

Goldman v Horowitz
2020 NY Slip Op 34810(U)
August 26, 2020
Supreme Court, Orange County
Docket Number: Index No. EF003539/2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 26th day of August, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

JACQUELINE GOLDMAN,

PLAINTIFF,

-AGAINST-

DECISION & ORDER

SAMUEL HOROWITZ, DDS;
BENNY GOLDSTEIN, DDS and
GEORGE FREUD, DDS, PLLC,

INDEX #EF003539/2018
Motion date: 05/21/20
Motion Seq.# 1

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 10 were read on the summary judgment motion by Defendant, **Samuel Horowitz, DDS** to dismiss the Complaint as against him:

- Notice of Motion, Doyle Affirmation, Exhibits A - I;
- Horowitz Affidavit, Expert Affirmation (Siegel) 1- 5
- Affirmation in Opposition (Crown), Exhibits A-Q,
- Goldman Affidavit, Expert Affirmation (Bieber) 6 - 9
- Reply Affirmation (Doyle) 10

In this dental malpractice action, plaintiff alleges that Dr. Horowitz was negligent and departed from accepted standards of dental practice when he failed to instruct plaintiff to stop her blood thinning medications prior to performing dental work related to dental implants on April 26, 2017, and improperly prescribed and/or recommended ibuprofen following the second stage implant procedure such that plaintiff suffered excessive bleeding requiring hospitalization, blood transfusion and an eight-to-ten week course of iron infusions.

It is undisputed that Dr. Horowitz is an independent contractor and not an owner/operator, shareholder, agent servant and/or employee of the dental practice, Goldstein & Freud, DDS, PLLC. Dr. Horowitz is a general dentist specializing in implants who provides implant services to patients of the practice one day per month. The fees for plaintiff's implants were set by Goldstein & Freud and she paid \$16,000.00 prior to the commencement of the work which was scheduled for February 22, 2017.

Plaintiff recalls stopping her blood thinning medication, Eliquis, at least four days before the procedure and on February 22, 2017, Dr. Horowitz placed implants at the location of teeth nos. 5,8,9 and 12 followed by interlocking sutures. Plaintiff returned to the dental office on April 26, 2017 at which time Dr. Horowitz exposed one or two implants using a 4 mm punch applied to the gum tissue. He then placed healing abutments or "caps" over the exposed implants. Plaintiff claims that after the procedure, she felt a shooting pain in her gum. She testified that "Amanda", the office manager of Goldstein & Freud, gave her two pills to take for the pain, which plaintiff identified as Motrin (Exhibit D at 144-145, 178). Dr. Horowitz denies being present or being aware of Amanda administering Motrin to plaintiff.

When she woke up the next morning, plaintiff claims that there was blood on her pillow and sheets coming from her mouth. Although her husband suggested that she go to the hospital, plaintiff drove herself to the dental practice and waited for the office to open. Plaintiff was seen by Amanda and treated by compression. She was not seen by Dr. Horowitz or any other dentist on that day. Although plaintiff indicates that the bleeding did not stop, she attended her grandson's wedding that afternoon and then drove herself to the emergency room at St. Luke's Cornwall Hospital. She was treated by compression and admitted to the hospital for observation.

While in the hospital, her Eliquis was held and her bleeding spontaneously resolved. She subsequently developed severe symptomatic anemia warranting transfusion of two units of packed red blood cells and hematology consultation. Plaintiff was discharged on April 30, 2017. Plaintiff's claim of having been given Motrin during her dental visit on April 26, 2017 does not appear anywhere in St. Luke's medical record.

In a medical malpractice action, it is the plaintiff's burden to establish both a deviation from accepted practice and that the deviation was the proximate cause of the injury (*see Zito v Jastremski*, 84 AD3d 1069 [2d Dept. 2011]). Consequently, on a motion for summary judgment, a defendant has the initial burden of establishing that he or she 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 (*see Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008] *Rivera v Albany Med. Ctr. Hosp.*, 119 AD3d 1135, 1137 [3d Dept. 2014]; *Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept. 2014]).

"The *prima facie* burden is met only where the defendant addresses and rebuts any specific allegations of malpractice set forth in the plaintiff's bill of particulars" through expert opinion testimony (*Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16-17 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 20150]; *Koi Hou Chan v Sammi Yeung*, 66 AD3d 642,642 [2d Dept 2009]). Where the defendant makes such a *prima facie* showing, the burden then shifts to the plaintiff to rebut the defendant's showing through the submission of evidence raising a triable issue of fact, but only as to the elements on which the defendant met the *prima facie* burden (*Barrocales v New York Methodist Hosp.*, 122 AD3d 648 [2d Dept 2014]; *Contreras v Adeyemi*, 102 AD3d 720 [2d Dept 2013]; *Stukas v Streiter*, 83 AD3d 18 [2d Dept

2011]; *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78 [2d Dept 2008]). Thus, upon a defendant's *prima facie* showing, plaintiff must submit an expert affidavit in which the expert opines that the defendant departed from accepted medical practice and that the departure proximately caused the alleged injuries (*Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]; *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [2d Dept 1998], *lv denied* 92 NY2d 818 [1999]).

Here, Dr. Horowitz has made a *prima facie* showing of his entitlement to summary judgment dismissing the Complaint as against him. In opposition, plaintiff submits the affirmation of her counsel in which the claims for lack of informed consent and nerve injury have been withdrawn. Plaintiff further submits the expert affidavit of Dr. Josef Bieber who states that the Dr. Horowitz's performance of the implant procedure was within the standard of care, that plaintiff was a good candidate for the procedure and that she did not have to stop her medically necessary blood thinning medication for the minimally invasive uncovering procedure performed on April 26, 2017.

Dr. Bieber opines that the departure from good and accepted dental practices occurred when Motrin was administered to the plaintiff. Such opinion is insufficient to defeat defendant's *prima facie* showing as it is based upon an assumption that the Motrin was provided to plaintiff at the direction or with the knowledge of Dr. Horowitz. Plaintiff's own testimony is that she only told Amanda about her pain and that it was Amanda who gave her the pills. There is no evidence that Dr. Horowitz prescribed, directed or had any knowledge that a dental assistant administered Motrin to plaintiff following the uncovering procedure. In the absence of any employment or agency relationship with the staff member who allegedly provided the medication, there is no

basis for imposing liability on Dr. Horowitz (*see Kavanaugh by Gonzales v Nussbaum*, 71 NY2d 535 [1988]).

What is also troubling is plaintiff's testimony about her ignorance of the effects of Motrin while on Eliquis as it is clearly a boxed warning that if taken with non-steroidal anti-inflammatory drugs it may cause an increased risk of bleeding.

To the extent plaintiff raises new injuries not pleaded in her Bill of Particulars, such as fear and anxiety over the transfused blood she received in light of the Coronavirus epidemic, such claims are not properly before the Court and are not being considered.

Accordingly, it is hereby

ORDERED that the summary judgment motion of defendant, Samuel Horowitz, DDS, is granted and the Complaint as against him is dismissed.

The parties are directed to appear for a previously scheduled SKYPE status conference on October 1, 2020 at 12:00pm.

This decision constitutes the order of this court.

Dated: August 26th, 2020
Goshen, New York

ENTER:


HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF