

Herdlinger v Brayman
2018 NY Slip Op 31676(U)
March 14, 2018
Supreme Court, New York County
Docket Number: 805258/16
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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HAILEY HERDLINGER,

Plaintiff,

INDEX NO. 805258/16

-against-

KATE BRAYMAN, DDS,

Defendant.

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JOAN A. MADDEN, J.:

In this action for dental malpractice, defendant Dr. Kate Brayman, D.D.S. moves for summary judgment dismissing plaintiff’s lack of informed consent claim and plaintiff opposes.

“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,” and “that a reasonably prudent person in the patient’s position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.” Public Health Law §§ 2805–d(1), (3); see Orphan v. Pilnik, 15 NY3d 907, 908 (2010) .

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 her 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, *supra* at 908 [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); Katz v. Sen, 111 AD3d 438 (1st Dept 2013).

Here, the issue is whether Dr. Brayman advised plaintiff of the available alternatives to treating the discoloration of her tooth #10. Plaintiff alleges that Dr. Brayman failed to advise her of the alternative of internally bleaching the tooth, and had she known about that alternative, she would have opted for that treatment, rather than the treatment Dr. Brayman provided of placing crowns on teeth #s 9 and 10, and veneers on teeth #s 7 and 8. Although Dr. Brayman and plaintiff each submit expert affirmations, the crux of the issue is the parties' own credibility given their conflicting sworn statements as to what Dr. Brayman did and did not tell plaintiff regarding the alternative of internally bleaching tooth #10

At her deposition, Dr. Brayman testified that plaintiff's first visit on December 9, 2014 was "for checkup, cleaning and to address her cosmetic concerns" that she "doesn't like her upper front teeth because they are all different colors." Dr. Brayman explained that she gave

plaintiff three different options with respect to the appearance of her four front teeth: do nothing; internal bleaching, and porcelain restorations. She testified that plaintiff wanted to do something, rejected internal bleaching, and chose porcelain restorations. When asked about the reference in plaintiff's chart to "external bleaching per arch," Dr. Brayman explained that it "was a mistake with the coding because I guess codes are done different . . . It was supposed to be internal bleaching." Dr. Brayman also testified that the "treatment plan" was "internal bleaching of tooth #10," and that internal breaching was her "suggestion" to plaintiff as the "most conservative way to treat tooth number 10, but plaintiff chose not to," as plaintiff "felt it is not going to change a lot, and she wanted a drastic change, more than one tooth." Dr. Brayman further testified that she described the risks and benefits of internal bleaching to plaintiff.

Dr. Brayman submits an expert affirmation from Dr. Peter Blauzvern, D.D.S., who opines that based on Dr. Brayman's foregoing testimony as to her discussions with plaintiff, as well as plaintiff's chart and the consent forms she signed, plaintiff was "fully" informed of the "reasonably foreseeable risks, benefits and alternatives to treatment that a reasonable practitioner would disclose." Dr. Blauzvern further opines that plaintiff's "informed consent was fully obtained," as at the first visit Dr. Brayman gave her "three options," including internal bleaching, and those were "all the alternatives that a reasonably prudent practitioner would present . . . where tooth #10 was noticeably discolored and teeth #s 7-9 were not uniform in colors." Specifically addressing the alternative of internal bleaching, Dr. Blauzvern opines that Dr. Brayman "appropriately explained the risks and benefits of internal bleaching, including the risks of inconvenience of needing to change the bleaching gel, the need to drill the tooth to bleach it internally, and the unpredictability of the results and the benefits of being cost effective and

conservative,” but plaintiff “did not want to pursue this option, as she felt it would not change her smile as much as she wanted.”

In contrast to Dr. Brayman’s testimony, plaintiff submits her own affidavit stating that Dr. Brayman never discussed the alternative of internally bleaching tooth #10. Plaintiff’s affidavit provides in relevant part as follows:

As I stated in my deposition, Dr. Brayman never discussed bleaching of any kind - internal or external or other -- as an option to address the discoloration of tooth #10. Dr. Brayman never:

- a. gave me the option to have internal bleaching of tooth #10;
- b. discussed the risks of internal bleaching;
- c. described that internal bleaching required the need for daily changing of the bleaching gel;
- d. described that bleaching required the removal of tooth structure to place the bleach inside the tooth;
- e. described that the results were unpredictable;
- f. explained that bleaching was cost effective;
- g. explained that bleaching did not require drilling;
- h. explained that bleaching did not require temporary crowns;
- i. explained that bleaching did not require choosing a shade; or
- j. explained that bleaching is conservative.

Plaintiff additionally states that the “only option that Dr. Brayman presented me with was crowns and veneers for the 4 teeth -- #7, 8,9, 10 – that she treated,” and “[h]ad Dr. Brayman presented to me a more conservative option -- specifically internal bleaching or other types of bleaching -- I would have decided not to undergo the porcelain restorations with crowns and veneers that Dr. Brayman recommended.” Plaintiff states that “[c]onsidering the nature of my condition at that time (slight discoloration of tooth #10) and risks involved in the treatment Dr. Brayman recommended . . . there is no chance that I would have consented to the treatment Dr. Brayman recommended.”

Plaintiff also submits an anonymous expert affirmation opining that the “standard of care requires that a dentist, before obtaining a patient’s consent on a procedure like porcelain crown and veneer restoration, must; 1) evaluate the patient’s existing condition; 2) explain the purposes and advantages to the procedure she is recommending; 3) explain the reasonably foreseeable risks to the patient’s health which the procedure may impose; 4) explain the risks involved to the patient if the procedure is not performed; and 5) explain the available alternatives and the risks and advantages of those alternatives.” Plaintiff’s expert further opines that “[t]o a reasonable degree of dental certainty, bleaching is an available alternative to porcelain restoration and veneers and crowns,” and “bleaching is the most conservative treatment option because it does not require drilling, it does not require temporary crowns, and it does not require the patient to choose a shade, . . . [and] is the most cost-effective treatment option for tooth discoloration.”

Plaintiff’s expert states that “Dr. Brayman and the plaintiff discussed the discoloration of the plaintiff’s tooth #10,” and “Dr Brayman testified that she presented the plaintiff with three options to address this issue: a) do nothing; b) internal bleaching of tooth #10; and c) porcelain restorations.” Plaintiff’s expert opines that if Dr. Brayman “presented the plaintiff with those options, then she comported with the standard of care on the issue of informed consent for the procedure she was recommending,” but “plaintiff maintains quite adamantly that Dr. Brayman never gave her any available alternatives and the risks and advantages of those alternatives.” Plaintiff’s expert opines that “[a]ccepting the plaintiff’s sworn testimony, both in deposition and affidavit form, Dr. Brayman – to a reasonable degree of dental certainty – departed from the standard of care when she failed to present the available alternatives and the risks and advantages of those alternative to Ms. Herdlinger,” and [b]ty failing to do so, she could not have obtained the

patient's informed consent to undergo the porcelain restoration and crowns and veneers."

Addressing the consent forms plaintiff signed, plaintiff's expert points out that the forms "do not state anywhere that Dr. Brayman discussed the alternatives to the procedure that she ended up performing." The expert opines that even though plaintiff signed the consent forms, "by failing to acknowledge that the available alternatives and risks and advantages of those alternatives were reviewed, those forms fail to accurately reflect the standard of care on the issue of informed consent." Plaintiff's expert also opines that "a reasonably prudent person in the plaintiff's position at the time consent was given would have decided not to undergo the procedure Dr. Brayman performed if she were give appropriate information," as "plaintiff testified she had slight discoloration to tooth #10," and "a reasonable prudent person would have chosen the most conservative, least costly, least invasive approach, namely bleaching, first before undergoing the treatment Dr. Brayman recommended." The expert opines that "a reasonably prudent practitioner would recommend the most conservative, least costly, least invasive approach to her patient before performing the same procedure Dr. Brayman performed on teeth #7, #8, #9, and #10."

Based on the parties' foregoing conflicting sworn statements, a sharp factual dispute exists as to what Dr. Brayman told plaintiff about the treatment options and alternatives, and whether plaintiff was adequately informed about the treatment alternative of internally bleaching tooth #10. See Mathias v. Capuano, 153 AD3d 698 (2nd Dept 2017); Schussheim v. Barazani, 136 AD3d 787 (2nd Dept 2016); Santiago v. Filstein, 35AD3d 184 (1st Dept 2006); Eppel v. Fredericks, 203 AD2d 152 (1st Dept 1994). Contrary to Dr. Brayman's assertion, plaintiff's affidavit does not contradict her prior deposition testimony, as plaintiff clearly and unequivocally

testified that Dr. Brayman never discussed any alternative other than veneers and crowns, and never discussed external or internal bleaching.¹

Thus, given the parties' conflicting versions of what Dr. Brayman told plaintiff about the treatment options and alternatives to the veneers and crowns, issues of credibility exist which can only be resolved by the trier of fact. See Rawls v. Simon, __ AD3d __, 66 NYS3d 126 (1st Dept 2018); Ocean v. Hossain, 127 AD3d 402 (1st Dept 2015). "It is not the court's function on a motion for summary judgment to assess credibility." Ferrante v. American Lung Ass'n, 90 NY2d 623, 631 (1997). Moreover, neither the consent forms signed by plaintiff, nor Dr. Brayman's records conclusively show that plaintiff was adequately informed about the alternative treatment of internally bleaching tooth #10. Notably, Dr. Brayman's deposition testimony establishes that she agrees with plaintiff's expert that internally bleaching tooth #10 was a viable alternative treatment to the veneers and crowns.

¹The relevant portions of plaintiff's deposition are as follows:

Q. If we go back to the first visit with Dr. Brayman, you already testified about some conversations you had with her, observations she made about the upper teeth and things she said about that. Did she ever discuss with you external bleaching of the upper front teeth?

A. No.

Q. Never?

A. No.

Q. Okay. Did she ever discuss with you any bleaching or [sic] any kind throughout her treatment with you?

A. I don't believe so. Not that I remember.

* * *

Q. Did Dr. Brayman ever discuss with you, other than the crowns on two teeth and veneers on the upper two front, did she ever discuss with you any other options for treatment?

A. For those teeth?


Q. Yes, for those teeth.

A. No, she didn't.


Hence, since triable issues of fact exist as to whether Dr. Brayman fully informed plaintiff of the alternative of internally bleaching tooth #10, Dr. Brayman is not entitled to summary judgment dismissing plaintiff's lack of informed consent claim. See Godel v. Goldstein, 155 AD3d 939 (2nd Dept 2017); Santiago v. Filstein, *supra*.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing plaintiff's lack of informed consent claim is denied.

DATED: March , 2018

ENTER:



HON. JOANNA C. MADDEN
J.S.C.