

Nesbit v Rostkowski
2021 NY Slip Op 31326(U)
April 15, 2021
Supreme Court, Kings County
Docket Number: 512354/2016
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

TIFFANY J. NESBIT,

Plaintiffs,

-against-

DR. SLYWIA ROSTKOWSKI and
DENTAL SPECIALTY ASSOCIATES, P.C.,

Defendants.

Index No.: 512354/2016

DECISION/ORDER

Hon. Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: award summary judgment to the defendants, pursuant to CPLR sec. 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	___ 1-2, 3-4 ___
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	___ 5, 6 ___
Replying Affidavits.....	___ 7, 8 ___
Exhibits.....	_____
Other: (memo).....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Dental Specialty Associates, P.C. (“Dental Specialty”), has moved (seq. 6), pursuant to CPLR § 3212, for an Order awarding summary judgment and a dismissal of plaintiffs’ complaint upon the grounds that there are no issues of fact with respect to the care and treatment that was rendered to the plaintiff Tiffany J. Nesbit (“Ms. Nesbit”) which would warrant a trial in this matter. In addition, defendant Dr. Slywia Rostkowski (“Dr. Rostkowski”) has likewise moved (seq. 7) for an Order awarding summary judgment, pursuant to CPLR § 3212 and a dismissal of plaintiffs’ complaint.

Counsel for the plaintiff, Ms. Nesbit, has opposed the motions for summary judgment upon the grounds that there are issues of fact with regard to the causes of action that have been pled by the plaintiff, as against the defendants, for negligence, medical and dental malpractice, and whether the departure from good and accepted practice through their acts and omissions was a proximate cause of the plaintiff's injuries.

Background:

The within action sounding in dental/medical malpractice was commenced on behalf of the plaintiff by the filing of a summons and complaint with the Clerk of this Court, on or about July 19, 2016. The original summons and complaint named Dr. Rostkowski, as the defendant. A verified answer was filed on behalf of defendant Dr. Rostkowski on or about August 31, 2016. Thereafter, the plaintiff commenced a separate action against Dental Specialty on or about February 27, 2017. Issue was joined by defendant Dental Specialty by the filing of a verified answer on or about July 11, 2017. On December 5, 2017, the parties entered into a stipulation in which there was an agreement to consolidate the two actions under the current index number. The stipulation was so-ordered by the Hon. Judge Gloria M. Dabiri.

The plaintiff alleges that the defendants provided improper dental care to the plaintiff as Dr. Rostkowski failed to properly perform a dental exam and tooth testing and then on September 21, 2015 mistakenly extracted tooth #18 (the lower left second molar) instead of tooth number #17 (the lower left third molar). In addition, it is alleged that the defendants failed to take note of the x-rays, records, symptoms and complaints of the plaintiff which would have ruled out the extraction of tooth #18; failed to take timely and appropriate radiographs; failed to perform proper diagnostic testing pre-operatively and

post-operatively and failed to properly interpret x-rays. It is further alleged that Dental Specialty is vicariously liable for all dental office personnel, employees, dentists, dental specialists, dental assistants and other staff members, including Dr. Rostkowski. As a result of the alleged malpractice, plaintiff maintains that she has an inability to open her mouth, experiences pain which necessitates her use of various medications which includes Peridex, Motrin and Tylenol; has to undergo procedures in order to restore the functionality of tooth #18; as well as the need for additional implants, custom abutments, and/or a crown in the tooth #18 position.

A deposition was conducted of the plaintiff on July 22, 2019 and the EBT of Dr. Rostkowski was held on July 22, 2019. There was no deposition taken of a witness on behalf of Dental Specialty, as a witness was not designated.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiff on or about February 22, 2020.

Facts:

Prior to the defendants' treatment of the plaintiff, the plaintiff received dental care at Morris Heights Health Center for a period of approximately fifteen years. On September 14, 2015, the plaintiff was seen by Dr. Glenn Goodbinder at the Morris Heights Health Center, who following an examination, advised the plaintiff that her remaining wisdom tooth was growing in which could eventually be painful due to the lack of space in her mouth for this tooth. Dr. Goodbinder offered a referral to the plaintiff

to address the extraction of the wisdom tooth as well as a referral for a missing tooth in the lower right (tooth #30).¹

On September 17, 2015, the plaintiff presented to Dental Specialty to make an appointment for oral surgery as well as periodontal work. The plaintiff was initially given an appointment and a pre-surgery checklist in the oral surgery department to have her wisdom tooth removed on September 22, 2015. The plaintiff then went to another office (periodontal department) on the same floor at Dental Specialty to make an appointment for a consult as to an implant. The plaintiff was advised that she had the option of having an office visit with the periodontist (Dr. Rostkowski) that day, as the doctor was in the office and had time availability, or she could schedule an appointment for a future date. The plaintiff decided to present to the doctor at that time. During the visit, Dr. Rostkowski performed an oral examination of the plaintiff, reviewed her x-rays, and advised her that while she would be a good candidate for an implant because of her bone structure, she would need a gum graft on the bottom left side of her mouth. Dr. Rostkowski offered to perform the gum graft on September 21, 2015, at which point the plaintiff inquired of the doctor as to whether it could be done on the date that he suggested since she was already scheduled for the removal of her wisdom tooth on September 22, 2015 (the following day). Dr. Rostkowski then allegedly offered to perform both procedures on the same day to avoid plaintiff having to undergo two separate procedures as the wisdom tooth was on the same lower left side where the gum graft was going to be performed (see plaintiff's EBT p. 56-57).²

¹ One referral was to periodontists Dr. Rostkowski/Lydia Gardner, DMD, for an implant at the site of tooth #30. The other referral was to oral surgeons Norman Gold DDS/Lisenia Rivera, DDS, for the extraction of the wisdom tooth (tooth #17).

² Dr. Rostkowski offers a different version of his proposed treatment plan which included osseous surgery for teeth #18-21, connective tissue graft for tooth #20 and implant #30 placement at the next visit. Dr. Rostkowski's treatment plan allegedly did not indicate that the plan was to extract tooth #17 nor did she advise the plaintiff that

The procedure was performed on September 21, 2015 by Dr. Rostkowski, after which the plaintiff was prescribed medicines, given a card which had telephone contact information in the event any issues arose, as well as a subsequent follow-up appointment for October 5, 2015.

Thereafter, the plaintiff stated that on her way home from the procedure, she received a phone call from the oral surgery department of Dental Surgery to confirm an appointment she had made when present in their office on September 17th. The plaintiff allegedly responded that since she had just had that tooth removed by a doctor in another department of their office, the appointment (scheduled for September 22nd) should be cancelled (see plaintiff's EBT p. 67-68).

On October 5, 2015, the plaintiff had an office visit with Dr. Rostkowski for a post-operative follow-up and the removal of the sutures. Dr. Rostkowski allegedly noted that the connective tissue graft for tooth #20 was healing within normal limits with no complications. The plaintiff had no further office visits with Dr. Rostkowski nor with the Dental Specialty practice after that date. Thereafter, between 2015 and 2019, the plaintiff treated with various other dental practices. In May of 2019, Dr. Andre Stein, of Oral Maxiofacial surgery of New York City, extracted tooth #17 with bone removal and sectioning of the crown with roots. The dental records of that practice allegedly indicate that the area where the dental work was performed healed well.

she would or could extract tooth #17 (lower left molar tooth) because the doctor never extracts semi-impacted, fully impacted or bony impacted wisdom teeth.

Parties' Contentions:

Here, the Court is presented with the issue as to whether a question of fact exists with respect to the alleged negligence of Dental Specialty and Dr. Rostkowski, and if they deviated from the standard of dental care in the extraction of tooth #18 rather than tooth #17.

In support of Dental Specialty's motion, counsel argues that Dental Specialty did not depart from good and accepted dental practice, and none of the alleged acts or omissions caused or contributed to plaintiff's alleged injuries, as Dental Specialty did not provide any care to the plaintiff.

In support of Dr. Rostkowski's motion, counsel offers the affirmation of Edward Gottesman, DDS, ("Dr. Gottesman"), who opines that Dr. Rostkowski did not depart from good and accepted dental practice, and none of her alleged acts or omissions caused or contributed to the plaintiff's alleged injuries.

Plaintiff, by her attorneys, opposes the defendants' motions for summary judgment, arguing that the defendants committed specific acts of dental malpractice in the treatment of the plaintiff, such as mistakenly extracting tooth #18 instead of tooth #17, which plaintiff claims caused and/or contributed to the need for a dental implant to replace tooth #18, an implant abutment, a crown placed on the #18 implant, necessary bone grafting, and other procedures that were deemed necessary.

Discussion:

A defendant moving for summary judgment in a case sounding in medical malpractice "must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the

plaintiff's injuries." Guctas v Pessolano, 132 AD3d 632, 633 [2d Dept 2015], quoting Matos v Khan, 119 AD3d 909, 910 [2d Dept 2014].

This Court finds that the defendants have presented evidence sufficient to meet this burden, including an expert affirmation. In support of their motion, Dental Specialty asserts that it did not provide any care or treatment to the plaintiff, as such care was solely provided by co-defendant Dr. Rostkowski. Dental Specialty states that despite numerous requests, plaintiff has not set forth allegations specifically pertaining to any care or treatment provided by any dental assistant or other employee of Dental Specialty and which was rendered in a negligent manner. Dental Specialty claims that Dr. Rostkowski did not consult with any other dentist or employee of Dental Specialty prior to removing the tooth at issue. Dental Specialty argues that they had no involvement in the treatment plaintiff received, which is evidenced by the fact that plaintiff had been referred directly to Dr. Rostkowski for implant placement and Dr. Rostkowski conducted the consultation and extraction of tooth #18.

Dental Specialty further argues that plaintiff has failed to identify the person(s) to whom plaintiff alleges Dental Specialty is vicariously liable. Dental Specialty also asserts that they are not vicariously liable for the alleged negligence of Dr. Rostkowski, who as an independent contractor is given a 1099 form, does not have an ownership interest in Dental Specialty, and pays her own malpractice insurance. Dental Specialty maintains that even if plaintiff was referred to Dr. Rostkowski at Dental Specialty for the tooth implant, Dr. Rostkowski exercised her own judgment with respect to the extraction of tooth #18. Further, the issue of vicarious liability is not addressed by Dr. Rostkowski in her motion papers.

In support of Dr. Rostkowski's motion, with respect to the treatment rendered to plaintiff, Dr. Gottesman opines that Dr. Rostkowski did not mistakenly extract tooth #18 in place of tooth #17, but rather properly extracted tooth #18. Dr. Gottesman asserts that upon review of plaintiff's dental records, tooth #18 was not a "good tooth" and had developed carious lesions that went beyond the bone level. Dr. Gottesman states that plaintiff had been referred to Dr. Rostkowski solely for an implant at tooth #30, and as such, Dr. Rostkowski did not ignore the treatment plan of September 14, 2015 which called for the extraction of tooth #17 by an oral surgeon. Dr. Gottesman notes that plaintiff had made an appointment with an oral surgeon for September 22, 2015 to extract tooth #17, and as such, the extraction of tooth #17 was not Dr. Rostkowski's responsibility. Dr. Gottesman asserts that Dr. Roskowski is a periodontist and does not extract impacted wisdom teeth, and the records reflect that Dr. Rostkowski never made any notes in her chart indicating she would be extracting tooth #17. Dr. Gottesman claims that plaintiff caused her own delay in having tooth #17 extracted, as she declined Dr. Goodbinder's subsequent referral to another oral surgeon and waited almost four years before extracting the tooth. Dr. Gottesman explains that the X-rays taken on August 19, 2015 and September 14, 2015 are not diagnostic and unable to show the decay or carious lesions at tooth #18, but would have been revealed and become evident to Dr. Rostkowski while performing the graft procedure on September 21st. Dr. Gottesman asserts that Dr. Rostkowski had no intention of extracting any of plaintiff's teeth before starting the graft procedure on September 21st, but observed the carious lesion on tooth #18 extending below the bone level, which indicates that the restorability of the tooth was compromised and crown lengthening was not recommended because class I mobility was present, and as such the tooth would be further compromised. Dr. Gottesman opines that

Dr. Rostkowski correctly advised the plaintiff that tooth #18 needed to be extracted, and such treatment was implemented properly and within a timely manner. Dr. Gottesman also states that the chart notes indicate Dr. Rostkowski told the plaintiff that removing tooth #18 would allow space in her mouth for her wisdom tooth to grow in without having to be removed.

Dr. Gottesman asserts that Dr. Rostkowski is a periodontist fully capable of examining, diagnosing and treating the plaintiff (including extracting tooth #18) and therefore did not need to consult with other dentists and/or dental specialists regarding the procedures she performed on plaintiff. Dr. Gottesman states that none of plaintiff's subsequent providers noted there was an unnecessary extraction of tooth #18 or any other condition that plaintiff alleges to have suffered as a result of the extraction, such as pain, difficulty eating, and the need for additional implants. Finally, Dr. Gottesman asserts that it is not Dr. Rostkowski's responsibility to deal with the logistics of how co-defendant Dental Specialty bills insurance companies, and as such would not be expected to review billing of other providers in the office.

Once the movant has made a prima facie showing, the plaintiff must submit evidence in opposition to rebut the movant's prima facie showing. Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Poter v Adams, 104 AD3d 925 [2d Dept 2013]; Stukas v Streiter, 83 AD3d 18 [2d Dept 2011]. The plaintiff must "lay bare her proof and produce evidence, in admissible form, sufficient to raise a triable issue of fact as to the essential elements of a medical malpractice claim, to wit, (1) a deviation or departure from accepted medical practice, [and/or] (2) evidence that such a departure was a proximate cause of injury." Sheridan v Bieniewicz, 7 AD3d 508, 509 [2d Dept 2004]; Gargiulo v Geiss, 40 AD3d 811-812 [2d Dept 2007]. In order to prevail on a claim for medical

malpractice, “expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause.” Nicholas v Stammer, 49 AD3d 832-833 [2008].

In opposing the defendants’ motions, plaintiff’s expert, Jeffrey Dorfman, DMD (“Dr. Dorfman”) has pointed to several possible departures by Dr. Rostkowski. Dr. Dorfman opines that tooth #18 was unnecessarily extracted by Dr. Rostkowski, as it only had one surface occlusal filling in it, with no radiographic evidence of decay or infection within the tooth or surrounding bone, and the alleged decay referred to by Dr. Rostkowski is not supported by any credible evidence. Dr. Dorfman opines that it was a deviation from the standard of care for Dr. Rostkowski to not consider the option of waiting until tooth #17 was extracted to assess the decay on tooth #18 and perform a filling or bone restoration. Dr. Dorfman claims that Dr. Rostkowski deviated from good and accepted dental practice by not referring plaintiff to other dental practitioners and obtaining a second opinion before extracting tooth #18, and also by not performing proper diagnostic tests to determine whether extraction of tooth #18 was warranted. Dr. Dorfman refers to plaintiff’s testimony, in which plaintiff claims that Dr. Rostkowski stated, “Are they sure this tooth should come out?” halfway through the procedure, which in Dr. Dorfman’s opinion indicates that Dr. Rostkowski must have believed that the fully erupted lower left second molar, tooth #18, was in fact tooth #17, and mistakenly extracted tooth #18. Dr. Dorfman states that this is not the only mistake Dr. Rostkowski made with respect to tooth numbers, as the tooth charting on September 17, 2015 indicated in a handwritten note that the periodontal graft procedure would take place on #20, and also indicated (on the same page of the records) the procedure would take place on tooth #19. Further, Dr. Dorfman notes that Dental Specialty initially billed plaintiff for

the extraction of tooth #17³, before submitting a correction the following month that tooth #18 was extracted. In addition, Dr. Dorfman asserts that it was negligent for Dental Specialty to not have a system in place to prevent Dr. Rostkowski from performing the unauthorized surgical extraction of tooth #17, which had been scheduled with an oral surgeon within the same practice. Dr. Dorfman opines that the responsibility for Dr. Rostkowski's mistaken and unnecessary extraction of tooth #18 lies with both Dr. Rostkowski and Dental Specialty.

Plaintiff further argues that the forms and questionnaires used by Dr. Rostkowski bear the logo of Dental Specialty, which raises an issue of fact as to whether plaintiff reasonably believed Dr. Rostkowski and her services were provided by Dental Specialty or Dr. Rostkowski acting in an independent manner on her own behalf. Plaintiff's counsel asserts that plaintiff was under the good faith impression that Dental Specialty employed Dr. Rostkowski and assigned Dr. Rostkowski to plaintiff to perform treatment, and that a question of fact exists as to whether Dental Specialty can be held vicariously liable under a theory of apparent or ostensible agency, for the alleged malpractice of Dr. Rostkowski, regardless of whether Dr. Rostkowski was in fact an independent contractor.

It is well settled that where parties to a medical malpractice action offer conflicting expert opinions on the issue of malpractice and causation, issues of credibility require resolution by the factfinder (see Loaiza v Lam, 107 AD3d 951, 953 [2013]; Omane v Sambaziotis, 150 AD3d 1126, 1129 [2d Dept. 2017]; Dandrea v Hertz, 23 AD3d 332, 333 [2005]). Summary judgment is not appropriate in a medical malpractice

³ Dr. Rostkowski asserts that she would not know or have reason to know of the improper billing made to plaintiff's insurance company (Emblem Health) for the surgical extraction of tooth #17 by Lisenia Rivera, DDS, who is affiliated with the oral surgery department.

action where the parties adduce conflicting medical opinions (see Elmes v Yelon, 140 AD3d 1009, 1011 [2d Dept. 2016], Feinberg v Feit, 23 AD3d 517, 519 [2d Dept. 2005]; Shields v Baktidy, 11 AD3d 671, 672 [2d Dept. 2014]). As such, the defendants' motions for summary judgment dismissing plaintiff's medical malpractice claim are denied.

In reaching that determination, this Court considered the argument of defendants' counsel by their expert that tooth #18 had significant decay and Dr. Rostkowski, after informing plaintiff of her plan, intended to extract tooth #18 and did so properly and within the standard of care. This argument is refuted by plaintiff through her expert, who asserts that there are issues of fact as to whether Dr. Rostkowski mistook tooth #18 for tooth #17, whether the plaintiff was aware tooth #18 was being extracted instead of tooth #17, and whether Dr. Rostkowski departed from the standard of care in performing an unplanned extraction without conducting the proper tests or referring to other dentists in the practice. With respect to Dental Specialty, although defendant claims Dr. Rostkowski is an independent contractor, plaintiff has raised a question of fact as to whether Dental Specialty may be held liable for Dr. Rostkowski's alleged negligence.

As to the informed consent claim, a plaintiff must prove (1) 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. See Zapata v Buitriago, 107 AD3d 977, 979, 969 NYS2d 79 [2d Dept 2013]; Spano v Bertocci, 299 AD2d 335, 749 NYS2d 275 [2d Dept 2002].

Dental Specialty argues that the lack of informed consent claim must also be dismissed, as Dental Specialty did not perform any dental treatment on the plaintiff. Dr. Gottesman opines that Dr. Rostkowski properly obtained consent from plaintiff to extract tooth #18, as the consent form refers to the extraction of tooth #18 and the chart notes indicate Dr. Rostkowski explained to plaintiff that tooth #18 had carious lesions extending below the bone level and needed to be extracted. Dr. Rostkowski claims she advised the plaintiff which tooth number she was extracting and also indicated the tooth to the plaintiff by use of a hand-held mirror. Plaintiff's counsel states that plaintiff did sign the consent form but argues that "extraction #18" was not on the consent form when it was signed and was added later by Dr. Rostkowski. Plaintiff also testified that she was not told tooth #18 was to be extracted. Plaintiff's counsel asserts that a reasonable person in plaintiff's position would not have undergone the treatment had she been fully informed about the alternatives, which would not involve the tooth being extracted.

In opposing the portion of defendants' motion to dismiss the lack of informed consent cause of action, the plaintiff has set forth sufficient grounds for this Court to find that there are several issues of fact, including the content of the form plaintiff executed before undergoing the dental procedure and whether the plaintiff was made fully aware of the procedure she was undergoing and the tooth that was being extracted. As such, the motion to dismiss the informed consent cause of action is denied.

Conclusion:

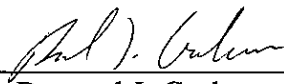
While the defendants have met their burden for establishing a prima facie case for summary judgment, the plaintiff, in opposition, has met her burden to offer admissible evidence raising a question of fact as to whether the defendants departed from good and

accepted dental practice in the diagnosis and treatment of the plaintiff. The issue of credibility regarding conflicting expert testimony must be submitted to the trier of fact. Accordingly, the motion by the defendants for summary judgment and a dismissal of plaintiffs' complaint, which includes causes of action for medical malpractice, negligence, and lack of informed consent, pursuant to CPLR §3212, is denied.

This shall constitute the decision and order of this Court.

Dated: April 15, 2021
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County
HON. BERNARD J. GRAHAM

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