

<b>McKay v Papageorge</b>
2006 NY Slip Op 30831(U)
February 28, 2006
Supreme Court, New York County
Docket Number: 101249/04
Judge: Joan B. Carey
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 40

**FILED**  
MAR - 7 2006  
NEW YORK COUNTY CLERK'S OFFICE

NELLIE MCKAY,

Plaintiff,

Index No.: 10:1249/04

MOTION DATE

MOTIONISED NO. 04

MOTION CAL. NO.

RECEIVED  
MAR 3 2006  
NYS SUPREME COURT  
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-v-

ARIADNA PAPAGEORGE, M.D.

The following papers, 1-27, were read on this motion by defendant, Ariadna Papageorge, M.D., for summary judgment dismissing plaintiff's complaint in its entirety.

Notice Of Motion - Affidavits - Exhibits  
Answering Affidavits - Exhibits  
Reply Affidavits - Exhibits

Papers Numbered  
1-9  
10-23  
24-27

Cross-Motion:  Yes  No

Plaintiff commenced the instant medical malpractice action to recover damages against defendant Ariadna Papageorge, M.D. with respect to a cosmetic surgical procedure performed on plaintiff's nose on June 22, 2001. Plaintiff asserts two causes of action based upon the alleged negligence of Dr. Papageorge. The first cause of action seeks to recover for physical injuries resulting from the allegedly negligent performance of plaintiff's surgery, while the second cause of action appears to seek to recover for the economic loss sustained as a result of that negligence. According to the allegations contained in plaintiff's complaint, Dr. Papageorge negligently removed excessive tissue and cartilage from the tip of plaintiff's nose causing deformities, described as buckling and asymmetry of the tip of the nose.

In addition to the aforementioned negligence claims, plaintiff asserts an assault claim, as well as a claim for breach of contract in her complaint. Dr. Papageorge presently moves for summary judgment dismissing plaintiff's complaint in its entirety<sup>1</sup>.

<sup>1</sup> Despite plaintiff's contention to the contrary, the fact that Dr. Papageorge's supporting proof was submitted by way of attorney affirmation annexing deposition testimony and other documentary evidence does not defeat her right to summary judgment (see Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept. 2004]).

*MP*

Dr. Papageorge moves for summary judgment dismissing plaintiff's surgical malpractice claims, arguing that dismissal is warranted because she acted in conformity with good and accepted standards of care in connection with the medical treatment she provided to plaintiff. In support of her motion, Dr. Papageorge has submitted, among other things, the affidavit of a licensed physician who is board certified in plastic surgery. The expert averred "that the care and treatment rendered to plaintiff by Dr. Papageorge was at all times appropriate, and did not depart from good and accepted medical practice." According to Dr. Papageorge's expert, prior to plaintiff's surgery she had a "a boxy shaped nose with a wide tip" and she "desired a more 'refined,' 'classical' appearance." During a preoperative consultation a series of photographs were reviewed and the proposed work to be done was illustrated, by Dr. Papageorge, on the photographs. Plaintiff approved the proposed changes depicted in the photographs.

The expert opined that Dr. Papageorge performed the surgery in accord with the plaintiff's requests, and consistent with the sketched representations to which plaintiff consented. Notwithstanding, plaintiff "developed buckling of the ala cartilage which caused an asymmetric bump on the left side of the nose, and contracture of the nasal tip." These results, according to the expert, "are risks inherent to the rhinoplasty procedure, which can and do occur even when the most skilled surgical technique is employed, and they in no way indicate that Dr. Papageorge departed from good and accepted practice."

Based upon the foregoing, Dr. Papageorge has made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's surgical malpractice claims. It is noted that contrary to plaintiff's contention, the opinions of Dr. Papageorge's expert were based upon facts in evidence and sufficiently established prima facie entitlement to summary judgment with respect to these claims. As a result of Dr. Papageorge's prima facie showing, the burden shifts to plaintiff to come forward with evidentiary facts or materials to rebut defendant's showing and demonstrate the existence of a triable issue of fact (see Wasserman v. A.V. Carella, 307 AD2d 225 [1st Dept. 2003]; see also Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]) ("in a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that [s]he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact").

In opposition, plaintiff adequately demonstrated the existence of a triable issues of fact as to whether Dr. Papageorge was negligent in the manner in which she performed plaintiff's surgery. The redacted expert affidavit of a licensed physician submitted by plaintiff in support of her motion sufficiently sets forth that Dr. Papageorge departed from good and accepted medical practice in removing excessive amounts of tissue and cartilage from plaintiff's nose during the surgery. According to plaintiff's expert, the removal of excessive amounts of tissue and cartilage was a substantial cause of the asymmetry and shortening of the tip of plaintiff's nose. Accordingly, Dr. Papageorge's motion is denied with respect to plaintiff's claims for surgical malpractice.

In addition to her claims relating to surgical malpractice, plaintiff alleges in her complaint that Dr. Papageorge, in removing cartilage from the tip of plaintiff's nose, performed a procedure that plaintiff did not consent to, which, according to plaintiff, "constitute[d] a common law assault." Defendant seeks summary judgment dismissing this claim, arguing that it is time barred, pursuant to CPLR 215(3), which sets forth that intentional tort claims, such as assault and battery, are subject to a one-year statute of limitations.

Based upon the allegations contained in plaintiff's complaint, as well as those set forth in her bill of particulars, wherein she states that the surgical procedure performed by Dr. Papageorge was not consented to and was an "alternate procedure" that was contrary to what she reasonably expected, it is clear that plaintiff is not alleging that Dr. Papageorge simply failed to obtain her informed consent with respect to the surgery. Since the essence of this claim is lack of consent, as opposed to lack of informed consent, it sounds in battery and is subject to the one-year statute of limitations (see Cross v. Colen, 6 AD3d 306 [1st Dept. 2004]; Messina v. Matarasso, 284 AD2d 32 [1st Dept. 2001]; see also Cerilli v. Kezis, 16 AD3d 363 [2d Dept. 2005]). Whereas this action was not commenced within the one-year limitations period, plaintiff's claim relating to Dr. Papageorge's performance of a non-consensual procedure is time-barred (see Cross v. Colen, supra).

Dr. Papageorge also seeks summary judgment dismissing plaintiff's breach of contract claim. Dr. Papageorge argues that summary judgment with respect to this claim is warranted since the evidence establishes that Dr. Papageorge did not make any guarantee to plaintiff relating to a specific result to be obtained from the performance of the surgery.

It is well settled that a breach of contract claim arising out of the rendition of medical services is cognizable only where it is based upon an express promise to effect a cure or to accomplish a specific result (see e.g. Abbondandolo v. Hitzig, 282 AD2d 224 [1st Dept. 2001]; Winegrad v. Jacobs, 171 AD2d 525 [1st Dept. 1991]; Monroe v. Long Is. College Hosp., 84 AD2d 576 [2d Dept. 1981]). In support of her argument Dr. Papageorge relies on the informed consent form executed by plaintiff prior to her surgery, which expressly states that plaintiff "acknowledge[s] that no guarantees or assurances have been made to [her] concerning the results intended from the surgical procedure. . . ." Dr. Papageorge further relies upon the deposition testimony of plaintiff, wherein she states that she read and understood the informed consent form prior to signing it. Based upon the foregoing, Dr. Papageorge has demonstrated that she did not make any promises to plaintiff relating to any specific results of her surgery, and, thus, has made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's breach of contract claim.

In opposition, the plaintiff failed to raise a triable issue of fact in this regard. It is noted that plaintiff testified at her deposition that although Dr. Papageorge was "reassuring" and "intimated" that her nose would turn out exactly as she wanted, she could not recall Dr. Papageorge ever guaranteeing or promising a particular result (see Abbondandolo v. Hitzig, supra; see also Weiss v. Gerard Owners Corp., 22 AD3d 406 [1st Dept. 2005]; Perez v. Bronx Park South Assocs., 285 AD2d 402 [1st Dept. 2001]; Phillips v. Bronx Lebanon Hosp., 268 AD2d 318 [1st Dept. 2000]).

Lastly, as the record is devoid of any evidence that Dr. Papageorge's conduct was so wantonly dishonest, grossly indifferent to patient care, or so malicious and/or reckless to raise an issue of fact as to punitive damages in this case, plaintiff's claim relating to punitive damages is dismissed (see Williams v. Halpern, 2006 WL 133998 (N.Y., App. Div. 1st Dept., Jan. 19, 2006); Arnold v. Siegel, 296 AD2d 363 [2d Dept. 2002]; Charell v. Gonzalez, 251 AD2d 72 [1st Dept. 1998]; Luby v. St. John's Episcopal Hosp., 220 AD2d 390 [2d Dept. 1995]; cf. Graham v. Columbia-Presbyterian Medical Center, 185 AD2d 753 [1st Dept. 1992]).

Based on the foregoing, it is hereby

ORDERED that the defendant Ariadna Papageorge, M.D.'s motion for summary judgment dismissing the complaint is granted to the extent that plaintiff's assault claim and claim for breach of contract are dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that counsel for all parties are to appear before the court on April 17, 2006, at 9:30am, at 111 Centre Street, room 572, Part 40D, for jury selection.

Dated: 02/28/2006

*[Handwritten signature]*  
J.S.C.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

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REFERENCE

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