

Bobb v New York City Health & Hosps. Corp.

2021 NY Slip Op 30365(U)

February 8, 2021

Supreme Court, Kings County

Docket Number: 503369/2018

Judge: Pamela L. Fisher

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At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 8th day of February 2021.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
GEORGE BOBB and ROSLYN CHARLES,

Plaintiffs,

DECISION/ORDER

- against -

Index No: 503369/2018

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____ | <u>1, 2</u> |
| Opposing Affidavits (Affirmations) _____ | <u>3</u> |
| Reply Affidavits (Affirmations) _____ | <u>4</u> |

Upon the foregoing papers in this medical and dental malpractice action, defendant moves, pursuant to CPLR 3212, for summary judgment, seeking an order dismissing plaintiffs' complaint in its entirety.

Plaintiffs served a Notice of Claim upon defendant on June 9, 2017, and an Amended Notice of Claim was served on June 29, 2017 (Defendant's Affirmation in Support ¶ 5). Both plaintiffs testified at a General Municipal Law §50-h hearing on July 20, 2017 (*Id.*; 50-h hearing transcript, annexed as Exhibit B to defendant's motion papers). Plaintiffs commenced this action by filing a summons and complaint on February 16, 2018 (NYSCEF #1). In their complaint and bill of particulars, plaintiffs allege that Mr. Bobb swallowed dental impression material on April 4, 2017 due to the negligence of the employees of defendant's hospital, Kings County Hospital Dental Clinic, causing a small bowel obstruction in Mr. Bobb's intestine (Plaintiffs' Complaint ¶ 18, annexed as Exhibit C to defendant's

motion papers; Plaintiffs' Verified Bill of Particulars ¶¶ 3-4; annexed as Exhibit D to defendant's motion papers).

The following facts are not in dispute. On April 4, 2017, Mr. Bobb went to Kings County Hospital Dental Clinic to receive secondary denture impressions (Kings County Dentistry Clinic records; annexed as Exhibit K to defendant's motion papers). On April 11, 2017, Mr. Bobb visited his primary care physician, Dr. Lavelanet (referred to as "Dr. Mario" by plaintiff), complaining of abdominal pain and nausea for 7 days, and Dr. Lavelanet referred his case to the Emergency Room at Mount Sinai Brooklyn Hospital (See Medical Records of Primary Care Physician, annexed as Exhibit D to plaintiffs' motion papers; Plaintiff's EBT tr. 21, lines 9-10, annexed as Exhibit F to defendant's motion papers). Mr. Bobb went to the ER at Mount Sinai Brooklyn Hospital on April 11, and a CT scan with contrast of the abdomen was performed (Mt. Sinai Brooklyn Hospital chart at 1, 8-9/33, annexed as Exhibit E to plaintiffs' motion papers). The CT scan ruled out appendicitis, and no bowel obstruction was apparent from the scan (*Id.*). The radiologist noticed "mildly prominent loops of jejunum in the mid abdomen which measure up to 3.1 cm" (Mt. Sinai Brooklyn Hospital chart at 9/33). Plaintiff was discharged and told to return if his symptoms worsened (*Id.* at 12-13/33). Ms. Charles, plaintiff's spouse, called an ambulance the following day because Mr. Bobb was in severe abdominal pain (Plaintiff's EBT tr.78, lines 1-11). Plaintiff was transported and admitted to Mount Sinai Brooklyn Hospital, and on April 13, 2017, a CT scan of his abdomen and pelvis without contrast was performed; he was diagnosed with a small bowel obstruction, and a foreign body was surgically removed later that day (Mt. Sinai Brooklyn Hospital chart at 15/36, 163). Dr. Krikhely, the surgeon who performed the operation on plaintiff ordered a pathology report (Pathology Report, annexed as Exhibit M to defendant's motion papers). The pathology report states under clinical history, "Possible Portion of Clay Like Dildo," and the final diagnosis was that the specimen was a "foreign body" (*Id.*)

In support of its motion for summary judgment, defendant claims that “the dental treatment provided to plaintiff George Bobb” “was at all times in accordance with accepted standards of dental practice,” and that defendant did not proximately cause Mr. Bobb’s bowel obstruction (Defendant’s Affirmation in Support ¶ 4). Defendant includes an expert affirmation from David A. Behrman, D.M.D., an Oral and Maxillofacial Surgeon to support this contention. In his affirmation, Dr. Behrman contends that Dr. Neman took the impressions correctly and took appropriate safeguards to prevent Mr. Bobb from swallowing dental impression material (Defendant’s Expert Affirmation ¶¶ 5, 15, annexed as Exhibit A to defendant’s motion papers). Dr. Behrman’s expert opinion relies primarily on Dr. Neman’s deposition testimony, wherein he testified as to how he performs dental impressions (*Id.* at ¶ 14; Defendant’s EBT transcript, annexed as Exhibit G to defendant’s motion papers). Dr. Neman also testified that plaintiff never coughed or gagged during the procedure or reported to him that he had swallowed dental impression material (*Id.* at 44, lines 5-25). He stated that he would have documented any swallowing of material in his notes had this occurred (*Id.* at 45, lines 1-4). Dr. Behrman described three measures taken by Dr. Neman that are designed to prevent accidental swallowing of dental impression material. The fact that the “upper and lower impression trays were border molded with a wax rim applied all along the edges of the impression tray and painted with an adhesive” prevents loss of impression material (Defendant’s Expert Affirmation ¶ 16). Loading the impression material to just below “the surface of the border molding wax rim” and the placement of the “back of the impression tray” into the “back of the patient’s mouth, at the border of the hard and soft palate” prevents the impression material from going down the patient’s throat when the tray is “pressed upward” (*Id.* at ¶ 17). The placement of the dentist’s hands inside the patient’s mouth and massaging the patient’s cheeks during the procedure helps to “create a complete and accurate impression” (*Id.* at ¶ 18). Dr. Behrman notes that the absence of any references to Mr. Bobb’s swallowing of dental impression material in the Kings County Hospital Dental Clinic record suggests that no material was swallowed

(*Id.* at ¶ 19). Dr. Behrman further claims that had Mr. Bobb swallowed a small quantity of dental impression material, it should have passed through the esophagus without causing an obstruction, and that PVS, the material used for the impressions, is not dangerous (*Id.* at ¶ 23). Dr. Behrman presumes that Mr. Bobb's small obstruction was "caused by a possible portion of clay like dildo" based on his review of the pathology report from Mount Sinai (*Id.* at ¶ 24).

In opposition to defendant's motion for summary judgment, plaintiffs contend that there are triable issues of fact warranting denial of the motion, given the differences between plaintiffs' and defendant's version of the facts, and the new information revealed from the pathologist's affirmation and examination before trial (Plaintiffs' Affirmation in Opposition ¶ 4). To support this contention, plaintiffs rely on Mr. Bobb's deposition testimony, affirmations from a dental and surgical expert, the medical records from plaintiff's primary care physician and from Mount Sinai, as well as the pathologist's affirmation and deposition testimony. In his examination before trial, Mr. Bobb testified that he was reclined back when the dental impressions were taken on April 4, 2017 (Plaintiff's EBT tr. 57, lines 10-11). He further testified that when the upper impression was taken, some of the impression material went down his throat, causing him to cough and gag, and when he tried to "come forward," the nurse touched his shoulder, "pulled [him] back," and the doctor "told [him] to hold on" (*Id.* at 61, lines 8-21). He testified that when the impression tray was removed from his mouth, he alerted the dentist that he had swallowed some of the impression material (*Id.* at 64, lines 2-6).

The affirmation and testimony from the pathologist, David E. Aledort, M.D. indicates that the specimen that was removed from Mr. Bobb's abdomen was diagnosed as a "foreign body," and that the clinical history on the report stating that the object was "a possible portion of clay like dildo" did not come from the pathology lab at Mount Sinai (Pathologist Affirmation ¶ 5, annexed as Exhibit C to plaintiffs' motion papers; Pathologist EBT tr. 33, lines 20-25; at 34, lines 1-4, annexed as Exhibit J to defendant's motion papers). Doctor Aledort affirmed that "the clinical history is [usually] provided to

the pathology department on a request sheet,” but he does not know the origin of the clinical history in this case (Pathologist Affirmation ¶ 5). He claims that he never examined the specimen in this case; he could not find the specimen at the time he was subpoenaed, because it had probably been discarded (*Id.* at ¶ 7; Pathologist EBT tr. 23, lines 18-25; at 24 lines 2-11).

Plaintiffs’ dental expert, a dentist licensed to practice in the State of New York, claims that Dr. Neman departed from acceptable standards of dental practice by placing Mr. Bobb in a reclining position when the impressions were taken, by not removing the impression tray when Mr. Bobb started to cough and gag, and by overloading the impression tray (Plaintiffs’ redacted Dental Expert Affirmation ¶ 7, annexed as Exhibit A to plaintiffs’ motion papers). Plaintiffs’ dental expert disagrees with Dr. Behrman’s contention that the impression tray should be loaded to just below the surface of the wax rim; plaintiffs’ expert contends that the “amount of PVS loaded into the tray should only be a few millimeters deep and should not be thick” (*Id.* at ¶ 31). Plaintiffs’ dental expert further disputes Dr. Behrman’s contention that Dr. Neman’s placement of the tray in the patient’s mouth would result in any excess material being “expelled forward” when the tray is removed (*Id.* at ¶ 36). Plaintiffs’ medical expert, a physician and surgeon, licensed to practice medicine in the State of New York, concludes that the “foreign body removed from Mr. Bobb on April 13, 2017 was the dental impression material that Mr. Bobb ingested on April 4, 2017” (Plaintiff’s redacted Medical Expert Affirmation ¶ 5, annexed as Exhibit B to plaintiffs’ motion papers). The surgeon further states that Mr. Bobb’s symptoms and complaints “were consistent with those that would be expected upon ingestion of a foreign body,” and that symptoms may begin “approximately a day after swallowing the foreign body and if the object causes intestinal obstruction,” “the complaints and symptoms will worsen until the foreign body is removed” (*Id.* at ¶ 33). Plaintiffs’ medical expert disputes Dr. Behrman’s contention that swallowing PVS is not dangerous; he/she explains that swallowing PVS can be dangerous, since it hardens after it has been ingested, and “rigid objects” are likely to cause an obstruction (*Id.* at ¶ 34).

The surgeon alleges that “the obstruction may not be complete at first but as the irritation, inflammation and swelling increases with time, the opening may be completely blocked,” which is consistent with Mr. Bobb’s symptoms of intermittent abdominal pain for several days before the surgery (*Id.*).

In reply, defendant reiterates that it has established a prima facie case that the treatment of Mr. Bobb on April 4, 2017 was in accordance with acceptable standards of dental practice and did not proximately cause Mr. Bobb’s bowel obstruction (Defendant’s Reply Affirmation ¶ 3). Defendant further alleges that plaintiffs’ expert opinions are insufficient to rebut its prima facie case, in that these opinions are speculative and conclusory (*Id.* at ¶ 4). Defendant relies on a recent trial court decision, where defendant was granted summary judgment in a case where plaintiff alleged that she swallowed dental impression material, resulting in a bowel obstruction two months after her last impression was taken (*Id.* at ¶ 22; *See Yolanda Sanchez-Henri v. New York City Health and Hospitals Corporation*, Index #23315/12E, Sup Ct, Bronx County, May 21, 2018])

To prevail on a cause of action for dental malpractice, the plaintiff must prove “a deviation or departure from accepted standards of dental practice, and that such a departure was a proximate cause of plaintiff’s injuries” (*Sharp v. Weber*, 77 AD3d 812, 813 [2d. Dept. 2010]; *Koi Hou Chan v. Yeung*, 66 AD3d 642, 642 [2d. Dept. 2009]; *Cohen v. Kalman*, 54 AD3d 307 [2008]; *Terranova v. Finklea*, 45 AD3d 572 [2007]; *Posokhov v. Oselkin*, 44 AD3d 921 [2007]; *Keevan v. Rifkin*, 41 AD3d 661, 662 [2007]). On a motion for summary judgment, “the defendant 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” (*Sharp*, 77 AD3d at 814; *Koi Hou Chan*, 45 AD3d at 642; *Myers v. Ferrara*, 56 AD3d 78, 83 [2008]). If defendant “sustain[s] its burden,” then plaintiff is required to “raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party’s prima facie showing” (*Silveri v. Glaser*, 166 AD3d

1044, 1046 [2d. Dept. 2018]). “[C]onclusory allegations of malpractice, unsupported by competent evidence” are “insufficient to defeat summary judgment” (*Id.*). Where the parties have submitted conflicting expert reports, summary judgment should not be granted (*See Sheppard v. Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d. Dept. 2019]).

Here, defendant met its prima facie burden. In his affirmation, defendant’s expert, Dr. Behrman demonstrated that the practice and procedures by the treating doctor were within acceptable standards of dental practice, and no malpractice occurred. Dr. Behrman laid out step by step the procedure performed on the plaintiff, and the precautions taken specifically designed to prevent ingestion of PVS material, including border molding & adhesive, loading the tray with impression material to just below the surface of the wax rim, and the placement of the impression tray in the plaintiff’s mouth. Dr. Behrman’s affirmation constitutes competent evidence, in that it is based on the medical record, dental clinic records, plaintiff’s bill of particulars, and deposition testimony of the treating doctor.

In opposition, plaintiffs produced an affidavit of merit from a dentist attesting to a departure from accepted practice. The affidavit also contains the attesting doctor’s opinion that this departure was a competent producing cause of the injury. Plaintiffs’ expert opinion, based on review of the medical records, plaintiff’s deposition testimony, the pathologist’s deposition testimony, as well as the expert’s own experiences, raises factual issues as to whether defendant’s treatment departed from acceptable standards of dental practice, causing plaintiff to ingest dental impression material. Specifically, plaintiffs’ dental expert concluded that defendant’s departures included the amount of impression material that was loaded in the impression tray coupled with the angle of the patient during the procedure. Accordingly, questions of fact preclude summary judgment in defendant’s favor.

Further, the *Sanchez-Henri* case, which defendant relies on, is distinguishable. In that case, plaintiff was claiming that she ingested small amounts of dental impression material at multiple dental visits, the last one occurring on April 6, 2011, which resulted in her being diagnosed with a bowel obstruction on June 6, 2011 (*Sanchez-Henri* at 1-2). Defendant was granted summary judgment, because defendant's experts concluded that the "large foreign object" that was removed from "plaintiff's small intestine on June 6, 2011" could not have "remained in plaintiff's digestive tract" for two months, indicating that defendant's treatment could not have proximately caused plaintiff's bowel obstruction (*Id.* at 2-3, 6-7). The decision also discussed the fact that the material had been discarded and noted that the hospital record "[did] not document either plaintiff reporting that she ever ingested dental impression material at Lincoln or that the Forest Hills surgeon, examining pathologist, or anyone else at the facility determined what was removed from plaintiff on June 6, 2011 was dental impression material" (*Id.* at 7-8). This case is different, since there is evidence in the record documenting that plaintiff's abdominal pain started shortly after his visit to the dentist's office on April 4, 2017, and there are notations in the medical chart documenting that he reported swallowing dental impression material (*E.g.*, Medical Records of Primary Care Physician; Mt. Sinai Brooklyn Hospital chart at 170). Therefore, defendant's motion for summary judgment is denied, except for plaintiffs' negligent hiring/training claim (3rd and 4th causes of action), since plaintiffs did not oppose that portion of defendant's motion. Plaintiffs' negligent hiring/training causes of action are hereby dismissed.

This constitutes the decision and order of the Court.

ENTER.


Hon. Pamela L. Fisher
J.S.C.
HON. PAMELA L. FISHER