

Zgadzaj v A.I.R. Touch Dental Bros., P.C.

2022 NY Slip Op 34915(U)

August 5, 2022

Supreme Court, Kings County

Docket Number: Index No. 522547/2019

Judge: Pamela L. Fisher

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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 5th day of August 2022.

P R E S E N T:

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

-----X
KRYSTYNA ZGADZAJ,

Plaintiff,

DECISION/ORDER

- against -

Index No: 522547/2019

A.I.R. TOUCH DENTAL BROTHERS, P.C.,
AND RADION G. ELIAV, DDS,

Defendants.

-----X

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

Papers Numbered

Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1-3, 4-5</u>
Opposing Affidavits (Affirmations) _____	<u>5, 6</u>
Reply Affidavits (Affirmations) _____	<u>6, 7</u>

Upon the foregoing papers in this dental malpractice action, defendants, A.I.R. Touch Dental Brothers, P.C. and Radion G. Eliav, DDS, move in motion sequence 4, 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. Plaintiff cross moves in motion sequence 5, to impose sanctions on defendants for spoliation of radiographic films.

Plaintiff commenced this action by filing a summons and complaint on October 18, 2019, naming A.I.R. Touch Dental Brothers, P.C., Radion G. Eliav, DDS, Igor G. Eliav, DDS, and Albert Eliav, DDS as defendants (Defendants’ Affirmation in Support ¶ 10; Summons & Complaint, annexed as Exhibit A to defendants’ motion papers, motion sequence 4). Issue was joined by defendants, Radion Eliav, DDS and A.I.R. Touch Dental Brothers, P.C. on or about November 13, 2019

ms #4 - XMO
ms #5 - XMO

(Defendants' Affirmation in Support ¶ 10; Answers annexed as Exhibit B to defendants' motion papers, motion sequence 4). Plaintiff served a bill of particulars upon defendants, Radion G. Eliav, DDS and A.I.R. Touch Dental Brothers, P.C. on November 18, 2019, and a supplemental bill of particulars was served on January 28, 2020 (Defendants' Affirmation in Support ¶ 11; Bills of Particulars annexed as Exhibit C to defendants' motion papers). By stipulation dated August 4, 2021, the action was discontinued against defendants, Igor G. Eliav, DDS and Albert Eliav, DDS, with prejudice, and the caption was amended to remove these defendants (Defendants' Affirmation in Support ¶ 16; Stipulation of Discontinuance annexed as Exhibit I to defendants' motion papers). 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 March 30, 2017 and June 16, 2017, by "perform[ing] improper and/or contraindicated dental procedures," "neglect[ing] to perform adequate, thorough and timely examinations of the plaintiff," "failing to timely diagnose the plaintiff's infections above teeth numbered 10-15 prior to affixing a dental bridge," "failing to properly read radiographic testing that revealed the presence of infection surrounding teeth numbered 10-15," "neglecting to timely institute proper and adequate dental treatment for said infection, including but not limited to antibiotic therapy," failing to "keep adequate, complete, accurate, thorough and relevant records" of plaintiff's treatment, "failing to obtain necessary, timely and adequate consultation with other dental professionals, including but not limited to a periodontist," and neglecting to obtain plaintiff's informed consent (Complaint ¶¶ 15, 16; Verified Bill of Particulars as to Radion Eliav, DDS and A.I.R. Touch Dental Brothers, P.C. ¶¶ 2, 5; Supplemental Verified Bill of Particulars as to Radion Eliav, DDS & A.I.R. Touch Dental Brothers, P.C. ¶¶ 2, 5). As a result of defendants' alleged malpractice, plaintiff is claiming to have sustained the following injuries: "[p]eriodontal injury, bone loss, as well as extraction of teeth #'s 10, 12, [and] 14" (*Id.* at ¶ 13).

The following facts are not in dispute. Plaintiff first presented to A.I.R. Touch Dental Brothers, P.C. on January 21, 1999 (Plaintiff's Statement of Facts Per 22 NYCRR 202.8-g ¶ 7). She initially received treatment from Igor Eliav, DDS, and "continu[ed] to treat with the group intermittently" until June 16, 2017 (Defendants' Concise Statement of Material Facts Pursuant to 22 NYCRR 202.8-g ¶ 1). In April 1999, Dr. Igor Eliav, DDS placed "an upper left side bridge in [plaintiff's] mouth spanning teeth #11 through #15" (*Id.* at ¶ 2). At around the same time that the upper bridge was placed, Dr. Igor Eliav also "fabricated and placed" "another bridge in [plaintiff's] mouth in the center bottom portion spanning 6 positions" (*Id.* at ¶ 3). On May 15, 2012, plaintiff "receiv[ed] a replacement bridge in the upper lefthand portion of her mouth to replace the initial bridge that was previously fabricated and placed by Dr. Igor Eliav" (*Id.* at ¶ 5; Defendants' Expert Affirmation ¶ 10, annexed as Exhibit K to defendants' motion papers). The replacement bridge "was similar to the prior bridge" (Defendants' Concise Statement of Material Facts Pursuant to 22 NYCRR 202.8-g ¶ 5). Dr. Igor Eliav left the practice, and plaintiff began receiving treatment from Dr. Radion Eliav in March of 2017 (*Id.* at ¶ 6). On March 30, 2017, plaintiff presented to the dental practice, because the "bridge in the upper portion of the left side of her mouth had been broken by a fork, and was also showing some aesthetic breakdown" (*Id.* at ¶ 7). She was treated by Dr. Radion Eliav at this visit, and plaintiff "requested a change of the bridge in the upper lefthand portion of the mouth as she did not like the appearance," "there were chips and breakdown of the existent materials, and there was also darkening and discoloration of tooth #10" (*Id.* at ¶ 8). On March 30, 2017, Dr. Radion Eliav examined plaintiff's mouth, and took x-rays (*Id.* at ¶ 9; Plaintiff's Statement of Facts Per 22 NYCRR 202.8-g ¶ 17). Dr. Eliav diagnosed plaintiff with "an infection at the apex of tooth #10," and "formulated a treatment plan, which included placement of a new bridge," spanning teeth #10 through #15 (*Id.* at ¶ 22; Defendants' Concise Statement of Material Facts Pursuant to 22 NYCRR 202.8-g ¶ 11). The chart states that plaintiff returned to the dental office on April 26, 2017, complaining of "severe pain

pointing to tooth #10,” and Dr. Eliav performed a root canal on that tooth (*Id.* at ¶ 13). The records document that Dr. Eliav prescribed Clindamycin 300 mg on that date (*Id.*). Plaintiff presented to the dental office on April 27, 2017, and “Dr. Eliav commenced the work in preparation for the anticipated bridge” (*Id.* at ¶¶ 16-17). The records indicate that Dr. Eliav “performed a post and core on tooth #10 with no anesthesia, and found tooth #10 to be only slightly sensitive” (*Id.* at ¶ 17). Plaintiff returned to the dental practice the following day on April 28, 2017, and “[t]eeth #10, #11, #13, and #15 were prepared for the impending bridge work” (*Id.* at ¶ 18). The chart states that a “shade assessment was conducted,” “an impression for a zirconia bridge was taken,” and the “patient’s prior bridge was temporarily cemented into place until the subsequent permanent bridge was completed” (*Id.*).

On May 12, 2017 and May 21, 2017, plaintiff had appointments at the dental practice with Dr. Radion Eliav (*Id.* at ¶ 19). During these appointments, the “bridge was tried in, and it was determined that aesthetic changes to same would be necessary, and the bridge was sent back to the lab to have the work conducted” (*Id.*). On June 4, 2017, plaintiff returned to the dental practice, and the bridge was “cemented in [her mouth] by Dr. Eliav” (*Id.* at ¶ 20). On June 16, 2017, plaintiff arrived at the dental practice “for an emergency examination by Dr. Eliav” due to pain and swelling (*Id.* at ¶ 21; A.I.R. Touch Dental Brothers, P.C. Records at 24, annexed as Exhibit F to defendants’ motion papers). Dr. Eliav examined plaintiff’s mouth and noted “the presence of palatal swelling” “behind tooth #11,” and a “periapical x-ray showed the existence of periapical pathology” (Defendants’ Concise Statement of Material Facts Pursuant to 22 NYCRR 202.8-g ¶ 21). Dr. Eliav recommended a root canal on tooth #11, “prescribed an antibiotic, Clindamycin 300 mg,” and referred plaintiff to an endodontist (*Id.*). On June 20, 2017, plaintiff presented to “non-party General Dentist, Dr. Boris Eydis” for a “second opinion” (*Id.* at ¶ 22; Dr. Eydis’ Records, annexed as Exhibit G to defendants’ motion papers). Dr. Eydis examined her, and his records indicate that there was “swelling around the gums,” “gum bleeding” and “mobility of the UL bridge” (Plaintiff’s Response to Defendant’s Statement of Facts ¶

22). Plaintiff was referred to an oral surgeon, and on June 22, 2017, plaintiff presented to oral surgeon, Dr. Steve Manzon (Dr. Eydis' Records; Defendants' Concise Statement of Material Facts Pursuant to 22 NYCRR 202.8-g ¶ 23). Dr. Manzon recommended extractions of teeth #'s 11 through 15, "perform[ing] a bone graft in the applicable area," and "plac[ing] implants" (*Id.* at ¶¶ 23-24). On June 26, 2017, Dr. Manzon "removed the 6-unit bridge affixed by Radion Eliav, DDS," "extracted teeth #[']s 10, 11, 13 [and] 15," and placed "implants" "in the areas of teeth #[']s 10, 12 [and] 14" (Plaintiff's Statement of Facts Per 22 NYCRR 202.8-g ¶¶ 45, 48).

Dr. Eliav's and A.I.R. Touch Dental Brothers, P.C.'s Motion for Summary Judgment (Motion Sequence 4):

In support of their motion for summary judgment, defendants submit an expert affirmation from Robert Mitchell Peskin, DDS, "a general dentist licensed to practice dentistry in the State of New York," contending that defendants did not deviate from acceptable dental practice in their treatment of the plaintiff, and that they did not proximately cause the plaintiff's injuries (Defendants' Expert Affirmation ¶¶ 1, 8, 9). Dr. Peskin's opinion is based on review of the pleadings, bills of particulars, deposition transcripts, and dental records "including radiology studies maintained by A.I.R. Touch Dental Brothers, P.C.," as well as his own training and experience (*Id.* at ¶¶ 5, 6, 7). Dr. Peskin opines that Dr. Radion Eliav properly performed a root canal on tooth #10 on April 26, 2017, based on plaintiff's symptoms and complaints of pain (*Id.* at ¶ 13). Further, Dr. Peskin maintains that Dr. Eliav appropriately replaced plaintiff's bridge in accordance with her request, and that "there were no contraindications to performing the work requested by Ms. Zgadzaj" "[b]ased upon Dr. Eliav's evaluation of the patient's mouth, periodontal charting, radiologic study and the absence of any complaints" (*Id.* at ¶ 24). He affirms that "Dr. Eliav did not delay, [fail] to timely diagnose and/or make any inappropriate diagnoses of the presence and/or absence of infection in teeth #10 through #15 as alleged" (*Id.* at ¶ 25). He states that the "plaintiff presented with signs and symptoms consistent with

an infectious process in tooth #10 on April 26, 2017, and Dr. Eliav timely, appropriately and properly treated the signs and symptoms and underlying infection in tooth #10 by way of a root canal therapy and antibiotic coverage” (*Id.*). Further, Dr. Peskin alleges that “[t]here was no indication, signs, and /or symptoms of an infection present in tooth #11 before plaintiff’s presentation on June 16, 2017” (*Id.* at ¶ 26). He claims that Dr. Eliav adhered to the standard of care on June 16, 2017, by “correctly perform[ing] the clinical and radiographic examination[s],” “prescrib[ing] the antibiotic Clindamycin,” and “referr[ing] the patient to an endodontist for further follow up and root canal treatment” (*Id.*). He concludes that defendants did not deviate from acceptable dental practice during their treatment of the plaintiff, and that they did not “[cause] or [contribute]” to plaintiff’s injuries, “including the need for extractions of teeth #10, #12, and #14, the placement of dental implants, bone loss or gum damage, and/or periodontal injury” (*Id.* at ¶ 29).

In opposition to defendants’ motion for summary judgment, plaintiff contends that defendants “failed to establish [their] prima facie entitlement to summary judgment” based on Dr. Peskin’s expert affirmation, as it is conclusory (Plaintiff’s Affirmation in Opposition at 15). Plaintiff points out that “Dr. Peskin’s affirmation fails to detail any review of the radiographic films,” or acknowledge “the absence of original films or duplicate original films, or the fact that the defendant[s] failed to preserve the original films” (*Id.*). Plaintiff argues that an expert “cannot rely on photocopies of radiographic films to opine that” “there were no periodontal pathologies,” but if the “photocopied films” “reveal” “positive periodontal findings,” “then [that] is significant” (*Id.* at 16). Plaintiff also maintains that Dr. Peskin’s affirmation is insufficient to establish defendants’ entitlement to summary judgment, since it “fails to comment on or refer to” the records of the “subsequent treating [dentists]” (*Id.* at 17).

In opposition to defendants’ motion for summary judgment, plaintiff submits an expert affidavit from Avrum Goldstein, DMD, a dentist licensed to practice in the State of New York, who is board certified in periodontics (Plaintiff’s Expert Affidavit ¶¶ 1, 2, annexed as Exhibit 1 to plaintiff’s

opposition papers). Dr. Goldstein opines that defendants departed from acceptable dental practice during their treatment of the plaintiff, and that these departures proximately caused the plaintiff's injuries (*Id.* at ¶¶ 17-23). Dr. Goldstein's opinion is based on review of the dental records, including radiographic studies, deposition transcripts, and expert affirmation of Robert M. Peskin, DDS (*Id.* at ¶ 6). Dr. Goldstein discusses Dr. Peskin's expert affirmation, and argues that it is conclusory since "Dr. Peskin merely relies upon Dr. Eliav's note, without radiographic proof to support his findings" (*Id.* at ¶ 7). Dr. Goldstein also refers to the alleged spoliation of radiographic films, and contends that the "color photocopies of the defendant's 2017 radiographic studies are a poor substitute, and could never be used to establish radiographically that there were no infections present or periodontal disease in March 2017" (*Id.* at ¶¶ 7-8). He maintains that Dr. Eliav deviated from the standard of care by "fail[ing] to conduct an appropriate pre-bridge periodontal examination on March 30th, 2017" (*Id.* at ¶ 10). He explains that a "complete periodontal exam includes measurement of sulcular or pocket depth, gingival margin position, bleeding on probing, mucogingival junction position, mobility, and furcation involvement," and that the "periodontal examination" on March 30, 2017 "[has] only sulcular/pocket depth measurements and no other parameters" (*Id.* at ¶¶ 9-10). Based on the incomplete examination, Dr. Goldstein affirms that "one cannot accurately assess loss of attachment, a key parameter to determine if a tooth is a suitable abutment for a crown or bridge" (*Id.* at ¶ 10). Further, he alleges that "the periodontal probings that were done were not accurate, as they are not indicative of the obvious bone loss on the radiographs" (*Id.*).

Dr. Goldstein claims that "Dr. Eliav's failure to diagnose the periodontal disease and [un]suitability of tooth #15 to act as an abutment for the subsequent bridge was a deviation from good and accepted dental practice" (*Id.* at ¶ 11). He opines that Dr. Eliav's contention that "there was no mobility" is incorrect, as teeth [#']s 2, 3, and 15 have significant bone loss and would have exhibited marked mobility" (*Id.*). Further, "based upon the photocopied radiographic appearance," he contends

that “tooth #15 would have been depressible, the most severe type of mobility that exists” (*Id.*). He concludes that tooth #15 “was completely unsuitable to act as a support for any bridge” based upon “the degree of bone loss surrounding tooth #15” (*Id.* at ¶ 16). He explains that using a tooth with bone loss, “such as tooth #15” “as a buttress for a bridge” “weakens the entire bridge, causing the remaining teeth to bear more burden than they should,” and “those other teeth would” “become looser and weaker by this extra burden, thereby contributing to their premature demise” (*Id.* at ¶ 17). Dr. Goldstein maintains that “the use of tooth #15 as a support for a bridge was a deviation from good and accepted dentistry, and was a substantial factor in the further damage to, and loss of, the remaining bridged teeth (## 10, 11, [and] 13)” (*Id.*). Further, he affirms that “tooth #15 needed to be extracted” (*Id.*).

Dr. Goldstein opines that Dr. Eliav departed from acceptable dental practice by failing to conduct “appropriate vitality tests” before performing a root canal on tooth #10 (*Id.* at ¶ 19). He points out that “Dr. Eliav’s records indicated there was a periapical radiolucency on tooth #10,” but “a poorly angulated radiograph shows a radiolucency between teeth 10 and 11” (*Id.*). He contends that the “radiolucency referred to in this radiograph was on tooth # 11, and that #10 may not have needed a root canal at all” (*Id.*). Dr. Goldstein suggests that which tooth needed treatment “could have been objectively determined with appropriate vitality tests” (*Id.*). Further, the failure to perform “required objective testing” “prevented timely treatment of [tooth] #11,” which may have “prevent[ed] significant bone loss” (*Id.*). He concludes that the failure to timely treat tooth #11 was a “substantial factor for the subsequent loss of teeth [#’s] 10, 11, [and] 13” (*Id.*).

In reply, defendants reiterate that they did not deviate from the standard of care during their treatment of the plaintiff, and that they did not proximately cause her injuries (Reply Affirmation ¶ 4). Defendants maintain that Dr. Goldstein’s opinion is insufficient to raise a triable issue of fact, as it is “speculative, conclusory,” and not based on facts in the record (*Id.* at ¶¶ 29-30). For example, Dr. Goldstein “sets forth no explanatory or factual detail to support his claim that the base teeth upon

which Ms. Zgadzaj's bridges were positioned showed [mobility], showed non-viability, and were not properly utilized to support the bridge, which was put in place on June 4, 2017" (*Id.* at ¶ 31).

Plaintiff's Cross Motion for Spoliation Sanctions (Motion Sequence 5):

In support of her cross motion to sanction defendants for spoliation of radiographic films, plaintiff contends that defendants must be sanctioned as they have failed to produce any duplicate original x-rays from plaintiff's treatment in 2017 (Plaintiff's Affirmation in Support of Cross Motion at 3). Although defendants have produced color photocopies of these x-rays that were allegedly damaged during a flood, plaintiff argues that the photocopies are insufficient, and that defendants intentionally destroyed the original films (*Id.* at 3-4). Since plaintiff's expert was able to identify departures from the standard of care despite the poor-quality of the radiographs, plaintiff is not requesting that the case be dismissed, but that the defendants be precluded from arguing "that based upon the spoliated x-rays," "Ms. Zgadzaj's periodontal condition could support a 6-unit bridge" (*Id.* at 4, 26).

In opposition, defendants affirm that duplicate original x-rays were provided to plaintiff, and that the x-rays from plaintiff's treatment on March 30, 2017 "were not damaged in a flood" (Defendants' Affirmation in Opposition to Cross Motion ¶¶ 6, 15). Further, "by email dated March 22, 2021," defense counsel "sent out correspondence to plaintiff's counsel requesting comment as to defendants' compliance with plaintiff's prior discovery demand," and defendants claim that plaintiff's counsel never responded (*Id.* at ¶ 13). Defendants maintain that plaintiff's motion for spoliation sanctions must be denied, as plaintiff is "in possession of duplicate, original, computer based copies of the" radiographs, and defendants did not intentionally or negligently destroy the radiographs (*Id.* at ¶¶ 18-19). Defendants have provided an affidavit from Radion G. Eliav, DDS, "deny[ing] that the x-ray[s] taken of the plaintiff between March 30, 2017 and June 16, 2017, have been altered, destroyed, modified or in any way changed or adulterated" (Eliav Affidavit at 1-2, annexed as Exhibit Q to defendants' opposition papers). Further, he affirms that on February 17, 2021, his attorney came to his

office, and the two of them “followed the directions of the IT” workers “as to the electronic duplication of each and every electronically stored item, and copied the x-rays in their original condition, form and format into a PDF so that the radiology studies of September 5, 2014, March 30, 2017, April 26, 2017, and June 16, 2017 were all in the same condition, clarity and diagnostic quality as they exist and existed in [his] office computer” (*Id.* at 3). Dr. Eliav states that on February 17, 2021, he emailed the x-rays to his attorney, who then forwarded them to plaintiff’s counsel on February 24, 2021 (*Id.* at 3-4).

In reply, plaintiff disputes defendants’ contention that duplicate original x-rays were provided to her counsel (Plaintiff’s Reply Affirmation at 4). Plaintiff insists that the films provided on a CD, and in PDF format “were the photocopied x-ray films” (*Id.*). Plaintiff reiterates that sanctions are warranted due to the spoliation of the radiographic films (*Id.* at 6).

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*, 66 AD3d at 642; *Myers v. Ferrara*, 56 AD3d 78, 83 [2008]). To “sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s bill of particulars” (*Anonymous v. Gleason*, 175 AD3d 614, 617 [2d. Dept. 2019]; *Bendel v. Rajpal*, 101 AD3d 662, 663 [2d. Dept. 2012]). Once the defendant meets its burden, the burden then shifts to the plaintiff 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]).

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Samaroo v. Bogopa Service Corp.*, 106 AD3d 713, 713 [2d. Dept. 2013]; *Rodman v. Ardsley Radiology, P.C.*, 103 AD3d 871, 872 [2d. Dept. 2013]). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that a trier of fact could find that the evidence would support that claim or defense" (*Loccisano v. Ascher*, 195 AD3d 610, 614 [2d. Dept. 2021]). Ordinary negligence is included within the definition of "culpable state of mind" (*Id.* at 614). Trial courts "have broad discretion in determining what, if any sanction should be imposed for spoliation of evidence" (*Samaroo*, 106 AD3d at 714; *Zaytsev v. Zelman*, 73 AD3d 909, 911 [2d. Dept. 2010]). Where the loss of evidence has "fatally compromised [a party's] ability to defend [or prosecute] the action," "the responsible party may be sanctioned by the striking of its pleading" (*Coleman v. Putnam Hosp. Center*, 74 AD3d 1009, 1011 [2d. Dept. 2010]; *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 AD3d 717, 718 [2d. Dept. 2009]; CPLR 3126(3)). A "less severe sanction is appropriate" where the loss of evidence "does not fatally compromise" a party's "ability to defend [or prosecute] the action," but "the destroyed evidence was relevant to the party's claim or defense," and the opposing party has "not offered a reasonable explanation" for its loss (PJI 1:77; *Johnson v. Ayyub*,

115 AD3d 1191, 1192-93 [4th Dept. 2014]; *Zaytsev*, 73 AD3d at 910-11; *Utica Mut. Ins. Co.*, 58 AD3d at 718; *Loccisano*, 195 AD3d at 614 (reversing trial court decision denying “plaintiff’s application to impose sanctions on the defendants” for “spoliation of evidence” where “defendant doctors offered no explanation for the absence of the venogram imaging,” “the plaintiff established that the venogram imaging was relevant and necessary to the prosecution of the action,” and “the handwritten notation on the plaintiff’s treatment notes indicating the results of the venogram was not an adequate substitute”). Possible sanctions include “an adverse inference charge at trial,” or precluding an expert “from offering any evidence at the time of trial with respect to his review and interpretation of the missing [evidence]” (*Zaytsev*, 73 AD3d at 910-11; *Loccisano*, 195 AD3d at 614 (holding that “the Supreme Court should have granted the plaintiff’s application to impose sanctions to the extent of directing an adverse inference charge against” defendants at trial); *Rodman*, 103 AD3d at 872-73 (stating that the “Supreme Court should have granted the defendants’ motion” “for the imposition of sanctions to the extent of directing that an adverse inference charge pertaining to the 2003 ultrasound films be given at trial against the plaintiffs.”)).

Analysis: Motion Sequence 4:

Here, defendants have failed to meet their prima facie burden on their motion for summary judgment, as the affirmation of their expert, Dr. Peskin, is conclusory, and does not address and “rebut all of the specific allegations of dental malpractice set forth in the bill[s] of particulars” (*Koi Hou Chan*, 66 AD3d at 643; *LaVecchia v. Bilello*, 76 AD3d 548, 548 [2d. Dept. 2010]). The majority of Dr. Peskin’s opinion is conclusory, as he “merely summarized the medical records, and certain deposition testimony,” and “opined that [Dr. Eliav’s] treatment of the injured plaintiff did not represent a departure from good and accepted medical practice” (*Wei Lin v. Sang Kim*, 168 AD3d 788, 788-89 [2d. Dept. 2019]; *Martinez v. Orange Regional Medical Center*, 203 AD3d 910, 912 [2d. Dept. 2022]). Further, defendants have not sufficiently addressed the allegations in the bills of particulars that they

“fail[ed] to timely diagnose the plaintiff’s infections above teeth numbered 10-15 prior to affixing a dental bridge,” and “fail[ed] to properly read radiographic testing that revealed the presence of infection surrounding teeth numbered 10-15” (Supplemental Verified Bill of Particulars as to Radion Eliav, DDS & A.I.R. Touch Dental Brothers, P.C. ¶ 5). Although Dr. Peskin maintains that Dr. Eliav timely diagnosed infections in teeth numbers 10 and 11 on April 26, 2017, and June 16, 2017, respectively, defendants have failed to establish their prima facie entitlement to summary judgment, as Dr. Peskin does not discuss all of the teeth in the bridge, or his evaluation of the radiographic films (Defendants’ Expert Affirmation ¶¶ 25, 26; *Koi Hou Chan*, 66 AD3d at 643). Accordingly, defendants’ motion for summary judgment is denied “regardless of the sufficiency of plaintiff’s opposing papers” (*Id.* at 644; *Graber v. Zwanger*, 175 AD2d 911, 911 [2d. Dept. 1991]).

Analysis: Motion Sequence 5:

Plaintiff’s cross motion, to impose sanctions on defendants for spoliation of radiographic films, is denied, as plaintiff has not met her burden on this motion. Defendants’ answer should not be stricken, as plaintiff’s expert affirmed that defendants deviated from the standard of care based on the available radiographic films, revealing that any loss of evidence has not “fatally compromised [plaintiff’s] ability to prosecute this action” (*Gotto v. Eusebe-Carter*, 69 AD3d 566, 568 [2d. Dept. 2010]). Further, plaintiff has failed to establish that the original radiographic films from plaintiff’s treatment with Dr. Eliav in 2017, have been destroyed. Although plaintiff contends that only photocopies of these films have been provided to her counsel, defendants have submitted an attorney affirmation and an affidavit from Dr. Radion Eliav claiming that the original radiographs from 2017 were provided to plaintiff’s counsel via email. Defendants have also provided the emails documenting that radiographs from September 5, 2014, March 30, 2017, April 26, 2017, and June 16, 2017, were emailed to plaintiff’s counsel on February 24, 2021 (Emails annexed as Exhibit O to defendants’ opposition papers). As plaintiff has not presented any evidence in support of her claim that the x-rays


that were emailed to her counsel are not in their original form, and that the original x-rays no longer exist, plaintiff's motion to impose sanctions on defendants for spoliation of evidence is denied.

Conclusion

Defendants' motion for summary judgment, pursuant to CPLR § 3212, is denied in its entirety. Plaintiff's cross motion, to sanction defendants for spoliation of radiographic films, is denied.

This constitutes the decision and order of the Court.

ENTER:



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

HON. PAMELA L. FISHER