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| Rosenzweig v Singer |
| 2020 NY Slip Op 33120(U) |
| September 23, 2020 |
| Supreme Court, Kings County |
| Docket Number: 519910/17 |
| Judge: Ellen M. Spodek |
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At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September, 2020.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.
-----X
BART P. ROSENZWEIG,
Plaintiff,

- against -

Index No. 519910/17

DR. ALAN B. SINGER, GREGORY HASKIN, D.D.S.,
ANTHONY T. VUONG, D.D.S., JACK HIRSCH,
D.M.D. and JACK M. HIRSCH, D.M.D., and
RONALD W. SCHWARTZ, D.M.D., P.C.,

Defendants.
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| <u>The following papers read herein:</u> | <u>Papers</u> : |
| Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed _____ | <u>1-3</u> |
| Opposing Affidavits (Affirmations) _____ | <u>4-6</u> |
| Reply Affidavits (Affirmations) _____ | <u>7-8</u> |
| Sur-Reply Affidavits (Affirmations) _____ | <u>9</u> |

Upon the foregoing papers, defendants Jack Hirsch, D.M.D., Jack M. Hirsch, D.M.D and Ronald W. Schwartz, D.M.D., P.C. (collectively referred to as the Hirsch Defendants), move for an order (1) pursuant to CPLR 3212, granting them summary judgment dismissing the complaint, and/or (2) pursuant to CPLR 3211, dismissing any causes of action claimed to have arisen before October 14, 2007 as untimely under CPLR 208 and 214-a (motion sequence number 1). By way of an “amended notice of motion,”

the Hirsch defendants seek dismissal of the entire action as against them as untimely under CPLR 208 and 214-a (also identified as motion sequence number 1). Defendant Dr. Alan B. Singer moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint (motion sequence number 2). Plaintiff Bart P. Rosenzweig cross-moves for an order granting him leave to amend the verified complaint and to a serve second supplemental bill of particulars (motion sequence number 3).

BACKGROUND

Plaintiff alleges that he suffered injuries as the result of defendants' malpractice in failing to timely diagnose an ameloblastoma, a benign tumor ultimately discovered in plaintiff's lower mandible in June 2017. It was removed as part of a mandibular reconstruction surgery that involved grafting bone from plaintiff's fibula to aid in the reconstruction of the mandibular. Dr. Hirsch was plaintiff's primary dentist from 2003, when plaintiff, who was born in December 1998, was four going on five years old, until August 16, 2012, when plaintiff was 13 years old. During his time as Dr. Hirsch's patient, plaintiff only saw Dr. Hirsch for routine dental examinations and cleanings. Plaintiff (or his parents) generally had no complaints regarding his teeth, and Dr. Hirsch and his staff, (other than noting that plaintiff might need orthodontics in the future), noted that plaintiff had no issues with cavities or any other serious dental issue. Dr. Hirsch, or his hygienist, took bitewing x-rays of plaintiff's teeth on an annual basis, and Dr. Hirsch did not observe any lesions in the x-rays, including the one taken at plaintiff's final visit on August 16, 2012.

After the August 2012 visit, plaintiff began seeing defendant Anthony T. Vuong as his regular dentist. According to plaintiff's deposition testimony, he began seeing Dr. Alan B. Singer as his dentist on August 27, 2014 because his father was a patient of Dr. Singer. He had an initial visit with Dr. Singer on that day in order to consider utilizing him as his dentist. Dr. Singer testified that his hygienist performed a cleaning at that visit because plaintiff's father told him that the plaintiff only needed to have a cleaning on that date. Plaintiff's father further told Dr. Singer that no x-rays were needed because his son had recently had x-rays taken elsewhere. Based on these statements by plaintiff's father, Dr. Singer understood that plaintiff would be returning to his regular dentist for future treatment. Plaintiff, in his own deposition testimony, asserts that he placed no limitation on the visit, and plaintiff's father, in an affidavit submitted in opposition, asserts that he was considering Dr. Singer as plaintiff's regular dentist and that he made no statement to Dr. Singer that placed any limitation on the examination of plaintiff at said visit. In any event, there is no dispute that Dr. Singer did not examine plaintiff's teeth at that visit, that no x-rays were taken, and that the only service provided was the cleaning performed by the hygienist. This was plaintiff's only visit with Dr. Singer and, following this visit, he continued to see Dr. Vuong.

Plaintiff, in June 2017, presented to defendant Dr. Vuong with complaints of pain and swelling in his lower mandible for the previous two weeks and Dr. Vuong took an x-ray that showed a lesion in plaintiff's jaw near tooth number 17. As noted above, the lesion was thereafter identified as an ameloblastoma, and its removal required the surgical

reconstruction of plaintiff's lower mandible.

This action was commenced with the filing of the summons and complaint on October 15, 2017. In the complaint, plaintiff alleges causes of action premised on medical/dental malpractice and lack of informed consent. Plaintiff, in the complaint and bills of particulars, generally alleges that Dr. Hirsch and Dr. Singer departed from accepted dental practice in failing to take more detailed x-rays, or make referrals for others to do so, and that Dr. Hirsch failed to make such referrals based on a radiolucent area of bone by tooth number 18 that is shown in the August 16, 2012 x-ray.

STATUTE OF LIMITATIONS

Here, in light of the 10 year infancy toll provided for in CPLR 208 (a) and the requirements of CPLR 214-a, plaintiff had two years and six months from his 18th birthday to commence an action that accrued during his infancy (*see Barron v Brown*, 101 AD3d 915, 917 [2d Dept 2012]; *see also Henry v City of New York*, 94 NY2d 275, 281-283 [1999]). As such, plaintiff's action is timely for all negligent acts that accrued within 10 years of October 15, 2017, the date the action was commenced, which date was within a year from the end of the infancy toll on December 2016, when plaintiff turned 18 (*see Contreras v KBM Realty Corp.*, 66 AD3d 627, 628 [2d Dept 2009], *lv denied* 14 NY3d 701 [2010]; *Cahill v Lat*, 39 AD3d 1013, 1014-1015 [3d Dept 2007]; *Rivera v Brookdale Hosp. Med. Ctr.*, 205 AD2d 677, 678 [2d Dept 1994]; *Ann Mary J. v City of N.Y., Health & Hosps. Corp.*, 204 AD2d 690, 691 [2d Dept 1994]; *cf. Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 634-635 [1991]). Since plaintiff has identified specific

acts of negligence in his bills of particulars and opposition papers that occurred within the 10 year period prior to the commencement of the action, these statute of limitation provisions would only require dismissal of the action with respect to actions occurring before October 15, 2007 (*see Cahill*, 39 AD3d at 1014-1015; *Rivera*, 205 AD2d at 678; *Ann Mary J.*, 204 AD2d at 691).

MEDICAL MALPRACTICE

“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’” (*Schmitt v Medford Kidney Ctr.*, 121 AD3d 1088, 1088 [2d Dept 2014], quoting *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dept 2012] [internal quotation marks omitted]; *see Hutchinson v New York City Health & Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept 2019]). A defendant moving for summary judgment dismissing a medical malpractice action must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries (*see Hutchinson*, 172 AD3d at 1039; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 918 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2d Dept 2013]). “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” (*Schmitt*, 121 AD3d at 1088; *see Hutchinson*, 172 AD3d at 1039; *Stukas v Streiter*, 83 AD3d 18, 30 [2d Dept 2011]).

In support of their motion, the Hirsch Defendants have provided an affirmation from Dr. Kelsch, who is board certified in oral and maxillofacial pathology, and who opines that, in the absence of clinical issues or complaints from plaintiff, there was no reason for Dr. Hirsch to be suspicious of an ameloblastoma. Given plaintiff's age and the progress of plaintiff's tooth development, Dr. Kelsch asserts that it was appropriate to take a wait and see approach to determine whether an orthodontic referral was required. Absent decay or other specific complaints, Dr. Kelsch opines that there was no reason to take any form of x-ray, other than the bitewing x-rays that were taken, which were proper and appropriate for a patient of plaintiff's age (pediatric to 13.5 years). According to Dr. Kelsch, there was no indication of the presence of an ameloblastoma in any of the x-rays that were taken, and that the radiolucent area of bone visible in the x-ray taken on August 16, 2012 near tooth 18 "was not suspicious for a mass or lesion and was not significant enough to warrant ordering further studies" (Dr. Kelsch Aff. ¶ 26).

Through Dr. Kelsch's affirmation, the deposition testimony in the record and the appended medical records, the Hirsch Defendants have demonstrated their prima facie entitlement to summary judgment dismissing the medical malpractice cause of action based on the absence of any departures from accepted medical practice (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova v Westerman*, 109 AD3d 965, 966 [2d Dept 2013]; *Mitchell v Lograno*, 108 AD3d 689, 692-693 [2d Dept 2013]). The burden shifted to plaintiff to demonstrate the existence of a factual issue with respect to the care provided by the Hirsch Defendants.

In opposition, plaintiff submits an affirmation from Dr. Steven Singer, who generally asserts that panoramic x-rays, or other forms of x-ray that provide more detail, or a referral to an orthodontist were required in view of the references in plaintiff's records relating to the possible need for orthodontics. According to Dr. Steven Singer, Dr. Hirsch departed from accepted practice in his chart practices and in the adequacy of his dental examinations. Dr. Steven Singer also opines that the radiolucent area near tooth 18 shown in the x-ray taken on August 16, 2012, "could represent a benign or malignant lesion" and that proper radiographic diagnosis required additional and more detailed imaging, and that such studies would have revealed the developing ameloblastoma which was later determined to be in conjunction with tooth #17 (lower third left molar or wisdom tooth) (Aff. of Dr. Steven Singer, ¶ 8 [NYSCEF doc. no. 120]). Further, in the affirmation submitted in opposition to Dr. Alan Singer's motion, which is part of the record before the court, Dr. Steven Singer states that "this radiolucent area was indicative of the developing Ameloblastoma" (Aff. of Dr. Steven Singer, ¶ 6).

Dr. Steven Singer's affirmation, however, fails to demonstrate the existence of a factual issue. While he notes the references in plaintiff's records suggesting that future orthodontics might be necessary, plaintiff's expert fails to identify any condition actually suffered by plaintiff that would have required an orthodontic referral or more detailed x-rays or imaging at the time of plaintiff's visits with Dr. Hirsch. In this regard, Dr. Steven Singer fails to address Dr. Kelsch's opinion that it was appropriate to take a wait and see approach as plaintiff's teeth were transitioning to adult dentation. Nor does Dr. Steven

Singer suggest that any of the possible orthodontic issues indicated the presence of the ameloblastoma or that the more involved dental examinations, that he asserts that Dr. Hirsch should have performed, would have led to the discovery of the ameloblastoma. Finally, Dr. Steven Singer's conclusory assertions regarding the radiolucent area seen on the August 16, 2012 x-ray fails to address Dr. Kelsch's opinion that radiolucency was insignificant and did not indicate the possible presence of the ameloblastoma (*see Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *Donnelly v Parikh*, 150 AD3d 820, 824 [2d Dept 2017]; *see also Gilmore v Mihail*, 174 AD3d 686, 688 [2d Dept 2019]; *Keun Young Kim v Lenox Hill Hosp.*, 156 AD3d 774, 775-776 [2d Dep 2017]).

With respect to plaintiff's single visit with Dr. Alan Singer on August 27, 2014, Dr. Singer relies, in support of his motion, on an affirmation from Allan J Kucine, D.D.S., an oral and maxillofacial surgeon. In his affirmation, Dr. Kucine opines that, even assuming that plaintiff and his father did not intend that plaintiff's August 27, 2014 visit be limited to a cleaning as testified to by Dr. Alan Singer, a more thorough examination, such as suggested for a new patient visit, would not have revealed the lesion. In addition, Dr. Kucine asserts that, since Dr. Alan Singer understood that x-rays were taken within 3-6 months prior to the visit (and were actually taken 7 months prior), and there were no new complaints at the time of the visit, there was no clinical reason to take x-rays at the visit. Through Dr. Kucine's affirmation, the deposition testimony in the record and the appended medical records, Dr. Alan Singer has demonstrated his prima facie entitlement to summary judgment dismissing the medical malpractice cause of action based on the absence of any

departures from accepted medical practice (*see Hutchinson*, 172 AD3d at 1039-1040; *Khosrova*, 109 AD3d at 966; *Mitchell*, 108 AD3d at 692-693).

In opposition, plaintiff's expert, Dr. Steven Singer, asserts that plaintiff should have been treated as a new patient at the time of the August 27, 2014 visit, and that x-rays should thus have been taken.¹ In view of the radiolucent area shown in the August 16, 2012 x-ray, Dr. Steven Singer further asserts that an x-ray taken at the time of the visit with Dr. Alan Singer would have led to the discovery of the ameloblastoma. In making this assertion, however, Dr. Steven Singer makes no assertion that such new patient x-rays are suggested or mandated as a means of screening for an ameloblastoma. Under such circumstances, and assuming that an x-ray was mandated by the standard of care for a new patient visit, the discovery of an ameloblastoma in a new visit x-ray would be the kind of incidental discovery of an undiagnosed condition that has been found insufficient to make out a malpractice claim (*see Rotanto v New York Presbyt. Hosp. - N.Y. Weill Cornell Med. Ctr.*, 175 AD3d 1142, 1443-1144 [1st Dept 2019]; *David v Hutchinson*, 114 AD3d 412, 413 [1st Dept 2014]; *Wilk v James*, 108 AD3d 1140, 1143-1144 [4th Dept 2013]; *see also Mathis v Hall*, 173 AD3d 1162, 1163-1164 [2d Dept 2019]).

Accordingly, plaintiff's expert, Dr. Steven Singer, has failed to demonstrate the

¹ The court notes that the American Dental Association recommendations for dental x-rays submitted by plaintiff, including the recommendations relating to new patients, are prefaced by the statement that "[t]hese recommendations are subject to clinical judgment and may not apply to every patient." In view of this reference to clinical judgment, it would appear that, as suggested by Dr. Kucine, that even for a new patient, it would constitute a proper exercise of clinical judgment for Dr. Singer to defer the recommended new patient x-rays until a later date based on his knowledge that plaintiff had recently had x-rays taken by his prior dentist given that a primary goal of the recommendations, as a whole, is to reduce a patient's radiation exposure.

existence of a factual issue warranting denial of the Hirsch Defendants' and Dr. Alan Singer's motions with respect to the medical malpractice causes of action.

LACK OF INFORMED CONSENT

The Hirsch Defendants and Dr. Singer are also entitled to summary judgment dismissing the lack of informed consent cause of action as plaintiff's allegations relating to the failure to diagnose plaintiff's ameloblastoma, request for more detailed x-ray imaging studies and the lack of any referrals did not involve an invasion of plaintiff's bodily integrity (*see Pinnock v Mercy Med. Ctr.*, 180 AD3d 1088, 1091-1092 [2d Dept 2020]; *Gilmore v Mihail*, 174 AD3d 686, 688 [2d Dept 2019]; *Guctas v Pessolano*, 132 AD3d 632, 634 [2d Dept 2015]; *Zapata v Buitriago*, 107 AD3d 977, 980 [2d Dept 2013]). Plaintiff, who has failed to address the lack of informed consent cause of action in his opposition papers, has failed to demonstrate the existence of a factual issue in this respect and the lack of informed consent claims must be dismissed.

CROSS-MOTION TO AMEND

Plaintiff's motion has been rendered moot in view of the court's granting of summary judgment dismissing the complaint as to the Hirsch Defendants.

CONCLUSION

The Hirsch Defendants' motion (motion sequence number 1) and Dr. Singer's motion (motion sequence number 2) are granted, the complaint is dismissed as against them, and the clerk is directed to enter judgment accordingly.

Plaintiff's cross-motion (motion sequence number 3) is denied as moot.

In addition, the action is severed accordingly, and the caption is amended to read as

follows:

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BART P. ROSENZWEIG,

Plaintiff,

- against -

Index No. 519910/17

GREGORY HASKIN, D.D.S., and ANTHONY T.

VUONG, D.D.S.,

Defendants.

-----X

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.