

Keating v D'Amico
2024 NY Slip Op 35542(U)
January 19, 2024
Supreme Court, Onondaga County
Docket Number: Index No. 001153/2019
Judge: Joseph E. Lamendola
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STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

KEVIN E. KEATING,

Plaintiffs,

v.

KURT A. D'AMICO, DDS;
JOHN and/or JANE DOE 1; JOHN and/or
JANE DOE 2, and
KURT D'AMICO, DDS, PC,

Defendants.¹

DECISION AND ORDER

Motion #1

Index No: 001153/2019

Before: Hon. Joseph E. Lamendola, J.S.C.

Plaintiff commenced this dental malpractice action for injuries allegedly sustained as the result of the Defendants' alleged deviation from the applicable standard of care in taking Plaintiff's yearly dental x-rays, and the failure to obtain informed consent from the Plaintiff prior to taking said x-rays. The summons and complaint were filed on February 5, 2019, and issue was joined with the filing of an answer on March 6, 2019.

By way of background, Plaintiff had been a longstanding patient of the Dr. D'Amico. On January 31, 2017, Plaintiff presented for a routine dental visit which included intraoral dental x-rays. On the following day, Plaintiff returned to Defendants' offices with a large lump on his left lower jaw. Defendants noted extraoral swelling, prescribed Amoxicillin and advised Plaintiff to see his primary care physician as soon as possible. On February 2, 2017, Plaintiff was seen by his primary care provider and as the swelling had greatly increased and he was experiencing difficulty swallowing he was referred to the emergency room. Plaintiff was admitted to St. Joseph's Hospital from

¹ John and/or Jane Does #1 and 2 "were and are dental hygienists and/or dental assistants and/or dental x-ray technicians and employees of Defendants" Dr. D'Amico and the PC "under the direction, control and supervisions of [said] Defendants..." (NYSCEF #1, Complaint para. 6)

February 2nd through 4th of 2017, for inflammation and swelling of the left submandibular gland. Plaintiff was thereafter referred to an ENT who, on February 8, 2017, diagnosed him with sialadenitis (inflammation of the salivary gland).

Over a month later, on March 10, 2017, Plaintiff returned to his primary care provider with complaints of abdominal pain. Lab tests revealed that Plaintiff tested positive for "c. diff." for which he was prescribed antibiotics. His pain worsened and he presented to Urgent Care on March 15, 2017, and thereafter taken by ambulance to Crouse Hospital where he was diagnosed with a perforated colon. He subsequently underwent a colon resection surgery on March 15, 2017, and a colostomy reversal surgery on June 14, 2017. Plaintiff alleges that Defendants deviated from the standard of care in taking his dental x-rays on January 31, 2017, which resulted in injury to the submandibular gland causing the subsequent sialadenitis, leading to the c. diff. infection, which ultimately required colon surgery.

Plaintiff's complaint, as amplified by his bill of particulars, alleged, inter alia, the Defendants were negligent in:

- Failing to use accepted dental practices to obtain x-rays in a manner that would not cause damage to the soft tissue of Plaintiff's oral/maxillofacial area;
- Failing to properly hire, train, supervise dental hygienists/technicians/staff;
- Failing to use proper and reasonable care under the circumstances;
- Failing to assess/manage/treat Plaintiff's condition appropriately;
- Failing to have dental hygienists/technicians/staff seek appropriate counsel and instruction to prevent injury to Plaintiff; and
- Failing to obtain informed consent from Plaintiff for the dental x-rays at issue.

Presently before the Court is a motion for summary judgment brought by Defendants Kurt A. D'Amico, DDS and Kurt D'Amico, DDS, PC (hereinafter, "Defendants") seeking dismissal of Plaintiff's complaint. "[T]o meet [their] initial burden on [their] summary judgment motion in this [dental] malpractice action, defendant[s] [were] required to 'present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [they] complied with the accepted standard of care or did not cause any injury to the patient' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; see *Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]). Affidavits submitted in support of such a motion must be "detailed, specific and factual in nature and [must] not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]). In addition, the expert affidavit must "address each of the specific factual claims of negligence raised in [the] plaintiff[s'] bill of particulars" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]; see *James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Defendants submitted the expert affirmation of Timothy Fallon, DDS, MD, (licensed dentist and oral and maxillofacial surgeon). Dr. Fallon provided a comprehensive summary of the treatment rendered by Defendants, which included several conclusions and opinions, e.g.,

- On January 31, 2017, Plaintiff underwent multiple dental x-rays utilizing an intraoral bite wing mouthpiece without any complications during the office visit.
- The following day, Plaintiff contacted Defendants complaining of a large lump on his lower left jaw and was examined that same day by Dr. D'Amico who noted swelling only extraorally with no palpation sensitivity, prescribed Amoxicillin and advised Plaintiff to follow-up with his primary care provider or the ER.
- There is no evidence of traumatic injury to Plaintiff as the result of his January 31, 2017, x-rays in the subsequent treatment records of St. Joseph's Hospital, Plaintiff's primary care provider, or his consulting ENT. Such an injury would have been evident upon the floor or other portions of the mouth.
- Plaintiff's diagnosis of left submandibular gland infection was infectious in nature only and did not result from any trauma from the x-rays.
- It is improbable that bacteria entered the oral cavity during the placement of the dental x-ray bite wing on January 31, 2017.
- Dr. Damico appropriately prescribed Plaintiff with a broad spectrum antibiotic during his evaluation on February 1, 2017.
- The performance of the x-rays and Dr. D'Amico's examinations on January 31, 2017 and February 1, 2017, and the prescribing of antibiotics on the latter date, did not cause Plaintiff to contract c. diff.
- Plaintiff's contraction of c. diff., and subsequent bowel resection and related treatments were not within the control of Defendants nor due to any negligence on the part of the Defendants.
- It was within the standard of care to order the x-ray on January 31, 2017, to evaluate Plaintiff's ongoing conditions.
- Dr. D'Amico complied with the standard of care in all respects during his routine dental examination on January 31, 2017, and his evaluation and treatment on February 1, 2017.
- There is no evidence to support the allegation that Defendants' staff were improperly trained, employed, or supervised.

- **Documentation signed by the Plaintiff during the January 31, 2017, visit indicates that Plaintiff provided informed consent for the annual x-rays.**

Based on the entirety of his submission, Dr. Fallon opined, to a reasonable degree of medical certainty that Defendants did not deviate from the applicable standard of care and that no deviation from the standard of care caused or contributed to any injuries allegedly sustained by the Plaintiff. He additionally opined that the Defendants obtained proper informed consent for the x-rays, and that Defendants “employed adequately trained employees, including dental assistants like Ms Amaral, to assist in the [Plaintiff’s] care, including but not limited to the performance of dental x-rays.

In this Court’s view, having considered the affidavit of Dr. Fallon together with the medical records and deposition testimony submitted in support of their motion, the defendants met their initial burden with respect to obtaining informed consent as well as on the issues of whether they complied with the accepted standard of care and whether they caused any injury, (*see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521-1522 [4th Dept 2019]).

The burden then shifted to the Plaintiff to set forth evidence to raise a genuine, material question of fact. The Plaintiff raised a triable issue of fact through the expert affidavits of Lorna Flamer-Caldera, DDS, FAGD (doctor of dental surgery and fellow of the Academy of General Dentistry); Brian T. Hart, DDS (doctor of dental surgery); and Darryl R. Fanney, MD (board certified radiologist). Taking each expert *in seriatim*, Dr. Flamer-Caldera raised a triable issue of fact as to whether Defendants failed to properly administer dental x-rays to the Plaintiff so as to avoid trauma to his mouth. Dr. Flamer-Calder rendered the following conclusions and opinions, e.g.,

- Plaintiff was known by Defendants to be a patient with xerostomia, which made him more prone to risk of damage or blockage of the duct openings in the mouth.
- On January 31, 2017, Plaintiff presented to Defendants for his routine dental examination with evidence of dry mouth.
- Defendants' dental assistant, Ms Amarel, re-placed the sensor "card" at least five or six times trying to get the proper angle/image for the x-rays.
- Plaintiff advised that he was experiencing pain after the third attempt as the card was pushing inside the lower left portion of his mouth, under the tongue.
- Plaintiff woke up the next day with a lump on his jaw near the left submandibular gland that was painful and swollen prompting him to call Defendants immediately.
- It was a deviation of the standard of care for Defendants to make five or six attempts to take an x-ray, especially in the same location, and especially in light of Plaintiff's complaints of pain and his dry mouth condition.

The affidavit of Dr. Fanney, set forth the following conclusion and opinion:

- The February 2, 2017, CT scan of Plaintiff's neck evidenced swelling in the floor of the mouth on the left side which extended into the submandibular gland.

The affidavit of Dr. Hart, further opined that:

- Plaintiff was known by Defendants to be a patient with xerostomia, which made him more prone to risk of damage or blockage of the duct openings in the mouth.
- On January 31, 2017, Plaintiff presented to Defendants for his routine dental examination with evidence of dry mouth.
- Plaintiff complained of pain in the lower left side of his mouth during the repeated placement of the mouth piece (sensor card).
- The manner in which the intraoral x-rays were taken by Defendants on January 31, 2017, resulted in trauma to the floor of the mouth.
- The trauma caused by the repeated attempts to take x-rays on January 31, 2017, is visualized on the February 2, 2017, CT scan.

- The trauma to the floor of Plaintiff's mouth caused the subsequent sialadenitis of the left submandibular gland which required antibiotic treatment and led to the development of c. diff. infection and required colon resection and subsequent treatment.

Based on the evidence submitted, including medical records, deposition transcripts, and expert affidavits of Drs. Hart, Fanney, and Flamer-Caldera, Plaintiffs established triable issues of fact to be resolved by the finder of facts. Conflicting affidavits by expert witnesses, with sufficient underlying evidence, create "a classic conflict between experts" precluding summary judgment. (*Santiago v. Brandeis*, 309 AD2d 621, 622 [1st Dept. 2003], *Page v. Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1320 [4th Dept. 2019]).

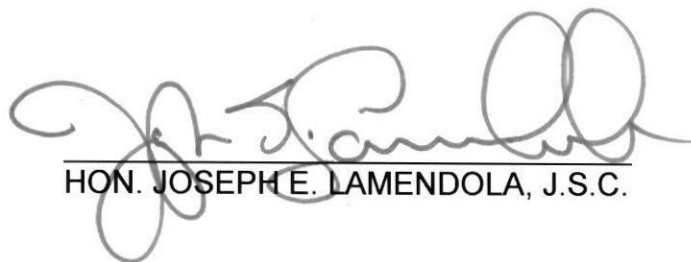
Plaintiff's expert did not address the issue of informed consent, however. As Plaintiff failed to raise a triable issue of fact on that claim, such is deemed abandoned and Defendants are granted summary judgment accordingly. (*Bubar v. Brodman*, 177 AD3d 1358 [4th Dept. 2019], *Bristol v. Bunn*, 189 AD3d 2114 [4th Dept. 2020]).

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment with respect to the discrete issue of informed consent is **GRANTED**; and it is further

ORDERED, that Defendants' motion for summary judgment is otherwise **DENIED**.

DATED: January 19, 2024
Syracuse, New York



HON. JOSEPH E. LAMENDOLA, J.S.C.

PAPERS CONSIDERED:

- 1) Notice of Motion, filed on October 18, 2023 (NYSCEF #9).

- 2) Attorney Affirmation in Support, with annexed exhibits, filed on October 18, 2023 (NYSCEF #10-22)
- 3) Expert Affidavit (Dr. Fallon), filed on October 18, 2023 (NYSCEF #23)
- 4) Memorandum of Law, filed on October 18, 2023 (NYSCEF #24)
- 5) Attorney Affirmation in Opposition, filed on December 7, 2023 (NYSCEF #28)
- 6) Expert Affidavit (Dr. Flamer-Caldera), filed on December 7, 2023 (NYSCEF #29)
- 7) Expert Affidavit (Dr. Fanney), filed December 7, 2023 (NYSCEF #30)
- 8) Expert Affidavit (Dr. Hart), filed December 7, 2023 (NYSCEF #31)
- 9) Memorandum of Law in Opposition, filed December 7, 2023 (NYSCEF #32)
- 10) Reply Affidavit, filed on December 12, 2023 (NYSCEF #33)