

**Cantor v Marder**

2014 NY Slip Op 30692(U)

March 14, 2014

Supreme Court, New York County

Docket Number: 805309/12

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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PEARL CANTOR,

Plaintiff,

-against-

Index No. 805309/12

**Decision and Order**

MICHAEL MARDER, D.D.S.,

Defendant.

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

In this dental malpractice action, Defendant Michael Marder, D.D.S., moves for partial summary judgment pursuant to Section 3212 of the Civil Practice Law and Rules on the portions of Pearl Cantor’s causes of action seeking punitive damages and the second cause of action for lacked of informed consent in its entirety. Pearl Cantor opposes the motion. For the following reasons, the motion is denied.

Between April 2010 and May 2011, Plaintiff received dental treatment from Dr. Marder. Treatment included diagnostic procedures and fitting of prosthetic restorations. Ms. Cantor alleges two causes of action, dental malpractice and lack of informed consent. Plaintiff requests punitive damages for both causes of action. Ms. Cantor alleges that Dr. Marder was negligent in the performance of diagnostic procedures, the fitting of prosthetic restorations, failure to remove restorations, and failure to advise Plaintiff of the nature of her problems and alternative treatments. Ms. Cantor alleges that as a result of Dr. Marder’s treatment, she suffered pain and mental anguish, occlusal disharmony, temporomandibular joint and neuromuscular problems, periodontal breakdown and bone loss, loss of teeth, future loss of tooth vitality, and loss of tooth structure.

Defendant now brings this motion for summary judgment. Dr. Marder argues that Plaintiff's claims for punitive damages are not appropriate because his conduct was not wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless. He claims that there is no evidence indicating such conduct. Dr. Marder asserts that even had he committed gross negligence, punitive damages would need to involve an improper state of mind or malice or cases involving wrongdoing to the public.

Dr. Marder also contends that Plaintiff has not established the requisite elements of lack of informed consent. He maintains that Ms. Cantor at no point during her deposition or in the bill of particulars claimed that any particular treatment would have been declined had she been provided more information. He claims that Ms. Cantor wanted the treatment but is now claiming that the work was "shoddy." Dr. Marder states that this gives rise to a dental malpractice claim but not an informed consent claim.

In opposition, Plaintiff claims that punitive damages are available in dental malpractice cases where conduct exhibits a reckless indifference to the health and safety of the patient. In particular, Plaintiff argues that Dr. Marder was reckless because he never wore gloves throughout the treatment. Plaintiff asserts that wearing gloves is axiomatic and not wearing gloves is conduct that is evil and reprehensible. Plaintiff states that every dental office in New York City has patients who have AIDs, hepatitis, and other infectious diseases. Plaintiff claims that had Dr. Marder treated a patient with an infectious disease, Ms. Marder could have changes in her oral bacterial flora and intestinal flora.

Plaintiff argues that the motion is technically deficient since Defendant has no expert affidavit stating that Dr. Marder's actions were not "gross, disgusting, evil reprehensible, reckless and against the law." Plaintiff claims that the motion for summary judgment as to lack of informed consent is also technically deficient because there are no affidavits from Dr. Marder or an expert. Plaintiff contends that her affidavit establishes that she was never told of the risks of treatment or alternatives.

In opposition to the motion, Plaintiff provides the expert affidavit of Howard Marshall, D.D.S. Dr. Marshall is a New York licensed dentist. He argues that it is axiomatic that a dentist must wash his hands and wear a fresh pair of gloves when treating any patient. He also claims it is a federal requirement by the Occupation, Safety, and Health Administration. He states that all patients need to be advised of the risks and benefits of a treatment prior to giving informed consent.

In reply, Defendant denies the need for an expert affirmation as there is no argument that the Plaintiff has not established a prima facie case of malpractice. Defendant claims that the Bill of Particulars lacks an assertion that the alleged failure to wear rubber gloves caused an injury to the Plaintiff. Dr. Marder contends that Plaintiff cannot establish a prima facie case that the rubber gloves caused an injury, let alone an injury that requires punitive damages. Defendant also argues that the Plaintiff's expert does not set forth any injuries from the failure to wear gloves. Defendant maintains that even in Plaintiff's opposition papers, there is no treatment identified that Ms. Cantor claims she was not appropriately appraised of or any information that Ms. Cantor claims would have

caused her to choose different treatment.

In considering a motion for summary judgment this 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). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. This Court may grant the motion if, upon all the papers and proof submitted, it is established that the Court is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id.

To justify the imposition of punitive damages, the conduct must be "exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights." Ross v. Louise Wise Services, Inc., 8 N.Y.3d at 489 (internal quotation marks and citations omitted). In a malpractice action, punitive damages are "not recoverable unless the conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless." Schiffer v. Speaker, 36 A.D.3d 520, 521 (1st Dep't 2007). Where punitive damages are "unavailable" as matter of law, summary judgment dismissing such claim can be granted. Graham v. Columbia-Presbyterian Med. Ctr., 185 A.D.2d 753, 756 (1st Dep't 1992); see also Anzalone v. Long Is. Care Ctr., Inc., 26 A.D.3d 449 (2d Dep't 2006).

At this stage of the litigation it cannot be said as a matter of law that the conduct alleged, that the dentist never wore gloves when treating the Plaintiff, was not gross indifference to patient care. Moreover, along with the dental problems, Plaintiff alleges injury in the form of mental anguish, which has manifested as fear of infection and disease.

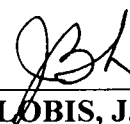
A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to the treatment and its reasonably foreseeable risks and benefits and “that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]” Koi Hou Chan v. Young, 66 A.D.3d 642, 643-44 (2d Dep’t 2009); see also Public Health Law § 2805-d(1).

Defendant fails to make a prima facie case for summary judgment on lack of informed consent. Defendant had no expert and Plaintiff’s expert made no statement regarding whether Ms. Cantor did or did not give informed consent. Defendant moving for summary judgment, however, must demonstrate that a plaintiff gave informed consent. Koi Hou Chan, 66 A.D.3d at 643-44. Defendant fails to make any showing that the Plaintiff was informed of the alternatives to treatment and its reasonably foreseeable risks and benefits. Accordingly, it is

ORDERED that Defendant’s motion for summary judgment is denied.

Dated: *Mar 14*, 2014

ENTER:

  
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JOAN B. LOBIS, J.S.C.