

Knafo v Elson

2021 NY Slip Op 33603(U)

September 20, 2021

Supreme Court, Nassau County

Docket Number: Index No. 615090/2019

Judge: Leonard D. Steinman

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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**

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DANIELLE KNAFO,

Plaintiff,

**IAS PART 8
Index No. 615090/2019
Motion Seq. No. 001**

-against-

DECISION AND ORDER

LEWIS ELSON, D.D.S.,

Defendant.

-----X
LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant’s Notice of Motion, Affirmation & Exhibits.....	1
Plaintiff’s Affirmation in Opposition & Exhibits.....	2
Defendant’s Reply & Exhibits.....	3

In this action, plaintiff alleges that defendant committed dental malpractice in connection with restoration work performed on plaintiff’s lower anterior teeth. Defendant now moves for summary judgment dismissing the complaint. For the reasons set forth below, the motion is denied.

BACKGROUND

Plaintiff began treating with defendant in September 2003. On September 6, 2016, plaintiff consulted with the defendant regarding restorative treatment for teeth numbers 22 through 27—the bottom front teeth. Plaintiff testified that she understood that she would be receiving veneers, similar to previous work done by defendant on her upper front teeth.

Digital impressions of plaintiff's teeth, mouth and jaw were taken that day. Defendant testified that he sent the digital impressions to a lab. On September 17, 2016, defendant prepared plaintiff's teeth and fabricated temporary restorations at his office. On September 24, 2016, defendant inserted veneers on two of the teeth and half-crowns/veneers on four others, with permanent cement. Thereafter, defendant performed adjustments to the teeth over several visits and added composite to plaintiff's posterior left teeth to adjust her bite.

On December 6, 2016 plaintiff had root canal on one of the two teeth on which a veneer was placed.

THE CLAIMS

First, plaintiff claims that she did not give her informed consent to the work actually performed—that defendant placed crowns rather than veneers for the restorative work and that defendant failed to inform plaintiff that she had a collapsed bite and the treatment options (including non-treatment) for this condition. Second, plaintiff asserts that defendant deviated from the standard of care by utilizing “chairside” temporary crowns rather than laboratory fabricated acrylic temporary crowns, resulting in fit and occlusion problems when the permanent crowns were placed. Third, plaintiff asserts that defendant acted negligently by permanently cementing poorly fitted crowns into plaintiff's mouth. Fourth, the installation of the crowns allegedly negligently altered plaintiff's occlusion causing plaintiff to have an open posterior bite. And finally, fifth, defendant's improper procedures allegedly caused plaintiff to undergo a root canal on one of her teeth.

LEGAL ANALYSIS

It is the movant who has the burden to establish its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). “CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses.” *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d

Dept. 1996): Where the movant fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *US Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014). The drastic remedy of summary judgment should be granted only if there are no material issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

Defendant has submitted an expert affirmation that concludes that the defendant did not deviate from the standard of care and that informed consent was given. For example, defendant's expert states that it was appropriate for defendant to make and insert "chairside temporaries" because this enabled him to customize the temporaries to ensure that the plaintiff's bite was as comfortable as possible. But plaintiff's expert states that by utilizing chairside temporary crowns instead of laboratory fabricated temporaries the defendant lost the opportunity to create a prototype for the permanent crowns, *i.e.*, an "informative blueprint for the dental lab." It is not this court's function to choose between these competing opinions on summary judgment.

When medical experts offer conflicting opinions as to whether there was a deviation from the standard of care and on causation, a credibility question is presented requiring jury resolution. *Russell v. Garafalo*, 189 A.D.3d 1100 (2d Dept. 2020); *Neyman v. Doshi Diagnostic Imaging Services, P.C.*, 153 A.D.3d 538, 544 (2d Dept. 2017); *Shields v. Baktidy*, 11 A.D.3d 671, 672 (2d Dept. 2004)("[s]ummary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts"). It is not for this court to decide which of the competing opinions are more persuasive. Therefore, is not material for purposes of this motion that defendant's expert may have more impressive credentials (prosthodontist vs. general dentist) or that plaintiff's expert offered his opinion in a 26-page affirmation compared to the 6-page affirmation of plaintiff's expert. Contrary to

defendant's argument, the 6-pages submitted by defendant's expert do not consist of merely conclusory or speculative opinions.

Another example of the competing opinions relates to whether plaintiff gave informed consent for the procedure utilized by the defendant. Pursuant to Public Health Law § 2805-d (1), lack of informed consent is defined as "the failure of the person providing the professional treatment to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation."

To establish a cause of action for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury. *Walker v. St. Vincent Catholic Med. Centers*, 114 A.D.3d 669, 670 (2d Dept. 2014); *Spano v. Bertocci*, 299 A.D.2d 335, 337-338 (2d Dept. 2002).

Plaintiff testified that she had no idea that the defendant was going to insert crowns—or half-crowns—and shave down her teeth to the extent that he did, and that she was surprised when she saw that he had. The defendant contests this, and the defendant's expert's opinion relies upon defendant's version of the contested events—which this court cannot assume to be true.

Plaintiff has raised an issue of fact as to whether she gave her informed consent for the placement of half-crowns. Plaintiff's expert states that the preparation for the crowns required removal of significantly more natural tooth structure than preparation for veneers.

Plaintiff's expert further states in his opinion that that this preparation, combined with the subsequent removal of the permanently cemented restoration, led to the need for a root canal treatment on one of plaintiff's teeth. Given the risk resulting from the removal of tooth structure—a risk realized when plaintiff required a root canal (according to plaintiff's expert)—it cannot be said as a matter of law that a reasonably prudent person would have undergone the elective restoration work in all events. To the extent that defendant's expert implies that the work performed was required due to the condition of plaintiff's bite, plaintiff's expert states that plaintiff's bite did not require the work to be performed and plaintiff testified that she was led to believe that she was having the restorative work done solely for aesthetic reasons.

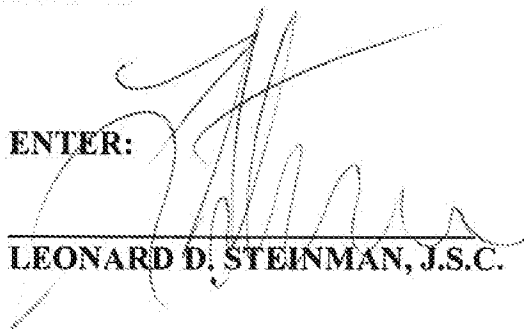
For all of the aforesaid reasons, defendant's summary judgment motion is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: September 20, 2021
Mineola, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.

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