

Reichman v Hertz

2025 NY Slip Op 34997(U)

December 19, 2025

Supreme Court, Kings County

Docket Number: Index No. 536694/22

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 19th day of December, 2025.

P R E S E N T:

HON. ELLEN M. SPODEK,
Justice.
-----X

PEARL REICHMAN,
Plaintiff,

-against-

MARC B. HERTZ, D.D.S.,
and MARC B. HERTZ, D.D.S., P.C.,
Defendants.
-----X

DECISION AND ORDER

Index No. 536694/22

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affirmation, and Exhibits Annexed	37-50
Affirmation in Opposition and Exhibits Annexed	52-54
Reply Affirmation	58

Upon the foregoing papers in this action to recover damages for dental malpractice and lack of informed consent, and after oral argument held on September 3, 2025, the joint motion of defendants Marc B. Hertz, D.D.S., and Marc B. Hertz, D.D.S., P.C. (collectively, defendant), for summary judgment dismissing all claims of plaintiff Pearl Reichman (plaintiff or patient) against them is *denied in its entirety*.

In April 2021, the patient allegedly sustained permanent right inferior alveolar nerve/right mental nerve (collectively, IAN) damage as a result of one or more of the following: (1) defendant’s improper extraction of her mandibular second molar (tooth #31); (2) his filling and packing of the tooth socket with an inappropriate type of bone graft

material – a synthetic product called Augma Bond Apatite (the BG material) – directly touching the IAN canal; and (3) his belated removal of the BG material with a curette instrument ten days post-extraction.

In December 2022, the patient commenced this action, alleging separate claims to recover damages for dental malpractice and lack of informed consent. After the issue was joined and discovery was completed, defendant timely moved for summary judgment dismissing both claims, based on the deposition testimony of the parties, an expert's affidavit, and certified dental records. In opposition, plaintiff submitted an expert's affirmation among other supporting documents.

“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.” *Id.* “To defeat summary judgment, [plaintiff as] 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 [defendant's] prima facie showing.” *Zito v Jastremski*, 84 AD3d 1069, 1070-1071 (2d Dept 2011), *lv dismissed in part, denied in part* 17 NY3d 885 (2011).

“In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party.” *Many v Lossef*, 190 AD3d 721, 722-

723 (2d Dept 2021). “Summary judgment is not appropriate in a dental malpractice action where . . . the parties adduce conflicting medical expert opinions, since conflicting expert opinions raise credibility issues which are to be resolved by the factfinder.” *Id.* at 723.

The record before the Court is replete with multiple triable issues of material fact as to whether (among other issues):

(1) According to plaintiff’s expert, “the 3-D Cone Beam CT (CBCT) taken at the office of [defendant] on March 4, 2021 [, one month prior to the extraction,] [showed] that the distal root [of tooth #31] *actually touche[d]* the [IAN] canal.” Pl. Expert Aff. at ¶¶ 5, 10 (emphasis added). *Compare* defendant’s expert affirmation, ¶ 5 (opining that tooth #32 was “near” the IAN).

(2) According to plaintiff’s expert, defendant “caused *a hole in the roof* of the [IAN] canal” or “opened up *a hole in the roof* exposing the [IAN] canal,” by extracting tooth #3. Pl. Expert Aff. ¶¶ 4-5, 7, 10 (emphasis added). Conversely, defendant’s expert opined that defendant “did not observe any communication between the socket and the [IAN] canal.” Def. Expert Aff. at ¶ 5

(3) Defendant’s erroneous interpretation of the CBCT films that the [IAN] . . . canal was totally intact . . . led him to place [the BG] material without a [membrane] barrier to protect the [IAN]” Pl. Expert Aff at ¶ 6.

(4) Defendant’s placement of the BG material in the form of the synthetic Augma Bond Apatite was inappropriate in the patient’s case because, in the opinion of her expert, Augma Bond Apatite “causes two reactions within a person. One is the exothermic heat

reaction [*i.e.*, the heat-releasing reaction] and the other is the aut[h]igenic response to the foreign material [*i.e.*, the formation of foreign material in place].” Pl. Expert Aff at ¶ 9. On the other hand, defendant’s expert broadly opined that defendant “did not deviate from the standard of care in . . . his placement of bone graft material,” but did not specifically address plaintiff’s expert’s contention that the placement of Augma Bond Apatite was inappropriate in the patient’s case. Def. Expert Aff at ¶ 6.

(5) According to plaintiff’s expert, defendant should have used “a PRP [platelet-rich plasma] or PRF [platelet-rich fibrin] plug or [a] dental collagen plug” instead of Augma Bond Apatite. Defendant’s expert is silent on this point. Pl. Expert Aff at ¶ 10.

(6) In the opinion of plaintiff’s expert (in ¶ 12 of his affirmation), the “[BG] material placed by [defendant] being in contact with the [IAN], was the initial proximate cause of the injuries suffered by [plaintiff],” defendant allowed the BG “material . . . to remain for 10 days despite [her] [interim] complaints of pain is the proximate cause of a worsening of [her] injuries. . . . Additionally, the removal process of the [BG] material by [defendant] is [another] proximate cause of [the] worsening of [her] injuries . . . , all directly leading to [her] permanent injuries.” Pl. Expert Aff at ¶ 12. Conversely, defendant’s expert averred that “[t]here is no way to know what the actual cause of the [IAN] injury was.” Def. Expert Aff. at ¶ 6.

Dismissal of plaintiff’s dental malpractice claim is unwarranted. *See Foley v Jarit*, 173 AD3d 1142, 1143 (2d Dept 2019); *Kozlowski*, 102 AD3d at 753; *Singh v Boodhoo*, 17 AD3d 345, 346 (2d Dept 2005).

Similarly unwarranted is dismissal of plaintiff's informed consent claim. "To establish a cause of action for malpractice based on lack of informed consent, a 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." *Folkes v Brooklyn Oak Dental Care, P.C.*, 241 AD3d 508, 509-510 (2d Dept 2025) (internal quotation marks omitted). "The mere fact that the plaintiff signed a consent form does not establish the defendant[']s prima facie entitlement to judgment as a matter of law." *Schussheim v Barazani*, 136 AD3d 787, 789 (2d Dept 2016).

Here, defendant's expert failed to aver that a reasonably prudent patient would not have declined to undergo the extraction and the BG material placement if he or she had been informed of the potential complications. *See Folkes v Brooklyn Oak Dental Care, P.C.*, 241 AD3d 508, 510 (2d Dept 2025); *Huichun Feng v Accord Physicians, PLLC*, 194 AD3d 795, 797 (2d Dept 2021); *Koi Hou Chan v Sammi Yeung*, 66 AD3d 642, 644 (2d Dept 2009); *Haggerty v Wyeth Ayerst Pharm.*, 11 AD3d 511, 513 (2d Dept 2004). Further, the consent forms signed by plaintiff (one for the tooth #31 extraction, and the other for the BG material placement) do not establish, as a matter of law, that a reasonable, fully informed person in her position would have undergone the procedures despite the risk

for permanent right-sided IAN damage. *See Kozlowski*, 102 AD3d at 753. Nor did defendant establish the content of the additional disclosures made beyond those contained in the consent forms. The parties' respective deposition testimony raised factual disputes between plaintiff and defendant as to the content of the additional warnings and information (if any) he may have orally given her prior to the extraction, as well as prior to the placement of the BG material. *See Wilson-Toby v Bushkin*, 72 AD3d 810, 811 (2d Dept 2010).

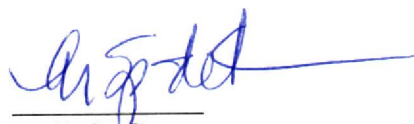
The Court considered the parties' remaining contentions and found them either moot or unavailing in light of its determination. All relief not expressly granted herein is denied.

Plaintiff's counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on the defense counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The parties are directed to appear ^{virtually} ~~in person~~ for a settlement conference in MMTRP on January 26, 2025 at 10:45 a.m.

This constitutes the Decision and Order of the Court.

ENTER,



J. S. C.

HON. ELLEN M. SPODEK

KINGS COUNTY CLERK'S OFFICE

DEC 22 2025

FILED