

Thomas v Madison Ave. Smiles Dental, PC
2017 NY Slip Op 30329(U)
February 6, 2017
Supreme Court, New York County
Docket Number: 805418/2014
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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CINDY K. THOMAS,

Plaintiff,

Index No. 805418/2014

-against-

Decision and Order

MADISON AVENUE SMILES DENTAL, PC, and
DR. FAUD H. MALIK,

Defendants.

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In this medical malpractice action, defendants Madison Avenue Smiles Dental, PC and Dr. Faud H. Malik (defendant) currently move for summary judgment. Plaintiff opposes the motion in its entirety. For the reasons below, the motion is denied.

Plaintiff's claims stem from dental treatment she underwent between April 1, 2014 and April 25, 2014. The purpose of the treatment was to close a gap between two of her upper front teeth, to clean up spots and stains, and to fix the bridge between her two lower left rear implants. Defendant testified at deposition that his treatment plan proposed changes to the crowns on teeth seven through ten, as well as debridement and cleaning of the area around teeth twelve through fifteen, sectioning the bridge around tooth thirteen, and providing composite fillings at teeth twenty-two and twenty-seven. Plaintiff acknowledged at deposition that defendant discussed the proposed treatment generally. Plaintiff did not sign an informed consent form for the crown and bridge work. Defendant states that he went into detail about the treatment, however, and warned plaintiff both of the possible need for further treatment and of the fact that her the implants on the upper left side of her mouth were compromised. He recalls telling plaintiff she had the option of no treatment and the use of a partial denture if her implants failed, and he states that he

obtained plaintiff's informed consent as to all aspects of the plan. On April 3, 2014, at plaintiff's second visit, defendant removed and replaced plaintiff's three pre-existing crowns, prepared a crown for a fourth tooth, sectioned the bridge, and performed minor gum surgery around tooth thirteen. Following this work, plaintiff returned for an adjustment on April 7, 2014, for suture removal on April 11, 2014, on April 25, 2014 for a trial insertion of the crowns. Plaintiff allegedly approved the crowns, which defendant cemented on that date, and which defendant adjusted at plaintiff's follow up appointment on May 9, 2014. Plaintiff did not return to defendant for her scheduled cleaning on June 7; at deposition she indicated she had not noticed the appointment reminder in the office's last correspondence with her.

Although she felt happy with defendant's work initially, plaintiff presented at 42nd Street Dental Associates on May 28, 2014, complaining of pain. Plaintiff received referrals to a periodontist and an oral surgeon. The periodontist performed scaling and root planings, and the oral surgeon extracted teeth seven and eight. According to plaintiff, she needed these additional treatments as the result of defendant's departures and of an infection which resulted from the treatment. She claims that defendant failed to diagnose her endodontic problems and her infection, among other things, and thus failed to perform the appropriate dental work and treat her resulting problems accordingly. As a result, she alleges the loss of two teeth, the failure of the bridge, continuing dental problems, and the need for additional work. She additionally alleges lack of informed consent.

In support of his motion for summary judgment, defendant submits the affirmation of Peter M. Blauzvern, D.D.S., a New York-licensed dentist with experience in general and

cosmetic dentistry. To a reasonable degree of dental certainty, he affirms that plaintiff gave her informed consent to the dental work and there was no malpractice. Defendant properly evaluated plaintiff's periodontal health by studying the radiograph and conducting a clinical exam which included photos and impressions, he states. He asserts that plaintiff understood the scope of the work defendant would perform, was told of its possible risks, and gave her informed consent. The expert contends that defendant did not fail to treat teeth seven and eight, as there was no infection and plaintiff did not complain about her prior work in this area. The expert states that defendant properly separated the implants from the tooth and it would not have been reasonable to withhold consent for the sectioning.

In addition, the expert states plaintiff provides no evidence showing that she did not consent to the replacement of her existing crowns, and this work was necessary to satisfy plaintiff's aesthetic goals. He states that alternative treatments were not possible. Tooth ten, he asserts, required restoration given its decay and other problems. He further notes that plaintiff signed a document agreeing to the crown work. He concludes that defendant performed all crown work within the standard of care. Similarly, he states, it was proper to section the bridge, the bridge work was not negligently performed, and there is no sign the sectioning worsened plaintiff's dental health. He concluded that as the implants were in poor shape when defendant first treated plaintiff, moreover, any further damage and need of repair were not caused by negligence on his part. As there was no evidence that an infection existed during the treatment, the expert opines, there also was no negligence in reading the x-rays, and no failure to refer. He states defendant used an appropriate amount of cement, and a proper antibiotic was prescribed. The expert states that

defendant could not treat plaintiff's subsequent problems because she did not return for her June 9 appointment.

Angela P. Abenathy, D.D.S., a New York-licensed dentist who has performed restorative services and provided dental crowns, examined the crown work on teeth nine and ten¹ and reviewed plaintiff's bills of particulars, dental records, and x-rays. Dr. Abenathy concludes that the crowns on these teeth conform to the accepted dental standards. The crowns, she states, are visible and sealed but not open, as is appropriate. Additionally, she states that the crowns are spaced properly and there is no evidence of food traps. She claims that any pocket depth that exceeded the preferred depth of under four millimeters is likely due to plaintiff's oral hygiene habits, as there is no evidence of a causal relationship to the restorative work defendant performed.

In opposition, plaintiff argues that defendant failed to satisfy the burden of proof and that the expert affirmations overlooked and misinterpreted material information showing malpractice. In support, she submits the affirmation of an expert, whose name, education, and certification information have been redacted. The expert alleges he or she has practiced dentistry in New York for over twenty years, has performed the type of dental work involved in this case, and has had patients with periodontal disease, bone loss, and other pertinent dental problems. To a reasonable degree of dental certainty and based on a review of the medical records, deposition testimony of defendant, and portions of the deposition testimony of plaintiff, the expert states there is evidence of malpractice. According to the expert, the x-rays defendant took after he cemented the crowns show significant problems with teeth seven and eight which defendant did not address.

¹ Teeth seven and eight, which also received crowns, already had been extracted.

The x-rays by subsequent treaters, the expert states, show that the pathology persisted. The expert disputes the assessment Dr. Abenathy makes concerning the pocket depths, stating that the depths far exceeded four millimeters and showed advanced periodontal disease and that there is no indication defendant checked the pockets before he crowned the teeth. The expert states that defendant should have performed periodontal probing, gum treatment, and prophys, and the failure to do so was a deviation. According to the expert, defendant's failure to refer plaintiff to a specialist at once is another deviation. Plaintiff alleges that issues of fact exist regarding causation, given the proximity in time between plaintiff's treatment with defendant and her dental failures. She says that defendant's experts do not explain, *inter alia*, defendant's failure to discuss the x-rays and other evidence from subsequent treaters.

Plaintiff also challenges the request to dismiss her claim for lack of informed consent. The expert opines that defendant was required tell plaintiff "that a failure to address all of that pathology first will mean a high risk of crown loss and tooth failure." P's Expert ¶ 6. Further, the expert states, no notes indicate defendant discussed the risks or alternative treatment plans. In the expert's opinion plaintiff's pathology should have alerted defendant to her heightened risks.

In reply, defendant states plaintiff has not satisfied her burden of proof. He challenges the alleged expert affidavit as inadmissible because it is unsworn and there is no evidence that an affirmation will suffice in this instance, and because not only the expert's name but the entire paragraph setting forth his or her credentials has been deleted. Even if admissible, defendant argues, the expert did not review a complete set of documents² and the expert therefore

² In particular, defendant notes that the expert only read part of plaintiff's deposition testimony.

cannot successfully rebut his experts. Defendant states plaintiff's expert seemingly did not review records from Dr. Rita Chan from 2010, which defendant contends shows preexisting problems, and the expert misinterprets certain records and does not show the existence of triable issues. As for informed consent, defendant reiterates that he had no obligation to warn plaintiff of nonexistent risks. Defendant contends that plaintiff has not addressed and rebutted all of his arguments. A further affirmation by Dr. Blauzvern highlights the alleged deficiencies of plaintiff's expert's statements, the issues the expert does not address, and the expert's reliance on misinformation.

In considering a summary judgment motion, a court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 308 (1st Dep't 2007). For a prima facie case in a medical malpractice action, the defendant must present expert opinion testimony supported by the record and addresses the plaintiff's essential allegations. Rogues v. Noble, 73 AD.3d 204, 206 (1st Dep't 2010). If the defendant makes this showing, the burden shifts to the plaintiff to "establish the existence of material issues of fact" through admissible evidence. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Here, the expert affidavit must state the defendant departed from accepted dental practice and this proximately caused the injuries. See Rogues, 73 AD.3d at 207. Where opposing experts disagree, summary judgment is denied. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011).

In light of these standards, the Court denies summary judgment on the issue of malpractice. Although defendant establishes a prima facie case, plaintiff's expert has alleged the existence of triable issues regarding, *inter alia*, defendant's failure to performed periodontal probing and other procedures, his failure to refer plaintiff to a specialist, his failure to perform

certain tests, and his failure to check the pocket size before he crowned the teeth. Moreover, the fact that the first paragraph is redacted is not fatal to the affirmation. Under CPLR 3101(d)(i) a party in a medical malpractice suit may redact the name of the medical expert during disclosure, and the second paragraph of the affirmation, which states that the expert has practiced dentistry in New York City for over twenty years and in particular has performed the type of work in dispute is sufficient, at this juncture, to establish his certification and ability to submit an affirmation.

Defendant's challenges to plaintiff's expert – that he or she did not review plaintiff's entire deposition transcript, for example, or did not fully consider plaintiff's previous dental treatment and all of her preexisting dental problems, or that the expert misread some medical evidence and ignored other evidence – all go to the expert's credibility and the strength of his or her opinion. These are jury questions, raising issues of fact rather than compelling summary judgment. Similarly, the parties' experts' differing opinions as to whether the infection existed at the time of plaintiff's final appointment with defendant raises an issue of fact. Plaintiff's expert also raises issues as to proximate cause by stating that the failure to do certain dental work first, to refer plaintiff to a specialist, and to detect and treat her infection resulted in the injuries plaintiff sustained. Defendant is incorrect that plaintiff is required to refute every one of his arguments. Instead, plaintiff must show that there is a triable issue as to every element (such as deviation and proximate cause) for which defendant shows a prima facie case. See Stukas v. Streiter, 83 A.D.3d 18, 25 (2nd Dep't 2011). There is also an issue of fact as to informed consent. Plaintiff's expert counters defendant's prima facie case on this issue by arguing that defendant should have alerted plaintiff to the heightened risks she faced due to her pathology. Defendant's counterarguments –

including that there were no heightened risks based on plaintiff's dental health, and that he adequately informed plaintiff of available alternatives – merely shows that issues of fact exist.

Accordingly, it is

ORDERED that defendant's motion is denied.

Dated: Feb. 6, 2017

ENTER:



JOAN B. LOBIS, J.S.C.