

Gerchik v Blau

2011 NY Slip Op 32603(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 106239/10

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

MARILYN GELMAN
- v -
BRUCE BLAU, D.D.S.

INDEX NO. 106239/10
MOTION DATE 7/19/11
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 19 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

1-16
17-18
19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
& Order

FILED

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/11

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
NATALIA GERCHIK and DEAN CEDERQUIST,

Plaintiffs,

Index No. 106239/10

-against-

Decision and Order

BRUCE B. BLAU, D.D.S.,

FILED

Defendant.

OCT 05 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Bruce B. Blau, D.D.S., moves, by order to show cause, for an order granting him summary judgment and dismissing plaintiffs' complaint in its entirety. Plaintiffs oppose the motion.

This case sounds in dental malpractice. The complaint sets forth that Ms. Gerchik treated with Dr. Blau from September 8, 2005 through September 8, 2009. The essential allegations in the bill of particulars are that Dr. Blau departed from the standard of care in placing inadequate and/or deficient crowns, bridges, and restorations in the face of gross decay, nerve exposure, and irreversible pulpitis, on teeth numbers 2-15 and 18-31. Plaintiffs allege that these departures compromised the strength and integrity of the dentition, resulted in damage to the restorations and the underlying teeth, and required Ms. Gerchik to undergo further extensive dental restorations.

As to the treatment relevant to the claims herein, the records annexed to the motion indicate that Ms. Gerchik presented to Dr. Blau, a dentist specializing in restorations, on July 8, 2008, with a history of clicking and pain associated with the temporomandibular joint ("TMJ"). Dr. Blau referred Ms. Gerchik to Michael Gelb, D.D.S., whose practice concentrates in treating patients

with TMJ problems. Dr. Gelb and Michael Lenchner, D.M.D., at Dr. Gelb's practice, in conjunction with Dr. Blau, formulated a treatment plan to realign Ms. Gerchik's bite and restore her teeth. On October 16, 2008, Dr. Blau made polyvinyl siloxane ("PVS") impressions of Ms. Gerchik's teeth in order to make models and craft temporaries for teeth numbers 18-22 and 28-31. On November 7, 2008, Dr. Blau prepped and installed the temporaries on Ms. Gerchik's teeth numbers 18-22 and 28-31, and removed caries (decay) from teeth numbers 29-31; his notes indicate that a filling would be performed on tooth number 13 at the next visit. Dr. Blau testified at his deposition that prepping teeth for temporaries involves drilling and removing old crowns and restorations, and checking for and removing any decay. On November 28, 2008, Dr. Blau built up Ms. Gerchik's bite on the left side. On December 4, 2008, December 19, 2008, and January 6, 2009, Dr. Blau made slight adjustments to the bite. On January 8, 2009, Dr. Blau adjusted the incisal angles on teeth numbers 23-26 by adding temporary composite to the teeth. On January 16, 2009, Dr. Blau again made adjustments to the bite. Dr. Blau testified at his deposition that adjustments to the bite were made at the sites of the temporaries, unless otherwise stated in his notes.

On January 27, 2009, Dr. Blau met with plaintiffs and discussed his proposed treatment plan for Ms. Gerchik. In Phase I, Dr. Blau would insert eighteen (18) new permanent crowns over three visits on teeth numbers 2-6, 12-15, 18-22, 27-28, and 30-31, at a cost of \$30,855.00. In Phase II, Dr. Blau would place nine (9) crowns on teeth numbers 7-11 and 23-26 at a cost of \$16,355.00. Ms. Gerchik started the proposed treatment plan. On six occasions in February and March 2009, Ms. Gerchik was seen at Dr. Blau's office for slight bite adjustments. On March 26, 2009, Dr. Blau made final molds and recorded her bite. On April 12, Dr. Blau inserted and

affixed new temporaries for teeth numbers 2-5. On April 16 and 24, 2009, Dr. Blau made slight adjustments to the bite. On May 1, 2009, Ms. Gerchik reported that she was doing much better with her bite and chewing, and Dr. Blau took photos of her bite. On May 6, 2009, Dr. Blau prepped and installed a temporary on tooth number 6, which had a prior restoration performed by another treater. On May 13 and 15, 2009, Dr. Blau made slight adjustments. On May 20, 2009, Dr. Blau prepped and installed a temporary crown on tooth number 6. On May 27, 2009, Dr. Blau made a slight adjustment to the lower right bite registration. On June 4, Ms. Gerchik and Dr. Blau met with the laboratory technician who would be crafting the final crowns to discuss the look of the crowns. The next day, Ms. Gerchik returned to Dr. Blau for final rubber impressions on teeth numbers 2-5 and to record her bite registration. On June 18, 2009, Dr. Blau had Ms. Gerchik try in the final crowns on teeth numbers 2-5 and made impressions for new temporaries on teeth numbers 28-31. Ms. Gerchik was seen on June 25, July 1, and July 10, 2009, for re-cementing of the temporaries and cosmetic measurements. On July 16, 2009, Dr. Blau had Ms. Gerchik try the upper right porcelain jackets; the notes indicate that everything looked great and that Ms. Gerchik was happy. On July 24, Dr. Blau inserted the bridge for teeth numbers 2-5 and affixed the bridge with temporary cement. On August 1, 2009, Dr. Blau sent the crowns for teeth numbers 4 and 5 back to the laboratory for adjustments. On August 6, 2009, Dr. Blau inserted the final crowns for teeth numbers 4 and 5, made adjustments to Ms. Gerchik's bite, and referred her back to Dr. Gelb to check occlusion. On August 18, Dr. Blau made a slight adjustment to teeth numbers 18-19.

On September 3, 2009, the notes indicate that Ms. Gerchik was feeling better and wanted to proceed with the insertion of the permanent lower right porcelain crowns. On September

8, 2009, the notes reflect that Dr. Gelb advised Dr. Blau that the occlusion was excellent and to proceed with the permanent crowns. Ms. Gerchik did not return to Dr. Blau after September 3, 2009.

On or about September 9, 2009, Elisa Mello, D.D.S., began treating Ms. Gerchik. Dr. Mello's review of the initial work that she performed on Ms. Gerchik indicates that she found open margins on the distals of teeth numbers 2 and 3; no post on tooth number 3; a very narrow occlusal table; and decay on teeth numbers 7, 18-22, and 30-31. She also found decay, inadequate cores, and/or pulpal exposure on a number of teeth with temporary or permanent restorations. Dr. Mello removed the porcelain crowns on teeth numbers 2-5 and temporized the teeth. She noted limited ferrule on teeth numbers 3-5 and referred Ms. Gerchik to a root canal specialist for a "redo" of "questionable endo" on tooth number 3 and for an evaluation of possible nerve exposure and pulpitis on tooth number 5. She noted that tooth number 5 had almost no core, and discussed with Ms. Gerchik the possibility that she would require a joint permanent crown for teeth numbers 4-5 to increase retention. At this initial appointment, Dr. Mello placed temporaries on teeth number 6-15; placed core buildup on teeth numbers 9 and 12-15; placed temporaries on teeth numbers 18-22; and placed temporaries on teeth numbers 23-31. After Ms. Gerchik had completed root canal treatments, Dr. Mello started a new restoration process on her teeth.

Dr. Blau now moves for summary judgment in his favor and dismissal of the complaint. A defendant moving for summary judgment in a dental 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 [dental] 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). See also Koi Hou Chan v. Yeung, 66 A.D.3d 642 (2d Dep’t 2009). To satisfy the burden, a defendant in a dental malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Roques, 73 A.D.3d at 206; Koi Hou Chan, 66 A.D.3d at 642. Conclusory statements which do not address the allegations in the pleadings are insufficient to demonstrate entitlement to summary judgment. See Cregan v. Sachs, 65 A.D.3d 101, 108 (1st Dep’t 2009). Failure to demonstrate a prima facie case requires denial of the summary judgment motion, regardless of the sufficiency of the opposition papers. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). If the movant makes a prima facie showing, the burden 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.” Id. (citation omitted). Specifically, in a dental malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted).

In support of his motion, Dr. Blau submits an affirmation from Peter M. Blauzvern, D.D.S., who states that he is licensed to practice dentistry in the State of New York. He states that his opinions are based on his review of Ms. Gerchik’s treatment records, the bills of particulars, and

the parties' deposition testimony. In Dr. Blauzvern's opinion, to a reasonable degree of dental certainty, there is no evidence of negligence by Dr. Blau on any date that he treated Ms. Gerchik. He states that there is no evidence of open margins or decay on teeth numbers 2 or 3, and that Dr. Blau did not place the post or core on tooth number 3. He states that tooth sensitivity, as plaintiffs allege, is a possible complication of any prepping procedure and is not a departure. He states that the occlusal table on teeth numbers 2-5 was appropriate for Ms. Gerchik's dentition. Dr. Blauzvern states that there were no departures for teeth numbers 6-15; that Dr. Blau only placed temporaries on teeth numbers 6 and 12; and that "these teeth had failing veneers from a prior treater, no departures." As to teeth numbers 7-11 and 14-15, Dr. Blauzvern states that Dr. Blau never treated these teeth since Ms. Gerchik "failed to complete the treatment plan that Dr. Blau established, no departures." As to tooth number 13, Dr. Blauzvern states that Dr. Blau performed a filling, and the fact that the tooth may have eventually needed a root canal is a possible complication in placing a restoration and not evidence of malpractice. As to teeth numbers 18-21, Dr. Blauzvern opines that teeth numbers 18-19 are discolored but not decayed; that there is no decay on tooth number 20, and even if there were decay under the temporary, it would have been detected upon placing a final crown, which Dr. Blau did not have the opportunity to do; and that there was enough tooth structure to perform the restoration of tooth number 21. As to teeth numbers 23-27, Dr. Blauzvern opines that Dr. Blau never completed the work, "no evidence of departures." As to teeth numbers 30-31, Dr. Blauzvern states that posts were not required at the time Dr. Blau treated Ms. Gerchik and there is no evidence of any type of departure.

Dr. Blauzvern sets forth that the record indicates that the teeth were healthy upon preparation; the pulp chambers were not compromised upon clinical examination; and discoloration

does not equate to decay. Thus, in his opinion, Ms. Gerchik did not suffer from most of the dental conditions that she alleges resulted from Dr. Blau's substandard care while she was under his care. He further opines that the fact that some teeth that Dr. Blau worked on later required a root canal is not evidence of malpractice because the drilling required from placing a crown or filling is traumatic to the tooth and can cause the nerve to die, a known and accepted risk. Dr. Blauzvern opines that Ms. Gerchik's complaints of facial pain, inability to chew foods, and difficulty eating are conditions related to her TMJ, which Dr. Blau did not treat but which he appropriately referred for treatment with a specialist. Dr. Blauzvern opines that the record is clear that as part of his protocol, Dr. Blau checked for decay and open margins but did not find any. Dr. Blauzvern opines that the June 4, 2009 meeting with the laboratory technician to evaluate the final crowns was "excellent protocol."

Dr. Blau also submits his own affidavit in support of his motion, in which he states that he saw Ms. Gerchik frequently between January and September 2009, and that he was constantly checking for any issues or problems such as gross decay, nerve exposure, pulpitis, open margins, and/or problems with occlusion, fit, and function. He states that none of these conditions existed while he treated Ms. Gerchik. He states that since Ms. Gerchik did not finish the treatment plan, he never treated teeth numbers 7-11, 14-15, or 23-27. As to teeth numbers 6 and 12, he only placed temporary crowns on failing veneers placed by a prior treater, he never had the opportunity to address these teeth. As to tooth number 13, he did perform a filling but did not have the opportunity to complete treatment on that tooth. He maintains that as to any tooth he treated, he always checked for and would treat any decay or open margins.

In opposition to the motion, plaintiffs' expert (name redacted) sets forth that he/she is licensed to practice dentistry in the State of New York. He/she sets forth that upon reviewing Ms. Gerchik's dental records, the bill of particulars, Dr. Blauzvern's affirmation, and the parties' deposition transcripts, he/she can say, within a reasonable degree of dental certainty, that Dr. Blau's treatment with respect to the upper and lower bridges was not in accordance with good and accepted standards of dental practice. Plaintiffs' expert sets forth that the bridges had minimal to no embrasures, which rendered them uncleanable. The expert opines that Dr. Blau left Ms. Gerchik with temporary dental work for an unacceptably extended period of time, which caused decay on the underlying teeth, and that Dr. Blau failed to treat the decay that was present under the lower bridge. Plaintiffs' expert opines that in order to protect the underlying teeth over an extended provisional period, Dr. Blau should have installed metallic casings to properly seal the teeth and protect them from decay. The expert opines that Dr. Blau's failure to do so caused Ms. Gerchik to develop substantial caries (decay), including subgingival caries that caused destruction to the entire lower arch. The expert further opines that Dr. Blau failed to obtain anatomically correct occlusion; that the twenty-eight (28) occlusion adjustments that Dr. Blau's records reflect that he made is inordinate; that Dr. Blau failed to note what he was specifically adjusting in these instances; and that it is a departure from good and accepted practice to make so many adjustments to the occlusion without ever obtaining an acceptable comfortable occlusion.

Dr. Blau's motion is sufficient to demonstrate a prima facie entitlement to summary judgment as to teeth numbers 2-15, 18-22, and 28-31. As to these teeth, he has submitted detailed expert opinion evidence establishing that his treatment did not deviate from the standard of care and

that the injuries that Ms. Gerchik claims were either never present; caused by factors other than Dr. Blau's treatment; or were not present at the time Dr. Blau treated Ms. Gerchik. In opposition, plaintiffs have submitted expert opinion evidence that sufficiently rebuts Dr. Blauzvern's opinion that Dr. Blau's treatment was within the standard of care and establishes that material issues of fact remain unresolved. Whereas Dr. Blauzvern opines that Dr. Blau's treatment was entirely appropriate, plaintiffs' expert opines that Dr. Blau should have taken further steps to prevent decay and that his failure to take those steps caused Ms. Gerchik to be injured. "Summary judgment is not appropriate in a [dental] malpractice action where the parties adduce conflicting [dental] expert opinions . . . Such credibility issues can only be resolved by a jury." Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011) (internal quotation marks and citations omitted).

On one final note, Dr. Blau and his expert maintain that he never treated teeth numbers 7-11, 14-15, or 23-27. As to teeth numbers 23-27, a review of Dr. Blau's records indicates that he treated these particular teeth with composite or bonding material and/or adjusted the incisal angles to these teeth, and neither he nor his expert adequately addresses this treatment in their affidavits; accordingly, defendant has not made out a prima facie demonstration of entitlement to summary judgment as pertains to the allegations regarding teeth numbers 23-27. As to teeth numbers 7-11 and 14-15, Dr. Blau's records do support his contention that he never treated these teeth. Moreover, a review of the bill of particulars reveals that plaintiffs have not alleged damage to these particular teeth related to work that Dr. Blau performed and plaintiffs' expert never opines on these teeth with respect to any alleged departure by Dr. Blau. There are no issues of fact that Dr. Blau did not treat teeth numbers 7-11 or 14-15. While the remainder of the motion is denied, Dr.

Blau is entitled to partial summary judgment dismissing the complaint to the extent that there are claims of dental malpractice alleged that pertain to teeth numbers 7-11 or 14-15. Accordingly, it is hereby

ORDERED that summary judgment is denied as to teeth numbers 2-6, 12-13, and 18-31; and it is further

ORDERED that summary judgment is granted as to teeth numbers 7-11 and 14-15, and any claims that pertain to those teeth are dismissed.

Dated: 10/4/11

FILED

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OCT 05 2011



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