| **Edell v Dechiara** |
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| 2014 NY Slip Op 32818(U) |
| August 19, 2014 |
| Supreme Court, Westchester County |
| Docket Number: 61062/2012 |
| Judge: Mary H. Smith |
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# DECISION AND ORDER

FILED & ENTERED
8/19/14

**To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK**
**IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH**
**Supreme Court Justice**

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**LESLIE EDELL,**

Plaintiff,

**MOTION DATE: 8/8/14**
**INDEX NO.: 61062/12**

-against-

**SHARON C. DECHIARA,**

Defendant.

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The following papers numbered 1 to 6 were read on this motion by defendant for summary judgment.

**Papers Numbered**

Notice of Motion - Affirmation (Sold) - Exhs. (A-J) .....1-3
Answering Affirmation (Cowle) - Exhs. (A-L)[1] .....4-5
Replying Affirmation (Sold) ..... 6

Upon the foregoing papers, it is Ordered and adjudged that this motion by

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[1]The Court notes that plaintiff's counsel's answering affirmation improperly is denominated a "Reply Affirmation" and that this Court's published Part Rules require securely affixed motion papers.

defendant, a Board certified plastic and reconstructive surgeon, for summary judgment dismissing this complaint pleading claims for medical malpractice, lack of informed consent and defamation arising out of defendant's treatment of plaintiff is disposed of as follows:

Plaintiff first had consulted defendant, on November 9, 2009, at which time she had been interested in an abdominoplasty, a thigh lift and a face lift.[2] Defendant had performed a medically necessary panniculectomy and removal of extensive calcium fragments in plaintiff's hips, thighs and abdominal area, as well as elective medial thigh lifts and a suction assisted lipectomy, on March 2, 2010, at Northern Westchester Hospital ("Hospital"). Plaintiff, who lives alone, had been discharged from the Hospital, on March 3, 2010, and thereupon had been followed by defendant at her office. Ten days following surgery, plaintiff had developed a dehiscence of the suture line incisions in the inner aspect of both of her thighs. Plaintiff thereupon had been re-admitted to the Hospital, on March 16, 2010, where she had been attended by a wound care specialist, Dr. Arthur Turken, until her release, on March 19, 2010. Plaintiff had continued to be seen at the Hospital's Wound Care Center, until April 5, 2010, and had continued in defendant's care, until June 14, 2010, at which time the dehisced incisions in her thighs had completely closed.

Claiming that her surgical stitches had opened five separate times and that it had taken four months for her to heal, and that she had obtained no aesthetic benefit from the procedure, her post surgical legs looking worse than her pre-surgical legs, plaintiff had commenced this action, on July 17, 2012, alleging that she had been sent home from the hospital post-operatively too soon, that she had been sent home without proper instructions

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[2]Plaintiff successfully had maintained for a long period of time a weight loss of 80 pounds and had excess skin that she had wanted removed and tightened.

for wound care, that defendant had failed to properly close the drains that had been left in the surgical areas, that defendant had failed to properly suture the incisions after the dehiscence had occurred, and that defendant had failed to properly inform plaintiff of the possible risks, trauma, emotional damage and pain related to the surgery, as well as that there might be only a 30 percent chance of improvement after the surgery. Additionally, plaintiff alleges that defendant libelously had written in plaintiff's medical chart that plaintiff possibly had early dementia and that both she and the wound care specialist thought that plaintiff needed "a possible evaluation of mental status," that she had been acting "like a baby," that Dr. Turken had opined that plaintiff "may have been picking at her wounds and making it worse on purpose," and that she had recommended plaintiff's admission to a nursing home so that plaintiff could be monitored 24/7 but that plaintiff had refused such admission. Plaintiff maintains that these remarks, which comprise part of her medical records, may be seen by other medical care providers.[3]

Presently, defendant is moving for summary judgment dismissing the complaint. Defendant prima facie has demonstrated entitlement to judgment dismissing the medical malpractice claim through the submission of her medical expert's affirmation, that of Dr. Paula Moynahan, a Board certified plastic and reconstructive surgeon, wherein she avers that she had reviewed the pleadings, bill and supplemental bill of particulars, plaintiff's medical records and the deposition testimony, and that it is her opinion based upon a reasonable degree of medical certainty, that the surgical procedures performed by

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[3]Plaintiff originally had asserted that these allegedly defamatory remarks also had adversely impacted her employment but she subsequently had admitted during her deposition that her later work retirement had been unrelated thereto.

defendant had been performed in accordance within the required standard of care and within good and accepted medical practice, that the occurrence of dehiscense of the surgical incisions in plaintiff's inner thighs is a recognized complication of this procedure and not evidence of negligence, that the closure and healing of the dehisced incisions had occurred within a time frame which normally would be expected in a patient experiencing said post-operative complication and had not been unduly prolonged by defendant's treatment, that defendant appropriately had responded to the dehiscense of the surgical wounds by referring plaintiff to a Wound Care Center and by recommending a wound VAC, a wound closure device, that plaintiff's continued refusal to use the wound VAC may have contributed to a delay in the wounds' closures, and that nothing defendant had done had been a substantial factor in causing plaintiff's alleged injuries, and that plaintiff had not had an unduly long recovery period from the wound complication. Further, Dr. Moynahan has opined that plaintiff had been fully and properly instructed in the proper care of the surgical drains, that the drains had been closed and functioning properly at the time that plaintiff had been discharged from the Hospital, that the care and functioning of the drains had not been casually related to the subsequent dehiscence, and that plaintiff had not been discharged too early from the Hospital. Lastly, Dr. Moynahan opined that there is no evidence supporting plaintiff's claim that the thigh lift operation should not have been performed at the same time as the other surgical procedures. The foregoing collectively is sufficient to demonstrate defendant's prima facie entitlement to judgment dismissing plaintiff's medical malpractice claim. See Brady v. Westchester County Healthcare Corp., 78 A.D.3d 1097 (2nd Dept. 2011); Castro v. New York City Health & Hospital Corp., 74 A.D.3d 1005 (2nd Dept. 2010); Taylor v. Nyack Hosp., 18 A.D.3d 537 (2nd Dept. 2005).

Defendant also prima facie has demonstrated her entitlement to dismissal of plaintiff's lack of informed consent claim through Dr. Moynahan's proffered opinion that, based upon the record at bar, defendant had obtained plaintiff's informed consent for the performed thigh lift and suction-assisted lipectomy procedures, the only procedures to which plaintiff's lack of informed consent claims relate, that the appropriate risks and complications thereof had been discussed with plaintiff, including the risks of difficulty in healing and wound dehiscence, and that defendant's relating of the potential risks and complications had met the required standard. Dr. Moynahan also notes in her supporting affirmation that plaintiff had admitted during her deposition that she had been aware that a thigh lift was to be performed and, notwithstanding her claim that she had been unaware that incisions would be made in her inner thighs to accomplish the lifts, Dr. Moynahan states that, while plaintiff had been standing, pre-surgery, visible markings had been made on plaintiff's thighs as to where the incisions were to be and that it simply is not possible for plaintiff to maintain that she did not know that incisions would be made in her inner thighs.

According to Dr. Moynahan, plaintiff's assertion that she should have been advised prior to surgery that there "might be only a 30% chance of improvement after the surgery," is a medically incorrect statement, that the standard of care does not require a patient to be advised of such, and the fact that plaintiff ultimately had expressed her dissatisfaction with the surgical outcome had not imposed a duty upon defendant to have advised plaintiff of anything more than what she had, including defendant's statements to plaintiff that the performed procedure would result in plaintiff's thighs not rubbing together so as to make plaintiff more comfortable and that she would be able to purchase clothes in a smaller size.

Finally, anent the defamation cause of action, defendant correctly argues that she further is entitled to judgment dismissing same because the essential elements of a defamation claim have not been stated. Defendant avers that she had not published the allegedly defamatory remarks to anyone other than at plaintiff's request, although plaintiff herself had shown her medical records to her sister and her friend, and that plaintiff had admitted that she had not shared her medical records with the allegedly defamatory remarks to any of her treating physicians, as well as plaintiff's having admitted that her retirement from employment had been wholly unrelated to any of defendant's authored statements set forth in her medical records. In fact, the allegedly defamatory remarks are part of plaintiff's confidential medical records, subject to HIPPA protection, and not viewable without plaintiff's consent. Thus, the requisite proof of defendant's having published the allegedly defamatory notes simply does not exist in this case.

Defendant also correctly argues that plaintiff's defamation claim is not viable for the additional reason that the medical record notations about which plaintiff complains simply are stated matters of opinion which are not provable, and further that they had been intended only as a medical assessment of plaintiff's mental state and her ability to understand and comply with treatment recommendations. Dr. Moynahan has offered her opinion that an assessment of a patient's mental state, particularly as to whether the patient is capable of understanding and following care instructions, is an appropriate concern of a treating physician for mention in a patient's medical records, and further that the comments of another treating physician during a discussion of the physicians' mutual patient is also an appropriate matter for entry in the patient's medical record.

In light of defendant's prima facie showings, it was incumbent upon plaintiff to avoid

summary judgment by raising a triable issue of fact with respect thereto. See Orsi v. Haralabotos, 89 A.D.3d 997 (2nd Dept. 2011), revd. on diff. grounds, 20 N.Y.3d 1079 (2013). This she has failed to do.

Plaintiff firstly argues that this Court should not consider the supporting affirmation of Dr. Moynahan because defendant had failed to disclose her retention of Dr. Moynahan as an expert.[4] Plaintiff further maintains that defendant had committed medical malpractice by her having deviated from the required standard of care in not providing plaintiff with appropriate information to find informed consent, and that plaintiff negligently had been forced to leave the Hospital early after only one day of recovery even though she lived alone, and that this departure had been a substantial factor in causing plaintiff's "suffering and deformities." Plaintiff argues that defendant also had failed to properly inform plaintiff of defendant's inexperience in performing these type of procedures, that plaintiff should expect to have pain and trauma from the surgery and that she only possibly would achieve a 30% improvement from the thigh lift operation. Plaintiff further maintains that the thigh lift operation never should have been performed at the same time as the other surgical procedures.

Additionally, plaintiff argues that the defamatory statements about which she complains are libelous and that they had been viewed by third parties, defendant having left plaintiff's medical records at her prior practice where it can be assumed that others had viewed same, and that defendant's own testimony establishes that certain of the

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[4]In her Response to Plaintiff's Combined Discovery Demand, dated January 4, 2013, defendant had responded that she had not at that time retained an expert and that when she did she would respond to the demand.

statements recorded in plaintiff's medical chart were not her own opinion but that of Dr. Turken, and thus that defendant is not entitled to rely upon her "expressions of opinion" as being constitutionally protected.

Initially, the Court rejects plaintiff's argument that this Court should not consider defendant's expert's opinion since plaintiff had failed to identify her expert pursuant to CPLR 3101, subdivision (d), paragraph 1, subparagraph (I), until the making of this summary judgment motion. See Rivers v. Birnbaum, 102 A.D.3d 26 (2nd Dept. 2012). To the extent that Dr. Moynahan had not been previously identified as defendant's expert, Second Department Courts routinely accept and consider opinion evidence on summary judgment motions even where such evidence is disclosed for the first time post note of issue where, as here, there is no surprise and prejudice to defendants, and no evidence that plaintiffs had acted wilfully in failing to disclose his name. See LeMaire v. Kuncham, 102 A.D.3d 659 (2nd Dept. 2013); Hayden v. Gordon, 91 A.D.3d 819 (2nd Dept. 2012); Browne v. Smith, 65 A.D.3d 996 (2nd Dept. 2009).

Addressing the remainder of plaintiff's opposition, it is well settled that to establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove the standard of care in the locality where the treatment occurred, that the defendant breached that standard of care, and that the breach of the standard was the proximate cause of injury. See Healy v. Finz & Finz, P.C., 82 A.D.3d 704 (2nd Dept. 2011); Berger v. Becker, 272 A.D.2d 565 (2nd Dept. 2000). To sustain this burden, a plaintiff must present expert testimony that the defendant's conduct constituted a deviation from the requisite standard of care. See Semel v. Guzman, 84 A.D.3d 1054, 1055 (2nd Dept. 2011); Dockery v. Sprecher, 68 A.D.3d 1043, 1045 (2nd Dept. 2009). "General allegations of medical

malpractice, merely conclusory in nature and unsupported by competent evidence tending to establish the essential elements of the claim, are insufficient to defeat the defendants' entitlement to summary judgment." Wicksman v. Nassau County Health Care Corp., 27 A.D.3d 644, 645 (2nd Dept. 2006); see, also Ross v. Braverman, 44 A.D.3d 923, 925 (2nd Dept. 2007).

Plaintiff here has failed to offer an expert affidavit supporting her allegations, only her attorney's affirmation[5] and plaintiff's subjective opinion that the surgery had not improved her appearance. Consequently, plaintiff has failed to raise an issue of fact that defendant had departed from the required standard of surgical care and that any departure had been a substantial factor in causing her injuries. Plaintiff's medical malpractice and lack of informed consent claims necessarily are hereby dismissed.

To recover damages for defamation, a plaintiff must prove the defendant's publication to a third party of a false statement about the plaintiff, without privilege or authorization, constituting fault as judged by a negligence standard, as well as either special harm or that the remarks constitute defamation per se. See Martino v. HV News, LLC, 114 A.D.3d 913, (2nd Dept. 2014); Knutt v. Metro Intl., S.A., 91 A.D.3d 915, 916 (2nd Dept. 2012).

It has not been established at bar that the statements by defendant set forth in plaintiff's medical chart, which medical records are confidential and HIPAA-protected,

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[5]Parenthetically, the Court notes that plaintiff's attorney asserts that plaintiff's claimed inexperience with plastic surgery is belied by plaintiff's having undergone, a year prior in time to the subject surgery, a resect of fat from her upper arms by another plastic surgeon.

constitute anything other than defendant's protected medical opinion, and that the statement were in accordance with defendant's obligation to document her concerns regarding plaintiff's mental status and her ability to comprehend and follow the care instructions given to her, as well as documenting another treating physician's opinion regarding the same. This Court is not aware of, and plaintiff has failed to cite, any case law demonstrating that statements set forth by a treating physician in a patient's chart and relating to medical opinions can support a defamation claim. To the contrary, this Court finds that a treating physician has the right and obligation to assess a patient's mental well-being and make a notation with respect thereto in a patient's medical chart without fear of judicial intervention. Cf. Ott v Automatic Connector, 193 A.D.2d 6571 (2nd Dept. 1993).

Additionally, this Court must agree with defendant that plaintiff merely speculates that the statements have been published by defendant to a third party; no proof of such publication exists, and without such, the Court must find that no defamation cause of action is stated. See Knutt v Metro Intl., S.A., 91 A.D.3d 915, 916 (2nd Dept. 2012); Diorio v. Ossining Union Free School Dist., 96 A.D.3d 710 (2nd Dept. 2012).

Finally, plaintiff has failed to establish that the allegedly defamatory statements had caused her special harm injuring her reputation or that they constituted defamation per se. See Epifani v. Johnson, 65 A.D.3d 224, 233-234 (2nd Dept. 2009).

Accordingly, based upon the foregoing analysis, defendant's motion for summary judgment is granted in toto; this action is hereby dismissed.

Dated: August 19, 2014
White Plains, New York

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J.S.C.

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