

**Tuber v New York Univ. Sch. of Dentistry**

2012 NY Slip Op 32916(U)

December 7, 2012

Sup Ct, New York County

Docket Number: 100753/2011

Judge: Joan B. Lobis

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

PRESENT: LOBIS  
Justice

PART 6

SCOTT TUBEN  
- v -  
NY UNIVERSITY SCHOOL OF DISTANCE

INDEX NO. 100753/11  
MOTION DATE 8-28-12  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 23 were read on this motion to (for summary judgment)

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-16</u>
<u>17-22</u>
<u>23</u>

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion DEC 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED BY MEMORANDUM  
WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 11/30/12

JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6

-----X  
SCOTT L. TUBER,

Plaintiff,

Index No. 100753/2011

-against-

Decision and Order

NEW YORK UNIVERSITY  
SCHOOL OF DENTISTRY,

**FILED**

Defendant.

-----X  
JOAN B. LOBIS, J.S.C.:

DEC 07 2012

Defendant New York University College of Dentistry (NYUCOD) moves for summary judgment pursuant to C.P.L.R. § 3212 in this medical malpractice action. Plaintiff Scott Tuber opposes the motion. For the reasons stated below, the motion is granted in part and denied in part.

NEW YORK  
COUNTY CLERK'S OFFICE

NYUCOD operates a dental clinic staffed by dental students who are supervised by NYUCOD faculty. Plaintiff Scott Tuber was treated at NYUCOD for a variety of dental issues from July 2009 through December 2010. The treatment is alleged to have affected teeth 2, 6, 7, 20, 29, and 31. Over the course of that treatment he signed several consent forms. Plaintiff sued in June 2011, alleging that NYUCOD was medically negligent in its care and that the treatments were performed without informed consent.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any

departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy the burden, defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden then shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). To meet that burden, plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged. Roques, 73 A.D.3d at 207 (internal citations omitted). Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep’t 2011); Fryc v. Montefiore Med. Ctr., 70 A.D.3d 15, 25 (1st Dep’t 2009). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to treatment and its reasonably foreseeable risks and benefits and “that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]” Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep’t 2009); see also Public Health Law § 2805-d(1).

After reviewing all the submissions and argument of counsel, I find that material issues of fact exist as to treatment relating to all teeth in contention except tooth 2. In this case, the record shows that NYUCOD treated tooth 2 beginning in January 2010. Defendant’s expert, Adina Carrel, D.M.D., opined that Defendant’s treatment of that tooth was within good and accepted medical practice. Plaintiff’s expert, Robert Corwin, D.D.S., did not dispute that claim. Accordingly,

summary judgment as to claims relating to that tooth is appropriate.

Genuine issues of material fact remain, however, as to Plaintiff's other contentions of medical malpractice. The experts disagree whether the Defendant acted within good and accepted medical practice regarding Defendant's treatment of teeth 20, 29, and 31 and whether any departure caused plaintiff's alleged injuries. Plaintiff's expert further alleges following examination of plaintiff and a review of the medical records in this case that during treatment of tooth 31 on July 20, 2009, the Defendant chipped a porcelain laminate on plaintiff's tooth 6, which fell out later the same day and had to be reattached the next day. Plaintiff alleges that on July 21, 2009, the dentist chipped the incisal edge of the laminate of Plaintiff's tooth 7 while adjusting the occlusion on tooth 31. That chip has not been repaired.

As to plaintiff's claim of lack of informed consent, this Court finds genuine issues of material fact remain on this issue. Defendant alleges that several consents to treatment were obtained from Plaintiff over time. Plaintiff, however, claims he consented to only one treatment plan, in January 2010, and he claims that the scope of his consent to treatment was narrower than the scope that Defendant claims. This dispute over informed consent presents a question for the fact-finder.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is granted to the extent of granting partial summary judgment for Defendant and against Plaintiff as to Plaintiff's claims

relating to tooth 2; and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to all remaining claims; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 345  
on December 11, 2012, at 9:30 am.

Dated: November 30, 2012

ENTERED:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

**FILED**  
DEC 07 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

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DEC 07 2012  
NEW YORK  
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