

Bennett v Drescher
2020 NY Slip Op 31698(U)
May 11, 2020
Supreme Court, New York County
Docket Number: 805146/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

JOAN BENNETT,
Plaintiff,

INDEX NO. 805146/2018

MOTION DATE

- v -

MOTION SEQ. NO. 3, 4

**EDWARD DRESCHER, D.D.S., MATHEW
GROSSMAN, D.D.S., AND KINGSTON DENTAL
ASSOCIATES,**

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED



Cross-Motion: Yes No

Under Motion Sequence 3, Defendant Kingston Dental Associates (“Kingston Dental”) moves for summary judgment dismissing Plaintiff Joan Bennett’s (“Plaintiff”) claims and allegations that arise prior to November 3, 2015 pertaining to teeth # 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 18, 19, 30, and 31 as time barred.

Under Motion Sequence 4, Defendant Matthew Grossman, D.D.S. (“Dr. Matthew Grossman”) moves to dismiss Plaintiff’s allegations of negligence, medical malpractice, and lack of informed consent against him for actions taken before November 2, 2015 as time-barred pursuant to CPLR § 3211(a)(5) and CPLR 214-a. Dr. Matthew Grossman also moves to dismiss all remaining claims of malpractice against him.

Plaintiff cross-moves for summary judgment against Dr. Matthew

Grossman, Dr. Edward Drescher, D.D.S. (“Dr. Drescher”) and Kingston Dental. Dr. Matthew Grossman, Dr. Drescher, and Kingston Dental Associates oppose Plaintiff’s cross motion.

Dr. Drescher does not move for summary judgment.

Facts

Dr. Matthew Grossman and his father Dr. Steven Grossman are dentists. Dr. Matthew Grossman is employed by Kingston Dental. Dr. Drescher is a board certified oral and maxillofacial surgeon. Dr. Drescher is an independent contractor brought in by Kingston Dental when needed.

Plaintiff first sought dental care from Kingston Dental on or about January 8, 1999. Between January 1999 and October 2014, Plaintiff was treated for tooth decay and had fillings on teeth numbers 1, 3, 4, 5, 6, 12, 20, and 21. During the same period, Plaintiff also had crowns placed and/or re-cemented on teeth numbers 2, 3, 6, 7, 8, 9, 10, 11, 13, 14, 15, 18, 19, 29, 30, and 31. Dr. Matthew Grossman and Dr. Steven Grossman were both involved in Plaintiff’s care during this time period.

Plaintiff continued to receive dental care from Kingston Dental from October 2014 through 2017. The following visits are relevant to Plaintiff’s claims in this action.

On January 16, 2017, Plaintiff presented to Kingston Dental Associates with complaints of food getting stuck between crowns of teeth #3 and 4. Additionally, the crown on tooth #13 had fallen out and was re-cemented in by Dr. Matthew Grossman.

On February 8, 2017, Plaintiff presented to Kingston Dental with crowns having fallen out of teeth #13 and 29.

On April 17, 2017, Plaintiff saw Dr. Steven Grossman for a root canal to tooth #13. Dr. Steven Grossman attempted the root canal but could not complete the procedure because the canal was calcified. The

“[p]ost that was placed did not hold up” and a “buildup [was] placed with Dentin and Ibond” by Dr. Matthew Grossman. Dr. Matthew Grossman created a crown and cemented it.

On July 5, 2017, Plaintiff returned to Kingston Dental for a limited exam of tooth #13 and saw Dr. Steven Grossman. Plaintiff reported having “pain all the time.” A mesial x-ray of tooth #13 was taken. Plaintiff was referred to an endodontist.

Plaintiff saw non-party Dr. Bilal Chaudhry, an endodontist. Kingston Dental’s medical records state that on July 11, 2017 Dr. Chaudhry called to speak with Dr. Grossman. Dr. Chaudhry stated that after his evaluation with Plaintiff, “it was determined that there was a poor prognosis on tooth #13 and the tooth should be extracted.” The medical records further state, “The endodontist also discussed #14 and that patient is currently asymptomatic with this tooth but should they develop symptoms in the future, a retreat of this tooth should be considered.”

On July 24, 2017, Plaintiff returned to Kingston Dental for the extraction of tooth #13. Dr. Matthew Grossman prepared teeth #12 and 14 for a three unit bridge. Kingston Dental’s medical records state “[c]onsent signed for bridge by patient.” Plaintiff was then brought into a different room where Dr. Drescher was to extract tooth #13. Dr. Drescher extracted tooth #12. Kingston Dental’s medical records state:

Dr. Drescher extracted the wrong tooth, tooth #12.
Dr. Drescher spoke to the pt and explained it to her. He explained to the pt that he will place 2 immed implants in the place of teeth 12 & 13.
Single unit crown will be done on #14.

Plaintiff testified that after Dr. Drescher extracted tooth #12, she went to a recovery room where Dr. Drescher notified her that he had “pulled out the wrong tooth.” Plaintiff states that she was then sent back to the room where Dr. Drescher had extracted tooth #12 and Dr. Drescher proceed to extract tooth #13. Plaintiff avers in her affidavit

that she “was in shock” when Dr. Drescher told her he had extracted “the wrong tooth.” Plaintiff states, “Without any discussion while I was still numb and in shock they extracted the correct tooth and placed two implants.”

Summary Judgment Standard

CPLR § 3212 provides in relevant part, that a motion for summary judgment,

shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party... [t]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

A defendant moving for summary judgment in a medical malpractice case has the burden of making a prima facie showing of entitlement to judgment as a matter of law by showing that “there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged” by introducing expert testimony that is supported by the facts in the record. *Rogues v. Nobel*, 73 A.D.3d 204, 206 [1st Dept. 2010]. Once the defendant has made this 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 Hospital*, 68 N.Y.2d 320, 324 [1986]. Specifically, a plaintiff “must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” *Rogues*, 73 A.D.3d at 207.

Pursuant to Public Health Law § 2805-d[2], “[t]he right of action to recover for medical, dental or podiatric malpractice based on a lack of

informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.”

A defendant moving for summary judgment on a lack of informed consent claim must show that there is no factual dispute as to whether the plaintiff was informed “of any foreseeable risks, benefits or alternatives” of the treatment rendered. *Balzola v. Giese*, 107 A.D.3d 587, 588 [1st Dept. 2013].

Motion Sequence 3

Kingston Dental moves for summary judgment as to the claims and allegations that arise prior to November 3, 2015 pertaining to Plaintiff’s teeth #2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 18, 19, 30, and 31. Kingston Dental contends that these claims are barred by the two and a half year statute of limitations set forth in CPLR 214. Plaintiff had alleged malpractice to these teeth in her Supplemental Bill of Particulars. Plaintiff did not commence this action until May 2, 2018.

In Plaintiff’s opposition papers and cross motion, Plaintiff’s counsel states that Plaintiff’s focus is on teeth #12, 13, and 14, and that the specific act of negligence begins with Dr. Matthew Grossman’s treatment of Plaintiff’s tooth #13 in 2017. Plaintiff’s counsel states, “Although as plaintiff alleged and then identified with specificity as directed by the court the teeth 2, 3, 6, 7, 8, 10, 11, 14, 15, 18, 19, 20, 30 and 31 that had ill-fitting restorations causing injury, plaintiff never inquired regarding these teeth at the deposition and never had any intention in discussing injury or damages as a result of the crowns on these teeth at trial.” Plaintiff’s counsel stated, “I will so stipulate thus addressing whether they are not within the statute of limitations based on the concept of continuing treatment is moot.”

As Plaintiff’s claims have been narrowed to treatment rendered in 2017, Kingston Dental’s motion for summary judgment dismissing claims based on pre November 2015 allegations is rendered moot.

With respect to tooth #14, Kingston Dental claims that all treatment would have been rendered before November 3, 2015 and therefore any treatment with regard to that tooth would fall outside the statute of limitations. However, while Plaintiff has withdrawn any claims concerning treatment of tooth #14 before November 3, 2015, Plaintiff alleges that Kingston Dental's preparation of tooth #14 for a three unit bridge in 2017 was negligent. Kingston Dental's motion is therefore denied to the extent that it seeks to bar claims regarding tooth #14 that arise after November 3, 2015.

Motion Sequence 4

Dr. Matthew Grossman claims that since Plaintiff commenced this action on May 2, 2017, any claims based on treatment provided prior to November 2, 2015 would be time barred and the continuous treatment would not apply. As stated above, Plaintiff's counsel states that Plaintiff's focus is on teeth #12, 13, and 14, and that the specific act of negligence begins with Dr. Matthew Grossman's treatment of Plaintiff's tooth #13 in 2017. Since Plaintiff is not pursuing any claims based on allegations that precede 2017, the portion of Dr. Matthew Grossman's motion which seeks to bar any claims of dental malpractice that precede November 2, 2015 is rendered moot.

The second branch of Dr. Matthew Grossman's motion seeks summary judgment as to all treatment rendered after November 2, 2015 on the grounds that there are no triable issues of fact.

The alleged negligent treatment that is at issue after November 2, 2015 is set forth in Plaintiff's motion papers. Specifically, Plaintiff claims that Dr. Matthew Grossman "departed from good and accepted practice in negligently placing a post and buildup to support a crown on tooth #13" and "in not identifying the negligent placement resulting in unnecessary pain and suffering and the need for its extraction."

Plaintiff further claims that Dr. Matthew Grossman "departed from good and accepted practice in negligently grinding and preparing an

extremely healthy tooth #12 and preparing #14 ignoring the warnings of the specialist that #14 was potentially infected and compromised” which resulted in “months of pain and suffering grinding tooth #12 and further compromise to tooth #14.”

Plaintiff further claims that Dr. Drescher’s “extraction of #12 an almost virgin tooth except for a small filling with excellent bone support is inexplicable.” Plaintiff claims that “Dr. Drescher is negligent” and “[w]hether Whether Dr. Grossman is complicit in improper communicating remains an issue.”

Plaintiff further claims that Dr. Matthew Grossman and Dr. Drescher were “totally negligent after the wrongful extraction both from an informed consent aspect and a negligence aspect to immediately extract tooth #13 and place implants in the position of teeth #12 and 13 without a CAT Scan without bone grafts and without encouraging Mrs. Bennett to reflect and to go for a second opinion.”

Expert Affidavits

Dr. Matthew Grossman submits the expert affidavit of Dr. Peter Blauzern (“Dr. Blauzern”), a dentist licensed to practice dentistry in New York. Plaintiff submits the opposing affidavit of Dr. Robert Vogel (“Dr. Vogel”), a dentist licensed to practice in the State of New York, in opposition to Dr. Matthew Grossman’s motion and in support of Plaintiff’s cross motion for summary judgment.

Dr. Blauzern states that he has reviewed Plaintiff’s medical records and x-rays, all deposition transcripts, and the Bills of Particulars. Dr. Blauzern opines that “within a reasonable degree of dental certainty that the dental care and treatment rendered to Ms. Bennett by Dr. Matthew Grossman was at all times appropriate and within the standard of care and that no act or omission on the part of Dr. Grossman was a proximate cause of any of plaintiffs’ alleged injustice or damages” and “nothing Dr. Grossman did or did not do caused any harm to plaintiff.”

Dr. Blauzern opines:

It appears ... that plaintiff claims Dr. Matthew Grossman should have performed x-rays on #13 and #14 around the time that the #13 crown was falling out - around January 16, 2017 and February 8, 2017. It is my opinion with a reasonable degree of dental certainty that Dr. Matthew Grossman did not depart from good and accepted practice by not performing x-rays on teeth 13 or 14 on either date. X-rays were taken less than three months prior, on October 18, 2016, a clinical examination was performed, and no symptoms or complaint from the patient were reported. The crowns were appropriately cemented.

As for Dr. Matthew Grossman's dental care of Plaintiff's tooth #13, Dr. Blauzern opines:

Dr. Matthew Grossman and his father attempted to salvage a very compromised tooth and did everything possible to try to restore it. Not only do I believe Dr. Matthew Grossman did not act negligently with respect to #13, but he instead tried to save the patient from further expense and surgery to try to save this tooth. I do not believe anything Dr. Grossman did or did not do was the proximate cause of the tooth having to be extracted.

As for Plaintiff's claim that Dr. Matthew Grossman "ignored signs of poorly fitting restorations," Dr. Blauzern opines:

It is my opinion with a reasonable degree of dental certainty that there is no evidence that Dr. Grossman ignored any such signs. Upon Ms. Bennett's complaint that tooth #13 was coming

out, Dr. Grossman sought a solution by re-cementing the crown with a bonded cement (UNICEM) and explained to Ms. Bennett that a root canal would be needed to build up the tooth to hold a crown. This was proper advice to give a patient under the circumstances.

Dr. Blauzern further opines:

Further, there is no evidence that Dr. Matthew Grossman negligently provided a crown which placed her in improper occlusion. Indeed, Dr. Grossman noted on each occasion he inserted a crown that he checked and confirmed proper occlusion. Neither Dr. Grossman's records nor the records of subsequent treaters indicate Ms. Bennett was complaining that she could not bite correctly or in her usual and customary fashion. The lack of any evidence of the patient making bite-related complaints demonstrates there is no evidence to indicate Dr. Matthew Grossman negligently provided an improper occlusion. Rather, as the record indicates after he placed crowns (sic), Dr. Grossman appropriately checked the bites and contacts. It is my opinion he properly checked the occlusion on all occasions where he tried in crowns and established proper occlusion without departure from accepted dental practices.

Dr. Blauzern further opines "with a reasonable degree of dental certainty that Dr. Grossman properly advised Ms. Bennett of the nature of her problems and alternative treatment options."

Plaintiff's expert Dr. Vogel states that he has "reviewed the treatment of Mrs. Bennett, the x-rays, deposition testimony of Dr. Grossman and Mrs. Bennett, the note of Dr. Chowdry, the affidavit of

Dr. Blauzvern and the affidavit of Mrs. Bennett” and that all of his “opinions are within a reasonable degree of dental certainty.”

Dr. Vogel states that based upon his review of x-rays of tooth #13 and the placement of post and buildup by Dr. Matthew Grossman, “Dr. Grossman departed from the standard of care in negligently placing the post on an improper angle resulting in a supracrestal perforation causing pain and suffering and the need to extract the tooth.” Dr. Vogel states that “[t]here is no excuse for the perforation” as “[p]lacing the post and buildup within the tooth is a routine dental practice.”

Dr. Vogel further opines that “Dr. Grossman departed from good and accepted practice in negligently grinding and preparing an extremely healthy tooth #12 and preparing #14 ignoring the warnings of the specialist Dr. Chowdry that #14 should continue to be monitored and that the prognosis for retreatment was guarded.” Dr. Vogel states:

In 2017 the absolute standard of care in this case if tooth #13 requires extraction where #12 is basically a virgin tooth with a small filling and #14 has a potential infection is to replace #13 with an implant. It is inexplicable in 2017 why in this case the plan was to place a three unit bridge and not refer for a CAT Scan and consultation for an implant when the placement of an implant in this area is so successful.

Dr. Vogel further opines that if Dr. Matthew Grossman “did not discuss implants and/or refer to a dentist that places implants, it is a departure from good and accepted practice as it relates to informed consent.” Dr. Vogel states that “[i]t is the absolute standard of care to discuss an implant replacement in this case” and opines “with reasonable certainty a reasonable person if informed of an implant replacement would accept an implant.”

Dr. Vogel further opines that “[e]xtraction of #12 an almost virgin tooth except for a small filling with excellent bone support is a violation of the standard of care and inexplicable. “ Dr. Vogel states that “Dr.

Drescher is negligent” and “[w]hether Dr. Grossman is complicit in improper communicating remains an issue. If Dr. Grossman did not communicate correctly he is complicit. The injury is the loss of tooth #12.”

In Dr. Blauzern’s reply affidavit, Dr. Blauzern opines “with a reasonable degree of dental certainty, that it is more likely than not that the perforation referenced by plaintiff’s expert was already in existence prior to April 17, 2017, or alternatively, caused by non-party Dr. Steven Grossman’s prior attempt at performing a root canal on the already compromised and calcified tooth #13 earlier that day.” Dr. Blauzern further opines “with a reasonable degree of dental certainty that the perforation was so small that it did not in any way cause the need for tooth #13 to be extracted.”

Dr. Blauzern further opines ”that using a healthy tooth, like #12, as an abutment for a bridge, is completely within the standard of care” and “that bridges are recommended, and within the standard of care, in a variety of circumstances, and based on certain factors, including but not limited to the patient’s health, the bone in the area, and financial considerations.”

Dr. Blauzern further opines “with a reasonable degree of dental certainty that there was no evidence plaintiff experienced pain and suffering, or any other damages, between the preparation of tooth #12 and the subsequent same-day extraction.”

Dr. Blauzern further opines “[i]n light of the asymptomatic status of tooth #14, meaning there was no pain or evidence of infection, I opine with a reasonable degree of dental certainty that it would have been perfectly acceptable and within the standard of care to use tooth #14 as an abutment for a bridge.”

Discussion

Dr. Matthew Grossman makes a prima facie showing of entitlement to summary judgment. *Alvarez*, 68 N.Y.2d at 324. Dr.

Blauzern, on behalf of Dr. Matthew Grossman, opines that Dr. Matthew Grossman met the standard of care and treatment he provided to Plaintiff.

The burden now shifts to Plaintiff to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Lindsay-Thompson*, 147 A.D.3d at 639. Dr. Vogel's affidavit shows "material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324. Dr. Vogel opines that Dr. Matthew Grossman was negligent and departed from the standard of care in his placement of a post and build up to support a crown on tooth #13; in his plan to make a bridge using tooth #12 which was healthy and tooth #14 which was potentially infected; in his failure to initially replace tooth #13 with an implant; and in failing to provide Plaintiff with sufficient information to give her informed consent. Dr. Vogel further opines that Dr. Matthew Grossman's acts of negligence caused injury to Plaintiff in the form of pain and suffering, emotional trauma and compromised implants.

As for Plaintiff's claim that Dr. Matthew Grossman is responsible for Dr. Drescher's extraction of tooth #12 due to a miscommunication, the records and testimony indicate that Dr. Drescher was brought in to extract tooth #13 and that Dr. Drescher "made a mistake" and extracted tooth #12. There is no testimony or record that supports a miscommunication. The claim that Dr. Matthew Grossman is thus responsible for the extraction of tooth #12 is speculative and is dismissed.

Plaintiff's Cross Motion

Under Motion Sequence 4, Plaintiff filed a cross motion for summary judgment against the defendants.

Plaintiff filed the Note of Issue on October 25, 2019. As per the Preliminary Compliance Conference and this Part's Rules, motions for summary judgment are to be filed within 60 days, on or about December 25, 2019.

On December 17, 2019, the Court extended the time for all parties to move for summary judgment to January 17, 2020. Plaintiff's motion was filed on February 18, 2020. Plaintiff's moving papers do not address the late filing or provide a reason for the delay.

Even if Plaintiff's cross motion was to be deemed timely filed as against Dr. Matthew Grossman and Kingston Dental, Dr. Blauzvern's opposing affidavit establishes sufficient factual disputes to defeat summary judgment that should be decided by a jury. "The weight to be accorded to the conflicting testimony of experts is "a matter 'peculiarly within the province of the jury.'" *Torricelli v Pisacano*, 9 A.D. 3d 291, 293 [1st Dept 2004].

As for Dr. Drescher, while Plaintiff's motion is described as a "cross motion," Dr. Drescher was not a moving party and therefore Plaintiff cannot properly "cross move" against him. Plaintiff did not timely move for summary judgment against Dr. Drescher.

Wherefore it is hereby

ORDERED that Defendant Kingston Dental Associates' motion for summary judgment dismissing claims based on pre November 2015 allegations is rendered moot. The motion is denied to the extent that it seeks to bar claims regarding tooth #14 that arise after November 3, 2015 (Motion Sequence 3); and it is further

ORDERED that the branch of Defendant Matthew Grossman, D.D.S.'s motion (Motion Sequence 4) which seeks to dismiss the allegations of negligence, medical malpractice, and lack of informed consent against him for actions taken before November 2, 2015 as time-barred pursuant to CPLR 3211(a)(5) and CPLR 214-a is rendered moot. Plaintiff is not pursuing claims prior to 2017; and it is further

ORDERED that the branch of Defendant Matthew Grossman, D.D.S.'s motion (Motion Sequence 4) seeking summary judgment dismissing all remaining claims is granted only to the extent that that Plaintiff's claim of "miscommunication" for extraction of tooth #12 as to Dr. Matthew Grossman is granted. The remainder of the motion is

denied; and it is further

ORDERED that Plaintiff's cross motion (Motion Sequence 4) seeking summary judgment against the defendants is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: MAY 11, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION X NON-FINAL DISPOSITION**