

Lopez v Fryd

2019 NY Slip Op 31048(U)

April 10, 2019

Supreme Court, Kings County

Docket Number: 515212/2017

Judge: Genine D. Edwards

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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 10th day of April 2019.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

-----X
ESTHER LOPEZ,

Plaintiff,

Index No. 515212/2017

-against-

DECISION/ORDER

MURRAY FRYD, DDS,

Defendant.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

In this action for dental malpractice, defendant moves: (1) pursuant to CPLR 214-a, CPLR 3211(a)(5) and CPLR 3212; to dismiss all allegations for treatment rendered prior to February 7, 2015 on the grounds that any such claims are time-barred by the applicable statute of limitations; (2) pursuant to CPLR 3212, granting summary judgment and dismissing plaintiff's cause of action sounding in dental malpractice as to the remaining dates of treatment; (3) pursuant to CPLR 3212, granting summary judgment and dismissing the plaintiff's cause of action sounding in lack of informed consent; and (4) dismissing the plaintiff's complaint in its entirety and directing the Clerk of Court to enter judgment in favor of defendant.

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Factual Background

Plaintiff has an extensive treatment history with defendant. On March 26, 2005, defendant extracted plaintiff's teeth nos. 3 and 4. Plaintiff returned for treatment on two occasions in 2005. From December 1, 2011 through May 17, 2012, plaintiff returned for emergency treatments. On June 28, 2012, defendant prepared a bridge for plaintiff's teeth nos. 20 and 21. Two months later, plaintiff presented with a fracture of tooth no. 21. Consequently, defendant extracted that tooth and prepared tooth no. 22 to act as an abutment for the bridge that would now span from teeth nos. 18 through 22. Defendant attempted to cement the bridge in October and November of 2012. Plaintiff returned on January 12, 2013 for an examination, during which defendant advised plaintiff to exercise better oral hygiene around the bridge.

On May 23, 2013, defendant placed a filling in plaintiff's tooth no. 28. Nearly three months later, plaintiff presented to defendant, who noted cavities in teeth nos. 28 and 30, and recommended a root canal. The root canal of tooth no. 28 was performed on August 21, 2013. A post and core crown¹ was placed on the same tooth on September 12, 2013. On October 10, 2013, defendant placed a filling in plaintiff's tooth no. 23. Two days later, plaintiff presented to defendant due to recurrent decay in tooth no. 18. After splitting the bridge and attempting to save the tooth, defendant removed tooth no. 18 and left the rest of the bridge spanning from teeth nos. 19-22 intact. On November 6, 2013, defendant filled in plaintiff's teeth nos. 8 and 9. The following week, defendant began performing root canal on tooth no. 30, which he completed on January 2, 2014. Defendant placed crowns on plaintiff's teeth nos. 28 and 30; he commenced the work on January 8, 2014 and finished on January 15, 2014. Over the course of the next six months,

¹ A type of dental restoration required where there is an inadequate amount of sound tooth tissue remaining to retain a conventional crown. A post is cemented into a prepared root canal, which retains a core restoration, which retains the final crown.

defendant placed fillings in plaintiff's teeth nos. 19, 31, 9 and 6. After February 7, 2015, defendant placed fillings in plaintiff's teeth nos. 27, 29, 31, 6, 7, 8 and 9; placed crowns on teeth nos. 11 through 13; and performed root canals and placed post and core crowns on teeth nos. 29, 5, 13 and 11. Defendant also placed a bridge on plaintiff's teeth nos. 4, 5 and 6. Plaintiff's last visit with defendant was on November 30, 2016.

Procedural Background

Plaintiff commenced this action for dental malpractice on August 7, 2017, alleging that defendant failed to provide appropriate treatment and failed to diagnose and treat decay and periodontal problems. The note of issue was filed on May 15, 2018. Defendant filed this motion on July 11, 2018.

Defendant asserts that any treatment that pre-dates February 7, 2015 is time-barred pursuant to the applicable statute of limitations. Through his dental expert, defendant alleges that he did not deviate from the standard of care and that any act or omission was not the proximate cause of plaintiff's injuries. Additionally, defendant argues that plaintiff is unable to make a prima facie showing as to informed consent because there is insufficient proof that a reasonable person in plaintiff's position would have declined the procedures. Lastly, defendant states that the procedures did not proximately cause plaintiff's injuries.

In opposition, plaintiff contends that defendant did not address all the allegations in the bill of particulars and submitted a conclusory and unsupported expert affirmation. According to plaintiff, the treatment provided by defendant from 2012 through 2015 were part of a continuous course of treatment.

In reply, defendant maintains its previous positions and rebuts any claims of failing to address allegations from plaintiff's bill of particulars as well as the claims of conclusory expert opinions. Defendant proffers that the continuous treatment doctrine does not apply.

Discussion

Pursuant to CPLR 214-a, "an action for medical, dental, or podiatric malpractice must be commenced within 2 years and 6 months of the act, omission or failure complained of." However, the statute allows for a delay in the running of the statute of limitations "where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure." Under the continuous treatment doctrine, the statute of limitations does not begin to run until the end of the course of treatment, "when the course of treatment which includes wrongful acts or omissions has run continuously and is related to the same original condition or complaint." *Gomez v. Katz*, 61 A.D.3d 108, 874 N.Y.S.2d 161 (2d Dept. 2009). The defendant has the initial burden of establishing the applicability of the statute of limitations. *Marks v. Model*, 53 A.D.3d 533, 862 N.Y.S.2d 533 (2d Dept. 2008). Thereafter, the plaintiff must raise a triable issue of fact by showing that the continuous treatment doctrine applies, and thus, tolls the statute of limitations. *See Nespola v. Strang Cancer Prevention Center*, 36 A.D.3d 774, 828 N.Y.S.2d 494 (2d Dept. 2007).

In this instance, defendant made a prima facie showing of his entitlement to judgment as a matter of law by demonstrating that the claims that pre-date February 7, 2015 were time-barred. The burden shifted to plaintiff, who raised an issue of fact with respect to the bridge that spanned teeth nos. 18, 19, 20, 21 and 22. The dental records indicate that defendant began preparing said bridge in June of 2012 then worked on the bridge and some of the underlying teeth in 2013 and 2015. The nature, context and timeliness of the contacts between plaintiff and defendant present

issues of fact with respect to the applicability of the continuous treatment doctrine. *Zito v. Jastremski*, 58 A.D.3d 724, 871 N.Y.S.2d 717 (2d Dept. 2009).

On a motion for summary judgment, the movant has the burden of establishing, prima facie, either that there were no deviations or departures from the applicable standard of care or that any alleged departures did not proximately cause the plaintiff's injuries. *Shashi v. South Nassau Communities Hosp.*, 104 A.D.3d 838, 961 N.Y.S.2d 307 (2d Dept. 2013). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in plaintiff's bill of particulars. *Parilla v. Sapphire*, 149 A.D.3d 856, 51 N.Y.S.3d 596 (2d Dept. 2017); *Terranova v. Finklea*, 45 A.D.3d 572, 845 N.Y.S.2d 389 (2d Dept. 2007); *Berkey v. Emma*, 291 A.D.2d 517, 738 N.Y.S.2d 250 (2d Dept. 2002). Once the defendant establishes its burden, the burden then shifts to plaintiff to submit evidentiary facts or materials to rebut the prima facie showing by the defendant. *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011). Summary judgment is not appropriate in a dental malpractice action where the parties adduce conflicting medical expert opinions. *Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014). Lastly, where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion should be given no probative value. *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 754 N.Y.S.2d 195 (2002).

Here, defendant failed to establish its prima facie entitlement to judgment as a matter of law with respect to plaintiff's claim of dental malpractice. Specifically, defendant's dental expert's affirmation repeatedly recounted the treatment provided by defendant and then opined in a conclusory fashion that such treatment did not depart from the standard of care. *See Couch v. County of Suffolk*, 292 A.D.2d 194, 746 N.Y.S.2d 187 (2d Dept. 2002); *Yaegel v. Ciuffo*, 95 A.D.3d 1110, 944 N.Y.S.2d 601 (2d Dept. 2012). Moreover, defendant's expert failed to address all the

allegations in the bill of particulars. Specifically, defendant's expert was silent regarding the allegations of failing to perform indicated root canal treatments, causing and/or ignoring a fractured post, and ignoring decay. *See Terranova*, 45 A.D.3d 572.

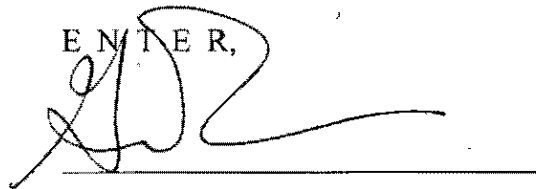
Nonetheless, defendant established entitlement to summary judgment with respect to plaintiff's informed consent claims. *See Bengston v. Wang*, 41 A.D.3D 625, 839 N.Y.S.2D 159 (2d Dept. 2007). Plaintiff failed to raise an issue of fact as to that allegation. *See Aronov v. Soukkary*, 104 A.D.3d 623, 960 N.Y.S.2d 462 (2d Dept. 2013).

Conclusion

Accordingly, defendant's summary judgment motion is granted only with respect to plaintiff's cause of action for informed consent and all causes of action regarding treatment provided prior to February 7, 2015, excluding the work done on teeth nos. 18, 19, 20, 21 and 22.

This constitutes the Decision and Order of this Court.

ENTER,



Genine D. Edwards
J. S. C.

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