

Mangat v Gitt

2019 NY Slip Op 34612(U)

December 18, 2019

Supreme Court, Nassau County

Docket Number: Index No. 605898/2017

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

HARDEV MANGAT,

Plaintiff,

-against-

DR. BRUCE GITT and MONDOVI DENTAL,

Defendants.

Index No. 605898/2017

Motion Submitted: 09/10/2019

Motion Sequence: 004

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X
- Answering Papers..... X
- Reply..... X
- Briefs: Plaintiff’s/Petitioner’s.....
- Defendant’s/Respondents.....

This motion by the plaintiff for an order pursuant to CPLR 3212 granting her summary judgment imposing liability on the defendants for her injuries is determined as provided herein.

The plaintiff in this action seeks to recover damages for dental malpractice. In her complaint and Bill of Particulars, she alleges that the defendants failed to diagnose and treat cancer in her mouth in the areas of teeth # 8 - # 11. The defendants’ alleged negligence allegedly caused the plaintiff to undergo significant treatment including surgery and radiation as well as to suffer extensive pain and suffering. The plaintiff presently seeks summary judgment holding the defendants liable for her injuries.

While the plaintiff alleges numerous theories of negligence in support of her motion, in particular regarding Teeth # 16, 17 & 31, only the claims advanced in her complaint and/or Bill of Particulars will be addressed here. New claims are not permitted at this juncture (*Anonymous v Gleason*, 175 AD3d 614, 617 [2d Dept 2019], quoting

Palka v Village of Ossining, 120 AD3d 641, 643 [2d Dept 2014] [“A plaintiff cannot, for the first time in [support of] a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars (citations omitted)”].

Succinctly put, the facts relevant to the determination of this motion are as follows:

The plaintiff began treating with the defendants in 1982, however, the defendants’ negligence is not alleged to have begun until 2014. The plaintiff testimony at her examinations-before-trial indicates that at her numerous visits between 2014 and 2016, she complained to the defendant Dr. Gitt (“the defendant”) and the Hygienist about the area around teeth #8 - #11 being irritated and bleeding when she brushed her teeth. She testified that as time progressed, she told the defendants that the area was red and white and getting bigger and that she reported that the area hurt. She testified that when she asked why she was having this problem, she was told because she was not brushing properly. She also testified that she sometimes made her appointments sooner than she otherwise would have because of this problem and that her May 2016 appointment was made solely to address it. Irritation including gingival irritation was in fact noted by the defendants on numerous occasions in the plaintiff’s chart and was acknowledged by the defendant at his examination-before-trial. The defendants routinely attributed the plaintiff’s complaints to her poor dental hygiene. She was routinely instructed to improve her brushing, to floss and to massage the area.

The plaintiff testified at her examination-before-trial that she made an appointment in August 2016 only a short while after her appointment in May due to increased bleeding and discomfort. There were now big bumps which were dark reddish with a little whiteish and was affecting her ability to eat. When the plaintiff presented at the defendants’ office on August 23, 2016, she was treated by Dr. Grandillo because the defendant was not in the office. It was noted that there was gingival *overgrowth* between teeth # 10 and # 11 and so Dr. Grandillo referred the plaintiff to a periodontist for evaluation and treatment. On September 29, 2016, the plaintiff saw periodontist Dr. Keith Hasday who evaluated her and referred her for a biopsy at Oral Pathology Lab. The plaintiff testified at her examination-before-trial that her mouth got significantly worse quickly following her referral to Dr. Hasday. On October 2, 2016, the Pathology Report revealed the presence of squamous cell carcinoma. The plaintiff was referred to Dr. Kutler at Weill Cornell New York Presbyterian Hospital. She underwent oral surgery, radiation and the removal of one lymph node.

The plaintiff alleges that the defendants were negligent in not referring her to a specialist and having cancer screening tests performed beginning in 2014 when she began

complaining of the area around teeth # 8 - #11 as that area is where the cancer was discovered. She alleges that her presentation and symptoms should have prompted referrals and/or additional testing years before that course was finally pursued.

“In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries (citations omitted)” (*Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). “[A] professional health care provider who moves for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries (citations omitted)” (*Matthis v Hall*, 173 AD3d at 1163). “Once the health care provider has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden (citations omitted)” (*Matthis v Hall*, 173 AD3d at 1163). “General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (citations omitted)” (*In Sook Choi v Doshi Diagnostic Imaging Services, P.C.*, 152 AD3d 750, 751-52 [2d Dept 2017]).

In support of her application, the plaintiff has submitted the affidavit of dentist Dr. Howard Marshall. He attests to having reviewed the pertinent medical records as well as the testimony given by the parties at their examinations-before-trial. All of his opinions are within a reasonable degree of dental medicine.

Dr. Marshall opines that the plaintiff's chart entry of March 17, 2014 reads: “Maxilla 8-1 has trauma on facia red raw.” He opines that this notation is consistent with the plaintiff's testimony that she told the dentist that that area was swollen and irritated. However, the plaintiff did not testify that her mouth was swollen or that she told the defendant that; She testified that she told the defendant that that area was bleeding when she brushed her teeth (Plaintiff's examination-before-trial, p. 50). In fact, she testified that she told the defendant this every time she saw him (Plaintiff's examination-before-trial, p. 53). She also testified that as of March 17, 2014, she felt like burning and a little bit of shooting pain like when you have pus in that area (Plaintiff's examination-before-trial, p. 52), but it is far from clear that she conveyed that information to the defendant. She also testified that it looked like a pimple and was white and red and that it got bigger in time (Plaintiff's examination-before-trial, p. 53). She testified that both the defendant and the hygienist told her that she needed to massage the area and floss, brush better and to take better care of her teeth (Plaintiff's examination-before-trial, p.50-61). Dr. Marshall opines that the defendants' care of the plaintiff that

day was a total departure from the standard of care. More specifically, he opines that an isolated red raw area in one part of a patient's mouth coupled with the plaintiff's complaints of irritation and swelling raises immediate concerns for cancer warranting immediate investigation, including referral for a diagnosis as well as follow up treatment. However, there is no testimony that she told the defendants that the area was swollen, rather, she testified that she believed that was why she was instructed to massage the area (Plaintiff's examination-before-trial, p. 67).

Dr. Marshall similarly opines that the entry on the plaintiff's chart on October 28, 2014, of "MAX ANT - GNG IRRITATION #8-#9-#10" is also consistent with the plaintiff's testimony that she continued to complain of irritation and swelling at that area. The plaintiff however did not testify as such. Rather, she testified that the area had gotten bigger and that she told the defendants that she was concerned about that area as it was bleeding more when she brushed her teeth and that it was "traveling" (Plaintiff's examination-before-trial, p. 63). She testified that she was again advised that she wasn't brushing properly and that she needed to massage the area and floss. Dr. Marshall opines that this was a continuing omission on the defendant's part: The development of gingival irritation also raised concern re cancer. Dr. Marshall opines that the finding of gingival irritation on teeth #8-#9-#10 should have prompted concerns of cancer and that that finding should have prompted "investigat[ion], diagnos[is] followed by treatment."

As for the entry on the plaintiff's chart of November 19, 2015 that "#8-#9 LOOKS BETTER." Dr. Marshall opines when coupled with the plaintiff's testimony that she told the defendants that she was still experiencing swelling and irritation, even this positive change warranted further investigation, diagnosis and a referral, followed by treatment. Once again, such testimony by the plaintiff is not reflected in the transcript of her testimony. While the defendant testified at his examination-before-trial that he did not recall any swelling or irritation in that area on that day, Dr. Marshall summarily discounts that testimony as unsupported by the plaintiff's chart.

Dr. Marshall notes that the plaintiff's chart entry of May 17, 2016 noted "Inflammation 9-11," which he opines is consistent with the plaintiff's testimony that she continued to complain of swelling and irritation at the same spot. However, again, testimony regarding swelling cannot be found in the transcript of plaintiff's examination-before-trial. Dr. Marshall notes that once again, the plaintiff was told that she wasn't brushing properly and that she needed to massage the area, brush better and to take better care of her teeth. Dr. Marshall opines that the same area had been bothering the plaintiff for over two and a half years and further investigation including referrals and diagnosis was warranted. While the defendant disagreed with the notation on the plaintiff's chart of "Inflammation at teeth #9 - 11" at his examination-before-trial, Dr. Marshall again summarily rejects that testimony as not supported by the plaintiff's chart.

Dr. Marshal notes that when the plaintiff saw Dr. Grandillo on August 23, 2016, because the defendant was not available, he noted that the plaintiff had “gingival *overgrowth* between 10 & 11 (emphasis added),” and referred her for a periodontal evaluation and treatment. Dr. Marshal notes that this is the same area that the plaintiff had complained about for years and was consistent with her continuing complaints of swelling and irritation. Again, the plaintiff did not testify that that area was swollen.

Dr. Marshall represents that the history that the plaintiff gave to Dr. Kutler was consistent with her history as he has described it. However, the plaintiff’s records from Dr. Kutler only reflect a history of significant problems in the area for several months beginning when she was seen by Dr. Grandillo, not for two and half years as Dr. Marshall has opined. Dr. Marshall opines that squamous cell carcinoma is the most frequent malignant neoplasm affecting the mouth and represents over 90 % of all oral malignancies. He opines that it frequently appears as gingival *overgrowth* and dentists should be aware of this to prevent morbidity and mortality. Dr. Marshall opines that the defendants’ treatment of this anterior inflammation was a total departure from the standard of care and that the failure to discover and diagnose and treat the cancer sooner caused it to spread to her lymph nodes.

Again, the plaintiff’s new theories of liability which were not set forth in her complaint and/or Bill of Particulars will not be considered here.

The plaintiff has not established her entitlement to summary judgment for numerous reasons. Critically absent from her submission are copies of the records relied on by her expert including both her medical records as well as the testimony provided at the examinations-before-trial. That alone warrants denial of her motion (*Zito v Jastremski*, 84 AD3d 1069, 1071 [2d Dept 2011]; *Werny v Roberts Plywood Co.*, 40 AD3d 977, 978 [2d Dept 2007]; *Thompson v Brown*, 167 AD3d 1310, 1312 [3d Dept 2018]; compare *Horton v Warden*, 32 AD3d 570, 572 [2006]).

Even were this vital procedural error overlooked in view of the defendants’ submissions of the pertinent records, the plaintiff has nevertheless failed to establish her entitlement to summary judgment. Many of Dr. Marshall’s opinions are based on facts not supported by the record., i.e., numerous references to testimony allegedly given by the plaintiff which cannot be located in the records submitted by the defendants. More importantly, while her expert opines that additional care was called for in light of her continuing symptoms, he refers to that additional care in the most general of terms as investigations, testing and diagnosis. He fails to specify what investigations or tests should have been done or how they could have resulted in an earlier diagnosis. More importantly, absent from his opinion is any conclusion that the absence of that additional care caused the plaintiff to sustain additional mental and/or physical injuries. That is,

the plaintiff via her expert has not established proximate cause between the defendant's alleged negligence and her injuries. Finally, the court is compelled to note that even the plaintiff's expert Dr. Marshall opines that gingival *overgrowth* is a classic sign of mouth cancer but there is not a scintilla of evidence that the plaintiff suffered from that condition before she was seen by Dr. Grandillo, at which time the proper course of treatment was undertaken.

In any event, assuming, arguendo, that the plaintiff has established her entitlement to summary judgment with respect to liability, the defendants have established the existence of material issues of fact requiring denial of the plaintiff's motion.

The defendants have submitted the affirmation of licensed dentist Dr. Robert Peskin. Having reviewed the pertinent medical and legal records -copies of which have all been submitted by the defendant- Dr. Peskin opines to a reasonable degree of dental certainty as follows:

Dr. Peskin opines that the care provided by the defendants and its staff conformed to the applicable dental standards and in any event, was not a proximate cause of her injuries.

As for the defendants' failure to investigate and act on the red raw area observed in the plaintiff's mouth on March 17, 2014, Dr. Peskin opines that no further investigation was warranted as that condition can be occasioned by many other sources that are not cancer and which are more likely the cause of the observed condition. He opines that the proper medical response to that condition was to educate the patient on home health care which the defendants undertook to do. He similarly opines that the findings of bleeding and irritation as testified to by the plaintiff do not require further actions by the doctor, either, as they are not unusual especially when the patient's oral care is not optimal. Dr. Peskin also opines that the plaintiff was given proper instructions at her visit on October 28, 2014, i.e. to floss and massage the irritated area and to take better care of her teeth. He opines that gingival irritation in one area of a patient's mouth is not pathognomonic of cancer. He strongly opines that not every patient with that condition need be sent to a specialist for a biopsy. Dr. Peskin disagrees strongly with Dr. Marshall's opinion that the fact that the plaintiff's mouth looked better on November 19, 2015 indicated that further investigation was warranted. He opines that a positive change does not necessarily require investigation, diagnosis or treatment.

Dr. Peskin opines that inflammation which was noted on the plaintiff's chart on May 17, 2015 is not necessarily consistent with swelling and irritation: They are all different conditions. As for the findings of inflammation, Dr. Peskin again opines that

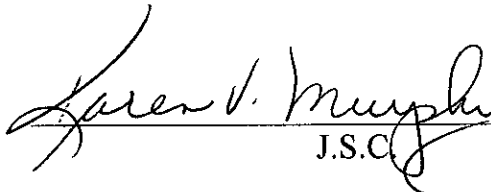
the proper course was followed here: the plaintiff was re-educated about her home dental hygiene.

Dr. Peskin notes that it was not until August 2016 that the plaintiff's condition was noted to have become "hypertrophic" between teeth # 10 and # 11 with gingival *overgrowth* and that that condition required investigation, referral and diagnosis, which was done. Dr. Peskin also disagrees with Dr. Marshall's opinion that squamous cell carcinoma represents over 90% of oral malignancies and citing a noted oral pathologist, opines that gingival cancers account for only 10% of intraoral squamous cell carcinomas. Furthermore, the risk is even more remote in the absence of an alcohol or tobacco habit of which there was no evidence here. Dr. Peskin opines that the August visit was considerably sooner than normal for the plaintiff which is evidence that there had been a significant change in her condition. In fact, Dr. Peskin notes that while Dr. Marshall noted the connection between gingival *overgrowth* and cancer, that condition did not exist in the plaintiff until August 2016, which led to the ensuing referrals and treatment. Dr. Peskin notes that Dr. Marshall's conclusion that there were "serious signs and symptoms" that were overlooked is conclusory and that the signs and symptoms of which we have evidence up until August 2016 consist of red, raw, irritated and inflamed areas of the plaintiff's mouth which are common and not signs of serious dental problems. Dr. Peskin also notes that Dr. Marshall's conclusion that the delay in diagnosis caused a need for further treatment including surgery and radiation is conclusory and totally lacking in explanation or support.

In conclusion, the court finds that the plaintiff did not meet her burden of establishing her entitlement to summary judgment imposing liability on the defendants. Assuming, arguendo, that she did, the defendants have established the existence of material issue of fact with respect to both negligence as well as causation. The plaintiff's motion is denied.

The foregoing constitutes the Order of this Court.

Dated: December 18, 2019
Mineola, NY


J.S.C.

ENTERED

DEC 19 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE