Schinitsky v Judy
2018 NY Slip Op 32364(U)
September 20, 2018
Supreme Court, New York County
Docket Number: 805116/16
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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SUSAN SCHINITSKY,

INDEX NO. 805116/16

Plaintiff

-against-

KENNETH W.M. JUDY, DDS,

Defendant.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged dental malpractice, defendant Kenneth W.M. Judy, DDS ("Dr. Judy") moves for an order granting summary judgment dismissing the complaint against him, or, in the alternative, granting summary judgment dismissing all claims regarding the failure to diagnose and treat plaintiff for malocclusion (i.e the abnormal alignment of upper and lower teeth) prior to August 18, 2013, as barred by the applicable statute of limitations, and granting partial summary judgment dismissing all claims as to any alleged failure to diagnose and treat periodontal disease, negligent placement of crown and bridgework and temporomandibular joint syndrome (hereinafter "TMJ"). Plaintiff opposes the motion.

Background

This action arises out of the dental care and treatment provided to plaintiff by Dr. Judy between January 28, 1976 and December 16, 2014. The Bill of Particulars alleges, *inter alia*, that Dr. Judy departed from good and accepted dental practice by failing to properly examine, assess and treat plaintiff during this time period. Specifically, it is alleged that Dr. Judy improperly and inadequately diagnosed plaintiff's conditions, including her periodontal condition, maintained inadequate dental records, failed to make adequate referrals to necessary specialists, took improper and inadequate tests and/or x-rays; failed to properly fabricate and place crown and

bridgework and/or dental restorations, and failed to diagnose and remove decay. It is further alleged that these departures resulted in plaintiff developing an occlusal discrepancy, required plaintiff to undergo extensive future dental restoration, compromised the strength and integrity of her dentition, and caused the loss of bridge and crown work and the underlying abutment.

Plaintiff's first visit to Dr. Judy was on January 28, 1976, when she was in her late 20s, at which time she had all her natural teeth and no crowns or bridgework. (Plaintiff's Dep at 17-19). Dr. Judy testified that at plaintiff's first examination on January 28, 1976, plaintiff had "a moderate degree of bone loss and she had an extremely jumbled and accommodated occlusion."[1] (Dr. Judy Dep at 14-15). According to Dr. Judy he discussed the possibility of tooth mobility with plaintiff beginning in 1976, and "everytime [he] saw her," and advised that if her teeth started to move, he would treat her at that time. (Id at 15-17). Dr. Judy testified that he reiterated the possibility of tooth mobility to plaintiff at every subsequent examination. (Id at 16). He testified that towards "the end of [his] treatment" of plaintiff, her teeth became mobile, including tooth no. 18 (which is the second molar in the lower left quadrant) and the upper right third molar (Id at 17, 18).

Plaintiff testified that while she could not recall every visit with Dr. Judy, that at a typical hygiene appointment, her teeth would first be cleaned by a hygienist, and after the cleaning, Dr. Judy would generally examine her teeth and answer any questions (Plaintiff Dep at 33). Additionally, at every examination. Dr. Judy or a dental hygienist tested plaintiff's pocket depths with a probe to confirm Dr. Judy's bone loss findings from his analysis of the x-rays. (Id at 41;

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[1]Dr. Judy explained that "an accommodated occlusion usually means that the patient's musculature is determining how the teeth come together by rubbing against each other and it's accommodated because it's not what the dentist designs, it's what the patient's muscular habits produces." (Dr. Judy Dep at 15).

Dr. Judy's Dep at 25; Notice of Motion, Exhibit K at 14-25). Dr. Judy testified that he would compare x-rays to determine if there was any change in bone height around the tooth roots to assess for bone loss; he also testified that plaintiff on occasion would refuse x-rays. (Dr. Judy Dep at 26-28, 34).

According to Dr. Judy, Arestin, a localized antibiotic, was sometimes placed to treat inflammation at plaintiff's gum, but that sometimes she refused to permit him to use it. (Dr. Judy at 19, 23, 34). During Dr. Judy's treatment of plaintiff, he placed one crown, on tooth no. 13 (in the upper left quadrant) in 1993. (Dr. Judy Dep at 9-10, 24-25, 70-71; Exhibit K at 17). Plaintiff testified that she "did not know" if she ever had a problem with the crown on tooth number 13. (Plaintiff Dep 29-30). While plaintiff admitted that she did not always permit x-rays to be taken, she testified that when she allowed Dr. Judy to take x-rays, he would review the x-rays with her and tell her if things were improving or getting worse (Id at 48-50). During her last ten years of treatment, plaintiff went to dental hygiene appointments every three months so that the cleanings would be less painful and the "tartar would not build up." (Id at 24-25; Dr. Judy Dep at 12-13).

According to Dr. Judy, an x-ray taken on December 4, 2008 and the dental chart reflects at the appointment, he discussed with plaintiff "heavy bleeding in the upper right area." (Id at 20). He also testified that he applied the antibiotic Aresin at tooth 15 (the second molar in the upper left quadrant) (Id; Exhibit K at 23). On January 6, 2009, Dr. Judy took a full mouth series of x-rays, but acknowledged that he never took full mouth series of x-rays again during his treatment of plaintiff (Judy Dep at 31).

At a November 1, 2012 appointment, plaintiff complained of a loose resin filling at tooth 19 (the first molar in lower left quadrant), and Dr. Judy replaced that filling, recemented, and

advised plaintiff that she may need a crown and root canal at tooth 19; he also did "light scaling around tooth 19" (Dr. Judy Dep at 36-39; Exhibit K at 26).

Dr. Judy testified that plaintiff complained of pain at tooth no. 18 during a January 14, 2014 appointment. (Dr. Judy Dep at 51-52; Exhibit K at 27). Dr. Judy testified that at that appointment he took an x-ray of plaintiff's lower left quadrant and examined plaintiff, and advised that she had an acute issue at tooth 18 and "constant evaluation was needed" (Dr. Judy Dep at 51-51; Exhibit K at 27). He then began seeing plaintiff every other month. (Exhibit K at 27-29). On December 4, 2014, after plaintiff complained of pain at tooth 18, Dr. Judy testified that he determined bone loss by taking an x-ray, which revealed an infection, and he placed plaintiff on an antibiotic, Amoxicillin, and noted the presence of substantial bone loss to that area. (Dr. Judy Dep at 59; Exhibit K at 28). To treat the condition, Dr. Judy recommended removing tooth no. 18; plaintiff agreed and the extraction was performed on December 8, 2014, along with the removal of some infected tissue, and plaintiff was placed on antibiotics. (Dr. Judy Dep at 60-61; Exhibit K at 28). At a follow-up appointment on December 16, 2014, Dr. Judy testified that he told plaintiff that tooth no. 16 should be extracted and that "she needed provisional bridges in the lower left quadrant and the upper right quadrant," and that plaintiff responded that she did not want to have any more work done. (Dr. Judy Dep at 61-62; Exhibit K at 29). Plaintiff did not return to Dr. Judy for treatment after December 16, 2014.

On January 8, 2015, plaintiff went to East Side Dental Practice ("East Side Dental") for a consult "regarding her bite being off and her jaw not being able to close." (Notice of Motion, Exhibit N, at 1). The dentist performing the examination wrote in his notes that plaintiff "had a lot going on" and that the "main concern is why her jaw doesn't close all the way" and also noted that plaintiff "needs some teeth to come out [and that] ... several fillings are breaking apart." (Id).

Plaintiff returned to East Side Dental for a full examination of January 12, 2015, and, at that appointment, was referred to Dr. Jeffrey Lemler, a periodontist. Dr. Lemler saw plaintiff on January 13, 2015, at which time he wrote a Periodontal Progress Therapy Progress Report which stated that plaintiff has "[g]eneralized severe malocclusion in the presence of generalized moderate, localized advanced periodontitis." He also noted that "over the past two years plaintiff had developed an anterior open bite from tooth # 3 to the left wisdom tooth [and that] there is moderate to severe recession, teeth #'s 2 and 15 are hopeless, teeth #'s 1,3,14, 16 and 17 are questionable." Regarding recommended treatment, he stated: "extract teeth #'s 2 and 15 and modify the occlusion to bring anterior teeth into correct occlusion. Once [plaintiff] has a stable condition, I will evaluate the periodontal status, which are of recession need treatment and would be necessary to replace loss dentition with implants. Once the re-construction is complete, frequent recall maintenance will be required." (Notice of Motion Exhibit M at 3).

East Side Dental subsequently provided treatment for plaintiff's malocclusion, which consisted of filing down the teeth, placing temporary and then permanent crowns on all her teeth, and performing the necessary occlusal adjustments. (Plaintiff's Dep at 104; Notice of Motion, Exhibit N).

Plaintiff testified, however, that no doctor, including Dr. Judy, had ever diagnosed her with a disorder of the TMJ joint. and that an x-ray taken by Dr. Mark Stein, an oral surgeon, in January 2015 "showed that the TMJ joint was fine" (Plaintiff Dep at 68-69; Notice of Motion, Exhibit L at 1-7).

Defendant moves for summary judgment, arguing that Dr. Judy's treatment comported with good and accepted medical practice and did not proximately cause plaintiff's alleged injuries. In support of his position, defendant submits the expert affirmation of Dr. Leslie W.

Seldin, a dentist licensed to practice in the State of New York. Dr. Seldin opines that"to a reasonable degree of dental certainty that Dr. Judy at all times, appropriately, properly, and timely examined, evaluated, and diagnosed plaintiff's condition." (Seldin Aff. ¶ 6). He further opines that "Dr. Judy properly and timely diagnosed, monitored, and treated plaintiffs periodontal disease in accordance with accepted dental standards ...[and that] Dr. Judy properly responded to all of the plaintiff's clinical signs, symptoms and complaints with respect to her malocclusion in accordance with proper dental standards." (Id) . He also opines that to a reasonable degree of medical certainty that "at no point in his care of plaintiff from January 28, 1976 to December 14, 2014 did Dr. Judy depart from the accepted standards of dental practice." (Id ¶ 7). With respect to plaintiff's periodontal condition, he opines that Dr. Judy "timely diagnosed this condition upon his first examination of her and he thereafter properly and closely monitored and maintained her condition for approximately 40 years." (Id ¶ 12). In particular, he opines that "Dr. Judy's frequent examinations including pocket depth charting, periodontal scalings and the necessary placement of Arestin, was appropriate preventative treatment for periodontal disease and successfully kept plaintiff's periodontal condition in good control." (Id).

Dr. Seldin further opines that plaintiff's bone loss, which was diagnosed in 2014, was an unavoidable condition and was the result of plaintiff being a post-menopausal female over the age of 70. (Id. at ¶ 13). In addition, he states that "[t]he propriety and effectiveness of [Dr. Judy's] treatment is evident from plaintiff's condition when she stopped treating with Dr, Judy. Dr. Lemler's chart indicates that at his examination of plaintiff one month after she stopped treating with Dr. Judy, her periodontal condition was under control as she did not have any significant pocket depths. She did not have any significant bone loss other than on the posterior left side, which was diagnosed by Dr. Judy in December 2014." (Id).

Dr. Seldin next opines that Dr. Judy did not deviate from accepted standards of dental care in his alleged failure to diagnose and treat plaintiff's TMJ, as plaintiff does not have a TMJ disorder as is confirmed by the cone beam imaging done after plaintiff left Dr. Judy's care. (Id. ¶ 15). Dr. Seldin also opines that Dr. Judy did not deviate from accepted standards of dental care with regard to the allegedly negligent crown and bridgework placement on plaintiff as the only crown or bridgework was a single crown placed on tooth no. 13 in 1993, which plaintiff herself admitted did not give rise to any problems. (Id ¶ 16).

As for plaintiff's occlusal discrepancy, Dr. Seldin opines that Dr. Judy did not depart from accepted standards of dental care with regard to his diagnosis and treatment of plaintiff for this condition, as it did not require treatment prior to it causing pain or other problems. (Id ¶ 18). He also states that when plaintiff's occlusal discrepancy did present objective issues, Dr. Judy offered treatment to treat the malocclusion in December 2014, plaintiff refused such treatment. (Id.).

Plaintiff opposes the motion, arguing that Dr. Seldin's opinions are conclusory, and provide no specifics as the reasons for plaintiff's 30-40 percent bone loss as evident in the records of East Side Dental. In support of her motion, plaintiff submits an expert affirmation, with the name redacted, of a dentist licensed to practice in New York (hereinafter "plaintiff's expert"). Upon examining the x-rays and records of plaintiff, and depositions of the parties, plaintiff's expert opines that although Dr. Judy established an appropriate treatment plan for plaintiff in 1976, the execution of his treatment plan was improper and resulted plaintiff requiring a full mouth restoration. With respect to plaintiff's condition following Dr. Judy's treatment, plaintiff's expert states that "[t]he x-rays taken by East Side Dental on January 12, 2015, show decay on

teeth nos. 1, 2, 3, 4, 29 and 30, with significant bone loss in the lower front anterior portion of her mouth teeth nos. 22-28." (Id.¶ 5).

Plaintiff's expert opines that, "[g]enerally over the course of treatment Dr. Judy's examinations were inadequate as there was no comprehensive examination performed, no documented periodontal charting was performed within the last 10 years of treatment and there was no charting to indicate if teeth were decayed, missing or if they had fillings present [and that] when treating a patient the dentist must know the condition of the patient's mouth in order to perform proper treatment" (Plaintiffs expert ¶ 6).

Plaintiff's expert also opines that Dr. Judy "inadequately read x-rays, ignored caries (i.e cavities) and decay throughout plaintiff's dentition [and that] the failure to adequately treat these conditions after August 18, 2013, caused the further deterioration of the teeth and eventually led to the loss of tooth no. 18 at the end of plaintiffs' care with Dr. Judy and the loss of teeth nos. 2 and 15 after leaving his care." (Id.).

Plaintiff's expert next opines that, although in 2008, Dr. Judy identified periodontal problems with tooth no. 15 and treated it with an antibiotic, [f]rom 2008 forward his examinations were inadequate and his reading of x-rays were inadequate as there was bone loss evidence in the x-rays taken subsequent to 2008 [and that] Dr. Judy's inadequate treatment of this area led to the loss of tooth number 15 due to very poor periodontal conditions" (Id. ¶ 7).

Plaintiff's expert states that based on the record "[t]he last full mouth set of x-rays Dr. Judy took of the plaintiff was January 6, 2009 ...[and that]...[o]ver the course of treatment Dr. Judy was using x-rays to determine bone loss" (Id ¶ 8). He opines that "[o]nly taking posterior x-rays after January 6, 2009 was a departure from good and accepted practice [and that][h]is failure to take x-rays of the lower anterior portion of the plaintiff's mouth caused damage as Dr. Judy

could not determine the extent of the bone loss, which was significant" (Id). He further opines that "[h]ad he continued to take x-rays and properly followed his treatment plan ..the bone loss would have been evident" (Id).

Plaintiff's expert further opines that Dr. Judy's treatment after identifying a problem in the lower left portion of plaintiff's mouth in 2014 was inadequate, and that plaintiff should have been treated when the problem first presented in an x-ray in 2013, and that his failure to treat her lower left quadrant at this time or to refer plaintiff to a specialist at that time "eventually resulted in the loss of tooth 18" (Id. ¶ 9). Plaintiff's expert further opines that "the proper treatment would have been to perform deep scaling or to refer the patient to a periodontist,... [and that as]. Dr. Judy did nothing ...the area deteriorated and as such the plaintiff's bite opened, meaning she no longer was contacting the wisdom teeth when she bit down..." (Id).

Plaintiff's expert next opines that based on the records, including x-rays and the deposition testimony of Dr. Judy, "it is evident that Dr. Judy has neglected the plaintiff's oral health from at least 2008 to her final visit with his office...[and that] within a reasonable of dental certainty, that the 30% to 40% bone loss that is visible in the x-rays from East Side Dental, the poor periodontal condition evidence by the records of Dr. Lemler and the open bite evidence by Dr. Stein's records are all a direct cause of Dr. Judy's in adequate treatment of plaintiff" (Id ¶ 10). Plaintiff's expert states, in summary, that "[t]he treatment plan established to prevent plaintiff from suffering bone loss and periodontal damage was not adequately followed which result in bone loss, gum disease, loss of teeth and the need for a full mouth reconstruction. This damage would have been prevented had Dr. Judy continued to take x-rays as his treatment plan called for and properly compared the x-rays to each other." (Id ¶ 23).

In reply, defendant argues that plaintiff's expert ignores evidence, including that plaintiff often refused to have x-rays taken or permit needed treatment, is riddled with errors and incompetent to defeat his motion. Defendant also argues that he is entitled to summary judgment with respect to the allegations in the Bill of Particulars not mentioned by plaintiff's expert, including those allegations related to negligent crown and bridgework, all treatment between 1976 and January 6, 2009, and TMJ. Defendant also argues that all allegations of negligence against Dr. Judy before August 18, 2013, should be dismissed as the continuous treatment doctrine does not apply, since under New York law monitoring a patient's health is not the type of affirmative and ongoing conduct required to invoke the continuous treatment doctrine. Defendant also argues that plaintiff does not raise an issue of fact as to causation.

Discussion

The first issue to be addressed by the court is whether allegations of malpractice prior to August 18, 2013 are barred by the statute of limitations based on the commencement date of this action on February 18, 2016. "An action for medical [or dental] malpractice must be commenced within two years and six months of the date of accrual." Massie v. Crawford, 78 NY2d 516, 519 (1991), citing CPLR 214-a. Moreover, "[a] claim accrues on the date the alleged malpractice takes place." Id (internal citation omitted). However, under the continuous treatment doctrine exception, the 2 ½-year period does not begin to run until the end of the course of treatment, if "the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." Prinz-Schwartz v. Levitan, 17 AD3d 175, 177 (1st Dept 2005); see also CPLR 214-a.[3] In such cases, the limitations period does not begin to

[3]CPLR 214-a provides, in relevant part, that a medical malpractice action must be commenced within 2 ½ years from the date "of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to

run until the end of treatment. Smith v. Fields, 268 AD2d 579, 580 (2d Dept 2000). Therefore, if the continuous treatment doctrine applies here, plaintiff's claim would not be barred by the statute of limitations, because her last visit with Dr. Judy was in December 2014, which is less than 2 ½-years before the commencement of this action in February 2016.

"The [continuous treatment] doctrine rests upon the belief that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, as the [existing provider] not only is in a position to identify and correct his or her malpractice, but is best placed to do so." Rudolph v. Lynn, 16 AD3d 261, 262 (1st Dept 2005). Once a defendant shows that a malpractice action was commenced after the expiration of the expiration of the 2 ½ year limitations period, the burden shifts to plaintiff to establish that the continuous treatment doctrine operates to toll the statute of limitations. Cox v. Kingsboro Medical Group, 88 NY2d 904, 906 (1996). Here, defendants have shown that absent the toll for the continuous treatment doctrine, allegations of malpractice prior to August 18, 2013 would be barred by the 2 ½ year statute of limitations. The issue is thus whether plaintiff has met her burden as to the applicability of the continuous treatment doctrine.

"To invoke the doctrine, a plaintiff must establish a continuous course of treatment with a particular health care provider with respect to the condition that gives rise to the lawsuit." Rudolph v. Lynn, 16 AD3d at 262. (internal citation omitted). In this connection, "[t]he continuous treatment doctrine may be invoked where there was 'further treatment [ ] anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments

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said act, omission or failure."

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which characterized the treatment in the immediate past.'" Blaier v. Cramer, 303 AD2d 301,302 (1st Dept 2003), citing Richardson v. Orentreich, 64 NY2d 896, 898-899 (2d Dept 1985). Further, that the treatment continued over a long period of time is not a deciding factor in determining whether the continuous treatment doctrine is applicable. See Pichichero v. Falcon, 142 AD3d 981 (2d Dept 2016) (holding that summary judgment on statute of limitations grounds was not warranted in malpractice action alleging the failure to diagnose and treat a cancerous lesion before it metastasized, as the doctor's treatment of plaintiff for the same condition over the span of 11 years was sufficient to toll the statute of limitations).

At the same time, "a mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for the purpose of the statutory toll...[n]or does continuing efforts to arrive at a diagnosis" Gomez v. Katz, 61 AD3d 108, 112 (2d Dept 2009); see also Flaherty v. Kantrowich, 144 AD3d 542, 543 (1st Dept 2016)(finding that continuous treatment doctrine did not operate to toll the statute of limitations because the defendant doctor was not engage in treatment of plaintiff's condition "but performed only routine ... or diagnostic examinations, even though such examinations were conducted repeatedly over a period of time")(internal citations omitted).

Here, plaintiff has established that the continuous treatment doctrine is applicable based on evidence that Dr. Judy diagnosed plaintiff with periodontal issues, bone loss, and malocclusion at plaintiff's first appointment in 1976, and that Dr. Judy continued to monitor plaintiff's condition with regard to those issues, and the possibility of teeth mobility was discussed with plaintiff at each subsequent visit. See Rudolph v. Lynn, 16 AD3d at 262 (finding that facts in dental malpractice action "conclusively established...continuous course of treatment for the attempted installation of six satisfactory crowns"); Dolce v. Powalski, 13 AD3d 1200, 1201 (4th

Dept 2004)(plaintiff established that the continuous treatment doctrine applied to toll the statute of limitations in dental malpractice action where dentist continually treated patient for underlying condition during time period at issue). Accordingly, defendant's motion is denied to the extent he seeks to bar all allegations of dental malpractice before August 18, 2013 on statute of limitations grounds, subject to the determination below with respect to the treatment prior to 2009.

The next issue is whether defendant is entitled to summary judgment based on the his expert's opinion that he did not commit malpractice. A defendant moving for summary judgment in a dental malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by demonstrating that "in treating the plaintiff there was no departure from good and accepted [dental] practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010) (citations omitted). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "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 NY2d 320, 324 (1986) (citation omitted). Specifically, in a dental malpractice action, a plaintiff opposing a summary judgment motion must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries.... In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d at 207 (internal citations omitted); see also Koss v. Bach, 74 AD3d 472, 472 (1st Dept 2010).

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Here even assuming *arguendo* that Dr. Seldin's opinion is sufficient to satisfy defendant's burden of demonstrating that Dr. Judy did not depart from accepted dental practice during the time period that he treated plaintiff, with the exceptions and time limitations explained below, plaintiff has controverted this showing. Specifically, plaintiff has raised issues of fact as to whether Dr. Judy committed malpractice in 2009 onward, based on her expert's opinion that, after Dr. Judy identified periodontal problems with tooth no. 15, in December 2008, that Dr. Judy departed from accepted dental practice in failing to take full mouth x-rays of plaintiff after January 6, 2009, and in failing to follow his own treatment plan during this period, or to refer plaintiff to a specialist. In addition, plaintiff has adequately demonstrated causation based on her expert's opinion that as a result of these departures, plaintiff suffered injuries including bone loss, gum disease, loss of teeth and occlusion, as evidenced by the records of subsequently treating dentists. Moreover, evidence that plaintiff refused certain recommended care and treatment, including x-rays and antibiotics, is insufficient to eliminate issues of fact as to Dr. Judy's liability for these alleged departures.

However, while plaintiff's expert raises factual questions as to whether Dr. Judy departed from accepted dental practice in 2009 onward, his affidavit is insufficient to raise factual issues with regard to Dr. Judy's care and treatment of plaintiff prior to that time. In this connection, as defendant notes, plaintiff's expert opines that Dr. Judy's treatment plan formulated at the time of plaintiff's first appointment in 1976 was appropriate, and while plaintiff's expert states that "no documented periodontal charting was performed within the last ten years of treatment (i.e. beginning in 2004)," he fails to connect this failure to any departures before 2009 that resulted in injuries to plaintiff. Accordingly, to the extent the Bill of Particulars alleges dental malpractice before 2009, such allegations do not provide a basis for liability.

Next, the departures contained in the Bill of Particulars regarding defendant's alleged failure to properly fabricate and place crown and bridgework and/or dental restorations are unsupported by the record, which shows that Dr. Judy placed a single crown in 1993, and that there were no issues with the crown. Nor does plaintiff's expert opine as to any departures related to the crown or bridgework or other restorations. Finally, to the extent the Bill of Particulars alleges departures related to the failure to diagnose and/or treat TMJ, such departures do not provide a basis for liability as there is no evidence that plaintiff suffers from TMJ.

Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is granted only to the extent of finding that defendant's liability for malpractice cannot be predicated on departures (I) before 2009, (ii) alleging the failure to properly fabricate and place crown and bridgework and/or dental restorations, and (iii) alleging the failure to treat and/or diagnose TMJ, and is otherwise denied; and is further

ORDERED that a pre-trial conference shall be held on September 27, 2018 at 10:00 am. in Part 11, room 351, 60 Centre Street, New York, NY 10007,

DATED: September 20, 2018

HON. JOAN A. MADDEN
J.S.C.