

Kovago-Feher v Toothsavers Dental Servs., P.C.

2018 NY Slip Op 32404(U)

September 21, 2018

Supreme Court, New York County

Docket Number: 805266/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARGIT KOVAGO-FEHER,

Plaintiff,

INDEX NO. 805266/13

-against-

TOOTHSAVERS DENTAL SERVICES, P.C., SOL S. STOLZENBERG, D.M.D., SOL S. STOLZENBERG, D.M.D., DENTAL SERVICES, P.C., SOL S. STOLZENBERG, D.M.D., P.C., JOHN JUNGIAN CHOI, D.D.S., LI YAN, D.D.S., DAVID COHEN, AS EXECUTOR OF THE ESTATE OF MORTON COHEN, D.D.S., MITCHELL LYNN, UNIVERSAL DENTAL CENTER a/k/a UNIVERSAL DENTAL AND IMPLANT CENTER, LAURENCE R. DANZIGER, D.M.D., LAURENCE R. DANZIGER, D.M.D., P.C., LAURENCE R. DANZIGER, D.M.D. d/b/a UNIVERSAL DENTAL AND IMPLANT CENTER, ROBERT F. WINEGARDEN, D.D.S., ROBERT F. WINEGARDEN, D.D.S., P.C., JERRY LYNN, JERRY LYNN, D.D.S., P.C. JERRY LYNN, D.D.S., MARTIN FELDMAN, D.D.S., P.C.,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking to recover for dental malpractice, lack of informed consent, and violation of General Business Law (“GBL”) § 349, defendants Toothsaunders Dental Services, P.C. (“Toothsaunders”) and Sol S. Stolzenberg, D.M.D. (Dr Stolzenberg), Sol S. Stolzenberg, D.M.D., Dental Services, P.C., Sol S. Stolzenberg, D.M.D., P.C. (together “the Toothsaunders defendants”) move for an order granting reargument and renewal of the court’s decision and order dated March 30, 2017 (“the original decision”),¹ which denied the Toothsaunders defendants’ motion for

¹The original decision also addressed the separate summary judgment motions by defendants Laurence R. Danziger D.M.D., Laurence R. Danziger, D.M.D. P.C., and Laurence R. Danziger D.M.D. d/b/a Universal Dental Center a/k/a Universal Dental and Implant Center, and by defendant John Jungian Choi, D.D.S.

summary judgment and other relief, except to the extent of dismissing the claim against them for lack of informed consent.

Upon reargument, the Toothsavers defendants seek an order granting summary judgment dismissing the complaint and all the cross claims against them or, alternatively, granting partial summary judgment dismissing (i) the complaint against Dr. Stolzenberg, individually, (ii) the medical malpractice claim to the extent it is based on certain alleged departures, including allegations of unlicensed treatment, (iii) malpractice claims as to all treatment after Toothsavers defendants' purported sale of the dental practice in January 2012, (iv) the GBL § 349 claim, and (v) claims alleging reckless disregard and seeking punitive damages. The Toothsaver defendants also seek an order permitting the Toothsaver defendants to limit their liability under Article 16 based on the conduct or omissions of defendant John Jungian Choi, D.D.S. ("Dr. Choi").

Plaintiff opposes the motion, except that at oral argument plaintiff acknowledged that Dr. Stolzenberger is not individually liable to plaintiff and that certain departures alleged in the Bill of Particulars do not provide a basis for the Toothsavers' defendants' liability.

Background

This action arises out of plaintiff's dental treatment by defendants in connection with the teeth on her upper jaw, between July 2011 and May 2013. Such treatment involved the extraction of four teeth (teeth nos. 7,8,10, and 12), the insertion of eight implants (teeth nos. 3, 4, 5, 7, 11, 12, 13 and 14), and the placement of a temporary bridges, and a permanent bridge. There is evidence in the record in the form of deposition testimony that the Toothsavers defendants sold the dental practice to defendants Laurence R. Danziger D.M.D. (Dr. Danziger), Laurence R. Danziger, D.M.D. P.C., and Laurence R. Danziger D.M.D. d/b/a Universal Dental Center a/k/a

Universal Dental and Implant Center, (“the Danziger practice”)(together “the Danziger defendants”) as of January 1, 2012, and that the Danziger practice was transferred to defendant Robert F. Winegarden, D.D.S. (“Dr Winegraden”) in or about May 17, 2013, after Dr. Danziger was dismissed from the practice.

Plaintiff, an immigrant from Hungary, first went to Toothsavars on July 15, 2011, after seeing a Toothsavars’ advertisement for implants totaling \$999 each, and was examined by Toothsavars’ employee, Dr. Winegarden. The Toothsavars defendants’ dental records show that Dr. Winegarden’s initial examination revealed the presence of a lower fixed implant supported bridge, without remaining teeth in the lower jaw. In the upper jaw was a fixed bridge supporting teeth nos. 7,8,10 and 12. The upper fixed bridge was removed, impressions obtained and a temporary bridge fabricated. The dental records note that the lower bridge had an occlusal plane that slanted from right to left. Dr. Winegarden’s treatment plan consisted of removing the existing upper bridge, making a temporary bridge over teeth nos. 7,8,10 and 12 and then placing upper implants, and subsequently evaluating the remaining teeth for additional implants and extractions.

According to plaintiff, at the appointment, Dr. Winegarden hammered out and broke her existing upper bridge, took x-rays, conducted an examination, and informed plaintiff she would need ten implants. He quoted her a price of \$10,000 which then went up to \$12,000 without explanation.

Defendant Mitchell Lynn, who is not a dentist, worked as a "treatment coordinator" for Dr. Stolzenberg and Toothsavars, and presented "treatment options and financial plans" to patients (Mitchell Lynn, EBT. 11-12). Plaintiff testified that while plaintiff was sitting in the

examination chair without a bridge in her mouth and unable to leave, Mr. Lynn pressured her husband into obtaining a “no interest” credit card to cover the cost of her dental work (Plaintiff’s 10/7/14 EBT at 32; Plaintiff’s 11/6/14 EBT at 110, 112-113). Plaintiff’s husband accepted, but it is alleged that he later learned that \$10,000 had been charged to Enhance Patient Financing, along with a \$59.00 fee. Plaintiff testified that her husband also learned that, contrary to what he had been told by Mitchell Lynn, this card was not “no interest,” but rather had an introductory rate of 14.90%, which later rose to approximately 29% a year (Plaintiff’s 10/7/14 EBT at 32; Plaintiff’s 11/6/14 EBT at 112-114). After plaintiff’s husband called to complain about the charges, an unidentified person from Toothsavvers wrote a letter dated July 25, 2010, stating that the \$10,000 had been returned; however, plaintiff maintains that the refund never occurred (Plaintiff’s 11/6/14 EBT at 112). Plaintiff testified that once the financing had been secured, Dr. Winegarden left the room and had an unsupervised technician make a temporary bridge, and then put the bridge back in, and that the temporary bridge fell out sometime in July or August 2011.

On August 26, 2011, Dr. Choi. placed Titan dental implants under anesthesia at teeth nos. 3, 4, 5, 11, 13 and 14 and Stage two of plaintiff’s treatment² was planned for February, followed by the insertion of final abutments (i.e. posts that are screwed into the implants) and evaluation for a second round of treatment. Plaintiff further testified that on that date she saw a technician who “put back the bridge that was broken,” and that she did know the name of the technicians who repaired her bridge other than a young man who was the “supervisor among the technicians” (Id at 41-42).

²As explained by the Danziger defendants’ expert the second stage “involves the uncovering of the implants through incision in the gum tissue removing any healing caps and placing abutments.”

The dental records show that on February 28, 2012, plaintiff was seen by Dr. Winegarden, who took a panoramic x-ray, and noted that the treatment plan was for final abutments followed by evaluation for extractions. On March 29, 2012, plaintiff was seen by Dr. Danziger, D.M.D., who extracted teeth #7 and 10 and uncovered the implants and placed the final abutments on teeth #3, 4, 5, 11, 13 and 14. On May 24, 2012 plaintiff was again seen by Dr. Choi, who extracted tooth #12 and placed two more fixtures at #7 and #12.

In or about June 2012, plaintiff testified that she started to go to Toothsavvers on a regular basis “because the bridges they were placing kept breaking, ... [and that she] “went back very many times, every time [she] was seen by some other technician [and that the technicians] were fixing the bridge over many hours.” (Plaintiff’s 11/6 /14 EBT at 51-52). Plaintiff continued to treat at Toothsavvers during the remainder of 2012, and from January to May 28, 2013, and testified that during this period of treatment, she was having extensive issues with the bridge continually breaking, for which she was going to Toothsavvers regularly and would be seen and treated only by technicians and not by dentists. When asked what kind of treatment the technicians provided she testified that “[t]hey were always doing the same. The bridge was broken, they were taking it out, they were gluing it back together and placing it in my mouth.” (Id at 55).

Following the completion of discovery, the Toothsaver defendants moved for summary judgment dismissing the complaint against them or, in the alternative, for partial summary judgment dismissing (i) the complaint against Dr. Stolzenberg, individually, (ii) the medical malpractice claim to the extent it is based on certain alleged departures, including allegations of unlicensed treatment, (iii) malpractice claims as to all treatment after Toothsavvers’ purported sale

of the dental practice in January 2012, (iv) the GBL § 349 claim, and (v) claims alleging reckless disregard and seeking punitive damages. The Toothsaver defendants also sought to limit their liability under Article 16 based on the conduct or omissions of Dr. Choi.

The original decision denied the Toothsaver defendants' summary judgment motion, except for dismissing plaintiff's claim for lack of informed consent. The court also precluded the Toothsaver defendants (and other defendants) from limiting their liability under Article 16 based on the conduct or omissions of Dr. Choi as the court had granted summary judgment dismissing the claims against him.

Motion to Renew and Reargue

The Toothsavers defendants now move for renewal and reargument of the original decision and, upon renewal and/or reargument, seek full or partial summary judgment, and/or an order permitting them to limit their liability at trial under Article 16 based on the conduct or omissions of defendant Dr. Choi.³

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted). As plaintiff cites no new facts or additional evidence not known to plaintiff at the time

³The Toothsavers defendants also argue that they cannot be held vicariously liable for Dr. Choi's treatment. Notably, however, they concede that plaintiff does not seek to hold them liable for such treatment and as the complaint was dismissed against Dr. Choi and the court found that he was not liable to plaintiff, there can be no vicarious liability arising from Dr. Choi's treatment of plaintiff.

of the original motion, renewal is denied.⁴

A motion for reargument, is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

In connection with the motion to reargue the denial of their summary judgment motion, the Toothsavers defendants argue that the court erred in finding sufficient evidence to provide a basis for Dr. Stolzenberg’s individual liability; in determining that they were potential liable for treatment received by plaintiff after the sale of the Toothsavers’ practice on January 1, 2012; in holding that they were subject to vicarious liability for the acts or omissions of the individual dentists and technicians who were independent contractors and not employees of the practice; and in deciding that there was sufficient evidence to support the departures alleged in the Bill of Particulars.

As for Dr. Stolzenberg’s individual liability, reargument should be granted as the original decision did not address his potential liability and, upon reargument, the court finds that the claims against Dr. Stolzenberg must be dismissed since, as acknowledged by plaintiff at oral argument, the record is devoid of evidence that Dr. Stolzenberg treated plaintiff.

As for the Toothsavers defendants’ argument that they are not subject to liability for

⁴The Toothsavers defendants have also not shown a change in the law that would affect the original decision’s determination. See CPLR 2221(e)(2); Dinallo v. DAL Electric, 60 AD3d 620, 621 (2d Dept 2009)

plaintiff's treatment occurring after the purported sale of the practice to Dr. Danziger on January 1, 2012, the original decision correctly found that the Toothsavers defendants had not submitted sufficient evidence to demonstrate the validity of the sale as a matter of law.⁵ In support of its determination, the court noted that Dr. Danziger testified that he did not pay for the practice,⁶ which continued using Dr. Stolzenberg's name and license for insurance billing, Dr. Stolzenberg received a weekly paycheck after the practice was transferred, and that a consent form plaintiff signed on May 29, 2012, after the purported sale and transfer of the practice, identified the practice as "Toothsavers." The court also correctly found that while Toothsavers defendants submitted documentary evidence that Toothsavers was dissolved on March 20, 2012, such dissolution did not eliminate Toothsavers defendants' potential liability, particularly as the record did not establish the validity of the transfer or the lack of the Toothsavers defendants' connection to the "new practice." See Ford v. Pulmosan Safety Equipment Corp., 52 AD3d 710, 711 (2d Dept 2008)(noting that "a dissolved corporation may ...be sued," citing Business Corporation Law § 1008).

With respect to the court's finding that issues of fact exist as to whether the Toothsavers defendants can be held vicariously liable for the alleged malpractice/negligence of the dentists

⁵As noted in the original decision, Toothsavers defendants failed to submit any documentary evidence supporting the purported sale of the practice and, instead, relied on Dr. Stolzenberg's deposition testimony and affidavit, as well as the deposition testimony of Dr. Danziger.

⁶While the Toothsavers defendants assert that "there is no requirement of an exchange of remuneration" for an entity to assume ownership of the practice, citing Schumacher v. Richards Shear Co., 59 NY2d 239 (1989), the court did not hold that payment was a requirement but, rather that evidence that Dr. Danziger did not pay for the practice was one factor tending to show that sale of the practice was invalid.

and technicians, the Toothsavers defendants assert that the court erred as vicarious liability cannot apply once the Toothsavers practice was transferred to the successor practice. In support of this assertion, the Toothsavers defendants cite two inapposite cases, Schumacher v. Richards Shear Co., 59 NY2d at 244-245 and Schoenwandt v. Jamfro Corp., 261 AD2d 117 (1st Dept 1999). Schumacher stands for the proposition that a corporation that acquires the assets of another corporation is generally not liable for the torts of its predecessor; however, in this case, Toothsavers is the predecessor corporation; while Schoenwandt, is inapplicable as it holds that the relationship between franchisor and franchisee is insufficient to impose liability on franchisor for plaintiff's injury at a restaurant operated by the franchisee.

As for Toothsavers defendants' argument that they cannot be held vicariously liable for the alleged malpractice/negligence of the dentists and technicians at Toothsavers since they were independent contractors and not employees of the practice, such argument is without merit. As found in the original decision, the record raises triable issues of fact as to the Toothsavers defendants' vicarious liability, since the Toothsavers defendants have not met their burden of demonstrating that the dentists and technicians were independent contractors. See Chan v. Toothsavers Dental Care, Inc., 125 AD3d 712, 713 (2d Dept 2015)(denying Toothsavers' motion for summary judgment where Toothsavers failed to establish prima facie that the treating dentist was an independent contractor such that Toothsavers was not vicariously liable for the dentist's acts); Erdorgan v. Toothsavers Dental Services, 57 AD3d 314, 315 (1st Dept 2008)(same).

In addition, the court also correctly found that the vicariously liability potentially exists under a theory of agency by estoppel based on evidence that plaintiff reasonably believed that her treatment was provided by employees of Toothsavers. Specifically, the court pointed to

plaintiff's testimony that she went to Toothsavvers based on an advertisement for Toothsavvers, and not because of any particular dentist, that she did not know the names of the technicians who worked at Toothsavvers repaired and replaced the bridge, that only one dental chart was kept for plaintiff during her dental treatment, and that the chart did not specify whether the treatment was performed by an independent contractor or an employee, such as Dr. Winegarden. See Hampton v Universal Dental, 140 AD3d 462, 462 (1st Dept 2016)(issues of fact existed whether Toothsavvers NY was vicariously liable for the malpractice of Toothsavvers NJ based on a theory of agency by estoppel where evidence existed showing that "plaintiff reasonably believed that the orthodontic treatment provided to him was by Toothsavvers NY, albeit in a satellite New Jersey office, rather than on referral to a different practice altogether, and the Toothsavvers defendants failed to establish that the dentists and technicians at issue were employees as opposed to independent contractors").⁷

The Toothsavvers defendants next argue that various alleged departures providing the basis for the malpractice claim against them were not supported by sufficient evidence including

⁷Contrary to the Toothsavvers defendants' argument, as the parties moving for summary judgment, the Toothsavvers defendants have the burden of demonstrating that they were not vicariously liable for the alleged acts and omissions of the dentists and technicians working at its practice. See Chan v. Toothsavvers Dental Care, Inc., 125 AD3d at 713 Moreover, the cases cited by the Toothsavvers defendants in support of this argument are not controlling here, including Phoenix Elec, Contracting, Inc v. Lehr Const. Corp, 219 AD2d 467 (1st Dept) lv denied 87 NY2d 805 (1995), which addresses a defendant contractor's burden at trial of proving the actual authority of a plaintiff subcontractor's employee. As for Gardner v. Brookdale Hosp Med Center, 73 AD3d 1124 (2d Dept 2010), that case involves the issue of a hospital's liability for the alleged malpractice of a private physician in which the court held that evidence that the plaintiff/patient did not request a specific doctor did not create an issue of fact as hospital's liability. Here, in contrast, the treatment at issue was not provided by a plaintiff's private dentist, and the record raises issues of fact as to whether plaintiff reasonably believed the persons who provided treatment were employed by the defendants.

departures related to “exam, diagnosis and treatment plan,” “premedication,” “implants” “crown and bridgework,” “extractions,” “periodontal,” “hiring, retaining, supervising qualified dentists,” and “unlicensed treatment,” “record keeping” and “abandonment.” In the original decision, the court noted that certain departures were not supported by the opinion of plaintiff’s expert and were considered abandoned and these departures include those related to “exam and diagnosis,” “premedication,” “periodontal” and “hiring and retaining qualified dentists, and “extraction” As for the departure related to record keeping, the original decision held that this alleged departure did not provide a basis for a malpractice claim against the Toothsavers defendants as although plaintiff’s expert opined that dental chart provided incomplete information, the record was devoid of evidence that any departure in this regard was a substantial factor causing plaintiff’s injuries. That said, to the extent the original decision was unclear in this regard, reargument is granted and, upon reargument, that court clarifies that the above identified departures do not provide a sufficient basis for plaintiff’s malpractice claim.

As for the remaining departures, the original decision correctly found that the record raises issues of fact as to whether they provide a basis for a malpractice claim against the Toothsavers defendants. As for the implants and crown and bridge work, which was performed by Toothsavers’ employee Dr. Winegarden, the court found that issues of fact were raised as to whether Dr. Winegarden departed for accepted dental practice in failing to properly place and align the bridge in plaintiff’s upper jaw.⁸ The court also correctly found that plaintiff’s expert

⁸Specifically, plaintiff’s expert opined that these departures included the placement of the bridge with inadequate freeway space and inadequate embrasures, the failure to properly align the bridge with plaintiff’s facial midline, and to fully seat the bridge onto the abutments of the implants.

raised triable issues of fact as to whether the Toothsav­ers defendants' use of unlicensed dental technicians was a departure, and contrary to the Toothsav­ers defendants' argument, and as noted in the original decision, there is evidence supporting this departure, including plaintiff's deposition testimony, that such technicians placed bridges in plaintiff's mouth. As for the related departure alleging abandonment of a patient and leaving her with a technician, although not expressly stated in the original decision, plaintiff's expert opinion is sufficient to raise an issue of fact in this regard. With respect to the departure related to Dr. Winegarden's treatment plan, plaintiff's expert raised triable issues fact as to this departure based on his opinion that Dr. Winegarden's treatment plan deviated from the standard of care as it provided for the replacement of the upper bridge first to match a defective lower bridge.

As for the GBL § 349 claim, the Toothsav­ers defendants argue that the court failed to consider factors that would mandate the dismissal of plaintiff's claim under GBL § 349, which makes it unlawful to perform "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

As noted in the original decision, plaintiff's GBL § 349 claim is based on allegations and evidence that plaintiff was deceived and misled into using the defendants' dental services by a false advertisement of \$999 for implants, crowns and abate­ments, and the Toothsav­ers defendants deceived her into financing her dental work through applying for a credit card at the behest of the Toothsav­ers defendants, by misrepresenting that it was a no-interest loan and by failing to inform her that she would be required to pay a fee, and charged \$10,000 as an up-front payment for dental work not yet performed by the Toothsav­ers' defendants.

To have a viable claim under GBL § 349, a plaintiff must allege that the defendant

engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.” Small v. Lorillard Tobacco Co., 94 NY2d 43, 55 (1999)(internal citations and quotations omitted). Deceptive or misleading representations or omissions are defined as those “likely to mislead a reasonable consumer acting reasonably under the [plaintiff’s] circumstances.” Solomon v. Bell Atlantic Corp., 9 AD3d 49, 52 (1st Dept 2004)(internal citations and quotations omitted). The deceptive act or practice must be “the actual misrepresentation or omission to a consumer,” Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 325 (2002), by which the consumer is “caused actual, although not necessarily pecuniary, harm.” Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20, 26 (1995).⁹

On this reargument motion, the Toothsavers defendants argue, as they did in connection with their original motion, that the GBL § 349 claim is without merit, as the financing of patient’s fees and advertising was done through an outside companies unconnected to the Toothsavers’ defendants, and that neither the advertisement or the loan agreement were fraudulent. Toothsavers also argues that since the loan papers were signed by plaintiff’s husband who has a masters degree in economics, it cannot be said that the practices are “deceptive” or

⁹In the original decision, the court rejected the Toothsavers defendants’ argument that the conduct was not consumer oriented, pointing to evidence that advertisements aimed at the public were used in connection with the false claim as to the cost of plaintiff’s treatment. With respect to the financing scheme, the court found that plaintiff had met her burden of showing that the scheme was not a private transaction but one which affected consumers at large by submitting evidence that approximately a year before her treatment by Toothsavers defendants, the Attorney General of the State of New York investigated Toothsavers and other health care providers based on complaints from consumers with respect to deceptive practices related to the financing of health care services. The Toothsavers defendants appear not to challenge this finding on this reargument motion.

fraudulent and that plaintiff was not sure the advertisement in the record was the one she saw before going for treatment at Toothsavvers.

These arguments are without merit since, as found in connection with original decision, the record, including plaintiff's testimony that she was charged more than the advertised fee for the work performed and that the misleading statements were made in connection with financing her dental work, are sufficient to raise issues of fact as to the fraudulent and deceptive nature of Toothsavvers defendants' conduct, and plaintiff's husband's education level is irrelevant in this regard. Furthermore, contrary to the Toothsavvers defendants' position, that the deceptive conduct involved third-parties does not negate their potential liability for their alleged participation in this conduct. Moreover, that plaintiff was uncertain as to the exact content of the advertisement that lead her to Toothsavvers is insufficient to eliminate Toothsavvers defendants' potentially liability as plaintiff testified that the advertised fee was less than the amount charged by Toothsavvers. In addition, it cannot be said as a matter of law that plaintiff was not damaged as a result of the fraudulent conduct.

With respect to the Toothsavvers defendants' request for summary judgment dismissing plaintiff's claim for punitive damages, the court noted in the original decision that neither the complaint nor the bill of particulars includes a request for punitive damages., and made no determination with respect to whether punitive damages are appropriate based on evidence that technicians fabricated, placed and adjusted the bridge.

The Toothsavvers defendants argue that the court erred in failing to preclude punitive damages as the record is insufficient to raise an issue of fact as to whether plaintiff received treatment from "unlicensed technicians," and plaintiff cannot recover punitive damages since

they were not sought in the complaint or bill of particulars. Contrary to the Toothsavers defendants' first argument, and as indicated above, the record, including plaintiff's testimony, raises factual issues as to the Toothsavers defendants' use of unlicensed technicians to perform dental work on plaintiff including the removal and placement of bridges. Moreover, as noted in the original decision, the use of such unlicensed technicians has been held to raise a jury issue as to the recovery of punitive damages. See Garber v. Lynn, 79 AD3d 401, 403 (1st Dept 2010)(question of punitive damages was properly submitted to jury based on evidence that Toothsavers allowed "the unlicensed (individual) to place, adjust and remove plaintiff's temporary bridge").

As to whether punitive damages are recoverable when they have not been pleaded, as the original decision did not address this issue reargument is granted and, upon reargument, the court adheres the original decision as to punitive damages. While plaintiff has not moved to amend to assert a demand for punitive damages, it is well settled that "a motion to amend may be made and granted at any stage of a proceeding 'absent prejudice or surprise resulting directly from the delay.'" including on the eve of trial. Persaud v. New York Presbyterian Hosp., 18 Misc3d 767, 772 (Sup Ct NY Co. 2007), quoting McCaskey, Davies and Associates, Inc. v. New York City Health and Hospitals Corp, 59 NY2d 755, 757 (1983); see also Pietras v. Gol Pak Corp, 131 AD2d 239, 243 (4th Dept 1987)(finding that "defendant's argument that plaintiff's ad damnum clause does not specifically contain a prayer for punitive damages is irrelevant since plaintiff may amend the ad damnum clause of his complaint to include a demand for punitive damages against

these defendants”).¹⁰

While plaintiff has not sought to amend to include a demand for punitive damages, the court notes that the allegations in the complaint and the bill of particulars as to the use of unlicensed technicians and reckless conduct, including that they acted with reckless disregard for the safety of others, provide a basis for finding that the Toothsavers defendants were on notice of a potential demand for punitive damages. See e.g. Persaud v. New York Presbyterian Hosp., 18 Misc3d at 772 (permitting plaintiff to amend complaint to add punitive damage demand on eve of trial where “the specific allegations in the complaint and bill of particulars as to defendants’ conduct and the characterization of that conduct were sufficient to put the defendants on notice of a potential punitive damages claim”); See Garber v. Lynn, supra. Accordingly, the court adheres to the determination in the original decision which denied the Toothsavers’ request to strike the reckless disregard for public safety which provide a potential basis for a demand for punitive damages.

The Toothsavers defendants next argue that the original decision incorrectly precluded

¹⁰The cases relied on by the Toothsavers defendants are not controlling here. Heller v. Provenzano, Inc., 303 AD2d 20 (1st Dept 2003), involved a personal injury action in which plaintiff was injured after he tripped and fell while exiting a freight elevator. The First Department found that a proposed amendment to include punitive damages after the original verdict was overturned on appeal would be prejudicial as “[u]nlike a claim for negligence, to establish ... punitive damages, plaintiff must demonstrate that the wrong to [him] rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations.” *Id* at 22 (internal citations and quotations omitted). In contrast, here, as noted above, the punitive damages are potentially recoverable based on allegations of the Toothsavers defendants’ use of unlicensed technicians, and that those allegations were part of the complaint and bill of particulars. As for Fiesel v. Nanuet Props Corp., 125 AD2d 292, 292 (2d Dept 1986), that case is also inapposite since the Second Department upheld the trial court’s denial of the motion to amend to add a punitive damage claim on the ground that “a demand for punitive damages does not amount to a separate cause of action for pleading purposes” and that the complaint lacked sufficient basis for assertion of such damages.

them from limiting their liability based on Dr. Choi's alleged conduct or omissions pursuant to Article 16 of the CPLR. As found in the original decision, contrary to the Toothsavers defendants' objection, the absence of a formal cross-motion is not fatal to plaintiff's request, as the relief was clearly set forth in plaintiff's opposition papers, and the Toothsavers defendants were fully aware of the request, expressly opposed it and therefore cannot claim surprise or prejudice based on plaintiff's failure cross move for relief. See Pokoik v. Pokoik, 146 AD3d 474 (1st Dept 2017); Rappel v. Wincoma Homeowners Ass'n, 125 AD3d 833 (2nd Dept 2015).

Moreover, contrary to the Toothsavers defendants' position, precluding them from the limiting of their liability based Dr. Choi's conduct is not akin to holding them vicariously liable for his conduct or omissions since Dr. Choi is not subject to liability as summary judgment was awarded in his favor and the complaint and all cross claims asserted against him were dismissed. Furthermore, under these circumstances, that court correctly precluded Dr. Choi's co-defendants, including the Toothsavers defendants, from limiting their liability pursuant to CPLR Article 16 based on the alleged acts or omissions of Dr. Choi. See Carmona v. Mathisson, 92 AD3d 492 (1st Dept 2012)(reversing trial court which included defendant on verdict sheet after claims against that defendant were dismissed on a summary judgment motion); Johnson v. Peloro, 62 AD3d 955 (2nd Dept 2009)(finding that trial court erred in denying plaintiff's cross-motion to preclude defendants from limiting their liability pursuant to CPLR Article 16 based on the acts or omissions of the defendants against which the complaint had been dismissed)

Conclusion


In view of the above, it is

ORDERED that Toothsavers defendants' motion to reargue is granted to the extent set

forth above, and upon reargument, the court adheres to the original decision except insofar as dismissing the complaint against defendant Dr. Sol Stolzenberg, D.M.D, and clarifying that departures in the bill of particulars related to “exam and diagnosis,” “premedication,” “periodontal,” “hiring and retaining qualified dentists”, “extraction” and “ record keeping” do not provide a basis for liability; and it is further

ORDERED that the parties shall appear for a previously scheduled pre-trial conference on October 11, 2018 at 10 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: September 21, 2018



J.S.C.

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