

Mawyin v Shah

2021 NY Slip Op 33196(U)

February 22, 2021

Supreme Court, Ulster County

Docket Number: Index No. EF2018-2551

Judge: Christopher E. Cahill

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**STATE OF NEW YORK
SUPREME COURT**

ULSTER COUNTY

XAVIER MAWYIN, JR.,

Plaintiff,

-against-

Decision & Order

Index No.: EF2018-2551

RADIKA KAPUR SHAH DDS and
DENTISTS' OFFICE OF THE HUDSON
VALLEY¹,

Defendants.

Supreme Court, Ulster County
Motion Return Date: September 21, 2020
RJI No. 55-18-01621

Present: Christopher E. Cahill, J.S.C.

Appearances:

MURPHY & LAMBIASE
(George A. Smith, Esq.)
26 Scotchtown Avenue
Goshen, New York 10924

LAW OFFICES OF TROMELLO & FISHMAN
(Christine Hanlon, Esq., of Counsel)
Attorneys for Defendant
120 White Plains Road, Suite 220
Tarrytown, New York 10591

Cahill, J.:

Plaintiff commenced this dental malpractice action against defendant Radika

¹ By stipulation, dated August 3, 2020, the action was discontinued with prejudice as against defendant Dentists' Office of the Hudson Valley.

Kapur Shah alleging negligent treatment. Defendant now moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint against her.

At a dental visit on February 14, 2017, plaintiff claims to have presented with extensive tooth decay and multiple dental caries impacting tooth numbers 13, 14, 15, 18 and 19. Plaintiff alleges that defendant failed to adequately prepare his teeth for filling and, instead, filled over existing decay, causing injury to tooth numbers 4, 5, 13, 18 and 19.

As the proponent of a motion for summary judgment in a dental malpractice action, defendant bears the “initial burden of establishing that there was no departure from accepted standards of practice or that plaintiff was not injured thereby” (*Amodio v Wolpert*, 52 AD3d 1078, 1079 [3d Dept 2008]; see *Menard v Feinberg*, 60 AD3d 1135, 1136 [3d Dept 2009]). Defendant did so here by submitting her deposition testimony, as well as that of plaintiff, plaintiff’s dental chart and the affidavit of Dr. Michael Cali, who concluded that defendant did not deviate from accepted standards of care.

More specifically, Dr. Cali states that defendant reviewed plaintiff’s x-rays from December 2016 and performed a clinical exam, during which she probed with an instrument called an “explorer” in an effort to detect any cavities. After placing fillings in tooth numbers 13 and 14, defendant observed that tooth number 15 also had a cavity. According to Dr. Cali, defendant removed the existing fillings and all identifiable decay with a hand piece (dental drill) at both high and low speed and then filled tooth numbers

13, 14 and 15 with a resin composite material.² Plaintiff's dental chart reveals that defendant advised him that the decay on tooth number 13 was very deep, close to the root canal and may require a root canal in the future (*see* Hanlon Aff., Ex. G). In light of the foregoing, Dr. Cali opines, within a reasonable degree of dental certainty, that the treatment provided by defendant was within accepted standards of care in dentistry. Dr. Cali also points out that plaintiff has retained tooth numbers 13, 14 and 15 in his mouth and only complains of an injury to one tooth defendant worked on - number 13.

The burden now shifts to plaintiff to "establish[] a departure from accepted [dental] practice, as well as a nexus between the alleged malpractice and plaintiff's injury" (*Menard*, 60 AD3d at 1137 [internal quotation marks and citation omitted]). In opposition to the motion, plaintiff submits the affirmation of his expert, treating dentist Stanley Weiss, who opines to a reasonable degree of dental certainty that defendant deviated from the accepted standard of care by failing to observe existing cavities in tooth numbers 3, 4, 5, 12, 20, 30, 31 that were clearly visible on plaintiff's x-ray. Dr. Weiss avers that he noted the decay under the fillings in those teeth on x-ray *before* removing any fillings. With respect to tooth numbers 13, 14 and 15, Dr. Weiss states that decay can be seen that was neither treated, nor removed by defendant. Indeed, Dr. Weiss opines that when defendant sealed those teeth with resin composite material, she deviated from the

² Based upon his review of the records, Dr. Cali opines that defendant did not work on tooth numbers 18 and 19 and that tooth numbers 4 and 5 were within normal limits, *i.e.* there was no clinical or radiographic evidence of dental decay.

accepted standard of dental care by sealing unremoved decay beneath the fillings. To this end, Dr. Weiss opines that defendant's failure to use a Carrie detecting substance – *e.g.* “snoop” (a liquid decay detector)³ – was a further deviation from the accepted standard of dental care because it was impossible for defendant to know whether she had removed all of the decay. In Dr. Weiss's view, plaintiff's tooth number 13 now requires a root canal, post core build-up and crown because defendant left decay under a filling.

Dr. Weiss also maintains that the decay exhibited on tooth numbers 18 and 19 was extensive. Although defendant charted the existence of this decay, she did not work on these teeth. In Dr. Weiss's opinion, defendant's failure to treat tooth numbers 18 and 19 constitutes an additional deviation from the accepted standard of dental care. Dr. Weiss further explains that tooth numbers 18 and 19 ultimately became unsalvageable and had to be extracted. In Dr. Weiss's view, earlier treatment - a root canal - could have saved tooth numbers 18 and 19.

In light of the foregoing, the Court concludes that Dr. Weiss's affirmation raises questions of fact as to whether defendant deviated from accepted standards of dental care, thereby causing his injuries. Stated differently, the conflicting opinions of plaintiff's and defendant's experts with respect to causation and defendant's alleged deviation from the accepted standard of dental care present significant credibility issues that preclude an

³ In his reply affidavit, defendant's expert, Dr. Cali, denies that a “snoop” procedure should have been performed because the use of a dye can result in removal of sound tooth structure. Dr. Cali counters that the proper standard of care for addressing a cavity is a clinical examination, probing with the explorer, review of x-rays, removal of decay with a hand piece and then filling the tooth with a resin composite.

award of summary judgment (*see Gilfus v CSX Transp., Inc.*, 79 AD3d 1671, 1672 [4th Dept. 2010]).

Therefore, it is

ORDERED that defendant Radika Kapur Shah's motion for summary judgment is denied.

This shall constitute the Decision and Order of the Court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
February 22, 2021

ENTER,



CHRISTOPHER E. CAHILL, J.S.C.

Papers considered:

1. Notice of Motion, dated June 19, 2020; Affirmation of Christine D'Addio Hanlon, dated June 19, 2020, with annexed exhibits; Affidavit of Michael L. Cali, B.S., D.D.S., sworn to June 15, 2020;
2. Affirmation of George A. Smith, Esq. in Opposition, dated August 4, 2020, with annexed exhibit; and
3. Reply Affirmation of Christine Hanlon, Esq., dated September 14, 2020; Reply Affidavit of Michael L. Cali, B.S., D.D.S., sworn to September 9, 2020.