SHORT FORM ORDER

INDEX No. 617329/2019
CAL. No. 202000844MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

***P R E S E N T :***

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 2/24/21
ADJ. DATE 3/31/21
Mot. Seq. # 001 MD

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CHRISTINE VERRELLI,

Plaintiff,

- against -

STEVEN B. SCHWARTZ, D.D.S., M.D., LONG ISLAND ORAL & MAXILLOFACIAL SURGERY ASSOCIATES, LLP,

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated January 21, 2021 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated March 19, 2021 ; Replying Affidavits and supporting papers by defendant, dated March 29, 2021 ; Other ___; it is

***ORDERED*** that defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained as the result of negligent dental treatment and a negligent dental implant procedure by Steven B. Schwartz, D.D.S., M.D., from March 1, 2018 through September 24, 2018 at defendant Long Island Oral & Maxillofacial Surgery Associates, LLP. Plaintiff also alleges that there was no informed consent to the surgery.

Defendants now move for summary judgment dismissing the complaint on the grounds that Dr. Schwartz was not negligent in his treatment of plaintiff, and that plaintiff gave informed consent to the procedure. In support of the motion, defendants submit the pleadings, the transcripts of the deposition testimony of plaintiff and Dr. Schwartz, the records of Long Island Oral & Maxillofacial Surgery, and

the records of plaintiff's dentist, Dr. Kleinman, neurologist, Dr. Pourmand, and oral surgeon, Dr. Lam. Plaintiff also submits the expert affirmation of David A. Behrman, D.M.D.

The requisite elements of proof in a dental malpractice action are (1) a deviation or departure from accepted standards of dental or medical practice, and (2) evidence that such departure was a proximate cause of the plaintiff's injury or damage (*see* ***Chan v Toothsavers Dental Care Inc***., 125 AD3d 712, 4 NYS3d 59 [2d Dept 2015]; ***Kozlowski v Oana***, 102 AD3d 752, 959 NYS2d 500 [2d Dept 2013]). To establish a claim for dental malpractice based on lack of informed consent, a plaintiff must prove; (1) that the dental professional providing the treatment failed to disclose alternatives to such treatment and failed to inform the plaintiff of the reasonably foreseeable risks of such treatment that a reasonable dental practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same situation would not have undergone the treatment had he or she been fully informed of the risks, and (3) that the lack of informed consent was a proximate cause of the plaintiff's injury (*see* ***Schilling v Ellis Hosp***., 75 AD3d 1044, 906 NYS2d 187 [3d Dept 2010]; ***Mangaroo v Beckman***, 74 AD3d 1293, 904 NYS2d 212 [2d Dept 2010]). Further, a medical corporation may be held vicariously liable for the wrongful acts of its employees (*see* ***Doe v Guthrie Clinic, Ltd.***, 22 NY3d 480, 982 NYS2d 431 [2014]; ***Hill v St. Clare's Hosp***., 67 NY2d 72, 49 NYS2d 904 [1986]).

On a motion for summary judgment dismissing a dental malpractice action, a defendant has the initial burden of establishing the absence of any departure from good and accepted dental practice or that, if there was a departure, it was not the proximate cause of the plaintiff's alleged injury (*see* ***Sharp v Weber***, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]). If the defendant makes such a showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact as to whether appropriate care was rendered (*see* ***Williams v Sahay***, 12 AD3d 366, 783NYS2d 664 [2d Dept 2004]). "To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*see* ***Terranova v Finklea***, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

Plaintiff first saw Dr. Schwartz on March 1, 2018, on a referral from her regular dentist, Dr. Kleinman, for an evaluation of her tooth #19 for possible apicoectomy. Dr. Schwartz took x-rays and recommended a tooth extraction and implant instead of an apicoectomy based on the x-ray. Dr. Schwartz discussed a bone graft and waiting approximately six weeks after the graft to place the implant. Plaintiff decided to undergo the extraction and implant placement procedure with Dr. Schwartz. Plaintiff testified at her deposition that Dr. Schwartz did not discuss any risks of the procedure with her, and that she signed a consent form but felt as though she did not have enough time to read it. She testified that when she was given the forms, her mouth had already been numbed and there was a lot to read in the short time before Dr. Schwartz entered the room to begin the procedure. She testified there was no pain following the extraction. She returned for a follow up visit with Dr. Schwartz on March 8, 2018, and for other visits afterward. Plaintiff testified that prior to the procedure to extract the tooth and place a bone graft, Dr. Schwartz discussed the procedure with her. Plaintiff testified that on the April 30, 2018 follow up visit, Dr. Schwartz showed her either "a pamphlet or something on his projector" regarding the placement of the implant and screw and she thought it was "pretty explanatory." She testified that "from what he said they were going to put the screw in and attach the implant to it so I thought that was pretty explanatory." Plaintiff testified that prior to the procedure Dr. Schwartz never

discussed the nerves in her lower jaw area with her. Since then, she has "Googled" the information and learned about the inferior alveolar nerve from Dr. Lam.

Plaintiff further testified she returned to Dr. Schwartz on May 2, 2018 for the implant procedure. She testified that she had no questions for the doctor prior to the procedure and that she understood the procedure to be performed. She testified that she was again given a consent form after she was numb and in a dental chair. She identified her signature on the consent form and testified that she did not read it before signing and initialing the paragraphs. Plaintiff stated she felt pressured to sign it, but was never told there was no time to read the forms. Plaintiff stated that she was not aware of the risks of the procedure even though they are listed including pain, numbness and tingling. Plaintiff testified that during the procedure she knew something was wrong because she felt a shock go through her body and her hand involuntarily ricocheted and hit the nurse. She told Dr. Schwartz she had pain at tooth #19 where he was placing the implant. The procedure ended five minutes later. Plaintiff testified that she was experiencing pain when she left the office, and that her husband called Dr. Schwartz's office later that same day and got a prescription for her for Vicodin. She was still in pain the following morning and returned to Dr. Schwartz's office, at which time she told him she could not feel her left lip and chin. She testified that Dr. Schwartz advised her that he needed to change the screw he had used because it was too long. Plaintiff agreed to the procedure. Plaintiff's final visit to Dr. Schwartz was on September 24, 2018, when the implant was uncovered. Plaintiff testified that she agreed to the procedure. She had a follow-up appointment with Dr. Schwartz one week later, at which time she was still experiencing pain. Plaintiff testified that, on the recommendation of her prior attorney, she saw Dr. Pourmand, a neurologist, with complaints of nerve pain she had since the implant, and Dr. Lam, an oral surgeon.

At his deposition, Dr. Schwartz testified that he first treated plaintiff on March 1, 2018 for a consultation and evaluation on referral from her regular dentist. He did not specifically recall what he told her but stated that he would normally give a patient in her situation treatment options. In plaintiff's case, the options were an apicoectomy or a tooth extraction and implant. He testified that he did not recall if he discussed the location of the alveolar nerve canal in relation to tooth #19 with plaintiff, but that he did discuss risks of the apicoectomy and extraction with her, including pain and numbness. He testified that he extracted the tooth and placed a bone graft on March 8, 2018. He could not recall specifics about what he discussed regarding the implant on the April 30, 2018 appointment, but stated that generally he would discuss how the procedure would be and the risks involved. He did not recall if he discussed risks or duration of numbness. In his May 2, 2018 notes, Dr. Schwartz documented that he used an 11.5 mm implant on plaintiff and chose that length after measuring a panorex x-ray taken on March 1, 2021, before the bone graft. He did not take another x-ray after the bone graft. Dr. Schwartz testified that he took a measurement to determine how long an implant to use to make sure it was placed in bone and not invading the inferior alveolar canal, which could lead to discomfort or altered sensation. Plaintiff returned the next day with deep pain at the implant site. Dr. Schwartz testified that, based on plaintiff's complaint of pain, he determined he should remove the 11.5 mm implant and place a shorter implant so it was not as close to the nerve canal. He replaced the 11.5 mm implant with a size 10 mm implant. One week later, plaintiff still had sharp shooting pain. Dr. Schwartz testified that on May 14, 2018 plaintiff said the numbness was gone. He testified that he did not recall discussing the consent forms with plaintiff but that he tells his patients to read the forms carefully and ask any questions before signing them.

In his expert affidavit, Dr. David Behrman, a dentist licensed to practice dentistry in New York and board certified in oral and maxillofacial surgery, states that he reviewed the pleadings, plaintiff's dental and relevant medical records, and the deposition testimony of plaintiff and Dr. Schwartz. Dr. Behrman opines, within a reasonable degree of dental certainty, that the care and treatment rendered by Dr. Schwartz was at all times within accepted standards of dental and oral surgery practice and that there were no departures from accepted dental and oral surgery practice. He also opines, within a reasonable degree of dental certainty, that Dr. Schwartz properly informed plaintiff of treatment options for her tooth pain, appropriately explained the risks and benefits of the treatment options to plaintiff in the manner that a reasonably prudent practitioner in oral surgery would have relayed, and that the information he provided was within the standard of reasonable care. Dr. Behrman notes that there is a signed consent form in the medical records which lists a risk of infection, bleeding, pain and numbness. He also opines that the recommendation of this surgery was proper, and that using the March 1, 2018 panorex to measure the bone level prior to the implant placement was proper. Dr. Behrman states that Dr. Schwartz appropriately used an 11.5 mm implant and that there was no evidence of physical damage at the nerve. He further opines that the decision to use a smaller 10 mm implant was a reasonable treatment option to address plaintiff's complaints of pain.

In deciding a motion for summary judgment, the Court must look at the evidence in the light most favorable to the nonmoving party, which must be accorded every favorable inference that can be drawn therefrom (*see* ***James v Greenberg***, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]). Here, defendants' submissions are insufficient to demonstrate prima facie entitlement to judgment in their favor on the plaintiff's claim that Dr. Schwartz did not properly inform her of the risks associated with extraction and implant before performing the procedure. In particular, while plaintiff concedes she signed the consent forms, she testified that they were handed to her after being put in chair and giving numbing medication. She further testified that she did not have enough time to read them before the doctor entered the room for the procedure. Furthermore, absent from the record before the Court is evidence from Dr. Schwartz showing he explained to plaintiff the potential risks and benefits associated with this tooth extraction in terms of nerve damage (*see* ***Luu v Paskowski,*** 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]; ***Bengston v Wang***, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]). Dr. Schwartz testified regarding the April 30 , 2018 visit that he could not recall if he discussed risks of numbness or duration of numbness. The conclusory assertion by Dr. Schwartz's expert that Dr. Schwartz obtained the proper written informed consent is insufficient to shift the burden of proof to the plaintiff. Accordingly, the branch of Dr. Schwartz's motion for summary judgment dismissing the claim for lack of informed consent is denied.

Defendants have, however, established prima facie entitlement to summary judgment dismissing the complaint based upon Dr. Behrman's expert affirmation demonstrating that Dr. Schwartz did not depart from good and accepted standards of dental practice and did not proximately cause the plaintiff's alleged injuries (*see* ***La Vecchia v Bilello****, supra*; ***Terranova v Finklea***, *supra*). As such, the burden now shifts to plaintiffs to demonstrate the existence of a triable issue of fact (*see* ***Williams v Sahay****, supra*).

In opposition, plaintiff has submitted the expert affirmation of a dentist who limits his practice to periodontics and has vast experience in tooth extraction and implant placement. This doctor reviewed

all of defendant's submissions including deposition testimony, the records of Dr. Kleinman, Dr. Purmand and Dr. Lam, and all radiographs related to this action. The doctor opines, within a reasonable degree of dental certainty, that Dr. Schwartz's treatment of plaintiff departed from good and accepted practice, and that the departures caused injury to plaintiff, including damage to her left inferior alveolar nerve. The doctor opines that Dr. Schwartz improperly chose an 11.5 mm implant based on a panorex x-ray taken on March 1, 2018, prior to the extraction and bone graft. This doctor also opines that there was insufficient height and bone width for the 11.5 mm implant and for the replacement 10 mm implant, which still impinged on the inferior alveolar canal.

Plaintiff's dental expert has raised factual issues as to whether Dr. Schwartz departed from good and accepted dental practice. Plaintiff's expert asserts that he reviewed the relevant pleadings, depositions and medical records and that it is his opinion, to a reasonable degree of dental certainty, that Dr. Schwartz deviated in his care of plaintiff by not measuring for the implant after taking a second x-ray following the bone graft and by using an implant that was too big, and that these deviations proximately caused plaintiff to suffer left inferior alveolar nerve damage. As the parties have adduced conflicting medical expert opinions, summary judgment is not appropriate (*see* ***Shehebar v Boro Park Obstetrics and Gynecology, P.C.***, 106 AD3d 715, 964 NYS2d 239 [2d Dept 2013]; ***Feinberg v Feit***, 23 AD3d 517, 806 NYS2d 661 [2d Dept 2005]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: July 5, 2021

David T. Reilly, J.S.C.

**____ FINAL DISPOSITION ____ NON-FINAL DISPOSITION**