

Young v Lenchewski
2013 NY Slip Op 30009(U)
January 3, 2013
Sup Ct, New York County
Docket Number: 114283/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

YOUNG, JOAN
- v -
ENRIQUE LENCHEWSKI, DDS,
ETAL.

INDEX NO. 114283/10
MOTION DATE 10-2-12
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to 31 were read on this motion to (or) summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-24

25-29

30-31

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

Dated: 1/3/13

JOBIS
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

JOAN YOUNG,

Plaintiff,

Index No. 114283/10

-against-

Decision, Order and Judgment

ENRIQUE LENCHEWSKI, D.D.S., METROPOLITAN
ORAL SURGERY ASSOCIATES, P.C., WILFRED
HEILBUT, D.M.D., Individually and d/b/a HEILBUT,
ROSENMAN, RADIN & CHO, DENTISTS, P.C.,

Defendants.

-----X

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

Defendants Enrique Lenchewski, D.D.S, Metropolitan Oral Surgery Associates, P.C.,
and Wilfred Heilbut, D.M.D., move for summary judgment pursuant to C.P.L.R. Rule 3212 in this
dental malpractice action. Plaintiff Joan Young opposes the motions.

In March 2009, Plaintiff Joan Young complained to her dentist that she had a loose
tooth. Her dentist recommended that the tooth, number 7, her upper right lateral incisor, be pulled.
Ms. Young sought a second opinion from Dr. David Hoexter. Dr. Hoexter agreed that the tooth
should be removed and recommended an implant. He also advised her that she had extensive bone
loss in the area, and he predicted the implant would fail. If that were to happen he indicated that Ms.
Young would need a bridge to restore the tooth. Ms. Young went ahead with the implant. She
suffered severe swelling and felt that the implant was protruding excessively. When she tried to see
Dr. Hoexter for the problem, she learned that he was unavailable. Instead she saw Dr. Enrique
Lenchewski, to whom a friend had referred her.

Dr. Lenchewski had a dentistry practice with Metropolitan Oral Surgery Associates, P.C. Ms. Young met Dr. Lenchewski there on March 25, 2009, to have the recently placed implant removed. Dr. Lenchewski took Ms. Young's medical history, x-rayed her mouth and diagnosed that the implant was out of the bone and symptomatic. Ms. Young returned the next day. She signed a consent form. Dr. Lenchewski proceeded to remove the failed implant at tooth 7 and perform a bone graft in the area. He saw Ms. Young for several additional follow up visits over the course of several months.

At one of those visits, in June 2009, Ms. Young indicated that she did not want a bridge but rather wanted to replace the implant. Test results showed that Ms. Young did not have much bone width in the area. Dr. Lenchewski decided to place a "mini-implant," a narrow implant that measured 3.25 mm by 13 mm. In August, after obtaining Ms. Young's consent to placing the implant, Dr. Lenchewski inserted the implant and grafted bone. Ms. Young saw Dr. Lenchewski for several follow up visits.

In January 2010, Ms. Young was referred to Dr. Wilfred Heilbut, for restoration of tooth 7. Dr. Heilbut, a licensed New York dentist, was a shareholder at Heilbut Roseman Radin & Cho Dentists, P.C. Ms. Young saw Dr. Heilbut for an initial visit in March of that year. At the visit Dr. Heilbut told Ms. Young that restoration of the tooth would be difficult due to the angle of Ms. Young's bone and her significant bone loss. In April, Dr. Heilbut placed a custom implant abutment over the implant and inserted a temporary crown. He used temporary cement for both the temporary crown and the permanent crown, due to the small crown to root ratio permitted by the implant. He noted that her prognosis was questionable based on the implant's integration by the bone. By June,

Plaintiff was complaining of sensitivity in the implant area. Dr. Heilbut recommended that she be evaluated by an oral surgeon. Ms. Young did not return to his care.

Subsequently Ms. Young obtained numerous opinions regarding tooth 7. Ultimately, in September 2010, she saw Dr. David Beller, an oral and maxillofacial surgeon, who removed the implant that had been placed by Dr. Lenchewski.

Within months of that removal, Ms. Young sued the Defendants for dental malpractice and lack of informed consent. Plaintiff complains, among other things, that based on Defendants' conduct she has incurred loss of bone and tissue, pain and suffering, and additional dental treatments.

Following discovery in this matter, the Defendants have moved for summary judgment. In support of his claim for summary judgment, Dr. Lenchewski submits the affirmation of Steven Gelfman, D.D.S., M.D. Dr. Gelfman is board certified in oral and maxillofacial surgery and practices in that area. In addition to reviewing the record in this case, Dr. Gelfman also conducted an independent dental examination of Plaintiff. He opines that Dr. Lenchewski neither departed from proper standards of care nor failed to obtain informed consent for treatment of Plaintiff.

In support of his motion for summary judgment, Dr. Heilbut submits the affirmation of Dr. Arnold Jutkowitz. Dr. Jutkowitz is qualified in prosthodontics, periodontics, and endodontics. In addition to his review of the records in this case, Dr. Jutkowitz notes that he has performed

hundreds of crown restorations and has a private practice in prosthodontics. He opines that Dr. Heilbut's restoration work was within proper standards of care and he obtained informed consent from Plaintiff to conduct that work.

Plaintiff opposes both motions. In opposing Dr. Lenchewski's motion she submits the affirmation of her subsequent treating dentist, Dr. Beller. Dr. Beller is board certified in oral and maxillofacial surgery and has performed thousands of implant procedures. He affirms that in preparing his opinion he reviewed his treatment records for Ms. Young, Plaintiff's affidavit in opposition to Dr. Lenchewski's motion, and the affirmations of Drs. Gelfman and Jutkowitz. In opposing Dr. Heilbut's motion, Plaintiff submits the affirmation of Jon Ackerman, D.M.D. Dr. Ackerman affirms that he has reviewed the record in this case, is a licensed New York dentist, and has had a private practice in prosthodontics and restorative dentistry since 1992.

This Court for purposes of this decision, order and judgment consolidates the two pending motions by Defendants. Before addressing the merits of the motions for summary judgment, this Court first considers the status of the Defendants in this case as reflected in the record before it. Defendant Wilfred Heilbut, D.M.D., has been sued here individually and as doing business as Heilbut, Rosenman, Radin & Cho, Dentists, P.C. (HRRC). The professional corporation, HRRC, has not appeared in this matter, and pursuant to C.P.L.R. § 3215(c), this Court finds that Plaintiff has abandoned any claim against that corporation. See, e.g., Affirmation of Eleanor N. Flach, Esq., in support of Plaintiff's Opposition to the Motion by Wilfred Heilbut, D.M.D., dated September 12, 2012, which states that "[t]his is an action for dental malpractice against Dr. Heilbut arising out of restoration of an implant" None of Plaintiff's opposition

(1st Dep't 2010) Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)).

If a 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, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted dental practice and that the departure was the proximate cause of the injuries alleged. See 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); Frye 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 the 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).

The record shows that genuine issues of material fact exist relating to Plaintiff's claims against Drs. Lenchewski and Heilbut for dental malpractice and lack of informed consent. The parties' experts disagree over the doctors' conduct in replacing the implant and restoring Ms. Young's tooth and obtaining her informed consent. Nor is this Court persuaded that Dr. Beller's expert opinion lacks foundation or is unreliable. Accordingly, it is

ORDERED that Plaintiff has abandoned any claim against Defendant Heilbut, Rosenman, Radin & Cho, Dentists, P.C., and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that Defendant Metropolitan Oral Surgery Associates, P.C., 's motion for summary judgment is granted, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that Defendant Lenchewski's motion for summary judgment is denied; it is further

ORDERED that Defendant Heilbut's motion for summary judgment is denied, and the action shall continue as to all remaining claims; and it is further

ORDERED that counsel are directed to appear for a settlement conference pursuant to C.P.L.R. § 3409 on February 19, 2013, at 9:30 am.

Dated: January 3, 2013

ENTERED:



JOAN B. LOBIS, J.S.C.