

Lucas v Filangeri

2016 NY Slip Op 31809(U)

April 18, 2016

Supreme Court, Suffolk County

Docket Number: 09-2909

Judge: Denise F. Molia

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INDEX No. 09-2909
CAL. No. 14-01644DM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 3-4-15
ADJ. DATE 6-5-15
Mot. Seq. #006 - Mot D

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JOANNE LUCAS and EDWARD LUCAS,

Plaintiffs,

RICHARD J. JAEGER, ESQ.
Attorney for Plaintiffs
217 Broadway, Suite 505
New York, New York 10007

- against -

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EDWARD FILANGERI, D.D.S., WILLIAM
SCHNEIDER, D.D.S., M.D. and NORTH
SHORE IMPLANT & ORAL SURGERY,
ASSOCIATES, P.C.,

KOLENOVSKY SPIEGEL LLP
Attorney for Defendants Schneider, D.D.S., M.D.
and North Shore Implant & oral Surgery
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Defendants.
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Upon the following papers numbered 1 to 64 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-31; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 32-61; Replying Affidavits and supporting papers 62-64; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendants William Schneider, D.D.S., and North Shore Implant & Oral Surgery Associates, P.C., for summary judgment dismissing the complaint against them is granted to the extent set forth, and is otherwise denied.

Plaintiff Joanne Lucas commenced this dental malpractice action against defendants Edward Filangeri, D.D.S., William Schneider, D.D.S., and North Shore Implant & Oral Surgery Associates, P.C., to recover damages for injuries allegedly sustained as a result of negligent dental care and treatment and lack of informed consent. Plaintiff's husband, Edward Lucas, brought a derivative claim for loss of services and companionship.

Defendants Dr. Schneider and North Shore Implant & Oral Surgery Associates now move for summary judgment dismissing the complaint against them on the grounds that their treatment of Joanne

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Lucas did not depart from accepted dental practice, and that they were not the cause of Joanne's alleged injuries. In support of their motion, moving defendants submit copies of the pleadings, the verified bill of particulars, the transcripts of the parties' deposition testimony, medical and dental records, and an affirmation of Mordechai Hoschander, D.M.D.

The complaint, as amplified by the bill of particulars, and as relevant to the instant motion, alleges that Dr. Schneider, an employee of defendant North Shore Implant & Oral Surgery Associates (hereinafter North Shore Implant), treated plaintiff Joanne Lucas from October 15, 2007 until November 21, 2008. It alleges that Dr. Schneider was negligent, among other things, in failing to perform diagnostic tests; in failing to determine the etiology of plaintiff's facial pain; in failing to properly prescribe antibiotics; in failing to identify plaintiff's pathological occlusion; in failing to properly place implants; in failing to properly design an implant supported prosthesis; and in failing to obtain informed consent. Plaintiffs further allege that North Shore Implant is vicariously liable for Dr. Schneider's alleged malpractice.

Dr. Schneider testified that he is a licensed dentist, board certified in maxillofacial surgery. He testified that as an oral maxillofacial surgeon, he performs surgeries involving the head and neck region, including temporal mandibular joint surgery and implants. Dr. Schneider testified that plaintiff was referred to him by Dr. Filangeri, and that she presented to his office on October 15, 2007. He testified that plaintiff had implants in her anterior maxilla, performed by Dr. Filangeri, and that Dr. Filangeri had referred plaintiff to him for evaluation and placement of implants in the posterior maxilla. He testified that plaintiff completed a patient history form and HIPAA authorizations. Dr. Schneider testified that plaintiff complained of pain in tooth # 7, and that he performed a dental examination and recommended that it be extracted. He testified that tooth #6, tooth #7, tooth #11, and tooth #12 had a poor prognosis as they had a poor crown-to-root ratio, that tooth #13 was missing, and that implants were inserted by Dr. Filangeri in May 2007 at tooth # 6, tooth #8, tooth #9, and tooth# 10. He testified that he performed a panoramic x-ray to evaluate her maxilla for placement of the implants and performed an examination of the tempo mandibular joint (hereinafter TMJ) and mastication muscles. He testified that the examination did not reveal any abnormalities of the TMJ joint, and that plaintiff's chief complaint was acute pain at tooth #7. He testified that the implants in the anterior maxilla were integrated and ready to be uncovered to place prosthetic teeth on them. Dr. Schneider testified that he advised plaintiff of his treatment plan and explained to her that he intended to extract tooth # 7and tooth #4, and to insert dental implants in such tooth roots and in the root for tooth #13.

Dr. Schneider testified that he discussed plaintiff's treatment plan, which consisted of a full maxillary implant prosthesis as the long-term goal, with Dr. Filangeri on November 19, 2007. He testified that he told Dr. Filangeri that he would insert the posterior implants and that, when they integrated, the remaining maxillary dentition would be removed. Dr. Schneider testified that plaintiff returned to his office on December 11, 2007, that he extracted tooth # 4 and tooth # 7, and that he placed implants in their place and at tooth # 13. Further, he testified that he performed bone grafting at the site of the missing tooth #13, around the implant at tooth #4 and around tooth #6, which had an implant from Dr. Filangeri. Dr. Schneider testified that he also performed a mini sinus lift so that he could place adequately-sized implants. He testified that he sutured tooth # 4, tooth #7 and tooth #13. Further, he testified that he informed plaintiff of the risks of implants including infection and failure. He testified that he prescribed Augmentin to prevent infection and Percocet for pain. Dr. Schneider testified that plaintiff returned for follow-up visits on December 18th and December 28, 2007, and that she was doing well. He testified that he intended to conduct another follow-up appointment within two to three weeks, but that plaintiff phoned his office on January 2, 2008 with complaints of pain. He testified that his partner, Dr. Casino, spoke with her and prescribed Percocet for the pain. Dr. Schneider testified that

plaintiff was seen by Dr. Casino on January 10, 2008 and that he prescribed Toradol, a non-narcotic pain medication, as they were concerned with possible addiction issues. He testified that plaintiff phoned him on January 12 with complaints of pain and he prescribed Percocet, as plaintiff advised him the Toradol was ineffective. He testified that plaintiff was examined on January 18, 2008, that the surgical site was healing well, and he did not observe any problems with the implants. He testified that plaintiff did not complain of pain, but that he gave her a prescription for Percocet for the future, as he believed she would be in pain after the numbing agents wore off.

Dr. Schneider testified that plaintiff returned to his office on March 14, 2008 with complaints of pain in her TMJ, and that she told him she thought her "bite was off." He testified that he performed an examination, palpated the muscles, the joints, had her open her mouth into occlusion left and right excursions. Further, he testified that he took two x-rays of tooth #4 and that he gave it a good prognosis. Dr. Schneider testified that he referred plaintiff to Dr. Filangeri to have her occlusion tested and adjusted, as it was not his area of specialty. He testified that her muscles were tender and prescribed a muscle relaxer and an anti-inflammatory.

Dr. Schneider testified that plaintiff returned to the office on March 28, 2008 for stage two of the treatment plan, which consisted of uncovering the implants to enable Dr. Filangeri to place the prosthetic teeth on them. He testified that he told plaintiff to follow-up with Dr. Filangeri, and that he did not see her until May 20, 2008, at which time she presented with increased discomfort at tooth #13. He testified that there was bone loss at tooth #13, and that he curetted around the implant, placed bone graft around it and sutured it. He testified that he prescribed Augmentin for potential infection and Percocet for pain.

Dr. Schneider testified that plaintiff was seen on May 27, 2008 with complaints of pain at teeth #13 and that he took x-rays of it which indicated some bone loss and infection. He testified that the implant had failed and he removed it. He testified that on June 5, 2008, plaintiff was seen for a follow-up, and he removed the sutures, cleaned the area and gave her prescriptions for Augmentin and Percocet. Dr. Schneider testified that he gave plaintiff a prescription for a CAT scan on June 9, 2008, as plaintiff still complained of pain, and he wanted to rule out osteomyelitis or a sinus infection. He testified that plaintiff returned to his office on June 17, 2008 to discuss the results of the CAT scan, which did not indicate a sinus infection or any other infections or abnormalities. He testified that he attributed her pain to delayed healing and referred her for pain management, as he believed she had atypical facial pain or neuralgia. He testified that he intended to follow up with plaintiff in four months to perform x-rays in preparation for the remaining implant placement.

Plaintiff testified that she has a history of TMJ issues and has used a mouth appliance for it in the past. She testified that she has been treated for neck pain, depression and alcoholism since 2000. Plaintiff further testified that she suffered from bulimia between 1989 and 1996, and that a dentist diagnosed the disorder based upon the worn condition of her back teeth. She testified that after she received the implants in May 2007 from Dr. Filanger, she began feeling discomfort and that she advised him of this in October 2007. Plaintiff testified that she presented to Dr. Schneider in November 2007, and that he explained the treatment plan for the implants and discussed the risks. She testified that she signed an informed consent form and completed a medical history. Plaintiff was shown a form that she filled out at Dr. Schneider's office which states that her current complaint was that she lost her front teeth from childhood. She testified that Dr. Schneider extracted one or two teeth and placed two implants in her upper area, and that she treated with him at least seven times. Plaintiff testified she felt pain when she bit down in the area of the sutures and thought it was from the temporary teeth. She testified that the temporary teeth were cemented by Dr. Filangeri and that Dr. Schneider did not remove

them when he cleaned the area or examined it; instead, he cleaned around them. She testified that she treated with Dr. Schneider several times with complaints of pain, and that he would examine her, rinse and irrigate her mouth, and prescribe antibiotics and pain killers. Plaintiff testified that in 2008 she was diagnosed with *Colstridium difficile*, also called C diff, and suffers from abdominal issues.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

The requisite elements of proof in a medical or dental malpractice action are a deviation or departure from accepted standards of dental practice, and evidence that such departure was a proximate cause of the plaintiff's injuries (see *Liyanage v Amann*, 128 AD3d 645, 8 NYS3d 390 [2d Dept 2015]; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 4 NYS3d 59 [2d Dept 2015]; *Kozlowski v Oana*, 102 AD3d 751, 959 NYS2d 500 [2d Dept 2013]; *Zito v Jastremski*, 58 AD3d 724, 871 NYS2d 717 [2d Dept 2009]). A defendant seeking summary judgment on a dental malpractice claim has the initial burden of establishing that the treatment he or she rendered did not deviate from good and accepted dental practice, or that the plaintiff was not injured by such treatment (*McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955, 942 NYS2d 558 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812, 909 NYS2d 152 [2d Dept 2010]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To satisfy his or her burden, a defendant dentist must establish through medical records and expert affidavits that he or she did not depart from accepted dental practice in the treatment of the plaintiff (*Koi Hou Chan v Yeung*, 66 AD3d 642, 887 NYS2d 164 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]). Once demonstrated, the burden shifts to plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted dental practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Landry v Jakubowitz*, 68 AD3d 728, 889 NYS2d 677 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856, 871 NYS2d 227 [2d Dept 2008]). Furthermore, to satisfy its burden on a motion for summary judgment, defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

Here, moving defendants submit the affirmation of Mordechai Hoschander, D.M.D., a licensed dentist specializing in oral and maxillofacial surgery. In his affirmation, Dr. Hoschander states that he reviewed the records of Dr. Schneider, North Shore Implant, Dr. Filanger, Dr. Gittleson, Stony Brook University Medical Center and Next Generation Radiology, as well as the bill of particulars and the parties' deposition testimony. He opines, with a reasonable degree of medical certainty, that Dr. Schneider did not depart from acceptable standards of care in treating plaintiff. He states that plaintiff

presented to Dr. Schneider on October 15, 2007 with implants at tooth #5, tooth #6, tooth #8, tooth #9 and tooth #10, that she was missing tooth #1, tooth #5, tooth #9, tooth #19, tooth #13, tooth #15, tooth #16, tooth #17, tooth #20 and tooth #32. He states that tooth #7 had bone loss, a poor crown-to-root ratio, was non-functional and was a hindrance to the implants it sat between. He opines that Dr. Schneider appropriately extracted it. He states that the x-ray films show the three remaining maxillary teeth had poor crown-to-root ratio and would likely be extracted in the long term. Dr. Hoschander explained that because plaintiff did not have molar teeth and the anterior maxilla had implants, a collapsed bite and unhealthy occlusion were created. He opines that the three teeth with the poor prognosis would complicate the restorative plan. He states that when plaintiff presented to Dr. Schneider on December 11, 2007, the work was performed without any complications, except that Dr. Schneider found bone loss around the implant at tooth #6.

Dr. Hoschander also opines that Dr. Schneider appropriately prescribed Augmentin to plaintiff, and that it is standard dental practice to prescribe Augmentin to prevent infection. Further, he opines that Dr. Schneider appropriately prescribed Percocet to plaintiff. He states that on March 14, 2008, Dr. Schneider conducted a standard TMJ evaluation and reported no abnormalities. He states that it was appropriate for Dr. Schneider to prescribe anti-inflammatories and a muscle relaxer given the muscle tenderness, and that Dr. Schneider properly referred plaintiff to Dr. Filangeri to adjust the temporary bridge.

Dr. Hoschander opines, with a reasonable degree of medical certainty, that Dr. Schneider properly examined plaintiff for TMJ issues and that she did not exhibit any signs or symptoms of TMJ issues while being treated by Dr. Schneider and North Shore Implant. Dr. Hoschander states that the implant at tooth #13 was properly removed on May 27, 2008, as Dr. Schneider had failed. Dr. Hoschander states that infections and loss of implants are well known complications of dental implant surgery and occur frequently without negligence. He opines, with a reasonable degree of medical certainty, that the pain plaintiff was experiencing is a common side effect of maxillary restoration.

With respect to plaintiff's claims that Dr. Schneider failed to identify plaintiff's pathological occlusion, failed to conduct a proper occlusal analysis prior to initiating treatment, and failed to properly design an implant supported prosthesis, Dr. Hoschlander opines, with a reasonable degree of dental certainty, that oral surgeons do not fabricate the final prosthesis and that occlusal issues are matters for the treating dentist. Dr. Hoschlander opines, with a reasonable degree of medical certainty, that Dr. Schneider appropriately prescribed Augmentin and was not the cause of the *Clostridium difficile* infection. Moreover, he states that plaintiff was not diagnosed with C diff. Finally, Dr. Hoschlander opines, with a reasonable degree of medical certainty, that Dr. Schneider conducted a proper informed consent discussion with plaintiff before he began treatment and that plaintiff signed several consent forms.

Here, Dr. Schneider established, *prima facie*, his entitlement to summary judgment dismissing the complaint against him by proffering, among other things, the opinion of Dr. Hoschlander, which demonstrates that Dr. Schneider's treatment of plaintiff was in accord with medically accepted standards of practice, that such treatment did not constitute a departure from same, and the treatment rendered to plaintiff by Dr. Schneider was not a proximate cause of plaintiff's injury (*Garcia v Richer*, 132 AD3d 809, 18 NYS3d 401 [2d Dept 2015]). North Shore Implant's burden also was satisfied as the basis for imposing liability against it is the doctrine of respondeat superior. The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176).

In opposition to the motion, plaintiffs submit copies of the pleadings, the bill of particulars, excerpts of the parties' deposition testimony and an affirmation of Glenn Gittlson, D.D.S. Initially, the court rejects plaintiffs' argument that the motion is untimely. The note of issue was filed on October 2, 2014, and not October 2, 2012. The instant motion was made on January 28, 2015, within the 120-day time prescription of CPLR 3212 (a).

Dr. Glenn Gittlson states in his affirmation that he is a licensed dentist and specializes in treating TMJ dysfunction, occlusal pain and implant prosthetics. Dr. Gittlson states he reviewed the affidavit of Dr. Hoschlander, the transcripts of the parties' deposition testimony, the dental records of Dr. Schneider, North Shore Implant and Dr. Falinger, and plaintiff's CT scan report. Additionally, he states that he has been treating plaintiff since July 12, 2008.

Dr. Gittlson opines that Dr. Schneider should have extracted tooth #7 at plaintiff's initial visit or soon thereafter, as plaintiff had been in acute pain since May 2007. Moreover, he opines that tooth #7 should have been extracted as a "standalone procedure" and that Dr. Schneider should not have extracted tooth #4 and inserted two implants and bone grafting at that time. He opines, with a reasonable degree of medical certainty, that performing multiple elective, pain-producing procedures on a patient who presented with acute pain is a departure from accepted dental practice. Dr. Gittlson opines, with a reasonable degree of medical certainty, that Dr. Schneider ignored plaintiff's history of TMJ dysfunction and failed to diagnose such dysfunction as the source of her pain.

Dr. Gittlson opines that Dr. Schneider should have ordered a Magnetic Resonance Imaging (MRI) of plaintiff's temporomandibular joint as it is the only method that can determine the stability of the temporomandibular joints and the only method to quantify an occlusion. He opines, with a reasonable degree of medical certainty, that Dr. Schneider departed from accepted dental practice by failing to conduct an MRI, and that such departure was a cause of plaintiff's injuries. Dr. Gittlson also opines, with a reasonable degree of certainty, that Dr. Schneider mis-diagnosed plaintiff with atypical facial pain, failed to diagnose a pathological occlusion and failed to diagnose an improperly fit prosthetic. He opines that such mis-diagnosis prevented plaintiff from receiving the proper care and treatment.

In addition, Dr. Gittlson opines that surgical implants have a 98% success rate and that, when the procedures are done properly and in accordance with accepted dental practice and procedure, they rarely fail. He opines that the implants at tooth #4 and tooth #13 failed because Dr. Schneider departed from acceptable dental practice. He explains that the proper standard of care for implant procedures involve the use of diagnostic wax ups, 3D - CT imaging and surgical guides. He opines that Dr. Schneider's failure to follow such procedures was the cause of plaintiff's failed implants and injuries.

With respect to plaintiff's claim that she contracted C diff. from the overprescription of antibiotics, Dr. Gittlson refers to the hospital records from Stony Brook University Hospital, where she was admitted from August 1, 2008 through August 5, 2008 and Peconic Bay Hospital, where she was admitted and treated for C diff. between July 16, 2008 and July 20, 2008. He explains the etiology of C diff. and opines, with a reasonable degree of medical certainty, that Dr. Schneider prescribed excessive and unnecessary amounts of Augmentin which caused abdominal pain, severe diarrhea, hospitalization and confirmed Clostridium Difficile colitis. Dr. Gittlson avers that when plaintiff presented to his office in July 2008, he examined her and removed the bridge fabricated by Dr. Filangeri to conduct a proper examination. He states that he adjusted her occlusion and retrofitted the bridge to the implant abutments and that her pain was finally alleviated.

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The affirmation of plaintiff's expert, Dr. Gittlson, is sufficient to raise triable issues of fact as to whether Dr. Schneider breached the duty of care owed to plaintiff by departing from acceptable dental practice and whether such departure was a cause of plaintiff's injuries. In a medical malpractice action, conflicting expert opinions require denial of a summary judgment motion (*Leto v Feld*, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]). Such issues of credibility are properly determined by the trier of fact (*Wexelbaum v Jean*, 80 AD3d 756, 915 NYS2d 161 [2d Dept 2011]). However, with respect to plaintiff's cause of action for lack of informed consent, the affirmation is silent.

The elements of a cause of action for lack of informed consent are "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Spano v Bertocci*, 299 AD2d 335, 337-338, 749 NYS 2d 275 [2d Dept 2002]). For the claim to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Here, the evidence submitted by moving defendants establishes that plaintiff was informed of the risks of the surgery, was informed of the alternatives, and expressly gave her consent to the surgery. No arguments or evidence in opposition have been submitted by plaintiffs. Accordingly, the branch of defendants' motion for summary judgment dismissing the cause of action for lack of informed consent is granted.

Dated: April 18, 2016


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION