

Odle v Mikhailov

2022 NY Slip Op 34850(U)

March 22, 2022

Supreme Court, Kings County

Docket Number: Index No. 521189/2018

Judge: Pamela L. Fisher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 22nd day of March 2022.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
GWENDOLYN ODLE,

Plaintiff,

DECISION/ORDER

- against -

Index No: 521189/2018

ALEXANDER M. MIKHAILOV, D.D.S., RENRICK BENN,
D.D.S., ATLANTIC TERMINAL DENTAL, P.C. and
KINGSTON AVENUE ORAL SURGERY, LLC,

Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____ | <u>1-2, 3-6</u> |
| Opposing Affidavits (Affirmations) _____ | <u>7</u> |
| Reply Affidavits (Affirmations) _____ | <u>8, 9, 10-12</u> |

Upon the foregoing papers in this dental malpractice action, defendants, Renrick Benn, D.D.S. and Kingston Avenue Oral Surgery, LLC, move in motion sequence 2, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff’s complaint against them in its entirety, and directing the Clerk of the Court to enter judgment in favor of defendants. Defendant, Alexander M. Mikhailov, D.D.S., moves in motion sequence 3, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff’s complaint against him in its entirety, and directing the Clerk of the Court to enter judgment in his favor. Defendant also moves to amend the caption to reflect his dismissal from the action.

Plaintiff commenced this action by filing a summons and complaint on October 22, 2018 (Summons & Complaint, annexed as Exhibit A to defendants’ motion papers, motion sequence 2; Defendants’ Affirmation in Support ¶ 4, motion sequence 2). Issue was joined by Dr. Mikhailov and

Atlantic Terminal Dental, P.C. on or about December 6, 2018, and by defendants, Dr. Benn and Kingston Avenue Oral Surgery, LLC on or about January 7, 2019, and February 28, 2019, respectively (*Id.* at ¶¶ 5, 6; Answers annexed as Exhibits B, C, and D to defendants' motion papers, motion sequence 2). Plaintiff served a bill of particulars upon defendants, Dr. Benn and Kingston Avenue Oral Surgery, LLC on or about May 21, 2019 (Defendants' Affirmation in Support ¶ 7, motion sequence 2; Bills of Particulars annexed as Exhibit E to defendants' motion papers, motion sequence 2). A separate bill of particulars was served upon defendants, Dr. Mikhailov and Atlantic Terminal Dental, P.C. on May 21, 2019, and a supplemental bill of particulars was served upon Dr. Mikhailov and Atlantic Terminal Dental, P.C. on or about September 10, 2021 (*Id.*; Defendants' Affirmation in Support ¶ 7, motion sequence 2). In her complaint and bills of particulars, plaintiff alleges that defendants departed from good and acceptable dental practice in their treatment of the plaintiff between October 25, 2017 and April 23, 2018 by "misidentifying a tooth that needed extraction," extracting tooth #9, instead of tooth #11, "failing to independently determine whether a tooth (#9) warranted extraction," "improperly taking notes and filling out forms," "failing to perform root canal therapy rather than pull[ing] a tooth," "failing to properly read x-rays and records," "failing to order a sufficient number of x-rays and other diagnostic tests," and neglecting to obtain plaintiff's informed consent (Complaint ¶¶ 19, 22; Bill of Particulars as to Renrick Benn, D.D.S. and Kingston Avenue Oral Surgery, LLC ¶¶ 1, 3, 5; Bill of Particulars as to Alexander M. Mikhailov, D.D.S. and Atlantic Terminal Dental, P.C. ¶ 1, Supplemental Bill of Particulars as to Alexander M. Mikhailov, D.D.S. and Atlantic Terminal Dental, P.C. ¶¶ 1, 30). As a result of defendants' alleged malpractice, plaintiff is claiming to have sustained the following injuries: extraction of the "incorrect tooth," "[r]etained root tips of [teeth] #'s 9 & 10, with resultant infection, pain," and "need for further surgery" and treatment, and two "days [of] confinement to bed [and] home" (Bill of Particulars as to Renrick Benn, D.D.S. and Kingston Avenue

Oral Surgery, LLC ¶¶ 10, 11, 13, 14; Bill of Particulars as to Alexander M. Mikhailov, D.D.S. and Atlantic Terminal Dental, P.C. ¶¶ 17, 18, 19, Supplemental Bill of Particulars ¶¶ 17, 18, 19).

The following facts are not in dispute. Plaintiff first presented to Atlantic Terminal Dental, P.C. on September 8, 2017, and saw Dr. Wong (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 2, motion sequence 3). Dr. Wong examined plaintiff's teeth, and took a periapical x-ray (*Id.*). The chart states that "tooth # 11 had recurrent decay extending to the pulp, and the patient was referred for root canal treatment" (*Id.*). The notes indicate that Ms. Odle was "prescribed Amoxicillin 500 mg, 21 tablets with 1 tablet [to be] taken every 8 hours for 7 days" (*Id.*). Plaintiff returned to Atlantic Terminal Dental, P.C. on October 25, 2017, and was seen by Dr. Pang (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 1, motion sequence 2). Dr. Pang "note[d] that a consultation was performed, and the patient was informed by the endodontist that the tooth [could not] be restored" (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 3, motion sequence 3). The chart documents that "[o]ne periapical x-ray was taken, and [the plaintiff] was referred to the oral surgeon for the extraction of teeth #'s 10 and 11" (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 1, motion sequence 2). The office manager, Katie Ganopolskaya filled out an "insurance referral form," "indicat[ing] that teeth #9 and 10 should be extracted," and gave this form to the plaintiff (*Id.* at ¶ 3; Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 4, motion sequence 3).

On November 7, 2017, plaintiff went to Kingston Avenue Oral Surgery, LLC, and saw Dr. Benn (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 4, motion sequence 2). She "provided the referral form" from Atlantic Terminal Dental, P.C., and Dr. Benn examined plaintiff's teeth, and took a panorex x-ray (*Id.*). Dr. Benn noted that "teeth #9 and 10 were periodontally involved with deep pockets," and "had gross caries" (*Id.*). The "[p]laintiff signed a general oral surgery consent form," and "teeth #'s 9 and 10 were extracted" "under general anesthesia"

(*Id.*). Plaintiff was given a “prescription for Penicillin and Ibuprofen” (*Id.*). On November 20, 2017, plaintiff presented to Atlantic Terminal Dental, P.C., and was seen by Dr. Jae Lee (*Id.* at ¶ 5). Dr. Lee examined plaintiff’s teeth, and “took a panoramic x-ray” (*Id.*). He noted that “[t]ooth # 11 was still present,” tooth #10 had been extracted, and the “root tip [of tooth #9] was present,” but the “crown [was] absent” (*Id.*). Dr. Lee advised Ms. Odle “of the situation, and she stated that she went to Kingston Avenue Dental for extractions” (*Id.*). He informed her that “she needed to have tooth #11 extracted due to deep caries” (*Id.*). Dr. Lee “referred [plaintiff] to an oral surgeon for the extraction of #9 root tip and #11,” and “sent for the approval of a partial upper and partial lower denture.” (*Id.*; Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 5, motion sequence 3). He noted that the “next visit would be for impressions” (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 5, motion sequence 2).

On April 9, 2018, plaintiff returned to Atlantic Terminal Dental, P.C., and an initial impression was taken by Dr. Lee (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 6, motion sequence 3). On April 23, 2018, Dr. Lee took a final impression (*Id.* at ¶ 7). On May 14, 2018, the chart indicates that Dr. Lee measured plaintiff’s bite, and the “next visit would be a try in” (*Id.* at ¶ 8; Dr. Lee’s EBT tr. 21, lines 3-7, annexed as Exhibit I to defendants’ motion papers, motion sequence 2). On May 21, 2018, Dr. Lee “noted a try in, and the patient was satisfied” (Statement of Material Facts Pursuant to Uniform Civil Rule 202.8-g ¶ 9, motion sequence 3). On June 4, 2018, Dr. Lee “noted delivery of partial upper and partial lower denture[s], and the next visit would be a recall” (*Id.* at ¶ 10). Plaintiff never returned to Atlantic Terminal Dental, P.C. after June 4, 2018 (*Id.*).

Dr. Benn’s and Kingston Avenue Oral Surgery, LLC’s Motion for Summary Judgment (Motion Sequence 2):

In support of their motion for summary judgment, defendants submit an expert affirmation from Dr. Harrison Linsky, D.D.S., M.D., an oral surgeon board certified in oral and maxillofacial

surgery, contending that Dr. Benn did not deviate from acceptable dental practice in his treatment of the plaintiff, and that no act or omission of his proximately caused the plaintiff's injuries (Linsky Expert Affirmation ¶¶ 1, 3, 24, annexed as Exhibit N to defendants' motion papers, motion sequence 2). Dr. Linsky's opinion is based on review of the pleadings, bills of particulars, dental records, deposition transcripts, and Dr. Benn's affidavit, as well his own training and experience (*Id.* at ¶ 2). Dr. Linsky opines that Dr. Benn properly "extracted tooth #9 on November 7, 2018, based on his findings on examination, the referral form, and the panoramic x-ray taken on that date" (*Id.* at ¶ 14). Dr. Linsky states that the records document that Dr. Benn's exam and panoramic x-ray revealed that "both teeth #9 and 10 were periodontally involved with deep pockets, and they had gross caries" (*Id.* at ¶ 6). Further, the referral form indicated that plaintiff "was referred for the extraction of teeth #'s] 9 and 10" (*Id.* at ¶ 7). Dr. Linsky concurs with Dr. Benn's analysis of the panoramic x-ray, and contends that "teeth #9, 10 and 11 [all] had deep periodontal pocketing and gross caries," and that "extraction was appropriate" (*Id.* at ¶ 16). He maintains that "tooth #9 was not a healthy tooth and had significant pathology which required treatment and would worsen without treatment" (*Id.*). Dr. Linsky alleges that Dr. Benn did not depart from acceptable dental practice by failing to extract tooth #11, even though "it was not a healthy tooth," as "there is nothing in the records to indicate it warranted [immediate] treatment by Dr. Benn" (*Id.* at ¶ 21). Further, leaving behind the root tip of tooth #9 did not constitute a deviation from the standard of care, as this "is a minor risk of extractions [that is] often not included on a standard consent for extraction form" (*Id.* at ¶ 11). Dr. Linsky affirms that there is "no basis" for the claims that Dr. Benn provided "poor fitting crowns, bridgework, and dentures," as he "never provided such treatment" (*Id.* at ¶ 12). He states that Dr. Benn did not deviate from acceptable dental practice by "fail[ing] to order a sufficient number of x-rays and properly read [them]," as "[a] panorex was taken at the office of Kingston Oral Surgery on the date of the extraction," and "[n]o other x-rays needed to be taken" (*Id.* at ¶ 13).

Dr. Linsky opines that Dr. Benn properly obtained plaintiff's informed consent for the extractions of teeth #'s 9 and 10, based on the referral form, defendant's office records, plaintiff's deposition testimony, and the signed consent form (*Id.* at ¶ 17). Dr. Linsky affirms that the referral form stated that plaintiff was being referred for the extraction of teeth #'s 9 and 10, "Dr. Benn reviewed the risks and alternatives to treatment," and plaintiff testified that "she read and signed the consent form" (*Id.*). Given that the plaintiff "knew and understood [that] she was undergoing the extraction of two teeth," the allegation that she believed a different tooth would be extracted, does not vitiate her consent (*Id.*). Further, Dr. Linsky claims that "the information provided to [the] plaintiff in order for her to give her informed consent to the extraction of tooth # 9 met the accepted standards of dental and oral surgical care" (*Id.* at ¶ 18). He also contends that "no reasonable person in plaintiff's condition would have opted against the extraction of tooth #9," as the "tooth had periodontal disease and non-restorable caries" (*Id.*). Dr. Linsky concludes that Dr. Benn's treatment did not proximately cause plaintiff's alleged injuries, including the "loss of a healthy tooth" (*Id.* at ¶ 23).

In opposition to defendants' motion for summary judgment, plaintiff submits a redacted expert affidavit from a dentist, "duly licensed to practice dentistry in the State of New York" (Plaintiff's Expert Affidavit ¶ 1, annexed as Exhibit G to plaintiff's opposition papers, motion sequence 2). He/she opines that Dr. Benn departed from acceptable dental practice in his treatment of the plaintiff, and that these departures proximately caused the plaintiff's injuries (*Id.* at ¶ 19). Plaintiff's expert opinion is based on review of the dental records, as well as his/her own education, training, and experience (*Id.* at ¶ 2). Plaintiff's expert contends that Dr. Benn deviated from the standard of care by extracting teeth #'s 9 and 10, and by failing to extract tooth #11 (*Id.* at ¶ 16). He/she bases this conclusion on the periapical x-rays taken at Atlantic Terminal Dental, P.C. on September 8, 2017, as well as the "progress note[s]" from that date (*Id.* at ¶¶ 4, 6) He/she points out that the September 8, 2017 progress notes do not state that anything was wrong with teeth numbers 9 or 10, and only refer to the "recurrent decay extending

to pulp” in tooth number 11 that “required immediate referral to an endodontist and antibiotic coverage” (*Id.* at ¶¶ 4-6). Plaintiff’s expert opines that the periapical x-ray from September 8, 2017, showed “significant bone loss at the distal portion (back portion) of” “tooth number 11,” and “deep decay most certainly entering into the pulp (nerve chamber) of the tooth” (*Id.* at ¶ 6). Further, he/she alleges that the x-rays “clearly show that neither tooth number 9 [n]or tooth number 10, the maxillary left central and left lateral incisor were suffering from extensive decay” (*Id.*). He/she maintains that although it is possible that there was some decay in both of these teeth, the decay was not so “extensive” as to require that these teeth be extracted (*Id.*). Plaintiff’s expert affirms that the x-rays do not indicate that there was significant bone loss around teeth numbers 9 and 10 (*Id.* at ¶ 7). He/she states that “while there is bone loss visible to the distal (or behind tooth number 11), only the slightest amount of bone loss is apparent at one area between tooth numbers 10 and 11,” and “[t]ooth number 9 shows no bone loss whatsoever” (*Id.*). Plaintiff’s expert criticizes Dr. Benn and defendants’ expert for relying on a panoramic x-ray to “[diagnose] tooth decay and periodontal disease” (*Id.* at ¶ 8). He/she claims that the “panoramic x-rays provide, at best distorted images with very little detail as compared to the accuracy of individual peri-apical x-rays,” and defendants’ expert “[cannot] make an accurate diagnosis of dental decay or periodontal disease based upon the panoramic x-ray obtained of Ms. Odle by Kingston Avenue Oral Surgery” (*Id.*). Plaintiff’s expert examined the panoramic x-ray, and indicates that “there is little to no detail shown regarding the decay state or bone support of the anterior teeth-the three upper teeth just to the center of the panoramic x-ray” (*Id.* at ¶ 11). Plaintiff’s expert affirms that Dr. Benn did not obtain plaintiff’s informed consent for the extractions, as “the records are void of appropriate discussion with the patient that these teeth need not be extracted” and “were viable” (*Id.* at ¶ 18). He/she concludes that the above deviations were “substantial causes of plaintiff’s damages,” including the “loss of teeth numbers 9 and 10, and the continued pain in tooth number 11” (*Id.* at ¶ 19).

In reply, defendants argue that the Court should grant their motion for summary judgment, because plaintiff did not submit any opposition to defendants' statement of material facts, as required by Uniform Rule 202.8-g(b) (Reply Affirmation ¶ 3, motion sequence 2). Defendants reiterate that they did not deviate from acceptable dental practice in their treatment of the plaintiff, and that they did not proximately cause her injuries (*Id.* at ¶ 12). Defendants contend that plaintiff's expert opinion is conclusory, as he/she relied on a "blurry and distorted image," as opposed to a digital copy of the panoramic x-ray (*Id.*). Further, defendants maintain that the lack of informed consent cause of action must be dismissed, as plaintiff's affidavit stating that "Dr. Benn never discussed the findings and treatment options that he mentioned in his affirmation," contradicts her deposition testimony (*Id.* at ¶ 9). After defendants' reply papers were filed, plaintiff submitted a response to defendants' statement of material facts, indicating that the majority of the facts in defendants' statement are "admitted," with the "exception" of the "last paragraph" "deny[ing] liability and proximate cause" (Plaintiff's Counsel's Supplemental Affirmation ¶ 3, motion sequence 2)

Alexander M. Mikhailov, D.D.S.'s Motion for Summary Judgment (Motion Sequence 3):

In support of his motion for summary judgment, defendant maintains that he is entitled to summary judgment, as he was "merely the passive owner of the dental practice," and was not involved in any aspect of the treatment of patients, including the plaintiff in this case (Defendant's Affirmation in Support ¶¶ 28, 29, motion sequence 3). Further, defendant claims that he did not supervise or control the "dentists or staff members at Atlantic Terminal Dental P.C.," and plaintiff has not pleaded "any allegations" to support piercing the corporate veil (*Id.* at ¶ 30). Defendant has submitted an affidavit in support of his motion, specifying that he "do[es] not review the treatment records, the treatment entries, treatment plans or referral slips with regard to care and treatment of patients that are seen at Atlantic Terminal Dental P.C.," and that he did not review these records with respect to the plaintiff in

this case (Dr. Mikhailov's Affidavit ¶ 5, annexed as Exhibit O to defendant's motion papers, motion sequence 3).

In opposition, plaintiff argues that Dr. Mikhailov is not entitled to summary judgment based on his "conclusory assertion" that "he did not directly supervise or control his practice's" "employees" (Plaintiff's Affirmation in Opposition ¶ 8). Plaintiff points out that defendant has "fail[ed] to proffer evidence as to who exercised supervision and control over the practice's treating dentists, and significantly, who exercised supervision and control over the practice's office manager, who acknowledge[d] in her deposition testimony that she entered the incorrect tooth numbers onto the specialist referral form" (*Id.*).

In reply, defendant reiterates that Dr. Mikhailov did not exercise any supervision or control over the practice's employees, and that he was not involved in the "care, treatment, and referrals" of patients at the practice (Affirmation in Reply ¶ 3, motion sequence 3). Defendant maintains that plaintiff's argument that defendant "failed to proffer evidence as to who exercised supervision and control over the treating dentists and over the office manager" should be disregarded, as "this is the purpose of discovery" (*Id.* at ¶ 4). Defendant alleges that plaintiff had an opportunity to question defense witnesses during their depositions as to who exercised supervision and control over the employees at the practice, but plaintiff did not make these inquiries (*Id.*). Defendant concludes that Dr. Mikhailov is not liable for any alleged malpractice committed at his practice, as he did not treat the plaintiff, he did not exercise supervision or control over the treating dentists and staff, and plaintiff has not pleaded any allegations to support "a cause of action under the doctrine of piercing the corporate veil" (*Id.* at ¶¶ 3, 5-8).

Law

To prevail on a cause of action for dental malpractice, the plaintiff must prove "a deviation or departure from accepted standards of dental practice, and that such a departure was a proximate cause

of plaintiff's injuries" (*Sharp v. Weber*, 77 AD3d 812, 813 [2d. Dept. 2010]; *Koi Hou Chan v. Yeung*, 66 AD3d 642, 642 [2d. Dept. 2009]; *Cohen v. Kalman*, 54 AD3d 307 [2008]; *Terranova v. Finklea*, 45 AD3d 572 [2007]; *Posokhov v. Oselkin*, 44 AD3d 921 [2007]; *Keevan v. Rifkin*, 41 AD3d 661, 662 [2007]). On a motion for summary judgment, "the defendant has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such a departure, that it was not a proximate cause of the plaintiff's injuries" (*Sharp*, 77 AD3d at 814; *Koi Hou Chan*, 45 AD3d at 642; *Myers v. Ferrara*, 56 AD3d 78, 83 [2008]). If defendant "sustain[s] its burden," then plaintiff is required to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Silveri v. Glaser*, 166 AD3d 1044, 1046 [2d. Dept. 2018]). "[C]onclusory allegations of malpractice, unsupported by competent evidence" are "insufficient to defeat summary judgment" (*Id.*). Where the parties have submitted conflicting expert reports, summary judgment should not be granted (*See Sheppard v. Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d. Dept. 2019]).

To prevail on a cause of action alleging lack of informed consent, "a plaintiff must prove (1) that the person providing the professional treatment failed to inform the patient of the reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar 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" (*Xiao Yan Ye v. Lam*, 191 AD3d 827, 829 [2d. Dept. 2021]; *Schussheim v. Barazani*, 136 AD3d 787, 789 [2d. Dept. 2016]; Public Health Law § 2805-d). A cause of action for "lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (*Id.*). On a motion for summary judgment, "[t]he mere fact that the plaintiff signed a consent form does not

establish the defendants' prima facie entitlement to judgment as a matter of law" (*Godel v. Goldstein*, 155 AD3d 939, 942 [2d. Dept. 2017]; *Schussheim*, 136 AD3d at 789). Where defendant fails to establish his/her "prima facie entitlement to judgment as a matter of law," the motion must be denied "regardless of the sufficiency of plaintiff's opposing papers" (*Walker v. Saint Vincent Catholic Medical Centers*, 114 AD3d 669, 671 [2d. Dept. 2014]).

New York Business Corporation Law Section 1505(a) provides that "[e]ach shareholder, employee or agent of a professional service corporation and a design service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation" (NY Business Corporation Law § 1505). Further, the fact that "a physician [or dentist] is a shareholder, officer or employee of a professional service corporation does not make him vicariously liable for the malpractice of another doctor who is an officer, director and employee of the corporation" (*Hill v. St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). However, an owner/shareholder of a corporation may be held personally liable "for actions purportedly taken on behalf of the corporation" where the plaintiff "allege[s] facts, that if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice" (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 16 NY3d 775 [2011]).

Analysis: Motion Sequence 2:

Here, defendants met their prima facie burden on the dental malpractice cause of action. Defendants' expert, Dr. Linsky, affirmed that Dr. Benn did not deviate from the standard of care in his treatment of the plaintiff, and that he did not proximately cause the plaintiff's injuries. Dr. Linsky maintains that extracting teeth numbers 9 and 10 was appropriate, given the referral form, the panoramic x-ray, and Dr. Benn's examination. Further, he contends that Dr. Benn did not depart from

acceptable dental practice by not extracting tooth #11, as it was not an emergency. His opinion constitutes competent evidence, in that it is based on the pleadings, bills of particulars, dental records, deposition transcripts, Dr. Benn's affidavit, and his own training and experience.

Before examining the merits of plaintiff's opposition, the Court notes that plaintiff's failure to comply with Uniform Rule 202.8-g(b) in opposing defendants' motion for summary judgment, is not fatal to her case. Uniform Rule 202.8-g(b) requires the plaintiff to file a response to defendants' statement of material facts, consisting of "correspondingly numbered paragraph[s] responding to each numbered paragraph in" defendants' statement of material facts (22 NYCRR 202.8-g(b)). Uniform Rule 202.8-g(c) provides that "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" (22 NYCRR 202.8-g(c)). Plaintiff submitted a response to defendants' statement of material facts after defendants filed their reply. Although this submission is late, it does not dispute most of the factual statements written by defendants, except for liability and proximate cause, which are clearly in dispute based on the plaintiff's opposition papers. Therefore, the late submission is inconsequential, as Uniform Rule 202.8-g(c) provides that defendants' facts "will be deemed to be admitted," if plaintiff does not submit opposition, and plaintiff did not submit opposition to most of defendants' statements.

In opposition, plaintiff produced an affidavit of merit from a licensed dentist, attesting to departures from accepted standards of dental practice, and that these departures were a competent producing cause of the plaintiff's injuries. Although defendants allege that plaintiff's expert opinion is conclusory, as he/she relied on a blurry copy of the panoramic x-ray, as opposed to a digital version, the Court notes that plaintiff's expert's conclusions are not solely based on the panoramic x-ray. He/she also assesses the condition of plaintiff's teeth based on the periapical x-rays taken at Kingston Avenue Oral Surgery, LLC on September 8, 2017. Plaintiff's expert opinion, based on review of

pleadings, dental/medical records, and deposition transcripts, raises triable issues of fact as to whether defendants deviated from the standard of care by extracting tooth number 9, and by failing to extract tooth number 11. Although plaintiff's expert also opined that the extraction of tooth number 10 constituted a deviation from the standard of care, this claim was not asserted in either the complaint or bills of particulars, and may not be "asserted for the first time in opposition to the summary judgment motion" (*Golubov v. Wolfson*, 22 AD3d 635, 636 [2d. Dept. 2005]). Accordingly, plaintiff's claims at trial shall be limited to teeth numbers 9 and 11 with respect to the dental malpractice cause of action. Due to the conflicting expert reports, defendants' motion for summary judgment is denied as to the cause of action for dental malpractice, except for two claims in the bill of particulars (*See Sheppard*, 171 AD3d at 1235). As plaintiff's expert did not comment on the claims that defendants negligently left behind root tips, and "provid[ed] poor fitting crowns, bridgework, and dentures," these claims are hereby dismissed (Bill of Particulars as to Renrick Benn, D.D.S. and Kingston Avenue Oral Surgery, LLC ¶ 3).

Defendants' motion for summary judgment on the second cause of action alleging lack of informed consent is denied, as triable issues of fact remain. Although plaintiff signed a consent form for the extractions, the consent form, entitled "Informed Consent For Oral Surgery Procedures" lists general risks of oral surgery, and is not specific to extractions (*See* Records of Kingston Oral Surgery at 5, annexed as Exhibit K to defendants' motion papers, motion sequence 2). Further, the form fails to specify which teeth would be extracted (*Id.*). Although defendants' expert opines that Dr. Benn provided plaintiff with all the information necessary to make an informed decision, and that "no reasonable person in plaintiff's condition," would have declined the extraction of tooth #9, plaintiff's deposition testimony and affidavit, her expert's affirmation, and the "generic consent form" reveal that there are triable issues of fact as to whether she was adequately advised before signing the consent form (Linsky Expert Affirmation ¶ 18; *See Godel*, 155 AD3d at 942 [2d. Dept. 2017]) (affirming the

trial court's denial of summary judgment as to the cause of action alleging lack of informed consent, on the grounds that the "deposition testimony of the parties and the generic consent form signed by the plaintiff revealed a factual dispute as to whether the plaintiff was adequately informed about the extraction, namely which tooth would be removed"). At her deposition, plaintiff testified that Dr. Benn did not tell her which teeth he was extracting, "why" the "teeth needed to be extracted," and did not "have any discussions with [her] before he extracted the teeth (Plaintiff's EBT tr. 69, lines 3-5; at 108, lines 7-12, annexed as Exhibit F to defendants' motion papers, motion sequence 2). In her affidavit, plaintiff states that Dr. Benn never "identified the teeth he intended to pull," and did not discuss any alternative treatment options with her (Plaintiff's Affidavit ¶¶ 3, 4, annexed as Exhibit F to plaintiff's opposition papers). Contrary to defendants' contentions, the statements in plaintiff's affidavit do not contradict her deposition testimony. Further plaintiff's expert contends that plaintiff's consent was not "informed," as defendants' "records are void of appropriate discussion" that the teeth did not need to "be extracted," and "were viable" (Plaintiff's Expert Affirmation ¶ 18). Accordingly, triable issues of fact preclude summary judgment on this cause of action.

Analysis: Motion Sequence 3:

Here, defendant, Dr. Mikhailov, has satisfied his prima facie burden by submitting an affidavit indicating that he was "merely the passive owner of the dental practice," did not treat the plaintiff, and did not exercise any supervision and control over its employees (Defendant's Affirmation in Support ¶¶ 29, 32). Pursuant to NY Business Corporation Law Section 1505, defendant is not liable for plaintiff's alleged injuries based on the facts submitted in his affidavit (NY Business Corporation Law § 1505(a)). Dr. Mikhailov has also submitted the deposition transcripts of Dr. Lee, Dr. Pang, and Ms. Ganopolskaya in support of his motion. Dr. Pang, the treating dentist on October 25, 2017, testified that he had never met Dr. Mikhailov, was not familiar with that name, and was hired by a manager named Juby in 2016, thereby indicating that Dr. Mikhailov did not exercise supervision and control

over him (Dr. Pang's EBT tr. 8, lines 24-25; at 9, lines 2-10; at 50, line 25; at 51, lines 2-14, annexed as Exhibit J to defendant's motion papers, motion sequence 3). In opposition, plaintiff has failed to raise a triable issue of fact, and her "conclusory assertion" that defendant was the office manager's supervisor is insufficient to defeat defendant's motion for summary judgment (Plaintiff's Affirmation in Opposition ¶¶ 5, 8; see *Oviedo v. Weinstein*, 2014 WL 4193304, at *9 [Sup Ct, Nassau County 2011], *aff'd*, 102 AD3d 844, 847 [2d. Dept. 2013] (granting summary judgment to owner of dental practice where "there [was] no evidence that [he] had or exercised any control over [the treating dentist's] course of treatment of the plaintiff"); *Ecker v. Zwaik & Bernstein, P.C.*, 240 AD2d 360, 362 [2d. Dept. 1997] (reversing trial court's denial of shareholder of professional corporation's motion for summary judgment, on the grounds that "the plaintiff did not present any proof beyond a speculative belief that [defendant] handled [plaintiff's] account during the relevant period, or that [defendant] supervised anyone who handled the account during that time")). Discovery is complete, and plaintiff has not produced any evidence to "create a question of fact as to the degree of control and supervision" that Dr. Mikhailov exercised over the employees of the dental practice (*Wise v. Greenwald*, 208 AD2d 1141, 1142 [3d. Dept. 1994]). Accordingly, defendant is entitled to summary judgment, and the Clerk of the Court is directed to enter judgment in favor of defendant, Dr. Mikhailov. The Court also grants defendant's motion to amend the caption to reflect his dismissal from the action, and all future papers filed with the Court shall bear the amended caption.

Conclusion

Dr. Benn's and Kingston Avenue Oral Surgery, LLC's motion for summary judgment is granted in part and denied in part. Defendants' motion is denied as to the first cause of action for dental malpractice, except for the claims regarding leaving behind root tips, and crowns, bridgework, and dentures. Defendants' motion is denied as to the second cause of action alleging lack of informed consent. Dr. Mikhailov's motion for summary judgment is granted in its entirety, and the Clerk of the

Court is directed to enter judgment in his favor. The Court also grants his motion to amend the caption to reflect his dismissal from the action, and all future papers filed with the Court shall bear the amended caption.

This constitutes the decision and order of the Court.

ENTER:



Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER