

<b>Mondesir v Leibowitz</b>
2015 NY Slip Op 31154(U)
July 7, 2015
Supreme Court, Kings County
Docket Number: 502036/14
Judge: Laura Lee Jacobson
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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14<sup>th</sup> day of May, 2015

PRESENT:

HON. LAURA JACOBSON,  
Justice.

-----X  
MARIE MONDESIR,

Plaintiff,

Decision/Order

- against -

Index No.: 502036/14

RODNEY P. LEIBOWITZ, D.D.S.,

Defendant.

-----X  
The following Papers 1 to 4 read on the Motion :

Papers	Numbered
Notice of Motion and Affirmation Annexed	1-2
Affirmation in Opposition	3
Reply	4

In this action sounding in dental malpractice , defendant moves for an order pursuant to CPLR §3212 granting summary judgment in his favor and dismissing the complaint. Plaintiff commenced this action seeking damages for alleged negligent dental treatment resulting in the unnecessary extraction of plaintiff's two upper front teeth, Nos. 8 and 9, and the preparation of eight additional upper teeth Nos. 4, 5 ,6 ,7, 10, 11, 12 and 13 for the proposed placement of a 10 unit permanent bridge.

Plaintiff was 38 years old when she first visited defendant's dental office on September 3, 2013. When plaintiff returned to defendant's office on September 6, 2013, x-rays were taken and defendant performed an oral examination and a hygienist cleaned plaintiff's teeth. Defendant determined that plaintiff's teeth Nos. 8 and 9 were "hopeless" and could not be saved. Defendant also found that plaintiff suffered from severe periodontal disease. Defendant proposed a treatment plan for plaintiff at a cost of \$8,500.00. On September 24, 2013, defendant extracted plaintiff's two upper front teeth Nos. 8 and 9, and filed down teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13 in preparation for dental crowns. Defendant made a plastic temporary bridge and cemented it over the teeth.

Plaintiff claims that the temporary bridge was negligently constructed and placed and that the extraction of teeth Nos. 8 and 9 was unnecessary. Plaintiff further asserts that defendant failed to inform her of the risks, benefits and alternative treatments and failed to inform her of her existing periodontal disease and bone loss. Additionally, plaintiff contends that defendant never advised her that he intended to extract teeth Nos. 8 and 9.

Defendant argues that plaintiff suffered from a lack of good oral hygiene and severe and widespread periodontal disease. As a result, plaintiff's gum tissue was compromised and irreversibly deteriorating. Defendant contends that the prognosis for plaintiff's teeth was "terminal and teeth Nos. 8 and 9 were described as "hopeless". Defendant claims that regardless of the care and treatment that may or may not have been rendered by defendant, all of the injuries complained of by plaintiff in her verified Bill of Particulars were unavoidable and inevitable given

plaintiff's pre-existing dental condition and not proximately caused or exacerbated by defendant.

In support of his claim, defendant submitted an expert affirmation from Richard Lawrence Elias, D.M.D., M.D. a doctor of dental medicine duly licensed to practice in the State of New York and a Diplomat of the American Board of Oral and Maxillofacial Surgery. Dr. Elias asserts that he reviewed plaintiff's bill of particulars, as well as plaintiff's dental records and diagnostic studies maintained by defendant. In the opinion of Dr. Elias, to a reasonable degree of medical certainty, plaintiff's prognosis was utterly and objectively hopeless upon her initial presentation to defendant. This was due to a lack of good oral hygiene, the severe nature of her widespread periodontal disease and the associated compromise of her gum tissue. Dr. Elias claims that as such, the treatment and care rendered by defendant in no way impacted plaintiff's ultimate outcome or the injuries complained of by plaintiff in this case. Dr. Elias alleges that in fact, the treatment rendered by defendant placed plaintiff in a better position as compared to her dental condition on September 3, 2013, based on the fact that the defendant initiated the removal of active disease/infection disease from plaintiff's mouth. According to Dr. Elias, plaintiff's injuries were unavoidable and inevitable and they were not proximately caused by the care and treatment rendered by defendant.

Plaintiff argues in opposition that the expert affirmation of Dr. Elias fails to establish defendant's entitlement to summary judgment. Plaintiff contends that Dr. Elias never examined plaintiff and that he based his opinion solely on the unsworn medical records maintained by defendant. Plaintiff alleges that defendant instituted the instant motion for summary judgment before any depositions have been

conducted and that the opinions of Dr. Elias are not based on evidence in admissible form. Plaintiff further asserts that Dr. Elias failed to refute the specific allegations of negligence in plaintiff's bill of particulars. Specifically, plaintiff contends that defendant failed to submit any evidence that (1) defendant's extraction of teeth Nos. 8 and 9 was within the standard of care; (2) defendant's fabrication of the "chair-side" temporary bridge on teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13 was within the standard of care; (3) defendant's preparation of teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13 was within the standard of care; (4) defendant's failure to take pre-treatment impressions was within the standard of care; (5) defendant's failure to create an esthetic/diagnostic "wax-up" prior to fabricating and placing temporary dental crowns was within the standard of care; (6) defendant's failure to properly prepare and interpret study models was within the standard of care; (7) defendant properly referred plaintiff to a periodontist; (8) defendant properly reviewed the x-rays; (9) defendant properly evaluated plaintiff's periodontal condition; (10) defendant properly evaluated plaintiff's occlusion; and (11) defendant properly formulated a treatment plan. Plaintiff further asserts that defendant failed to submit any evidence regarding plaintiff's second cause of action for lack of informed consent.

In rebuttal to defendant's motion, plaintiff submitted an expert affirmation from plaintiff's treating dentist, David Kanner, D.D.S. who is duly licensed to practice dentistry in the State of New York. Dr. Kanner states that he based his opinion on his review of plaintiff's dental records and radiographs maintained by defendant, the dental records of plaintiff's treating periodontist, Dr. Lance Adelson, the expert affirmation of Dr. Elias, as well as, his personal examinations and clinical treatment of plaintiff. Dr. Kanner alleges that he initially examined plaintiff on

March 12, 2014. Dr. Kanner asserts that he observed that there was a temporary bridge on the upper teeth Nos. 7 through 13 with teeth Nos. 8 and 9 clinically missing. According to Dr. Kanner, the portion of the bridge that covered teeth Nos. 4, 5 and 6 had fractured off and was no longer present. Dr. Kanner claims that the remaining segment of the temporary bridge was an ill-fitting "chair-side" prosthesis (not fabricated by a dental laboratory) with improper margins that permitted food trapping which exacerbated her existing periodontal disease and caused development of tooth decay. Dr. Kanner claims that he advised plaintiff that the bridge needed to be removed and replaced with a new, well fitting dental laboratory fabricated temporary bridge. Dr. Kanner asserts that he further advised plaintiff that she needed to be evaluated and treated by a periodontist. Dr. Kanner states that he reviewed plaintiff's x-rays that had been taken by defendant and on March 26, 2014 he excavated the existing decay on teeth Nos. 4, 5, and 6 and fabricated and placed an interim acrylic prosthetic to cover those three teeth. Dr. Kanner claims that he removed the temporary restorations on April 14, 2014 and took impressions for the dental laboratory which fabricated a ten (10) unit acrylic bridge. Dr. Kanner asserts that on May 2, 2014, he made the necessary adjustments on the subject bridge which had been designed by the dental laboratory for long term use. Dr. Kanner alleges that he cemented the bridge in place after plaintiff approved the bite and esthetics. Dr. Kanner claims that the bridge was removed and re-cemented three times, on May 28, 2014, July 7, 2014 and July 29, 2014. Dr. Kanner alleges that he advised plaintiff that the bridge would need to be replaced in the future with permanent dental restorations but first plaintiff needed to be treated by a periodontist specialist. In Dr. Kanner's opinion, to a reasonable degree of certainty, the dental treatment

performed by defendant on plaintiff was negligent and deviated from the standards of good and accepted practice in that (1) defendant negligently and unnecessarily extracted plaintiff's teeth Nos. 8 and 9, when there was no clinical reason to do so, since the standard of care was to perform no treatment to teeth Nos. 8 and 9 and to refer plaintiff to a periodontist; (2) defendant negligently started a treatment plan for a 10 upper bridge in the presence of periodontal disease and negligently prepared and removed natural tooth structure from teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13, when the standard of care was to refer plaintiff to a periodontist; (3) defendant failed to advise plaintiff as to the advanced periodontal disease and bone loss in her entire mouth; (4) defendant negligently fabricated and placed a temporary "chair-side" bridge on plaintiff's teeth which was ill-fitting with improper margins that exacerbated plaintiff's existing periodontal disease, permitted food impaction and the development of tooth decay. Further, the bridge had improper occlusion resulting in the right side section of the bridge covering teeth Nos. 4, 5 and 6 to fracture off. According to Dr. Kanner, defendant's negligence was a substantial factor in causing plaintiff to sustain the following injuries: (1) plaintiff suffered unnecessary loss of teeth Nos, 8 and 9; (2) plaintiff sustained the unnecessary loss of natural tooth structure in teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13 and the temporary bridge fabricated by plaintiff permitted decay to develop in these teeth, with the loss of natural tooth structure causing these teeth to have diminished successful prognosis even with periodontal treatment; (3) the temporary bridge fabricated and placed by defendant exacerbated plaintiff's existing periodontal disease; (4) plaintiff required the removal of defendant's bridge and the fabrication and placement of new dental laboratory processed dental restorations;

and (5) plaintiff now requires the fabrication and placement of permanent crowns at teeth Nos. 4, 5, 6, 7, 10, 11, 12 and 13. Dr. Kanner asserts that he disagrees with the statements of Dr. Elias that allege that plaintiff's teeth were "terminal" and that the loss of her teeth was unavoidable and inevitable. Dr. Kanner contends that as of today, plaintiff has not lost any of her other teeth other than teeth Nos. 8 and 9 which were negligently extracted by defendant. Dr. Kanner contends that plaintiff is now being treated by periodontist Dr. Lance Adelson. He has reviewed Dr. Adelson's treatment records and he concurs with his evaluation that plaintiff's existing upper teeth have a questionable, not hopeless, prognosis. Dr. Kanner also disagrees with Dr. Elias' assertion that defendant's treatment placed plaintiff in a better position as compared with her condition on September 3, 2013. According to Dr. Kanner, defendant did nothing to remove active disease or infection in plaintiff's mouth and his negligence significantly harmed plaintiff's dental health and as a result, plaintiff will require significant additional treatment in the future.

In reply, defendant submitted an affidavit signed by defendant's office manager Sherri Dogali certifying that the dental records reviewed by Dr. Elias are complete and that such records were maintained in the ordinary course of defendant's dental practice. Defendant asserts that the records maintained by defendant and the affirmation of Dr. Elias are in admissible form. Defendant argues that the dental records indicate that he informed plaintiff as to the benefits and alternatives regarding extraction of tooth Nos. 8 and 9 and the placement of temporary crowns on tooth Nos. 4 through 12, and plaintiff executed a "Dental Treatment Plan" which explicitly detailed the course of treatment proposed by defendant. Defendant argues that as such, plaintiff was fully informed as to the care and treatment issues in this

case. Defendant further asserts that even if he failed to rebut each allegation contained in plaintiff's bill of particulars as asserted by plaintiff, the motion should be granted nonetheless, because the care and treatment rendered by defendant did not proximately cause plaintiff's injuries. Defendant contends that the injuries complained of by plaintiff were unavoidable and inevitable given plaintiff's pre-existing dental condition.

"The plaintiff in a dental malpractice action must establish that the defendant departed from good and accepted dental practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Cohen v Kalman*, 54 AD3d 307 [2<sup>nd</sup> Dept. 2008]). "Thus, on a motion for summary judgment, the defendant doctor or dentist has the initial burden of establishing the absence of any departure from good and accepted practice or that the plaintiff was not injured by any departure" (*Terranova v Finklea*, 45 AD3d 572 [2<sup>nd</sup> Dept. 2007]). "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Chan v Yeung*, 66 AD3d 642, 643 [2<sup>nd</sup> Dept. 2009]). The proponent of a motion for summary judgment 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 New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). "Once the defendant has made a prima facie showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*DiGiario v Agrawal*, 41 AD3d 764, 767 [2007], quoting *Chance v Felder*, 33 AD3d 645, 645-646 [2006]). In this instance, defendant failed to make a prima facie showing of

entitlement to summary judgment in that he failed to rebut each and every allegation of plaintiff's bill of particulars (see *Chan v Yeung*, supra; also, *Terranova v Finklea*, supra), and he failed initially to even address plaintiff's cause of action based on informed consent. However, even if defendant had made a prima facie showing, the affidavit by plaintiff's expert created questions of fact as to whether defendant departed from good and accepted practice and as to whether the care and treatment rendered by defendant was a substantial proximate cause of plaintiff's injuries. It is well settled that summary judgment is not appropriate in actions where the parties adduce conflicting medical expert opinions. "Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 626 [2007], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2005]). Consequently, defendant is not entitled to summary judgment in his favor.

Accordingly the motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

**HON. LAURA JACOBSON**

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