Mulroe v New York-Presbyt. Hosp.
2020 NY Slip Op 34031(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 162310/2015
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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CYNTHIA MULROE and JAMES MULROE,

Plaintiffs,

- v -

NEW YORK-PRESBYTERIAN HOSPITAL, DAVID KUTLER, JOEL FRIEDMAN, and JACK KAUFMAN

Defendants.

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INDEX NO. 162310/2015

MOTION DATE 10/20/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 122, 123, 124, 125, 126, 127, 128, 130, 132, 135, 136, 137, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action to recover damages for dental malpractice and lack of informed consent, the defendant Jack Kaufman moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiffs oppose the motion. The motion is granted to the extent that summary judgment is awarded to Kaufman dismissing the lack of informed consent cause of action insofar as asserted against him, and the motion otherwise is denied.

On December 31, 2013, the plaintiff Cynthia Mulroe (hereinafter the patient) presented Kaufman with symptoms of swollen, irritated gums in the lower right posterior quadrant that were distal and lingual to an existing dental implant at the location where tooth number 30 previously had been extracted. The plaintiffs allege that Kaufman, who treated the patient until February 2014, failed to make a proper diagnosis of osteomyelitis, causing her to sustain pathologic bone fractures, malocclusion and traumatic occlusion, dysphonia, and the need for additional surgeries, dental rehabilitation, implants, bone grafting, crowns, and bridges. They

further assert that Kaufman's failure properly to diagnose the patient's condition caused her to sustain fatigue, headaches, infections, and concomitant prolonged exposure to antibiotics. The plaintiffs allege that Kaufman's failure to take the necessary steps to enable him properly to diagnose the patient's true condition constituted a departure from good and accepted medical practice that proximately caused these conditions. They also assert that he provided all treatment and procedures without informed consent because the patient was unaware of any risks of the procedures and/or treatments that Kaufman undertook before they were performed, and because Kaufman failed to impart any particular risks concerning his proposed treatment or procedures.

Kaufman, a Doctor of Dental Surgery and an Oral and Oromaxillary Facial Surgeon, moves for summary judgment dismissing the complaint insofar as asserted against him. In support of his motion he submits, among other things, transcripts of the parties' depositions. At his deposition, Kaufman testified that he first saw the patient on December 31, 2013, at which time she signed an "informed consent" form, but that he did not perform any procedures upon her. Kaufman testified that, in January 2014, he called Dr. Michael Voskian, the periodontist who had placed the subject implant, to discuss the patient's prior treatment, and that Voskian's records indicated the presence of bony sequestra near the implant site, but that neither of them discussed the possibility that she was suffering from osteomyelitis.

Prior to treating with Kaufman, the patient previously had been treated with Mycelex troches for two weeks, three times per day, but that treatment had resulted in no change in the lesion. Kaufman's chart for February 27, 2014 indicated that he noted swelling near the implant site. He testified, however, that he observed no infection around the implant site, although he also averred that he prescribed an antibiotic because he thought that the patient nonetheless might have had a localized infection. His plan of treatment was "One, RX Temovate ointment .05 percent with Kenalog and Orabase, 30 grams mixed half and half. Apply three times a day. Will reevaluate in one week. If no change, will rebiopsy."

Kaufman further asserted that, on March 12, 2014, the patient executed a second "informed consent" form, and that, the next day, he sectioned her bridge on the lower right posterior quadrant of her mouth and removed an implant at the area where tooth number 30 previously had been extracted. Kaufman explained that, upon examination of that area, there was bone loss around the implant and the presence of a lesion, which he removed and sent to a laboratory for a biopsy.

The biopsy revealed the presence of fragments of nonviable bone, that "bacterial colonies were present focally," and that "chronic inflammatory cells were present." Kaufman opined that there might have been several causes of that condition, conceding that those causes may have included infection.

Kaufman diagnosed the patient with "epithelial hyperplasia with overlying keratosis," also known "hyperkeratosis," that was distal and lingual to the subject implant. The biopsy tests also were positive for fungus that caused "fungal mucositis."

Kaufman thereafter referred the patient to Dr. David Kutler for assessment and further treatment of the lesion. He testified at his deposition that he and Kutler did not discuss the possibility that the patient suffered from osteomyelitis. In a report dated December 10, 2014, Kutler noted that the patient "had a CAT scan of the neck and mandible region which showed signs of chronic osteomyelitis and a lytic bone lesion." Kaufman testified at his deposition that he did not discuss that report with Kutler.at any time, that he did not undertake any further examination or treatment when he reviewed the report, and that he had no reason to doubt Kutler's conclusion.

In support of his motion for summary judgment, Kaufman also submitted the expert affidavit of David Koslovsky, D.D.S., F.A.C.S. Dr. Koslovsky opined, within a reasonable degree of dental certainty, that Kaufman's examination, treatment, and diagnosis adhered to, and fell within, the applicable standard of care. Specifically, he asserted that when Kaufman was presented with a patient whose prior treatment with antifungal agents did not relieve the

symptoms, he properly switched the treatment to steroidal anti-inflammatory agents. Dr. Koslovsky further opined that Kaufman's referral of the patient to Dr. Kutler, who was affiliated with Weill Cornell Medical Center, a major medical institution equipped to provide multidisciplinary workup and care for her, adhered to the relevant standard of care. As Dr. Kosovsky opined in his supplemental affidavit, Kaufman:

> "acted within the standard of good and accepted care when he submitted hard tissue along with the soft tissue after he investigated the lesion and appreciated a bone sequestrum. Dr. Kaufman acted within the standard of good and accepted care, when he reviewed the findings of the biopsy with the patient and made the appropriate recommendation for further surgery.
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> "Dr. Kaufman continued to act within the standard of good and accepted care when, within one month of evaluating, treating, monitoring, and diagnosing the patient, he appropriately referred the patient for further specialized treatment on January 28th, 2014."

In opposition to Kaufman's motion, the plaintiffs relied upon the affidavits and exhibits that Kaufman submitted to the court. The plaintiffs also submitted the expert affirmation of a Doctor of Dental Medicine who is licensed in New York and is a Diplomate of the American Board of Oral Maxillofacial Surgery. Based on the review of the deposition transcripts and dental records, the plaintiff's expert opined, within a reasonable degree of medical certainty, that Kaufman deviated from good and accepted practice, and that the deviation was a substantial factor in causing injury to the patient.

The plaintiffs' expert explained that, in 2011, the patient received two implants in her mandibular right quadrant in 2011, and started experiencing symptoms of swelling and pain in her face and jaw in 2013. As the expert described it, after she presented those symptoms to Kaufman,

> "[a] white surface lesion was noted and she was prescribed amoxicillin, an antibiotic. The patient responded, but three weeks later returned with swelling and antibiotics were again prescribed. Inflammation persisted. She underwent a biopsy which revealed epithelial hyperplasia, inflammation, hyperkeratosis, fragments of nonviable bone, (sequestra) and focal bacterial colonies.
>
> "The patient then saw defendant Dr. Kaufman on January 21, 2014 and he rebiopsied the right retro-molar area. On January 23, 2014, Dr. Voskian [the

> periodontist who had performed the implants] wrote that Dr. Kaufman initially suspected osteomyelitis from prior grafting tissue: verrucus hyperplasia and fragments of necrotic bone. Contradicting what Dr. Voskian wrote in his January 23, 2014 note, Dr. Kaufman denied during his pretrial deposition questioning, that he considered osteomyelitis. Kaufman then referred the patient to Dr. Kutler for further evaluation.

The expert noted that the patient saw Dr. Kutler for the first time on February 12, 2014, and that, two days later, she saw Dr. Joel Friedman, who told her that she had a lesion that was suspicious for oral cancer, and thus ordered a CT scan. The expert further noted that, on February 27, 2014 a CT scan was taken, revealing "significant bone loss along the medial aspect of the mandibular implant #30 area and 1.9 cm. submandibular lymph node." The expert explained that, on March 13, 2014, Kaufman removed the dental implant in order for the patient to undergo surgery to address the lesion and that, on March 18, 2014, Kutler excised a mandibular lesion on the right, while also performing a marginal mandibulectomy at New York Presbyterian Hospital (NYPH).

According to the plaintiffs' expert, the pathology report from NYPH showed no evidence of cancer. The expert went on to state that the patient's pathology slides and samples were sent for a second opinion to Beth Israel Hospital, yielding an opinion inconsistent with that reached by NYPH and that, consequently, a third opinion was sought, this time from Johns Hopkins. As the expert summarized the pathology reports, NYPH pathologists concluded that the patient did not have cancer, Beth Israel concluded that she had squamous cell carcinoma, and Johns Hopkins determined that the she did not have cancer.

The plaintiffs' expert noted that, despite these markedly inconsistent pathology conclusions, all of the defendants decided to treat the patient as if she had squamous cell carcinoma. Although the expert acknowledged that one of the defendants' experts opined that the patient suffered from that condition from the beginning of her symptomology, the plaintiffs' expert concluded that, "[c]ontrary to that assertion, the fact remains that the pathology results do

NOT confirm that she had squamous cell carcinoma. This is important since [the defendants' expert] bases the majority of his opinion on this incorrect conclusion."

The plaintiffs' expert thus concluded, within a reasonable degree of medical probability, that

> "Kaufman . . . failed to institute definitive treatment in an expeditious manner. For example, the biopsy of 4/10/14 was suggestive of carcinoma by one of the three pathologists yet the patient was instructed to return in six weeks. Dr. Kaufman failed to consult with Drs. Friedman and/or Kutler which effectually delayed a differential diagnosis, a working diagnosis and failed to provide appropriate treatment in a timely fashion. Specifically, the records do not reflect that Dr. Kaufman discussed his diagnosis of osteomyelitis with Dr. Kutler.
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> "Even if Dr. Kaufman claims he spoke to Dr. Kutler, there is no documentation in the [patient's] medical record to confirm any such consultation. In addition, Dr. Kaufman failed to consult with [the patient's] treating periodontist, Dr. Voskian, regarding the biopsy report citing bony sequestra (osteomyelitis). Dr. Kaufman failed to document any discussion with Dr. Voskian regarding the biopsy report significant for osteomyelitis. Furthermore, Dr. Kaufman failed to appropriately prescribe antibiotics and apply antibiotic therapy principles when treating [the patient].
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> "It is my conclusion that Dr. Kaufman failed to diagnose or create a working diagnosis by neglecting the radiological studies including a Panorex x-ray and CT scan. He also failed to take appropriate radiographs. The standard of care required a panorex x-ray which would have elucidated the large osteolytic (destructive) lesion at the right angle/ramus of the mandible.
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> "Dr. Kaufman failed to recognize a "bump" on the right mandibular lingual surface (#28/#29) as a lingual torus (a normal physiological exostosis of bone), which is a basic clinical diagnosis. This subjected the patient to unnecessary surgery. He failed to consult and share the results of the cone beam CT with his referral, Dr. Friedman. Had he done so, this would have conveyed to Dr. Friedman that there was a destructive (lytic) lesion at the right mandibular angle/ramus area.
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> "Dr. Kaufman also failed to consult with Dr. Kutler after sending [the patient] for a cone beam CT. He also failed to document any consultation with Dr. Kutler after [the patient] had her cone beam CT scan.
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> "The record reflects that Dr. Kaufman erroneously diagnosed temporomandibular dysfunction and treated her for that condition. This incorrect diagnosis caused [the patient] further delay in her diagnosis and treatment. Dr. Kaufman also failed to recognize and treat [the patient] for a significant infection, osteomyelitis, when clinical signs of such infection were present including trismus and drainage from the pterygomandibular raphe area."

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

The requisite elements of proof in a medical or dental malpractice action are a deviation or departure from accepted standards of dental practice, and evidence that such departure was

a proximate cause of the plaintiff's injuries (*see Liyanage v Amann*, 128 AD3d 645 [2d Dept 2015]; *Chan v Toothsavers Dental Care, Inc..*, 125 AD3d 712 [2d Dept 2015]; *Kozlowski v Oana*, 102 AD3d 751 [2d Dept 2013]; *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Zito v Jastremski*, 58 AD3d 724 [2d Dept 2009]). A defendant seeking summary judgment on a dental malpractice claim has the initial burden of establishing that the treatment that he or she rendered did not deviate from good and accepted dental practice, or that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the fact must be personally known to the expert and, in any event, the opinion of defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id.*, quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]).

Furthermore, to satisfy its burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted dental practice and opining that the defendant's acts or omissions

were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied (*see Frye v Montefiore Medical Center*, 70 AD3d 15, [1st Dept 2009]; *Cruz v St. Barnabas Hospital,* 50 AD3d 382 [1st Dept 2008]).

Here, Kaufman established his prima facie entitlement to judgment as a matter law through the affidavits of his experts. The detailed affirmation of the plaintiffs' expert, however, is more than sufficient to raise a triable issue of fact as to whether Kaufman deviated from good and accepted dental practice (*see Castro v Yakovaskvilli*, 187 AD3d 403 [1st Dept 2020]; *Lesniak v Huang*, 186 AD3d 1512, 1513 [2d Dept 2020]) by failing fully to discuss Dr. Voskian's findings of bony sequestra and incorporate them into his own examination and assessment, failing to employ appropriate imaging technology, failing expeditiously to follow up on his referral to Dr. Kutler, failing to share his own imaging with Dr. Friedman, failing to prescribe appropriate antibiotic therapy to treat bacterial infection, and failing to identify a lingual torus, all of which delayed the correct diagnosis of osteomyelitis, thus proximately causing the patient to undergo additional surgery and adverse sequellae (*see Fonseca v Hershkin*, 2018 NY Slip Op 33138[U]. 2018 NY Misc LEXIS 5961 [Sup Ct, N.Y. County, Dec. 3, 2018]; *see also Castro v Yakovaskvilli*, 187 AD3d at 403; *Lesniak v Huang*, 186 AD3d at 1513; *Lucas v Filangeri*, 2016 NY Slip Op 31809[U], 2016 NY Misc LEXIS 3508 [Sup Ct, Suffolk County, Apr. 16, 2016]).

In light of the ultimate diagnosis of osteomyelitis, Kaufman may not be heard to argue that his choice of treatment was merely one of several medically acceptable treatment alternatives (*cf. Hartt v Kramer*, 155 AD3d 560, 560 [1st Dept 2017[).

The elements of a cause of action for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the

> treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]). For the claim to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

Here, the documentary evidence submitted by Kaufman establishes that patient was informed, in writing, of the risks of the surgery that he performed, consisting of the sectioning of the patient's bridge on the lower right posterior quadrant of her mouth, and the removal of an implant at the area where tooth number 30 previously had been extracted, including the risks of pain, swelling, bleeding, dry socket syndrome, infection, sinus problems, and numbness (*see Cole v Tischler*, 68 AD3d 1595, 1596 [3d Dept 2009]). Kaufman's submissions also established that the patient was informed of the alternatives, and expressly gave her consent to the surgery. No persuasive argument or evidence in opposition has been submitted by the plaintiffs. In fact, the affirmation of the plaintiffs' expert is conclusory in this regard (*see Alvarado v Miles*, 9 NY3d 902, 903 [2007]). Accordingly, the branch of Kaufman's motion seeking summary judgment dismissing the cause of action for lack of informed consent against him must be granted.

Accordingly, it is,

ORDERED that the motion of the defendant Jack Kaufman for summary judgment dismissing the complaint insofar as asserted against him his granted to the extent that the cause of action to recover for lack of informed consent is dismissed insofar as asserted against him, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

12/8/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE