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| <b>Alvarado v Manhattan Oral Facial Surgery LLC</b>                                                                                                                                                                                                              |
| 2016 NY Slip Op 32574(U)                                                                                                                                                                                                                                         |
| December 20, 2016                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 805325/2013                                                                                                                                                                                                                                       |
| Judge: Joan B. Lobis                                                                                                                                                                                                                                             |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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DANIEL ALVARADO,

Plaintiff,

-against-

MANHATTAN ORAL FACIAL SURGERY LLC  
ALI PAYAMI, DMD, MD,

Defendants.  
-----X

**JOAN B. LOBIS, J.S.C.:**

Index No. 805325/2013

**Decision, Order, and  
Judgment**

This dental malpractice action arises from defendant Ali Payami's allegedly negligent extraction of plaintiff's tooth, which plaintiff contends resulted in the spread of his existing infection and unnecessary surgery. Defendants move for summary judgment, arguing that Dr. Payami's treatment was appropriate and that he obtained plaintiff's informed consent prior to the extraction. Plaintiff opposes the motion. For the reasons below, the motion is denied.

Plaintiff presented to Dr. Payami on March 23, 2013 with a swelling along his lower jaw. Dr. Payami diagnosed him with pericoronitis (inflammation surrounding the soft tissue surrounding the crown) of the left lower wisdom tooth and performed an extraction. Following the procedure, plaintiff's infection spread and necessitated additional treatment. He alleges that defendants negligently performed the procedure and that they lacked informed consent. In support of their motion, defendants submit an affidavit from Dr. Payami. Dr. Payami states that he appropriately treated plaintiff's condition by removing the infected tooth and prescribing antibiotics. He asserts that pre-procedure antibiotics were not indicated, and adds that the unnecessary prescription of antibiotics carries risks. He contends that records from New York-

Columbia Presbyterian, where plaintiff was seen on March 27, 2013, indicate plaintiff did not take antibiotics he prescribed following the extraction, and asserts that if plaintiff failed to take the medications, that was the proximate cause of his injuries. He opines that he obtained plaintiff's informed consent prior to the procedure and that the Manhattan Oral Facial Surgery LLC staff provided appropriate assistance during the procedure. On September 29, 2016, one day before the motion return date, defendants submitted an additional affidavit seeking summary judgment based on plaintiff's failure to oppose the motion.

On October 12, 2016, plaintiff submitted opposition papers in which he asserts that Dr. Payami's affidavit is self-serving, and that defendants' care was negligent. He also states that he did not give informed consent to the extraction. In support of his opposition he submits the redacted affidavit of a practitioner who is licensed to practice oral and maxillofacial surgery in New York and teaches oral and maxillofacial surgery in the tri-state area. The expert affirms to a reasonable degree of dental certainty that defendants deviated from accepted dental practice by failing to take plaintiff's vital signs and blood pressure, which the expert states would have indicated the severity of plaintiff's infection. The expert also avers that Dr. Payami's failure to take a current radiograph, and use of a radiograph from almost two years prior, resulted in the doctor's inability to have a complete informed consent discussion. The expert states that there is no indication that Dr. Payami explained that a risk associated with an existing infection is worsening of the infection, maintains that failure to include known risks of a pre-existing infection as a component of informed consent is a departure, and states that Dr. Payami failed to advise plaintiff of the possibility of taking antibiotics before the extraction. The expert also opines that Dr. Payami departed by failing to schedule a follow-up visit with plaintiff. The expert states that

“pre-procedure administration of antibiotics is a well-known and accepted protocol in treating and preventing infection complications in daily dental practice,” and that Dr. Payami’s failure to prescribe them in this situation was a departure. Aff. At p. 6. The expert also states that the departures caused and contributed to plaintiff’s injuries and that a reasonably prudent person in plaintiff’s position would not have proceeded with the procedure without pre-procedure antibiotics to eradicate or control the infection.

In reply, defendants argue that because plaintiff’s expert fails to set forth his or her credentials and qualifications, the affidavit is not probative and should not be considered by the Court. Defendants also argue that plaintiff’s expert’s opinion is speculative and that the expert fails to opine as to what defendants should have done. Additionally, they argue that the expert does not explain how the informed consent discussion was deficient and how the deficiency impacted the treatment plan. They contend that plaintiff’s expert fails to rebut their assertion that plaintiff caused his injury by failing to take the prescribed post-procedure antibiotics. Finally, they argue that the expert does not establish proximate cause.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. *E.g., Dallas-Stephenson v. Wajzman*, 39 A.D.3d 303, 308 (1st Dep’t 2007). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. *Id.* Courts grants the motion if, upon all the papers and proof submitted, it is warranted as a matter of law in directing judgment. *Id.* Summary

judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010). In claiming treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. E.g., Joyner-Pack v. Sykes, 54 A.D.3d 727, 729 (2d Dep't 2008). The expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why.'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)).

Once the defendant makes a prima facie showing, the burden shifts to the plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure proximately caused the injuries. See Roques, 73 AD.3d at 207. Where opposing experts disagree, the disputed issues

must be resolved by a fact finder and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).

Initially, the Court rejects defendants' argument that the Court should not consider plaintiff's late opposition. Though all parties are bound by Court deadlines, the prejudice to plaintiff if the Court disregarded his papers outweighs the prejudice defendants incurred by not receiving the papers on time. Defendants had the opportunity to, and did, reply to the opposition.

Through Dr. Payami's affidavit, defendants' motion makes a prima facie showing that defendants' care and treatment was within the standard of care and that plaintiff gave informed consent to the treatment. Through his expert's affidavit, however, plaintiff raises triable issues of fact as to the propriety of the treatment and as to informed consent. Despite the alleged deficiencies raised by defendants – that the expert does not list his or her degree, alma matter, or specific board certifications – the expert sets forth that he or she is licensed to practice and teach oral and maxillofacial surgery in New York. The Court is not aware of any license that would allow one to practice oral and maxillofacial surgery without a dental degree. Additionally, the expert purports to have sufficient knowledge to opine on the issues for the purposes of this motion. Plaintiff meets his burden through expert's statements that the standard of care required Dr. Payami to prescribe pre-procedure antibiotics to plaintiff to eradicate or control the infection and that failure to do so resulted in worsening of plaintiff's condition and need for subsequent treatment. Defendants' challenges go to the expert's credibility which is a jury question. Additionally, plaintiff establishes a triable issue of fact as to informed consent through his and his expert's statements that Dr. Payami

failed to disclose the use of pre-procedure antibiotic therapy as an alternative treatment and the risks of undergoing the procedure without antibiotics, in connection with statements that the treatment was non-emergent<sup>1</sup>, that a fully-informed reasonable person would not have undergone the treatment, and that plaintiff's injury resulted from the treatment. The Court has considered the rest of the parties' arguments and they do not change the outcome.

Accordingly, it is

ORDERED that the motion is denied. The Clerk of the Court is directed to enter judgment accordingly.

Dated: Dec. 20, 2016

ENTER:

A handwritten signature in black ink, appearing to read 'JBL', is written over a horizontal line.

JOAN B. LOBIS, J.S.C.

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<sup>1</sup> The Court notes that the parties dispute whether the treatment was emergent. This is another issue of fact.