

Posillico v Mangiaracina
2020 NY Slip Op 35182(U)
September 8, 2020
Supreme Court, Nassau County
Docket Number: Index No. 613826/17
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

DIANE POSILLICO,

Plaintiff,

— against —

CONCETTA MANGIARACINA, D.D.S.,
CONCETTA MANGIARACINA, D.D.S., PLLC,
ERIC WEINSTEIN, D.D.S., ISLAND SMILE
DENTAL ASSOCIATES, PLLC, SHINE
DENTAL ASSOCIATES OF THE NORTH SHORE,
PLLC, and ISLAND DENTAL ASSOCIATES,

Defendants.

**TRIAL / IAS PART 22
NASSAU COUNTY**

Index No. 613826/17

Motion Sequence No. 003, 004

The following papers having been read on these two (2) motions:

Motion sequence No. 003

Notice of Motion, Affidavits & Exhibits 1, 2
Answering Affidavits..... 3
Replying Affidavits..... 4
Briefs: Plaintiff / Petitioner..... _____
Defendant / Respondent..... _____

Motion sequence No. 004

Notice of Motion, Affidavits & Exhibits 1, 2
Answering Affidavits..... 3
Replying Affidavits..... 4
Briefs: Plaintiff / Petitioner..... _____
Defendant / Respondent..... _____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including efiled documents/exhibits numbered 57 through and including 84, 88 through and including 92 and 99 through and including 102, these two (2) motions are decided as follows:

The plaintiff filed the summons and complaint on December 19, 2017. The plaintiff alleged professional malpractice in the first cause of action, negligence in the second cause of action and negligent hiring and supervising medical personnel who lacked the requisite knowledge and skill of medical professionals in the community in the third cause of action. The plaintiff also alleged the defendants failed to advise of the risks, hazards and dangers inherent in the treatment rendered, alternatives to the treatment rendered and failed to obtain an informed consent from the plaintiff or any other authorized person.

The plaintiff claimed, in the amended bill of particulars, the defendants departed from good and accepted dental practice on or about November 2, 2011 up to and including July 2, 2015. The plaintiff alleged the defendants' conduct caused the plaintiff the need for extractions, need for implants, need for multiple surgeries, need for surgical flap, need for crown lengthening, extractions, gross decay, need for pain medications, hemorrhaging, root canals, tenderness and swelling of gums, nerve damage, swelling, numbness, tingling, severe facial pain, weight loss, pain, bleeding, embarrassment, fear of dental work, fatigue and pain and suffering.

It is not the court's function on a motion for summary judgment to assess credibility, or to engage in the weighing of evidence. Issue finding, rather than issue determination, is the court's proper function on such a motion. Thus, a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" [citation omitted]

Chimbo v Bolivar, 142 AD3d 944, 945 (2d Dept 2016).

Motion sequence No. 003

The defendants Concetta Mangiaracina, D.D.S. and Concetta Mangiaracina, D.D.S., PLLC move for an order dismissing all claims against them for all treatment dates before June 19, 2015, as outside the statute of limitations. Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC point out Eric Weinstein, D.D.S. referred the plaintiff to Dr. Mangiaracina, and Concetta Mangiaracina, D.D.S., PLLC. Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC note the plaintiff initially appeared at Shine Dental Associates of the North Shore, PLLC on November 2, 2011 and on November 9, 2011 with Dr. Weinstein, who treated the plaintiff.

CPLR 3211 (a) (5) provides, in pertinent part: “a party may move for judgment dismissing one or more causes of action asserted . . . on the ground that: the cause of action may not be maintained because of . . . [the] statute of limitations.” CPLR 214-a provides, in pertinent part: “[a]n action for . . . dental . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure.”

Here, Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC assert the plaintiff was last treated on May 2, 2014, and there were no communications among plaintiff, Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC after that visit.

In opposition, the plaintiff provides evidence in admissible form satisfactorily showing the statute of limitations should be tolled as to Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC due to continuous treatment of the plaintiff (*see Couch v County of Suffolk*, 296 AD2d 194 [2d Dept 2002]). The plaintiff proffers evidence in admissible form showing the plaintiff’s dental treatment from November 9, 2011 until July 2, 2015, which was part of a continuous course of treatment related to the single treatment plan to address the plaintiff’s complaints of continuous pain and sensitivity in the upper portion of the plaintiff’s mouth (*Cohen v Gold*, 165 AD3d 879 [2d Dept 2018]). The plaintiff also submits evidence that Dr. Mangiaracina and Dr. Weinstein treated the plaintiff at the practice entities named in this lawsuit,

and the plaintiff was treated by another doctor from the practices as a patient of the practice when the defendants were unavailable.

Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC move for an order pursuant to CPLR 3212 granting them summary judgment. Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC assert there are no genuine issues of material fact that would warrant a trial on this matter.

In a dental malpractice action, the requisite elements of proof are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries. A defendant moving for summary judgment 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 *Kozlowski v Oana*, 102 AD3d 751, 752-53 [2d Dept 2013].

Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC established a prima facie entitlement to judgment as a matter of law. Here, Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC provided the affirmed report of their medical expert showing they did not depart from good and accepted practice deviate or depart from accepted standards of dental practice, and they were not a proximate cause of the plaintiff's injuries.

In opposition, the plaintiff raised a triable issue of fact. The plaintiff provided an affirmed report by the plaintiff's expert showing a deviation or departure from accepted standards of dental practice by Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC, and that such departure was a proximate cause of the plaintiff's injuries.

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” [citation omitted] (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]).

Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC alternatively move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's claim for lack of informed consent and directing the clerk of the court to enter judgment.

“To establish a cause of action [to recover damages] for malpractice based on 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” [[citation omitted]

Chan v Toothsavers Dental Care, Inc., 125 AD3d 712, 713 [2d Dept 2015].

Here, Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC established a prima facie entitlement to judgment on the issue of the defendants informing the plaintiff of the risks, hazards and dangers inherent in the treatment rendered, alternatives to the treatment rendered and obtaining an informed consent from the plaintiff (Public Health Law § 2805-d [1]). Dr. Mangiaracina and Concetta Mangiaracina, D.D.S., PLLC provided evidence in admissible form showing the plaintiff was informed of the reasonably foreseeable risks associated with the treatment, and the alternatives.

In opposition, the plaintiff failed to raise a triable issue of fact regarding informed consent. The plaintiff did not provide evidence in admissible form showing the dental treatment failed to disclose alternatives and failed to inform the plaintiff of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable dentist would have disclosed in the same circumstances. The plaintiff did not proffer evidence in admissible form showing a reasonably prudent patient in the same position would not have undergone the treatment if the plaintiff had been fully informed. The plaintiff did not submit evidence displaying the lack of informed consent was a proximate cause of the plaintiff's injury.

Motion sequence No. 004

The defendants Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates move for orders pursuant to CPLR 3212 granting them summary judgment and dismissing the plaintiff's cause of action sounding in negligence and all claims against them. Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates assert they did not commit any malpractice and cannot be held liable to the plaintiff.

In a dental malpractice action, the requisite elements of proof are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries. A defendant moving for summary judgment 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 *Kozlowski v Oana*, 102 AD3d 751, 752-53 [2d Dept 2013].

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates established a prima facie entitlement to judgment as a matter of law. Here, Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates provided the affirmed report of their medical expert showing they did not depart from good and accepted practice deviate or depart from accepted standards of dental practice, and they were not a proximate cause of the plaintiff's injuries.

In opposition, the plaintiff raised a triable issue of fact. The plaintiff provided an affirmed report by the plaintiff's expert showing a deviation or departure from accepted standards of dental practice by Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates, and that such departure was a proximate cause of the plaintiff's injuries.

“Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” [citation omitted] (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]).

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates contend the defendants properly obtained the plaintiff's informed consent and cannot be held liable to the plaintiff on that cause of action.

“To establish a cause of action [to recover damages] for malpractice based on 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” [citation omitted]

Chan v Toothsavers Dental Care, Inc., 125 AD3d 712, 713 [2d Dept 2015].

Here, Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates established a prima facie entitlement to judgment on the issue of the defendants informing the plaintiff of the risks, hazards and dangers inherent in the treatment rendered, alternatives to the treatment rendered and obtaining an informed consent from the plaintiff (Public Health Law § 2805-d [1]).

In opposition, the plaintiff failed to raise a triable issue of fact regarding informed consent. The plaintiff did not provide evidence in admissible form showing the dental treatment failed to disclose alternatives and failed to inform the plaintiff of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable dentist would have disclosed in the same circumstances. The plaintiff did not proffer evidence in admissible form showing a reasonably prudent patient in the same position would not have undergone the treatment if the plaintiff had been fully informed. The plaintiff did not submit evidence displaying the lack of informed consent was a proximate cause of the plaintiff's injury.

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates claim the plaintiff's cause of action sounding in negligent hiring/supervision and all plaintiff's claims may not be maintained against them.

A necessary element of a cause of action alleging negligent hiring or negligent supervision of an employee is that the “employer knew or should have known of the employee's propensity for the conduct which caused the injury” [citation omitted] (*KM v Fencers Club, Inc.*, 164 AD3d 891, 892 [2d Dept 2018], *lv to appeal denied*, 32 NY3d 919 [2019]). Here, Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates establish a prima facie entitlement to judgment as a matter of law regarding the issue of negligent hiring/supervision. In opposition, the plaintiff failed to raise a triable issue of fact. Moreover, the plaintiff

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates also move for an order denying the motion by Dr. Mangiaracina, and Concetta Mangiaracina, D.D.S., PLLC. Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates assert the statute of limitations regarding the continuous treatment doctrine applies to the plaintiff's relevant treatment.

The Court determines Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates failed to satisfy their burden for denying the motion by Dr. Mangiaracina, and Concetta Mangiaracina, D.D.S., PLLC.

In opposition, the plaintiff provides evidence in admissible form satisfactorily showing the statute of limitations should be tolled as to Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates due to continuous treatment of the plaintiff (*see Couch v County of Suffolk*, 296 AD2d 194 [2d Dept 2002]). The plaintiff proffers evidence in admissible form showing the plaintiff's dental treatment from November 9, 2011 until July 2, 2015, was part of a continuous course of treatment related to the single treatment plan initially created by Dr. Weinstein and later amended by Dr. Mangiaracina to address the plaintiff's complaints of continuous pain and sensitivity in the upper portion of the plaintiff's mouth (*Cohen v Gold*, 165 AD3d 879 [2d Dept 2018]). The plaintiff also submits evidence that Dr. Mangiaracina and Dr. Weinstein treated the plaintiff at the practice entities named in this lawsuit, and the plaintiff was treated by another doctor from the practices as a patient of the practice when the defendants were unavailable.

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates also move for an order pursuant to CPLR 3212, granting them summary judgment and dismissing the plaintiff's cause of action sounding in vicarious liability against them if it is held no individual defendant was negligent. This branch of the motion by Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is denied, under these circumstances, since a finding of negligence as to any party is the province of a trier of fact.

Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates further move for an order dismissing the plaintiff's complaint and directing the Clerk of the Court to enter judgment in their favor. This branch of the motion by Dr. Weinstein, Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is moot, under these circumstances, since the plaintiff's complaint is not dismissed.

ORDERED that the branch of the motion (sequence 003) by Concetta Mangiaracina, D.D.S. and Concetta Mangiaracina, D.D.S., PLLC is **DENIED** for dismissing all claims against them for all treatment dates before June 19, 2015, as outside the statute of limitations, and it is also,

ORDERED that the branch of the motion (sequence 003) by Concetta Mangiaracina, D.D.S. and Concetta Mangiaracina, D.D.S., PLLC is **DENIED** granting them summary judgment, and it is also,

ORDERED that the branch of the motion (sequence 003) by Concetta Mangiaracina, D.D.S. and Concetta Mangiaracina, D.D.S., PLLC is **GRANTED** awarding partial judgment only dismissing the plaintiff's claim regarding lack of informed consent, and it is also,

ORDERED that the branch of the motion (sequence 004) by Eric Weinstein, D.D.S., Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is **DENIED** for granting summary judgment and dismissing the plaintiff's cause of action sounding in negligence and all claims against them, and it is also,

ORDERED that the branch of the motion (sequence 004) by Eric Weinstein, D.D.S., Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is **GRANTED** awarding partial judgment only dismissing the plaintiff's claim regarding lack of informed consent, and it is also,

ORDERED that the branch of the motion (sequence 004) by Eric Weinstein, D.D.S., Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is **GRANTED** for partial summary judgment only on the issue of negligent hiring/supervision, and it is also,

ORDERED that the branch of the motion (sequence 004) by Eric Weinstein, D.D.S., Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is **DENIED** for dismissing all claims against them as time barred by the statute of limitations, and it is also,

ORDERED that the branch of the motion (sequence 004) by Eric Weinstein, D.D.S., Shine Dental Associates of the North Shore, PLLC and Island Dental Associates is **DENIED** for granting them summary judgment and dismissing the plaintiff's cause of action sounding in vicarious liability against them if it is held no individual defendant was negligent, and it is also,

This decision will constitute the order of the Court.

Dated: September 8, 2020

ENTERED



ANTONIO I. BRANDVEEN
J. S. C.

NOT FINAL DISPOSITION

ENTERED

Sep 10 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE