Hunter v Habib
2018 NY Slip Op 30607(U)
April 4, 2018
Supreme Court, New York County
Docket Number: 805182/14
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ACE HUNTER, INDEX NO. 805182/14

Plaintiff,

-against-

BARRY HERTZL HABIB, D.D.S., DAVID TAVELIN, D.D.S., and CONTEMPORARY DENTAL IMPLANTS MADISON AVENUE, LLP,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for alleged dental malpractice, defendant Dr. Barry Hertzl Habib, D.D.S. (motion seq. no. 002) and defendant Dr. David Tavelin, D.D.S. (motion seq. no. 003) each move for summary judgment.[1] Plaintiff opposes the motions. The motions are consolidated for determination.

This action, sounding in dental malpractice and lack of informed consent, concerns the treatment provided to plaintiff Ace Hunter by defendant doctors at Contemporary Dental Implants Madison Avenue, LLP ("CDI"). The treatment involved a complete reconstruction of plaintiff's teeth, and consisted of Dr. Tavelin's extraction of all of plaintiff's existing 19 teeth (10 upper and 9 lower) and placement of 17 dental implants, and Dr. Habib's fabrication and placement of upper and lower permanent bridges.

With respect to the malpractice claims against Dr. Tavelin and Dr. Habib, plaintiff alleges the following departures from the standard of accepted dental practice: 1) Dr. Tavelin and Dr.

[1]Defendant Contemporary Dental Implants Madison Avenue, LLP has neither appeared nor answered, and plaintiff has yet to move for a default judgment against such defendant.

Habib together failed to provide a coordinated pre-treatment plan; 2) Dr. Tavelin failed to follow the proper "diagnostic protocol" for planning a full arch restoration with surgical implants by relying only a panoramic x-ray, and failing to obtain a CT scan, failing to take "intra-oral impressions," failing to use "study models and articulated casts," and failing to fabricate and use a "surgical stent"; 3) Dr. Tavelin negligently placed the dental implants; 4) Dr. Tavelin placed an insufficient number of dental implants; and 5) Dr. Habib improperly fabricated and placed the permanent bridges. With respect to the informed consent claim, plaintiff alleges that Dr. Tavelin failed to advise him of any alternative treatment plan or that he had insufficient bone in the upper left area and a sinus lift was necessary, and failed to provide the consent forms prior to the first day of treatment.[2]

Plaintiff alleges that as a result of the foregoing departures, he has a "haphazard placement" of 17 dental implants "with bridges that have multiple unsupported/cantilevered crowns, improper occlusion, dysfunction and unacceptable esthetics." He alleges the permanent bridges "look terrible," he is unable chew and eats only soft food, he must "concentrate and speak slowly in order to pronounce words correctly," and he has jaw pain and headaches. Plaintiff alleges these difficulties can only be remedied by removing, re-fabricating and replacing the permanent bridges, at the cost of approximately $40,000.

Plaintiff, a Florida resident, visited the offices of defendant Contemporary Dental Implants Madison Avenue, LLP ("CDI") on June 15, 2012, and was seen by Dr. Tavelin. According to plaintiff, he "elected" to treat with defendant CDI "because I believed that the

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[2]At oral argument plaintiff agreed to withdraw his lack of informed consent claim against only Dr. Habib, but not as against Dr. Tavelin.

dentists in New York City are better than those in Jacksonville, Florida," and he was also "impressed" that "they did both the surgical placement of implants as well of fabrications and placement of the crowns." Based on a panoramic x-ray and an oral examination, Dr. Tavelin recommended a treatment plan to extract all of plaintiff's existing 19 teeth, place 8 upper and 8 lower dental implants, place temporary bridges on the implant abutments, and place permanent bridges after the implants were integrated with the bone. Plaintiff asserts that Dr. Tavelin provided only this one treatment plan and explained that the permanent bridges "would be done by another dentist" at CDI, Dr. Habib

On July 13, 2012, plaintiff returned to CDI for the treatment and signed several consent forms. Plaintiff states that the implant surgery began at approximately 9:00 a.m. and lasted approximately six hours, during which time Dr. Tavelin performed 19 extractions, and placed 17 implants and temporary bridges. The temporary bridges were prefabricated shells, rather than laboratory fabricated. Plaintiff asserts the temporary bridges "did not fit well and did not look the way that I was expecting," the teeth were "large and protruding," and the "lower bridge was so bulky I was unable to comfortably keep my tongue in my mouth."

The next day plaintiff called CDI and scheduled an emergency appointment for July 15, 2012, when a "dental assistant at the direction of Dr. Habib, grinded the inside of the lower bridge to make more room for my tongue." Plaintiff states he told Dr. Habib that "the appearance of the bridges was unsatisfactory, that they did not feel right and that I had trouble speaking," and Dr. Habib "assured" him the permanent bridges "would be different and that I would be very happy once the permanent bridges were done." On July 16, plaintiff returned to

CDI for a second emergency appointment and saw Dr. Tavelin, who "did more grinding of the inside of the lower temporary bridge." Plaintiff states that he told Dr. Tavelin that his tongue was still "uncomfortable," and Dr. Tavelin replied that he could not grind any more. Plaintiff went back to Florida, and "[o]ver the next few months I sent several emails to the office describing my dissatisfaction with the temporary bridges."

On October 4, 2012, plaintiff returned to CDI for Dr. Habib to begin the process of fabricating the permanent bridges. Plaintiff states that he told Dr. Habib that he "did not like the way the temporary bridges looked or the way they fit," he was having trouble speaking, and had headaches and jaw pain. Dr. Habib removed the temporary bridges, took impressions for both the new temporary bridges and the final permanent bridges, and reinstalled the original temporary bridges. On October 18, 2012, Dr. Habib installed the new temporary bridges. Plaintiff states he still had problems with speaking, headaches and jaw pain, and that Dr. Habib "again assured me that I would be happy with the permanent bridges."

On November 13 and 27, 2012, Dr. Habib continued to work on fabricating and completing the permanent bridges, and on December 11, 2012, he cemented the permanent bridges. Plaintiff states that he was immediately dissatisfied with the bridges, as the teeth were "large and bulky," "didn't look right" and "didn't feel right." Plaintiff states that Dr. Habib told him to come back the next day afer he had time to wear the bridges. Plaintiff states that on December 13, 2012, Dr. Habib removed the permanent bridges, added material to the upper bridge, re-cemented the bridges, and "attempted to grind the lower bridge down to make adjustments, but that did not fix the problems." Plaintiff states he "still felt uncomfortable and

my speech was still effected," but Dr. Habib "said that there's nothing more to do." Plaintiff thereafter had no further contact with defendants.

On June 8, 2014, plaintiff commenced this action, asserting claims for dental malpractice and lack of informed consent based on the dental treatment provided by Dr. Tavelin and Dr. Habib. Defendants Tavelin and Habib are now each moving for summary judgment.

A defendant moving for summary judgment in a medical or 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 medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy this burden, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. See id; Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant's expert opinion must "explain 'what defendant did and why.'" Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

In a medical or dental malpractice action, "to avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries." Roques v. Nobel, supra at 207; see Koss v. Bach, 74 AD3d 472 (1st Dept 2010). To meet this burden, "plaintiff must submit an affidavit from a

medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged." Id. Specifically, plaintiff is required to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establishing the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Alvarez v. Prospect Hospital, 68 NY2d 320, 324-325 (1986).

The opinion of plaintiff's expert "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dept 2007) (quoting Ferrara v. South Shore Orthopedic Associates, PC, 178 AD2d 364, 366 [1st Dept 1991]). Plaintiff's expert must address and refute the specific assertions of defendants' experts with respect to negligence and causation. See Janelle M. v. New York City Health & Hospitals Corp, 148 AD3d 519 (1st Dept 2017); Foster-Sturrup v. Long, 95 AD3d 726 (1st Dept). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. New York Downtown Hospital, 99 NY2d 542, 544 (2002); accord Rivera v. New York Pain Care Center, PC, 154 AD3d 421 (1st Dept 2017). Moreover, where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

A defendant moving for summary judgment on a lack of informed consent claim must make a prima facie showing that a plaintiff was informed of any foreseeable risks, benefits and alternatives of the treatment rendered. See Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2nd Dept 2009); Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003). The mere fact plaintiff signed a consent form does not establish defendant's prima facie entitlement to judgment as a matter of law. See Godel v. Goldstein, 155 AD3d 939 (2nd Dept 2017); Santiago v. Filstein, 35 AD3d 184 (1st Dept 2006). Once defendant's burden is satisfied, plaintiff must show that defendant doctor failed to fully apprise him of the reasonably foreseeable risks, benefits and alternatives of the procedure, and a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. See Orphan v. Pilnik, 15 NY3d 907, 908 (2010) [citing Public Health Law §§ 2805–d (1), (3)]; Eppel v. Fredericks, 203 AD2d 152 (1st Dept 1994). "Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan v. Pilnik, supra at 908; see Ramos v. Weber, 118 AD3d 408 (1st Dept 2014), lv app dism 26 NY3d 1127 (2016); Katz v. Sen, 111 AD3d 438 (1st Dept 2013).

Here, defendant Dr. Tavelin has established prima facie entitlement to judgment as a matter of law, by submitting the expert affirmation of Dr. Arthur C. Elias, D.M.D., who reviewed the bills of particulars, defendants' records and films, other records and films, the parties' depositions, the IME report of Dr. Placa, and the report and films of Dr. Klausner. Dr. Elias also examined plaintiff on December 8, 2015 and prepared a written report. Dr. Elias explains that when plaintiff first presented to Dr. Tavelin, his "remaining teeth were hopeless with considerable mobility requiring extraction, as correctly assessed by Dr. Tavelin," and that "[i]mplant borne fixed bridges were a reasonable treatment alternative (as [opposed] to

removable dentures), which Mr. Hunter elected and consented to." Dr. Elias opines that "the number of implants was sufficient to support the proposed plan of maxillary and mandibular restoration, they were placed correctly, they were well integrated and they remain in his mouth since their placement by Dr. Tavelin 4 years ago." Dr. Elias states that "the panorex [panoramic x-ray] was sufficient so it was not a departure not to obtain a CT Scan, and it is not necessary nor a departure not to use a surgical stent for implant placement."

With respect to the treatment plan, Dr. Elias explains that the "ability to restore the occlusion is the province of the restorative dentist [Habib] who can direct where s/he wishes the implants to go," and the "oral surgeon's [Tavelin's] job is to satisfy this outcome as long as there is enough bone present and to evaluate whether there is anything that would interfere with the placement of the implants such as the sinuses." Dr. Elias states that here, "the possibility of a full sinus lift and bone graft at the patient's upper left was discussed (a sinus lift is surgery to add bone between the upper jaw and the maxillary sinuses in the area of the molars and premolars for implant surgery), but Mr. Hunter did not want to pay for this and it was something that be addressed later if needed." Dr. Elias explains that "[c]onsidering the right side, Dr. Tavelin did tent the sinus (a minor lift because there was enough bone) for the last implant in the upper right, which was feasible and suitable."

Dr. Elias opines that with respect to the "plan for 3 cantilevered pontics on the left side (a cantilevered pontic/bridge is supported on only one side by a retainer) instead of a sinus lift to place more implants, the cantilevers held up so this is a non-issue," and "[i]n any event, the choice to use a cantilever is up to the restorative dentist [Habib] and is an option that is presented

to the patient." He explains that "[e]ssentially, in this case Dr. Tavelin acted as a technician placing implants, and the restorative dentist [Habib] would assess whether the patient will have enough support in front of the cantilever so that enough weight is present to offset the stress on the cantilever."

Dr. Elias opines that "there does not seem to be anything wrong with Mr. Hunter's occlusion," and "[e]ven if there was something wrong with it, it has nothing do to with the teeth extractions and placement of the implants," performed by Dr. Tavelin. He reports that "[t]here appeared to be no difficulty with Mr. Hunter's speech during my interview and examination," and he "believes that Mr. Hunter is focused on and is consciously controlling, the position of his jaw and his tongue to recreate the sensory and muscular sensitivities of dentate jaws, much like a full denture wearer would do." Dr. Elias explains that "[u]sually a patient accommodates to the changes and the jaw position becomes one which is at rest and subconscious," but "[n]evertheless, Mr. Hunter's temporomandibular joint function was within normal limits and asymptomatic, and his fixed prostheses have far greater mechanical efficiency and stability, in contrast to denture wearers."

Addressing plaintiff's complaints of pain, Dr. Elias states that "5 months after Dr. Tavelin's placement of the implants and the last time Dr. Tavelin saw plaintiff, Mr. Hunter signed a form dated 12/10/12 stating he was pain free with respect to this dental condition, and that he did not have any current complaints of pain, numbness, altered sensation, discomfort or any other problems associated with the implants placed by Dr. Tavelin." Dr. Elias opines that any "alleged pain did not result until the restorations were placed, thus the pain was not caused

by the implant placement" by Dr. Tavelin. Dr. Elias explains that the "nature of the intermittent left supraorbital pain Mr. Hunter described during my examination is inconsistent with the dental care he received and the uneventful healing that ensued, and no mass was palpated behind the left ear," and "[p]alpitation of the facial bones failed to elicit pain or reveal depression, expansion or discontinuity." Dr. Elias notes that during his examination, plaintiff's "sensation of the 3 divisions of the trigeminal nerves was bilaterally within normal limits, and "[i]ntraorally, the mandibular and maxillary implant supported fixed bridges were firm and no pain could be elicited by palpation or percussion."

Dr. Elias addresses plaintiff's assertion that a dentist in Florida advised that the fixed bridges should be removed, the implants evaluated and the bridges remade to "achieve the sensation he had pre-surgery." Dr. Elias opines that such treatment "is not necessary and illogical," as "[f]or a dentist to imply that a dentition which is entirely achieved with implant support can ever provide the sensation of a natural dentition with intact periodontal ligaments shows a lack of understanding of both implant and oral physiology."

As to the lack of informed consent claim against Dr. Tavelin, Dr. Elias opines that Dr. Tavelin advised plaintiff of "the procedures to be performed, the benefits they provide, and alternatives available and the foreseeable risks . . . as documented in the several signed writings." He explains that "on the date of surgery, prior to treatment, plaintiff read and signed 7 separate consent forms dated 7/13/12 which were witnessed and countersigned, and even 1 earlier form dated 6/15/12 also concerning his dental treatment." He states that the consent forms "clearly emphasized the 'commonly known risks and potential complications' associated with 'dental extractions, implant placement and other dental surgery,'" and that plaintiff "read, understood

and accepted." Dr. Elias opines that the consent forms and the "separate prior discussions between Dr. Tavelin and the plaintiff, together with the several questions Mr. Hunter asked of Dr. Tavelin prior to and regarding the treatment and risks as plaintiff testified, were more than sufficient to allow him to make an informed decision as to whether to undergo the recommended treatment." Dr. Elias also opines that even if plaintiff claims he did not read or understand the consent forms, "reasonable patients in the plaintiff's position at that time would go forward as this patient did (as implant placement has become a frequently performed dental procedure, albeit the fact that it, as well as many other procedures, has risks associated with it)."

Defendant Dr. Habib has likewise established prima facie entitlement to judgment as a matter of law by submitting affirmations from two experts, Dr. Placa and Dr. Goldstein. Dr. Placa reviewed the pleadings, plaintiff's dental records from CDI and thereafter, images and photographs, and the parties' depositions. Dr. Placa also examined plaintiff on October 24, 2014, and took x-rays and photographs. Dr. Placa states that she conducted a "comprehensive dental evaluation" of plaintiff and reports the following: plaintiff had a "normal facial appearance, and compared to the photographs depicting plaintiff taken prior to Contemporary Dental, there was no difference in his appearance"; plaintiff's TMJ "joint function was within normal limits"; the "maximum opening of his mouth was 42 mm, which is within normal limits"; "[u]pon examination of plaintiff's jaw relationships, it was noted plaintiff's speaking space was within normal limits and appropriate for normal pronunciation of words"; and plaintiff "had no difficulty with speech during the entire evaluation and examination and did not 'whistle' when speaking or exhibit any speech impediments."

Dr. Placa further reports that "[p]eridontal examination revealed no significant or detrimental periodontal defects," noting a "minor recession around some of the implants, which is within normal limits and expected and attributable to normal die back following implant surgery." She states that the "percussion test, which consisted of tapping on the dental implants, revealed slight sensitivity from certain implants, as well as unexplained and anatomically inconceivable responses to other implants," and that "[n]otwithstanding these sensitivity complaints, same are related solely to the implant surgery, and not to the upper and lower bridgework performed by Dr. Habib." She explains that the "three tooth cantilever . . . on plaintiff's maxillary left and one tooth cantilever . . . on the right side, with all four cantilevers exhibiting light occlulsal forces," are "intended to protect the implants and upper and lower bridgework from destructive biting forces"; the upper and lower bridgework "was firmly cemented in place"; and the implants were "stable with no mobility."

Dr. Placa notes that on December 8, 2015, a year after she examined plaintiff, Dr. Lloyd Klausner, D.M.D. performed a CT scan and reported that "several implants have labial/buccal bone loss associated with them and are placed with insufficient horizontal space between them." Dr. Placa opines that "[n]otwithstanding the accuracy of the interpretations by Dr. Klausner, same is solely related to the implant placement, which was performed by Dr. Tavelin," and "has nothing to do with the upper and lower bridgework performed by Dr. Habib."

Dr. Placa explains that on examination, plaintiff "complained of pain in his lower right side when chewing 'ice'" and at his deposition he complained he was unable "to eat 'beefsteak' or 'hard shell nuts.'" Dr. Placa states that while plaintiff claims these complaints are related to his treatment at CDI, "it is my opinion that, within a reasonable degree of dental certainty,

plaintiff's chewing efficiency was already severely compromised" before he came to CDI and that "Dr. Habib's treatment significantly improved this for plaintiff." Dr. Placa explains that plaintiff came to CDI "for implant surgery and restorative work due to a seriously compromised and neglected dentition," as at "his initial presentation, he had only 18 of 32 teeth remaining, significant bone loss and no posterior occlusion or support, and reported chewing only on one side." She opines that Dr. Habib "appropriately, biomechanically controlled plaintiff's occlusion in order to provide long-term success for the implants and upper and lower bridges," and that "Dr. Habib's treatment produced acceptable results, within the anticipated and expected standard of care." She explains that the "upper and lower bridges constructed by Dr. Habib are still in place and did not exhibit any mobility or loosening from the underlying implant abutments," and "[i]t is present in plaintiff's mouth the way it existed after his last visit with Dr. Habib on December 13, 2012," and plaintiff "has never undergone any subsequent treatment."

Dr, Placa disagrees that the permanent bridges will need to be refabricated and replaced in the future. While acknowledging that "there is a slight marginal discrepancy on the upper left implant, as evidenced by x-ray," she opines that "this did not affect the integrity of the bridgework, nor cause any clinical concerns." She states that the "fact that after 3½ years the x-rays and clinical examination reveal no pathological changes is an indication of a passive fit, which is the ideal outcome." In sum, she opines that "with a reasonable degree of dental certainty, plaintiff's claimed injuries, if any, were caused by his preexisting dental condition prior to Dr. Habib's involvement and [is] not in any way, related to the care and treatment provided by Dr. Habib."

Dr. Habib's other expert, Dr. Goldstein, reviewed the pleadings, the bills of particulars, plaintiff's dental records and images from CDI and thereafter, Dr. Placa's x-rays and photographs, Dr. Klausner's CT scan report, the report of Dr. Tavelin's expert, Dr. Elias, plaintiff's photographs and the parties' depositions. Dr. Goldstein explains that from the "outset, plaintiff had a severe and neglected preexisting dentition, which included numerous missing teeth, and mobility, bone loss and decay of remaining teeth, which either had or were missing temporary crowns," and plaintiff "exhibited a retruded tongue position and did not have posterior occlusion." He states that Dr. Tavelin "developed the surgical and restorative treatment plan" and opines that plaintiff was an "appropriate candidate for Dr. Habib's proposed treatment."

Dr. Goldstein opines that Dr. Habib "timely and appropriately treated plaintiff," as at each visit he obtained a "complete pertinent history," and evaluated and examined plaintiff, "taking all dentally indicated measurements and records, imaging studies and impressions." He states that there was "no dentally indicated reason" for Dr. Habib to perform or order a CT scan or any other imaging studies," and that Dr. Habib "used accepted standards of practice in his fabrication of the prostheses and the use of the cantilevered pontics was properly performed and appropriate for the esthetic rehabilitation of the patient." Dr. Goldstein states that plaintiff has a "normal facial appearance," and comparing photographs taken prior to his treatment at CDI, "there has been no difference in his appearance." He also states that plaintiff "has no temporomadibular joint dysfunction as set forth in the records of Dr. Placa and Dr. Elias," and "during the consultation by David & Associates, a dentist plaintiff sought, plaintiff denied painful or swollen temporomandibular joints."

Dr. Goldstein states that plaintiff's "freeway space is within normal limits, as set forth by each examining dentist, and there is no reference in any record that plaintiff's speech is affected." He states that plaintiff "has no periodontal disease or defects, other than minor recession around some of the implants, which is within normal limits and expected and attributable to normal recession following implant surgery." Dr. Goldstein states that the "four cantilevers inserted by Dr. Habib remain with light occlusal forces, the anticipated and appropriate outcome pursuant to Dr. Habib's plan," and that the "protheses provided by Dr. Habib remain firmly cemented in place." Addressing Dr. Klausner's report of the CT scan, which states that "several implants have labial/buccal bone loss associated with them and are placed with insufficient horizontal space between them," Dr. Goldstein states that "[n]othwithstading the accuracy of the interpretations by Dr. Klausner, it has nothing to do with the restorative work or prostheses performed by Dr. Habib," and "based on the radiographs, photographs and clinical examinations provided, the implant retained prostheses are a success."

Dr. Goldstein opines that Dr. Habib "appropriately controlled plaintiff's occlusion in order to provide long-term success for the implants and the prosthesis," and that Dr. Habib's "treatment produced acceptable results, within the anticipated and expected standard of care." He explains that the "prostheses constructed by Dr. Habib are firmly in place, have no chipped porcelain, have healthy peri-implant soft tissue, have no significant bone loss around the implants, and show no clinical or radiographic pathologic signs," and they are "present in plaintiff's mouth the way it [sic] existed after his last visit with Dr. Habib on December 13, 2012." Dr. Goldstein also disagrees with plaintiff's claim that in the future, the bridges will need to be removal, re-fabricated and replaced. He states that such treatment is not needed and

"[a]lthough there is a slight marginal discrepancy on the upper left implant, as evidenced by x-ray, this did not affect the integrity of the bridgework, nor cause any clinical concerns." He states that the "fact that afer 3 ½ years, the x-rays and clinical examination reveal no pathological changes," is an "indication of a passive fit, which is the ideal outcome."

In opposition to defendants' motions, plaintiff submits an expert affirmation from Dr. Joel T. Gluck, D.D.S., who examined plaintiff in May 2014,[3] and also reviewed defendants' dental records, Dr. Klausner's CT scan report, Dr. Placa's x-rays and photographs, the parties' depositions, the pleadings and the bills of particulars. Based on his examination, Dr. Gluck "found that the bridges had no posterior occlusion bilaterally," the "upper plane of occlusion was off as the left side was much higher than the right," and "[t]his was in conjunction with three unsupported cantilevered pontics in the upper left posterior." Dr. Gluck states that at the examination, plaintiff "complained of left and right side jaw pain," and that his "review of the radiographs of Dr. Placa also revealed that the crowns on the implants at site #'s 4, 20 and 28 are poorly fitting."

Dr. Gluck opines that Dr. Tavelin and Dr. Habib together deviated from the standard of care in failing to properly plan for the proposed treatment by not providing a "coordinated pre-treatment plan for restoration of Mr. Hunter's upper and lower jaws."

With respect to Dr. Tavelin alone, Dr. Gluck opines that he deviated from the standards of good and accepted practice of dentistry "by failing to perform a full oral examination and evaluation of plaintiff on June 15, 2012 prior to the formulation of the treatment plan," which

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[3]It is unclear whether the examination took place on May 6 or May 7, as both dates appear in Dr. Gluck's affirmation.

"includes a full series of periapical x-rays, periodontal evaluation, tooth mobility evaluation and a set of study models with face bow mounting." He states that Dr. Tavelin's use of a "single panoramic x-ray" to evaluate plaintiff's teeth, was a deviation from the standard of care.

Specifically, Dr. Gluck opines that the standard of care required Dr. Tavelin to perform "full analysis" of plaintiff's upper and lower jaws, by determining his "vertical dimension and centric relation," so the "lower jaw, which is not in a fixed position" is "correctly aligned to the upper jaw which is in a fixed position." Dr. Gluck opines that Dr. Tavelin's failure to establish plaintiff's vertical dimension and centric relation prior to treatment "was a substantial factor in causing injury to Mr. Hunter because the permanent bridges that are now in place do not have the correct vertical dimension and centric relation which is causing him jaw pain as well as speech difficulty."[4]

Dr. Gluck explains that the fabrication of "prosthetic restorations with the correct vertical dimensions and centric relation" require the use of "articulator mounted study models" since the "upper and lower jaws need to be correctly aligned with the patient's temporal mandibular joints to establish the correct position for fabricated prosthetics with clinically repeatable jaw relationship." Dr. Gluck opines that Dr. Tavelin deviated from the standards of good and accepted practice of dentistry by failing to obtain "pre-treatment study models" and failing to "fabricate bite rims so that study models can be made." He explains that "[b]ite rims are made of

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[4] Dr. Gluck explains that the "[v]ertical dimension refers to a measurement that establishes the space between the upper and lower teeth at rest (teeth not touching) to allow 3-4 mm so that facial features do not collapse and the teeth don't 'click' when speaking," and "[c]entric relation refers to positioning the condyles (the rounded ends of the lower jaw bone) so that the upper and lower teeth meet evenly in a reproducible manner."

wax on a acrylic base that fits on areas where there are no teeth," and since plaintiff "did not have any upper and lower functioning molar teeth . . . bite rims were necessary to mount the models." He further explains that the "bite rims are placed on stone models of the upper and lower jaw," and a "face bow is used to record the horizontal and anterior/posterior jaw position so that when the models are mounted on an articulator the orientation can be adjusted to the correct vertical dimension and centric relation." He states that "[o]nly after study models are obtained and mounted can a treatment plan be determined and implemented."

Dr. Gluck opines that Dr. Tavelin also departed from the standards of good and accepted practice of dentistry by "failing to fabricate and utilize a surgical stent and obtain a CT scan prior to placing the dental implants." He explains that a "surgical stent is an appliance that is used for the treatment planning of implant placement and during surgical procedures to locate optimal implant placement sites," and a CT scan is "three dimensional imaging which is used to evaluate bone structure to determine the sites for the placement and positioning of the dental implants." He explains that the "stent is fabricated with radiographic markers and the CT scan is obtained with the stent in place in the patient's mouth," and that the "stent and CT scan in coordination with the tooth arrangement on the mounted study models enable the dentist to identify the specific sites for prospective implant surgery and determine the optimal positioning of the implants." He states that during surgery, the stent is "used as a guide for the precise placement of the dental implants."

Dr. Gluck opines that Dr. Tavelin's failure "to fabricate surgical stents, obtain the CT scan, coordinate the plan with the tooth arrangement on mounted study models and utilize stents for implant placement were deviations from the standard of care and a substantial factor in

causing the dental implants to be incorrectly placed." He states that the CT scan taken by Dr. Klausner on December 8, 2015 shows that the "apex of the posterior right side implant is located within the maxillary sinus, the 4th implant from the right appears to have a mid-body osseous fenestration defect, the third implant from the upper left has thin or absent buccal bone, the right anterior upper implants have insufficient horizontal alveolar space between them, the 3rd implant from the right in the lower has absent buccal crestal bone, the 3th and 4th implants from the lower left have thin or absent buccal crestal bone and several lower implants have inadequate horizontal alveolar space between them." Dr. Gluck states that Dr. Placa's x-rays "also show that Dr. Tavelin placed an excessive number of dental implants that have insufficient space between them particularly in the upper right anterior and lower left." Dr. Gluck opines that "the defectively positioned implants will fail," and the "reason" they have "not failed yet is that the upper and lower bridges do not have occlusion and Mr. Hunter had altered his diet accordingly." Dr. Gluck states that "[i]f properly fitting bridges were placed on these implants thus subjecting them to ordinary occlusal forces, the implants would begin to fail due to the multiple defects, poor positioning and insufficient space between the implants."

As to the lack of informed consent, Dr. Gluck opines that Dr. Tavelin provided only one treatment plan and failed to advise plaintiff that he could "alternatively have implant support over dentures," which was an "especially good alternative" for plaintiff since he had "insufficient bone in the upper left posterior to support dental implants for a fixed dental bridge." Dr. Gluck explains that an "upper over-denture could have been supported with dental implants in the areas where there was sufficient bone," and that an "over-denture differs from a traditional upper denture in that it is securely held in place by dental implants" He explains that a "traditional

upper denture is held in by place by suction which is created by full palatal coverage at the roof the mouth," but an "over-denture is horse-shoe shaped and does not have full palatal coverage"

Dr. Gluck opines that Dr. Tavelin additionally departed from the standard of care by failing to provide the consent forms and information to plaintiff prior to the date of surgery, so that plaintiff would have had the time to decide on the treatment, and by failing to advise plaintiff that he had "insufficient bone in the upper left area and a sinus lift would be needed to place dental implants in the upper left."

Turning to defendant Dr. Habib, Dr. Gluck opines that he deviated from good and accepted standards of dentistry "in his fabrication and placement of upper and lower implant supported permanent bridges," as the bridges "have no posterior contact bilaterally." He explains that the upper bridge has "a left side plane of occlusion that is significantly higher than the right side," which "corresponds with the three cantilevered left side pontics which have been intentionally left out of occlusion." He opines that the "three cantilevered pontics on the bridge are a deviation from the standard of care" and that there is "also no embrasure space between the teeth where there are implants which prevents Mr. Hunter from adequately performing good oral hygiene." He opines that the "mid-line is also off by 1.5 mm to the left," and that these deviations "are a substantial factor in causing injury to Mr. Hunter," as the "lack of occlusion has resulted in Mr. Hunter's inability to properly chew food and has caused bilateral jaw pain." He also opines that the "esthetics of both bridges is below the standard of care."

Dr. Gluck opines that Dr. Habib further deviated from the standards of good and accepted dental practice "by failing to ensure that the temporary bridges were satisfactory to Mr. Hunter for chewing, did not interfere with his ability to speak properly and met the esthetic objectives."

He explains that plaintiff "had numerous complaints about the temporary bridges," the second of which Dr. Habib fabricated. Dr. Gluck opines that Dr. Habib's assurances that the "permanent bridges would be made correctly," were "illogical," as the standard of care is to fabricate temporary bridges that the patient is satisfied with, both functionally and esthetically, and once that is achieved, "the temporary bridges become a template for the permanent bridges," and for that reason "Dr. Habib's failure to have satisfactory temporary bridges was the cause of the permanent bridges being unsatisfactory." Finally, Dr. Gluck opines that permanent bridges fabricated by Dr. Habib need to be "removed, re-fabricated and replaced," and there is "no other way to correct the defects in the bridges."

Dr. Gluck's expert affirmation is sufficient to raise issues of fact for trial as to some, but not all of the claims against Dr. Tavelin and Dr. Habib.

Plaintiff alleges that Dr. Tavelin and Dr. Gluck together departed from the standard of care by failing to provide a coordinated treatment plan. "Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient." Huffman v. Linkow Institute for Advanced Implantology, Reconstructive and Aesthetic Maxillo-Facial Surgery, 35 AD3d 214 (1st Dept 2006) (quoting Boone v. North Shore University Hospital at Forest Hills, 12 AD3d 338, 339 [2nd Dept 2004]).

Here, Dr. Tavelin alone determined that plaintiff was a suitable candidate for implants, determined the number and location of the implants, performed the surgical extractions and placed the implants. Dr. Habib was not involved in the surgical aspects of the treatment, and his involvement with plaintiff's care and treatment was limited to post-surgical restorative efforts,

consisting of the fabrication and placement of the second set of temporary bridges and the final set of permanent bridges. Although Dr. Habib saw plaintiff on an emergency basis two days after the surgical procedure, he simply adjusted the temporary bridges in an effort to make them more comfortable. Under these circumstances, where Dr. Tavelin and Dr. Habib performed separate medical functions, their duties of care to plaintiff are limited to those specific functions. See Huffman v. Linkow Institute for Advanced Implantology, Reconstructive and Aesthetic Maxillo-Facial Surgery, supra. Defendants, therefore, are each entitled to summary judgment dismissing the claim premised on their alleged failure to provide a coordinated treatment plan.

Dr. Tavelin is also entitled to summary judgment dismissing the lack of informed consent claim.[5] Plaintiff fails to raise an issue of fact as to the necessary element of whether a reasonably prudent person, fully informed would have refused the treatment. See Public Health Law §2805-d(1), (3); Orphan v. Pilnik, supra. Plaintiff's expert, Dr. Gluck, fails to state that a reasonable person in plaintiff's position, fully informed, would have elected not to undergo the treatment. Although expert opinion is not necessary to establish this element, in neither his affidavit nor at his deposition does plaintiff state that he would have declined the treatment or opted for an alternative treatment, had he been fully informed of the risks, benefits and alternatives. See Anderson v. Delaney, 269 AD2d 193 (1st Dept 2000) ("[P]laintiff's testimony that she would not have consented to the surgery had she been fully informed of the risks involved, without more is sufficient to raise a question of fact as to whether a reasonably prudent person, fully informed, would have refused the operation.").

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[5]As noted above, plaintiff has withdrawn his lack of informed consent claim against Dr. Habib.

Defendants are not entitled to summary judgment with respect to the balance of plaintiff's claims. Plaintiff's expert, Dr. Gluck disagrees with Dr. Tavelin's expert, Dr. Elias as to whether Dr. Tavelin departed from the standard of care by relying solely on a single panoramic x-ray, and failing to fully analyze plaintiff's jaws so as to establish the vertical dimension and centric relations, failing to take intra-oral impressions, and failing to utilize a CT scan, a surgical stent and study models, so as to ensure the proper placement of the implants. Based on Dr. Klausner's CT scan and Dr. Placa's x-rays, Dr. Gluck opines that the implants were not properly placed as they are too close together, and there is an insufficient number of implants. Dr.Gluck also disagrees with Dr. Habib's experts about whether the permanent bridges were properly designed and fabricated. Dr. Gluck opines that the upper bridge which has large cantelevered section with three posterior cantelevered pontics, deviated from the standard of care, as the bridge is inherently unstable and to compensate for that instability, the cantelevered pontics were intentionally left out of occlusion resulting in no posterior contact on the left side. Thus, since the parties have adduced conflicting medical expert opinions that are adequately supported by the record, summary judgment must be denied with respect to plaintiff's remaining claims for medical malpractice. See Frye v. Montefiore Medical Center, supra; Cruz v. St Barnabas Hospital, supra.

Accordingly, it is

ORDERED that the branch of defendant Dr. Tavelin's motion for summary judgment dismissing the lack of informed consent claim is granted and the lack of informed consent claim is dismissed as against Dr. Tavelin; and it is further

ORDERED that plaintiff has withdrawn the lack of informed consent claim against defendant Dr. Habib, and such claim is dismissed; and it is further

ORDERED the defendants' motions for summary judgment dismissing plaintiff's medical malpractice claims are granted only to the extent of dismissing the claim premised on Dr. Tavelin's and Dr. Habib's alleged failure to provide a coordinated treatment plan; and it is further

ORDERED defendants' motions for summary judgment are otherwise denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 26, 2018 at 11:00 am in Part 11, Room 351, 60 Centre Street.

DATED: April 4, 2018

ENTER:

J.S.C.