Delerme v Lin
2018 NY Slip Op 30613(U)
February 1, 2018
Supreme Court, Bronx County
Docket Number: 21624/2014E
Judge: Llinet M. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Carolyn Delerme,

Plaintiff,

-against-

Dr. Lin, Dr. Mark, Dr. Robert Winegarden, Dr. Tatyiana Berman, Sol Stolzenberg, D.M.D., PC d/b/a Toothsavers, Raimone Perez, and Jerry H. Lynn, D.D.S.,

Defendants.

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DECISION AND ORDER

Present: Hon. Llinét M. Rosado

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1**
Opposition	**2**
Reply	**3**

Defendant Sol S. Stolzenberg, D.M.D., P.C., moves for an order granting it summary judgment dismissing the complaint. Plaintiff opposes the motion.

The complaint in this action alleges dental malpractice and lack of informed consent based on plaintiff's dental treatment by the defendants during the period from 2008 to 2014. The plaintiff alleges in the complaint, generally, *inter alia*, that the defendants negligently performed diagnostic procedures, negligently prepared teeth for crowns, placed implants without a treatment plan, allowed unlicensed dentists and technicians to perform dental work, and negligently placed implants.

In moving for summary judgment, the defendant argues:

- The plaintiff sued the wrong party, in that she sued "Dr. Sol Stolzenberg, DMD d/b/a Toothsavers," as opposed to the correct defendant "Dr. Sol Stolzenberg, DMD, **PC**, d/b/a Toothsavers." (Emphasis added).
- The dentists employed by Toothsavers were independent contractors, and thus Toothsavers is not liable for any negligence or breach of duty.
- Neither Toothsavers nor the independent contractors committed dental malpractice.
- Dr. Sol Stolzenberg, DMD, PC, d/b/a Toothsavers, sold the dental practice on January 1, 2012, and the PC was formally dissolved on March 20,

2012, and thus all claims based on treatment after January 1, 2012, must be dismissed.

- This action was commenced on April 14, 2014, and is governed by a 2-½ year statute of limitations. Thus, all claims based on conduct occurring before October 14, 2011, must be dismissed as untimely.
- The request for punitive damages must be dismissed as it is based on allegations that an unlicensed technician attempted to remove a temporary bridge on September 7, 2013, which was subsequent to the sale of the practice.

Each of these arguments is considered *seriatim* below.

Analysis

The Correct Party Defendant

Defendant argues that the plaintiff sued the wrong party, in that she sued "Dr. Sol Stolzenberg, DMD d/b/a Toothsavers," as opposed to the correct defendant "Dr. Sol Stolzenberg, DMD, **PC**, d/b/a Toothsavers." (Emphasis added).

Contrary to defendant's initial arguments, the summons herein indicates that plaintiff sued "Dr. Sol Stolzenberg, DMD, **PC**, d/b/a Toothsavers." Defendant admits in reply papers that the PC was named in the original pleadings, but maintains that the correct entity is "Dr. Sol ***S.*** Stolzenberg, DMD, PC, d/b/a Toothsavers."

CPLR 305(c) authorizes the court, in its discretion, to "allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced." "This provision, and its predecessors, has been consistently interpreted as allowing a misnomer in the description of a party defendant to be cured by amendment, even after the Statute of Limitations has run. Generally, such an amendment should be granted where (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought." (*Ober v. Rye Town Hilton*, 159 A.D.2d 16, 19-20, 557 N.Y.S.2d 937, 939 [2d Dept. 1990].)

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The Court discerns no prejudice or confusion in the omission of the "S." from the name of the defendant PC. The summons and complaint are deemed amended *nunc pro tunc*.

Independent Contractors

Defendant argues that the dentists employed by Toothsavers were independent contractors, and thus Toothsavers is not liable for any negligence or breach of duty in tort.

The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." (*Kleeman v Rheingold*, 81 N.Y.2d 270, 273, 614 N.E.2d 712, 598 NYS2d 149 [1993].) "The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced or, more importantly, the means used to achieve the results" (*Bravo v Vargas*, 113 A.D.3d 579, 582, 978 N.Y.S.2d 307 [2d Dept. 2014]; *see Chan v. Toothsavers Dental Care, Inc.*, 125 A.D.3d 712, 713, 4 N.Y.S.3d 59, 61 [2d Dept. 2015].)

In a case involving the same defendant herein – Toothsavers – Supreme Court, New York County denied defendant's motion to dismiss based on Dr. Stolzenberg's affidavit and identical arguments as are raised herein. The Court stated:

> "Defendants failed to meet their burden in demonstrating, through competent evidence, that there was no actual agency between Toothsavers and the dentists who worked on plaintiff. Dr. Stolzenberg's self-serving affidavit is unsupported by any evidence regarding the employment relationship between Toothsavers and the dentists who treated plaintiff. There are no statements from the dentists as to their legal relationship to Toothsavers. As defendants have failed to demonstrate a prima facie entitlement to summary judgment on this issue by eliminating all issues of fact, summary judgment on the issue of Toothsavers' vicarious liability for the acts of plaintiff's treaters is denied." (*Gati v Toothsavers Dental Servs., P.C.*, 2011 N.Y. Misc. LEXIS 3521, *4-5, 2011 NY Slip Op 31957(U), 4-5 [Sup Ct, NY Co [Lobis, J.].)

Here, in addition to a failure of proof as to actual agency,[1] issues of fact exist as to an apparent agency. Plaintiff did not seek out treatment from any particular dentist, but rather, accepted whatever dentist Toothsavers assigned to see her on that particular occasion. Issues of fact exist as to whether there existed an agency relationship. (*See Hampton v Universal Dental*, 140 A.D.3d 462, 463, 35 N.Y.S.3d 3, 4-5 [1st Dept. 2016] ["Toothsavers NY is not entitled to summary judgment under the independent contractor defense as to those individual dentists who performed orthodontic work upon plaintiff. Plaintiff did not seek out any of the orthodontists Toothsavers NY claims were independent contractors. Rather, he went to the practice based upon a newspaper advertisement for "Toothsavers," and could not even recall the full names of most of the individuals who treated him."])

Absence of Dental Malpractice

In a dental malpractice action, the requisite elements of proof are a deviation or departure from accepted standards of dental practice, and that such departure was a proximate cause of the plaintiff's injuries (*see Kozlowski v Oana*, 102 AD3d at 752; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 956, 942 NYS2d 558 [2012]; *Zito v Jastremski*, 84 AD3d 1069, 1070, 925 NYS2d 91 [2011]). "A defendant moving for summary judgment has the initial burden of establishing that he or she did not depart from good and accepted practice, or if there was such a departure, that it was not a proximate cause of the plaintiff's injuries" (*Kozlowski v Oana*, 102 AD3d at 752-753).

Here, defendant has not established, prima facie, that Toothsavers did not depart from good and accepted practice. Expert opinion that "merely recount[s] the treatment rendered, and opine[s] in a conclusory manner, that such treatment did not represent a departure from the standard of care....is insufficient." (*Tomeo v. Beccia*, 127 A.D.3d 1071, 1072, 7 N.Y.S.3d 472 [2d Dept. 2015]). Instead, a defense expert opinion must "elucidate the standard of care," and "'explain what defendant did and why.'" (*Ocasio—Gary v. Lawrence Hosp.*, 69 AD3d 403, 404, 894 N.Y.S.2d 11 [1st

[1] In this regard, Dr. Winegarden, who treated the plaintiff on one occasion at Toothsavers, testified that he was in fact an employee of Toothsavers, and not an independent contractor. Notice of Motion, Ex. E, p. 7.

Dept. 2010], quoting *Wasserman v. Carella*, 307 AD2d 225, 226, 762 N.Y.S.2d 382 [1st Dept. 2003].)

The court notes that even if the defendant had established a prima facie case, in opposition, the plaintiff raised a triable issue of fact as to a departure by submitting the affirmation of an expert, who opined that Toothsavers deviated from good and accepted dental practice in treating the plaintiff. The conflicting expert opinions give rise to issues of fact requiring a trial. (*See Bradley v Soundview Healthcenter*, 4 A.D.3d 194, 194, 772 N.Y.S.2d 56 [1st Dept. 2004] ["Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"].)

Summary judgment dismissing plaintiff's claim of lack of informed consent is not warranted. "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Public Health Law § 2805—d(1). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. (*Koi Hou Chan v. Yeung*, 66 A.D.3d 642, 643, 887 N.Y.S.2d 164 [2d Dept. 2009]; *see also, Smith v. Cattani*, 2 A.D.3d 259, 260, 769 N.Y.S.2d 32 [1st Dept. 2003] [defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment"]).

Defendants have not met this burden. While Toothsavers' expert opines that the dentists at Toothsavers explained the procedures, risks, and alternatives to the plaintiff-patient, such opinion is insufficient, as it is unsupported by the record, which includes generic consent forms used by Toothsavers, and plaintiff's deposition testimony that there was no discussion as his treatment or the alternatives to such treatment.

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Sale of the Dental Practice

Dr. Sol Stolzenberg, DMD, PC, d/b/a Toothsavers, alleges that he sold the dental practice on January 1, 2012, and that his PC was formally dissolved on March 20, 2012. He maintains that all claims based on treatment after January 1, 2012, must be dismissed.

Plaintiff fails to offer any evidence suggesting that Toothsavers maintained control, apparent or otherwise, over the dental practice after January 1, 2012.

Accordingly, all claims against Toothsavers based on conduct occurring after January 1, 2012, are dismissed.

Statute of Limitations

"An action for medical [or dental] malpractice must be commenced within two years and six months of the date of accrual." (*Massie v. Crawford*, 78 N.Y.2d 516, 519, 583 N.E.2d 935, 577 N.Y.S.2d 223 [1991].) Moreover, "[a] claim accrues on the date the alleged malpractice takes place." (*Id.* [internal citation omitted]). However, under the continuous treatment doctrine exception, the 2 1/2-year period does not begin to run until the end of the course of treatment "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint." (*Prinz-Schwartz v. Levitan*, 17 AD3d 175, 177, 796 N.Y.S.2d 36 (1st Dept. 2005); *see also* CPLR 214-a). In such cases, the limitations period does not begin to run until the end of treatment. (*Smith v. Fields*, 268 A.D.2d 579, 580, 702 N.Y.S.2d 364 (2d Dept. 2000).

Here, issues of fact exist as to continuous treatment. It is clear that additional treatment was contemplated during those time periods when a temporary bridge was inserted, as it is clear that a temporary bridge, by definition, is meant to be replaced by permanent hardware. Moreover, at the very least, issues of fact exist as to whether the plaintiff contemplated continued treatment for the same conditions during her numerous visits to Toothsavers.

Edmonds v Getchonis (150 AD2d 879, 541 NYS2d 250 [3d Dept. 1989]), is instructive. In *Edmonds*, a dental malpractice case, defendant inserted an implant in the plaintiff's mouth in November 1977 to correct a denture problem. After the removable implant was determined to be ineffective, the defendant inserted a fixed one in August

1978. Defendant told the plaintiff that he no longer needed to see her. Nevertheless, in December 1980, 27 months later, the plaintiff went to see the defendant, complaining of "continued denture-related problems," and continued under his care through August 1982. The defendant moved for summary judgment dismissing part of the action as time-barred. The Court found that issues of fact existed as to whether plaintiff's visit in December 1980 related back to the insertion of the original implant. (*See also, Devadas v Niksarli*, 120 A.D.3d 1000, 1006, 992 N.Y.S.2d 197, 203 [1st Dept. 2014].)

Punitive Damages

This Court agrees with the defendant that the request for punitive damages must be dismissed as it is primarily based on allegations that plaintiff was left in the office unattended for many hours, after which an unlicensed technician attempted to remove a temporary bridge on September 7, 2013. These actions were subsequent to the sale of the practice by the defendant. The remaining allegations do not evince the type of egregious or exceptional conduct necessary to support a claim for punitive damages. (*See Schifferv Speaker*, 36 A.D.3d 520 [1st Dept. 2007] [punitive damages in medical malpractice action not recoverable unless conduct is wantonly dishonest, grossly indifferent to patient care, or malicious and/or reckless].)

Accordingly, it is

ORDERED that the summons and complaint are deemed amended *nunc pro tunc* to reflect the defendant as "Sol S. Stolzenberg, D.M.D., P.C. d/b/a Toothsavers," and it is

ORDERED that all claims against Toothsavers based on conduct occurring after January 1, 2012, are dismissed, and it is

ORDERED that the request for punitive damages against Toothsavers is dismissed, and it is

ORDERED that the motion is otherwise denied.

This constitutes the Decision and Order of the Court.

Dated: February 1, 2018

Hon. Llinét M. Rosado, A.J.S.C.

HON. LLINET ROSADO