

**Kaplan v Fletcher**

2020 NY Slip Op 32261(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 805063/2018

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**ELLEN KAPLAN,**

**INDEX NO. 805063/2018**

**MOTION DATE**

**MOTION SEQ. NO. 1**

**MOTION CAL. NO.**

**Plaintiff,**

**- against -**

**PAUL FLETCHER, D.D.S and SYNERGISTIC  
DENTISTRY OF NEW YORK, P.C. d/b/a  
SPECIALIZED DENTISTRY OF NEW YORK  
a/k/a SKNY DENTAL,**

**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

1  
1

**Cross-Motion:    Yes    X No**

Plaintiff Ellen Kaplan (“Plaintiff”) moves pursuant to CPLR § 3212 for an Order granting partial summary judgment on the issue of liability as against Defendant Paul Fletcher, DDS (“Dr. Fletcher”) on the ground that he deviated from accepted standards of care when he lacerated Plaintiff’s face and lip and such deviation was the proximate cause of Plaintiff’s damages; and granting summary judgment on the issue of lack of informed consent as against Dr. Fletcher, upon the ground that in performing a procedure he lacerated the face and lip of Plaintiff and was careless and negligent. Defendants Dr. Fletcher and Synergistic Dentistry Of New York, P.C. d/b/a SDNY Dental (“SDNY Dental”) (collectively, “Defendants”) oppose.

Background

This action sounding in dental malpractice and lack of informed consent arises from Dr. Fletcher’s alleged negligence when he lacerated Plaintiff’s face and lower lip while performing periodontal surgery which resulted in “excessive and abundant bleeding at the left lower lip...[l]oss of saliva/drooling, numbness and reduced sensation of the affected lip, dysarthria, tingling at lip, phantom sensation at the affected area, scarring, anxiety, severe pain, suture and disfigurement.”

Plaintiff first treated with Dr. Fletcher on May 10, 2017. Defendants allege that Plaintiff first presented with periodontal pocketing and chronic inflammation around tooth #14, which was a progressing non-maintainable situation. On May 24, 2017 and June 14, 2017, Plaintiff was treated again by Dr. Fletcher.

Dr. Fletcher performed a periodontal surgery, specifically a flap surgery for tooth #14 on Plaintiff's upper left molar on July 19, 2017. While performing the surgery, Dr. Fletcher lacerated Plaintiff's lower lip with a scalpel.

Plaintiff commenced this action on March 6, 2018 by filing a Summons and Complaint. Defendants interposed a Verified Answer on April 18, 2018.

### Summary Judgment

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.”

“Ordinarily, a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical malpractice, and that such deviation was a proximate cause of the plaintiff's injury.” *James v Wormuth*, 21 NY3d 540, 545-46 [2013] (citations omitted). “The theory of res ipsa loquitur is applied to occurrences ‘[w]here the actual or specific cause of an accident is unknown’ (*Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 678 N.E.2d 456 [1997] ).” *Id.* at 546. “Under such circumstances, ‘a jury may ... infer negligence merely from the happening of an event and the defendant's relation to it’ (*id.* at 494, 655 N.Y.S.2d 844, 678 N.E.2d 456; *see States v. Lourdes Hosp.*, 100 N.Y.2d 208, 211–212, 762 N.Y.S.2d 1, 792 N.E.2d 151 [2003] ).” *Id.*

“To establish a prima facie case of negligence in support of a res ipsa loquitur charge, plaintiff must establish three elements: [1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; [2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and [3.] it must not have been due to any voluntary action or

contribution on the part of the plaintiff. *Id.* (citation omitted). “[W]here a plaintiff’s prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable and un rebutted, summary judgment on liability is proper.” *Thomas v New York Univ. Med. Ctr.*, 283 AD2d 316, 317 [1st Dept 2001].

Once the movant 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, the opposing party “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 v. Nobel*, 73 A.D.3d 204, 207 [1st Dept. 2010].

A defendant physician can act as his own expert in a medical malpractice case “where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care.” *Toomey v Adirondack Surgical Assoc. P.C.*, 280 AD2d 754, 755 [3d Dept 2001].

“To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff’s position, fully informed, would have elected not to undergo the procedure or treatment.” *Orphan v Pilnik*, 15 NY3d 907, 908 [2010] (*see* Public Health Law § 2805–d).

“Pursuant to CPLR 4401–a, a plaintiff’s claim for medical malpractice based on lack of informed consent must be dismissed if the plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively inadequate (*see Sallam v. New York Hosp.*, 155 A.D.2d 389, 548 N.Y.S.2d 16 [1989], *lv. denied* 75 N.Y.2d 712, 557 N.Y.S.2d 310, 556 N.E.2d 1117 [1990]; *Gonzalez v. Moscarella*, 142 A.D.2d 550, 530 N.Y.S.2d 218 [1988] ).” *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]. “In other words, plaintiff could not defeat the requirement of CPLR 4401–a even if she were able to establish that the consent form was altered and/or that defendant did not verbally inform her of the risk...” *Id.* Plaintiff has not satisfy her burden of establishing lack of informed consent where “[t]he expert’s affirmation was tentative and vague, and would not state with certainty that the information plaintiff allegedly received prior to the procedure was a departure from what a reasonable practitioner would have disclosed.” *Orphan*, 15

NY3d at 908-909. Moreover, Plaintiff must “establish that a fully informed reasonable person would have declined the procedure.” *Id.* at 909.

### Parties’ Contentions

In support of Plaintiff’s motion for summary judgment, Plaintiff submits the Affirmation of Michael L. Ferstendig (“Dr. Ferstendig”). Dr. Ferstendig is duly licensed to practice dentistry in the State of New York. According to Dr. Ferstendig’s Affirmation, he examined Plaintiff on September 10, 2017 and he reviewed the deposition transcript of Dr. Fletcher. Dr. Ferstendig opines that in the process of performing periodontal surgery, “Dr. Fletcher violated the Standard of Care, and lacerated tissues outside the operating field” on Plaintiff’s face. Dr. Ferstendig opines that:

[p]eriodontal surgery is performed with scalpels and other sharp instruments. The Standard of Care dictates that the operator exercise appropriate care to avoid damaging tissues and structures that are outside of the operating field.

Therefore, Dr. Ferstendig opines that the laceration of Plaintiff’s face during the procedure could not occur without professional negligence.

In opposition, Defendants argue that “Plaintiff’s motion should be denied because she failed to establish her entitlement to summary judgment and because the conflicting expert affidavits establish issues of fact.” Defendants assert that while Plaintiff’s expert states that it was negligent for Dr. Fletcher to lacerate Plaintiff’s lip, Dr. Fletcher states that it was an accident. Defendants argue that case law states that “the happening of an accident is not proof of negligence or malpractice.” Defendants assert that Dr. Fletcher “is an experienced periodontist, who has performed the subject surgery thousands of times and used his usual technique.” Defendants further assert that “[t]he accident was not caused by any lack of skill, training or attention to detail by Dr. Fletcher from his many years of experience. Dr. Fletcher considers himself to be extremely proficient in doing that procedure and other periodontal procedures as part of his practice. Therefore, Defendants argue that there are conflicting expert opinions.

Furthermore, Defendants argue that Plaintiff has made no argument or reference to informed consent in her motion and thus Plaintiff’s summary judgment request as to informed consent should be denied. Defendants argue that even if Plaintiff made an argument regarding informed consent, Plaintiff’s motion should

still be denied because her expert was silent as to this issue. Defendants further argue that “even if plaintiff’s requested relief as to lack of informed consent with no argument or expert opinion to support it, were entertained, there is a question of fact since plaintiff did sign a consent form for the procedure, which states that the risks, consequences and alternatives were explained to plaintiff.”

Moreover, Defendants submit the Affidavit of Dr. Fletcher. Dr. Fletcher is duly licensed to practice dentistry in the State of New York. Dr. Fletcher states that he discussed the risks and benefits of the procedure with Plaintiff and Plaintiff signed a written consent on July 19, 2017 before Dr. Fletcher performed the procedure. Dr. Fletcher states prior to the procedure Dr. Fletcher was aware that Plaintiff had a small mouth. Dr. Fletcher opines that during the procedure he used his “usual technique” knowing that he “had a sharp scalpel in the vicinity of the patient’s soft tissue.” Dr. Fletcher contends that he “inadvertently cut her lip to a depth of approximately 2 millimeters.” Dr. Fletcher asserts that the accident “was not caused by any lack of skill, training or attention to detail by me from my many years. of experience.” Dr. Fletcher further asserts that “this accident happened not because of any negligence or lack of care on my part, but because of something that can happen given the use of sharp instruments in a restricted space.”

In reply, Plaintiff contends that Defendant is allowed to act as his own expert in a medical malpractice. However Plaintiff asserts that “Defendant presents as his own expert in an entirely conclusory, biased and self-serving affidavit where Dr. Fletcher plainly admits to cutting Plaintiff’s lip, stating ‘put the scalpel into the patient’s mouth and inadvertently cut her lip to a depth of approximately 2 millimeters.’” Plaintiff argues that the Court will not consider “biased, self-serving and conclusory affidavits.” Plaintiff argues that Defendant makes a self-serving statement when admitting to cutting Plaintiff’s lip because it was a “true accident.” Furthermore, Plaintiff asserts that *res ipsa loquitur* should be invoked because there is no triable issue of fact that Defendant admitted to lacerating Plaintiff’s mouth which could only occur through negligence. Plaintiff argues that Defendant admitted that there was no informed consent. Plaintiff asserts that “[w]hile Defendant argues that the Plaintiff signed a consent form for the procedure, the injuries that occurred here were not contemplated by the form, by the doctor or by [Plaintiff] prior to undergoing the procedure as admitted by Defendant during his deposition.” Plaintiff contends that Defendant admitted in his deposition that the consent form signed by Plaintiff did not refer to laceration as a foreseeable risk to the procedure.

### Discussion

Plaintiff has established a *prima facie* showing of entitlement to summary judgment in support of *res ipsa loquitur* by showing that: (1) that the injury sustained by Plaintiff does not ordinarily occur in the absence of negligence; (2) the injury was caused by an instrumentality within the exclusive control of Dr. Fletcher; and (3) that the injury was not due to any voluntary action or contribution on the part of Plaintiff. *James*, 21 NY3d at 546. Dr. Ferstendig's Affirmation demonstrates that in the process of performing periodontal surgery "Dr. Fletcher violated the Standard of Care, and lacerated tissues outside the operating field" on Plaintiff's face and such a laceration outside the operating field could not occur without professional negligence. Moreover, Plaintiff asserts that Dr. Fletcher acknowledged lacerating Plaintiff's lip. In Dr. Fletcher's deposition, Dr. Fletcher stated:

I went to make my initial incision back by tooth number 14, and I began the initial incision. And I subsequently looked and saw that the scalpel had lacerated her lip, and I was, you know, I was taken aback and I stopped the procedure and I saw the laceration.

(Dr. Fletcher's Deposition Tr. June 13, 2019 at 49-50).

Dr. Fletcher further stated that Plaintiff was not at fault. The relevant portions of Dr. Fletcher's testimony are as follows:

Q. Is there anything that Ellen Kaplan [Plaintiff], any directions you gave Ellen Kaplan in treating her that she failed to follow that day?

A. No.

Q. Did Ellen Kaplan's [Plaintiff's] actions contribute in any way to this laceration in her left lower lip?

A. No.

Q. For example, did she move unexpectedly --

A. No.

Q. -- at the time of this laceration?

A. No.

(Dr. Fletcher's Deposition Tr. June 13, 2019 at 52).

Since Plaintiff has made a *prima facie* showing of entitlement to summary judgment, the burden now shifts to Defendants "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]. Defendants submit the Affidavit of defendant himself, Dr. Fletcher, in an effort to demonstrate "material issues of fact which require a trial of the action." *Alvarez*, 68 N.Y.2d at 324. Defendants do not dispute that the injury was caused by an instrumentality within the exclusive control of Dr. Fletcher; or that any voluntary action or contribution on the part of Plaintiff did not contribute to the injury. Dr. Fletcher opines that during the procedure he used his "usual technique" knowing that he "had a sharp scalpel in the vicinity of the patient's soft tissue." Dr. Fletcher's Affidavit provides conclusory statements that the accident "was not caused by any lack of skill, training or attention to detail by me from my many years of experience." He states that "this accident happened not because of any negligence or lack of care on my part, but because of something that can happen given the use of sharp instruments in a restricted space." However, Dr. Fletcher does not address Dr. Ferstendig who opines that it is negligence for the scalpel to cause a laceration outside of the operative field. While a laceration within the operative field may be a risk of the procedure, this laceration was not within a restrictive space, but rather, outside of the mouth.

Turning to that part of Plaintiff's motion which seeks partial summary judgment on her claim of lack of informed consent, Plaintiff fails to meet her burden. Plaintiff's expert does not speak to the signed consent form; nor does the expert establish what risks, benefits and alternatives the standard of care requires a dentist to discuss before obtaining informed consent. Therefore, partial summary judgment on the claim of lack of informed consent is denied.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability for her cause of action sounding in professional negligence as against Defendant Dr. Fletcher is granted; and Plaintiff's motion on the issue of lack of informed consent as to Defendant Dr. Fletcher is denied; and it is further

ORDERED that the parties are directed to appear on August 4, 2020 at 9:30am in Part 6 at 71 Thomas Street for a Pre-Trial conference.

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

**Dated: June 24, 2020**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

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