

<b>Castellano v Decorato</b>
2008 NY Slip Op 30199(U)
January 28, 2008
Supreme Court, New York County
Docket Number: 0104019/2006
Judge: Eileen Bransten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: BRANSTEN  
Justice

PART 6

Audrey Castellano  
John DeCorto M.D.

INDEX NO. 104019/06  
MOTION DATE 12/11/07  
MOTION SEQ. NO. 02  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1-23-08

Eden Branstien  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X

AUDREY CASTELLANO and JOHN CASTELLANO

Plaintiffs,

Index No.: 104019/06  
Motion Date: 12/11/07  
Motion Sequence No.: 002

-against-

JOHN DECORATO, M.D. and ASTHETIC  
PAVILION, LLC.

Defendants.

-----X

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERKS OFFICE

PRESENT: EILEEN BRANSTEN, J:

In this motion, defendants John DeCorato, M.D. (“Dr. DeCorato”) and Asthetic Pavilion, LLC. (“the Pavilion”) (collectively “Defendants”) move for summary judgment pursuant to CPLR 3212. Plaintiffs Audrey Castellano (“Mrs. Castellano”) and John Castellano (“Mr. Castellano”) (collectively “Plaintiffs”) oppose the motion.

**BACKGROUND**

On or about November 4, 2004, Mrs. Castellano consulted with Dr. DeCorato regarding breast reduction to alleviate her back pain. *See*, *Lugara Aff* at 7, ¶ 21. She returned to Dr. DeCorato’s office on December 30, 2004, at which time surgical-coordinator Barbara Savino gave her a consent form. *Id.*, ¶ 22. The consent form is a four-page document approved by the American Academy of Facial Reconstructive and Plastic

Surgeons. *Id.* It outlines a number of issues related to the surgery, including alternative treatments, risks, and the possible need for additional surgery. *See, Id.*, Ex H. Under the heading “Risks of Reduction Mammoplasty Surgery,” the form warned that possible side-effects of the procedure include bleeding; infection; change in sensation; scarring; pains; firmness; delayed healing; breast disease; allergic reactions; and the development of fat necrosis, or lesions on the breast. *Id.* Mrs. Castellano read the consent form before she initialed each page and signed it. *Id.*, Ex C at 55-58 and 68.

Dr. DeCorato performed the surgery at the Pavilion on January 7, 2005. In the two and one-half months following the surgery, Mrs. Castellano complained of swelling and drainage in her right breast. *Id.* at 8, ¶ 24-25. On March 3, 2005, Dr. DeCorato noted that liquid fat had been expressed from her right breast and was becoming softer. He then inserted a drain into the wound, and determined that there was no infection.

In a subsequent post-operative examination on March 12, 2005, Dr. DeCorato found fat necrosis in the upper right breast. *Id.* at 9, ¶ 28. On July 25, 2005, Mrs. Castellano complained about a tender upper-left breast mass. *Id.*, ¶ 29. Dr. DeCorato attempted to aspirate the mass, but no fluid returned. He concluded that it was probably another fat necrosis and referred Mrs. Castellano for a mammogram and breast ultrasound. *Id.*

Mrs. Castellano began treatment on August 9, 2005 with Dr. Dominic Filardi (“Dr. Filardi”), a breast surgeon. During the course of his treatment, Dr. Filardi performed

aspirations on her breast and concluded that it was fat necrosis with no signs of infection although he prescribed an antibiotic in the event she developed one. *Id* at 10-11, ¶ 31-37.

This medical malpractice action was commenced on March 23, 2006. In their first cause of action, Plaintiffs allege that Defendants did not maintain the Pavilion in a sterile condition, failed to obtain proper informed consent, negligently performed the surgery, and provided inadequate follow-up care. In the second cause of action, Mr. Castellano alleges that he was deprived of Mrs. Castellano's consortium as a result of Defendants' negligence and malpractice.

In this motion, Defendants move for summary judgment disposition pursuant to CPLR 3212, arguing that they satisfied the standard of care in all respects. Plaintiffs oppose the motion.

### ANALYSIS

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue of fact. *See, Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *see also, Greenidge v. HRH Constr. Corp.*, 279 A.D.2d 400, 403 (1st Dept. 2001); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dept. 1996). Indeed, because summary disposition deprives a party of a day in court, relief should not be granted where an issue of fact is even arguable. *See, Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dept. 1991). Further, "on a defendant's motion for summary judgment, opposed by

plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision must be made on the version of the facts most favorable to [plaintiff].” *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dept. 1991).

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *See, Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.*

General allegations of medical malpractice that are unsupported by competent medical evidence are insufficient to defeat a motion for summary judgment. *See, Neuman v. Greenstein*, 99 A.D.2d 1018 (1st Dept. 1984). Thus, on a motion for summary judgment where a medical malpractice defendant demonstrates that treatment was provided in accordance with accepted standards of medical practice, the plaintiff must respond with medical evidence establishing a departure from accepted medical procedures. *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d, at 327.

In support of their motion, Defendants submit the affirmation of Carroll B. Lesesne, M.D. (“Dr. Lesesne”). Dr. Lesesne, a board certified plastic surgeon, opines that

“It is my opinion that the consent form provided by Dr. DeCorato was sufficiently detailed and contained appropriate language to accurately explain the risks of the reduction mammoplasty to the plaintiff, including the risks of

infection, fat necrosis, and other wound healing difficulties. The form used by Dr. DeCorato is the one recommended by the American Academy of Facial and Reconstructive Plastic Surgery.

\* \* \*

“The Pavilion is accredited by the American Association for the Accreditation of Ambulatory Surgery Facilities (“AAAASF”), an organization that ensures patient safety and compliance with national standards for ambulatory surgery centers. The Pavilion passed all of the inspections mandated by state and satisfied all of the guidelines established by AAAASF. Furthermore, in my review of the above medical records and deposition testimony, I found no evidence that an unsterile condition existed in the Pavilion’s operating room at the time of the plaintiff’s surgery.

\* \* \*

“It is my opinion that the reduction mammoplasty performed by Dr. DeCorato on January 7, 2005 was performed in accordance with the standard of care. Dr. DeCorato’s surgical technique was not the proximate cause of any condition complained of by the plaintiff.

\* \* \*

“It is my opinion that the plaintiff did not suffer an infection at any time following the surgery. The records \* \* \* indicate that she developed fat necrosis in the weeks and months following the procedure. Fat necrosis is a benign breast condition in which a firm lump forms in an area of fatty breast tissue that has been damaged. [It] can be mistaken for infection; however, it is not. [It] is a known risk associated with breast reduction surgery. The risk \* \* \* is increased in patients such as the plaintiff, who are smokers, obese or who have hypertension. \* \* \* Additionally, fat necrosis is caused by interrupted blood flow and cannot be caused by unsterile conditions. Therefore, the plaintiff’s claim that an unsterile condition in the Pavilion’s operating room at the time of the breast reduction surgery caused her fat necrosis is unfounded because it is not medically possible

Based on their submission, Defendants have established a *prime facie* showing of entitlement to judgment as a matter of law. The burden now shifts to Plaintiffs to raise triable factual issues concerning whether consent was properly obtained; the standard of care used in the surgery and post-operative care; and the Pavilion's sanitary conditions.

It is well-settled that once the burden shifts to the plaintiffs to show triable issues of fact, they must do so with expert medical opinions. *See, Mosberg v Elahi*, 80 NY 2d 941 (1992). Here, Plaintiffs proffer three documents in order to defeat the motion: an attorney affirmation that repeats the allegations set forth in the complaint; a report from the hospital where Dr. Filardi performed the aspiration; and a supplemental Bill of Particulars in which the allegations are repeated yet again. *See, Beals Aff in Opp, Ex A & B*. The proffered documents completely fail to raise any triable issue of fact. Indeed, they do not substantively challenge in expert-format Dr. Lesesne's's affirmation that informed consent was properly obtained, Dr. DeCorato acted within the acceptable standard of care, and that the Pavilion was kept in a sanitary state.

Furthermore, "[t]he burden of a party opposing a motion for summary judgment is not met by the unsubstantiated assertions or speculations of plaintiff's counsel that a defendant may have breached a possible duty of care." *Alvarez*, 68 N.Y. 2d at 327. Plaintiffs' counsel's affirmation that Mrs. Castellano suffered a post-operative infection is entirely insufficient to defeat the motion.

Accordingly, it is

ORDERED that the motion for a summary judgment is GRANTED; and it is further

ORDERED that the clerk of the court is directed to enter judgment in Defendants' favor.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

January 23, 2008

ENTER



Hon. Eileen Bransten

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERKS OFFICE