

**Chery v Malik**

2015 NY Slip Op 30338(U)

February 20, 2015

Supreme Court, New York County

Docket Number: 805192/2012

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X  
MARIE CHERY and JEAN JOSEPH,

Plaintiffs,

Index No. 805192/2012

-against-

**Decision, Order, and  
Judgment**

SAJID MALIK, M.D. and SAJID MALIK, M.D., P.C.,

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

In this medical malpractice action, defendants Sajid Malik, M.D. and Sajid Malik, M.D., P.C. move for summary judgment dismissing the action. Plaintiff Marie Chery opposes the motion.<sup>1</sup> For the reasons below, the Court denies the motion.

Ms. Chery first went to ophthalmologist Dr. Julia Katz in Manhattan in 2008, and during her examination Dr. Katz diagnosed Ms. Chery with cataracts in both eyes. The doctor’s chart also indicates that Ms. Chery suffered from guttata, an abnormal growth of collagen in the back of the cornea. Dr. Katz performed extraction surgery on the cataract in her left eye in September 2008, and according to Ms. Chery this eliminated a blurriness in her vision and there were no further problems. However, Ms. Chery states that subsequently her right vision began to blur, and Dr. Katz stated Ms. Chery would need cataract surgery in that eye as well. At that point, she was reluctant to have a second procedure. In May of 2010, Ms. Chery had her last visit with Dr. Katz.

---

<sup>1</sup> The parties have stipulated to discontinue the claims of co-plaintiff Jean Joseph. The Court shall amend the caption in this order, to reflect the discontinuance.

In March of 2011 she had her first regular appointment with Dr. Malik, whose Garden City office was closer to her home and her workplace. Dr. Malik states that he did not receive Ms. Chery's records from Dr. Katz. He further states that he would have asked for them as this was his practice, but he has no record of this request, no recollection of Ms. Chery's response, and no memory of whether his office attempted to obtain the records. Ms. Chery saw several doctors who worked at Dr. Malik's office during her visits. During Ms. Chery's initial visit, she filled out an eye history questionnaire on which she did not indicate that she had any of the specified eye problems but did write that she had a history of eye surgery and a problem with cataracts. The treating doctor told her that she needed immediate cataract surgery in her right eye. She states that the doctor gave her prescriptions in preparation for the surgery, but she filled only some of them because of their cost.

Dr. Malik saw her at her next appointment, on May 21, 2011. He reaffirmed that she needed the cataract surgery. According to his chart and his deposition testimony, the doctor's examination of Ms. Chery revealed a small scar in the right cornea. He states that although scarring is a possible sign of Fuchs Dystrophy there are many other possible causes, and that his examination did not reveal corneal guttata, which is a possible sign of Fuchs Dystrophy. He states that he informed Ms. Chery that due to her corneal scar there would be an extended healing period and the swelling would last longer. According to Ms. Chery, neither doctor told her she had corneal guttata or other eye problems, advised her of potential risks of the cataract extraction, told her what to expect during her recovery period, or informed her of alternative treatments. Both doctors told her that the surgery would be quick and easy and would correct her problems, she states. Though

Dr. Malik states that he did not diagnose corneal guttata or Fuchs, his bill states that Ms. Chery had corneal dystrophy. Dr. Malik states that this is a different diagnosis from those he made.

The surgery took place on July 1, 2011. Dr. Malik states that he took additional precautions to protect Ms. Chery's cornea during surgery as a result of her scarring. The operative report stated that the surgery went smoothly. Dr. Malik prescribed anti-inflammatory steroid and non-steroidal eye drops, along with antibiotic eye drops.

Ms. Chery had a follow-up visit the next day. She states that the treating doctor did not mention any complications or problems with her surgery. As for her swelling and discomfort, he told her to keep using her medications and the inflammation would go away. As for her pain, he stated that she should go to the emergency room if she saw any flashes of light in her eye. The doctor's notes indicate his more detailed assessment and his plan that Ms. Chery continue her treatment, with an additional pressure-lowering medication. During Ms. Chery's second postoperative visit a week later, she complained that she still had pain in her eye, and after his examination the doctor informed her this was due to the swelling. The treating ophthalmologist noted a mild corneal edema, apparently at the location of the scar Dr. Malik had noted earlier. At Ms. Chery's third postoperative visit, she complained of continued pain and of a discharge in her eye, and also complained that she saw what is known as a "floater," which made it look like there was a fly moving in front of her eye. She states that the treating doctor changed her medication but did not advise her of any serious problems.

The notes from these and other treatments do not mention Ms. Chery's comments about the floaters but frequently refer to the corneal edema and the intraocular pressure, along with her gradually improving vision. According to Dr. Malik, Ms. Chery's failure to take all the medication she'd been prescribed at the hospital was possibly the cause of mild corneal edema. As she had no insurance coverage for prescriptions, the doctors at his office gave her samples of her medications after that. He states that subsequent visits showed continued swelling, for which the doctors prescribed medications and gave her samples, and that Ms. Chery reported seeing floaters but not flares, or flashes of light. He states that all of her reported and observed problems were typical in the aftermath of the type of procedure she underwent.

At her fourth postoperative visit, on July 29, 2011, she professed to have the same difficulties, although her vision continued to improve. The doctor reassured her there was no damage and she would continue to recover, and he scheduled an appointment for August 15, 2011. She states that her condition continued to deteriorate, and that the doctor prescribed additional medications. Ms. Chery returned for an unscheduled visit on August 18, 2011, due to her increased pain, tearing and floaters. The doctor's notes on this date indicate her complaints of pain and floaters in her right eye. Her last visit was on August 20, 2011. During the visit, she states, she told the doctor she had very little vision in her right eye and was in tremendous pain. In response, he gave her an antibiotic drops and anti-inflammatory steroid drops and told her that her problems would subside as the swelling decreased.

Dr. Malik's office scheduled a further appointment for Ms. Chery on August 27, 2011, but on August 24, 2011, she went to the emergency room of the Queens Hospital Center for

treatment because she was running a fever, seeing flashes in her right eye, and feeling as if “something was ripping [her] eye out.” She states that at the hospital, she was informed that her right cornea had been cut and she had to undergo surgery – in particular, a corneal implant. She returned for a corneal scan on August 26, 2011, and the doctor who examined her on this date noted that she had, among other things, bilateral Fuchs Dystrophy and traumatic endothelial damage in the right eye. She did not return to Queens Hospital Center after that date. Instead, she visited Dr. Avi Bitton, an ophthalmologist, on September 1, 2011. She states that Dr. Bitton told her that her cornea had been cut, and he referred her to Dr. Wilson Ko, an ophthalmologist who had experience performing corneal implants and treating Fuchs Dystrophy. Dr. Ko warned her of the risks of surgery but informed her that the implant was necessary to preserve the vision in her right eye.

When, expressing reservations, Ms. Chery canceled her surgery and asked to see a corneal specialist, Dr. Ko scheduled an appointment with Dr. Susan Airiani.<sup>2</sup> From that point, she continued treatment with Dr. Airiani. Given Ms. Chery’s fear of further surgery, Dr. Airiani prescribed alternate treatment for six months, to see whether it obviated the need for surgery. According to Ms. Chery, the treatment improved her condition and eliminated her swelling, and the doctor prescribed additional, over-the-counter medications and prescribed glasses which help with the pressure with her right eye and help her to read with that eye. She states that she continues to see Dr. Airiani periodically, that she sees flashes only on occasion when she is tired, and that the eye drops along with rest substantially alleviate her headaches and other occasional problems.

---

<sup>2</sup> In addition, Ms. Chery sought an opinion from Dr. Gerard DaVersa, who confirmed her need for surgery.

She states that her problems with reading, which had impaired her ability to perform certain tasks at her job as nurse's assistant, have improved. Dr. Airiani has told her that she may need surgery in the future, but it is not necessary at this time.

Ms. Chery commenced this action in July of 2012, alleging medical malpractice during the surgery and her subsequent treatment and also alleged lack of informed consent. In their answer, defendants denied all liability and also set forth affirmative defenses including contributory negligence. After the completion of discovery and the filing of the note of issue defendants made this motion for summary judgment.

Among other supporting papers, including the parties' depositions and the medical charts, defendants submit the affirmation of Robert C. Cykiert, M.D., an ophthalmologist licensed to practice medicine in New York. Dr. Cykiert provides a thorough review of the records and Ms. Chery's patient history, from her treatment with Dr. Katz through the present, and concludes that Dr. Malik and the other ophthalmologists at his office provided proper care and that their treatment did not result in any injuries to Ms. Chery. He states that given the accurate conclusion that Ms. Chery suffered from a cataract, defendants properly recommended the only available treatment. He states that the corneal scar Dr. Malik noted – and even a finding of corneal guttata or Fuchs Dystrophy – would not have contraindicated surgery. According to Dr. Cykiert, Dr. Malik performed the surgery in a timely fashion and without deviating from proper medical standards, and he took all necessary precautions to protect her cornea, in particular the endothelial lining. He finds that defendants performed all appropriate examinations, both prior to and following Ms. Chery's cataract surgery, and that defendants' post-operative treatment of her was proper and

would not have altered even if they had diagnosed her with corneal guttata or Fuchs Dystrophy. The medications she received, he states, were appropriate given her post-operative condition. He states that defendants did not deviate from proper standards when they did not call in consultations, as her diagnosis and their proposed treatment was not in controversy. He believes that all of the subsequent consulting and treating doctors who concluded that Ms. Chery needed corneal transplant surgery – that is, all but Dr. Airiani – were wrong, and that her subsequent and successful treatment with Dr. Airiani proves this fact. He points out that, according to Ms. Chery's deposition testimony, the vision in her right eye is now better than it had been prior to the cataract surgery. He challenges Ms. Chery's contention that defendants' negligent treatment caused the corneal scarring, pointing out that prior to the surgery Dr. Malik already noted there was scarring. He further stated that some post-operative corneal edema is a normal result of the surgery and that the preexisting corneal scar tear widened but this was not the result of negligence. He opines that Ms. Chery had floaters prior to her surgery but did not realize it because her cataract had reduced her vision, that the surgery in no way caused her to see the floaters, and that the situation has improved not because of Dr. Airiani's treatment but because Ms. Chery's brain has learned to ignore them. Additionally, the doctor states that the other conditions of which she complains either were due to her preexisting scar or otherwise not the result of the surgery, were normal and transitory effects of the procedure, or did not exist in the form described in the complaint and bill of particulars.

As for informed consent, Dr. Cykiert states that a reasonable person would have elected to undergo treatment despite the risks and potential complications. Therefore, he concludes, any alleged failure to obtain informed consent is of no consequence. Finally he opines that defendants were not negligent in their record keeping or in any other asserted respects.

In opposition, Ms. Chery argues that there are triable issues of fact regarding defendants' malpractice and therefore summary judgment is not warranted. She submits the expert affidavit of Sylvia W. Norton, M.D., who is board certified in ophthalmology and has practiced for 32 years. In her affirmation Dr. Norton states that defendants deviated from acceptable medical practice in numerous respects. She points out that defendants' medical records for Ms. Chery do not mention Dr. Katz's diagnosis of corneal guttata, and that Dr. Malik failed to notice and diagnose her corneal guttata. She states that unlike Dr. Katz, who correctly assessed Ms. Chery's corneal endothelium before she decided whether the left cornea would tolerate cataract surgery, Dr. Malik did not perform a specular microscopy in order to make a similar assessment concerning the left cornea. She also offers a contrary opinion to that of Dr. Cykiert, stating that there was an alternative to the procedure Dr. Malik performed. Instead, she states, he could have performed a combined surgical procedure for her cataract and corneal disease, the latter through DSAEK surgery. She challenges some of his alleged surgery strategy, which Dr. Cykiert sets forth, stating that as Dr. Malik was unaware of Ms. Chery's corneal disease he would not have planned to take some of the steps. As a result, Dr. Norton states, Ms. Chery sustained injury. Moreover, she opines with a reasonable degree of medical certainty that defendants' delineated deviations from the standard of care proximately caused damages including pain and suffering, permanent corneal damage, vision loss, and the eventual need for further surgery. As for informed consent, she states that Dr. Malik did not counsel Ms. Chery about her corneal condition and the increased risks and increased possibility that additional surgery would be necessary. He also did not counsel her as to the alternative of DSAEK surgery.

In considering a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. E.g., Dallas-Stephenson v. Waisman, 39 AD.3d 303, 308 (1st Dep't 2007). The movant must support the motion by affidavit, a copy of the pleadings, and other available proof, including depositions and admissions. C.P.L.R. Rule 3212(b). The affidavit must recite all material facts and show, where defendant is the movant, that the cause of action has no merit. Id. Courts grants the motion if, upon all the papers and proof submitted, it is warranted as a matter of law in directing judgment. Id. It must be denied where facts are shown "sufficient to require a trial of any issue of fact." Id. This Court does not weigh disputed issues of material facts. See, e.g., Matter of Dwyer's Estate, 93 AD.2d 355 (1st Dep't 1983). Summary judgment proceedings are for issue spotting, not issue determination. See, e.g., Suffolk County Dep't of Soc. Servs. v. James M., 83 N.Y.2d 178, 182 (1994).

In a medical malpractice action, the plaintiff must show that the defendant deviated from the accepted standards of practice and that this departure proximately caused the asserted injury. Yankus v. Kelly, 72 A.D.3d 1068, 1069 (2<sup>nd</sup> Dep't 2010). For a prima facie showing in a motion to dismiss, the defendant must present expert opinion testimony that is supported by facts in the record and addresses the essential allegations in the complaint and the bill of particulars. Rogues v. Noble, 73 AD.3d 204, 206 (1<sup>st</sup> Dep't 2010). Expert opinion must be based on the facts in the record or those personally known to the expert. Id. The expert cannot make conclusions by assuming material facts not supported by record evidence. Id. Expert opinion must "explain 'what defendant did and why.'" Ocasio-Gary v. Lawrence Hosp., 69 AD.3d 403, 404 (1<sup>st</sup> Dep't 2010) (quoting Wasserman v. Carella, 307 AD.2d 225, 226 (1st Dep't 2003)).

Once a movant makes a prima facie showing, the burden then shifts to the non-moving party "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). To meet that burden, a plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted dental practice and that the departure proximately caused the injuries alleged. See Rogues, 73 AD.3d at 207. Where opposing experts disagree on issues, those issues must be resolved by a fact finder, and summary judgment is precluded. Barnett v. Fashakin, 85 AD.3d 832, 835 (2d Dep't 2011); Frye v. Montefiore Med. Ctr., 70 AD.3d 15, 25 (1st Dep't 2009).


Claims of lack of informed consent are statutorily defined. Pub. Health Law § 2805-d. Under the law, a defendant providing treatment or diagnosis must disclose to the patient alternatives and reasonably foreseeable risks and benefits involved as a reasonable doctor under similar circumstances would have provided. See id. § 2805-d(1). The disclosure must permit "the patient to make a knowledgeable evaluation." Id. To prevail on a lack of informed consent cause of action, the movant must establish that the doctor did not disclose the risks benefits and alternatives to a reasonable extent, and that a fully informed and reasonably prudent person in the patient's position would not have undergone the treatment. See Orphan v. Pilnik, 15 N.Y.3d 907, 908 (2010); see also Pub. Health Law § 2805-d(3). Or, even assuming a reasonably prudent person in the patient's position would not have undergone the treatment had that patient been fully informed, a movant may show that the lack of informed consent did not proximately cause the injury alleged. See Schilling, 75 A.D.3d at 1046; Pub. Health Law S 2805-d(3).

Utilizing the standard above, the Court concludes that summary judgment is not appropriate. Defendants satisfied their prima facie burden by presenting the detailed affirmation of Dr. Cykiert, which discusses and rejects the complaint's numerous allegations relating to malpractice and informed consent. However, in response Ms. Chery successfully showed the existence of disputed issues of fact through the affirmation of Dr. Norton. The Court observes that a few of Dr. Cykiert's conclusions – that Ms. Chery may have had floaters prior to the surgery and not realized it, and that several doctors were wrong in telling Ms. Chery she needed further surgery – are speculative or themselves show the existence of disputed issues. Among other things, Dr. Norton challenges Dr. Cykiert's position that there was no alternative to the surgery Dr. Malik performed in her discussion of the combined cataract-corneal operation. Finally, given Dr. Norton's opinions that defendants should have discovered or been aware of Ms. Chery's corneal problems, that Ms. Chery should have received more specific counseling regarding the surgery and the alternative procedure, and that as a result of her uninformed decision to go through with the surgery Ms. Chery sustained injury, Dr. Norton raises an issue as to informed consent. Therefore, it is

ORDERED that the motion is denied.

Dated: Feb. 20, 2015

ENTER:

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.