

<b>Averbukh v Beydoun</b>
2021 NY Slip Op 30876(U)
March 18, 2021
Supreme Court, Kings County
Docket Number: 516065/2019
Judge: Pamela L. Fisher
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At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 18<sup>th</sup> day of March 2021.

P R E S E N T:

HON. PAMELA L. FISHER,  
J.S.C.

-----X  
ZHANNA AVERBUKH,

Plaintiff,

**DECISION/ORDER**

- against -

Index No: 516065/2019

FADI BEYDOUN, D.D.S. and DOWNTOWN  
DENTAL STUDIO,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed_____	<u>1, 2</u>
Opposing Affidavits (Affirmations)_____	<u>3, 4, 5</u>
Reply Affidavits (Affirmations)_____	<u>6, 7</u>

Upon the foregoing papers in this medical and dental malpractice action, defendants move, pursuant to CPLR 3212, for summary judgment, dismissing plaintiff’s complaint in its entirety.

Plaintiff commenced this action by filing a summons and complaint on or about July 22, 2019 (Defendants’ Affirmation in Support ¶ 5; Summons & Complaint, NYSCEF #1). Issue was joined on or about August 12, 2019, and plaintiff served a bill of particulars upon defendants on or about September 10, 2019 (Defendants’ Affirmation in Support ¶ 5; Defendants’ Answer, NYSCEF # 2; plaintiff’s bill of particulars, annexed as Exhibit B to defendants’ motion papers). In her complaint and bill of particulars, plaintiff alleges that defendants departed from acceptable standards of dental practice by “instituting contraindicated treatment of a fixed implant and supported bridges,” failing to discuss the risks and alternatives of the treatment plan with the plaintiff, and “allowing unqualified personnel to perform procedures on the plaintiff” (Complaint ¶¶ 14, 29; plaintiff’s bill of particulars ¶

3). In her bill of particulars, plaintiff maintains that “the anterior-posterior spread of the implants was too wide to support a screw retained implant prosthesis,” and the proper treatment included “a combination of implant supported and tissue borne removable prosthesis” (*Id.* at ¶ 9). As a result of defendants’ alleged malpractice, plaintiff is claiming to have sustained the following injuries: failed implants, extensive grafting of the maxillary sinuses, pain and trauma to the mouth, pain, trauma, and irritation to the gums, gum swelling, infection in the dental implant area, and loss of opportunity for successful implant due to bone loss (*Id.* at ¶ 11).

The following facts are not in dispute. Plaintiff first presented to Dr. Beydoun’s office, Downtown Dental Studio, on August 23, 2017 to discuss replacing her removable upper denture with implants and a fixed prosthesis (Defendants’ Expert Affirmation ¶ 6, annexed as Exhibit A to defendants’ motion papers). At this visit, plaintiff filled out some paperwork; Dr. Beydoun reviewed a cone beam CT scan (CBCT) she brought with her, and performed an examination of her mouth (Plaintiff’s EBT tr. 25, lines 6-25; at 26, lines 1-12, annexed as Exhibit C to defendants’ motion papers; Defendants’ Expert Affirmation ¶ 6). After some discussion, plaintiff agreed to a treatment plan consisting of a sinus lift with bone grafting, six upper implants, and a fixed porcelain bridge (*Id.* at ¶¶ 6-7). On October 11, 2017, Dr. Beydoun performed the sinus lift with bone grafting on the plaintiff; he took an x-ray after the procedure was performed, and he prescribed an antibiotic and painkiller (*Id.* at ¶ 8). On October 17, 2017, plaintiff was seen by Dr. Kumin, another dentist at the practice, who observed that her sutures were intact, and noticed “inflammation in the upper right at the healing surgical sites” (*Id.* at ¶ 9). He directed plaintiff to rinse her mouth with Peridex and warm salt water (*Id.*). On October 30, 2017, plaintiff’s sutures were removed by Dr. Kumin (*Id.*). On November 1, 2017, plaintiff returned for a follow-up visit with Dr. Beydoun, who observed that the surgical site was healing well, and he relined her denture (*Id.* at ¶ 10). On February 14, 2018, plaintiff was seen for a routine check-up, and on April 11, 2018, Dr. Beydoun inserted the implants in plaintiff’s mouth, and

she was prescribed Peridex, a painkiller, and an antibiotic (*Id.* at ¶¶ 11, 12). On April 25, 2018, plaintiff's sutures were removed, and on May 9, 2018, she returned for a follow-up appointment (*Id.* at ¶¶ 12, 13). At this appointment, she was directed to return in three months for stage 2 of the procedure, uncovering the implants (*Id.* at ¶ 13). On August 8, 2018, the implants were uncovered, and "[h]ealing abutments were placed (*Id.* at ¶ 14). On August 15, 2018, plaintiff returned to Downtown Dental due to her discomfort around a few implant sites, and the plaque around the healing abutments was cleaned and irrigated (*Id.* at ¶ 15). On August 22, 2018, plaintiff presented to Downtown Dental, complaining of discomfort at an implant site; her denture was adjusted, and she was advised to schedule a cleaning to reduce the inflammation (*Id.*). On September 5, 2018, she was seen for the cleaning, and impressions were taken for the bridge (*Id.*). On September 12, 2018, final impressions were taken (*Id.* at ¶ 16). She returned on September 20, 2018 with discomfort around the implants, "as tissue had begun growing over the healing cap," and her healing cap was changed to a seven-millimeter healing cap (*Id.* at ¶ 17). On September 26, 2018, the metal framework for the bridge was tried on in her mouth, and impressions for "the porcelain that would go onto the framework" were taken (*Id.*). During this process, some of the "impression material lodged under the metal framework and got stuck," but this "did not affect Dr. Beydoun's ability to send the framework with the impression to the lab to add porcelain to the framework" (*Id.*). On October 4, 2018, plaintiff returned for a follow-up visit, and the hygienist observed a "five millimeter pocket where the gum had not healed tightly to the implant" (*Id.* at ¶ 18). On October 10, 2018, a gingivectomy was performed to address this issue (*Id.*). On October 24, 2018, plaintiff presented to Downtown Dental with a letter from Dr. Barsky, a dentist whom she had consulted, and she advised Dr. Beydoun that she no longer wished to continue treatment with him (*Id.* at ¶ 19). Plaintiff subsequently continued treatment with Dr. Paly and Dr. Rosenberg (Records of Dr. Steven Rosenberg, annexed as Exhibit G to defendants' motion papers; Records of Dr. Bruce Paly, annexed as Exhibit H to defendants' motion papers).

In support of their motion for summary judgment, defendants submit an expert affirmation from Dr. Harry Dym, D.D.S., an oral and maxillofacial surgeon, contending that Dr. Beydoun's treatment was in accordance with acceptable standards of dental practice, and that his treatment did not proximately cause any of plaintiff's alleged injuries (Defendants' Expert Affirmation ¶¶ 1, 3). He also concludes that defendant obtained the patient's informed consent before beginning treatment (*Id.* at ¶ 3). Dr. Dym's opinion is based on review of plaintiff's dental and medical records, legal documents for this case, and deposition testimony (*Id.* at ¶ 2). Dr. Dym maintains that Dr. Beydoun did not deviate from the standard of care by offering the fixed porcelain bridge treatment option to the plaintiff, as this option was viable given the plaintiff's small mouth, small anterior posterior-distance, and the fact that plaintiff "did not have overly strong chewing forces" (*Id.* at ¶ 7). He alleges that Dr. Beydoun properly obtained plaintiff's informed consent by discussing three different treatment options with her, and the risks, benefits, and alternatives of each treatment option (*Id.* at ¶¶ 6, 21-22). Dr. Dym states that the hygienist, Galina Aleksandrovich, was properly supervised during all procedures, and that she did not cause any injury to plaintiff (*Id.* at ¶ 23). Dr. Dym contends that all of the injuries claimed in plaintiff's bill of particulars are without merit, as some of these injuries were inherent risks of the procedures, or she did not sustain these injuries at all (*Id.* at ¶ 25). As to the first injury claimed, failed implants, Dr. Dym notes that all of the implants placed by Dr. Beydoun are stable and usable (*Id.* at ¶ 26). The second claimed injury, extensive grafting of the maxillary sinuses, is not an injury, as the grafting was necessary to "ensure adequate bony support for implants," and there is no evidence that plaintiff suffered from sinusitis following the procedure (*Id.* at ¶ 27). The third claimed injury, pain, trauma, and irritation to the mouth and gums, are "expected conditions" after surgery, and there is no evidence that plaintiff's surgical sites became infected (*Id.* at ¶ 28). As for the last claimed injury, loss of opportunity for successful implants due to bone loss, Dr. Dym opines that plaintiff has not lost the opportunity for successful implants, as the six implants inserted by Dr. Beydoun were successful, and

Dr. Rosenberg was able to successfully place an additional anterior implant (*Id.* at ¶ 29). He further contends that the bone loss was not caused by defendants' treatment, but was the result of plaintiff not having teeth in the "maxillary arch" for many years (*Id.*). Dr. Dym maintains that the fact that plaintiff's subsequent providers preferred a different treatment method, which was an option Dr. Beydoun presented to her on the first visit, does not indicate that Dr. Beydoun was negligent; it "merely reflects a difference in opinion and technique" (*Id.* at ¶ 31).

In opposition to defendants' motion for summary judgment, plaintiff submits an expert affirmation from Dr. Alexander Barsky, DDS, a dentist licensed to practice in the State of New York, who concludes that Dr. Beydoun deviated from the standard of care by performing treatment that was contraindicated (Plaintiff's Expert Affirmation ¶¶ 1, 4, 5). Dr. Barsky's opinion is based on review of plaintiff's dental records, including radiographic films, as well as his examination of plaintiff (*Id.* at ¶ 2). Dr. Barsky maintains that "the fixed-implant supported bridge" treatment option was "absolutely contraindicated due to the wide anterior-posterior spread of the implants (21-25) mm, little native bone," and "excessive bone/gingival tissue loss" (*Id.* at ¶ 4). Further, he contends that Dr. Beydoun's decision to even offer this treatment plan as an option was not "merely an error in judgment," as the treatment had "no reasonable chance" of success (*Id.* at ¶ 5). He indicates that a "fixed hybrid implant/tissue supported appliance" was the best option for the plaintiff (*Id.*). Based on Ms. Averbukh's representation to him regarding the division of the work between Dr. Beydoun and his hygienist, Dr. Barsky suggests that defendants deviated from the standard of care by having the hygienist provide the "substantial majority of treatment," as the "complex restorative procedure" was "beyond the scope, capabilities, and licensure of a hygienist" (*Id.* at ¶ 4). Dr. Barsky concludes that Dr. Beydoun's departures proximately caused plaintiff's injuries, as she was "required to undergo additional care and procedures by subsequent providers," resulting in additional costs (*Id.* at ¶ 6).

In reply, defendants reiterate that Dr. Beydoun's treatment was within the standard of care, and it did not cause any injury to plaintiff (Defendants' Reply Affirmation ¶ 6). Further, defendants argue that the cause of action for lack of informed consent must be dismissed, as plaintiff has failed to oppose that portion of the motion (*Id.* at ¶ 12). Defendants maintain that Dr. Barsky's affirmation is insufficient to raise a triable issue of fact, in that it is speculative and conclusory (*Id.* at ¶ 9; Defendants' Supplemental Reply Affirmation ¶¶ 5, 12-13).

To prevail on a cause of action for dental malpractice, the plaintiff must prove "a deviation or departure from accepted standards of dental practice, and that such a departure was a proximate cause of plaintiff's injuries" (*Sharp v. Weber*, 77 AD3d 812, 813 [2d. Dept. 2010]; *Koi Hou Chan v. Yeung*, 66 AD3d 642, 642 [2d. Dept. 2009]; *Cohen v. Kalman*, 54 AD3d 307 [2008]; *Terranova v. Finklea*, 45 AD3d 572 [2007]; *Posokhov v. Oselkin*, 44 AD3d 921 [2007]; *Keevan v. Rifkin*, 41 AD3d 661, 662 [2007]). On a motion for summary judgment, "the 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" (*Sharp*, 77 AD3d at 814; *Koi Hou Chan*, 45 AD3d at 642; *Myers v. Ferrara*, 56 AD3d 78, 83 [2008]). If defendant "sustain[s] its burden," then plaintiff is required to "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 AD3d 1044, 1046 [2d. Dept. 2018]). "[C]onclusory allegations of malpractice, unsupported by competent evidence" are "insufficient to defeat summary judgment" (*Id.*). Where the parties have submitted conflicting expert reports, summary judgment should not be granted (*See Sheppard v. Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d. Dept. 2019]).

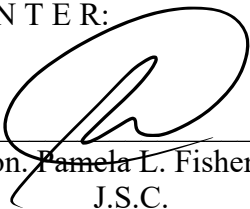
Here, defendants met their prima facie burden. Defendants' expert, Dr. Dym affirmed that the practice and procedures by the treating doctor were within acceptable standards of dental practice, and that no act or omission of defendants proximately caused any injury to plaintiff. Dr. Dym explained

that the fixed-implant supported bridge was a viable treatment option for the plaintiff, given her small mouth and small anterior-posterior distance. He also indicated that the sinus lift and bone grafting were necessary to support the implants due to her bone loss. Dr. Dym's affirmation constitutes competent evidence, in that it is based on the dental records, legal documents, and deposition testimony.

In opposition, plaintiff produced an affidavit of merit from Dr. Barsky, a licensed dentist attesting to a departure from accepted practice. The affidavit also contains the attesting doctor's opinion that this departure was a competent producing cause of the injury. Plaintiff's expert opinion, based on review of the dental records and his own examination of plaintiff, raises factual issues as to whether defendants' treatment departed from acceptable standards of dental practice, resulting in plaintiff's injuries. Specifically, Dr. Barsky concluded that defendants departed from the standard of care by implementing a treatment plan that was contraindicated and allowing a hygienist to perform procedures beyond the scope of her license. Accordingly, questions of fact preclude summary judgment in defendants' favor on the dental malpractice cause of action based on the conflicting expert reports (*Sheppard*, 171 AD3d at 1235). As plaintiff has failed to oppose defendants' motion for summary judgment as to the cause of action for lack of informed consent, the second cause of action alleging lack of informed consent is hereby dismissed. Defendants' motion for summary judgment is granted in part and denied in part.

This constitutes the decision and order of the Court.

ENTER:



Hon. Pamela L. Fisher  
J.S.C.