

Bruno v Haselkorn

2013 NY Slip Op 32643(U)

October 8, 2013

Supreme Court, Suffolk County

Docket Number: 08-10267

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 1-8-13
ADJ. DATE 2-19-13
Mot. Seq. 003 - MD

-----X
BEVERLY BRUNO,

Plaintiff,

- against -

MICHAEL HASELKORN, D.D.S.,

Defendant.
-----X

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-17; Replying Affidavits and supporting papers 18-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion (003) by the defendant, Michael Haselkorn, D.D.S., for summary judgment dismissing the complaint as asserted against him is denied..

In this dental malpractice action, the now sixty-nine year old plaintiff, Beverly Bruno, alleges that the defendant, Michael Haselkorn, D.D.S., departed from good and accepted standards of dental practice and failed to provide her with informed consent regarding the dental care and treatment in placing bridges which caused excruciating jaw pain, headaches, tightness in her jaw, ringing in her ears, inability to sleep, and which further caused sores and abscesses in her mouth. The plaintiff also alleges that despite her complaints, the defendant failed to take any action to alleviate her pain and discomfort, did not attempt to adjust the ill-fitting bridges, and failed to treat the sores in her mouth with antibiotics. The plaintiff further alleges that the defendant failed to repair her original bridge, and instead replaced the bridge with the ill-fitting bridge. She was required to undergo surgical intervention to correct the issues caused by the defendant's negligent care and treatment, and further suffered fractured teeth, loss of teeth #19 and 20, and bone loss.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316

[1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of the instant application, the defendant has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, answer, and plaintiffs’ verified and supplemental verified bills of particulars; the signed and certified copies of the transcripts of the examinations before trial of Beverly Bruno dated April 18, 2011, and Michael Haselkorn, D.D.S. dated June 13, 2011; and an uncertified copy of the defendant’s office record.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503[2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant’s negligence was a substantial factor in producing the alleged injury (*see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff’s injury (*see Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

Beverly Bruno testified to the extent that she had formerly been a patient at Total Dental Care in Holbrook, New York, where she received “precious metal tops and bottoms”, and implants in the bottom and back of her mouth in about 2002. She started treating with the defendant, Michael Haselkorn, D.D.S., but she did not know what her care and treatment consisted of at the time. In 2005, she chipped the porcelain off of a front bottom tooth on a bridge that previously had “precious metal” placed in it, and went to the defendant for treatment. She stated that after he examined her, he did not tell her what he was going to do, and just started working, then told her he was going to make a bridge to replace the old bridge which was broken. He gave her a temporary plate. At that visit, she already had three posts in her mouth on the bottom right and left. When he placed the bridge, it did not fit correctly. She returned for adjustments to the bridge and stated that the posts fell out, so he put something in to make the posts stay. For about a year thereafter, when she ate, the posts slipped out and she developed sores in her mouth. Her upper teeth prosthetics began to chip. She continued that she returned to the defendant three times a week during that year. Her last visit was about November 2006. The defendant did not perform any extractions or root canals, but gave her “Snap” to repair the teeth at home. She stated that she sent a letter to the Office of Professional Discipline to complain about the defendant, and went to another dentist, Dr. Donnerman who told her she had to see a specialist. She then saw Dr. Ivry in December 2006.

The plaintiff continued that Dr. Ivry had to take out all her front upper teeth (she thinks six) and put a drain, as the teeth were all infected. There was also an abscess in the lower jaw where a post fell out. He put in filler so he could place implants, and made new temporary top and bottom teeth. She also developed TMJ which had been diagnosed by Dr. Haselkorn who advised her that she needed surgery to treat it. Dr. Ivry also

diagnosed the TMJ and told her it was due to Dr. Haselkorn's treatment and shifting teeth, causing her jaw to go "back and forth." She no longer has pain in her mouth but still has the clicking and pain in her jaw and ringing in her ears.

Dr. Haselkorn testified that he has been self-employed in a sole proprietorship for thirty-eight years in the general practice of dentistry. He stated that general dentistry enables him to do all phases of dentistry that he feels competent in dealing with, including the insertion of bridges and posts. He employs one dentist, dental assistants, front desk personnel and a part-time hygienist, but did not know the name of those employed by him in 2005 through 2006. Dr. Haselkorn testified that he knew the plaintiff prior to 2005 as a friend and from when she brought her children to his office. She first presented to him as a patient in January 2005. Prior to that, she had done some advertising or promotional work for him. He continued that in January 2005, the plaintiff presented on an emergency basis as her lower fixed porcelain bridge that she had made in Florida, broke and was not salvageable. He focused on her lower teeth as she had no problem with her upper teeth at the time. He took impressions so he could make a temporary bridge, which was completed in about nine or ten days. He saw her on a recall visit on the next visit for x-rays, cleaning, and a check up. She had problems with her temporary bridge for awhile as it was loosening. The bridge had been attached with cement to posts.

Dr. Haselkorn testified that on January 18, 2005, he took six emergency x-rays of her lower teeth, repaired her broken lower fixed bridge encompassing all of her lower teeth, made upper and lower alignment study models and gave a consultation. On January 20, 2005, he repaired the posts and did core buildups at teeth #19, 28, 29, which posts had been placed by her prior dentist. At that first visit, they had a consultation about what procedures they could do and what her options were. He recemented an upper fixed bridge and made some adjustments on it, took three x-rays of her uppers and recommended a recall visit. On February 3, 2005, he recemented her temporary lower bridge. On March 27, 2005, he recemented and realigned her temporary lower bridge as it loosened. He felt that she was missing a lot of teeth, the teeth that she had were over prepared, there was not a lot of tooth structure, and there were retention problems with her lower mouth. On July 7, 2005, he recemented the temporary lower bridge and advised of the need for the permanent fixed bridge. He did not remember if he discussed the process of a permanent bridge, but she had a permanent bridge before and was aware of what was involved. On July 20, 2005, he repaired and recemented her temporary bridge again. At that time he did not feel a new temporary bridge was necessary.

Dr. Haselkorn continued that on August 8, 2005, the plaintiff had an emergency visit. An x-ray was taken, pathology or abscess on the lower right side was noted at tooth # 28 under the temporary bridge. The tooth was extracted, and the temporary bridge was replaced. On August 25, 2005, he smoothed her lower teeth and gave her a prescription for Gelclair, a liquid rinse that soothes the tongue and mouth as she was sore from some rough edges on her temporary bridge. She returned on January 5, 2006, at which time he realigned and recemented the temporary bridge. He made no notation and had no recollection of any contact with the plaintiff from August 25, 2005 through January 5, 2006. Still no plan had been made by the plaintiff for a permanent fixture for her lower mouth as they had discussed. His notes indicated that on March 31, 2006, she had fractured porcelain on tooth #9, an upper tooth. He noted that the plaintiff had been playing dentist trying to recement the porcelain on her own with Crazy Glue, which he told her not to use. The porcelain was off the metal of tooth # 9, so he recovered the metal with a composite to make it aesthetic. He knew of no one in his office who would have given the plaintiff an acrylic monomer, to create a plastic material. He generally used a different acrylic than that for the temporary bridges. On June 13, 2006, he adjusted and recemented her lower temporaries.

Dr. Haselkorn's notation on August 7, 2006 was to remake her lower temporaries as there had been a breakage of the other temporary which could not be repaired. He had the same notation for August 9, 2006, and stated that they were to "go over treatment plan," which included extractions on her lower left, and he made notations about crowns and a removable lower partial in a flexsite material, and an upper fixed bridge and a flex partial for the upper. Dr. Haselkorn testified that the plaintiff wanted a full fixed bridge. On August 10, 2006, he did a repair on the lower temps. On August 14, 2006, he prepped teeth # 27, 29, and 31 on the lower right to create a new finish line for the permanent bridge. On August 21, 2006, he extracted teeth #19, a root tip, and # 20, a root tip, and prepared teeth # 18, 21, and 22 in the lower mouth, with a "try in for the next visit". On August 28th, impressions of the upper counter or upper teeth, were taken to balance against the lowers that he was building up. He testified that he "tried in" the lower right on September 5, 2006, lower left and "fixed bridge frames, pick up and sent to solder and biscuit bake". He had two sections of the permanent bridge and was having them soldered together to make one complete piece. Then he had to take an impression to see if that fit adequately in her mouth. On that date, it appeared that the permanent bridge fit properly. On September 21, 2006, he "tried in the lower frame, made some adjustments for the pontic areas, pick up impression and a bite". The only problem was the pontic area as there were no teeth so there was more space than he wanted, so he made some adjustments there. On September 26, 2006, Dr. Haselkorn's notes reflect a "#6 post and core and a new upper temporary", which he believed was due to a problem with a post that had to be replaced. He cemented the lower fixed bridge on October 23, 2006. The plaintiff had no complaints about the lower bridge.

On December 29, 2006, Dr. Haselkorn testified that he had a conversation with the plaintiff's daughter that her mother was very upset over the bill of \$9,000.00, and the continuing treatment. He advised the daughter that it included the proposed work for the upper and adjusted the bill to \$5,000.00. He has not spoken to the plaintiff since her last visit. Dr. Haselkorn testified that the plaintiff was a nice lady, but he was frustrated as she was noncompliant. He did not recall the plaintiff developing any TMJ problems during his course of treatment with her, but testified that the fact that she had no teeth on the bottom was an issue. However, he never diagnosed her with TMJ.

The defendant's expert, Martin Bassiur, D.D.S. has submitted his affirmation wherein he affirms that he has been licensed to practice dentistry in New York State since 1968. He set forth his education and training, and the medical records and materials which he reviewed. He set forth his opinion within a reasonable degree of dental certainty that Dr. Haselkorn's dental care and treatment of the plaintiff was within good and accepted dental practice throughout the course of the plaintiff's treatment at his office, and that his treatment was not the proximate cause of the plaintiff's claimed injuries. He further opined that the injuries suffered by the plaintiff are a result of her long-standing dental problems that were not causally related to the treatment rendered by Dr. Haselkorn, but were pre-existing and persisted his treatment. He continued that the plaintiff had been negligent in maintaining good dental health, and the records confirm that she had significant pre-existing dental problems involving her teeth and temporary dental restorations. The records further demonstrate that the plaintiff had temporary dental crowns and bridges for many years prior to seeing Dr. Haselkorn, and the failing temporary dental restorations prior to his treatment were the proximate cause of her alleged injuries.

Dr. Bassiur continued that pursuant to the office records, the plaintiff presented to Dr. Haselkorn on an emergency basis on January 18, 2005 with a lower fixed bridge which was broken and not salvageable. X-rays revealed she was missing many teeth and there was very little tooth structure in her mouth. He described the care and treatment and opined that Dr. Haselkorn repaired the plaintiff's upper fixed bridge to preserve her pre-existing dental restoration. He advised the plaintiff that she needed to have a permanent fixed bridge placed in the lower part of her mouth to replace the temporary bridge. The defendant's expert opined that the re-cementing of the lower temporary bridge prior to January 2006 was done to repair and preserve her pre-existing

dental restorations and was within good and accepted dental practice and did not deviate from the standard of care, as was his advising the plaintiff to replace the lower temporary with a permanent fixed bridge. Extraction of tooth # 28 was necessary due to the abscess, and was not due to Dr. Haselkorn's care and treatment. Rather, it was caused by the plaintiff's own documented failure to maintain good dental health, her failing prior temporary dental restorations, including crowns and bridges provided to her for many years prior to treating with Dr. Haselkorn, and her significant pre-existing dental problems and decay involving her teeth and temporary dental restorations.

Dr. Bassiur stated that on August 7, 2006, Dr. Haselkorn discussed a treatment plan with the plaintiff and that she agreed with the plan and insisted that he place a full fixed bridge in the lower part of her mouth as he had previously recommended. This was within the standard of care in that the temporary bridge was not intended to be a permanent attempt to save the pre-existing dental work. Due to the failing dental restorations, it was appropriate to extract the non-viable teeth # 19 and 20, and repair and preserve plaintiff's dentition by providing new fixed bridgework in the upper and lower parts of the plaintiff's mouth. The permanent lower fixed bridge was cemented in place on October 23, 2006, with no complaints from the plaintiff and no problems with the bridge noted. However, the plaintiff failed to return for further treatment after that date and missed two appointments prior to December 29, 2006. Although the defendant attempted to contact the plaintiff, she did not return his calls.

Dr. Bassiur also opined that informed consent was implied for the treatment that the plaintiff received, namely the restorative dental treatment to the lower part of the plaintiff's mouth, which was a non-invasive procedure to remedy pre-existing dental work, thus there were no new procedures which required informing the plaintiff of any new risks.

Based upon the foregoing, the defendant has established prima facie entitlement to summary judgment on the bases that he did not depart from the accepted standards of dental care and practice in his treatment of the plaintiff; that he did not proximately cause the plaintiff's injuries; and that he provided proper informed consent for the non-invasive bridgework.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2d Dept 2007]).

In opposition to this motion, the plaintiff has submitted the affirmation of her expert, Michael Y. Ivry, D.D.S. who was also her treating dentist. He affirms that he has been licensed to practice dentistry in New York State since 1998, was a periodontics resident from 2001-2003; practiced oral surgery from 2003-2011; and specializes in implant dentistry with Total Dental Care. He set forth the materials and records which he reviewed, exclusive of the pleadings, and the party depositions. It is Dr. Ivry's opinion that Dr. Haselkorn departed from good and acceptable dental practice when he fabricated the lower fixed bridgework because there was an insufficient number of teeth to ensure the stability of a fixed prosthetic device, and implant therapy should have been included in the treatment plan.

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Dr. Ivry opined that the plaintiff became his patient in December 2006, at which time he noted the plaintiff was experiencing a significant infection in her upper maxillary arch. He took x-rays of her upper and lower jaw and noted a fixed prosthetic device was implanted on all of the plaintiff's upper teeth. He opined that these teeth needed root canal treatment prior to the fabrication and installation of the fixed prosthetic device. The failure to do so led to the deep space infection in her upper jaw, and was thus a departure from the standard of care he stated. He further opined that the plaintiff should have been referred to an endodontist immediately prior to the installation of a fixed prosthetic device on all the teeth of the maxillary arch, and that such expert would have performed the root canal treatment prior to the installation.

Dr. Ivry opines that root canal therapy would have or should have been performed prior to cementing the upper bridge. Dr. Ivry contends that Dr. Haselkorn treated the plaintiff in a conservative way to try to preserve as many of the original dental restorations, and by doing so, he jeopardized the plaintiff's dental health, causing the deep space infection in the upper maxillary arch.

Inasmuch as opposing expert affidavits have been provided to the Court, questions of fact exist which must not be decided on a summary judgment motion. Similarly, the credibility of the experts must be left to a trier of fact (*see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp., supra*).

Based upon the foregoing, it is determined that plaintiff has raised a factual issue to preclude summary judgment from being granted to the defendant.

Accordingly, motion (003) is denied.

Dated: October 8, 2013
Riverhead, NY



HON. DANIEL MARTIN, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION