

The Plastic Surgery Group, P.C. v Kolb

2007 NY Slip Op 33174(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 4759-05/

Judge: Daniel Martin

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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

THE PLASTIC SURGERY GROUP, P.C.

TRIAL/IAS, PART 31
NASSAU COUNTY

Plaintiff.

- against -

Sequence No.: 002
Index No.: 014759/05

MARIA KOLB.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

This motion by plaintiff The Plastic Surgery Group, P.C., for an order pursuant to CPLR 3212 granting it partial summary judgment dismissing the defendant Maria Kolb's counterclaims against it is denied.

The plaintiff The Plastic Surgery Group, P.C. brought this action to recover fees allegedly owed for services rendered to defendant Maria Kolb. The defendant Maria Kolb counterclaimed for medical malpractice and lack of informed consent. Ms. Kolb alleges that the staff and physicians of The Plastic Surgery Group, P.C., specifically, Dr. DeVita, committed medical malpractice in that as a result of her breast reduction surgery performed by Dr. DeVita at the office of The Plastic Surgery Group, P.C. on August 9, 2004, her breasts were not symmetrical and an extra flap of flesh beneath her left breast developed.

The Plastic Surgery Group, P.C. seeks dismissal of Ms. Kolb's counterclaims.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King, 10 A.D.3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627 (2005), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the

sufficiency of the opposing papers.” Sheppard-Mobley v. King, *supra*, at p. 74; Alvarez v. Prospect Hosp., *supra*; Winegrad v. New York Univ. Med. Ctr., *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., *supra*, at p. 324. Since the defendant is opposing summary judgment, her evidence must be accepted as true and she must be given the benefit of every reasonable inference. *See*, Demishick v. Community Housing Management Corp., 34 A.D.3d 518 (2d Dept. 2006), citing Secof v. Greens Condominium, 158 A.D.2d 591 (2d Dept. 1990).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages. Ramsay v. Good Samaritan Hosp., 24 A.D.3d 645 (2d Dept. 2005); *see also*, Thompson v. Orner, 36 A.D.3d 791 (2d Dept. 2007); DiMitre v. Monsouri, 302 A.D.2d 420, 421 (2d Dept. 2003); Holbrook v. United Hospital Medical Center, 248 A.D.2d 358, 359 (2d Dept. 1998). “In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital] were negligent.” Taylor v. Nyack Hospital, 18 A.D.3d 537 (2d Dept. 2005) *citing Alvarez v. Prospect Hospital*, *supra*. Thus, a moving doctor or hospital has “the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby.” Williams v. Sahay, 12 A.D.3d 366, 368 (2d Dept. 2004), *citing Winegrad v. New York University Medical Center*, *supra*; *see also*, Thompson v. Orner, *supra*.

To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law § 2805-d, that:

- (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner ‘under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation,’ and (2) a reasonably prudent person in the patient’s position would not have undergone the procedure if he or she had been fully informed. Dunlop v. Silverman, 272 A.D.2d 570, 570-571 (2d Dept. 2000) *citing* Public Health Law § 2805-d[1], [3]; Davis v. Nassau Ophthalmic Servs., 232 A.D.2d 358 (2d Dept. 1996), *lv den.* 89 N.Y.2d 814 (1997).

In support of its motion for summary judgment, The Plastic Surgery Group has submitted the Affirmation of Joseph Feinberg, M.D., a Board Certified plastic surgeon. He affirms that he has reviewed Ms. Kolb’s medical records, and both Ms. Kolb’s and Dr. DeVita’s examination-before-trial testimony. He avers that it is his opinion with a reasonable degree of medical certainty that the care and treatment rendered by Dr. DeVita to Ms. Kolb was consistent with good and accepted medical practice and did not cause her injuries. More specifically, he affirms that Ms. Kolb’s office chart indicates that all of the procedures and complications associated with the surgery were explained to her and that all of her questions were answered. He specifically

notes that Dr. DeVita testified that he explained to Ms. Kolb that efforts would be made to make her breasts as close as possible in size but that they could not be made identical in size. Dr. Feinberg also noted that Dr. DeVita testified at his examination-before-trial that he tells each and every patient who has a breast reduction procedure that when a vertical mammoplasty is performed, pleats of skin are gathered underneath the breast so that the patient will not have a large scar; that he informs his patient that the pleats of skin will remain from four to six months after the procedure; and, that in 40% of vertical mammoplasties, there is a dog ear under the breast, which can be resected in a 10 minute office procedure. Dr. Feinberg notes that Dr. DeVita testified that he explained that this dog ear is a normal sequella of the procedure. Dr. Feinberg notes that Ms. Kolb scheduled corrective surgery for removal of her skin flap several times but never had it performed. Dr. Feinberg concluded:

“It is my opinion, within a reasonable degree of medical certainty, based upon a review of the postoperative photographs contained in the chart, that an acceptable result was obtained after the breast reduction surgery. It is not malpractice not to achieve complete symmetry in the breasts postoperatively. The fact that this patient, according to the office chart and her testimony, gained 40 pounds postoperatively contributed to the lack of breast symmetry, not the surgery. It is a common occurrence in a vertical breast reduction, and not malpractice. It occurs because that patient’s skin is gathered beneath the breast during the procedure.”

As for Ms. Kolb’s alleged lack of informed consent, based on her office chart and Dr. DeVita’s testimony at his examination-before-trial, Dr. Feinberg concluded that “all of the risks and complications were explained” to her. Indeed, he notes that she signed a consent form prior to surgery.

The Plastic Surgery Group has established that the care and treatment rendered by Dr. DeVita comported with applicable medical standards.

However, contrary to The Plastic Surgery Group’s position, it may not rely on Dr. DeVita’s custom and practice in advising patients in order to establish that he procured Ms. Kolb’s informed consent and to obtain summary judgment. While evidence of custom and habit is admissible to establish that a patient was properly advised of the risks and options attendant to a medical procedure, such evidence merely provides a basis for the jury to draw the permissible inference. *See, Rigie v. Goldman*, 148 A.D.2d 23, 27 (2d Dept. 1989). It cannot be the basis for summary judgment. *Lindeman v. Slavin*, 184 A.D.2d 910 (3d Dept. 1992). Furthermore, even assuming, *arguendo*, that The Plastic Surgery Group could rely on evidence of custom and practice to establish that Ms. Kolb’s informed consent was procured, The Plastic Surgery Group’s motion for summary judgment on the lack of informed consent form would still be denied because The Plastic Surgery Group has not established that a reasonably prudent person in the position of Ms. Kolb would have undergone the procedure when fully informed. *See, Haggerty v. Wyeth Ayerst Pharmaceuticals*, 11 A.D.3d 511 (2d Dept. 2004); *Baez v. Lockridge*, 259 A.D.2d 573 (2d Dept. 1999).

The burden is therefore shifted to Ms. Kolb to establish the existence of a material issue of fact only with respect to her medical malpractice claim.

In opposition to The Plastic Surgery Group's motion, Ms. Kolb adamantly attests in her Affidavit that she was never told about the possibility of the flap or dog-ear nor was she told that additional surgery might be required. She states that had she been told, she would not have had the surgery. Ms. Kolb has also submitted the Affidavit of Dr. Tomas Pattugalan, M.D., an internist doctor licensed to practice medicine in New York State. He states that he is familiar with the care and treatment of patients such as plaintiff and that he is familiar with the proper standards of plastic surgery and general medical care as it existed at the time at issue in this case. Having reviewed Ms. Kolb's medical records and Ms. Kolb's and Dr. DeVita's examination-before-trial testimony, Dr. Pattugalan concluded that "the care and treatment rendered by Dr. DeVita was not consistent with good and accepted medical practice." He states that "[a] normal breast reduction procedure should not result in the remainder of excess tissue hanging down or the growth of same consisting of a 'dog-ear' or third small breast."

"While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in the field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." Postlethwaite v. United Health Servs. Hosps., Inc., 5 A.D.3d 892, 895 (3d Dept. 2004); *see also*, LaMarque v. North Shore Univ. Hosp., 227 A.D.2d 594 (2d Dept. 1996). "Thus where, [as here], a physician opines outside of his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered." Behar v. Coren, 21 A.D.3d 1045, 1047 (3d Dept. 2005), *lv to app den.* 6 N.Y.3d 705 (2006), *citing* Romano v. Stanley, 90 N.Y.2d 444, 451-452 (1997); Nongano v. Mount Sinai Hosp., 305 A.D.2d 473 (2d Dept. 2003).

Contrary to The Plastic Surgery Group's argument, Ms. Kolb's expert adequately established the reliability of his opinion. While his expertise may not be plastic surgery, his credibility will be weighed by the jury. *See*, Adamy v. Ziriakus, 92 N.Y.2d 396, 402 (1998).

Dr. Pattugalan has established the existence of an issue of fact with regard to Ms. Kolb's claim for medical malpractice.

So Ordered.


A.J.S.C.

Dated: September 26, 2007

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COUNTY CLERK'S OFFICE**