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

PRESENT: EILEEN BRANSTEN Justice PART 6

KWO FUNG LIU YU and SHIN-JOH YU,

Plaintiffs,

- v -

GLAUCOMA ASSOCIATES OF NEW YORK, P.C., ROBERT RITCH, M.D., NEW YORK EYE & EAR INFIRMARY IPA, INC., and EDWARD PLOTZKER, M.D.,

Defendants

INDEX NO. 111082/04

MOTION DATE 2/27/07

MOTION SEQ. NO. 012

The following papers, numbered 1 to 3 were read on this motion to/for REARGUE

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3-22-07

EILEEN BRANSTEN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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KWO FUNG LIU YU and SHIN-JOH YU,

Plaintiffs,

-against-

Index No.: 111082/04
Motion Date: 2/27/07
Motion Seq. No.: 12

GLAUCOMA ASSOCIATES OF
NEW YORK, P.C., ROBERT RITCH, M.D.,
NEW YORK EYE & EAR INFIRMARY
IPA, INC and EDWARD PLOTZKER, M.D.,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 2221, defendant New York Eye and Ear Infirmary IPA, Inc. ("Eye and Ear") moves for reargument of its motion for summary judgment. Plaintiffs Kwo Fung Liu Yu ("Mrs. Yu") and Shin-joh Yu ("Dr. Yu") oppose the motion.

Background

On June 30, 2004, defendant Robert Ritch, M.D. ("Dr. Ritch") admitted Mrs. Yu to Eye and Ear for eye surgery. Affirmation in Support ("Aff."), at ¶ 8; Affirmation in Opposition ("Opp."), at ¶ 2. Eye and Ear provided the anesthesia. Opp, at ¶ 2. According to Mrs. Yu, she experienced extreme pain throughout the surgery. Opp., at ¶ 3.

Later, Mrs. Yu met with Dr. Ritch, who speculated that the anesthesia vials may have contained defective anesthesia. Aff., at ¶ 11. In particular, Dr. Ritch wrote Mrs. Yu that he had "two other patients with the same problem. * * * I am waiting to speak to the Chairman

of the Anesthesia Department [at Eye and Ear] * * *." Opp., Ex. F, at 1. Dr. Ritch avers that he later spoke to someone at Eye and Ear about the anesthesia; Eye and Ear, by contrast, denies that Dr. Ritch made any such complaint. Opp., ¶ 6.

In this medical malpractice action – commenced June 30, 2004 – plaintiffs allege that the defendant doctors negligently failed to properly anesthetize Mrs. Yu and that Eye and Ear negligently provided ineffective anesthesia, causing Mrs. Yu considerable pain and suffering. Aff., at ¶ 6.

In 2006, Eye and Ear moved for summary judgment dismissal of plaintiffs' claims against it. Opp., at ¶ 7. Noticeably, however, it provided no expert affidavit attesting to the propriety of the anesthesia provided. Thus, by Order dated November 16, 2006, the Court denied summary judgment as to plaintiffs' defective-anesthesia claims. Aff., at ¶ 7.

Eye and Ear now moves for reargument of the motion, urging that, as a matter of law, plaintiffs cannot hold Eye and Ear liable because plaintiffs never filed a written incident report or verbally advised anyone at Eye and Ear that the anesthesia might have been defective. Aff., at ¶ 9. It asserts, moreover, that plaintiffs' failure to obtain the empty anesthesia vials is dispositive and mandates dismissal. Aff., at ¶ 15.

Plaintiffs oppose Eye and Ear's motion for reargument. They point out that Eye and Ear has once again failed to submit sufficient evidence demonstrating its *prima facie* entitlement to judgment as a matter of law. Opp., at ¶ 15.

Analysis

Reargument is not designed to afford an unsuccessful party the opportunity to re-litigate issues already decided or to present new arguments. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992), *lv. dismissed in part, denied in part*, 81 N.Y.2d 782 (1993), *rearg. denied,* 81 N.Y.2d 782; *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984); *300 West Realty Co. v. City of New York*, 99 A.D.2d 708, 709 (1st Dept. 1984), *lv. dismissed*, 63 N.Y.2d 952. CPLR 2221 makes clear that reargument may be obtained only upon demonstrating that the court in its decision "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979), *lv. denied*, 56 N.Y.2d 507 (1982).

Eye and Ear has failed to establish that the Court overlooked or misapprehended anything. It merely sets forth yet another time the very same arguments that it raised in support of summary judgment dismissal, namely, that plaintiffs' failure to contact anyone regarding the possibility of defective anesthesia or to obtain the empty vials warrants dismissal.

The Court, in issuing its decision, carefully considered and rejected these arguments. In any event, even if this Court were to again consider the arguments, the outcome would remain unchanged.

The proponent of a summary judgment motion has the burden of establishing entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). In a medical malpractice action, the movant must present evidence that the defendant comported with good and accepted medical practice and did not proximately cause plaintiff's injuries. *Masucci v. Feder*, 196 A.D.2d 416, 418-19 (1st Dept. 1993). This evidence must generally be set forth through an expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003). "Failure to make a *prima facie* showing [of entitlement to judgment] requires denial of the motion, regardless of the sufficiency of the opposing papers." *Masucci v. Feder*, 196 A.D.2d, at 419.

Once the movant has made this showing – then and only then – the burden then shifts to the opponent of summary judgment to demonstrate through competent evidence that there is a material issue of fact that warrants a trial. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324

Here, plaintiffs allege in their complaint that Eye and Ear provided expired or ineffective anesthesia. Opp., at ¶ 1. Eye and Ear has failed to submit any expert evidence or other conclusive proof to meet its summary judgment burden of establishing that it was not negligent in this manner. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 324. Thus, the sufficiency of plaintiffs' submissions is irrelevant and summary judgment was properly denied.

Indeed, Eye and Ear misapprehends the burden of proof in the summary judgment context; the burden rests squarely with defendants who must conclusively demonstrate through sufficient proof that there is absolutely no basis for recovery. *See, Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991) ("On a defendant's motion for summary judgment * * * [the court is] required to accept [plaintiff's] pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff]'"). Although plaintiffs' failure to register a formal complaint or to obtain the empty vials for analysis may make it difficult for them to ultimately prove their case at trial, there is no legal requirement that a plaintiff make a formal complaint as a prerequisite to recovery and Dr. and Mrs. Yu's failure to do so does not automatically defeat their claims. Nor must a plaintiff be expected to have immediately after surgery obtained empty anesthesia vials in order to later proceed with an action alleging defective anesthesia. The burden of proof at this stage is not on plaintiffs.

In the end, Eye and Ear has not demonstrated that the Court overlooked or misapprehended anything in deciding the previous motion. In the underlying motion and on this one, Eye and Ear's failed to provide sufficient proof to defeat plaintiffs' defective-anesthesia claims.

Accordingly, it is

ORDERED that Eye and Ear's motion for reargument is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 22, 2007

ENTER

Hon. Eileen Bransten