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| <b>Kormusis v Goldenberg</b>                                                                                                                                                                                                   |
| 2024 NY Slip Op 35225(U)                                                                                                                                                                                                       |
| January 4, 2024                                                                                                                                                                                                                |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 708441/2019                                                                                                                                                                                           |
| Judge: Tracy Catapano-Fox                                                                                                                                                                                                      |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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MAGDELENA KORMUSIS,

Index No. 708441/2019

Plaintiff,

Part MDP

Motion Date: December 13, 2023

-against-

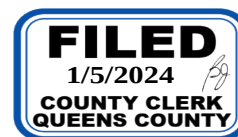
Calendar No. 13

JOEL GOLDENBERG D.D.S. and NATIONAL  
DENTAL PLLC,

Sequence No. 2

Defendants.

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The following papers numbered EF-37 to EF-65 read on this motion by defendant NATIONAL DENTAL PLLC for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF37-EF54

Memorandum in Opposition, Exhibits.....EF60-EF62

Reply Affirmation.....EF64-EF65

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant National Dental PLLC's (hereinafter referred to as "National Dental") motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, as defendant National Dental eliminated all triable issues of fact with respect to whether it departed from accepted standards of medical and dental care and proximately caused or contributed to plaintiff's injuries. (*See generally Perez v. NES Med. Servs. of N.Y., P.C.*, 203 A.D.3d 1089 [2d Dept. 2022].)

Plaintiff commenced this action for dental malpractice and lack of informed consent arising from dental treatment rendered by National Dental employees to plaintiff from March 2018 through June 2018. Plaintiff filed the Summons and Complaint on May 14, 2019, and issue was joined via service of defendant Dr. Goldenberg's Answer on June 11, 2019, followed by service of defendant National Dental's Answer on June 14, 2019.

Defendant National Dental argues that it is entitled to summary judgment and presents the pleadings, plaintiff's medical records, the affirmation of Jeffrey Rabinowitz, D.M.D., and the affidavit of Theodore J. Jenal, D.D.S in support of its motion. Defendant National Dental argues that it did not depart from accepted standards of care that caused or contributed to plaintiff's injuries, as its dentists adhered to the standard of dental care in rendering a treatment plan and dental care to plaintiff from March 26, 2018 through September 10, 2018. It argues that the treatment rendered to plaintiff was within the standard of care, and had no bearing or affect on tooth #12 which plaintiff claims needed to be extracted. National Dental also argues that plaintiff's claim for lack of informed consent must be dismissed, as the medical records and deposition testimony clearly demonstrate defendant's dentist reviewed the risks, benefits and alternatives to the procedure and obtained plaintiff's informed consent.

National Dental presents plaintiff's medical records and deposition testimony, which shows plaintiff suffered an injury when she was about nine or ten years old that caused some of her upper teeth to be knocked loose. In 2005, plaintiff had two implants inserted in her mouth and in 2011 or 2012 had crowns placed. In March 2018, plaintiff presented to defendant National Dental to see Dr. Goldenberg with complaints of a loose crown at tooth #11, gum irritation, and slight pain. Upon examining plaintiff, Dr. Goldenberg recommended a tooth extraction and implant placement. On March 29, 2018, plaintiff presented to periodontist Dr. Bernard Filakoff for a second opinion, and he recommended a different, longer course of treatment. Plaintiff ultimately returned to Dr. Goldenberg at National Dental on March 30, 2018, who performed the tooth extraction and implant placement on tooth #11 during that visit.

National Dental presented the affirmation of Dr. Jeffrey Rabinowitz, a Doctor of Dental Medicine, in support of its motion. Dr. Rabinowitz affirmed that he reviewed the pleadings including plaintiff's Bill of Particulars, medical records, and the deposition testimony in rendering his opinions. Dr. Rabinowitz opined that Dr. Goldenberg adhered to the accepted standard of dental care in formulating plaintiff's treatment plan. Dr. Rabinowitz further opined that Dr. Goldenberg's plan was within the standard of care, reasonable and did not depart from good and accepted standards, and was based upon Dr. Goldenberg's professional experience and judgment and clinical observations of plaintiff. Dr. Rabinowitz further opined that Dr. Goldenberg's execution of the treatment plan was within the standard of dental care, as the extraction and placement of an implant on the same day are not outside the standard of care. Dr. Rabinowitz reasoned that Dr. Goldenberg considered a number of factors including plaintiff's tooth-bone integrity, quality and quantity, the presence of infection in the area, and periodontal health in exercising his professional and clinical judgment. Dr. Rabinowitz added that there were no absolute contraindications to the same-day extraction and immediate implant placement.

Dr. Rabinowitz also reasoned that Dr. Goldenberg properly examined plaintiff, obtained radiographic studies including a CT scan, and used the Platelet Rich Fibrin technique of utilizing

growth and healing factors that are harvested from the patient's drawn and centrifuged blood. Dr. Rabinowitz opined that Dr. Goldenberg did not depart from the accepted standard of dental care with respect to plaintiff's post-procedure treatment. Dr. Goldenberg reasoned that plaintiff's post-procedure complaints were within normal range including the appearance of gingival inflammation, which is a normal part of the healing process. He further opined that infection, bone loss, and damage to adjacent teeth are known risks associated with dental implant surgery, and that the presence of infection and/or bone loss is not necessarily reflective of a deviation from the standard of care. Dr. Rabinowitz further reasoned that the placement of an implant does not guarantee success and there is always a chance of implant failure based on several factors including the patient's age, systemic health, history of trauma, local oral environment and health, and social habits. Based upon the foregoing, Dr. Rabinowitz opined within a reasonable degree of medical and dental certainty that Dr. Goldenberg did not depart from accepted standards of dental practice and that his acts and/or omissions did not proximately cause plaintiff's injuries.

Dr. Rabinowitz also noted that the medical records from National Dental included consent forms authorizing Dr. Goldenberg to perform the extraction and Dr. Goldenberg noted that he obtained consent from plaintiff for the extraction of tooth #11 on March 30<sup>th</sup>. Based upon the deposition testimony and medical records, Dr. Rabinowitz opined that plaintiff was provided with adequate information regarding the risks, benefits and alternatives of the procedure.

Defendant National Dental also presented the affidavit of Dr. Theodore J. Jenal, a licensed dentist in New York in support of its motion. Dr. Jenal attested that he reviewed the pleadings including plaintiff's Bill of Particulars, deposition testimony, and plaintiff's medical records in rendering his opinions. Dr. Jenal attested that with respect to Dr. Goldenberg, he deferred to Dr. Rabinowitz's opinions in his expert affirmation. Dr. Jenal attested that during plaintiff's treatment with Dr. Goldenberg at National Dental, she also presented to other doctors at National Dental including Dr. Arnold Fischler and Dr. Hankyu Cho. Dr. Jenal opined within a reasonable degree of medical certainty that National Dental and its dentists rendered care and treatment within the standard of dental care and did not proximately cause plaintiff's injuries. Dr. Jenal opined that an infection is not necessarily indicative of dental malpractice, but rather is a known risk associated with the procedure to which plaintiff consented. He also opined that Dr. Fischler appropriately examined plaintiff and adjusted the flipper and occlusion, and noted there were no complaints or findings that required additional treatment. Dr. Jenal further opined that at a subsequent visit, Dr. Fischler promptly acknowledged plaintiff's symptoms and discomfort and appropriately prescribed her amoxicillin and recommended that she follow up with her treating dentist. Based upon the foregoing, Dr. Jenal opined within a reasonable degree of medical certainty that defendant National Dental did not depart from the accepted standards of care and did not proximately cause or contribute to plaintiff's injuries.

Plaintiff opposed defendant National Dental's motion and argued there are material issues

of fact in dispute with respect to whether defendants departed from accepted standards of dental and medical care. Plaintiff argued that her dental records showed chronic periodontal disease, and defendants should have informed her of this condition and the increased risk of failure of a same-day implant. Plaintiff further argues there are issues of fact in dispute regarding informed consent that warrant denial of defendant's motion.

Plaintiff presented the affirmation of Gary Orbach, D.M.D. in opposition to defendant National Dental's motion. Dr. Orbach affirmed that he is a Doctor of Dental Medicine and reviewed the deposition testimony and plaintiff's medical records in rendering his opinions. Dr. Orbach opined within a reasonable degree of medical certainty that defendants departed from the applicable standards of care in repeatedly failing and omitting to timely diagnose and treat plaintiff's infection, and in failing to remove the infected implant, treat the socket, and properly graft the tooth. He opined that Dr. Goldenberg violated the standard of care by placing an immediate implant in an infected area. Dr. Orbach also opined within a reasonable degree of medical certainty that Dr. Goldenberg violated the standard of care by failing to advise plaintiff that while implant placement procedures are done the same day, the risk of failure is much greater with same-day implants. Dr. Orbach further opined that the standard of care would be to extract the tooth, graft, and wait four to six months to place the implant.

Dr. Orbach further opined that defendants departed from the accepted standard of care in failing to timely diagnose and treat plaintiff's infection and ignoring the signs of implant failure, swelling, inflammation, oozing, open sutures, edematous tissue, and pain over the course of plaintiff's three-month post-procedure treatment. He argued that defendants failed to acknowledge that the implant was failing probably from early April 2018. He further opined that defendants' violations of the standard of care were the proximate cause of plaintiff's failed implant, raging infection and extensive bone loss that more likely than not will not be fully restored. Based upon the foregoing, plaintiff argues that there are material issues of fact with respect to whether defendants departed from accepted standards of care and proximately caused plaintiff's injuries.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has

been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a dental malpractice action, the requisite elements of proof are a deviation from accepted standards of dental practice and that such deviation was a proximate cause of the plaintiff's injuries. (*Kozlowski v. Oana*, 102 A.D.3d 751, 752 [2d Dept.2013].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Stukas v. Streiter*, 83 A.D.3d 18, 28 [2d Dept. 2011].) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Many v. Lossef*, 190 A.D.3d 721, 723 [2d Dept. 2021].) In general, a hospital or business may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendant National Dental established a prima facie entitlement to summary judgment through the production of the medical records, deposition testimony, expert affirmation of Dr. Rabinowitz, and expert affidavit of Dr. Jenal. It is noted that summary judgment was granted as to defendant Dr. Goldenberg by the Court Order dated January 3, 2024, and defendant established that plaintiff solely asserted claims of vicarious liability against it. Defendant National Dental demonstrated that its dentists provided appropriate dental care to plaintiff within the standard of care, as Dr. Fischler and Dr. Cho did not depart from the accepted standards of dental care and did not proximately cause or contribute to plaintiff's injuries. Based upon the foregoing, defendant National Dental demonstrated a prima facie entitlement to summary judgment.

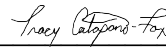
Plaintiff failed to raise a triable issue of fact in dispute. (*See Nelson v. Lighter*, 179 A.D.3d 933 [2d Dept. 2020].) Plaintiff's expert affirmation was insufficient to raise a triable issue of fact, as it was vague and conclusory. (*See Longhi v. Levit*, 187 A.D.3d 873, 878 [2d Dept. 2020])[“In order not to be considered speculative or conclusory, expert 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”].) Plaintiff's expert affirmation by Dr. Orbach presented conclusory and general opinions of defendant National Dental's departures without specifying how Dr. Fischler and Dr. Cho departed from the accepted standard of dental care. Dr. Orbach similarly presented conclusory and general opinions that defendants failed to timely diagnose and treat plaintiff's infection, but did not present any evidence within the medical records or deposition testimony to support the opinions. Additionally, Dr. Orbach failed to demonstrate that there was any causal connection between defendants' treatment and plaintiff's injuries. As plaintiff's expert was conclusory and not supported by the evidence, it was insufficient to raise a triable issue of fact in dispute. (*See Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

Accordingly, defendant National Dental PLLC's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and it is hereby

ORDERED that plaintiff's Complaint is dismissed as to defendant National Dental, PLLC.

This constitutes the decision and Order of the Court.

Dated: January 4, 2024



Hon. Tracy Catapano-Fox, J.S.C.

