

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND DEPARTMENT

Terranova v. Finklea

45 A.D.3d 572 (N.Y. App. Div. 2d Dep't 2007) · Decided November 7, 2007

SUMMARY

The court reversed an order granting the defendant dentist summary judgment dismissing the plaintiffs’ dental malpractice claim. It held that the defendant failed to make a prima facie showing because the expert affirmation did not address specific allegations that the tooth could have been saved through endodontic therapy and that a fixed rather than removable dental prosthesis should have been used.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Department
WRITING FOR THE COURT	Miller, J.P.; Ritter, J.; Covello, J.; McCarthy, J.
JURISDICTION	New York
DECIDED	November 7, 2007
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiffs appealed from the portion of an order granting the defendant's motion for summary judgment dismissing the first cause of action for dental malpractice.
STANDARD OF REVIEW	On a motion for summary judgment in a medical or dental malpractice action, the defendant must make a prima facie showing that there was no departure from accepted practice or that any departure was not a proximate cause of the plaintiff's injury. The defendant must address and rebut the specific allegations of malpractice in the plaintiff's bill of particulars.
PRECEDENTIAL VALUE	Published New York Appellate Division decision and precedential within the applicable court system.
PARTIES	Terranova, Plaintiffs v. Finklea, Defendant

TOPICS

- medical malpractice
- standard of care
- proximate cause
- summary judgment
- appellate procedure

PRACTICE AREAS

medical malpractice

dental malpractice

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the defendant established prima facie entitlement to summary judgment dismissing the dental-malpractice claim.
2. Whether a defendant's expert affirmation that does not address specific malpractice allegations in the plaintiff's bill of particulars is sufficient to support summary judgment.

HOLDINGS

1. The defendant failed to make a prima facie showing of entitlement to summary judgment because the expert affirmation did not establish the absence of a departure from accepted dental practice or the absence of injury caused by such a departure.
2. Because the defendant failed to establish prima facie entitlement to summary judgment, the court denied the motion without considering the sufficiency of the plaintiffs' opposition papers.

KEY QUOTATIONS

“The requisite elements of proof in either a medical or a dental malpractice action are a deviation or departure from accepted standards of practice, and evidence that such departure was a proximate cause of the plaintiffs injury” (45 A.D.3d at 572-73)

“To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiffs bill of particulars” (45 A.D.3d at 573)

“Accordingly, that branch of the defendant’s motion which was for summary judgment dismissing the first cause of action should have been denied without considering the sufficiency of the plaintiffs’ opposition papers” (45 A.D.3d at 573)

FACTUAL BACKGROUND

The plaintiffs' first cause of action alleged dental malpractice arising from the defendant's treatment of a tooth. Their verified bill of particulars alleged that the defendant should have attempted to save the tooth through endodontic therapy and should have installed a fixed rather than removable dental prosthesis. The defendant's expert submitted an affirmation offering only a conclusory opinion that recommending extraction was appropriate.

PROCEDURAL HISTORY

The Supreme Court, Westchester County, granted the branch of the defendant's summary-judgment motion seeking dismissal of the plaintiffs' first cause of action. The Appellate Division reversed that portion of the order and denied the branch of the motion.

DISPOSITION

reversed

CASES CITED

- DiGiaro v. Agrawal, 41 A.D.3d 764, 767 (N.Y. App. Div. 2d Dep't 2007)
- Keevan v. Rifkin, 41 A.D.3d 661, 662 (N.Y. App. Div. 2d Dep't 2007)
- Clarke v. Limone, 40 A.D.3d 571 (N.Y. App. Div. 2d Dep't 2007)
- Calabro v. Hescheles, 22 A.D.3d 622 (N.Y. App. Div. 2d Dep't 2005)
- Williams v. Sahay, 12 A.D.3d 366, 368 (N.Y. App. Div. 2d Dep't 2004)
- Ward v. Engel, 33 A.D.3d 790, 791 (N.Y. App. Div. 2d Dep't 2006)
- Ticali v. Locascio, 24 A.D.3d 430, 431 (N.Y. App. Div. 2d Dep't 2005)
- Johnson v. Ladin, 18 A.D.3d 439 (N.Y. App. Div. 2d Dep't 2005)
- Berkey v. Emma, 291 A.D.2d 517, 518 (N.Y. App. Div. 2d Dep't 2002)
- Drago v. King, 283 A.D.2d 603, 603-04 (N.Y. App. Div. 2d Dep't 2001)
- Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985)

OPINION

PER CURIAM.

In an action, inter alia, to recover damages for dental malpractice, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Donovan, J.), dated April 24, 2007, as granted that branch of the defendant's motion which was for summary judgment dismissing the first cause of action. Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was for summary judgment dismissing the first cause of action is denied.

The requisite elements of proof in either a medical or a dental malpractice action are a deviation or departure from accepted standards of practice, and evidence that such departure was a proximate cause of the plaintiffs injury (see *DiGiaro v Agrawal*, 41 AD3d 764, 767 [2007]; *Keevan v Rifkin*, 41 AD3d 661, 662 [2007]; *Clarke v Limone*, 40 AD3d 571 [2007]; *Calabro v Hescheles*, 22 AD3d 622 [2005]; *Williams v Sahay*, 12 AD3d 366, 368 [2004]).

Thus, on a motion for summary judgment, the defendant doctor or dentist has the initial burden of establishing the absence of any departure from good and accepted practice, or that the plaintiff was not injured by any departure (see *DiGiaro v Agrawal*, 41 AD3d at 764; *Keevan v Rifkin*, 41 AD3d at 661; *Williams v Sahay*, 12 AD3d at 366).

To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiffs bill of particulars (see *Ward v Engel*, 33 AD3d 790, 791

[2006]; *Ticali v Locascio*, 24 AD3d 430, 431 [2005]; *Johnson v Ladin*, 18 AD3d 439 [2005]; *573*Berkey v Emma*, 291 AD2d 517, 518 [2002]; *Drago v King*, 283 AD2d 603, 603-604 [2001]).

Here, the defendant failed to make a prima facie showing of entitlement to summary judgment dismissing the plaintiffs' first cause of action, which is predicated upon dental malpractice. The affirmation of the defendant's expert offered only a conclusory opinion that the defendant appropriately recommended extraction of the subject tooth, and did not address the specific claims in the plaintiffs' verified bill of particulars that an effort should have been made to save the tooth with endodontic therapy, and that a fixed rather than a removable dental prosthesis should have been installed.

Accordingly, that branch of the defendant's motion which was for summary judgment dismissing the first cause of action should have been denied without considering the sufficiency of the plaintiffs' opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ward v Engel*, 33 AD3d 790 [1969]; *Johnson v Ladin*, 18 AD3d 439 [2005]). Miller, J.P., Ritter, Covello and McCarthy, JJ., concur.