

Daleo v Siegel

2021 NY Slip Op 30458(U)

February 17, 2021

Supreme Court, New York County

Docket Number: 805405/2016

Judge: Judith Reeves McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDITH REEVES MCMAHON PART IAS MOTION 30

Justice

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JOSEPH DALEO,

Plaintiff,

- v -

SCOTT SIEGEL MD DDS FACS FICS FAAP, NORTHEAST
ORAL AND MAXILLOFACIAL SURGERY PLLC

Defendant.

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INDEX NO. 805405/2016

MOTION DATE 02/10/2021

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 112 were read on this motion to/for JUDGMENT - SUMMARY.

Defendants' motion for Summary Judgment seeking to dismiss Plaintiff's (1) first cause of action for dental malpractice as against Scott A. Siegel, M.D., D.D.S., ("Dr. Siegel"), FICS, and FAAP, (2) third cause of action for lack of informed consent as against Siegel, FICS, and FAAP, and (3) third cause of action for vicarious liability as against Northeast Oral and Maxillofacial Surgery, PLLC ("Northeast") is granted in part and denied in part as detailed herein.

According to his Complaint, Plaintiff was referred to Dr. Siegel by his own dentist for the extraction of tooth 16 and tooth 17. Plaintiff alleges that Dr. Siegel departed from accepted standards of dental care when he performed a second procedure and tried to surgically remove a broken "burr" tip that severed while he was performing the extraction. After Dr. Siegel could no longer see the burr tip, he ceased any efforts to extract it. Plaintiff alleges that Dr. Siegel did not

get his informed consent to perform the second procedure, which resulted in unnecessary permanent nerve damage and injury to the Inferior Alveolar Nerve.

In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986).

“The requisite elements of proof in a dental malpractice action are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff’s injuries.” *Silveri v. Glaser*, 166 A.D.3d 1044, 1045-46 (2d Dept 2018) (internal citations omitted). “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 A.D.3d 751, 752-53 (2d Dept 2013).

“To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient 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.” *Godel v. Goldstein*, 155 A.D.3d 939, 941-42 (2d Dept 2017) (internal citations omitted). “The mere fact that the plaintiff signed a consent

form does not establish the defendants' prima facie entitlement to judgment as a matter of law.” *Schussheim v. Barazani*, 136 A.D.3d 787, 789 (2d Dept 2016).

Here, Defendants submit an Affirmation from David A. Behrman, D.M.D., (“Dr. Behrman”) which demonstrated their prima facie entitlement to judgment as a matter of law. *See Zito v. Jastremski*, 84 A.D.3d 1069, 1071 (2d Dept 2011). In his Affirmation, Dr. Behrman opined that Dr. Siegel’s attempt to retrieve the severed burr tip and the techniques he utilized were reasonable and appropriate. According to Dr. Behrman, Dr. Siegel’s decision to stop the second procedure when the burr was no longer visible was appropriate in order to avoid adverse effects to the Inferior Alveolar Nerve. Dr. Behrman also states in his Affirmation that it is reasonable to opine that Plaintiff’s paresthesia is a result of the third molar extraction itself, which Dr. Siegel properly disclosed the risk of to Plaintiff.

“To defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing.” *Silveri v. Glaser*, 166 A.D.3d 1044, 1046 (2d Dept 2018).

Here, “in opposition, the plaintiff raised a triable issue of fact by submitting an expert affirmation from a physician, who opined with a reasonable degree of medical certainty that the defendants departed from the accepted standard of care.” *Cummings v. Brooklyn Hosp. Ctr.*, 147 A.D.3d 902 (2d Dept. 2017). In his affirmation, Stuart Lieblich, a Board certified Oral and Maxillofacial Surgeon (“Dr. Lieblich”) opined that extraction was not the only treatment option available and that Plaintiff should have been offered to undergo a “coronectomy”, which would have avoided the risk of injury to the Inferior Alveolar Nerve. According to Dr. Lieblich, Dr. Siegel departed from the standard of care in failing to get Plaintiff’s informed consent before he

commenced the second procedure. Dr. Lieblich opined that Dr. Siegel also departed from the standard of care when he waited to get Plaintiff's consent for the initial tooth extraction until Plaintiff was in the chair and had received an anesthetic. Finally, Dr. Lieblich also states in his Affirmation that the risk of nerve injury as a result of tooth extraction was disclosed in Plaintiff's consent form.

This Court finds that based upon Dr. Lieblich's Affirmation, Plaintiff has shown the existence of a triable issue of fact regarding whether Dr. Siegel departed from the standard of care with regards to the second procedure, including the techniques he used. The Court further finds that Plaintiff has put forward triable issues of fact regarding whether he gave informed consent for the second procedure during which Dr. Siegel attempted to remove the severed burr tip.

However, the Court also finds that Plaintiff has failed to present a triable issue of fact sufficient to overcome Defendants' prima facie showing that Dr. Siegel received informed consent to perform the initial extraction of tooth 16 and tooth 17. Therefore, any allegations in Plaintiff's Complaint regarding lack of informed consent with respect the initial extraction procedure are hereby dismissed.

The Court notes that Plaintiff concedes in his Affirmation in Support that Dr. Siegel did not depart from the standard of care in extracting tooth 16 and tooth 17. Dr. Lieblich also opines in his Affirmation that Dr. Siegel's extraction of tooth 16 and tooth 17 was properly performed. Therefore, any allegations made by Plaintiff as to Dr. Siegel's extraction of tooth 16 and tooth 17 are dismissed.

Accordingly, it is hereby

ORDERED that Plaintiff's allegations of malpractice against Defendants based on Dr. Siegel's extraction of tooth 16 and tooth 17 are hereby dismissed; it is further

ORDERED that Plaintiff's allegations of lack of informed consent with respect to the initial procedure of extracting tooth 16 and tooth 17 are hereby dismissed; it is further

ORDERED that the remainder of Defendant's Motion for Summary Judgment seeking dismissal is denied; it is further

ORDERED that any and all additional requests for relief are hereby denied; and it is further

ORDERED that the Clerk enter the Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

<u>2/17/2021</u> DATE		<u>S//</u> JUDITH REEVES MCMAHON, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE