SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT: HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

DIANE MONTAGNINO and MICHAEL MONTAGNINO,

Plaintiffs,

-against-

INAMED CORPORATION, INAMED HEALTH, INAMED AESTHETICS, ALLERGAN, INC., ALAN R. SHONS, M.D., NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., GLEN COVE HOSPITAL, and NORTH SHORE UNIVERSITY HOSPITAL AT GLEN COVE,

Defendants.

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INDEX NO. 13532/07

XXX

MOTION DATE: 03/13/12

SEQUENCE NO. 006, 007

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Upon the foregoing papers, defendant Alan R. Shons, M.D.'s motion for summary judgment, pursuant to CPLR §3212, is granted, and plaintiff's complaint, together with all cross-claims, is hereby dismissed as against defendant Alan R. Shons, M.D. Plaintiff's cross-motion for an order striking the answer of the defendant Alan R. Shons, M.D. and precluding him from offering, utilizing and/or relying upon any expert testimony or affidavits due to his spoliation of evidence, is denied. The Court notes that this action has been previously voluntarily discontinued against all defendants except defendant Alan R. Shons, M.D.

This is an action for medical malpractice against defendant Alan R. Shons, M.D. (hereinafter "Shons") in connection with breast reconstruction surgeries which plaintiff Diane Montagnino underwent on September 20, 2004, February 2, 2005, May 6, 2005, and August 29,

2006.

Defendant Shons moves for summary judgment on the grounds that Dr. Shons did not depart from good and accepted medical practice and that plaintiff was completely informed of all the risks associated with the surgeries, including breast implant deflation/failure, post surgical infection and wound healing associated with the procedures performed. In support of his motion, defendant Shons submits plaintiff's verified bill of particulars; defendant Shons's deposition transcript; portions of plaintiff's medical records from Dr. Shons and North Shore University Hospital, which include the operative reports from September 20, 2004, February 2, 2005, May 6, 2005, and August 29, 2006, and February 26, 2008; and an affirmation of defendant's expert, Dr. William Rosenblatt, M.D.

On September 20, 2004, plaintiff underwent bilateral mastectomies and bilateral sentinel node azillary lymphadenectomy which were performed by Dr. DeRisi. Immediately following said procedure, defendant Shons performed reconstruction of the right and left chest wall deformity with serratus anterior muscle flap and reconstruction of the right and left breast with tissue expanders. Thereafter, plaintiff between October 8, 2004 and December 20, 2004, plaintiff regularly saw Dr. Shons for post-operative and tissue expander checks, including incremental additions of 60 cc's of saline to each side until a total of 600 cc's had been inserted. On February 2, 2005, plaintiff underwent surgery in which Dr. Shons removed the right and left breast tissue expanders and placed permanent saline implants into the plaintiff. Dr. Shons examined the implants before filling them and inserting them. Thereafter, on May 3, 2005, plaintiff was seen by Dr. Shons where she reported that the right implant was slowly deflating. On May 6, 2005, Dr. Shons performed a removal of a failed right breast implant, open right breast capsulotomy, and immediate insertion of a new permanent right breast implant of the same type and manufacturer. In his operative report, Dr. Shons reported that the implant was "partially filled" and noted a "pinhole defect in the wall" of the implant. A year later, on May 11, 2006, plaintiff returned to Dr. Shons's office and complained of leaking of the left implant. On August 29, 2006, Dr. Shons performed revision of the plaintiff's left breast reconstruction, removal and replacement of the left breast saline implant. In his operative report, Dr. Shons noted that the implant was partially deflated and that "careful examination revealed a pinhole defect on the

posterior wall of the implant...."

In January 2008, plaintiff was seen by another plastic surgeon, Dr. Ron Israeli, when her new right implant began deflating. Dr. Israeli removed the deflated right implant on February 26, 2008, and placed a new tissue expander rather than immediately placing a new implant. Dr. Israeli noted that the implant was deflated and that it "appeared grossly to be intact with an intact valve." Dr. Israeli did not report observing any pinhole defect in the third failed implant. Thereafter, on August 15, 2008, Dr. Israeli performed another surgery to remove the right tissue expander and the left implant and reconstruct both breasts with silicone gel implants.

Plaintiff alleges that Dr. Shons was negligent and guilty of malpractice in connection with two implants that he placed into plaintiff's chest on February 2, 2005 and with a third implant that he placed into plaintiff's chest on May 6, 2005.

Dr. William Rosenblatt, M.D., defendant Shons's expert, submits an affirmation in which he attests to the treatment rendered by Dr. Shons in connection with the plaintiff's multiple surgeries, and opines that "Mrs. Montagnino was, at all times, treated by Dr. Shons in accordance with good and accepted medical standards of practice." Dr. Rosenblatt further attests:

> "The fact that the plaintiff has three (3) implant deflations (twice on the right and once on the left) and each required surgical replacement is not, in and of itself, a departure from good and accepted medical standards. Deflation of saline implants and the need to undergo subsequent surgery is an accepted and known complication. While three such failures is highly unusual, it still does not implicate an iatrogenic etiology of these implant failures. I can state, within a reasonable degree of medical certainty, that it is virtually impossible that the deflations were the result of anything Dr. Shons may have done or failed to do, at the time of the surgical placement of the implants, given the time gap between the placement of each implant and deflation. If an implant is punctured/ penetrated for any reason, deflation occurs almost immediately.
>
> Consequently, it is my opinion that Dr. Shons' plastic surgical care and treatment of Mrs. Montagnino was always appropriate and comported with accepted standards of medical and plastic reconstructive surgical care."

In a medical malpractice action, a plaintiff must prove that the defendant physician departed from the controlling standard of care and that "but for" the alleged wrongful conduct,

plaintiff would not have suffered the injury complained of. (*Lyons v. McCauley*, 252 A.D.2d 516, 675 N.Y.S.2d 375 (2d Dept. 1998); *Lynch v. Bay Ridge Obstetrical*, 72 N.Y.2d 632, 536 N.Y.S.2d 11 (1998)). The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage. (*Heller v. Weinberg*, 77 A.D.3d 622, 909 N.Y.S.2d 477 (2d Dept 2010); *Anonymous v. Wyckoff Heights Medical Center*, 73 A.D.3d 1104, 902 N.Y.S.2d 147 (2d Dept. 2010); *Dolan v. Halpern*, 73 A.D.3d 1117, 902 N.Y.S.2d 585 (2d Dept. 2010); *Orsi v. Haralabatos*, 89 A.D.3d 997, 934 N.Y.S.2d 195 (2d Dept. 2011)). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. (*Heller v. Weinberg*, 77 A.D.3d 622, 909 N.Y.S.2d 477 (2d Dept 2010); *Dolan v. Halpern*, 73 A.D.3d 1117, 902 N.Y.S.2d 585 (2d Dept. 2010); *Anonymous v. Wyckoff Heights Medical Center*, 73 A.D.3d 1104, 902 N.Y.S.2d 147 (2d Dept. 2010); *Murray v. Hirsch*, 58 A.D.3d 701, 871 N.Y.S.2d 673 (2d Dept. 2009); *Rebozo v. Wilen*, 41 A.D.3d 457, 838 N.Y.S.2d 121 (2d Dept. 2007)).

Defendant Shons has made a prima facie showing of entitlement to summary judgment through the submission of the affirmation of his expert, Dr. Rosenblatt, wherein Dr. Rosenblatt attested that Dr. Shons's did not depart from good and accepted medical practice. *(See, Murray v. Hirsch*, 58 A.D.3d 701, 871 N.Y.S.2d 673 (2d Dept. 2009); *Anonymous v. Wyckoff Heights Medical Center*, 73 A.D.3d 1104, 902 N.Y.S.2d 147 (2d Dept. 2010); *Deutsch v. Chaglassian*, 71 A.D.3d 718, 896 N.Y.S.2d 431 (2d Dept. 2010); Guzzi v. Gewirtz, 82 A.D.3d 838, 918 N.Y.S.2d 552 (2d Dept. 2011)).

The proponent of a summary judgment motion "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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, 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 a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, plaintiff fails to submit any affidavit or affirmation by a medical expert establishing that defendant Shons departed from accepted standards of medical practice. In opposition to a motion for summary judgment in a medical malpractice action, the plaintiff must submit a physician's affidavit attesting to the defendants departure from accepted practice. (*Guzzi v. Gewirtz*, 82 A.D.3d 838, 918 N.Y.S.2d 552 (2d Dept. 2011); *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011); *Anonymous v. Wyckoff Heights Medical Center*, 73 A.D.3d 1104, 902 N.Y.S.2d 147 (2d Dept. 2010); *Deutsch v. Chaglassian*, 71 A.D.3d 718, 896 N.Y.S.2d 431 (2d Dept. 2010)). In opposing the motion for summary judgment, the plaintiff was required to lay bare her proof. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). The failure of plaintiff to submit an affidavit by a medical expert competent to attest to the defendant's departure from good and accepted medical practice requires dismissal of the complaint. (*Amsler v. Verrilli*, 119 A.D.2d 786, 501 N.Y.S.2d 411 (2d Dept. 1986)). "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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Deutsch v. Chaglassian*, 71 A.D.3d 718, 896 N.Y.S.2d 431 (2d Dept. 2010)). Accordingly, plaintiff has failed to raise a triable issue of fact sufficient to defeat defendant's prima facie showing of entitlement to summary judgment.

Defendant Shons has also established that the plaintiff has no basis for a claim for lack of informed consent. Public Health Law § 2805-d(1) defines lack of informed consent as "the failure of the person providing the professional treatment . . . to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." (*Manning v. Brookhaven Memoral Hosp. Medical Center*, 11 AD3d 518, 782 N.Y.S. 833 (2d Dept 2004)).

> " 'To establish a cause of action [to recover damages] for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2)

> that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury.' " *(Spano v. Bertocci*, 299 A.D.2d 335, 337-338 (2d Dept 2002), quoting *Foote v. Rajadhyax*, 268 A.D.2d 745 (3d Dept. 2000), citing Public Health Law § 2805-d; *King v. Jordan*, 265 A.D.2d 619, 629 (3d Dept 1999)).

The evidence submitted by the defendant indicates that Dr. Shons specifically discussed the risks of the procedures with plaintiff prior to her undergoing same and that consent forms were signed by the plaintiff. While defendant Shons has demonstrated his prima facie entitlement to summary judgment on said issue and plaintiffs have failed to address same in their opposition papers, the Court notes that although plaintiffs assert claims sounding in a lack of informed consent within their Bill of Particulars, they have failed to plead a cause of action for lack of informed consent. Accordingly, the plaintiffs have failed to properly assert a claim for lack of informed consent. (Pagan v. State of New York, 124 Misc.2d 366, 476 N.Y.S.2d 468 (N.Y. Ct. of Claims 1984)(holding that in light of the specialized nature of lack of informed consent, it should be pleaded separately in the claim); *See also, Barkakos v. Avellini*, 185 A.D.2d 805, 587 N.Y.S.2d 844 (2d Dept. 1992); *See also, Luu v. Paskowski*, 57 A.D.2d 856, 871 N.Y.S.2d 227 (2d Dept. 2008)(patient's lack of informed consent claim against doctors was barred where patient signed consent form agreeing to undergo surgery and doctor explained to patient the potential benefits and risks of the procedure and discussed alternative form of treatment).

Turning to plaintiff's motion for an order striking defendant Shons's answer and/or precluding him from using any expert testimony or evidence, plaintiff contends that defendant Shons answer should be stricken and that he should be precluded from offering expert testimony in this action based upon the destruction of the first removed implants (which Dr. Shons noted upon removal had "pinhole" defects). Plaintiff contends that Dr. Shons told the plaintiff that the defective implants would be returned to the manufacturer, but they were ultimately destroyed after being sent to pathology after her surgeries. Plaintiff further contends that Dr. Shons failed to respond to written communications from the hospital's Director of Pathology which stated that unless Dr. Shons notified the Pathology Department as to the desired disposition of the implants,

the implants would be destroyed. As a result of Dr. Shons's failure to respond to those communications, the first two removed implants were destroyed. The right implant, which was removed on May 6, 2005, was destroyed on March 30, 2006, and the left implant, which was removed on August 29, 2006, was destroyed on March 30, 2007. Dr. Paul Kalish, the Chairman of the Department of Pathology at Glen Cove Hospital, attested in an affidavit that if the department had received a response or request to maintain the breast implant prostheses, they would not have been disposed. Plaintiff contends that due to the destruction of the implants, plaintiff has been deprived of the opportunity to have those implants examined and tested to determine the cause of their failures. As such, plaintiff contends that this resulted in a loss of "key evidence" which has resulted in prejudice to the plaintiffs warranting a striking of defendant Shons's answer for spoliation.

In opposition, the defendants contend, *inter alia*, that the implants were not in the possession of, or controlled by, Dr. Shons, that Dr. Shons was not the party who destroyed the implants, that the implants were discarded prior to the filing of the summons and complaint in this action on August 2, 2007, and that the plaintiff never sought a court order to compel the preservation of the implants.

In the instant action, there is insufficient proof that defendant Shons acted willfully or contumaciously or that defendant Shons intentionally or negligently destroyed key evidence that is central to the plaintiff's case. (*See, Huezo v. Silvercrest,* 68 A.D.3d 820, 890 N.Y.S.2d 125 (2d Dept. 2007); *Friel v. Papa*, 36 A.D.3d 754, 829 N.Y.S.2d 569 (2d Dept. 2007)). Spoliation sanctions are not warranted where there is no indication that the defendant disposed of crucial evidence with knowledge of its potential evidentiary value. (*Herbert v. City of New York*, 12 A.D.3d 209, 783 N.Y.S.2d 807 (1st Dept. 2004)). In addition, because the striking of a pleading is a severe sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation. (*Molinari v. Smith*, 39 A.D.3d 607, 834 N.Y.S.2d 269 (2d Dept. 2007); *Klein v. Ford Motor Company*, 303 A.D.2d 376, 756 N.Y.S.2d 271 (2d Dept. 2003)(holding that where the physical evidence lost as a result of spoliation is not central to the case or its destruction is not prejudicial, a lesser sanction than striking the pleading, or no sanction, may be appropriate). In the instant action, plaintiffs' causes of action against Dr.

Shons sound in medical malpractice, and the plaintiffs have failed to show that the evidence destroyed was central to their action or that the loss of the implants is completely fatal to their claims against Dr. Shons. (See, *Klein v. Ford Motor Company*, 303 A.D.2d 376, 756 N.Y.S.2d 271 (2d Dept. 2003); *Barnes v. Paulin,* 52 A.D.3d 754, 860 N.Y.S.2d 221 (2d Dept. 2008); *Huezo v. Silvercrest,* 68 A.D.3d 820, 890 N.Y.S.2d 125 (2d Dept. 2007); *See also, Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170 (1st Dept. 1997)(a spoliation sanction in the form of striking a pleading is a severe outcome only appropriate when the loss of evidence is completely fatal to the non-responsible party's claim or defense)). Further, where the plaintiffs and defendants are equally affected by the loss of the items in their investigation of the proximate cause of the accident, and neither have reaped an unfair advantage in the litigation, the striking of a pleading is not warranted. (*Del Los Santos v. Polanco*, 21 A.D.2d 397, 799 N.Y.S.2d 776 (2d Dept. 2005); *Ifraimov v. Phoenix Indus. Gas*, 4 A.D.3d 332, 772 N.YS.2d 78 (2d Dept. 2005); *Lawson v. Aspen Ford*, 15 A.D.3d 628, 791 N.Y.S.2d 119 (2d Dept. 2005); *O'Reily v. Yavorskiy*, 300 A.D.2d 456, 755 N.Y.S.2d 81 (2d Dept. 2002)). As plaintiffs failed to demonstrate that the loss of the implants was fatal to their action, that Dr. Shons willfully or intentionally destroyed the implants knowing of their potential evidentiary value, or that the plaintiffs suffered prejudice as a result of the loss, the sanction of striking defendant Shons's answer or precluding his expert for spoliation of evidence is unwarranted. The Court further notes that the loss of evidence equally affected the plaintiff and Dr. Shons in this litigation. Accordingly, plaintiff's cross-motion for spoliation sanctions is denied, and plaintiff's eighteenth and nineteenth causes of action for spoliation against Dr. Shons are hereby dismissed. (*See, Hulett ex. Rel. Hulett v. Niagara Mohawk Power Corp.,* 2002 WL 31010983, 2002 N.Y. Slip. Op. 40402(U) (N.Y. Sup. 2002); *Weigl v. Quincy Specialties Co.,* 158 Misc.2d 753, 601 N.Y.S.2d 774 (N.Y. Sup. 1993); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F.Supp.2d 565 (S.D.N.Y. 1999); *MetLife Auto & Home v. Joe Basil Chevrolet*, 1 N.Y.3d 478, 807 N.E.2d 865 (2004); *Carella v. Reilly & Assoc.*, 22 A.D.3d 623, 803 N.Y.S.2d 428 (2d Dept. 2005); *Monteiro v. Werner Co.*, 301 A.D.2d 636, 754 N.Y.S.2d 328 (2d Dept. 2003); *Ripepe v. Crown Equip. Corp.*, 293 A.D2d 462, 741 N.Y.S.2d 64 (2d Dept. 2002)).

Lastly, plaintiff's application for summary judgment on *res ipsa loquitor* grounds is also denied. To prevail on that doctrine, a plaintiff must establish, *prima facie*, that the injury does

not ordinarily occur in the absence of negligence; the instrumentality that caused the injury was within defendant's control; and, the injury is not the result of any voluntary action by plaintiff. (*Antoniato v Long Island Jewish Medical Center*, 58 A.D.3d 652, 871 N.Y.S.2d 659 (2d Dept 2009); *Rosales-Rosario v. Brookdale Univ. Hosp. & Med. Center*, 1 A.D.3d 496, 767 N.Y.S.2d 122 (2d Dept. 2003); *see also, Dermatossian v New York City Transit Authority*, 67 N.Y.2d 219, 226, 492 N.E.2d 1200 (1986); *Morejon v Rais Constr. Co.*, 7 N.Y.3d 203, 851 N.E.2d 1143 (2006); *Kambat v St. Francis Hosp.*, 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997)). "*Res ipsa loquitur* does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence . . . The rule has the effect of creating a *prima facie* case of negligence sufficient for submission to the jury, and the jury may – but is not required to – draw the permissible inference" (*Dermatossian v New York City Transit Authority, supra,* at p. 226)). "[O]nly in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment . . . That would happen only when the plaintiff's circumstantial proof is so convincing that the defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 N.Y.3d 203, 851 N.E.2d 1143 (2006); *Lau v Ky*, 63 A.D.3d 801, 880 N.Y.S.2d 510 (2d Dept 2009); *Simmons v Neuman*, 50 A.D.3d 666, 855 N.Y.S.2d 189 (2d Dept 2008)). Indeed, "[a]s regards to the human body, its capacities and tolerances, it is a rare case where common knowledge is sufficient to show that an accident would not have happened without negligence." (*George v City of New York*, 22 A.D.2d 70, 253 N.Y.S.2d 550 (1st Dept 1964), *affd*, 17 N.Y.2d 56 (1966)). Plaintiffs herein have failed to meet the burden of establishing their entitlement to summary judgment on res ipsa loquitor grounds, as they have not submitted any expert affidavit or other sufficient evidence that the plaintiff's injury would not have occurred in the absence of negligence by Dr. Shons. As such, plaintiff's application for summary judgment is denied.

Accordingly, the motion by defendant Shons for summary judgment, pursuant to CPLR §3212 is granted, and plaintiffs' complaint, together with all cross-claims, is dismissed as against defendant Shons; and plaintiff's cross-motion for an order striking defendant Shons's answer and/or precluding his use of expert evidence due to spoliation is denied.

This constitutes the decision and Order of this Court.

Dated: May 9, 2012

Anthony L. Parga, J.S.C.

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