

Greenstein v Stolzenberg

2016 NY Slip Op 32599(U)

December 27, 2016

Supreme Court, New York County

Docket Number: 805017/2016

Judge: Alice Schlesinger

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This opinion is uncorrected and not selected for official publication.

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

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LINDA GREENSTEIN and BRIAN GREENSTEIN,

Plaintiff,

Index No. 805017/2016
Motion Seq. No.001

-against-

SOL S. STOLZENBERG, D.M.D., P.C., Individually
And doing business as TOOTHSAVERS DENTAL SERVICES,
P.C., and/or TOOTHSAVERS, SOL S. STOLZENBERG, D.M.D.,
TOOTHSAVERS DENTAL SERVICES, P.C., TOOTHSAVERS
DENTAL LABORATORY INC., JERRY LYNN, MITCHELL D.
LYNN, ROBERT WINEGARDEN D.D.S., P.C., ROBERT
WINEGARDEN D.D.S., TATYANA BERMAN, D.D.S.,
MICHAEL HYOCHOL LEES, D.D.S., and ALEXANDER
ROCK, D.D.S., M.D.,

Defendants.

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SCHLESINGER, J.:

Before this court is a motion by defendant, Tatyana Berman, a dentist working at ToothsaVERS Dental Services, also a defendant in this dental malpractice action. She is moving to dismiss the complaint as untimely.

The action was commenced on January 11, 2016. Dr. Berman's treatment of Linda Greenstein, the plaintiff, pursuant to an affidavit from Dr. Berman included in the moving papers, was to perform root canals on teeth #20 and #21 in August, 2003 and four years later, on December 5, 2007 to perform root canals on teeth #22 and #23. Further, Dr. Berman says, she last treated Ms. Greenstein on December 27, 2007. Therefore counsel argued, since in a dental malpractice action, a complaint must be filed no more than two and a half years from the last treatment, here that

time was exceeded by about five and a half years! Counsel suggests the last day such a complaint would have been timely filed would have been on June 27, 2010.

The plaintiff is opposing the motion on several fronts. Counsel for Ms. Greenstein points out that on July 12, 2003, she began a treatment plan with Toothsavvers. This was to include work on her upper and lower teeth to give her "a pretty smile." The records show her last treatment there was on August 14, 2015.¹ Counsel urges that Dr. Berman's root canal treatments may well have been part of this plan. Therefore, he argued that "facts essential to oppose the motion may exist."

Further, counsel pointed out, that in Berman's brief affidavit, she fails to put her treatment into a larger context and fails to say how it came to be that she was assigned to Ms. Greenstein in 2003 and 2007. Finally, counsel maintained that Dr. Berman's treatment was negligent, as allegedly was most of the other treatments she received at Toothsavvers. During her twelve years of treatment at this dental facility, Ms. Greenstein lost 13 teeth. When she began, she had 25. When she ended her relationship there, only 12 remained!

The Reply claimed that all the plaintiff had succeeded in doing was to fabricate an issue of fact where none exists; namely that Dr. Berman's emergent treatments for pain via her root canal work was a part of an all encompassing twelve year treatment plan implemented by Toothsavvers to fully reconstruct Ms. Greenstein's

¹Dr. Berman has been associated with Toothsavvers sine 2000, although it is not entirely clear in what capacity.

mouth. Moving counsel insists this was not the case. In fact, he points out that the opposition fails to include an affidavit from the plaintiff stating that it was. Further, repeating his initial statement, Dr. Berman's treatment was years ago and was at all times in 2003 and 2007 for distinct tooth problems.

Oral argument on the motion was held on August 31, 2016. There, I did indicate that I was leaning toward granting the motion. But counsel for the plaintiff convinced me to allow him to depose Dr. Berman on the relevant issues before finally deciding the motion. Thus, I directed such a deposition. This would then be followed by supplemental affirmations from counsel, first from opposing counsel and then from moving counsel.

Dr. Berman was deposed on September 29, 2016. James Lutfy, Ms. Greenstein's very good, persistent attorney, questioned her at length and then supplemented his opposition. There he pointed out first that Dr. Berman's original affidavit was "incorrect and incomplete". Why? Because it omitted additional interaction between her and Greenstein in 2007. Because of this unreliability, counsel argues I should deny her motion and that he should be permitted still more discovery.

The argument continues that Dr. Berman's work, the performance of four root canals on lower teeth and advice given to the plaintiff regarding surgery on a fifth tooth, #26, were in fact all part of this multi-year plan to restore plaintiff's entire

mouth.²

The further and final affirmation by Victor Bota, Dr. Berman's equally strong attorney, urges that the deposition makes it clear that this defendant provided no treatment to the plaintiff after 2007. Her opinion as to tooth #31 was just that, an opinion, to have an oral surgeon extract that tooth. It did not constitute treatment. As to tooth #26, Dr. Berman again merely made a recommendation to have an apicoectomy. This recommendation also was not treatment by Dr. Berman. However, even if these interventions were treatment, counsel argues they would still be way outside the statute of limitations.

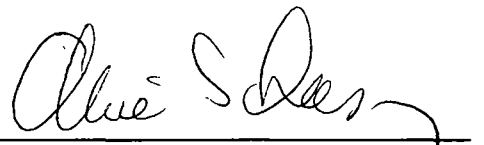
I believe defense counsel makes the better argument. Why? Because the unrefuted facts support the conclusion that Dr. Berman last provided treatment to this patient in 2007. Further, I cannot find, pursuant to Dr. Berman's answers in her deposition, that her work was part of Toothsavers' 12 year treatment plan. Rather her work was to relieve pain emergently for Ms. Greenstein by performing root canal in years 2003 and 2007. There is no evidence that this root canal work was anything other than treatment to relieve pain for immediate tooth problems.

That being the case, I find that the complaint here, commencing in January of 2016 against Dr. Berman, is untimely and thus deserving of dismissal. Therefore, it is ordered that the action against Dr. Tatyana Berman is in all respects dismissed

²Apparently this defendant also opined in April of 2012 regarding tooth #31, that it ought to be extracted.

with prejudice. This decision constitutes the order of the court.

Dated: December 27, 2016



Alice Schlesinger, J.S.C.