

Gallo v Shapiro

2020 NY Slip Op 34720(U)

August 26, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 607626/2017

Judge: Linda Kevins

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SHORT FORM ORDER

INDEX No. 607626/2017
CAL. No. 201901625M

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 1/15/20
ADJ. DATE 7/7/20
Mot. Seq. # 001 MotD

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PATRICIA GALLO and CARMINE GALLO,

Plaintiffs,

JOHN L. JULIANO, ESQ.
Attorney for Plaintiffs
39 Doyle Court
East Northport, New York 11731

- against -

SLAVA SHAPIRO, SLAVA SHAPIRO D.D.S.,
M.D., SLAVA SHAPIRO D.D.S. M.D. P.C., and
WOODBURY ORAL SURGERY,

VIGORITO BARKER PORTER
Attorney for Defendants
300 Garden City Plaza, Suite 308
Garden City, New York 11530

Defendants.

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Upon the following papers read on the e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, filed December 13, 2019; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by plaintiff, filed February 21, 2020; Replying Affidavits and supporting papers by defendant, filed May 4, 2020; Other _____; it is

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiffs' claim for dental malpractice is dismissed, and is otherwise denied.

In this dental malpractice action, plaintiffs, Patricia Gallo (Patricia) and Carmine Gallo (Carmine), allege that defendants, Slava Shapiro, Slava Shapiro, D.D.S., M.D., Slava Shapiro D.D.S. M.D. P.C., and Woodbury Oral Surgery, extracted the wrong tooth from Patricia. Plaintiffs allege that Patricia went to Dr. Shapiro with a prescription from her general dentist, nonparty Dr. Eyal Waldman, to extract teeth 6 and 11. Instead, plaintiffs allege that Dr. Shapiro extracted teeth 6 and 13. In addition to the dental malpractice claim, plaintiffs allege that defendants failed to obtain Patricia's informed consent.¹ Plaintiffs further allege that the corporate defendants, by their agents and employees, "failed to examine, read, interpret, diagnose[,] and treat" Patricia's dental condition; retained incompetent employees; and

¹ Plaintiffs have not asserted a claim for medical battery (see generally *Tirado v Koritz*, 156 AD3d 1342, 68 NYS3d 295 [4th Dept 2017]).

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failed to properly supervise or train their employees. Patricia's alleged injuries include the loss of tooth 11, pain, sensitivity, swelling of the face, headaches, halitosis, and weakened bite strength. The malpractice allegedly occurred on August 16, 2016.

Defendants now move for summary judgment dismissing the complaint. In support of their motion, defendants submit, among other things, an affidavit from Harry Dym, D.D.S., M.D.; the pleadings; bills of particulars; a transcript of the deposition of Patricia; a transcript of the deposition of Carmine; a transcript of the deposition of Dr. Shapiro; Dr. Waldman's medical records pertaining to Patricia; and defendants' medical records pertaining to Patricia. In opposition, plaintiffs submit, among other things, an affidavit from Richard Smith, D.D.S.; a March 2016 prescription from Dr. Waldman; and a consent form from August 2016.

Healthcare professionals must exercise due care in caring for patients (*see e.g. Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]). "The requisite elements of proof in a [dental] malpractice action are a deviation or departure from accepted community standards of [dental] practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*E.K. v Tovar*, __ AD3d __, __ NYS3d __, 2020 NY Slip Op 03904, *2 [2d Dept 2020] [quotation marks, alterations, and citations omitted]; *see Nelson v Lighter*, 179 AD3d 933, 116 NYS3d 360 [2d Dept 2020]). To meet its prima facie burden on summary judgment, a defendant in a dental malpractice action must show either that it "did not depart from good and accepted practice, or if there was such a departure, that it was not a proximate cause of the plaintiff's injuries" (*Mathias v Capuano*, 153 AD3d 698, 699, 60 NYS3d 327, 329 [2d Dept 2017] [quotation marks and citations omitted]; *see Dyckes v Stabile*, 153 AD3d 783, 61 NYS3d 110 [2d Dept 2017]). In so doing, "the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Bacalan v St. Vincents Catholic Med. Ctrs. of N.Y.*, 179 AD3d 989, 991-992, 118 NYS3d 147, 150 [2d Dept 2020]; *see Nelson v Lighter, supra*). In opposition, a plaintiff must "raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*Aliosha v Ostad*, 153 AD3d 591, 592, 61 NYS3d 55, 57 [2d Dept 2017] [quotation marks and citations omitted]; *see Nelson v Lighter, supra*). Summary judgment is inappropriate when the parties present divergent medical expert opinions (*see e.g. Macancela v Wyckoff Hgts. Med. Ctr.*, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]).

Lack of informed consent is a distinct cause of action from dental malpractice (*see Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 48 NYS3d 455 [2d Dept 2017]). In a cause of action alleging a lack of informed consent,

"a plaintiff must prove (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"

(*Gilmore v Mihail*, 174 AD3d 686, 688, 105 NYS3d 504, 507 [2d Dept 2019] [quotation marks and citations omitted]; *see Public Health Law § 2805-d; Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]). In determining whether a reasonable person, fully

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informed, would have undergone the medical procedure, an objective standard applies (*Davis v Nassau Ophthalmic Servs.*, 232 AD2d 358, 648 NYS2d 454 [2d Dept 1996], *lv denied* 89 NY2d 814, 659 NYS2d 854 [1997]). Accordingly, a plaintiff need not specifically state that he or she would not have undergone the medical procedure if properly informed (*id.*), though such a statement by the plaintiff may be evaluated by the trier of fact in determining, objectively, what a reasonable person would do (*see e.g. James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]). In an informed consent claim, proximate cause "mean[s] that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" (*Figueroa-Burgos v Bieniwick*, 135 AD3d 810, 811-812, 23 NYS3d 369, 371 [2d Dept 2016] [quotation marks and citations omitted]). "In order to meet their burden on this cause of action, defendants [are] required to establish either that the practitioner 'disclosed the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed' or that 'a reasonable person in the plaintiff's position, fully informed, would have elected to undergo the procedure or treatment'" (*Rivera v Albany Med. Ctr. Hosp.*, 119 AD3d 1135, 1138, 990 NYS2d 310, 313 [3d Dept 2014] [alterations and ellipses omitted], quoting *Orphan v Pilnik*, 15 NY3d 907, 914 NYS2d 729 [2010]).

In support of their motion, the defendants submitted the affidavit of Harry Dym, D.D.S., M.D. The Court will consider Dr. Dym's affidavit even though defendants did not serve an expert disclosure pursuant to CPLR 3101 (d) (*see Rivers v Birnbaum*, 102 AD3d 26, 953 NYS2d 232 [2d Dept 2012]). Dr. Dym, Chairman of the Department of Dentistry/Oral and Maxillofacial Surgery at The Brooklyn Hospital Center, avers he "routinely perform[s] oral surgery, including removal of teeth to create a bridge," and "routinely treat[s] patients who are referred from dental providers." Dr. Dym reviewed the pleadings, the bills of particulars, medical records, and the parties' deposition transcripts. Dr. Dym opined that "the care rendered to [Patricia] by the defendants was at all times appropriate and in accordance with good and accepted medical practices. The defendants did not depart from accepted medical care during the treatment of [Patricia]." Dr. Dym also averred that "there were no acts or omissions by the defendants that were the proximate cause of the injuries alleged herein."

Dr. Dym noted that Patricia previously, in 2014, had a tooth extracted by defendants. Although Patricia, in 2014, was referred to have two teeth extracted, Dr. Shapiro examined Patricia himself and determined that only one of the two teeth had to be extracted, according to Dr. Dym. Dr. Dym stated that Dr. Shapiro, in 2014, "discussed his findings with [Patricia] and, after obtaining her consent," extracted only the single tooth.

"The same series of events occurred with respect to [Patricia's] presentation on August 16, 2016[,] to Woodbury Oral Surgery," Dr. Dym stated. Dr. Waldman's prescription was for the extraction of teeth 6 and 13. "Again, Dr. Shapiro performed an independent examination, including taking and reviewing x-rays of [Patricia's] teeth." Dr. Shapiro discovered that tooth 13 was "a healthy tooth," while tooth 11 contained "a vertical fracture." "Dr. Shapiro discussed these findings with [Patricia] and advised that tooth #11 should be pulled instead of tooth #13 as tooth #13 was a healthy tooth." Patricia, Dr. Dym stated, "agreed to have tooth #11 removed instead of tooth #13." Dr. Shapiro also "discussed with [Patricia] that leaving tooth #11 in place . . . could cause infection given her history of diabetes and heart disease. He further explained that she could be at risk of having facial abscess, cellulitis, or further complications if tooth #11 remained in place. Additionally, Dr. Shapiro explained to [Patricia] that if tooth #11 were left in place, it would not support the bridge that needed to be constructed" (citations

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omitted). Although Dr. Shapiro "asked [Patricia] if she would like to think it over or discuss same with her husband," Patricia decided to have the extraction done that day so she would not have "to come back for a further visit." Dr. Dym explained that teeth 6 and 11 were extracted by Dr. Shapiro that day. Patricia "was given a prescription for Amoxicillin, Peridex, Rinse, and Tylenol #3." The next day, Carmine called Dr. Shapiro and "expressed that Dr. Waldman had recommended tooth #6 and tooth #13 be removed, not #11. Dr. Shapiro assured him that he removed two fractured teeth just as his wife had requested."

Turning to his analysis, Dr. Dym first noted that "tooth #6 is not at issue in this matter. There has been no testimony provided in which either party disagrees over the extraction of tooth #6."

Dr. Dym also opined that Dr. Shapiro properly extracted tooth 11 instead of tooth 13. Specifically, "Dr. Shapiro, as an oral surgeon, would have been remised if he did not perform an independent examination of [Patricia] and took Dr. Waldman at his word. By performing an independent examination[,] Dr. Shapiro was able to diagnose a vertical fracture present in tooth #11." The x-rays examined and viewed by Dr. Shapiro are "an adjunctive diagnostic tool," though they "do not provide the entire story[,] as an x-ray cannot show mobility, pain, or in some instances, whether a vertical fracture is present." Accordingly, Dr. Dym continued, Dr. Shapiro also "performed an independent examination of the plaintiff's teeth to determine mobility and pain. Upon that examination, he was able to diagnose the vertical fracture in tooth #11 and determine that tooth #13 was a healthy tooth." Dr. Dym also noted that the fracture of tooth 11 "was present on the films conducted by Dr. Waldman."

Dr. Dym stated that Dr. Shapiro's attempt to call Dr. Waldman "to inform him of the change of plan was nothing more than professional courtesy. Dr. Shapiro, as a board[-]certified oral surgeon, was well within the standard of care when determining that the plan of treatment should be changed to remove an unhealthy tooth as opposed to a healthy tooth." In fact, Dr. Dym opined that "had Dr. Shapiro blindly followed the recommendation of Dr. Waldman without conducting his own examination as a board[-]certified oral surgeon, that blind faith would have resulted in a departure from the standard of care."

Dr. Dym also opined that Dr. Shapiro's alleged malpractice did not cause Patricia's injuries. Although Patricia "alleged that she suffered severe pain, sensitivity, and weakened bite strength following the extraction of teeth #6 and #11," those alleged injuries "would have occurred regardless of whether teeth #6 and #13 were extracted instead of teeth #6 and #11." Specifically, "[p]ain and tenderness are results of any extraction procedure, which occur in the absence of negligence. In fact, those symptoms and events can occur simply as a result of a fractured tooth. There is no evidence of any improper technique employed by Dr. Shapiro that contributed to any of the plaintiff's complaints in this case."

Dr. Dym further posited that Dr. Shapiro, "as an employee and agent of Woodbury Oral Surgery," properly obtained Patricia's informed consent. Dr. Shapiro "properly explained to [Patricia] that she ran the risk of developing an infection if tooth #11 was left in place. Specifically, Dr. Shapiro testified that given [Patricia's] history of diabetes and heart disease, a vertical fracture could cause infection, including fascial abscess and cellulitis." Additionally, if tooth 11 had been left in place, "it would not be able to support the anticipated bridge given the presence of a fracture." Dr. Shapiro, according to Dym, also gave Patricia "the opportunity to discuss the change in plan with her husband" or "to reschedule her appointment if she wanted more time to weigh her options," both of which Patricia rejected. Ultimately,

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Dr. Dym stated, Patricia "agreed to undergo the extraction of tooth #11 rather than tooth #13." Dr. Dym also stated that Patricia signed a consent form that stated that "[t]he risks and benefits for the procedure have been discussed with me to my satisfaction, including the risks and benefits of no treatment." Carmine's phone call to Dr. Shapiro "the following day stating that his wife did not understand the change of plan is irrelevant," Dr. Dym continued, because Patricia "appeared as a cognizant and understanding person, who had undergone a prior tooth extraction with Dr. Shapiro in the past, under similar circumstances."

Dr. Dym's affidavit was sufficient for the defendants to satisfy their prima facie burden on plaintiffs' dental malpractice claim. Dr. Dym explained, in a detailed manner, why it was medically appropriate to remove tooth 11 instead of tooth 13. Dr. Dym stated that Dr. Shapiro would have violated the applicable standard of care if he followed Dr. Waldman's prescription without conducting his own examination of Patricia. Dr. Dym explained that a fracture of tooth 11 "was present on the films conducted by Dr. Waldman, which Dr. Shapiro reviewed prior to consulting with [Patricia]," and was also noted during Dr. Shapiro's own examination. Dr. Dym explained that "Dr. Shapiro correctly assessed that tooth #11 could eventually result in a facial abscess, cellulitis, or other possible infection." Dr. Dym explained that Dr. Shapiro "was able to . . . determine that tooth #13 was a healthy tooth."

Dr. Dym also sufficiently explained why removing tooth 11 instead of tooth 13 did not proximately cause Patricia's alleged injuries. Dr. Dym stated that Patricia's alleged "severe pain, sensitivity, and weakened bite strength . . . would have occurred regardless of whether teeth #6 and #13 were extracted instead of teeth #6 and #11." He explained that "[p]ain and tenderness are results of any extraction procedure, which occur in the absence of negligence. In fact, those symptoms and events can occur simply as a result of a fractured tooth."

Dr. Dym's affidavit was also sufficient to establish defendants' prima facie entitlement to summary judgment on the informed consent claim. Although defendants' submission reveals the existence of triable questions of fact as to whether Dr. Shapiro informed Patricia that he would be extracting teeth 6 and 11 instead of teeth 6 and 13 (see *Godel v Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 AD3d 939, 64 NYS3d 127 [2d Dept 2017]; see generally *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 4 NYS3d 59 [2d Dept 2015]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]), defendants have shown that a reasonable person in Patricia's position would have consented to the removal of tooth 11 instead of tooth 13. Specifically, Dr. Dym explained that tooth 11 was fractured and tooth 13 was healthy, and he opined that a "reasonable person [would] have agreed to have an unhealthy tooth removed rather than a healthy tooth." Accordingly, defendants have satisfied their prima facie burden on plaintiffs' informed consent claim.

In opposition, plaintiffs failed to raise a triable question of fact as to whether defendants are liable for dental malpractice. Specifically, plaintiffs submitted the affidavit of Richard Smith, D.D.S., a retired dentist who has performed tooth extractions and, therefore, is qualified to render an opinion in this action (see *Castillo v Columbia Univ. Health Care Inc.*, 2016 NY Slip Op 32490[U] [Sup Ct, NY County 2016]). Although Dr. Smith raised a triable question of fact as to whether defendants departed from the applicable standard of care in extracting teeth 6 and 11 instead of teeth 6 and 13, his affidavit did not rebut defendants' showing that Patricia's claimed injuries—such as pain, sensitivity, swelling of the face, and headaches—would have occurred even if teeth 6 and 13 had been extracted and, therefore, were not caused

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by any alleged malpractice. Although Dr. Smith averred that defendants' malpractice caused "additional extractions, bone grafting, dental implants and a prosthesis [presumably the aforementioned bridge] incapable of being solely supported by remaining natural teeth," plaintiffs have not alleged such injuries in their complaint or bill of particulars (*Steinberg v Lenox Hill Hosp.*, 148 AD3d 612, 50 NYS3d 356 [1st Dept 2017]; see also *Brzozowy v ELRAC, Inc.*, 39 AD3d 451, 833 NYS2d 590 [2d Dept 2007]; *Diarassouba v Urban*, 24 AD3d 602, 808 NYS2d 344 [2d Dept 2005]).

Turning to the informed consent claim, plaintiffs raised a triable question of fact as to whether a reasonable person in Patricia's position would have had tooth 11 extracted instead of tooth 13. Specifically, the underlying basis for Dr. Dym's contention that a reasonable person in Patricia's position would have had tooth 11 removed instead of tooth 13 is that a "reasonable person [would] have agreed to have an unhealthy tooth removed rather than a healthy tooth." But Dr. Smith raised a question of fact as to the health of teeth 11 and 13. Specifically, after reviewing the x-ray taken by Dr. Waldman the month before the extractions, Dr. Smith opined that tooth 11 did not contain a vertical fracture, while tooth 13 had significant bone loss and should have been extracted. Although Dr. Smith did not review the x-rays taken by Dr. Shapiro, that merely goes to the weight of Dr. Smith's opinion. Of note, Dr. Dym claimed that the fracture of tooth 11 was present on Dr. Waldman's x-ray, which Dr. Smith specifically refuted.

Accordingly, defendants' motion for summary judgment is granted to the extent of dismissing the dental malpractice claim, and is otherwise denied.
Dated: 8/26/2020

LINDA KEVINS, JSC

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION