

SHORT FORM ORDER

IN COMPUTER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

DOLETTE WHITE,

Plaintiff,

-against-

INDEX No. 2654/00

MOTION DATE: May 7, 2001
Motion Sequence # 001

SABEEH KHAN, D.M.D., LEONARD SCHREIBER,
D.M.D. and URESH B. GANDHI, D.D.S.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... XX
Reply Affirmation..... XX

Motion by defendant Leonard Schreiber, D.D.S. s/h/a Leonard Schreiber, D.M.D. for summary judgment dismissing the complaint and all cross-claims asserted against him is **denied**.

In this action, plaintiff seeks to recover damages predicated on the defendants' purported dental malpractice. With respect to Dr. Schreiber, plaintiff's bill of particulars alleges, **inter alia**, failure to diagnose periodontosis and refer plaintiff to a periodontist, failure to assess plaintiff's potential for bone loss during orthodontic tooth movement, and failure to establish a protocol for periodontic treatment during orthodontic tooth movement. It is plaintiff's position that Dr. Schreiber's negligent failure to properly diagnose plaintiff's periodontosis was a substantial factor in causing the rapid and

extensive bone loss that she sustained during orthodontic treatment which culminated in a need for periodontal surgery, extractions, implant surgery and prosthetic restoration.

The record indicates that plaintiff was referred to the office of Drs. Schreiber and Khan for orthodontic evaluation by her regular dentist in or about February 1995. Although she was apparently seen pretreatment on a number of occasions by Dr. Khan, who ultimately treated her during the period June, 1995 to July, 1998, Dr. Schreiber's one and only contact with plaintiff was apparently limited to a single consultation on May 19, 1995. According to the deposition testimony, it was the usual practice for either he (Dr. Schreiber) or Dr. Khan

“to sit down with the patient and explain to them what we perceive the problem to be based upon the records, what we would like to do to correct the problem, approximately how we would go about doing it, to go over the pros and cons, things that might occur, good or bad, and just give her a – go over everything that might pertain to the treatment that we could think of”.

In support of his motion for summary judgment, defendant Schreiber has submitted the affidavit of an expert in which he opines that Dr. Schreiber "in no way departed from standards of acceptable dental practice, and did not proximately cause or contribute to any injury that plaintiff may have suffered" and concludes that

“there was no way that Dr. Schreiber or any other dentist could have diagnosed any other periodontal condition or disease process from one such contact * * * from the medical evidence then in existence; indeed there is no way for the plaintiff or anyone else ever to know whether any other periodontal condition or disease even existed at the time”.

In a medical or dental malpractice case, to defeat a motion for summary judgment where a **prima facie** showing is made by the proponent, the plaintiff must submit evidentiary facts or materials to rebut the defendant's showing that he was not negligent in treating plaintiff or his negligence was not the proximate cause of the injury so as to demonstrate the existence of a triable issue of fact. (**Boz v Berger**, 268 AD2d 453.)

Plaintiff has sustained her burden by submitting the affidavit of her expert, a specialist in the field of periodontics and implantology, who attests that Dr. Schreiber deviated from good and accepted standards of dental practice

“In failing to diagnose periodontosis, in failing to refer Ms. White to a periodontist prior to the initiation of orthodontic work, in failing to assess the potential for bone loss during orthodontic tooth movement, in failing to perform any degree of periodontal probing, and in failing to establish a protocol for periodontic treatment during the course of the orthodontic treatment”.

Plaintiff's expert further states that the visible bone loss defects, admittedly seen by Dr. Schreiber in the February 1995 panoramic x-rays, “are the classic signs of periodontosis” and that Dr. Schreiber's failure to properly diagnose plaintiff's condition, and to take appropriate steps to avoid the bone loss that occurred during orthopedic treatment, was a substantial factor in causing the plaintiff's present condition as a result of which she will lose all of her eight anterior teeth (upper and lower incisors) as well as all four first molars and is in jeopardy of losing her remaining upper molars.

The requisite elements of proof in a medical/dental malpractice case are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of the injury or damage. (**Pasquale v Miller**, 194 AD2d 597, 598; **Kramer v Rosenthal**, 224 AD2d 392.) Expert proof is required to establish matters beyond the experience of the average juror. (**McGinn v Sellitti**, 150 AD2d 967, 968.) The contradictory affidavits of the experts herein raise an issue of fact with respect to whether Dr. Schreiber's alleged failure, *inter alia*, to diagnose periodontosis and to establish a protocol for periodontic treatment during the course of plaintiff's orthodontic treatment constitutes a departure from accepted practice which proximately caused plaintiff's injury which requires resolution at trial.

The court notes with respect to an expert's affidavit that a party may successfully oppose a summary judgment motion without disclosing the name of the party's expert witness by serving the movant with a redacted copy of its expert's affidavit as long as an unredacted original is provided to the court for in camera inspection. (**Napierski v Finn**, 229 AD2d 869, 870-871.) Such practice may not, however, be utilized in an offensive

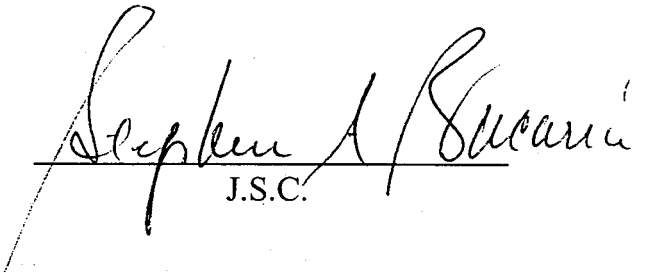
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context (to support a motion for summary judgment). (Marano v Mercy Hosp., 241 AD2d 48, 51.)

Given the existence of such factual issues, defendant Schreiber's motion for summary judgment dismissing the complaint and all cross-claims asserted against him is denied.

Dated JUN 19 2001.



J.S.C.

ENTERED

JUN 20 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**