

**Towers v Gurfinkel**

2017 NY Slip Op 31160(U)

May 23, 2017

Supreme Court, New York County

Docket Number: 805274/2016

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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ADAM GIBSON TOWERS,

Plaintiff,  
-against-

Index No. 805274/2016

*Decision and Order*

ALINA GURFINKEL, D.D.S. a/k/a  
ALINA RODEK, D.D.S.  
UNION SQUARE DENTAL, P.C., and  
JOHN DOE DENTISTS,

Defendants.

-----X  
JOAN B. LOBIS, J.S.C.:

The underlying action arises out of defendants' allegedly negligent dental treatment of plaintiff on June 29, 2009. Plaintiff alleges that defendants left a foreign object in his tooth during a root canal procedure and fraudulently concealed the object by sealing a crown on top of the affected tooth. Plaintiff discovered the object on July 7, 2015. Defendant Alina Gurfinkel, D.D.S. a/k/a Alina Rodek, D.D.S. (Dr. Rodek) moves, and defendant Union Square Dental, P.C. (Union) cross-moves, for an order dismissing the cause of action for fraudulent concealment, ordering plaintiff to provide security for costs under CPLR Section 8501(a), and ordering plaintiff to pay costs, disbursements, and attorneys' fees associated with making and filing these motions. Plaintiff opposes the motions in part and, in the alternative, cross-moves for leave to file an amended complaint. For the reasons below, the motion is granted to the extent it seeks an order for plaintiff to provide security for costs and the remainder of the motion is denied.

Defendants argue that plaintiff fails to specify, as required under CPLR Section 3016(b), what misrepresentations Dr. Rodek made, how Dr. Rodek concealed the existence of the

foreign object, and what actions or statements Dr. Rodek made to induce reliance. Plaintiff argues that his complaint alleges that defendant was aware she committed malpractice, made a misrepresentation that she completed the root canal procedure successfully without leaving any foreign objects in the tooth, and intentionally concealed her negligence by sealing a crown on top of the tooth. Further, he states that he justifiably relied on defendant's representations, and that he suffered injuries as a result of his reliance. He states that defendant had a duty to disclose that the object was left in his tooth. In the alternative plaintiff seeks leave to serve an amended complaint and attaches the proposed amendments. Plaintiff does not oppose the request that he provide security costs and states that they should be in the amount of \$500.00 pursuant to CPLR Section 8503. He asserts that defendants' requests for costs, disbursements, and attorneys' fees should be denied because defendants do not explain why such an award would be appropriate or demonstrate that plaintiff engaged in frivolous conduct.

In reply, defendants reiterate that plaintiff failed to plead fraudulent concealment with enough particularity and argue that the cross-motion should be denied. According to Union, that the records demonstrate that Dr. Rodek informed plaintiff that a file separated during the procedure. They allege that plaintiff's fraudulent concealment claims impermissibly mirror his malpractice claims and does not give rise to separate damages.

When considering a motion to dismiss pursuant to CPRL Section 3211 the Court accepts the facts as alleged in the complaint as true. Williams-Smith v. MTA New York City Transit, 82 A.D.3d 512, 513 (1st Dep't 2011). To plead a cause of action for fraud, plaintiffs must

set forth “the circumstances constituting the wrong . . . in detail.” C.P.L.R. Rule 3016(b). “[T]he complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.” Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 57 (1999). In pleading a claim for fraudulent concealment, plaintiffs must also set forth that “the defendant had a duty to disclose material information.” Standish-Parkin v. Lorillard Tobacco Co., 12 A.D.3d 301, 303 (1st Dep’t 2004) (internal citation omitted).


The Court finds that plaintiff has pled fraudulent concealment with enough specificity to survive at this stage in the pleadings notwithstanding the heightened pleading standard set forth by CPLR Section 3016(b). The complaint states that Dr. Rodek knowingly misrepresented that the procedure was completed without leaving any foreign objects in plaintiff’s tooth and placed a cap over the foreign object to conceal it, that plaintiff relied on the misrepresentation, and that plaintiff suffered injury. Contrary to defendants’ contention, by alleging that Dr. Rodek made verbal misrepresentations to plaintiff and placed a cap to conceal her malpractice, plaintiff asserts conduct separate from that which the malpractice is based on. Defendants have not demonstrated that plaintiff engaged in frivolous conduct which warrants costs, disbursements, or attorneys’ fees. Under CPLR Section 8503, plaintiff shall provide security for costs in the amount of \$500. The Court has considered the rest of the parties’ arguments and they do not change the outcome.

Therefore, it is

ORDERED that the motion is granted to the extent that plaintiff is ordered to provide security for costs in the amount of \$500 and the remainder of the motion is denied. The Clerk of the Court is directed to enter accordingly.

Dated: *May 23*, 2017

ENTER:



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