

Marique v Isler

2010 NY Slip Op 32077(U)

July 28, 2010

Supreme Court, New York County

Docket Number: 115231/07

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis
Index Number : 115231/2007

PART 6

MARIQUE, ISABELLE

vs

ISLER, STUART D.D.S.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/21/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-13</u>
<u>X-mot. 14, 15-16</u>
<u>17-18, 19-20, 21</u>

Cross-Motion: Yes No

*affirmation +
reply aff. 14-20
further reply: 21*

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/28/10

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ISABELLE MARIQUE,

Plaintiff,

Index No. 115231/07

-against-

Decision and Order

STUART ISLER, D.D.S.,

Defendant.

FILED

AUG 05 2010

NEW YORK COUNTY CLERK

-----X
JOAN B. LOBIS, J.S.C.:

In Motion Sequence Number 003, defendant Stuart Isler, D.D.S., moves, pursuant to C.P.L.R. § 3212, for summary judgment on the grounds that there are no genuine, material issues of fact to support plaintiff's claims that her alleged injuries were proximately caused by defendant's alleged negligence. Plaintiff opposes the motion and cross-moves for an order, pursuant to 22 N.Y.C.R.R. § 130-1.1, sanctioning defendant for frivolous conduct.

According to the treatment records, plaintiff first saw Dr. Isler on December 21, 1999. She had been referred to Dr. Isler by a dentist in Belgium, Dr. Didier Cauchie. She reported she was in good health but that she had trouble with prior dental treatment and she was wearing removable dental appliances. Dr. Isler noted that she presented with a temporary full plastic arch from tooth number 3 to tooth number 14 (the upper teeth). Dr. Isler testified that plaintiff complained that her temporary teeth were uncomfortable and was seeking advice as to the next step. Plaintiff testified that she was looking for a dentist to place a permanent dental appliance but that the temporary bridge was fitting "perfectly." Dr. Isler's notes reflect that teeth numbers 1, 4, 5, 12, 13, 15, and 16 were missing. Plaintiff testified that she was not aware that those teeth were missing. Dr. Isler's notes reflect that plaintiff was a "heavy" smoker of cigarettes. Plaintiff denied telling Dr. Isler that she

abused tobacco and testified that she only smokes two or three cigarettes per day. Dr. Isler's notes reflect that he advised her that long term success of the restoration was compromised and the treatment was not guaranteed. She did not want treatment of her lower teeth at the time due to finances and she did not want to see a periodontist. He took full mouth x-rays and photographs of her teeth.

Dr. Isler's notes reflect that at her January 2, 2000 visit, he presented plaintiff with a letter or contract, a copy of which is in plaintiff's dental records. The letter recites the state of plaintiff's mouth and proposes two treatment plans. Under Plan 1, if teeth numbers 3 and 14 are adequate abutments, two fixed prostheses will be inserted from teeth numbers 3 to 10, and teeth numbers 11 to 14. Under Plan 2, if either tooth number 3 or 14, or both, are inadequate to use as abutments, a removable partial denture will be inserted. Due to a discount defendant applied to both plans, each plan was offered to plaintiff at a cost of \$16,000. Both plaintiff and defendant signed the letter, indicating that they understood the contents of the letter and agreed to the terms of payment. Dr. Isler's notes from that visit reflect that he examined plaintiff's mouth and found all of her remaining teeth to be loose. He advised plaintiff that teeth numbers 3, 10, and 14 had a poor prognosis, and that she may need a removable partial denture for her top right teeth in the future.

At her February 2, 2000 visit, Dr. Isler took an impression of her upper arch. He then redrilled teeth that had previously been drilled by plaintiff's prior dentist so that they were in a more stable condition. Dr. Isler testified that plaintiff did not tolerate the drilling very well and described her as on the extreme end of the population in her reactions to dental work. He took her original

temporary bridge and realigned and recemented it by hollowing out the inside and applying new wet plastic to impress the bridge on the newly drilled teeth. Plaintiff and defendant agreed to replace the one original temporary prosthetic with two separate permanent prosthetics, and they picked out the color of the prosthetics. Dr. Isler's notes reflect that he advised plaintiff about going to see a periodontist. He testified that her gums were bleeding easily and that she had some periodontal disease present. His notes reflect that she did not want to see a periodontist or spend more money. His notes reflect that he also informed her that all of her teeth would not survive long term.

On March 10, 2000, Dr. Isler began fitting her metal framework for the new bridges. His notes reflect that he discussed with plaintiff the probability that she would lose tooth number 3, so to work around that, he made two fixed bridges so that one day, tooth 3 could be cut off if necessary and she would not have to have everything remade again. If tooth 3 ever had to be extracted, he could make a removable partial denture at that time.

On April 16, 2000, Dr. Isler's notes reflect that he did a "try in" of a "bisque bake", which means that he inserted the prosthetics before they had their final glazing to make sure that he could make any necessary adjustments, and his notes reflect that plaintiff liked the color and fit. She wanted the upper four front teeth one millimeter shorter. He then recemented in the original temporary bridge. On June 11, 2000, Dr. Isler performed the final "try in" of the glazed prosthetics. His notes reflect that the "try in" was good, and he again temporarily recemented the original temporary prosthesis. On August 7, Dr. Isler inserted the final bridges with a very strong temporary cement. He testified that he opted to use a temporary cement because he wanted to have as many

alternative routes of treatment as possible, given his opinion that plaintiff's remaining natural teeth would begin to fail. If he had permanently cemented the bridges, he would have had to redo the whole case. His notes reflect that she was satisfied with the cosmetics and agreed to pay him in full at her next visit.

On September 26, 2000, Dr. Isler's notes reflect that plaintiff was pleased with the final result. He noted that food was collecting between her two front teeth. He advised plaintiff that with bone loss, food collection is more problematic. She was advised to pay attention for food impaction, and that she needed to come in for cleanings and examinations every three months.

Dr. Isler next treated plaintiff on February 7, 2001, for pain at tooth number 30 on the bottom of her mouth, which he testified was unrelated to her upper mouth restorations. He referred her to another dentist, Joshua Brickman, D.D.S., who performs root canals. She acknowledged at that appointment that she still owed Dr. Isler one thousand dollars. Plaintiff did eventually see Dr. Brickman and he did perform a root canal on tooth number 30.

Plaintiff next saw Dr. Isler on April 30, 2001, for an emergency visit, due to an abscess on her upper left molar, tooth number 15. Dr. Isler's notes for that appointment reflect that she was to see Dr. Brickman about that tooth as well. On May 23, 2001, plaintiff called Dr. Isler's office and spoke to his hygienist. She asked the hygienist why tooth number 15 was in the bridge when it was not in the contract. Dr. Isler testified that by this point, plaintiff's tooth number 14 had migrated to the space where her original natural tooth number 15 had been, so he referred to the

tooth in that space as tooth number 15. The hygienist spoke to Dr. Isler and Dr. Isler said that plaintiff needed to have tooth number 15 evaluated by a periodontist. The hygienist's notes reflect that plaintiff did not want to see Dr. Isler or a periodontist. Dr. Isler spoke to the dentist who referred plaintiff to him, Dr. Cauchie, who agreed that plaintiff needed to have a periodontist evaluate tooth number 15. When plaintiff called Dr. Isler's office on May 30, 2001, the hygienist relayed to plaintiff that Dr. Isler had spoken to Dr. Cauchie, who agreed that she needed a periodontal evaluation. The hygienist's notes reflect that plaintiff said that there was nothing wrong with her gums, she was just getting food stuck and it was a lot of work to get it out.

On June 14, 2001, plaintiff saw Dr. Isler and his notes reflect that she asked him why she had been sent for a root canal at tooth number 15. He explained to her that he was hoping to save her previous root canal for that tooth; he referred her to a periodontist, James E. Jacobs, D.M.D.; and he agreed to help her financially. According to a letter to Dr. Isler thanking him for the reference, Dr. Jacobs examined plaintiff on July 17, 2001. He took x-rays and advised plaintiff that she should have a cleaning in three months. Dr. Jacobs' letter states that plaintiff understood that teeth numbers 3 and 14 were "hopeless" and that her dentists were holding on to those teeth for as long as possible because they did provide support and allowed her artificial teeth to continue in her mouth. Once teeth numbers 3 and 14 were gone, she would require a partial denture or dental implants. She understood that oral hygiene was critical and was "doing a great job." Dr. Jacobs would see her again in three months, barring any problems before that next appointment. This information was also conveyed to Dr. Isler over the telephone on July 17, 2001. On July 30, 2001, Dr. Isler spoke with plaintiff about Dr. Jacobs' findings. Dr. Isler told plaintiff that both he and Dr.

Jacobs knew that the upper molars would have reoccurring infections and would eventually have to be extracted. Dr. Isler's notes reflect that Ms. Marique acknowledged that the recurring infections were not Dr. Isler's fault but that it was uncomfortable when her teeth had infections. He recommended that she see another dentist closer to her office in order to treat her lower teeth.

On September 9, 2001, defendant shortened the length of plaintiff's bridge between teeth 6 through 11 because she preferred the shorter "look" and felt that the longer teeth were dragging on her lower lip. She also had two broken teeth on the bottom that were sharp. He bonded these teeth back together because she was having food collection and pain. He did not charge her for repairing the bottom teeth. Defendant testified that those two bottom teeth broke because they were shells and the insides were disintegrated, most likely due to the loss of an old filling that was never repaired. He testified that tooth disintegration is accelerated by smoking and affected by aging.

Five months later, Dr. Isler examined plaintiff's upper bridges on February 5, 2002. His notes reflect that the upper bridge had no mobility, her gums were pink and stippled, and there were no areas of obvious infection, all signs to Dr. Isler that plaintiff's mouth was healthy. She complained that her distal molars were still collecting food, but she was keeping them clean. She claimed that her lower lip was still irritated by the upper bridge, but there were no signs of tissue change. His plan was to extract tooth number 15 after cutting the bridge.

Plaintiff was next seen sixteen months later, on October 2, 2003. Her bridge over teeth numbers 7 through 15 was loose and Dr. Isler recemented it. His notes reflect that tooth

number 10 would have to be extracted soon and that the upper right bridge was loose and needed a reevaluation. At her next appointment on January 8, 2004, Dr. Isler recemented the upper left side again. The notes reflect that tooth 11 (the canine tooth) was fracturing, she would need a new temporary, and he was going to have to extract teeth 10 and 11. On February 12, Dr. Isler extracted tooth number 10 and tried to build up tooth number 11 with composite bonding material. He testified that it would have been better to get a root canal on tooth number 11 and insert a reinforcing bar into the core of the tooth, but plaintiff did not want that, and she was not having pain at tooth number 11. He made a new temporary bridge for the upper left side of her mouth and cemented it with temporary cement. He had to recement this bridge twice on February 19, 2004 and May 31, 2004.

On September 9, 2004, plaintiff was seen again to recement the upper left bridge with a stronger temporary cement. Dr. Isler's notes reflect that he wanted to remove the bridge abutted to tooth number 15 as that tooth was no longer a good abutment, but plaintiff refused a removable partial denture. He told her that at her next visit, she would have to have the upper right bridge removed and he would reconnect to the remainder of the bridge that was still there. At her next visit, his plan was to redrill the upper front tooth and rebuild tooth number 11. All of this, Dr. Isler testified, was to help her without resorting to a removable partial denture, which plaintiff had refused.

About one month later, on October 21, 2004, Dr. Isler added composite to teeth numbers 8, 9, and 11, remade for plaintiff a new left side temporary bridge, and cemented the new

bridge with a temporary cement. Two weeks later, plaintiff complained of discomfort. He adjusted the bite on the front teeth by taking off another half-millimeter in length, because plaintiff again complained that they were too long. Her upper right bridge was loose but the notes reflect that plaintiff refused to have the bridge recemented. Two weeks later, plaintiff was back in the office for swollen gums between teeth 6 and 7 (the upper right side of the mouth). Dr. Isler removed the upper right bridge and recemented it. His notes reflect that she would need a new temporary bridge over teeth 3 through 6 at her next visit. However, at her next visit on January 27, 2005, Dr. Isler's notes reflect that plaintiff refused a new bridge over those teeth. Tooth number 11 was broken again and Dr. Isler recommended a root canal evaluation for a post and crown so that he could make a new bridge from teeth 3 through 12, all the way around her mouth. He testified that by this point, her teeth were failing all over. His notes reflect that he was not going to charge plaintiff for this new work. He referred her to Dr. Brickman for the root canal and recemented her front teeth.

At plaintiff's next appointment on March 24, 2005, the notes reflect that she redressed Dr. Isler loudly for twenty-five minutes, repeating herself. He told her that he was happy to keep treating her. He removed her upper temporary bridge, took a new impression, made her a new temporary bridge, and cemented it at that time. Notes from the hygienist that same day reflect that plaintiff left without complaining and that Dr. Isler's office would call plaintiff when her new permanent bridge was in. She returned on April 28, 2005, for a fitting of the new bridge. Dr. Isler was not satisfied with the fit so he made impressions and sent the bridge back to be adjusted. The notes reflect that plaintiff was screaming, kicking, and yelling "unacceptable". She was angry and combative. She refused to help Dr. Isler adjust the fit. Dr. Isler told plaintiff he was trying to make

her comfortable, and he made a new temporary and cemented it in. She still had not had a root canal at tooth number 11. Plaintiff complained that she could not afford the root canal at tooth number 11. Plaintiff agreed to have a root canal if Dr. Isler could arrange for it to be free. Dr. Isler testified that he asked Dr. Brickman to do him a favor and treat plaintiff for no charge, and so Dr. Brickman eventually did the root canal on plaintiff's tooth number 11 on July 25, 2005.

Plaintiff next saw Dr. Isler on October 27, 2005. He inserted a post and core at tooth number 11, and extended her temporary bridge to include that tooth. This was plaintiff's last visit to Dr. Isler. On February 9, 2006, she sent a messenger to pick up her records from Dr. Isler's office. He testified that she left while he was in the process of making her a new permanent bridge. Dr. Isler testified that all along her treatment she was advised to come in for cleanings and examinations every three months. It does not appear from her chart that she ever came in for cleanings.

Plaintiff commenced this action on November 14, 2007. The pleadings allege that between December 21, 1999 and October 27, 2005, Dr. Isler rendered negligent dental care to plaintiff by, *inter alia*, inserting ill-fitting bridges into plaintiff's mouth; fracturing several of her bottom teeth; and causing lacerations and infections in plaintiff's mouth. Plaintiff also claims that Dr. Isler departed from the standard of care by failing to ensure that plaintiff had a periodontal examination prior to inserting the bridge, failing to perform periodontal charting, and using hopeless teeth as abutments for bridges thereby ensuring that the bridges would fail. There is also a claim that Dr. Isler failed to obtain plaintiff's informed consent to the treatment. Plaintiff alleges that defendant's negligent treatment caused her pain, loss of taste sensation, loss of weight, and the need for future dental treatment.

The party moving for summary judgment in a 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 [dental] practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in dental malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a dental malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from [an expert in dental care] attesting that the defendant departed from accepted [dental] practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted).

In support of his motion for summary judgment, Dr. Isler submits an expert affidavit from Mark S. Wolff, D.D.S., Ph.D., a dentist duly licenced to practice dentistry in New York. In forming his opinion, he reviewed the pleadings, the dental records, and Dr. Isler’s deposition testimony. Dr. Wolff opines that Dr. Isler did not depart from good and accepted standards of dental practice in treating plaintiff. He recounts the facts of the case. Based on his experience and his

review of the case, he opines that Dr. Isler consistently provided proper dental treatment, within good and accepted standards of care, and that plaintiff's allegations are erroneous. Dr. Isler informed plaintiff from her first appointment that her teeth were in poor condition, and it was the poor condition of her teeth that caused her poor prognosis and the eventual bridge failure. In light of her poor prognosis, Dr. Isler presented plaintiff with two viable treatment options, both of which fully comported with good and accepted standards of dental care. Dr. Isler properly had plaintiff sign off on the treatment plan, advised her of the poor condition and prognosis of her teeth, and advised her of the risks and benefits of each option in light of her condition. Dr. Wolff also believes that Dr. Isler appropriately advised plaintiff to have cleanings every three months, referred her to a periodontist on a number of occasions, and referred her to a specialist regarding root canals. He opines that smoking accelerates tooth failure and that it was appropriate for Dr. Isler to warn plaintiff about her smoking and its impact on her overall dental health. He notes that at each visit, Dr. Isler noted and addressed plaintiff's complaints, developed and implemented a proper treatment plan, and provided that treatment within good and accepted standards of dental care. He concludes that Dr. Isler did not depart from the standard of care and that no act or omission of Dr. Isler proximately caused any injury to plaintiff.

Originally, plaintiff's opposition papers to defendant's motion included her C.P.L.R. § 3101(d) expert response together with a brief affirmation from her expert, Mark Heller, D.D.S., adopting the contents of the 3101(d) response. Plaintiff argued that defendant's motion was frivolous because she had already served her 3101(d) response and defendant knew that there were conflicting expert affidavits in this case, and that defendant should therefore be sanctioned under 22

N.Y.C.R.R. § 130-1.1. The parties appeared for oral argument on June 8, 2010. The court rejected plaintiff's arguments in favor of sanctions. Since plaintiff's expert affidavit in opposition was deemed deficient as to her claim for medical malpractice, the court granted plaintiff additional time to put in an expert affidavit, and granted defendant additional time to submit a sur-reply. The court dismissed plaintiff's claims for lack of informed consent and *res ipsa loquitur* because plaintiff's 3101(d) response entirely failed to address these claims. See Order dated June 8, 2010.

Plaintiff now submits an affidavit from Dr. Heller, a dentist duly licensed to practice dentistry in New York. He states that he has reviewed the dental records, deposition transcripts, and pleadings on this case. He opines that Dr. Isler did depart from good and accepted dental practice in treating plaintiff. The records indicate that teeth 3 and 14 had no bone surrounding them due to advanced periodontal disease. The records further indicate that Dr. Isler's bridge failed. Plaintiff suffered lacerations to the inside of her mouth, cracks in her bottom teeth, mouth infections, swelling of her mouth and gums, loss of taste sensation, loss of weight, constant pain, inability to sleep due to pain, and the need for future dental treatment. Dr. Heller opines that Dr. Isler departed from good and accepted dental practice when he performed a dental bridge procedure in the presence of advanced periodontal disease without having first ensured that a periodontal examination and periodontal charting was performed. Dr. Isler further departed from the standard of care when he used teeth numbers 3 and 14 as abutments for the bridge, since those teeth had no surrounding bone, were hopeless, and were inadequate to serve as abutments for a bridge. In Dr. Heller's opinion, teeth numbers 3 and 14 should have been extracted, not used as abutments. The bridge that Dr. Isler put in was certain to fail, and Dr. Isler knew or should have known that. In Dr. Heller's professional

opinion, it is a departure to proceed with an inappropriate treatment plan even if that is what the patient wants done. He opines that Dr. Isler's departures substantially caused plaintiff's injuries. Further, he disagrees with Dr. Wolff's opinion that the treatment plan offered by Dr. Isler involving the bridges abutted to teeth 3 and 14 was a viable option. The only plan that Dr. Isler should have offered was the plan that called for the insertion of a removable partial denture.

Defendant's expert affidavit demonstrates that he is entitled to summary judgment on the issue of whether there were any departures. His expert relies on the records and testimony and, in sufficient detail, explains that Dr. Isler did not depart from good and accepted medical practice in treating plaintiff. The burden shifts to plaintiff to raise material issues of fact requiring a trial. Plaintiff's expert's affidavit, although thin, is enough to overcome summary judgment. The two experts materially disagree as to whether both treatment plans proposed by Dr. Isler were viable; whether plaintiff's own poor dental condition or attempting to utilize teeth numbers 3 and 14 as abutments caused plaintiff's bridge work to fail; and whether the predicted failure of teeth numbers 3 and 14 was an acceptable component of the treatment plan. The experts' conflicting opinions raise issues of fact. See Boston v. Weissbart, 62 A.D.3d 517, 518 (1st Dep't 2009); Cruz v. St. Barnabas Hosp., 50 A.D.3d 382 (1st Dep't 2008). Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied, and plaintiff's cross-motion for sanctions is denied. The parties shall appear for a pre-trial conference on August 24, 2010 at 9:30 a.m.

Dated: July 28, 2010

FILED
AUG 05 2010
NEW YORK
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JOAN B. LOBIS, J.S.C.