

Mathias v Capuano
2015 NY Slip Op 32160(U)
November 5, 2015
Supreme Court, Suffolk County
Docket Number: 12-1090
Judge: Joseph C. Pastorella
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SHORT FORM ORDER

INDEX No. 12-1090CAL. No. 14-01477DM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY**PRESENT:**

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-30-15 (#002)MOTION DATE 2-4-15 (#003)ADJ. DATE 3-4-15

Mot. Seq. # 002 - MD

003 - MD

-----X
DENISE MATHIAS,

Plaintiff,

- against -

MARIO JOSEPH CAPUANO, D.D.S. and
EUGENE G. HERMAN, D.M.D.,

Defendants.
-----X

JOEL M. KOTICK, ESQ.
Attorney for Plaintiff
501 East 79th Street
New York, New York 10075

AVELINO NITKEWICZ LLP
Attorney for Defendant Capuano, DDS
225 Broadway, Suite 2500
New York, New York 10010

RAWLE & HENDERSON LLP
Attorney for Defendant Herman, D.M.D.
14 Wall Street
New York, New York 10005

Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 15 - 29; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 30 - 32; 33 - 35; Replying Affidavits and supporting papers 36 - 42; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (# 002) by defendant Eugene G. Herman, DMD, and the motion (# 003) by defendant Mario Joseph Capuano, DDS, for summary judgment are consolidated for purposes of this determination; and it is further

ORDERED that motion (# 002) by defendant Eugene G. Herman, DMD, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

ORDERED that motion (# 003) by defendant Mario Joseph Capuano, DDS, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

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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 her during the period of March 2010 through July 2010. It is alleged that the defendants were negligent, *inter alia*, in performing diagnostic procedures and surgical treatment, extracting tooth No. 17 that did not require extraction, and ignoring signs and complaints of TMJ problems. The plaintiff interposed claims for lack of informed consent against both defendants.

Defendant Dr. Eugene G. Herman moves (# 002) 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. Herman submits, *inter alia*, the pleadings; the bill of particulars; the transcripts of the deposition testimony of the plaintiff, Dr. Herman, and Dr. Capuano; and the affirmation of his expert, Andrea Schreiber, DMD.

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; Kozlowski v Oana, 102 AD3d 752; Sharp v Weber, 77 AD3d 812; Koi Hou Chan v Yeung, 66 AD3d 642). 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; Cole v Tischler, 68 AD3d 1595; see also Mangaroo v Beckman, 74 AD3d 1293).

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; Starr v Rogers, 44 AD3d 646). "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (Terranova v Finklea, 45 AD3d 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; see also Alvarez v Prospect Hosp., 68 NY2d 320; Simmons v Brooklyn Hosp. Ctr., 74 AD3d 1174).

At her deposition, the plaintiff testified that when she presented at Dr. Herman's dental office on March 24, 2004 complaining of severe pain on the lower left side of her mouth, an x-ray of the subject tooth was taken by a technician. On March 26, 2004, when the plaintiff first met Dr. Herman in his office, he mentioned that he was going to extract the tooth and extracted the tooth without examining her teeth or explaining the contents of the consent form. On March 29, 2010, the plaintiff presented to Dr. Capuano, who took a panoramic x-ray and found no fragment in the area of the extraction. While Dr.

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Capuano was away on vacation, the plaintiff saw Dr. Park, one of Dr. Capuano's colleagues, who took several individual x-rays of the tooth, found "little fragments" therein, and contacted Dr. Capuano with regard to what he saw. On April 8, 2010, a dental CT scan revealed a 3mm by 9mm root remnant in the socket of the extracted tooth. On April 15, 2010, Dr. Capuano surgically removed the root remnant. Prior to the April 15, 2010 surgery, Dr. Capuano had several discussions with the plaintiff about the proposed procedure including any risks involved with the procedure. Soon after the surgery, she complained of TMJ pain and numbness on the lower left side of her mouth. On April 27, 2010, a further CT scan revealed that there was another root in the socket of the extracted tooth. Thereafter, Dr. Capuano performed a neurological examination on the plaintiff. She kept complaining of the TMJ and numbness on the same area. On June 22, 2010, an MRI examination was taken and revealed that the plaintiff was suffering from TMJ.

At his deposition, Dr. Herman testified that on March 24, 2004, the plaintiff presented at a dental office where he was working as an independent contractor. The plaintiff was referred by Dr. Newzier, a general dentist at the office, for the extraction of the subject tooth. On March 26, 2010, when the plaintiff first presented to Dr. Herman, he examined her tooth, recognized that it needed to be removed, and performed an extraction. When he examined her tooth, he used only a mirror. He did not use an explorer or a periodontal probe because he did not need them. He also did not do any tests on the tooth. After he removed the tooth, he examined it. However, he had no recollection as to whether he noticed if all of the roots were present. Dr. Herman added that he had no independent recollection of the visit with the plaintiff.

At his deposition, Dr. Capuano testified that on March 29, 2010, when the plaintiff first presented to him, he took a panoramic x-ray of her teeth and did not observe anything in the socket of the subject tooth. He explained to the plaintiff that her pain resulted from a "dry socket post extraction," and treated her by placing a packing into the socket. While Dr. Capuano was away for a vacation, a panoramic x-ray of the plaintiff's teeth was taken on April 2, 2010. On April 8, 2010, when Dr. Capuano returned to his office, he read the April 2, 2010 x-ray and observed a root tip in the socket. A dental CT scan of the plaintiff, taken on April 8, 2010, revealed a root tip present in the socket of the tooth. While the plaintiff was treated at his office from March 29 to April 8, Dr. Capuano did not know there was a root tip in the socket. On April 15, 2010, Dr. Capuano surgically removed the root tip. After the surgery, the plaintiff complained of the same pain at the site of the surgery. Since the plaintiff did not complain of TMJ, he did not make an assessment of it. On April 27, 2010, another dental CT scan was taken and revealed that there may be another root in the same socket. According to the note Dr. Capuano wrote on April 29, 2010, the plaintiff stated that her lips and chin felt numb, that there was pain in the socket, and that these symptoms started after the surgery. Dr. Capuano thought the numbness was going to be transient. The note also indicated that the plaintiff had paresthesia because the root tip was close to the nerve. When questioned by the plaintiff's attorney "[d]id you consider sending [the plaintiff] to somebody who is equipped to do microsurgery?," Dr. Capuano answered, "No," and testified that he does not perform microsurgery.

In his affirmation, Dr. Andrea Schreiber, DMD, affirmed that she is a board certified dentist in oral and maxillofacial surgery duly licensed to practice in New York State. She set forth her education and training, and indicated that she currently maintains her own private dental practice. She set forth the

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records which she reviewed, and found that on March 24, 2010, the plaintiff was evaluated by a general dentist, Dr. Newizer, who scheduled her for an extraction of the offending tooth #17 with Dr. Herman. It was also found that Dr. Herman extracted the plaintiff's tooth #17 on March 26, 2010, and that said treatment was Dr. Herman's only treatment of the plaintiff. Dr. Schreiber opined that Dr. Herman obtained proper written informed consent for the surgical procedure from the plaintiff, and that the treatment was in keeping with the applicable standard of care. Dr. Schreiber also found that a retained root tip left by the extraction of tooth #17 was subsequently detected on a CT scan taken in April 2010. However, Dr. Schreiber opined that a retained root tip at the time of extraction does not, in and of itself, constitute negligence, and that retained root tips usually remain asymptomatic and rarely require further intervention. Dr. Schreiber affirmed within a reasonable degree of medical certainty that the treatment rendered by Dr. Herman was not the proximate cause of the damages allegedly complained of by the plaintiff.

Here, Dr. Herman's submissions are insufficient to demonstrate prima facie entitlement to judgment in his favor on the plaintiff's claim, asserted in the fourth cause of action in the complaint, that Dr. Herman did not properly inform her of the risks associated with extraction before performing the procedure. In particular, while the plaintiff concedes she signed the consent form, absent from the record before the Court is evidence from Dr. Herman showing he explained to the plaintiff the potential risks and benefits associated with a tooth extraction and discussed possible alternative treatments (*cf. Luu v Paskowski*, 57 AD3d 856; *Bengston v Wang*, 41 AD3d 625). The conclusory assertion by Dr. Herman's expert that Dr. Herman obtained the proper written informed consent is insufficient to shift the burden of proof to the plaintiff. Accordingly, the branch of Dr. Herman's motion for summary judgment dismissing the fourth cause of action is denied. However, based upon the foregoing, it is determined that Dr. Herman established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the ground that he did not depart from good and accepted standards of dental practice and did not proximately cause the plaintiff's alleged injuries.

To rebut Dr. Herman'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; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282).

In opposition, the plaintiff submits an expert's affidavit, dated January 19, 2015, from Howard Marshall, DDS stating that he is duly licensed to practice dentistry in New York State as a general practitioner with a specialty in periodontics. Dr. Marshall opined that Dr. Herman departed from good and accepted dental practice by failing to take an appropriate history of the patient, failing to use any periodontal instrument, failing to take a post operation x-ray, and failing to remove the root which was left in the extraction site. Dr. Marshall also opined that Dr. Herman departed from good and accepted dental practice by failing to inform the plaintiff that the subject tooth did not have to be extracted and failing to inform her that during the extraction procedure, a sizeable root was broken and left in her jaw bone. Dr. Marshall observed that the April 8, 2010 CT scan revealed a 3mm by 9mm root remnant in

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the socket of the extracted tooth, and opined that it is difficult to believe that Dr. Herman did not notice this large remnant in examining the extracted tooth.

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues which preclude summary judgment from being granted to Dr. Herman. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (see Shehebar v Boro Park Obstetrics and Gynecology, P.C., 106 AD3d 715; Feinberg v Feit, 23 AD3d 517; Shields v Baktidy, 11 AD3d 671). Such credibility issues can only be resolved by a jury (see Bengston v Wang, 41 AD3d 625). Accordingly, Dr. Herman's motion is denied.

Defendant Dr. Mario Joseph Capuano moves (# 003) 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. Capuano submits, *inter alia*, the pleadings; the bill of particulars; the transcripts of the deposition testimony of the plaintiff, Dr. Herman, and Dr. Capuano; and the affirmation of his expert, Allan Kucine, DDS.

In his affirmation, Dr. Allan Kucine, DDS, affirmed that he is a board certified dentist in oral and maxillofacial surgery duly licensed to practice in New York State. He set forth his education and training, and indicated that he currently teaches and trains students and residents at the Stony Brook University School of Dental Medicine. He set forth the records which he reviewed, and observed that on April 15, 2010, Dr. Capuano appropriately performed an operation to remove the retained root tip of tooth # 17 of the plaintiff. Dr. Capuano obtained informed consent for the April 15, 2010 surgery from the plaintiff. Dr. Kucine also found that although there was a history of right TMJ clicking obtained prior to the April 15, 2010 surgery, there were no TMJ complaints in the left side in the immediate post-operative period. The plaintiff did not make any complaints of numbness in the area of the surgery until April 28, 2010. It is also observed that Dr. Capuano ordered a CT scan, which was performed on April 27, 2010 and revealed a possible remnant of root tip still at the area of the subject tooth. Dr. Kucine opined that the plaintiff's persistent numbness is a known complication of the April 15, 2010 surgery, and that this complication can occur as a known risk of the procedure even when the surgery is performed in accordance with accepted standards of dental practice. Dr. Kucine opined that the treatment provided by Dr. Capuano was in all respects in accordance with accepted standards of practice within that specialty, and that Dr. Capuano appropriately informed the plaintiff of the risks, benefits and alternatives to the April 15, 2010 surgery. Dr. Kucine further opined that no claimed negligence on the part of Dr. Capuano was a substantial factor in causing the plaintiff's injury.

Based upon the foregoing, it is determined that Dr. Capuano established prima facie entitlement to summary judgment dismissing the complaint as asserted against him on the ground that 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.

In opposition, the plaintiff submits, an affidavit, dated January 19, 2015, from Howard Marshall, DDS, stating that he is duly licensed to practice dentistry in New York State as a general practitioner with a specialty in periodontics. After Dr. Marshall reviewed the records, he opined that Dr. Capuano

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departed from good and accepted dental practice by failing to immediately re-take an x-ray when the March 29, 2010 x-rays having "questionable quality" failed to detect the 3mm by 9mm root remnant which was revealed by the April 8, 2010 CT scan. The plaintiff continued to suffer pain as a result of Dr. Capuano's failure to immediately refer her for a CT scan to see the exact location and dimensions of the root remnant. With regard to the paresthesia, Dr. Marshall opined that the extraction procedure could have directly damaged the nerve, or could have caused pressure from the curved root remnant onto the nerve, causing the paresthesia. Dr. Marshall further opined that Dr. Capuano departed from good and accepted dental practice by not referring the plaintiff for a neurological consultation prior to the surgery or immediately after discovering the paresthesia. Dr. Marshall opined that Dr. Capuano departed from good and accepted dental practice by failing to investigate the plaintiff's TMJ condition prior to the surgery.

Based upon the foregoing, it is determined that the plaintiff's expert has raised factual issues which preclude summary judgment from being granted to Dr. Capuano. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions (see Shehebar v Boro Park Obstetrics and Gynecology, P.C., supra; Feinberg v Feit, supra; Shields v Baktidy, supra). Accordingly, Dr. Capuano's motion is denied.

Dated: November 5, 2015



HON. JOSEPH C. PASTORELLA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION