defendants.

A good place to begin this discussion would be an affidavit from the plaintiff dated November 5, 2014, which accompanies his cross motion. Mr. Hampton describes a situation in 2004 when he noticed a developing space between his two front top teeth. At that time, he was also missing a back tooth. Several years later, he went to ToothSavers on 57<sup>th</sup> Street because of its advertisement for implants and braces at highly reduced rates. This was on or about December 17, 2008.<sup>3</sup>

Mr. Hampton relates that approximately one year after the implant was placed, another dentist at ToothSavers looked in his mouth while Hampton told him he was there for braces. The plaintiff says that earlier, while the implant work was being performed, he had raised the question about the special fee for braces at half price and Dr. Lynn, presumably "an old white guy, white hair around six-feet tall around 70 or 80 who told me he was the owner" (¶12) at the first visit, had told him they would discuss the braces after

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<sup>3</sup>Between that date and August 26, 2009, ToothSavers performed an implant in the space where tooth#13 had been. Beside that work being done more than two-and-a-half years before this action was commenced on May 8, 2012, that treatment seems to have been a success. In any event, it plays no part in the treatment being challenged in the current motions, which exclusively concern orthodontic work and braces.

the implant was placed. So now when the implant had been placed, a dentist came into the room, with another man who was wearing a white lab coat and looking like one of the "doctors" (or dentists). He introduced himself as Mitchell Lynn, or "Mitch", and asked Hampton to open his mouth. (Looks, of course, can be deceiving and they were here. Mitch, Jerry Lynn's son, appears to have completed only a single year at dental school and has had no further training in dentistry). Irrespective, "Mitch" was not a dentist.

Hampton was asked by Mitch if he wanted the gap closed and also what work he did. Hampton told him he was a model and actor. Mitchell then responded that he could put a "Hawley" in his mouth.

I asked him what that was. Mitchell explained I could pop it in and out, it would absolutely close the space and would not interfere with the camera; he said it is cheaper than braces; he could do it for \$2,000. He assured me it was good and would be completed within one year (¶15).

He was to pay that amount "up front". Mr. Hampton says he paid \$200 that day, and the remaining \$1800 balance soon thereafter, probably in 2009.

Mr. Hampton then recounts that "They kept putting off giving me the Hawley" (¶16). He states he saw "Mitch and his father in 2010 and again Mitch looked in my mouth and had another impression taken" (¶17). He kept calling to get the Hawley but he was always told it was not yet ready. Finally, he was told it was ready, "but that I had to go to their ToothSavers office in New Jersey" (¶17). The inconvenience of the situation made him angry, but he felt he had no choice. He went to the ToothSavers' New Jersey office and was told by the receptionist that the orthodontist came in only once a month and he would have to come back. Mr Hampton was not happy.

However, Mr. Hampton eventually did go back to the New Jersey office where he saw and was examined by the orthodontist, who told him that a "Hawley" was not for him, as there was no room to push the teeth back to close the gap. The orthodontist provided a plan that involved braces on the lower and upper teeth. Mr. Hampton says, "My teeth were moving around like marbles in different directions; the space in front got bigger" (¶10). He cannot recall the name of the dentist who he saw the most, which is 5 or 6 times.

With regard to defendant Jerry Lynn, Mitchell's father, Mr. Hampton states he saw him again in 2011, when "he just snipped a wire to let my teeth come out..."(¶12). Hampton then relates their conversation of about an hour where Dr. Lynn said he was basically retired but that he owned the place. This visit appears to have occurred in the New Jersey office, but that is not explicitly said.

The plaintiff states that after this visit with Lynn, he saw a young orthodontist named Ivy. She told Elaina, the receptionist that Mr. Hampton needed more brackets. Elaina said in the future, he would have to pay \$25.00 per bracket. Mr. Hampton reminded her he had already paid in full. An argument with Mitch ensued, and Mitch told the plaintiff never again to set foot in ToothSavers (¶15).

Despite this, the receptionist called Mr. Hampton to make an appointment regarding the braces he was still wearing. He returned and saw Ivy. She told him that he had "over 70% bone loss, my teeth are going to fall out, and the braces had to be removed" (¶17). She did this and made retainers. Finally, the receptionist told a young orthodontist not to give Hampton any more free cleanings as he was "an orthodontist and the people at 57 Street do not want him giving me free cleanings" (¶19).

In Jerry Lynn's motion for summary judgment, he provides his own affidavit (Exhibit "G") to support his position that he provided no dental treatment to the plaintiff. Beyond stating that, he also emphasizes that he never provided dental care or treatment to any patient at any time at any New Jersey dental office (¶4). He also states that he had no professional dealings with the plaintiff and specifically details all the things he did not do, such as examine Hampton's mouth, or order and/or take X-Rays. Dr. Lynn also relies on the plaintiff's chart with ToothSavers, and an affidavit by Sol S. Stolzenberg which outlines the treatment provided at the 57<sup>th</sup> Street office.

Dr. Lynn then discusses the orthodontical treatment provided "at separate and independent New Jersey dental/orthodontic practices from 11/18/09 through 4/26/12" (¶10). He says he was not involved in any way with this treatment. As to the allegation that he cut a wire in Hampton's mouth, he said it was absolutely not him, but rather he "is describing the now deceased Morton Cohen, who was an older orthodontist who saw patients at the Fort Lee, NJ office" (¶11).

Accompanying this motion is also an affidavit from Maria Elena Vielman (Exhibit "H"). She identifies herself as the office manager of the New Jersey ToothSavers office. She says that Mr. Hampton was treated in New Jersey from July 2010 through January 2012. She confirms that Jerry Lynn has never been involved with any patients in the New Jersey ToothSavers offices. She also corroborates Lynn's account of the wire snipping incident being performed by Morton Cohen, who was an "older gentleman with white hair who saw patients." In fact, Ms. Vielman reviewed Hampton's New Jersey chart and "can state with certainty that Morton Cohen saw Mr. Hampton on July 15, 2010" (¶6-7).

Hampton's attorney, who has some degree of experience with Jerry Lynn, believes fervently that this unlicensed dentist, one who has pled guilty to the felony of practicing dentistry without a license, is the "true owner of ToothSavers (and) responsible for the employees at ToothSavers including his son Mitchell Lynn" (§4 of Affirmation in Support and Affirmation in Opposition). He then provides background material as to the ownership of ToothSavers. He takes issue with the position that it was Morton Cohen, rather than Jerry Lynn, that treated Hampton and who cut the wires.

However, counsel's beliefs, as sincere as they may be, do not have evidentiary value. The sole dental activity plaintiff is able to point to Jerry Lynn as performing, the wire cutting, even if it was Lynn who did this, is simply not sufficient to show that this action alone constituted professional malpractice causing injury to Mr. Hampton.

The affidavits of Lynn and Vielman, together with the patient's charts, which make no mention of Jerry Lynn, make out a prima facie case in support of Lynn's motion for summary judgment. Therefore, since there is no probative evidence to rebut this prima facie demonstration, even to show the existence of factual issues pointing to negligence and injury, Jerry Lynn's motion should be granted, and it is.

As to the other motions, the plaintiff's, Stolzenberg's d/b/a ToothSavers, and Cohen's Estate, those are all denied. Regarding the "Cohen" motion, there is more than enough here to suggest a real connection between the ToothSavers' offices in New York and New Jersey. Also it must be kept in mind that the plaintiff insists he paid \$2000 to Mitchell Lynn in New York for work to be performed by others in the New Jersey offices. It would not offend principles of justice and/or fairness for New York to maintain jurisdiction in a controversy such as this, which involves a New York citizen who claims he suffered

an injury at the hands of a professional corporation related to a New York one which operates in New Jersey.

Further, there is even additional evidence, not specifically referred to here, showing that the New York and New Jersey offices' financial arrangements were intertwined. Finally, what must be remembered is that Hampton states he paid the \$2000 fee to ToothSavers in New York but had to go to New Jersey to receive the treatment. No one disputes this.

As to the other motions, plaintiff presents an affidavit from Robert Gottlieb, a licensed dentist, now retired, who continues to teach dentistry at New York University's College of Dentistry. He says malpractice occurred here because Hampton was in "no circumstances a candidate for orthodontic treatment. He simply did not have sufficient bone to move teeth through." Therefore such work was contraindicated and caused bone loss (§5). He also criticizes specific aspects of the treatment. Finally, Gottlieb opines that no informed consent was obtained here as alternatives to treatment were never discussed (§21).

On behalf of Stolzenberg and ToothSavers, counsel presents the affidavit of Dr. David Seligman who is a New York licensed dentist. (Exhibit AA"). He limits his practice to orthodontics and is well credentialed. His opinion is that the orthodontic treatment did not depart from accepted dental practices or cause any injury. Dr. Seligman states that this treatment was appropriate and even if these teeth were ultimately lost, the "treatment was indicated and better positioned the bone for ultimate implants." (§25).

As to malpractice, the experts here both have the training and experience to be able to opine in this area. Dr. Gottlieb insists the treatment chosen for the plaintiff was clearly

not indicated and harmful, while Dr. Seligman disagrees. Therefore, a jury is necessary to decide which opinion stands up best to challenge and scrutiny. That is why I am denying the motion of plaintiff and the two moving defendants, Dr. Cohen's estate and Stoltenberg d/b/a ToothSavers.

Finally, on the subject of punitive damages, this claim is dismissed as to all defendants. To allow a claim of punitive damages to persist in a medical or dental malpractice case, and on occasion it does, the plaintiff must show outrageous, reckless, almost criminal behavior on the part of the defendant. Punitive damages, if found to exist, are to punish the defendant, rather than compensate the patient/plaintiff. Sometimes such damages are referred to as exemplary damages, meant to serve an example and deter others from engaging in such undesirable conduct. Nothing claimed in this action rises to this level.

Therefore to recapitulate, Jerry Lynn's motion for summary judgment is granted, the other dispositive motions are all denied. Notwithstanding, all claims for punitive damages are dismissed.

Therefore it is hereby

ORDERED that the motion for summary judgment by Jerry H. Lynn, D.D.S. is granted; thus, the complaint is dismissed with prejudice as against said defendant, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant; it is further

ORDERED that the caption shall be amended to delete any reference to Jerry H. Lynn, D.D.S. upon Dr. Lynn's service of a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of Trial Support (Room 119), who are directed

to mark the court's records to reflect the change in the caption; and it is further

ORDERED that the motions by Sol Stolzenberg, D.M.D., P.C. d/b/a Toothsavers, s/h/a Sol Stolzenberg, D.M.D., d/b/a Toothsavers; and David Cohen as Executor of the Estate of Morton Cohen, D.D.S., and Morton Cohen, P.A. are granted to the extent that plaintiff's claims for punitive damages against said parties are dismissed; notwithstanding, the remainder of these defendants' motions are denied, and the action is severed and continued as to these and any other remaining parties; it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in its entirety; it is further

ORDERED that counsel shall appear in Room 222 on July 1, 2015 at 9:30 a.m. for a pre-trial conference.

Dated: June 9, 2015

**JUN 09 2015**

  
J.S.C.

**ALICE SCHLESINGER**