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

PRESENT: LOBIS Justice — PART 6

KNOX MARTIN, WILLIAM

-v-

GOLNAZ MOAZAMI, M.D., ET AL.

INDEX NO. 104752/07

MOTION DATE 9-25-12

MOTION SEQ. NO. 03

MOTION CAL. NO. ____

The following papers, numbered 1 to 19 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-15
Answering Affidavits — Exhibits	16-18
Replying Affidavits	19

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion decided in accordance with accompanying decision and order.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/2/13

JOAN B. LOBIS J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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WILLIAM KNOX MARTIN,

Plaintiff,

Index No. 104752/07

-against-

Decision, Order and Judgment

GOLNAZ MOAZAMI, M.D., EDWARD S. HARKNESS EYE INSTITUTE and COLUMBIA PRESBYTERIAN MEDICAL CENTER,

Defendants.

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

Defendant Golnaz Moazami, M.D., moves for summary judgment pursuant to C.P.L.R. Rule 3212. This action has previously been discontinued against the other defendants. Plaintiff William Knox Martin opposes the motion. For the reasons set forth below, the motion is granted.

On November 30, 2005, William Knox Martin first saw Dr. Golnaz Moazami for eye problems. Dr. Moazami diagnosed him in pertinent part as having bilateral ectropion (out-turned eyelids), and blepharoptosis (drooping upper eyelid). She prescribed surgery to repair the bilateral ectropion. On January 5, 2006, Plaintiff returned to the doctor for an additional consultation. At that time, the doctor also recommended that she perform blepharoplasty and conjunctivoplasty procedures in conjunction with the bilateral ectropion repair. On January 17, 2006, Plaintiff signed a consent form for bilateral ectropion repair, bilateral blepharoplasty, and conjunctivoplasty to the left eye. Plaintiff's medical records also contain a signed but undated consent form for "Ectropion Repair, left eye."

The surgeries described in the executed consent form dated January 17, 2006, were performed on February 14, 2006. Plaintiff saw Dr. Moazami the next day for a follow up visit. A few days later Plaintiff contacted the doctor, complaining of left eye tearing. She advised him to come in immediately. Plaintiff saw the doctor the next day, on February 21, 2006. The doctor found that one of the sutures in his left eye had ruptured. Plaintiff signed a consent form to repair the suture and that procedure was performed on the same day. At a subsequent visit in March Plaintiff complained of burning eyes and tearing. The doctor told him to follow up in two weeks. Plaintiff failed to appear for his appointment on March 31, 2006, and failed to reschedule it. The following month, Dr. Moazami contacted Plaintiff, who indicated to her that he was no longer comfortable having her treat him. She advised him to seek a second opinion or another evaluation.

One year later, Plaintiff sued, alleging medical malpractice and lack of informed consent. Three months later, Plaintiff had a second surgery for bilateral ectropion, which was performed by another doctor. Following discovery between the parties, in August of this year, the action was discontinued against all Defendants except for Dr. Moazami.

Dr. Moazami now moves for summary judgment, claiming that no material issues of fact exist and that her treatment of Plaintiff was at all times within the standard of care. In support of her motion, she submits the expert opinion of Roman Shinder, M.D., a New York licensed, board certified ophthamologist, who has also participated in a two-year fellowship in ophthalmic plastic and reconstructive surgery. Dr. Shinder indicates that in preparing his opinion he reviewed the file, including pleadings, deposition transcripts, and medical records. He bases his opinion on that review as well as his personal knowledge and experience. He opines that Dr. Moazami did not negligently

treat Martin or cause or contribute to his alleged injuries. Dr. Shinder details and assesses the steps that Dr. Moazami took in her pre-operative assessment of the patient, performing the initial eye surgery and subsequent suture repair, as well as her post-operative management.

Dr. Shinder opines that Dr. Moazami properly performed the relevant procedures, including lateral tarsal strip procedure for the ectropion repair, conjunctivoplasty, and blepharoplasty. He opines that although Plaintiff's symptoms of ectropion were more pronounced in the left eye than the right, Dr. Moazami properly diagnosed and treated the condition for both eyelids. He further opines that because Plaintiff had steatoblepharon, documented in the record as dermatochalasis, Dr. Moazami properly removed fat from the eye area to avoid a potential worsening of that condition. Additionally, he opines that the doctor's repair of the ruptured suture was appropriately timed and properly performed. He notes, moreover, that suture rupturing is a known and accepted risk of any surgery. Continued symptoms from Plaintiff's diagnosed conditions are also a known risk of the procedures performed.

Plaintiff opposes the motion for summary judgment. In support, he submits the expert opinion of Debra Ann Taubel, M.D. Dr. Taubel is a licensed New York physician who is board-certified in obstetrics and gynecology and is an experienced surgeon. She has been the Medical Director at Weill Medical College of Cornell University, New York Presbyterian Hospital since January 2002. She is responsible for residents' and medical students' education in the ambulatory division of the clinic. In preparing her affirmation, Dr. Taubel reviewed Defendant's motion for summary judgment, including the affirmation of "Roman Schneider [sic], M.D.," and the office records and operation report of Lupa Gupta, M.D., who performed a second ectropian repair on

Plaintiff in July 2007.

Dr. Taubel begins her affirmation by stating "I, Debra Ann Taubel, M.D. being duly sworn, deposes [sic] and says [sic]." The affirmation is signed but does not reference or contain language set forth in C.P.L.R. § 2106 that it is affirmed "to be true under the penalties of perjury." An unexecuted notarial jurat follows Dr. Taubel's signature at the end of the document.

Dr. Taubel opines that the Defendant committed medical malpractice, there was lack of informed consent and the Defendant's actions caused Plaintiff's injuries. She contends that surgery to Plaintiff's right eye was unnecessary. She claims that Plaintiff did not have ectropian in that eye. Accepted practices would have required Dr. Moazami to inform Plaintiff accordingly that surgery on the right eye was contraindicated, and, therefore, Plaintiff lacked informed consent to surgery on his right eye. She further opines that the blepharoplasty performed was an inappropriate procedure to repair Plaintiff's ectropian; rather Defendant should have performed a tarsal strip procedure. She further opines that the suture repair was conducted too soon after the initial surgery.

Dr. Moazami raises several challenges in her reply. First she contends that Plaintiff's expert did not properly affirm her opinion. Second she argues that Plaintiff's expert failed to show that the expert possesses the requisite skill, training, education, knowledge, or experience to render her opinion reliable. Lastly Defendant contends that the opinion misstates the record, opines relating to matters not previously raised by Plaintiff and is conclusory.

"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 eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). In a malpractice case, to establish entitlement to summary judgment, the defendant must demonstrate that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). Expert medical testimony is required for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause. Roques, 73 A.D.3d at 206. If the movant makes a prima facie showing, the burden then 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." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted).

This Court first considers whether Defendant has established a prima facie showing that she is entitled to summary judgment. Expert opinion must be based on the facts in the record or those personally known to the expert. Roques, 73 A.D.3d at 195. An expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 A.D.3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must "explain 'what defendant did and why'" Id. (quoting Wasserman v. Carella, 307 A.D.2d 225, 226 (1st Dep't 2003)). Conclusory medical affirmations fail to establish prima facie entitlement to summary judgment. 73 A.D.3d at 195. Expert opinion that fails to address a plaintiff's essential factual allegations fails to establish prima facie entitlement to summary judgment as a matter of law. Id.

This Court is satisfied that Defendant has met its prima facie showing. The record reflects that Dr. Shinder possesses the knowledge and skills necessary to render his opinion reliable. His conclusions are supported by specific, extensive references to the medical records in this case, including medical notes, operative reports, and photographs, among others.

This Court next considers whether Plaintiff has rebutted Defendant's showing. This Court first considers Defendant's challenge to the affirmation of Plaintiff's expert as defective under C.P.L.R. § 2106. That section provides that statements submitted under that provision have the same force and effect as an affidavit when "subscribed and affirmed by [the affirmant] to be true under the penalties of perjury." The First Department has held that submissions that fail to comply with that provision cannot be deemed competent evidence. Offman v. Singh, 27 A.D.3d 284 (2006). This matter was fully submitted by September 25, 2012. The expert's affirmation omitted any reference to the language "under the penalties of perjury." Subsequently Plaintiff submitted that affirmation in camera which purportedly constituted the original. That affirmation, however, also included an execution of the jurat, dated November 5, 2012. Given the disparities in these documents this Court finds that Plaintiff's expert's affirmation is deficient. Nor was there any timely remedy. Cf. Berman Bottger & Rodd, LLP v. Moriarty, 58 A.D.3d 539 (1st Dep't 2009) (procedural error cured by submitting proper form in reply papers).

Even were Plaintiff's expert's affirmation to have satisfied Section 2106, this Court would find that Plaintiff's expert lacked sufficient qualifications to opine on the matters in this case. An expert must profess requisite knowledge necessary to make a determination on the issues presented. Limmer v. Rosenfeld, 92 A.D.3d 609, 609 (1st Dep't 2012)(citing Joswick v. Lenox Hill Hosp., 161 A.D.2d 352, 355 (1st Dep't 1990)). Here, there is no evidence that Plaintiff's expert

possessed requisite knowledge of eye surgery. Her substantive area of certification is obstetrics and gynecology. Although she has ample surgical experience, she does not indicate that any of that experience relates to the eye, let alone the particular eye procedures involved in this case. Indeed, even were she to have shown that she was competent to opine regarding the standards of care in this case, this Court would further find that her lack of familiarity with the file record shown by the numerous material misstatements and omissions in her opinion would render it unreliable. See Wong v. Goldbaum, 23 A.D.3d 277, 280 (1st Dep't 2005). For example, Plaintiff's expert misstates that Dr. Moazami performed a blepharoplasty rather than the medically indicated procedure of a tarsal strip procedure. The operative notes and discharge sheet among other documents in this record make plain that not only were both procedures performed but also that the tarsal strip procedure was the principal procedure. For Plaintiff's expert to claim that Dr. Moazami did not diagnose the right eye with ectropion ignores the medical notes before this Court that state otherwise.

Nor does this Court find that any genuine issue of material fact remains as to informed consent. Plaintiff's attempt to reply on undated drafts of consent forms that remained in his medical files to contend that the consent was narrower does not create a genuine issue of material fact. The only signed and dated consent forms in this record clearly set forth the procedures to be formed, including those on the right eye. Accordingly, it is

ORDERED that the summary judgment motion is granted; the Clerk is directed to enter judgment accordingly.

Dated: January 2, 2013

ENTER:

JOAN B. LOBIS, J.S.C.