

Charmant v Freud & Goldstein D.D.S. P.C.
2021 NY Slip Op 33247(U)
April 6, 2021
Supreme Court, Orange County
Docket Number: Index EF003548-2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street
Goshen, New York 10924 on the 6th day of April, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

FENEL CHARMANT and MARIE A. CHARMANT,

Plaintiffs,

-against-

FREUD & GOLDSTEIN D.D.S. P.C., BENJY
GOLDSTEIN AND GEORGE FREUD, D.D.S.,
PLLC, DR. BENJY GOLDSTEIN, D.D.S,
DR. GEORGE FREUD, D.D.S, NEWBURGH MALL
DENTAL SERVICES, DRS. GOLDSTEIN & FREUD,
D.D.S., P.C.,

Defendants.

VAZQUEZ-DOLES, J.S.C.

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, on all
parties.

DECISION & ORDER

INDEX EF003548-2018

Motion date: 1/5/2021

Motion Seq. #2

The following papers numbered 1 - 18 were read on this motion for summary judgment,
dismissing plaintiffs complaint, made by defendants Benjy Goldstein, George Freud, D.D.S.,
PLLC, Benjy Goldstein, D.D.S., and George Freud, D.D.S.:

Notice of Petition/Affirmation/Exhibits A - K.	1 - 13
Affirmation in Opposition/Exhibits A-C.....	14 - 17
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Defendants have brought this instant motion to dismiss Fenel Charmant’s claim (and his
wife Marie Charmant’s derivative claim) for dental malpractice and for failure to provide
informed consent. The action arose from Mr. Charmant’s treatment on October 22, 2015 at the
office of Goldstein and Freud. He had pain in his lower left wisdom tooth (#17), and was prepared
to have it extracted. The patient was sedated and when he awoke, learned that in addition to #17,
the other three wisdom teeth were removed as well (numbers 1, 16 and 32).

The affirmation of plaintiffs' expert dentist together with counsel's affirmation make it clear that the claim is limited to a lack of informed consent and not a departure from accepted dental practice. According to the expert, "It is my opinion from a review of the records, that by failing to explain the listed diagnoses on the incomplete 'consent form', failing to list alternative treatments on the "consent form", and according to plaintiffs testimony, failing to gain his consent on the alleged "consent form", in failing to consult with and inform patient which teeth he referred for extraction, and by not identifying the teeth to patient in his mouth, and according to patient, by not discussing the procedures with him before referring him to have teeth #1, #16, and #32 extracted, it appears that Dr. Goldstein and his staff departed from good and accepted dental practices by failing to provide appropriate information to the plaintiff and failed to gain informed consent" (Exhibit C to opposing papers).

In any event, a necessary element of an informed consent claim is that the operation or procedure was a substantial factor in causing injury to the patient (Public Health Law §2805-d (3)). In addition to proximate cause, the other elements of a lack of informed consent are that the dentist or oral surgeon failed to disclose the reasonably foreseeable risks and benefits of the proposed procedure in a manner permitting the patient to make a knowledgeable decision, and that a reasonably prudent person in the patient's situation would not have undergone the procedure if he had been fully informed. (Public Health Law §2805-d (1 & 3); PJI 2:150A).

The determination of informed consent is not confined to the existence of a consent form; there has to be a discussion with the patient of the risks and alternatives. Where a plaintiff's deposition disputes whether such discussion ever took place, a motion to dismiss will not be sustained (*Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 2d Dept; *Dyckes v Stabile*, 153 AD3d 783, 2d Dept). As set out above - - whether informed consent obtains is governed by an

objective standard; this Court is not persuaded by defendants contention that plaintiff argues from a subjective vantage (among the cases cited by defendants is *Figuroa-Burgos v Bieniewicz*, 135 AD3d810, 2d Dept).

Dr. Benjy Goldstein, in his deposition of January 29, 2020, testified on consent as follows: “So what was discussed with Mr. Charmant was - - again, I encouraged him to do what I felt at that time would have been the best treatment for him, which would have been at that time to have all four of his wisdom teeth removed. And that's what this sheet is all about.” (Exhibit G, p 44).

The “sheet” was a consent form used by oral surgeon, Dr. Cameron Lewis, who sees patients in defendants’ offices on Thursdays. The document, entitled Consent for Extraction of Teeth and Anesthesia, is not all that precise; it states “My diagnosis is: 1 16 17 32.” We know what these numbers mean; at the time, Fenel Charmant may not have. The four-page form lists 21 risks (also referenced in Dr. Goldstein’s deposition at pages 100 and 101), which are to be initialed by the patient. Mr. Charmant initialed the first 19, which included one headed “Information for Female Patients,” suggesting that he did not give it sufficient time and that the document was not reviewed by a doctor or staff person.

Dr. Goldstein’s August 13, 2020 affidavit states that “After I explained the above treatment plan to Mr. Charmant, he agreed to undergo the proposed treatment, that being the removal of all four wisdom teeth and the restoration of tooth # 18 that day” (Exhibit K, ¶ 11).

Fenel Charmant testified on August 12, 2019 that he never had a proper discussion on consent:

Q. Do you recall that dentist without the beard telling you anything about having other teeth in your mouth extracted in addition to the last one on the left side of your lower jaw?

A. No

...

Q. Well do you recall that dentist saying anything to you about possible things that can happen when a tooth is extracted?

A. No. . . (Exhibit E, p 51-52)

...

Q. Do you remember any dentist speaking to you about the risks and benefits of having teeth extracted that day?

A. No. I don't remember, no. . . That day I went for only one tooth. I knew in advance that tooth was going to be pulled. (*Id.*, p 62; the sentence order is reversed).

...

Q. You said that he's the one [the dentist without the beard] that told you about the procedures. I'm asking you what procedures did he tell you about?

A. Yes, he told me he was going to pull the last tooth, and the one by the last tooth was to be fixed¹ . . . (*Id.*, p 78).

Charmant's injuries included pain, uncontrolled saliva pooling and difficulty in chewing and enjoying food. (Bill of Particulars, Exhibit D, ¶ 9, as well as his deposition testimony thereon). Plaintiffs' expert dentist concluded that "Indeed, the injuries cited by Plaintiff in his Bill of Particulars are causally connected to and are direct results of the extractions performed by defendants. The nerve injury and symptoms described are textbook examples of dental paresthesia, which is (one of the Plaintiff/patient's claimed injuries) a possible postoperative complication of wisdom tooth removal" (Exhibit B to opposing papers, ¶ 5).

Upon view of the foregoing,

ORDERED that motion 002 seeking the dismissal of plaintiffs' complaint is **GRANTED** with respect to that cause of action based upon a departure from accepted dental practice; and **DENIED** with respect to that cause of action based upon a lack of informed consent.

This decision constitutes the order of the Court.

Dated: April 6th, 2021
Goshen, New York

ENTER:


HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

¹ Tooth 18, which initially was thought to need to need canal, had a crown affixed to it, most of which treatment was done in two visits subsequent to October 22, 2015.