

Bror v Mamaroneck Dental, PLLC
2021 NY Slip Op 32946(U)
June 16, 2021
Supreme Court, Westchester County
Docket Number: 68818/2018
Judge: Terry Jane Ruderman
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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 upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ADEL BROR,

Index No. 68818/2018

Plaintiff,

DECISION AND ORDER

-against-

Motion Sequence No. 1

MAMARONECK DENTAL, PLLC, its agents, servants,
and/or employees and NABIL FARRA,

Defendants.

-----X
RUDERMAN, J.

The following papers were read on a motion by plaintiff, pursuant to CPLR 3212, for an order in defendants' favor and dismissing plaintiff's complaint in its entirety, and for such other, further and different relief as this Court deems just and proper:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, Exhibits A-L	1
Affirmation in Opposition, Exhibits 1-5	2
Reply Affirmation	3

Plaintiff commenced the present action seeking money damages for dental malpractice. Plaintiff received dental care from defendant Nabil Farra Samarneh, D.D.S. (sued herein as Nabil Farra) (hereinafter "Dr. Farra") at defendant Mamaroneck Dental, PLLC. Plaintiff alleges in his verified complaint that Dr. Farra failed to properly examine and evaluate plaintiff and was negligent in treating "in an incorrect, inadequate and unskillful manner, and in providing unnecessary and/or contraindicated treatment, and in otherwise, failing and/or omitting to provide proper dental care and treatments to plaintiff ..." (Defendants' Exhibit A, Verified

Complaint ¶ 13). Plaintiff further alleges, inter alia, that defendant Mamaroneck Dental, PLLC, is vicariously liable for the care and treatment rendered to plaintiff. Finally, plaintiff's second cause of action¹ alleges lack of informed consent.

In the bill of particulars, plaintiff alleges that defendants negligently treated teeth numbers 4, 5, 11, 14, 21 through 29, and committed malpractice by, inter alia, failing to conduct diagnostic tests, failing to properly diagnose and treat plaintiff's dental condition, causing and/or exacerbating bone loss in plaintiff's mouth and periodontal problems, and making and placing poorly fitted contoured crowns. Therein, plaintiff also alleges that defendants failed to provide plaintiff with requisite informed consent that a reasonable dentist would provide a patient, and had plaintiff been provided with informed consent of the risks, benefits and alternatives to the treatment, plaintiff would not have consented.

In the second supplemental bill of particulars, plaintiff alleges that defendants' negligent acts, which included unnecessary root canals on teeth numbers 4, 5, 11-14 and 21-29, caused plaintiff dental injuries, including extractions of tooth numbers 3, 12, 14 and 23 through 26. Further, plaintiff alleges, inter alia, that there was no clinical correlation or pre-apical pathology indicating the need for the root canals.

The dental chart submitted by defendants in support of this motion for summary judgment dismissing the complaint establishes that Dr. Farra performed root canals on plaintiff's teeth as follows: (1) teeth numbers 4, 5, 21, 28 and 29 in October 2015; (2) teeth numbers 11 and 14 in January 2016; (3) teeth numbers 24, 25 and 26 in December 2016; (4) tooth number 28

¹ Although plaintiff failed to title any portion of his allegations in the Verified Complaint as the first cause of action, this Court treats plaintiff's allegations set forth prior to the section titled "AS AND FOR A SECOND CAUSE OF ACTION" as plaintiff's first cause of action.

in January 2017; and (5) teeth number 22 and 23 in December 2017. Dr. Farra also placed crowns on a number of the teeth on which root canals were performed, as well as filled cavities on other teeth.

Defendants contend that they are entitled to summary judgment dismissing the complaint, since Dr. Farra complied with good and accepted standards of dental care in managing the plaintiff's condition, his treatment did not result in any injury, and there is no viable claim for lack of informed consent.

Dental Malpractice

In order for plaintiff to prevail on a cause of action for dental malpractice plaintiff must prove defendant deviated or departed from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries (*Dyckes v Stabile*, 153 AD3d 783, 783-784 [2d Dept 2017]; *see Alongi v Sutter*, 139 AD3d 887, 887-888 [2d Dept 2016]; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 714 [2d Dept 2015]).

To be entitled to summary judgment, defendants must make a prima facie showing by "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In a medical or dental malpractice action, to establish entitlement to summary judgment in favor of the defendant, the defendant must submit competent evidence refuting plaintiff's contention in the pleadings and bill of particulars of a departure from good and accepted medical or dental practice, or establishing that plaintiff was not injured by any departure (*see Gross v Friedman*, 73 NY2d 721, 722-723 [1988]; *Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59AD3d 431, 433 [2d Dept 2009]). A defendant's burden on such a motion in a medical or dental malpractice action is met only where the defendant addresses and rebuts any

specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1044 [2d Dept 2016]). A defendant's own affidavit, in which the defendant avers that his or her treatment of the plaintiff was in accord with accepted medical or dental standards and/or that any alleged deviation was not a proximate cause of plaintiff's injury, is sufficient to make a prima facie showing of entitlement to summary judgment as a matter of law (*Swezey*, 59 AD3d at 433; *Gargiulo v Geiss*, 40 AD3d 811 [2d Dept 2007]).

Here, defendants demonstrated their prima facie entitlement to summary judgment as to plaintiff's cause of action for dental malpractice with respect to plaintiff's allegation that the root canals performed by Dr. Farra were unnecessary. The affidavit of Dr. Farra, who obtained a degree in Doctor of Dental Science ("D.D.S.") and is licensed to practice dentistry in the State of New York, offers Dr. Farra's opinion, within a reasonable degree of professional certainty, that defendants acted reasonably, appropriately, and complied with the applicable standard of care of general dentistry in the treatment rendered to plaintiff's teeth numbers 4, 5, 11, 14, 21-26, 28 and 29, and that such treatment was appropriately indicated.

Specifically, Dr. Farra opines, inter alia, that his determination that plaintiff needed the root canals was based on his proper assessments of plaintiff's dental condition, his review of plaintiff's dental history and current complaints, his review of prior radiological examinations, and his clinical examination and inspection of plaintiff's teeth by, inter alia, palpating where the tooth meets the gum line and using an air gun to determine if a pain response was elicited. With respect to tooth number 28, Dr. Farra avers that he initially treated plaintiff with antibiotics since the radiological and clinical examination did not reveal an explanation for plaintiff's complaints, and subsequently, when plaintiff again complained about the tooth, referred plaintiff

to an oral and maxillofacial surgeon, who recommended a root canal.

Defendants also demonstrated their prima facie entitlement to summary judgment with respect to the claims regarding plaintiff's teeth numbers 12, 13 and 27. Dr. Farra asserts that he did not render any treatment to plaintiff's teeth numbers 12, 13 and 27, as plaintiff never informed him of complaints regarding those teeth, and indeed, that teeth numbers 12 and 13 were missing when plaintiff first was seen by Dr. Farra. Additionally, Dr. Farra's chart as to plaintiff's treatment, which defendants submitted in support of the motion, indicates that on September 19, 2015, the first date of treatment, plaintiff was missing teeth numbers 6, 12 and 13. The dental chart contains no notes as to the treatment of tooth number 27.

However, Dr. Farra did not address plaintiff's allegation that he committed malpractice by making and placing poorly fitted contoured crowns. Dr. Farra only avers with respect to the restoration of plaintiff's teeth that, after fully removing the nerve and any decay, he inserted a post and core, and, except as to teeth numbers 11, 14, 22 and 23, he completed restoration with a permanent crown. Dr. Farra avers that teeth numbers 11 and 14 were properly completed with plaintiff's pre-existing bridge, and that teeth numbers 22 and 23 were not permanently restored as plaintiff abandoned treatment. Dr. Farra does not address how the permanent crowns that he placed fit plaintiff, and defendants did not submit any other evidence with respect to the crowns. Accordingly, defendants failed to make a prima facie showing of entitlement to summary judgment dismissing the allegations in plaintiff's cause of dental malpractice as to the crowns.

Finally, defendants failed to demonstrate, prima facie, entitlement to summary judgment dismissing plaintiff's dental malpractice claim on the ground that any alleged deviations by Dr. Farra did not cause any injury to plaintiff. Dr. Farra's opinion, as set forth in his affidavit, that plaintiff did not suffer any injuries as the result of his care or neglect is conclusory and

insufficient to make the required showing. Notably, Dr. Farra's opinion that plaintiff's ongoing dental issues are the result of plaintiff's poor dental hygiene and/or treatment provided by other dental providers is not supported by the record. Dr. Farra does not point to any specific dental records or specific treatment by other dental providers in support of his opinion. Moreover, plaintiff's dental records from other dental providers, which defendants submit in support of this motion, do not address the causation of plaintiff's alleged dental injuries or demonstrate that plaintiff's alleged injuries, including the extraction of a number of teeth, were caused by plaintiff's poor dental hygiene or treatment provided by other dental providers.

In view of the foregoing, defendants demonstrated prima facie entitlement to summary judgment dismissing only those allegations in plaintiff's dental malpractice action with respect to the root canals and the treatment of teeth numbers 12, 13 and 27.

Upon a prima facie showing by defendants to entitlement to summary judgment as to a cause of action, the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which defendants met their prima facie burden (*Gressman v Stephen-Johnson*, 122 AD3d 904, 906 [2d Dept 2014]; *Seiden* at 1162). In order to rebut defendants' prima facie showing, plaintiff must "submit evidentiary facts or materials to rebut the defendant's prima facie showing" (*Stukas*, 83 AD3d at 24). Conclusory opinions of the plaintiff's expert or opinions of the plaintiff's expert that are unsupported by the record, are insufficient to defeat summary judgment (*see generally Alvarez*, 68 NY2d at 324).

In opposition, plaintiff submits the letter affirmation of Dr. Michael Oil, D.D.S., who is licensed to practice dentistry in the State of New York. Therein, Dr. Oil asserts that his opinions rendered were based upon his examination of plaintiff and his review of plaintiff's treatment records from defendants for the period of September 15, 2015 through and including September

21, 2018, plaintiff's additional dental records, the transcripts of the parties' examinations before trial, and the pleadings in the present action, including the bill of particulars.

Dr. Oil opines, based upon a reasonable degree of dental certainty and after setting forth the specific treatment provided to plaintiff by Dr. Farra, that there is no clinical correlation for the root canals performed, no pre-apical pathology indicating the need to do the root canals, and that the x-rays do not show any need for the root canals. Dr. Oil asserts that Dr. Farra did not conduct testing on the teeth prior to performing the root canals. Further, Dr. Oil opines that the teeth appeared to be vital as there were no abscesses on these teeth. Dr. Oil, therefore, maintains with a reasonable degree of dental certainty, that the root canals were completely unnecessary and contraindicative of the treatment he should have received. Further, Dr. Oil states that the unnecessary root canals have caused and will cause plaintiff to have significant serious complications, such as tooth loss, and will require future procedures and costs during the remainder of his life.

Contrary to defendants' contention, the fact that Dr. Oil's affirmation is dated prior to Dr. Farra's affidavit does not render Dr. Oil's affirmation insufficient to rebut the allegations in Dr. Farra's affidavit with respect to the necessity for the root canals. Notably, Dr. Oil asserts that the root canals were not necessary based upon his examination of plaintiff and his review of the dental records, x-rays and the transcripts of the parties' deposition testimony, including Dr. Farra's deposition testimony. Specifically, Dr. Oil maintains that the x-rays do not show any need for the root canals. Moreover, Dr. Oil observes that there were no abscesses on the teeth on which the root canals were performed and the teeth appeared to be vital. Further, Dr. Oil bases his opinion on the fact that Dr. Farra did not conduct hot/cold tests, which is supported by Dr. Farra's own deposition testimony that he did not conduct a hot/cold test. Finally, Dr. Farra

testified during his deposition testimony that he did not see any abscesses and the teeth upon which the root canals were performed were vital.

In view of the conflicting opinions of Dr. Farra and plaintiff's expert, Dr. Oil, with respect to whether the root canals performed by Dr. Farra upon plaintiff's teeth numbers 4, 5, 11, 14, 21 through 26, 28 and 29 were necessary, defendants are not entitled to summary judgment dismissing plaintiff's cause of action for dental malpractice based upon allegations that the root canals performed by Dr. Farra were unnecessary. Where, as here, the parties offer conflicting expert opinions which present a credibility question which must be determined at trial, summary judgment is not warranted (*Dandrea v Hertz*, 23 AD3d 332 [2d Dept 2005]; *Shields v Baktidy*, 11 AD3d 671 [2d Dept 2004]; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623 [2d Dept 2003]).

Contrary to defendants' contention in reply, plaintiff's expert was not required to address the manner in which the root canals were performed insofar as plaintiff did not specifically allege that the manner in which Dr. Farra performed the root canals deviated from the good and accepted standards of dental practice.

In view of the foregoing, defendants are entitled to summary judgment with respect to plaintiff's dental malpractice cause of action only with respect to teeth numbers 12, 13 and 27, since plaintiff did not specifically address nor submit evidence contradicting defendants' evidence that Dr. Farra did not treat teeth 12, 13 and 27, or cause any injury to those teeth. Notably, plaintiff's expert, in his list of Dr. Farra's treatment of plaintiff's teeth, does not list those teeth as being treated by Dr. Farra. Accordingly, plaintiff failed to raise a triable issue of fact as to plaintiff's claims with respect to teeth numbers 12, 13 and 27.

Lack of Informed Consent

To prevail on a cause of action for dental malpractice based on lack of informed consent,

plaintiff must prove (1) defendants failed to disclose to plaintiff alternatives to the treatment performed and reasonably foreseeable risks and benefits of the treatment that a dentist under similar circumstances would have disclosed, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if the patient had been fully informed, and (3) the lack of informed consent is a proximate cause of plaintiff's injury (*Chan v Toothsavvers Dental Care, Inc.*, 125 AD3d 712, 713 [2d Dept 2015]; *Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see* Public Health Law 2805-d).

The affidavit of Dr. Farra and plaintiff's dental records, including the dental chart, establish defendants' prima facie entitlement to summary judgment dismissing the cause of action for lack of informed consent with respect to the root canals performed by Dr. Farra on October 5, 2015, January 19, 2016, December 5, 2016, January 24, 2017 and in December 2017.² Dr. Farra avers that he properly discussed the proposed treatment of root canal with plaintiff, including the risks, benefits and alternative treatments. Moreover, the chart for those dates include the handwritten notation: "All options Risks Alternatives explained to pt. pt. understands" (Defendants' Exhibit F at 3-6). As to the dates of December 5, 2016 and December 2017, the chart also contains the note "consent signed" (*id.* at 4-6). Defendants also submit signed forms titled "Consent for root canal treatment," with handwritten dates of December 6, 2016 and December 13, 2017 (Defendant's Exhibit F at 9-10).

However, plaintiff's affidavit in opposition is sufficient to raise a triable issue of fact as to whether Dr. Farra provided him with the requisite information necessary for informed

² The date of the day the root canals were performed in December 2017 is illegible in the chart. The handwritten entry, however, appears to be two digits, follows an entry dated December 2, 2017 and precedes an entry dated December 12, 2017.

consent, in which affidavit he avers that Dr. Farra never advised him that he was performing a root canal, never advised him of the alternatives to a root canal, and never advised him of the risks of a root canal. Plaintiff also relies upon his deposition testimony that prior to performing the root canals, Dr. Farra told plaintiff that he was going to fill a cavity. Moreover, plaintiff notes that there are only two consent forms for a root canal contained in Dr. Farra's dental records for plaintiff and that both consent forms are dated after the root canals were performed.

The branch of defendants' motion seeking summary judgment dismissing plaintiff's second cause of action based upon the lack of informed consent, is therefore denied.

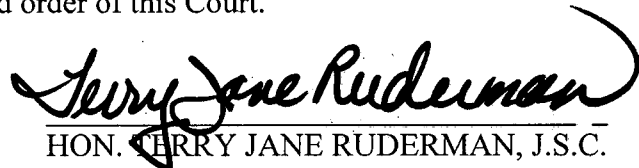
In view of the foregoing, it is

ORDERED that defendants' motion for summary judgment in their favor dismissing the complaint is granted only to the extent that the plaintiff's allegations of dental malpractice with respect to teeth numbers 12, 13 and 27 are dismissed, and is otherwise denied; and it is further

ORDERED that the matter is referred to the Settlement Conference Part for a settlement conference at a date and time to be scheduled by that Part.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 16, 2021


HON. TERRY JANE RUDERMAN, J.S.C.