

Fox v Bach
2015 NY Slip Op 31925(U)
October 8, 2015
Supreme Court, Suffolk County
Docket Number: 11-19743
Judge: Daniel Martin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

COPY

INDEX No. 11-19743

CAL No. 14-00801DM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT :

Hon. DANIEL MARTIN

MOTION DATE 5/27/14 (#001)

MOTION DATE 6/14/14 (#003)

MOTION DATE 12/2/14 (#004 & #005)

ADJ. DATE 12/9/14

Mot. Seq. # 001 - MD

#003 - XMD

004 - MD

005 - XMD

-----X

CASSIDY FOX, by her mother and natural guardian, LISA FOX and LISA FOX, individually,

Plaintiffs,

- against -

RICHARD M. BACH, DDS, JASON PARLI, DDS and ALEXIS GERSTEN, DDS,

Defendants.

-----X

JEAN MARIE HAZELTON LAW FIRM, P.C.
Attorney for Plaintiffs
176 North Sea Road
Southampton, New York 11968

CATALANO GALLARDO & PETROPOULOS
Attorney for Defendant Bach, DDS
100 Jericho Quadrangle Suite 214
Jericho, New York 11753

CHESNEY & NICHOLAS, LLP
Attorney for Defendants Parli DDS & Gersten, DDS
2305 Grand Avenue
Baldwin, New York 11510

Upon the following papers numbered 1 to 215 read on this motion for summary judgment, vacate note of issue ; Notice of Motion/ Order to Show Cause and supporting papers 1- 38 (#001);135-190 (#004) Notice of Cross Motion and supporting papers 97-120 (#003); 211-213 (#005) ; Answering Affidavits and supporting papers 39-94 (001); 121-134 (#003); 191- 205 (#004); 214-215 (#005); Replying Affidavits and supporting papers 95-96 (#001); 206-210 (#004); Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions (#001, #003, #004, and #005) are hereby consolidated for purposes of this determination; and it is further

Fox v Bach
Index No. 11-19743
Page No. 2

ORDERED that the motion (#001) of defendants Jason Parli, D.D.S., and Alexis Gersten, D.D.S., for an order granting them summary judgment dismissing the complaint and all cross claims against them is granted to the extent set forth, and is otherwise denied; and it is further

ORDERED that the motions (#003) and (#004) of defendant Richard Bach, D.D.S. for, inter alia, an order vacating the note of issue is denied; and it is further

ORDERED that the cross motion (#005) of defendants Dr. Parli and Dr. Gersten compelling plaintiff to provide outstanding discovery is denied.

Plaintiff Lisa Fox, individually and on behalf of her daughter, plaintiff Cassidy Fox, commenced this dental malpractice action against defendants Richard Bach, D.D.S., Jason Parli, D.D.S., and Alexis Gersten, D.D.S. to recover damages for injuries allegedly sustained by Cassidy as a result of negligent dental care and treatment and lack of informed consent.

Defendants Dr. Parli and Dr. Gersten move for summary judgment dismissing the complaint and the cross claims against them on the grounds that their treatment of Cassidy Fox did not depart from accepted dental practice, and that they were not the cause of Cassidy's alleged injuries. In support of their motion, Dr. Parli and Dr. Gersten submit copies of the pleadings, the verified bill of particulars, the transcripts of the parties' deposition testimony, correspondence among the parties regarding Cassidy's complaints and diagnosis, and an affirmation of Dr. Richard L. Raush, D.D.S.

The complaint, as amplified by the bill of particulars and as relevant to the instant motions, alleges that defendants Dr. Parli and Dr. Gersten treated plaintiff Cassidy Fox, at which time she was an infant, from January 8, 2005 until March 11, 2009. It alleges such defendants were negligent, among other things, in failing to properly and timely x-ray; in failing to diagnose the growth of tooth # 32 and its consequence of causing the loss of tooth #31; in failing to appreciate unerupted teeth, and the consequences of not addressing their growth and movement; in failing to diagnose, treat, and plan for impacted wisdom teeth; in failing to diagnose and treat hypoplasia in the mandible or to consult with an oral surgeon; in allowing the super eruption of tooth #2; in failing to treat a class II malocclusion; in failing to consult with and refer Cassidy to an orthognathic surgeon; and in failing to obtain informed consent. Further, it is alleged that as a result of the negligence of defendants, Cassidy suffered psychological injuries from having to wear braces during her college years, had to have tooth extractions, bone grafts, and surgery on her jaw. Plaintiffs further allege that if they were informed of the unerupted teeth, they would have chosen a different course of treatment.

Dr. Parli testified at his deposition that Cassidy presented to his practice, Beach Dental, on January 8, 2005 when she was 11 ½ years old. He testified that he examined her teeth, which had braces on them, and observed substantial plaque on her teeth. He testified that he recommended sealant be placed on tooth #15 and tooth #30, and that he sealed both teeth on April 9, 2005. Dr. Parli testified that Cassidy returned to his office on January 31, 2006, had her teeth cleaned by the hygienist, and had four x-rays taken. He testified that Cassidy was examined by his partner, Dr. Gersten, who reviewed her x-rays and noted acid erosion on her front teeth. Dr. Parli testified that he treated Cassidy again on April 18, 2006, at which time he restored tooth #2 and filled a cavity on tooth #8. He reviewed her x-rays and

found that Cassidy had two tilted unerupted molars, tooth #31 and tooth #32. Dr. Parli testified that he was not concerned with the condition of the molars, as he knew Cassidy was under the care of an orthodontist, Dr. Bach. He testified that he did not bring the condition to the attention of Dr. Bach. Cassidy returned to defendant Dr. Parli's office on May 15, 2006. Dr. Parli testified that he filled some cavities and advised plaintiff Lisa Fox that Cassidy might need a root canal in the future. Dr. Parli testified that Cassidy returned on August 22, 2006 for a cleaning and an examination, and that he filled cavities in her teeth in March 2007. Dr. Parli testified that Cassidy did not return to Beach Dental until April 19, 2008, at which time he found tooth #2 had erupted. Dr. Parli testified that he spoke to Dr. Bach about removing the bands so he could restore the anterior tooth, but that they never discussed the unerupted wisdom tooth or molar. Dr. Parli testified that the last time he treated Cassidy was on March 11, 2009, at which time she had no braces or brackets on her teeth. He testified he took x-rays of the decayed teeth and filled them, but did not perform a complete examination of Cassidy's teeth.

Dr. Gersten testified she is a partner with Dr. Parli at Beach Dental where they practice general dentistry. Dr. Gersten testified that she treated Cassidy once on January 31, 2006. She testified that she examined Cassidy, cleaned her teeth and reviewed her x-rays. She testified that tooth #31 and tooth #2 were unerupted, but did not disclose this information to Cassidy's mother or to Dr. Bach. Dr. Gersten testified that Cassidy's teeth had acid erosion and plaque, and that she advised her mother, plaintiff Lisa Fox, of the importance of proper home dental care.

Dr. Bach, Cassidy's treating orthodontist, testified at his deposition that he consulted with plaintiffs on January 10, 2001, when Cassidy was 7 ½ years old, at which time he recommended that Cassidy have early orthodontic treatment. He testified that most orthodontic patients are treated at the age of 10, but that he believed Cassidy should be treated immediately. He testified that she presented for an examination on August 6, 2002, at which time he took a panoramic x-ray and a model. Cassidy and her mother, plaintiff Lisa Fox returned on October 15, 2002 for a "case presentation." Dr. Bach testified he took cephalic x-rays and discussed the treatment plan and its cost with plaintiffs. He testified that Cassidy's lower jaw was back too far in relation to her upper jaw, and that phase one of the treatment would be to insert a palate expander and an activator appliance. He testified that Cassidy's two upper canine teeth had to be extracted, and that nonparty dentist, Dr. Matusui, extracted them. Dr. Bach testified that the dental appliances were placed onto Cassidy's teeth on November 12, 2002.

The requisite elements of proof in a medical or dental malpractice action are a deviation or departure from accepted standards of dental practice, and evidence that such departure was a proximate cause of the plaintiff's injuries (*see Liyanage v Amann*, 128 AD3d 645, 8 NYS3d 390 [2d Dept 2015]; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 4 NYS3d 59 [2d Dept 2015]; *Kozlowski v Oana*, 102 AD3d 751, 959 NYS2d 500 [2d Dept 2013]; *Zito v Jastremski*, 58 AD3d 724, 871 NYS2d 717 [2d Dept 2009]).

A defendant seeking summary judgment on a dental malpractice claim has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted dental practice, or that the plaintiff was not injured by such treatment (*McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 942 NYS2d 558 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To satisfy his or her burden, a

defendant dentist must establish through medical records and expert affidavits that he or she did not depart from accepted dental practice in the treatment of the plaintiff (*Koi Hou Chan v Yeung*, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]). Once demonstrated, the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted dental practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Landry v Jakubowitz*, 68 AD3d 728, 889 NYS2d 677 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]).

"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" (*Lau v Wan*, 93 AD 3d 763, 940 NYS2d 662 [2d Dept 2012]; *Micciola v Sacchi*, 36 AD3d 869, 828 NYS 2d 572 [2d Dept 2007]). Here, defendants submit the affirmation of Richard Rausch, D.D.S., a licensed dentist. Dr. Rauch states that both Dr. Parli and Dr. Gersten practice "general dentistry," which he defines as including cleaning, maintenance, the diagnosis and treatment of decay, and providing home dental care instructions. He states that general dentistry focuses on the comprehensive, preventive and therapeutic oral health care and maintenance for patients. In Dr. Rauch's opinion, unerupted molars are within the expertise of an orthodontist and not a dentist. "Where the expert states his conclusion unencumbered by any trace of facts or data, testimony should be given no probative force whatsoever" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS 2d 337 [1991]). Dr. Rauch's opinion lacks evidentiary support and thus lacks probative value (see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]). Furthermore, to satisfy his or her burden on a motion for summary judgment, defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]). Dr. Rauch, however, does not address the crux of plaintiff's complaint, namely, that it was a departure from good and accepted dental practice for Dr. Parli and Dr. Gersten to fail to confer with Cassidy's mother, plaintiff Lisa Fox, to fail to refer Cassidy to an oral surgeon or an orthognathic surgeon, and to fail to consult and confer with Dr. Bach about the results of the x-rays taken in 2006 which revealed tilted unerupted molars. Having failed to produce sufficient evidence to show they did not depart from acceptable dental standards, Dr. Pardi and Dr. Gersten failed to establish, prima facie, that they are entitled to summary judgment dismissing the cause of action for dental malpractice asserted against them. As such, the court need not consider the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Schofield v Edward B. Borden, M.D., P.C.*, 117 AD3d 936, 986 NYS2d 215 [2d Dept 2014]).

With respect to the cause of action for lack of informed consent, the elements are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Spano v*

Bertocci, 299 AD2d 335, 337-338, 749 NYS 2d 275 [2d Dept 2002]). For the claim to be actionable, the defendant must have engaged in a “non-emergency treatment, procedure or surgery” or “a diagnostic procedure which involved invasion or disruption of the integrity of the body” (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is that there be an affirmative violation of the plaintiff’s physical integrity (*Ellis v Eng*, 70 AD3d 887, 895 NYS2d 462 [2d Dept 2010]). Here, Dr. Parli and Dr. Gersten established their prima facie entitlement to summary judgment on the cause of action for lack of informed consent, as there are no allegations by Cassidy that her injuries were due to an affirmative violation of her physical integrity (*Capobianco v Marchese*, 125 AD3d 914, 4 NYS3d 127 [2d Dept 2015]; *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 912 NYS2d 104 [2d Dept 2010]). Accordingly, the branch of Dr. Parli’s and Dr. Gersten’s motion for summary judgment dismissing the cause of action for lack of informed consent is granted.

Dr. Bach’s cross motion for an order vacating the note of issue is denied. It is undisputed that a note of issue in this action was filed by plaintiffs on May 14, 2014, and that this cross motion is made timely pursuant to 22 NYCRR 202.21(e). Dr. Bach contends that plaintiffs falsely state in the certificate of readiness that all discovery has been completed in this action. However, the record reflects that the parties appeared for a compliance conference before the undersigned on February 11, 2014, that all parties certified that disclosure was complete, and that plaintiff was directed to file a note of issue by May 13, 2014. Notwithstanding, the parties further entered into a so-ordered stipulation which directed Cassidy to appear for an independent dental exam within 60 days before trial, to furnish new authorizations within 30 days, and to respond to a notice for discovery and inspection within 30 days.

The cross motion is denied, as Dr. Bach’s counsel failed to submit a sufficient affirmation of good faith. The affirmation of good-faith effort “shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held” (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). The affirmation does not refer to any communications between the parties that would evince a diligent effort by the movant to resolve the discovery dispute; hence, it does not satisfy 22 NYCRR 202.7 (c) (*see Murphy v County of Suffolk*, 115 AD3d 820, 982 NYS2d 380 [2d Dept 2014]). A single letter is insufficient (*see Amherst Synagogue v Schuele Paint Co.*, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]). Furthermore, the affirmation in opposition by counsel for plaintiffs avers that all of the requested discovery has been provided, and Dr. Bach has not submitted a reply indicating that he is entitled to any further discovery. Dr. Bach’s application for an order extending his time to move for summary judgment also is denied, as defendant has failed to set forth legally sufficient grounds for the requested relief.

Dr. Bach’s motion to conduct further discovery also is denied, as no affirmation of good faith was included with the moving papers. Moreover, a party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(d) must show “unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice” (22 NYCRR 202.21[d]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). The note of issue was filed on May 14,

Fox v Bach
Index No. 11-19743
Page No. 6

2014 yet this motion was not made until November of 2014. "A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances warranting post-note of issue disclosure" (*Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]).

Finally, the cross motion by Dr. Parli and Dr. Gersten for an order compelling plaintiff to provide outstanding discovery is denied, as no affirmation of good faith was submitted with their moving papers.

Dated: OCTOBER 8, 2015


A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION