

Lianzo v Hertzog

2021 NY Slip Op 32985(U)

October 20, 2021

Supreme Court, Nassau County

Docket Number: Index No. 616577/2018

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 11
Present: Hon. Sharon M.J. Gianelli

MAYA LIANZO,

Plaintiff,

-against-

CHARLES HERTZOG, D.M.D.,
JEFFREY H. FOX, D.D.S., and
NATIONAL DENTAL, LLC,

Defendants.

X

Index No. 616577/2018

Mot. Seq. No. 001

Decision and Order

X

Papers submitted:

Defendant Fox's Notice of Motion _____ X

Defendant Fox's Statement of Material Facts w/Exhibits _____ X

Plaintiff's Affirmation in Opposition _____ X

Defendant's Affirmation in Reply _____ X

This is Defendant Jeffrey H. Fox, D.D.S.'s motion for an Order of the Court granting movant summary judgment based on the fact that his professional treatment of Plaintiff was in accordance with accepted dental standards.

Background/Facts

Defendant movant treated Plaintiff for the first time on April 13, 2018, which consisted of a consultation, wherein Plaintiff complained of looseness in a temporary bridge. On April 27, 2018, a dental implant procedure was performed on Plaintiff, and on May 16, 2018, a temporary bridge was inserted on her upper left side. Plaintiff claims that the treatment was negligently performed, in that the implants were not placed into sufficient bone and extended through the sinus floor, which required removal and replace

In support of his motion, Defendant movant offers the expert affirmation by Allan J. Kucine, DDS, an oral and maxillofacial surgeon and dentist licensed to practice in the State of New York since 1982. He opined after reviewing Plaintiff's records, Bill of Particulars, and deposition transcripts, that Defendant movant's diagnosis, treatment and care of Plaintiff was in accord with good and accepted dental standards.

Plaintiff in response offers the expert affirmation of Eugene Antenucci, DDS, who following a similar review, opined that Defendant movant's care departed from good and accepted dental practice in placing the implant in the area of tooth number 2 that invaded Plaintiff's sinus cavity.

Law/Ruling

"In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries. On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby". *Leavy v Merriam*, 133 AD3d 636 [2d Dept 2015]. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause". *Lyons v McCauley*, 252 AD 2d 516, 517, 675 NYS 2d 375 [1998], citing *Koehler v Schwartz*, 48 NY 2d 807, 399 NE 2w 1140, 424 NYS 2d 119 [1979]. The movant must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]. Once such a *prima*

facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action. *See Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

Here, Defendant movant made a *prima facie* showing warranting summary judgment by submitting the expert affirmation of Allan J. Kucine, DDS, an oral and maxillofacial surgeon and dentist licensed to practice in the State of New York since 1982., who opined after reviewing Plaintiff's records, Bill of Particulars, and deposition transcripts, that Defendant movant's diagnosis, treatment and care of Plaintiff was in accord with good and accepted dental standards.

An affirmation in opposition, however, was submitted by Plaintiff's expert Eugene Antenucci, DDS, who following a similar review, opined that Defendant movant's care departed from good and accepted dental practice in placing the implant in the area of tooth number 2 that invaded Plaintiff's sinus cavity.

The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept. 1992], and it should only be granted when there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361 [1974].

The Court has considered the parties' contentions and concludes that the movant fails to eliminate all triable issues of facts with respect to the conflicting claims and allegations which have been advanced.

Accordingly,

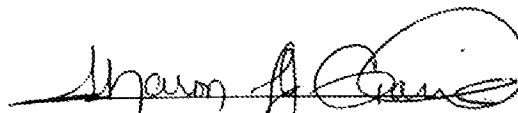
It is

ORDERED, that Defendant Jeffrey H. Fox, D.D.S's motion for an Order of the Court granting movant summary judgment based on the fact that his professional treatment of Plaintiff was in accordance with accepted dental standards, is Denied.

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of this Court.

DATED: Mineola, New York
October 20, 2021



HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

ENTERED

Oct 25 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE