

Greene-Kamen v Enn Kong Liew

2025 NY Slip Op 31490(U)

April 15, 2025

Supreme Court, New York County

Docket Number: Index No. 805372/2016

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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LISA GREENE-KAMEN

Plaintiff,

- v -

ENN KONG LIEW, DMD,

Defendant.

-----X

INDEX NO. 805372/2016

MOTION DATE 04/25/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action to recover damages for dental malpractice based upon alleged departures from good and accepted practice, the defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

The crux of the plaintiff's claim is that, beginning in August 2014, the defendant negligently treated her in the course of her dental care, causing her to sustain unwarranted tooth decay and gum deterioration, and requiring her to obtain corrective dental care from other providers. Specifically, in her bill of particulars, she alleged that the defendant failed to take necessary and appropriate radiographic studies, failed to design, fabricate, and insert veneers and/or crowns in a manner that avoided causing a dental occlusion, failed to recognize and take precautions in order to avoid adverse vertical dimensions, failed to take into account her history of abnormal occlusion, and designed, fabricated, and inserted veneers and/or crowns that were oversized, ill-fitting, and improperly contoured. The plaintiff further averred in her bill of particulars that, as a consequence of the defendant's malpractice, she experienced ill-fitting crowns and/or veneers that were misshapen and incorrectly sized, causing them to become de-

bonded and to fall off. She additionally asserted that she sustained instances of pain and swelling that directly interfered with her dental functionality, including eating, speaking, and resting the muscles of her jaw, as well as episodes of mental anguish. The plaintiff claimed that the defendant's malpractice further required her to seek the assistance of other dentists who alleviated her conditions, as well as the trauma caused by the defendant to her gingiva, which increased her risk of bone loss and gum recession.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively

establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

“To sustain a cause of action for medical [or dental] malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Dykes v Stabile*, 153 AD3d 783, 783-784 [2d Dept 2017]; *Alongi v Sutter*, 139 AD3d 887, 887-888 [2d Dept 2016]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 956 [2d Dept 2012]; *Florio v Kosimar*, 79 AD3d 625, 625 [1st Dept 2010]; *Alvarado v Miles*, 32 AD3d 255, 256-257 [1st Dept 2006]).

Once the applicable burden is satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted dental practice, and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains “[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice” (*Alvarez v Prospect Hosp.*, 68 NY2d at 325; see *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant standards in the field of dentistry is sufficient to preclude an award of summary judgment in a defendant's favor (see *Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Where the expert's “ultimate assertions are speculative or unsupported by any evidentiary

foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; see *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

In support of his motion, the defendant submitted the pleadings, the plaintiff’s bill of particulars, the transcripts of the parties’ deposition testimony, relevant dental records, charts, and imaging films, the note of issue, a status conference order, a memorandum of law, an attorney’s affirmation that included a statement of allegedly undisputed material facts, and the expert affirmation of Theodore J. Jenal, DDS, who opined that the defendant did not depart from good and accepted standards of dental care, and that nothing that the defendant did or did not do caused or contributed to the plaintiff’s claimed injuries.

Upon reviewing the plaintiff’s dental records, Dr. Jenal first noted that the defendant examined and treated the plaintiff between August 14, 2014 through November 3, 2014, and asserted that, in response to the plaintiff’s request, the defendant first saw the plaintiff for treatment directed towards an aesthetic change. Specifically, he averred that radiographs that the defendant had taken on August 15, 2014 indicated that the plaintiff presented to the defendant with existing crowns and porcelain veneers that had been placed in 2007 by dentist Fuad H. Malik, DDS, on tooth numbers 4 through 13 and 20 through 29. Dr. Jenal opined that these radiographs were devoid of evidence of defects or pathology associated with the existing restorations but, rather, that the plaintiff simply was unhappy with the appearance of the crowns and veneers, that she similarly was dissatisfied with the shape and color of the veneers, and that she complained of them cracking.¹

¹ The court notes that the defendant’s chart actually contains copies of eight radiographic images taken on August 5, 2014, and one image taken on August 1, 2014, all before the defendant treated the plaintiff, and none taken subsequent to the treatment that he rendered on September 5, 2014. The images, however, do not indicate who took the x-rays that produced those images. The defendant’s chart also contains numerous images taken between 2010 and 2012, all of which clearly antedate the plaintiff’s treatment with the defendant.

According to Dr. Jenal's interpretation of the records and deposition testimony, the defendant took those x-rays to facilitate his investigation of the plaintiff's prior dental history, and was specific to her claimed dissatisfaction with her existing restoration, and that the defendant prepared study models for the purposes of creating a diagnostic "wax-up" model, discussed the treatment plan both with the plaintiff and laboratory technician Carlos Carranza, and presented the plaintiff with a diagnostic wax-up model to demonstrate the anticipated progression of her teeth. As Dr. Jenal further gleaned from the plaintiff's records, the plaintiff next presented to the defendant on August 21, 2014, at which time the defendant "prepared" tooth numbers 4 through 13 and 20 through 29, while, on September 5, 2014, the defendant inserted E-max veneers, which he described as "well-known widely used ceramic veneers that generally preserve more of the natural teeth, are resistant to chipping, and provide exceptional longevity with proper care." Based on the defendant's testimony, Dr. Jenal asserted that the defendant placed these veneers using Nexus resin-based cement before curing the veneers in place. He further opined that Nexus resin-based cement is a well-known and widely used cement in the application of ceramic veneers. Dr. Jenal concluded that the radiographic evidence that he reviewed demonstrated that the plaintiff's teeth were properly prepared, and that the records demonstrated that the "case was prepared, impressed, and delivered in the usual way employing customary methods and materials."

Dr. Jenal noted that, on September 8, 2014, the plaintiff returned to the defendant to have tooth number 4 recemented, but that, contrary to the plaintiff's contention, there was no evidence that the veneer de-bonded due to improper placement, the manner in which the veneers were inserted, or the fashion in which bonding agents were applied. Rather, he concluded that the need for recementing that tooth "likely occurred due to the occlusal scheme and function particular to" the plaintiff, and that this occlusal scheme and function "could not be predicted prior to placement." Specifically, Dr. Jenal concluded that de-bonding of laminates at tooth number 4 "was likely the result of underlying problems arising from her habit of grinding

which occurred prior to Dr. Liew's treatment or other occlusal issues." He continued that the plaintiff should have been well aware, from having undergone similar restorations with Dr. Malik in 2007, that the de-bonding of a laminate "is an acceptable risk for this treatment and in this instance."

As Dr. Jenal explained it, to reinsert the veneer, the defendant correctly placed Nexus resin dental cement onto the veneer and set it onto the tooth, cleaned up the excess, and then hardened it using a blue light. He thus opined that the defendant's reinsertion of the veneer at tooth number 4 was well within the standard of care. Dr. Jenal additionally opined that, on September 17, 2014, the defendant correctly adjusted the plaintiff's occlusion and took a full-mouth series of x-rays. He, in effect, concluded that the occlusal adjustment that the defendant performed on that date did not arise from any departure from the standard of care in placing the veneers, but, rather, that the need for occlusal adjustments following the placement of a restorative rehabilitation, such as in the plaintiff's case, were "common and expected."

As Dr. Jenal recounted the contents of the dental records and deposition testimony, the plaintiff returned to see the defendant on November 3, 2014, at which time the defendant advised her of the need to remove excess bonding agent at tooth numbers 17 and 18, but that the plaintiff refused the defendant's advice, and discontinued treatment with him. Dr. Jenal noted that, following her treatment with the defendant, the plaintiff apparently had crowns placed at tooth numbers 4 and 5 by a subsequent dental provider, but that there was no record evidence identifying the dentist who placed these crowns, and no treatment records from that dentist. He thus concluded that any deviation or injury with regard to the placement of crowns at tooth numbers 4 and 5 were not related to the restorations placed by the defendant.

Dr. Jenal opined that the defendant did not depart from the standard of care in connection with his diagnosis and treatment of the plaintiff. More specifically, he averred that radiographs and study models that the defendant generated were sufficient to establish the diagnosis and treatment plan, that the use of E-max veneers was within the standard of care,

and that the “record evidence does not reflect a departure in terms of marginal fit, occlusion, or aesthetics.” Moreover, Dr. Jenal stated that there was no radiographic evidence of any defects in the marginal fit of the subject restorations, and, as such, there was no departure by the defendant. Neither, according to Dr. Jenal, was there any radiographic evidence to support the plaintiff’s claim that she developed periodontal problems as a result of the restorations that the defendant had placed, nor was there evidence of gingivitis, recurrent decay, open contact, bone loss, or gum recession related to the restorations that the defendant inserted. As Dr. Jenal explained it,

“[o]cclusal adjustments invariably need to be made after placement of complex restorations over the course of days or weeks after they are in function. Such adjustments are exceedingly common and depend on the particular occlusal scheme of the patient (no two patients are alike) and the sensitivity of the patient to occlusal changes. The occlusal function is difficult to measure or predict prior to placing a restoration, and, as such, adjustments are made after the case is placed based upon clinical evaluation. Dr. Liew made occlusal adjustments to Ms. Greene-Kamen’s case on September 17, 2014, but he did not have the opportunity to make additional adjustments as Ms. Greene-Kamen left his care. It is not a departure to place a restoration (especially one that involves both arches and multiple teeth) that requires multiple occlusal adjustments.”

He further explained that it was not uncommon for a patient who has undergone complex restorative rehabilitations to complain of jaw pain and that such a complaint was “not an indication of a departure from the standard of care.” Moreover, Dr. Jenal stated that occlusal adjustments often resolve these issues, and that, in the plaintiff’s case, Ari J. Kramer, DMD, had addressed and resolved all of the plaintiff’s occlusal concerns in the course of his treatment of the plaintiff between April 29, 2015 and June 10, 2015. In addition, he concluded that there was no evidence in the records of persistent symptoms related to the occlusion following the successful equilibration by Dr. Kramer. In this respect, he noted that, upon intra- and extra-oral examination and review of diagnostic records on May 5, 2015, orthodontist David H. Seligman, DMD, did not find any evidence of orthodontic irregularities, but, conversely, found that the plaintiff’s archform, occlusion, and range of motion in her jaw to be normal. Furthermore, Dr.

Jenal opined that several photographs of the plaintiff's mouth, teeth, and jaw demonstrated that the defendant's restorations at tooth numbers 6 through 13 and 20 through 29 "appeared well proportioned and of pleasing color and translucency."

Dr. Jenal further explained that, in the plaintiff's case, her rear molars defined the "vertical dimension," and that, inasmuch as the defendant did not treat the rear molars, "the vertical dimension could not have been reduced" or led to a "collapsed bite," as the plaintiff claimed. Moreover, Dr. Jenal concluded that there was no record evidence of a departure from good practice in connection with the aesthetics of the restorations, since photographic evidence demonstrated that the restorations "appear to be proportionally accurate within" the plaintiff's facial profile. In any event, Dr. Jenal asserted that it is not a departure, in and of itself, to change the size and shape of previous restorations where the changes are designed to achieve a particular aesthetic result, and he explained that obtaining such a result is typically the role of the diagnostic wax-up model, which was presented to the plaintiff before she commenced her treatment with the defendant. He thus opined that the plaintiff's claim that the restorations felt as though they protruded "is likely due to her particular sensitivity to the change in the tooth size and shape," as a patient's "sensitivity to restorations often emerges as subjective complaints"

As to the plaintiff's claim that she was required to undergo a complete restoration of all of the teeth that the defendant treated, Dr. Jenal expressly concluded that none of the records referable to the plaintiff's subsequent dental treatment demonstrated that any subsequent dental provider "removed" or "redid" all of her veneers, and that only the veneer on tooth number 4 needed to be reinserted and recemented.

In opposition to the motion, the plaintiff relied on many of the same documents that the defendant had submitted, and also submitted an attorney's affirmation, a memorandum of law, unsworn and unaffirmed correspondence from a proposed treating dentist as to the additional restorative work that he recommended that the plaintiff undergo, additional dental records, a proposed amended complaint that had been drafted by a dentist on behalf of the plaintiff, and

the expert affirmation of dentist Keven G. Murphy, DDS, M.S., who, like Dr. Jenal, reviewed the plaintiff's dental records, charts, and radiographic imaging. Dr. Murphy attached, to his affirmation, copies of several radiographic images of the plaintiff's teeth, to which he referred throughout the text of the affirmation.

Dr. Murphy opined that the defendant departed from good and accepted dental practice, and that his departures caused or contributed to the plaintiff's injuries and need for follow-up dental restoration treatment.

Dr. Murphy first noted that the defendant's records are devoid of any memorialization of the condition of the plaintiff's dentition when she first presented to him, including any dental pathologies, occlusal diagnosis, and aesthetic analyses, and that there were no references in the chart to pretreatment radiographs that the defendant allegedly performed, even though the defendant referred to them at his deposition.² In addition, according to Dr. Murphy, in connection with this initial visit, there are no records of any occlusal registrations, often referred to as "check-bites," and that, without these registrations, the precise relationship between the upper and lower teeth cannot be determined accurately. As he explained it, when a patient's upper front teeth are to be restored, it is the standard of care to take a "face-bow," which he described as a device that relates the position of the dentition to the patient's face, and that mounting the patient's study-model casts into a bite-simulating device, known as an articulator, is accomplished with a face-bow registration. Dr. Murphy opined that the failure to employ a face-bow registration will often result in a misalignment of the upper front teeth, resulting in a possible error in how the teeth will present aesthetically in relationship to the patient's face and smile. He thus concluded that the standard of care requires a dentist to take a face-bow registration when restoring teeth that are observable when a patient smiles, and that the defendant's failure to take a face-bow registration constituted a departure from that standard.

² As noted above, the defendant's chart did, in fact, include nine recent pre-treatment images, but no post-treatment images.

According to Dr. Murphy's reading of the records generated by the defendant, there is no mention of any analysis of the functional dynamics of the plaintiff's lip movement when she is smiling or when her lips are in repose. He asserted that, without this information, the length of the upper front teeth cannot accurately be determined. He concluded that the standard of care requires a dentist to document and provide this information, along with the "face-bow" registrations, to the dental technician in the form of a dental lab prescription. Since Dr. Murphy concluded that the defendant did not record this information in his treatment records, Dr. Murphy was of the opinion that the defendant departed from the standard of care in this regard. Although Dr. Murphy did not fault the defendant for his oral communications with his dental technician, Dr. Murphy asserted that it was a violation of the New York State Dental Practice Act (Education Law art. 133) for the defendant to have failed to create a dental laboratory prescription for the proposed fabrication of the plaintiff's dental restorations (see Education Law § 6611[1]), and a misdemeanor offense to fail to retain this prescription for at least one year (see *id.*; Education Law § 6611[2]). According to Dr. Murphy, the defendant did not and cannot produce such a required prescription, which was not included in his treatment record for the plaintiff, and Dr. Murphy noted that, at his deposition, the defendant testified that he did not recall completing the prescription. As Dr. Murphy framed the issue, only a dentist, not a dental technician, can provide diagnoses and a treatment plan for the patient.³

Although Dr. Murphy conceded that it was proper for dental technician Carranza to fabricate the "diagnostic wax-up to facilitate a simulation of the proposed shape of the restorations," he concluded that there was no documentation that the defendant personally presented this diagnostic wax-up model to the plaintiff, who testified that Carranza presented

³ A statutory cause of action to recover for lack of informed consent, although akin to a claim for medical malpractice, is a distinct cause of action (see *Pagan v State of New York*, 124 Misc 2d 366, 367 [Ct Claims 1984]). Although Dr. Murphy faulted the defendant for failing to obtain the plaintiff's fully informed consent to the procedure, neither the complaint nor the plaintiff's bill of particulars alleged or set forth a cause of action or claim to recover for lack of informed consent pursuant to Public Health Law § 2805-d.

the diagnostic wax-up to her. Dr. Murphy averred that a dental technician is not licensed to practice dentistry, and that it is unknown as to whether the defendant was present at the time of this presentation. Dr. Murphy explained that a diagnostic wax-up model is an essential part of successful treatment for a patient, inasmuch as it simulated the “end-product,” but that, without face-bow and bite registrations, “the diagnostic wax-up is likely to be flawed and will likely provide an incorrect simulation. If this diagnostic wax-up was fabricated without these registrations, then it cannot be used to convey consent accurately.” He noted that the records of dentists who provided treatment to the plaintiff subsequent to the defendant mentioned that the plaintiff complained of that the visual presentation of her anterior teeth was not to her satisfaction. As Dr. Murphy further explained,

“[t]he diagnostic wax-up is also essential for another reason. From this diagnostic wax-up, it is the standard of care to provide a pre-treatment intra-oral ‘mock-up.’ This mock-up is a commonly used method to give a patient a sense of how the teeth will appear in their mouth. From the diagnostic wax-up, a mold is taken. Using the mold of the proposed tooth shapes, a temporary resin material is placed over the patient’s existing teeth. Since the plaintiff was to receive tooth shapes slightly larger than her current (at the time) teeth, a mock-up could have been easily fabricated. Fabrication of this ‘in the mouth’ mock-up is essential. The mock-up will demonstrate the final shape, the occlusion or bite, and relationship of the veneered teeth to the patient and the treating dentist. It is the standard of care to provide this mock-up before the preparation, impression and provisionalization appointment. According to [the defendant’s] records, this crucial step was not provided.”

Dr. Murphy reiterated that the plaintiff presented to the defendant with pre-existing crowns on tooth numbers 4 and 5, and that it is “not common practice to place veneers upon teeth with pre-existing crowns as the bond strength, or how well the resin cement will work, is relatively weak compared with the bonding of veneers to natural tooth structure.” He explained that, if a veneer, whether made of eMax or porcelain, is bonded to an existing porcelain crown, it is done in areas where there are no occlusal forces present, while placement of veneer over a pre-existing porcelain crown, where the veneer is likely to receive an occlusal force, is not consistent with the standard of care. Dr. Murphy, adverting to the first attachment to his affirmation, asserted that, in the plaintiff’s case, that is exactly what the defendant did.

Dr. Murphy referred to the records and imaging generated by Michael Nguyen, DDS, between January 7, 2020 and August 4, 2022 in connection with Dr. Nguyen's treatment of the plaintiff, which contained, as characterized by Dr. Murphy, several "diagnostic radiographs of very good quality." Upon Dr. Murphy's review of this imaging, he concluded that tooth numbers 6, 11, 18, 19, 23 and 27 were not removed or recemented by any other practitioner prior to the plaintiff's presentation to Dr. Nguyen in 2020. From his further review of these radiographs, Dr. Murphy opined that it was "very clearly evident" that the defendant "did not insert and cement these restorations accurately." Referring to the second through sixth images attached to his affirmation, Dr. Murphy concluded that "very large gaps or empty spaces between the restoration and the tooth structure are present." He explained that this finding was of particular importance in understanding the plaintiff's chief complaint of an incorrect bite since:

"(1) . . . the restorations on #6, 11, 23 and 27 did not 'seat' all the way upon the tooth, the restoration will be positioned 'higher' or taller upon each aforementioned tooth, (2) If these teeth now have restorations which are taller than the other teeth, they will come into contact with the opposing teeth before the remaining teeth, (3) Since these anterior teeth are in the front part of the mouth, the patient will be unable to occlude on her posterior (rear or back) teeth as the contact on the anterior teeth will prevent the lower jaw from making contact with the upper jaw, (4) If the patient cannot contact her posterior teeth, she will be unable to chew and (5) this type of malocclusion often results in muscle pain and temporal-mandibular joint pain."

Dr. Murphy asserted that the finding of significant gaps was verified by the examination of dentist Marc Lazare, DDS, within a month after the insertion of the veneers by the defendant, and that this finding demonstrated that the veneer restorations provided by the defendant were inconsistent with the standard care, in part, due to the failure to bond or cement the restorations with sufficient accuracy. As he explained it, it is common practice to utilize "try-in cements" in the veneer placement procedure that allow the dentist to verify the fit of the restorations before cementing them, and, because they are shaded, they better simulate the appearance of the final restoration after cementation. Dr. Murphy concluded that, based on his review of the parties' deposition testimony and the defendant's records, the defendant did not employ try-in cements,

which he characterized as inconsistent with the standard of care. Moreover, he opined that the presence of the gaps between several of the plaintiff's restorations and tooth structures poses a future risk of dental cavities and chronic gingival inflammation, and that the defendant's failure to replace these restorations was not consistent with the standard of care. Dr. Murphy further noted that, although the plaintiff currently reports that she can chew more effectively than she was able to do shortly after the defendant's restoration procedure, she has noticed migration of her teeth, which he asserted likely was reflective of an unstable occlusion as a result of the incorrect placement of the veneer restorations in the first instance.

Dr. Murphy ultimately opined that the defendant's "substandard record keeping, diagnoses and treatment planning contributed to the fabrication of restorations which were not consistent with the patient's aesthetic needs," and that the treatment rendered by the defendant was not consistent with the standard care in the context of pretreatment acquisition of pertinent measurements and registrations. He further asserted that the defendant's failure to provide the plaintiff with the opportunity to see a prediction of the final product, using an intra-oral mock-up, departed from the standard of care, since it would have afforded both the defendant and the plaintiff with the opportunity to make corrections. Crucially, Dr. Murphy opined that the defendant's failure to insert and "to cement the veneers appropriately" or with "the requisite accuracy," constituted a "breach in the standard of care that directly lead the iatrogenic outcome of the plaintiff's malocclusion" that, in turn, "resulted in the muscle pain and temporal-mandibular pain, discomfort and emotional trauma suffered by the plaintiff," the "inability to close her mouth properly, and the inability to chew and eat," all of which increased the risk that the plaintiff would experience cavities, gingival inflammation, and possible instability of her occlusion. More specifically, Dr. Murphy asserted that the defendant failed to adhere to the applicable the standard of care by improperly leaving large gaps between the plaintiff's restorations and teeth, in addition to leaving residual cement, both of which he opined had caused the plaintiff to experience gingival inflammation and her current periodontal disease. Additionally, Dr. Murphy

specified that the defendant failed to adhere to the standard of care when he placed veneers over the occlusal surfaces of the pre-existing porcelain crowned teeth, numbers 4 and 5, resulting in the immediate failure of these restorations, causing the plaintiff pain, and requiring the plaintiff to seek re-treatment, which ultimately was rendered by Dr. Nguyen. Dr. Murphy further ascribed a breach of the standard of care to the defendant's failure properly and accurately to design and measure the plaintiff's upper and lower teeth, which he concluded had proximately caused a deep bite, contributed to the misalignment of her bite, and was a factor in her inability to properly close her mouth. He further concluded that, by failing to provide for a proper and stable occlusion, the defendant's malpractice contributed to the migration of the plaintiff's teeth, resulting in malocclusion.

According to Dr. Murphy, as a consequence of the defendant's malpractice, the plaintiff will, at a minimum, require replacement of all veneers and restorations associated with teeth numbers 4 through 13 and 20 through 29. He asserted that a properly performed comprehensive examination, diagnosis, and treatment plan will define the appropriate plan of treatment, and opined that the treatment plan formulated by dental providers at a dental practice entity known as Real Smile in Miami Beach, Florida, which the plaintiff annexed to her opposition papers, and which proposed to restore tooth numbers 5, 6, 11, 18, and 28, as well as myofunctional therapy and lingual frenuloplasty on numerous other unidentified teeth, was a sound and clinically appropriate initial plan for her future care.

In reply, the defendants submitted an attorney's affirmation, and a supplemental expert affirmation from Dr. Jenal. Counsel argued that Dr. Murphy relied upon medical records that were unaffirmed, unsworn, and uncertified, and from unidentified providers and, hence, were inadmissible as evidence. She further contended that, inasmuch as the defendant's statement of undisputed material facts was not contradicted by a counterstatement from the plaintiff, those facts must be deemed admitted. She further argued that the plaintiff served her opposition papers one day after the stipulated deadline for service had lapsed, and that the court thus

should not even consider those papers. In addition, the defendant's attorney asserted that all of the plaintiff's injuries must be attributed only to the plaintiff's refusal to continue her treatment with the defendant, and her decision to treat with other dentists, all of whom contributed to any of the conditions of which the plaintiff complained, and that there was a five-year gap in the plaintiff's active treatment of her conditions. In his supplemental affirmation, Dr. Jenal claimed that he had not been given the opportunity to review the images attached to Dr. Murphy's affirmation, and didn't know who had taken those photographs or images. He further asserted that, inasmuch as Dr. Murphy was licensed to practice dentistry in Maryland, he was not actually familiar with the applicable standards of care for dentistry New York, as opposed to the dental profession in general, even though Dr. Murphy expressly asserted that he was, in fact, familiar with dentistry standards of care in New York. Dr. Jenal additionally disagreed with Dr. Murphy's opinions as to the need for dental registrations and the method of creating a wax-up model.

Contrary to the defendant's contention, the statement of allegedly undisputed material facts that he submitted need not be accepted as true merely because the plaintiff declined to submit a counter statement of uncontested material facts. 22 NYCRR 202.8-g, referable to such statements, was amended on July 6, 2022 to make the movant's submission of a statement of undisputed facts optional, unless the court otherwise directs (*see* 22 NYCRR 202.8-g[a]). This court did not direct the parties to submit statements of uncontested facts or counter statements of fact. Moreover, to the extent that the defendant's statement included opinions of some of the physicians with whom the defendant subsequently treated, those are not statements of fact, but only of opinion. The court excuses the one-day delay in the plaintiff's submission of opposition papers, and notes that, only three weeks prior to that submission, she had signed a consent to change attorney form, which provides a reasonable excuse for that delay. In any event, that one day did not prejudice the defendant in his ability to submit an attorney's affirmation and a supplemental expert affirmation in reply. The court rejects Dr. Jenal's contention that it must ignore Dr. Murphy's affirmation because Murphy purportedly was

not familiar with applicable standards of care that were specific to the practice of dentistry in New York, and the court notes that, in fact, Dr. Murphy referenced violations of the standards set forth in the Education Law.

Moreover, the records upon which Dr. Murphy actually relied in connection with the facts underlying the plaintiff's claim were the same records of Drs. Nguyen, Lazare, Kramer, and Seligman that the defendant submitted, and upon which the defendant relied. A plaintiff "may rely on unsworn reports and uncertified medical records if they were submitted by defendants . . . or were referenced in the reports of physicians who examined plaintiff on their behalf, and [defendants] submitted the reports of their experts" (*Siemucha v Garrison*, 111 AD3d 1398, 1399 [4th Dept 2013], quoting *Feggins v Fagard*, 52 AD3d 1221, 1223 [4th Dept 2008]; see *Brown v Achy*, 9 AD3d 30, 32 [1st Dept 2004]). Although Dr. Murphy referred to other dental records, he did not do so for the purpose of commenting or relying upon any facts contained therein but, rather, employed them as hypothetical treatment plans that he could employ in formulating his opinions with respect to future treatments that he believed that the plaintiff would need to correct her continuing conditions. Courts have repeatedly permitted a medical expert testifying at trial to base his or her opinion as to the need for, and nature of, a plaintiff's future medical treatment upon hypothetical questions (see, e.g., *Ioffe v Seruya*, 134 AD3d 993, 996 [2d Dept 2015]). A fortiori, an expert supplying an expert affirmation in connection with a summary judgment motion may premise an opinion based upon a hypothetical future treatment plan. Moreover, contrary to the opinion set forth in Dr. Jenal's supplemental affirmation, it is quite clear from Dr. Murphy's affirmation that the photographs and radiographs annexed to the latter's affirmation were from Dr. Nguyen's records, to which the defendant had access.

With respect to the merits of the motion, the court concludes that, although the defendant established his prima facie entitlement to judgment as a matter of law through his submissions, including Dr. Jenal's initial expert affirmation, the plaintiff raised triable issues of fact, with Dr. Murphy's affirmation, as to whether the defendant departed from good and

accepted practice by failing to take necessary and appropriate radiographic studies, by designing, fabricating, and inserting veneers and/or crowns that were oversized, ill-fitting, and improperly contoured, by failing to recognize and take precautions necessary to avoid adverse vertical dimensions, and by failing to take into account the plaintiff's history of abnormal occlusion, and as to whether those departures caused or contributed to the failure of the veneers and crown, the plaintiff's concomitant pain, and the need for a full corrective restoration of all of the teeth that the defendant had treated. Nor does the fact that there was a five-year gap in the plaintiff's follow-up treatment negate the plaintiff's allegations of malpractice and proximate cause.

Finally, the court notes that, although Dr. Murphy's affidavit was sworn to and executed in Maryland, it was not accompanied by the certificate of conformity required by CPLR 2309. A certificate of conformity is a written instrument, pursuant to which a person qualified by the laws of the state in which an affidavit or affirmation is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or affirmation has indeed been drafted, executed, and notarized in conformity with the laws of that state. The absence of the certificate of conformity, however, does not require the court to disregard or reject Dr. Murphy's affidavit, as the failure to include a certificate of conformity is a mere irregularity that may be cured by the submission of the proper certificate nunc pro tunc (*see Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]; *Parra v Cardenas*, 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]). Consequently, the court directs the plaintiff to serve and file the necessary certificate of conformity on or before May 30, 2025.

Accordingly, it is,

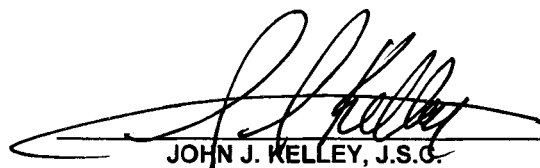
ORDERED that the defendant's motion is denied; and it is further,

ORDERED that ~~the~~, on the court's own motion, the attorneys for all of the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on May 13, 2025, at 12:00 noon, at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection; and it is further,

ORDERED that, on or before May 30, 2025, the plaintiff shall serve and file a certificate of conformity in connection with the affidavit of her expert dentist, Kevin G. Murphy, DDS, M.S.

This constitutes the Decision and Order of the court.

4/15/2025
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER		