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

PRESENT: Joan B. Lobis Justice PART 6

Linda Christopherson

-v-

Genovese Optics, Inc.

INDEX NO. 111602/06

MOTION DATE 2/10/09

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	12-18
Replying Affidavits	X

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
MAR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/13/09

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
NEW YORK COUNTY: IAS PART 6

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GORDON CHRISTOPHERSON,

Plaintiffs,

Index No. 111602/06

-against-

Decision and Order

LENSCRAFTERS, INC., OMNI EYE SURGERY OF NEW YORK, P.C., STEVEN M. FRIEDLAND, O.D., DOUGLAS K. GRAYSON, M.D., BURTON J. WISOTSKY, M.D. and MEGAN BRUTHER, O.D.,

Defendants.

JOAN B. LOBIS, J.S.C.:

Defendant Steven M. Friedland, O.D., brings this motion, pursuant to C.P.L.R. Rule 3212, for summary judgment in his favor.

According to the papers, plaintiff has been a patient of defendant Steven M. Friedland, an optometrist, since July 2002, before plaintiff had cataract surgery in both eyes. Plaintiff sets forth in his affidavit in opposition to the motion that on Saturday, April 24, 2004, at approximately 8:20 a.m., plaintiff was moving some boxes at Gracious Home, his place of employment, when he "felt a twitch." He called Dr. Friedland, who said to come into the office; at approximately 10:30 a.m., plaintiff was in Dr. Friedland's office. Plaintiff complained of diminished vision. He also said that there was a "flash" and there was "graying" in his left eye. Dr. Friedland examined plaintiff and prescribed drops for plaintiff's eyes. Plaintiff avers that he did not recall Dr. Friedland performing a dilated examination of either eye at that time, nor did he recall receiving any other instructions. Dr. Friedland acknowledged at his deposition that he did not perform any examination that would rule out retinal detachment at that time. Plaintiff obtained the drops, put them in his eyes, and returned to

work. At approximately 4:30 p.m. that day, plaintiff called Dr. Friedland to inform him that his vision was darker. Dr. Friedland gave plaintiff the doctor's cell phone number, and told plaintiff to call the next day. Dr. Friedland told plaintiff that the drops take time to work.

Meanwhile, Dr. Friedland testified at his deposition that at approximately 4:30 p.m. on April 24, Dr. Friedland contacted defendant Douglas Grayson, M.D., an ophthalmologist at OMNI Eye Surgery of New York, P.C. ("OMNI"), to whom he refers patients. In fact, Dr. Grayson performed plaintiff's 2002 cataract surgery. Dr. Friedland's notes reflect that he made the call because he thought he was bothered that he was "missing RD," which refers to retinal detachment, when he examined plaintiff. Dr. Grayson told Dr. Friedland to refer the patient to the New York Eye and Ear Infirmary ("Eye and Ear"). Friedland testified that he spoke to plaintiff at approximately 5:30 p.m., and referred him to New York Eye and Ear. Dr. Friedland's notes reflect that the patient did not want to go because he "doesn't like it there;" the notes also reflect that plaintiff declined to visit New York Eye and Ear, and that plaintiff's retina was at risk.

Plaintiff states that the next morning, Sunday, April 25, his vision was worse. He was seeing an array of colors, which he described at his deposition as being like a slice of watermelon in his left eye — first pink, then white, then green, then a dark green, then black. At approximately 10:00 a.m., plaintiff spoke with Dr. Friedland and explained the problems with his vision. Plaintiff testified at his deposition that Dr. Friedland said that he would speak with Dr. Grayson, and that plaintiff should call back that afternoon. Dr. Friedland testified at his deposition that he told plaintiff to go to Eye and Ear. Plaintiff spoke with Dr. Friedland again at 5:00 p.m., and indicated that his vision had not improved. Plaintiff said that Dr. Friedland instructed plaintiff to see Dr. Grayson at

OMNI on Monday, at which time Dr. Grayson might give plaintiff a different prescription for an eye drop. Plaintiff testified that he did not recall any conversation concerning a possible problem with his retina, and plaintiff specifically denied that Dr. Friedland recommended or advised that plaintiff go to Eye and Ear that night, although Dr. Friedland testified that he advised plaintiff to go to Eye and Ear.[1]

On Monday, April 26, plaintiff went to OMNI, where he was examined by Dr. Megan Bruther, an optometrist, because Dr. Grayson was not in the office. Plaintiff claimed that Dr. Bruther did not tell him what was wrong with his eye, and that he was told to return to the office later to see Burton J. Wisotsky, M.D., an ophthalmologist. Plaintiff returned to work, and then returned to OMNI at approximately 5:30 p.m. Dr. Wisotsky examined plaintiff's left eye. Dr. Wisotsky testified at his deposition that plaintiff had a "macula off" detached retina in his left eye. Plaintiff asserts that he did not recall being told what was wrong with his eye,[2] but that Dr. Wisotsky seemed worried and told plaintiff that he would insert a gas bubble into plaintiff's left eye. At approximately 6:00 p.m., Dr. Wisotsky performed a pneumatic retinoplexy with cryopexy to repair the retinal detachment. The procedure involves a freezing technique that freezes the tear in the retina, and an injection of a gas bubble into the eye to push the retina back in place.

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[1] Plaintiff denied being given these instructions, and testified at his deposition that he should have been told to go to a hospital. At plaintiff's deposition, defendants contended that plaintiff's denials are contradicted by a letter plaintiff wrote a letter to Dr. Friedland, dated September 23, 2004, in which he states that "[g]iven the choice of going to the Eye and Ear Hospital that [Sunday] night and going to O[MNI] Surgery's 36th Street office on the next morning, I chose the latter."

[2] A document dated April 26, 2004, entitled "Consent Form for Retinal Procedures," which bears plaintiff's signature, reflects that plaintiff had a "cryoretinal detachment," and indicates that plaintiff consented to Dr. Wisotsky performing a "pneumatic retinoplexy."

Plaintiff had a follow-up visit a few days after the surgery; he testified at his deposition that it was not until this visit that he learned for the first time that the procedure was to repair a tear to his retina. In the weeks following the surgery, plaintiff returned for follow-up visits with Dr. Wisotsky. Plaintiff complained of decreased vision in his left eye. Diagnostic testing of the retina was performed to see whether there was any sign of swelling or significant wrinkling. There was no leakage of the macula, nor was there any sign of macula pucker, which is wrinkling on the surface of the retina. In October 2004, plaintiff complained that his vision was still blurry in his left eye.

In this action, plaintiff alleges that there is an absolute difference in prognosis for "macula on" as opposed to "macula off" retinal detachment.[3] Plaintiff contends that Dr. Friedland's delay in diagnosing his condition contributed to increasing the severity of plaintiff's injuries and negatively impacted on the result. Plaintiff maintains that the result is not the same; if the macula were on, his prognosis would be better.

The party moving for summary judgment in a medical malpractice action 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 was negligent. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Once the movant satisfies this burden, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Id. (citation omitted).

[3] Dr. Friedland testified at his deposition that "macula off" refers to the detached retina affecting the central part of the retina, where fine vision is located. With a "macula on" detachment, the detached retina does not affect the central part of vision.

Specifically, this requires, in a medical malpractice action, that a plaintiff opposing a physician's summary judgment motion

> must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact. . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion.

Id. at 324-25 (citations omitted).

In support of the motion, defendant submitted an affirmation by Wing Chu, M.D., a physician board certified in Ophthalmology. Dr. Chu states, with a reasonable degree of medical certainty, that Dr. Friedland's care and treatment of plaintiff was in accordance with good and accepted medical practice and did not cause plaintiff's injuries.

Dr. Chu affirms that based on his experience with detached retinas, plaintiff's initial visit to Dr. Friedland on April 24 did not warrant an immediate referral for emergency surgery. Dr. Chu rejects plaintiff's contention in the bill of particulars that the delay resulted in the need for additional procedures; rather, Dr. Chu states that the procedure performed by Dr. Wisotsky on the 26th is the same procedure that would have been performed on the 24th. The timing of the surgery had no effect on the surgical result, according to Dr. Chu, and the delay in referral did not affect plaintiff's condition.

Dr. Friedland has met his burden as the proponent of summary judgment. He has submitted an affidavit by an expert qualified in the field of ophthalmology. The expert concluded, after reviewing all relevant documents, that there was no departure from the standard of care in failing to diagnose the detached retina on April 24, and no proof of any additional injury following the surgery as a result of the alleged delay in diagnosis.

Having established a *prima facie* entitlement to summary judgment, the burden shifts to plaintiff to assert a genuine issue of material fact as to whether the proper standard of care was used. The only issue raised by plaintiff is the delay in diagnosis and in performing the surgery. Plaintiff contends that Dr. Friedland should have diagnosed plaintiff immediately and referred him for surgical intervention.

In response to the motion, plaintiff submitted an affirmation of Vivien Boniuk, M.D., an Associate Professor of Ophthalmology at the Albert Einstein College of Medicine and Director of Ophthalmology at Queens Hospital Center. Dr. Boniuk affirms, with a reasonable degree of medical certainty, that it was a departure for Dr. Friedland to fail to perform a dilated examination of the retina on Saturday, April 24. She contends that such an examination is a critical part of the examination in a patient who is a postoperative cataract patient who complains of a sudden change in vision in the operated eye. She further asserts that failure to evaluate the status of the macula was a departure, because there "is an absolute difference in prognosis for macula on versus macula off retinal detachment." In addition, she asserts that Dr. Friedland should have advised plaintiff to cease all physical activity and should have expressed the exigent nature of plaintiff's medical situation. Finally,

she affirms that as a result of the delay in diagnosis in plaintiff's injury, a pucker developed, which interfered with plaintiff's vision and recovery. She opines that these departures contributed to the severity of plaintiff's injuries and impacted negatively on the result that would have been reasonably expected.

Although both defendant's expert and Dr. Wisotsky, who performed the surgery, state that the delay in performing the surgery is of no consequence, plaintiff's expert opines that the delay had an effect on plaintiff's subsequent recovery and prognosis. Under such circumstances, where there is a conflict in the medical expert opinions as to whether the alleged delay in diagnosis or referral to a specialist resulted in injuries to plaintiff, such credibility issues can only be resolved at trial. Bengston v. Wang, 41 A.D.3d 625, 626 (1st Dep't 2007); Schaub v. Cooper, 34 A.D.3d 268, 271 (1st Dep't 2006); Prigorac v. Park, 20 A.D.3d 363 (1st Dep't 2005). It cannot be concluded as a matter of law that the two-day period of time from plaintiff's examination by Dr. Friedland on April 24 and plaintiff's surgery on April 26 did not affect the outcome of the surgery and plaintiff's recovery.

The motion for summary judgment is denied. The parties are directed to appear for a pre-trial conference on March 17, 2009, at 9:30 a.m. This constitutes the decision and order of the court.

Dated: March 13, 2009

JOAN B. LOBIS, J.S.C.