

**McGraw v Capuano**

2017 NY Slip Op 30736(U)

April 3, 2017

Supreme Court, Suffolk County

Docket Number: 12-21904

Judge: Joseph C. Pastoressa

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SHORT FORM ORDER

INDEX No. 12-21904  
CAL. No. 16-0568MM

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

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 9-14-16  
ADJ. DATE 11-2-16  
Mot. Seq. # 003 - MG; CASEDISP

-----X

ALYSSA McGRAW,  
  
Plaintiff,  
  
- against -  
  
MARIO J. CAPUANO, D.D.S., DAVID B.  
PARK, D.D.S., and LONG ISLAND ORAL &  
MAXILLOFACIAL SURGERY,  
  
Defendants.  
  
-----X

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Upon the following papers numbered 1 to 38 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-27; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 28-36; Replying Affidavits and supporting papers 37-38; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that defendants motion for summary judgment dismissing the complaint against them is granted.

Plaintiff Alyssa McGraw commenced this dental malpractice action against defendants Mario Capuano, D.D.S., David Park, D.D.S., and Long Island Oral & Maxillofacial Surgery to recover damages for injuries she allegedly sustained as a result of negligent dental care and treatment. The complaint, as amplified by the bill of particulars, alleges, among other things, that treatment rendered by defendants on March 21, 2009 through October 21, 2010 departed from acceptable dental practice and caused plaintiff to suffer various injuries, including severe malocclusion, noisy oral breathing, mandibular instability and reduced mouth opening. The complaint also contains a cause of action for lack of informed consent for surgery that she underwent on April 22, 2010.

Defendants now move for summary judgment dismissing the complaint on the grounds that their treatment of plaintiff did not depart from accepted standards of dental care and was not a proximate cause of her injuries. In support of the motion, defendants submit copies of the pleadings, the bill of particulars, their own affidavits, the transcripts of the parties' deposition testimony, plaintiff's dental records and hospital records, and a consent form.

Plaintiff testified that she began orthodontic treatment when she was 11 years old to correct an over bite, and that she wore her first set of braces for two and a half years. Plaintiff testified that some time after the braces were removed her teeth shifted and became crooked, so she consulted with Dr. Sabo, an orthodontist, who advised her that braces would not correct her condition and that she needed jaw surgery. She testified that Dr. Sabo referred her to Dr. Mario Capuano. Plaintiff testified that her mother accompanied her to all of the appointments that she had with Dr. Capuano, and that she went to Dr. Capuano's office several times before having the subject surgery. She testified that her mother signed the consent forms for her, as she was a minor at the time, and that she had the surgery on April 22, 2009. She testified that when she awoke from the anaesthesia, her mouth was wired closed and was swollen for the first few weeks. She testified that the wires were removed on June 11, 2009, that she was unhappy with the results of the surgery as her lower jaw looked "pushed in" and she still had an overbite, and that she began having breathing problems and speech issues. She testified that at one of her follow up visits with Dr. Capuano and Dr. Park, they told her they were not happy with the results and recommended further surgery. She testified that her mother did not want her to continue treatment with defendants, and that she presented to the offices of Dr. Sacks and Dr. Neugarten, who ultimately performed another surgery which corrected her conditions.

Deborah McGraw, plaintiff's mother, testified that plaintiff first had braces put on by Dr. Kardovich when she was between 12 and 13 years old to correct an overbite. She testified that plaintiff wore the braces for two and a half years, and that they initially corrected plaintiff's over bite, but her teeth shifted and the overbite became prominent. She testified that she brought plaintiff back to Dr. Kardovich who told her the orthodontics had failed, so she brought her to Dr. Sabo, who recommended that plaintiff have jaw surgery to pull the lower jaw forward. Mrs. McGraw testified that Dr. Sabo told her plaintiff needed to have braces put on to prepare her for the surgery and he put them on. She testified that Dr. Sabo referred plaintiff to Dr. Capuano for the surgery, and that she brought plaintiff to Dr. Capuano's office several times before undergoing the surgery. She testified that Dr. Park took measurements of plaintiff's jaw and teeth, and that Dr. Park was to assist Dr. Capuano during the surgery. Mrs. McGraw testified that Dr. Capuano told her the purpose of the surgery was to bring plaintiff's lower jaw forward. She testified that she signed a three-page document and gave her consent for the surgery during a pre-operative visit to St. Charles Hospital. Mrs. McGraw testified that Dr. Capuano informed plaintiff had a risk of numbness to the jaw, and that there was a possibility plaintiff's jaw would be wired shut following the surgery. She testified that plaintiff stayed overnight at St. Charles Hospital, and that after the surgery plaintiff's mouth was wired shut and the area was swollen. She testified that after the wires were removed and the swelling decreased, the results of the surgery were unsatisfactory, as plaintiff's lower jaw looked pushed in, like "she had no bottom face." She further testified that plaintiff's speech was slurred and that she had trouble breathing. Mrs. McGraw testified that she expressed her unhappiness to Dr. Capuano at a post-operative appointment, and that he told her he

would redo the surgery. She testified that she sought treatment for plaintiff from the offices of Dr. Sacks and Dr. Neugarten, and that jaw surgery performed by Dr. Neugarten corrected plaintiff's jaw problems.

Dr. Mario Capuano testified that he graduated from New York University Dental School in 1988, and attended a four year program in oral and maxillofacial surgery at Nassau University Medical Center. He testified that he subsequently began his own private practice. He testified that plaintiff and Mrs. McGraw presented to his office in March 2009 at the referral of Dr. Sabo, and that he performed a complete dentofacial workup, which entails analyzing hard and soft tissue of the face clinically and photographically. Dr. Capuano testified to his findings in detail and explained that plaintiff's lower jaw was, in essence, pushed in as compared to the upper jaw, that there was crowded dentition in the lower jaw, and that she had an open bite. He testified that he explained the treatment plan to plaintiff and Mrs. McGraw, that he intended to perform a maxillary Le Fort 1 osteotomy, and plaintiff would have to wear braces before the surgery to correct some issues. He testified that he told plaintiff and Mrs. McGraw that the surgery would be beneficial, that she would masticate her food more effectively. He testified that he explained to plaintiff and Mrs. McGraw that once the orthodontic treatment was close to completion, he would perform a cephalometric analysis, among other things. Dr. Capuano testified that plaintiff and Mrs. McGraw returned on February 23, 2010, and that he explained that he would perform Le Fort 1 surgery and a bilateral sagittal split osteotomy. Dr. Capuano testified that when he informed plaintiff and Mrs. McGraw that there was a risk of permanent numbness to her lips from the bilateral sagittal split osteotomy, plaintiff became visibly upset and sought an alternative. He testified that he suggested she have a vertical ramus osteotomy with the Le Forte 1. He testified to the procedures involved with the Le Forte 1 surgery and vertical ramus osteotomy and explained that the vertical ramus osteotomy would level the jaw, but not advance it as the bilateral sagittal split osteotomy would.

Dr. Capuano further testified that plaintiff and Mrs. McGraw returned to the office on April 8, 2010 with questions; that he and Dr. Park worked together and took occlusive impressions and facebow measurements to create models, and discussed the surgery with plaintiff. Dr. Capuano testified that Dr. Park later showed Mrs. McGraw the models to explain the surgery and show the differences between the bilateral sagittal split osteotomy and vertical ramus osteotomy, and that on April 9, 2010 the decision was made to perform the Le Forte 1 and the vertical ramus osteotomy. He testified that Mrs. McGraw signed the consent forms on April 19, 2010, and that he and Dr. Park performed the surgery on April 22, 2010. He testified that the surgery went well, that there were no complications, and that the goals of the surgery were accomplished, which he described in detail. Dr. Capuano testified plaintiff returned for several post-operative visits. He testified in detail as to his findings during such visits, which indicated that plaintiff was healing and improving, and that the goals of the surgery were achieved. He testified that the wires were removed on June 18, 2010 and that on plaintiff's visit on July 9, 2010, she expressed her unhappiness with her appearance, but was satisfied with the results of the surgery. Dr. Capuano also testified that plaintiff told him she did not like the angle of her jaw or the shape of her upper lip. Following two further visits, he offered to do the surgery for cosmetic purposes only at no cost, but he did not hear from plaintiff or her parents after October 21, 2010.

Dr. David Park testified that he graduated from Columbia Dental School in 2002 and received a medical degree from Stony Brook University in 2007. He testified that he trained in oral maxillofacial

surgery which he completed in 2009. Dr. Park testified that he became a partner in Long Island Oral and Maxillofacial in July 2009. He testified that in March 2009, he and Dr. Capuano reviewed plaintiff's x-ray pictures and models, and they conducted a skeletal and soft tissue analysis of plaintiff's upper and lower jaws, lips and teeth. He testified that he drew measurements and determined values to properly move the jaw during surgery. He testified in detail to the angles and measurements and explained that plaintiff's lower jaw was further back than the upper jaw. He testified that plaintiff also had an anterior open bite and an overjet bite. Dr. Park testified that the initial plan was to do the maxillary Le Fort 1 osteotomy (surgery to the upper jaw) and the mandibular bilateral sagittal split osteotomy (surgery to the lower jaw), followed by a chin genioplasty, but that neither plaintiff nor Mrs. McGraw wanted to take the risk associated with the bilateral sagittal split osteotomy. He testified that he performed a clinical assessment of plaintiff, took impressions, conducted a facebow transfer for the articulator, and took measurements with a caliper and prepared a model. He testified that he saw both plaintiff and her mother at least twice before the surgery to confirm that they wanted the vertical ramus osteotomy, as opposed to the bilateral sagittal split osteotomy, and used a model to describe and explain both procedures and their risks. He testified that Mrs. McGraw opted for the vertical ramus osteotomy. Dr. Park testified that he informed plaintiff and Mrs. McGraw that plaintiff's jaw would have to be wired closed with the vertical ramus osteotomy, and that he answered all of Mrs. McGraw's questions and believed that both she and plaintiff understood the nature of the procedure and what the surgery entailed.

Dr. Park testified that on the date of the surgery, he was "co-surgeon" with Dr. Capuano, that the surgery took a couple of hours, that there were no complications, and that the goal of alignment was achieved. He explained in detail how he determined that proper alignment was achieved during the surgery, and testified that an x-ray examination conducted immediately after the surgery confirmed that proper alignment was achieved. Dr. Park testified that plaintiff's chart indicates she returned to the office on April 25, 2010, May 3, 2010, and May 11, 2010, and that he examined her on May 14, 2010. He testified such examination revealed that there was no swelling or occlusion, and that plaintiff's nerves were intact, chin was in line, and midline was in place. Dr. Park testified that he saw plaintiff on June 11, 2010, at which time he removed the wires and examined her. He testified that she was healing normally and the jaw was stable. He testified that plaintiff presented on July 8, 2010 at which time an x-ray examination was performed. Dr. Park testified that the upper and lower jaws moved forward after the surgery, creating a better relationship between them, and described in detail the measurements which indicated that the outcome was successful. He testified that plaintiff and Mrs. McGraw presented on July 9, 2010 and August 6, 2010 and expressed their discontent with the appearance of plaintiff's upper lip. Dr. Park testified that he and Dr. Capuano showed plaintiff and Mrs. McGraw the x-ray pictures and explained that the goals of the surgery were met, as plaintiff's teeth were touching, the occlusion was intact, and the lower jaw was significantly improved. He testified that further surgery was unnecessary, but if plaintiff wanted it for cosmetic reasons, they would have performed a sagittal surgery when everything healed. He testified that plaintiff and Mrs. McGraw presented on October 21, 2010 and that they discussed doing the sagittal surgery, but they would need a CT scan first to ensure that the bones had healed. He testified that October 21, 2010 was the last time he saw plaintiff.

Dr. Capuano and Dr. Park submitted their own affidavits as expert opinions in support of the motion. Such affidavits may be used in support of the motion where the affidavit is detailed, specific

and factual in nature (*Marine v Camissa*, 107 AD3d 672; *Thomas v Richie*, 8 AD3d 363; *Toomey v Adirondack Surgical Assocs. P.C.*, 280 AD2d 754). Dr. Capuano states that he became board certified in oral and maxillofacial surgery in 1998 and was recertified in 2008. He states that he has been in private practice since 1998. As the factual statements in the affidavit comport with his deposition testimony, they will not be repeated. Dr. Capuano addresses plaintiff's allegations in her bill of particulars. The bill of particulars allege that defendants were negligent in performing surgery to plaintiff's upper jaw as opposed to her lower jaw. Dr. Capuano avers that the surgery performed was conducted on both the upper and lower jaws. He states that the maxillary LeFort 1 osteotomy involves repositioning the back of the upper jaw to allow the lower jaw to rotate to a closed position. He explains that the lower jaw also would need surgery to properly reposition it after the upper jaw was impacted and rotated forward, and that the vertical ramus osteotomy was the lower jaw surgery. He states that he initially recommended a bilateral sagittal split osteotomy for the lower jaw in March 2009, as it allows more versatility, but after he informed plaintiff of its risk of permanent numbness to the lip, she and Mrs. McGraw opted for the vertical ramus osteotomy. The bill of particulars alleges that defendants departed from the standard of care in failing to keep apprised of plaintiff's condition following the surgery and failed to employ proper tests and diagnostic studies and examinations. Dr. Capuano attests to all of the preoperative and post-operative tests, examinations and analysis performed that he testified to in his deposition.

In his affidavit, Dr. David Park attests to facts which he testified to at his deposition as set forth above. He states, among other things, that in early 2010, he conducted a detailed study of plaintiff's upper and lower jaw using photographs, radiographs, models and cephalometric analysis using an acetate overlay on an x-ray picture to show positions and locations of key anatomical points of plaintiff's facial skeleton. He states that plaintiff returned in early April 2010, that he used occlusive impressions, wax bite and a facebow to create a model of plaintiff's jaw, and that on April 9 it was determined that the vertical ramus osteotomy would be performed in conjunction with the Le Forte 1 procedure. He states that both he and Dr. Capuano discussed the risks and benefits of the surgery with plaintiff and Mrs. McGraw, and that consent forms were executed on April 19, 2010. Dr. Park opines with a reasonable degree of certainty, that plaintiff was properly examined and treated, that the surgery resolved the functional issues of plaintiff's jaw, and that she was given informed consent.

The consent form signed by Mrs. McGraw on April 19, 2010 is submitted. The form consists of three pages and enumerates the risks of the subject surgery. Mrs. McGraw's signature is on the form, and her initials appear next to each risk associated with the surgery. Among the risks enumerated are a relapse, the tendency for the repositioned bone segments to return to their original position which may require additional surgery, a change in cosmetic appearance and sinus issues which may require further surgery.

It is well settled that a party moving 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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557; *O'Neill v Town of Fishkill*, 134 AD2d 487).

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; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712; *Kozlowski v Oana*, 102 AD3d 751). 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; *Sharp v Weber*, 77 AD3d 812; *Stukas v Streiter*, 83 AD3d 18). 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; *Jones v Ricciardelli*, 40 AD3d 935). If a defendant makes such showing, the burden shifts to the 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; *Luu v Paskowski*, 57 AD3d 856). Furthermore, to satisfy its burden on a motion for summary judgment, a 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; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874; *Terranova v Finklea*, 45 AD3d 572).

Here, Dr. Capuano and Dr. Park established, prima facie, their entitlement to summary judgment dismissing the complaint against them by demonstrating that their treatment of plaintiff was in accord with medically accepted standards of practice, that such treatment did not constitute a departure from same, and the treatment they rendered to plaintiff was not a proximate cause of plaintiff's alleged injury (*Garcia v Richer*, 132 AD3d 809). Long Island Oral and Maxillofacial Surgery's burden also was satisfied as the basis for imposing liability against it is the doctrine of respondeat superior. Defendants further established that they obtained plaintiff's informed consent. The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Stukas v Streiter*, 83 AD3d 18).

In opposition, plaintiff submits the affidavit of Dr. Stanley Lane, who states that he is a New York-licensed oral and maxillofacial surgeon. It is well settled that opinion evidence must be based on evidence in the record or upon the expert's personal knowledge (see *Hambusch v New York City Transit Authority*, 63 NY2d 723). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a medical provider's summary judgment motion" (*Garbowski v Hudson Val. Hosp. Ctr.*, 85 AD3d 724, 726, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320). The affidavit of Dr.

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Lane failed to state what, if any, records he reviewed to form his opinion. Dr. Lane made no reference to any of the medical records in his affidavit and did not state that he reviewed the pleadings and depositions. Thus, the affidavit was conclusory and lacked a foundation (*see Luu v Paskowski*, 57 AD3d 856). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: April 3, 2017

  
**HON. JOSEPH C. PASTORESSA, J.S.C.**

FINAL DISPOSITION     NON-FINAL DISPOSITION