

Koutellos v Schwartzstein

2026 NY Slip Op 30097(U)

January 6, 2026

Supreme Court, New York County

Docket Number: Index No. 805129/2021

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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MARCIA KOUTELLOS,

Plaintiff,

- v -

SOL SCHWARTZSTEIN, D.D.S, CENTRAL PARK SOUTH
DENTAL, GARY J. RUTH, and ORAL & MAXILLOFACIAL
SURGERY OF NYC,

Defendants.

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INDEX NO. 805129/2021

MOTION DATE 01/07/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and oral arguments being heard, the Defendant Sol Schwartzstein, D.D.S. ("Dr. Schwartzstein") moves for an order granting summary judgment, pursuant to CPLR 3212, dismissing all of Plaintiff's claims against him.1

Plaintiff opposes the motion.

BACKGROUND

This dental malpractice action arises from the dental care and treatment rendered to Plaintiff by the Moving Defendant. The gravamen of Plaintiff's allegations is that Dr. Schwartzstein was negligent from March 14, 2019, to March 19, 2019, and, as a result, Plaintiff sustained injuries including severe and permanent serious personal injuries, mental anguish, conscious pain and suffering, economic loss, and medical expenses.

1 The Complaint is dismissed as to Defendant Dr. Ruth pursuant to NYSCEF document number 150.

Plaintiff first presented to Dr. Schwartzstein on February 4, 2019 with complaints of hot and cold sensitivity and pain on tooth #18. Images were taken of teeth #18 and upon examination it was noted that Plaintiff had a fractured onlay with open distal margin. On March 14, 2019, Dr. Schwartzstein removed the fractured onlay from Plaintiff's tooth #18. Dr. Schwartzstein took an impression for a new crown and cemented a temporary crown in place. On March 15, 2019, Plaintiff was again seen by Dr. Schwartzstein's office because her temporary crown had fallen out, and it was noted that tooth #18 has a subgingival fracture line. Thereafter, on March 18, 2019, Dr. Schwartzstein evaluated tooth #18, and recommended extraction of the tooth as it was not restorable. On March 19, 2019, Dr. Schwartzstein attempted to extract the tooth. During the extraction, Dr. Schwartzstein determined that the root also needed to be removed due to the fracture under the bone crest, so Dr. Schwartzstein stopped the procedure and referred the Plaintiff to Dr. Ruth to complete the root removal, which was successfully performed.

Plaintiff alleges that Dr. Schwartzstein was negligent in performing the removal of the fractured onlay on March 14 and failing to timely, properly and appropriately evaluate and treat Plaintiff's subgingival fracture line on March 14; failing to appropriately refer Plaintiff to a specialist on March 14; and improperly perform the surgery on March 19. Specifically, Plaintiff alleges that Dr. Schwartzstein unsuccessfully attempted to perform a tooth extraction on Plaintiff, which resulted in tooth #18 further fracturing under the bone crest. Plaintiff alleged injuries include a subgingival fracture line with the fractured root being left in Plaintiff's mouth following an uncompleted surgery, together with severe and permanent serious personal injuries, severe and permanent mental anguish, conscious pain and suffering, economic loss, and medical expenses.

Plaintiff commenced this action by service of a Summons and Verified Complaint on May 3, 2021.

Defendant Dr. Schwartzstein joined issue by interposing a Verified Answer on September 17, 2021, and now moves for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Defendants and dismissing the complaint.

Plaintiff opposes the motion.

SUMMARY JUDGMENT AS TO MEDICAL MALPRACTICE

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by submitting admissible evidence that demonstrates the absence of material issues of fact that would require a trial (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see also Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). In a medical malpractice action, a movant must provide evidentiary proof in the form of expert opinions and factual evidence establishing that the defendant complied with accepted standards of medical care and practice and/or the defendant's conduct was not a proximate cause of plaintiff's alleged injuries (*see Alvarez*, 68 NY2d 325 [1986]).

In support of his motion, Defendant Dr. Schwartzstein's expert Harrison Linsky, D.D.S., M.D. ("Dr. Linsky"), a dentist and board-certified physician in Oral and Maxillofacial Surgery, opines, to a reasonable degree of medical certainty, Dr. Schwartzstein acted appropriately when performing the extraction on March 19, 2019 and did not depart from the standard of care. Specifically, Dr. Linsky opines that Dr. Schwartzstein took appropriate imaging prior to performing the extraction, and that Dr. Schwartzstein acted appropriately upon noticing that the tooth had fractured by appropriately referring the Plaintiff to another doctor for immediate assistance that same day. Dr. Linsky further opines that nothing about Dr. Schwartzstein's surgical technique is the cause of Plaintiff's injuries.

As a result, based on Dr. Linsky's expert affirmation, the Court finds that Defendant has demonstrated his prima facie entitlement to summary judgment as a matter of law.

Once the defendant physician makes a prima facie showing for summary judgment, the burden shifts to the plaintiff to demonstrate, by admissible evidence, the existence of a material issue of fact that requires resolution at trial (*see Zuckerman v City of New York*, 49 NY2d 557, 558-59 [1980]). In a medical malpractice action, plaintiff must show, through a medical expert, both a deviation from accepted standards of medical care and that the treatment rendered by the moving defendant was a proximate cause of plaintiff's injuries (*see e.g., Prete v Rafla-Demetrious*, 224 AD2d 674 [2d Dept 1996]; *Canter v Mulnick*, 60 NY2d 689 [1983]; *see also Fridovich v David*, 188 AD2d 984 [3d Dept 1992]; *Ferrara v South Shore Orthopedic Associates*, 178 AD 2d 364 [1st Dept 1991])

Plaintiff, in opposition, submits the expert affirmation of board-certified dentist Adina Carrel, D.M.D. ("Dr. Carrel"), who opines, to a reasonable degree of medical certainty, that Dr. Schwartzstein deviated from acceptable dental practice while rendering treatment to the Plaintiff and caused the subgingival fracture to Plaintiff's tooth #18 on March 14, 2019. Specifically, Dr. Carrel opines that the manner in which Dr. Schwartzstein removed the onlay on March 14, 2019 caused the tooth to fracture. Dr. Carrel notes that the x-ray of the tooth taken after Dr. Schwartzstein's failed extraction attempt shows that the tooth cracked along the diagonal fracture line visible in the prior x-rays. Dr. Carrel further opines that Dr. Schwartzstein improperly performed a crown replacement procedure on March 19 by pushing pieces of the Plaintiff's tooth into her jawbone and improperly removed the fractured tooth causing the root to be pushed deeper into her jaw resulting in emergency surgery which included bone grafting surgery and tooth extraction. As a result, Dr. Carrel opines that Dr. Schwartzstein departed from good and accepted

standards of dental care, and proximately caused the subgingival fracture to Plaintiff's tooth #18 on March 14, 2019.

As a result, the Court finds that Dr. Carrel raises triable issues of fact sufficient to rebut the defendant's prima facie showing to summary judgment. "Summary judgment is not appropriate ... [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; see *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the Plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]; see also *Smith v Cattani*, 2 AD3d 259, 260 [1st Dept 2003]; *Johnson v Staten Is. Med. Group*, 82 AD3d 708, 709 [2d Dept 2011]). A defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (see *Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021], see *Johnson v Staten Is. Med. Group*, 82 AD3d 708, 709 [2d Dept 2011] [holding that where the plaintiff signed an informed consent form, the form itself was sufficient to carry the defendants' prima facie burden on summary judgment]).

In support of his motion, Dr. Linsky opines that the Plaintiff signed a consent form on March 19, 2019, which indicated the risk of a small fragment of root or bone being left in the jaw intentionally when its removal is not appropriate. It is Dr. Linsky's opinion that the situation that occurred was noted as a risk of the procedure which the Plaintiff was advised of prior to the procedure and consented to when she signed the consent form.

Based on the expert affirmation of Dr. Linsky, the Court finds that Defendant Dr. Schwartzstein has satisfied his prima facie burden regarding Plaintiff's lack of informed consent cause of action.

Contrary to the opinion of Dr. Linsky, Plaintiff opines that the root fragments were left in place because Dr. Schwartzstein caused the tooth to erupt, not because the root fragments were left in place, contrary to the risk warned of in the consent form. As a result, the Court finds that Plaintiff has raised a triable issue of fact regarding the lack of informed consent claim against Dr. Schwartzstein (*Rosario v Our Lady of Consolation Nursing & Rehab. Care Ctr.*, 186 AD3d 1426 [2d Dept 2020]; *Boston v Weissbart*, 62 AD3d 517 [1st Dept 2009]).

Based on the foregoing, it is hereby

ORDERED, that Defendant Dr. Schwartzstein's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the Plaintiff is to serve a copy of this order upon all parties with notice of entry within twenty (20) days of entry of this order; and it is further

ORDERED that the remaining parties shall appear for a virtual settlement/pre-trial conference on June 17, 2026, at 10:00am, after consultation with the Court’s Alternative Dispute Resolution (ADR) department. The ADR Order and specific date, time, and appearance link for the virtual conference shall be set forth in subsequent correspondences by the Court.

This constitutes the decision and order of the Court.

1/6/2026
DATE

Kathy J. King
KATHY J. KING, J.S.C.

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