Rose v Tucker
2016 NY Slip Op 32529(U)
October 17, 2016
Supreme Court, Suffolk County
Docket Number: 09-3189
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-3189
CAL. No. 14-02153DM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-22-15
ADJ. DATE 10-23-15
Mot. Seq. # 004 - MD

KEVIN ROSE,

Plaintiff,

- against -

DR. MICHAEL TUCKER, D.D.S.,

Defendant.

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Upon the following papers numbered 1 to 79 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-61 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 62-72 ; Replying Affidavits and supporting papers 73-79 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendant Michael Tucker, D.D.S., for, inter alia, summary judgment dismissing the complaint against him is denied.

Plaintiff Kevin Rose commenced this dental malpractice action against defendant Michael Tucker, D.D.S. to recover damages for injuries allegedly sustained by him as a result of negligent dental care and treatment and lack of informed consent. By verified bill of particulars, plaintiff alleges that Dr. Tucker's treatment rendered on July 20, 2005 through October 9, 2006 departed from acceptable dental practice and caused plaintiff to suffer various injuries, including a temporomandibular joint dysfunction. Specifically, plaintiff alleges that Dr. Tucker improperly shaved down four of plaintiff's front teeth, failed to diagnose a class III malocclusion, and failed to refer plaintiff to an orthodontist or oral surgeon.

Dr. Tucker now moves for summary judgment dismissing the complaint on the grounds that his treatment of plaintiff did not depart from accepted dental practice, and that he was not the cause of plaintiff's alleged injuries. Alternatively, Dr. Tucker seeks dismissal of the portions of the allegations of dental malpractice based on treatment rendered prior to January 27, 2006 and other related relief. In support of the motion, Dr. Tucker submits copies of the pleadings, the verified bill of particulars, the

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transcripts of the parties' deposition testimony, plaintiff's dental records, and an affirmation of Dr. Arnold Jutkowitz, D.M.D.

Plaintiff testified that he began treating with Dr. Tucker in 1985 for general dental care, and that in August 2006 he sought treatment for a tooth that he chipped while chewing. He testified that he wanted another front tooth treated for cosmetic reasons, and that he complained to Dr. Tucker several times throughout the years that he was concerned about the condition of his front teeth. He testified that Dr. Tucker discussed a treatment plan with him, which included bonding the front four teeth and shaving them down. He testified that Dr. Tucker gave him a night guard, but he did not wear every night. Plaintiff testified that Dr. Tucker shaved four of the lower front teeth and bonded two of the upper, front teeth. Plaintiff testified his father commented on the color of plaintiff's teeth being "off," but he did not return to Dr. Tucker's office until October 2006, when he complained that his teeth were sharp and sensitive, and that he was unable to bite down with his front teeth. He testified that Dr. Tucker grinded the sharp edges with a polishing tool and told him that everything needed time to settle, but that it "looked good." Plaintiff testified that in February 2007 he began treating with Dr. William O'Shaugnessey who examined his teeth and polished the four lower front teeth. He testified that in August 2007, he began experiencing new complaints of clicking and popping in his jaw and was unable to chew. He testified that he presented to Dr. Mark Slovin, who examined him and referred him to Dr. Risa Beck. Plaintiff testified that he sought treatment from an orthodontist, Dr. Weinberg, in September 2007, who told him he would need braces, but that he should consult with Dr. Beck first to treat his TMJ condition. He explained his various treatment plans with various doctors, and testified that they allegedly told him that his injuries were caused by the shortening of his four front teeth and a class III malocclusion that was not treated.

Dr. Michael Tucker testified that he received his license to practice dentistry in 1973, and that plaintiff became his patient on October 5, 1985. He testified from the plaintiff's dental records to the dates that plaintiff had his teeth cleaned and had x-ray pictures taken, and described the fillings plaintiff received throughout the years. Dr. Tucker testified that plaintiff had an "edge to edge bite" but had no symptoms which would cause him to recommend plaintiff to an orthodontist. According to the notes prepared by his hygienist in July 2005, plaintiff needed a night guard, as his front teeth were beginning to wear. He testified that plaintiff returned in June 2006 for a routine examination and cleaning and that on August 15, 2006, plaintiff presented with a mesial incisor chip on tooth #9 and wear facets on tooth #8. Dr. Tucker testified that he discussed the treatment plan with plaintiff, and that he bonded tooth #8 and tooth #9. He testified that he abraded the subject teeth to enable proper bonding, but that he did not "shave" or "grind" the subject teeth. Dr. Tucker was asked about other treatment alternatives such as crowns and veneers and testified that plaintiff had an "edge to edge bite." Such occlusion, according to Dr. Tucker, is not conducive for veneers or crowns. He explained that a veneer would not last long and that a crown involved an unnecessarily aggressive approach which has the potential to fracture, among other things. Dr. Tucker testified that the following day plaintiff came to his office to pick up the night guard, which he typically recommends for patients who grind their teeth, and that on October 9, 2006, plaintiff presented to his office with complaints that his bottom teeth felt sharp. He testified that he polished tooth #23, tooth #24, tooth # 25, tooth #26 and the back of tooth #8, and denied shaving plaintiff's teeth down.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

The requisite elements of proof in a medical or dental malpractice action are a deviation or departure from accepted standards of dental practice, and evidence that such departure was a proximate cause of the plaintiff's injuries (*see* ***Liyanage v Amann,*** 128 AD3d 645, 8 NYS3d 390 [2d Dept 2015]; ***Chan v Toothsavers Dental Care, Inc.***, 125 AD3d 712, 4 NYS3d 59 [2d Dept 2015]; ***Kozlowski v Oana***, 102 AD3d 751, 959 NYS2d 500 [2d Dept 2013]; ***Zito v Jastremski***, 58 AD3d 724, 871 NYS2d 717 [2d Dept 2009]). A defendant seeking summary judgment on a dental malpractice claim has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted dental practice, or that the plaintiff was not injured by such treatment (***McGuigan v Centereach Mgt. Group, Inc.***, 94 AD3d 955, 942 NYS2d 558 [2d Dept 2012]; ***Sharp v Weber***, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To satisfy his or her burden, a defendant dentist must establish through medical records and expert affidavits that he or she did not depart from accepted dental practice in the treatment of the plaintiff (***Koi Hou Chan v Yeung***, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]; ***Jones v Ricciardelli***, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]). Once demonstrated, the burden shifts to 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* ***Landry v Jakubowitz***, 68 AD3d 728, 889 NYS2d 677 [2d Dept 2009]; ***Luu v Paskowski***, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]).

Here, defendant submits the affirmation of Arnold Jutkowitz, D.M.D, a licensed dentist in the State of New York. Dr. Jutkowitz states that he has been in practice since 1970 and has extensive experience in cosmetic and restorative dentistry. He states that he has reviewed the bill or particulars, the transcripts of the parties' deposition testimony, plaintiff's dental records, and a report from Dr. Alan Kucine, who performed an independent dental examination on plaintiff. Dr. Jutkowitz opines, with a reasonable degree of dental certainty, that Dr. Tucker acted in accordance with acceptable dental standards and his treatment of plaintiff was not a cause of his injuries. Dr. Jutkowitz states that he reviewed the x-ray images of plaintiff's teeth and opines that the height of plaintiff's teeth never changed over his course of treatments with Dr. Tucker. He opines that Dr. Tucker did not shave or grind the subject teeth. Dr. Jutkowitz opines that plaintiff's "edge to edge bite," while less aesthetic, is not

pathological and does not have to be changed. He opines that it is common for people to have class III occlusions and they are not considered abnormal and do not require a referral to an orthodontist. According to Dr. Jutkowitz, there was no evidence that plaintiff's occlusion was causing plaintiff any complaints other than wear and tear which Dr. Tucker properly addressed with the bonding procedure. Dr. Jukowitz extensively details the proof that forms the basis of his opinion that Dr. Tucker only polished plaintiff's lower front four teeth and did not shave or grind them. Further, he opines that plaintiff's alleged injuries were caused by a history of bruxism, for which the night guard was prescribed, but plaintiff failed to wear it. He opines that Dr. Tucker properly monitored plaintiff's teeth, and that his treatment of plaintiff did not depart from acceptable dental practice and was not a cause of plaintiff's injuries.

Dr. Tucker established, prima facie, his entitlement to summary judgment dismissing the complaint against him by proffering, among other things, the affirmation of Dr. Jutkowitz, who opines that Dr. Tucker's treatment of plaintiff was in accordance with medically accepted standards of dental practice, that such treatment did not constitute a departure from same, and was not a proximate cause of plaintiff's alleged injuries (***Garcia v Richer***, 132 AD3d 809, 18 NYS3d 401 [2d Dept 2015]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176.

In opposition to the motion, plaintiff submits, among other things, the affidavit of Leonard Goldstein, D.D.S. In his affidavit, Dr. Goldstein states that he is licensed to practice dentistry in the State of New York since 1967. He states that he has reviewed plaintiff's dental records, discovery materials and transcripts of the deposition testimony given by plaintiff and defendant, and the report of the independent examination conducted by Dr. Alan Kucine. He opines, with a reasonable degree of dental certainty, that the care and treatment rendered to plaintiff by Dr. Tucker departed from acceptable dental practice and was a proximate cause of plaintiff's injuries. Dr. Goldstein opines that plaintiff's "edge to edge bite" is considered a Class III malocclusion and "clear pathology" that Dr. Tucker failed to appreciate and properly refer to an orthodontist. He opines that plaintiff's injuries were caused by the shaving, grinding and reduction of tooth #23, tooth #24, tooth #25, tooth# 26. He states that he reviewed the x-ray images of plaintiff's teeth and disagrees with defendant's expert regarding their height. He opines that the various x-ray images do demonstrate a change in height. Dr. Goldstein opines that a night guard would not have prevented plaintiff's teeth from suffering from wear and tear as it would not prevent the wear and tear during the daytime, and the acceptable standard of dental care was for Dr. Tucker to refer plaintiff to an orthodontist, among other things.

The affirmation of plaintiff's expert, Dr. Goldstein, is sufficient to raise triable issues of fact as to whether Dr. Tucker breached the duty of care owed to plaintiff by departing from acceptable dental practice and whether such departure was a cause of plaintiff's injuries. In a medical malpractice action, conflicting expert opinions require denial of a summary judgment motion (***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]; ***McKenzie v Clarke***, 77 AD3d 637, 908 NYS2d 370 [2d Dept 2010]). Such issues of credibility are properly determined by the trier of fact (***Wexelbaum v Jean***, 80 AD3d 756, 915 NYS2d 161 [2d Dept 2011]).

With respect to the cause of action for lack of informed consent, the elements are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks asocited with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed n the same circustances, (2) that a reasonably prudent patient in the same position would not have unergone 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" (***Spano v Bertocci***, 299 AD2d 335, 337-338, 749 NYS2d 275 [2d Dept 2002]). For the claim to be actionable, the defendant must have engaged in a "non-emergency treatment, procedure o surgery" or " diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Furthermore, an essential element of a cause of action for lack of informed consent is tat there be an affirmative violation of the plaintiff's physical integrity (***Ellis v Eng***, 70 AD3d 88, 895 NYS2d 462 [2d Dept 2010]). Here, the evidence presents triable issues of fact as to whether Dr. Tucker shaved plaintiff's teeth or merely polished them. Accordingly, the application for summary judgment dismissing the complaint is denied.

The branches of the motion which seek partial summary judgment pursuant to CPLR 214-a dismissing plaintiff's claims of malpractice for treatment rendered to plaintiff prior to July 27, 2006 on the ground that it is time barred and other related relief are denied. Generally, a cause of action alleging dental malpractice accrues on the date of the alleged wrongful act or omission, and the statute of limitations begins running on that date (***Leifer v Parikh***, 292 AD2d 426, 739 NYS2d 415 [2d Dept 2002]). CPLR 214-a prescribes that an action for medical, dental or podiatric malpractice "must be commenced within two years and six months of the act, omission or failure complained or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." Where a patient is undergoing a "continuous course of treatment" with the physician with respect to the same condition or complaint that gives rise to the lawsuit, the statute of limitations will not begin to run until the end of the course of treatment (*see* ***Nykorchuck v Henriques***, 78 NY2d 255, 573 NYS2d 434 [1991]; ***Fraumeni v Oakwood Dental Arts, LLC***, 108 AD3d 495, 968 NYS2d 561 [2d Dept 2013]).

Here, plaintiff's last date of treatment with Dr. Tucker was on October 9, 2006 and this action was commenced on January 27, 2009. Dr. Tucker argues that any treatment rendered prior to July 27, 2006 is time barred and does not fall within the continuous course of treatment exception as the treatment was merely for routine examinations and cleaning. However, due to the conflicting testimony of plaintiff and Dr. Tucker as to the nature and context of the treatments, the court cannot conclude as a matter of law that they represent continuous treatment within the meaning of CPLR 214–a, so as to toll the statute of limitations (***Zito v Jastremski,*** 58 AD3d 724, 871 NYS2d 717 [2d Dept 2009]).

Dated: 10-17-16

Hon. Denise R. Molly
A.J.S.C.

_____ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**