

Henry v 34th St. Dental Assoc.

2023 NY Slip Op 34508(U)

December 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 500327/22

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of December, 2023.

P R E S E N T:

HON. ELLEN M. SPODEK,

Justice.

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APRIL HENRY,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 500327/22

34TH STREET DENTAL ASSOCS.,
Y. PAUL HAN, DDS, and HUYEN LE, DDS,

Mot. Seq. Nos. 2-3

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmations, and Exhibits Annexed _____

95-111; 112-127

Opposing Affirmations and Exhibits Annexed _____

130-134, 145-146; 135-141, 147-148

Affirmations in Reply _____

151-153; 149-150

Upon the foregoing papers in this action for dental malpractice and lack of informed consent, defendants Y. Paul Han, DDS (“Dr. Han”), and Huyen Le, DDS (“Dr. Le”), separately move for summary judgment dismissing the amended complaint of plaintiff April Henry (“plaintiff”) as against each such defendant. Plaintiff opposes both motions.¹

Background

On December 21, 2020, plaintiff, age 46, was seen for routine general dental care by Dr. Le. At that appointment, Dr. Le referred plaintiff to Dr. Han for consultation regarding extraction of her upper left second molar, known as Tooth #15 (the “tooth”). On

¹ The remaining defendant – 34th Street Dental Assocs. – was dismissed from this action by the so-ordered stipulation, dated June 27, 2023 (NYSCEF Doc No. 143).

December 30, 2020, plaintiff was seen by Dr. Han, who extracted the tooth. As part of the extraction, Dr. Han placed a bone graft, together with a membrane, at the extraction site of the tooth (the “extraction site”).

The patient had two appointments with Dr. Le after her tooth extraction on December 30th. On January 11, 2021 and again on January 18, 2021, plaintiff returned to Dr. Le with multiple complaints at each visit of a post-extraction green-fluid discharge and a foul smell emanating from her nose and mouth. On January 18, 2021 Dr. Le, after a telephone consultation with Dr. Han, removed the membrane but could not remove the bone graft because the latter had been resorbed into (or around) the extraction site. The removal of the membrane temporarily alleviated some of plaintiff’s symptoms.

Three days later, on January 21, 2021, plaintiff returned to Dr. Han for her first post-extraction follow-up visit with him. At that visit, Dr. Han, after performing an in-office 3-D scan of the extraction site, recommended that she see an ENT specialist. That was plaintiff’s last visit with either Dr. Han or Dr. Le.

Plaintiff allegedly sustained several injuries as a result of the tooth extraction; namely: (1) an oroantral communication (“OAC”) which is a pathological space that forms between the mouth and the maxillary sinus because of the loss of soft and hard tissues that normally separate those compartments; (2) an oroantral fistula (“OAF”) which developed as a result of the delay in closing the OAC; and (3) chronic sinus disease. On March 31, 2021, plaintiff had her OAF surgically closed with a buccal flap by way of joint surgery performed by an ENT specialist and a dental surgeon.

Standard of Review

“In a dental malpractice action, the requisite elements of proof are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff’s injuries” (*Kozlowski v Oana*, 102 AD3d 751, 752 [2d Dept 2013]). “A defendant moving for summary judgment 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” (*Nelson v Lighter*, 179 AD3d 933, 934 [2d Dept 2020]).

“To defeat summary judgment, the nonmoving party need only 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” (*Nelson*, 179 AD3d at 934). “[E]xpert opinions in opposition should address specific assertions made by the movant’s experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017] [internal quotation marks omitted]). “In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party” (*Many v Lossef*, 190 AD3d 721, 722-723 [2d Dept 2021] [internal citation and quotation marks omitted]).

“[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence” (*Jolly v Russell*, 203 AD2d 527, 528 [2d Dept 1994]). “To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, 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” (*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002] [internal quotation marks omitted; alterations in the original]). “The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury” (*Trabal v Queens Surgi-Ctr.*, 8 AD3d 555, 556-557 [2d Dept 2004]). “To state it in other terms, the causal connection between a doctor’s failure to perform his [or her] duty to inform and a patient’s right to recover exists only when it can be shown objectively that a reasonably prudent person would have decided against the procedures actually performed. Once that causal connection has been established, the cause of action in negligent malpractice for failure to inform has been made out and a jury may properly proceed to consider plaintiff’s damages” (*Dries v Gregor*, 72 AD2d 231, 236-237 [4th Dept 1980]).

Discussion

Dental Malpractice Cause of Action

Here, each defendant has met his or her prima facie burden of demonstrating his or her entitlement to judgment as a matter of law dismissing, insofar as asserted against such defendant, so much of the cause of action to recover damages for dental malpractice, through, among other things, the affirmation of their respective experts; namely, Michael Schwartz, DDS, for Dr. Han, and Jeffrey Rabinowitz, DMD, for Dr. Le. Both experts, based on their review of the dental records and deposition testimony, opined that neither

defendant deviated from the applicable standard of dental care in his or her treatment of plaintiff, and that, if any departure occurred, it was not a proximate cause of plaintiff's injuries (*see e.g. Cujcuj v Jayadevan*, 218 AD3d 436, 437-438 [2d Dept 2023]; *Schmidt v Bangiyev*, 210 AD3d 924, 925 [2d Dept 2022]).

In opposition to each defendant's prima facie showing, plaintiff has raised triable issues of fact as to whether Dr. Han (and separately whether Dr. Le) departed from the good and accepted standards of dental care, and whether such departures on the part of Dr. Han (and separately on the part of Dr. Le) proximately caused plaintiff's injuries. More specifically and viewing the evidence in a light most favorable to plaintiff as the nonmovant, plaintiff's expert as to Dr. Han has raised triable issues of fact as to whether Dr. Han's extraction of the tooth caused the OAC and, if so, whether Dr. Han departed from the standard of care, at the December 30th visit, by failing to diagnose the OAC by performing and reading an in-office 3-D scan immediately post-extraction and, further, to immediately close the OAC surgically or, alternatively, to immediately refer plaintiff to another oral surgeon (or to an ENT specialist) for the immediate closure of the OAC, in either instance, before the OAC could evolve into the OAF.

As to Dr. Le, viewing the evidence in a light most favorable to plaintiff as the nonmovant, plaintiff's expert has raised triable issues of fact as to: (1) whether Dr. Le (either at the January 11th visit and/or the January 18th visit) should have diagnosed plaintiff as suffering from the OAC or the OAF (depending on its progression) by performing and reading an in-office 3-D scan (among other modalities) and, upon such diagnosis, whether she should have immediately referred plaintiff either to Dr. Han or to an outside dental surgeon (or to an ENT specialist) for its immediate surgical closure; and (2) whether, at the

January 18th visit when she discovered the necrotizing tissue at the extraction site upon her removal of the membrane, she should have immediately referred plaintiff either to Dr. Han or to an outside dental surgeon or to an ENT specialist for its immediate surgical closure (*see e.g. Cujcuj*, 218 AD3d at 438; *Schmidt*, 210 AD3d at 925; *Many*, 190 AD3d at 723).

Lack of Informed Consent Cause of Action

Each defendant has established his or her prima facie entitlement to judgment as a matter of law dismissing the cause of action based on the alleged lack of informed consent by submitting his or her pretrial testimony, office records, and his or her medical expert's respective opinion demonstrating that he or she properly informed plaintiff about the proposed extraction of the tooth on December 30th in the case of Dr. Han, and the proposed removal of the membrane from the extraction site on January 18th in the case of Dr. Le, together with the respective alternatives thereto, as well as the reasonably foreseeable risks and benefits of the respective procedure (*see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]). Each defendant has further demonstrated that, in any event, a reasonably prudent person in plaintiff's position would not have declined to undergo the respective procedure (*see Public Health Law § 2805-d [3]*), and that any lack of informed consent did not proximately cause any injury to plaintiff (*see Zapata*, 107 AD3d at 980). In response to those showings, plaintiff has failed to raise a triable issue of fact as to either Dr. Han or Dr. Le (*see Kelapire v Kale*, 189 AD3d 1197, 1199 [2d Dept 2020]; *Zapata*, 107 AD3d at 980).

The Court has considered the parties' remaining contentions and found them unavailing.² All relief not specifically granted herein is denied.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 2, Dr. Han's motion for summary judgment is granted to the extent that plaintiff's informed consent claim as against him is dismissed, and the remainder of his motion is denied; and it is further

ORDERED that in Seq. No. 3, Dr. Le's motion for summary judgment is granted to the extent that plaintiff's informed consent claim as against her is dismissed, and the remainder of her motion is denied; and it is further

ORDERED that to reflect the prior stipulated dismissal of defendant 34th Street Dental Assocs. from this action, the caption is amended to read in its entirety as follows:

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APRIL HENRY,
Plaintiff,

-against-

Index No. 500327/22

Y. PAUL HAN, DDS, and HUYEN LE, DDS,
Defendants.

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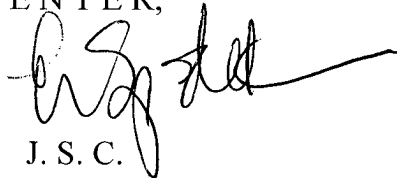
; and it is further

² Dr. Han's contention that plaintiff would be unable to rely on the doctrine of res ipsa loquitur at trial is premature, having been lodged at the summary-judgment stage (see *Weeks v St. Peter's Hosp.*, 128 AD3d 1159, 1161-1162 [3d Dept 2015]).

ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on defendants' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

HON. ELLEN M. SPODEK