Previtera v Nath
2015 NY Slip Op 32446(U)
December 23, 2015
Supreme Court, Queens County
Docket Number: 24602/11
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

IGNACIO PREVITERA,	Index No. 24602/11
Plaintiff,	Motion Date April 13, 2015
-against-	Motion Cal. No. 92
SANJEEV NATH, M.D., et al.,	Motion
Defendant.	Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits....	1-4
Affirmation in Opposition.....	5-7
Reply	8-9

Upon the foregoing papers and after oral argument held on June 2, 2015, it is ordered that the motion is determined as follows:

This is a motion by defendant Sanjeev Nath, M.D., for an order: (1) granting summary judgment as a matter of law pursuant to CPLR 4401 and 4404 in favor of the defendant as against the plaintiff on the cause of action alleging a failure on the part of the defendant to refer the plaintiff to a specialist in vitreoretinal surgery for the operation of November 12, 2009 on both the issue of liability and the issue of proximate cause leading to damages, without interests, costs or disbursements; (2) in the alternative, vacating the answer of the jury to interrogatory No. 2-B and directing as a matter of law that the answer to interrogatory No. 2-B is "NO", and directing judgment on that cause of action for the defendant as against the plaintiff, without interests, costs or disbursements; (3) in the alternative, if the Court denies the aforementioned relief, directing a new trial on the issue of an alleged failure to refer the patient to a specialist in vitreoretinal surgery for the

operation of November 12, 2009 only; and (4) in the alternative, if the Court does not grant the relief requested in No. 1 or No. 2, reducing the amount awarded in the jury verdict in the sum of $1,250,000.00 ($800,000.00 past pain and suffering and $450,000.00 for future pain and suffering) as excessive.

Defendant's motion is granted only to the extent, and for the reasons set forth hereinafter.

I. PROCEDURAL HISTORY

This is a medical malpractice action which arises out of alleged acts negligence in the performance of cataract surgery upon plaintiff on November 5, 2009 and November 12, 2009 by defendant Sanjeev Nath, M.D. On November 5, 2009, plaintiff underwent cataract surgery where there was complication of the rupture of the capsule containing the natural lens with debris and vitreous going forward and debris going back toward the retina and after vitrectomis to help remove some debris, the insertion of an intraocular lens. On November 12, 2009, defendant Sanjeev Nath, M.D. performed a second surgery which was to remove more debris from the eye, including debris in the vitreous cavity, remove the intraocular lens that was by the retina, and insert another lens. As a result of the two surgeries, plaintiff suffered a retinal detachment and significant loss of vision in his left eye. Plaintiff commenced this action on October 27, 2011 seeking to recover money damages. The complaint alleges, inter alia, that defendant Sanjeev Nath, M.D., departed from good and accepted practices of ophthalomogical surgery in how he performed surgery of plaintiff's left eye on November 5, 2009 and November 12, 2009. This Court presided over a jury trial on this case that was conducted from November 21, 2014 through December 10, 2014. On December 10, 2014, the jury rendered a verdict in favor of plaintiff and against defendant Sanjeev Nath, M.D. In response to the interrogatories, the jury answered the questions as follows:

> Question 1-A, on November 5, 2009 did defendant Sanjeev Nath M.D. depart from good and accepted practices of ophthalmological surgery in how he performed plaintiff Ignacio Previtera's left eye surgery? The jury answered no -- six out of six.
>
> Question 2-A, following the plaintiff Ignacio Previtera's left eye surgery performed on November 5, 2009 did defendant

Sanjeev Nath M.D. depart from good and accepted practices of ophthalmological surgery by not referring the plaintiff Ignacio Previtera to a retina-vitreous eye surgery before the operation on November 12, 2009? The jury answered yes -- six out of six.

Question 2-B, was the aforesaid departure from good and accepted medical practice a substantial factor resulting in harm to plaintiff Ignacio Previtera? The jury answered yes -- six out of six.

Question 3-A, on November 12th, 2009 did defendant Sanjeev Nath M.D. depart from good and accepted practice of ophthalmological surgery in how he performed the surgery on plaintiff's left eye? The jury answered no -- six out of six.

Question 4, state the amount of damages if any that plaintiff Ignacio Previtera is entitled to recover from the date of malpractice of defendant Sanjeev Nath M.D. to the date of this verdict? The jury answered $800,000 -- six out of six.

Question 5, state the amount of damages if any that plaintiff Ignacio Previtera is entitled to recover from the date of your verdict to be incurred in the future for pain and suffering? The jury answered $450,000 -- six out of six.

Question 6, if you have made any award for amounts intended to compensate the plaintiff Ignacio Previtera for damages to be incurred in the future then state the period of years over which such amount is intended to provide compensation? The jury answered ten years -- six out of six.

By leave of the Court, defendant Sanjeev Nath, M.D., was granted an extension to file a post-trial motion pursuant to CPLR 4404(a), setting aside the jury verdict or in the alternative, directing a new trial. That date was extended by several adjournments by stipulations. On June 2, 2015, the court heard oral argument, the motion was submitted and the court reserved decision.

II. THE LAW

To be awarded judgment as a matter of law pursuant to CPLR

4401, a defendant must show that, upon viewing the evidence in the light most favorable to the plaintiff, there is no rational process by which the jury could find for the plaintiff against the moving defendant (*see Lyons v McCauley*, 252 AD2d 516, 517 [1998]; *Farrukh v Board of Educ. of City of N.Y.*, 227 AD2d 440 [1996]). The plaintiff's evidence must be accepted as true, and the plaintiff is entitled to every favorable inference which can be reasonably drawn from the evidence (*see Farrukh v Board of Educ. of City of N.Y.*, 227 AD2d 440 [1996]; *Zboray v Fessler*, 154 AD2d 367 [1989]; *Pontiatowski v Baskin-Robbins*, 91 AD2d 1035 [1983]).

Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (*see Higbie Constr., Ltd. v IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]). Defendant seeks to set aside the verdict both, as a matter of law, and as against the weight of the evidence pursuant to CPLR 4404. To set aside a verdict as a matter of law, the trial court must conclude that there is "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*see Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" *(Nicastro v Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed with considerable caution, 'for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict"' (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence

(*McDermott v Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, New York Practice § 406, at 687 [4th ed]).

The court's authority to set aside a verdict as against the weight of the evidence and order a new trial is an inherent one and demands a discretionary balancing of many factors (*Doyle v Seney*, 221 AD2d 828, 830 [1995]; *Green v City of New York*, 138 AD2d 676 [1988]; Siegel, NY Prac § 406, at 657 [3d ed]). Such authority is codified in CPLR 4404 (a), which provides, in pertinent part, that: "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence . . ."

While the statutory standard has been characterized as an elusive one which has "long defied precise definition (*Nicastro v Park*, 113 AD2d 129, 132 [1985]; *see also Niewieroski v National Cleaning Contrs.*, 126 AD2d 424 [1987], *lv denied* 70 NY2d 602 [1987]), it is a settled rule that a jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Goldstein v Snyder*, 3 AD3d 332 [2004]; *Kennedy v New York City Health & Hosps. Corp.*, 300 AD2d 146 [2002]; *Bernstein v Red Apple Supermarkets*, 227 AD2d 264, 265 [1996], *lv dismissed* 89 NY2d 961 [1997]; *Teneriello v Travelers Cos.*, 264 AD2d 772 [1999], *lv denied* 94 NY2d 758 [2000]; *Green v City of New York*, *supra* at 676; *Nicastro v Park*, *supra* at 135; Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.09).

In making this determination, the court must proceed with considerable caution, "for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Nicastro v Park*, *supra* at 133; *see also Schray v Amerada Hess Corp.*, 297 AD2d 339 [2002]). Indeed, the court must cautiously balance " 'the great deference to be accorded to the jury's conclusion' . . . against the court's own obligation to assure that the verdict is fair" (*Fontana v Kurian*, 214 AD2d 832, 833 [1995] [citations omitted], *lv denied* 86 NY2d 707 [1995]), and the court may not employ its discretion simply because it disagrees with a verdict,

as this would "'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty' " (*Pena v New York City Tr. Auth.*, 185 AD2d 794, 795 [1992], quoting *Ellis v Hoelzel*, 57 AD2d 968, 969 [1977]).

Particular deference is to be accorded a jury verdict in favor of a defendant in a tort action (*Nicastro v Park, supra* at 134; Weinstein-Korn-Miller, NY Civ Prac ¶ 4404.09; Siegel, NY Prac § 406, at 657 [3d ed]), especially if the resolution of the case turns on the evaluation of the conflicting testimony of expert witnesses (*Fontana v Kurian, supra* at 833). The resolution of such a conflict rests with the jury, and not the court (*Wierzbicki v Kristel*, 192 AD2d 906, 908 [1993]; *Jones v Schockett*, 109 AD2d 821, 822 [1985]; *see also Gamiel v University Hosp.*, 216 AD2d 80, 81 [1995], *lv dismissed* 87 NY2d 911 [1996]), and the jury is entitled to accept, or reject, an expert's testimony in whole or in part (*Mejia v JMM Audubon*, 1 AD3d 261 [2003]).

Viewing the record here in this light, the court concludes that the defendant did meet his burden.

III. DISCUSSION

In order to establish a prima facie case of medical malpractice, a plaintiff must establish that the physician's actions deviated from accepted medical practice and that the deviation proximately caused the plaintiff's injuries (*see Thompson v Orner,* 36 AD3d 791 [2007]; *Texter v Middletown Dialysis Ctr., Inc.*, 22 AD3d 831 [2005]; *Prete v Rafla-Demetrious,* 224 AD2d 674, 675 [1996]; *Rivera v Greenstein*, 79 AD3d 564, 568 [2d Dept][holding that to succeed in a medical malpractice action, it is necessary for the plaintiff to show a departure from accepted standard of medical practice, and that this departure was a proximate cause of the patient's injuries.... Competent medical proof as to causation is usually essential]). A plaintiff ordinarily presents expert testimony on the defendant's deviation from the requisite standard of care in order to satisfy this burden (*see Texter v Middletown Dialysis Ctr., Inc.*, 22 AD3d 831 [2005]). To establish proximate cause, the plaintiff must present "sufficient evidence from which a reasonable person might conclude that it was more probable than not that" the defendant's deviation was a substantial factor in causing the injury" (*Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883 [2005]; *see Holton v Sprain Brook Manor Nursing Home,*

253 AD2d 852 [1998]; *Alicea v Ligouri*, 54 AD3d 784 [2d Dept 2008]).

Defendant argues that the verdict should be set aside because, as a matter of law and fact, there is no direct or indirect evidence in the record to support a finding that defendant Nath's actions deviated from accepted medical practice and that the deviation proximately caused the plaintiff's injuries. Defendant further argues that the verdict should be set aside because it is inconsistent. Plaintiff contends that the uncontroverted facts introduced as evidence at the trial support the argument that defendant's acts or omissions departed from accepted medical practice and that such deviations were the proximate cause on his injuries, as a matter of law and fact.

At trial plaintiff presented evidence to establish that the plaintiff underwent cataract surgery performed by defendant Dr. Nath on November 5, 2009. As a result of that operation, due to complications arising out the November 5, 2009 surgery, Dr. Nath performed a retinal vitrectomy surgery on the plaintiff on November 12, 2009.

Plaintiff's expert, Dr. Jason Steinfeld, a board certified ophthalmologist, opined that Dr. Nath departed from good and accepted practice in the manner in which he performed the cataract surgery on November 5, 2009. He opined when complications in the nature as occurred in the November 5th surgery occurs, i.e., loss of fragments of cataract to the back of the eye, compounded with the lens falling to the back of the eye, Dr. Nath should have ceased treating plaintiff and referred him to a retinal surgeon. However, instead of Dr. Nath referring plaintiff to a retinal surgeon after the November 5th surgery, Dr. Nath continued to treat plaintiff, and on November 12, 2009 performed a retinal vitrectomy surgery on plaintiff. Dr. Steinfeld opined that Dr. Nath lacked the proper experience and training to perform the November 12th surgery. He further opined that it was a departure from good and accepted practice for Dr. Nath to undertake the surgery on November 12, 2009 (T. 304), and the harm to plaintiff that occurred as a result of that surgery was a detached retina. (T. 304, L. 22). He admitted that injury to the retina can occur even in an uncomplicated cataract procedure. (T. 306, L. 1). However, he opined that based on the acts or omissions by Dr. Nath, there was an increase in the "odds" or "chances" of a retinal tear and eye damage. (T. 306, L. 23). He opined that there was a greater risk for plaintiff to develop complication from the vitrectomy because the surgery was

being performed by someone who lacked experience (T. 306, L. 23) and lack of experience raises the rate of having complications. (T. 307, L. 4-11). In his opinion a physician must complete a fellowship in order to be qualified to perform vitreoretinal surgery. (T, 339, L. 20). On cross examination, he testified that even without fault on the part of the physician, complication can occur to any physician in any surgery (T. 335, L. 10), and the rupture of the membranes of the posterior wall of the capsule as occurred here is not a departure from good and accepted practice (T. 335, L. 16), and these are all complications that can occur without negligence on the part of the ophthalmologist. (T. 338).

> **POINT 1:** Plaintiff presented no evidence that defendant's failure in referring plaintiff to a retina-vitreous eye surgeon from November 5 until November 9, 2009 was a departure from accepted standard of medical practice.

The issue of whether a departure from proper medical care was a cause of harm is often a difficult question in medical malpractice actions (*see Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 261 [1968]). Expert testimony is required in a medical malpractice case to establish the departure from the standard of care and causation.

At trial, by answering the questions 1 and 3 "NO", the jury rejected plaintiff's claims that defendant Dr. Nath departed from good and accepted practices of ophthalmological surgery in how he performed surgery on plaintiff's left eye on both November 5, 2009 and November 12, 2009. As well, the jury rejected plaintiff's claim it was a departure from good and accepted medical practice to perform the surgery on November 12, 2009 because defendant had not completed a fellowship in vitreoretinal surgery. The remaining theory of liability put forth at trial and the primary basis of defendant's motion is that following the plaintiff's left eye surgery performed on November 5, 2009, defendant Dr. Nath departed from good and accepted practice ophtalmological surgery by not referring the plaintiff to a retina-vitreous eye surgeon before the operation of November 12, 2009.

First, it should be noted that during the trial the plaintiff's counsel conceded that plaintiff is not claiming that it was a departure from good and acceptable medical practice to wait for seven (7) days, or from November 5, 2009 until November 12, 2009 to perform the second surgery on November 12,

2009. However, plaintiff does argue that if the jury found that defendant Dr. Nath did not possess the required retinal surgical knowledge, training and skills required to competently provide for the plaintiff's care after the November 5, 2009 surgery, inclusive of further surgical intervention, then defendant Dr. Nath was negligent in failing to refer the plaintiff to the care of a skilled retina-vitreous eye surgeon prior to performing the surgery on November 12, 2009. Second, plaintiff argues that it was a departure from good and acceptable medical practice to fail to refer plaintiff to a retina-vitreous eye surgeon after the complications that arose out of the November 5, 2009 surgery. However, not withstanding plaintiff's argument of failure to refer, the undisputed record is that in fact Dr. Nath did refer plaintiff to Dr. Thomas Muldoon, an experienced retina-vitreous eye surgeon on or about December 6, 2009, who then performed emergency surgery on December 6, 2009 to repair the retinal tear in plaintiff's left eye.

Plaintiff did not present any evidence from which the jury could infer liability. Plaintiff failed to present evidence from which a jury could find that Dr. Nath departed from accepted standards of medical practice. Plaintiff points to the fact that after the complications that arose out of the November 5th surgery, defendant Dr. Nath did not possess the required retinal surgical knowledge and skills to competently provide the plaintiff's care thereafter, inclusive of any further surgical intervention, and that defendant was negligent in failing to refer plaintiff to the care of a skilled retinal specialist prior to the surgery performed on November 12, 2009.

Plaintiff failed to present any evidence as to what specific medical care plaintiff should have received or would have received from a "skilled retinal specialist" that would have made a difference, or was different from the care or treatment defendant provided plaintiff between November 5, 2009 and November 12, 2009.

Because plaintiff's expert failed to render an opinion as to what a retina-vitreous eye surgeon could have done between November 5, 2009 and November 12, 2009 to treat plaintiff for his medical condition, including the complications that arose out of the November 5, 2009 surgery, the record is inadequate to establish proximate cause (*Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]).

In this case because there was no evidence, expert or

otherwise, presented by plaintiff as to what medical treatment a retina-vitreous eye surgeon could have performed or administered between November 5, 2009 and November 12, 2009 to treat plaintiff or could have done better than the treatment and care administered by defendant Dr. Nath on the plaintiff, plaintiff failed to prove that there was a departure from any accepted standard of medical practice.

> **POINT 2:** Plaintiff presented no evidence of an injury that plaintiff suffered between November 5, 2009 and November 12, 2009 that was a direct consequence of defendant's failure to refer plaintiff to a retina-vitreous eye surgeon.

It is well established that if there were several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of a cause for which the defendant was not responsible, the plaintiff has failed to establish causation (*see Kallenberg v Beth Israel Hospital*, 45 AD2d 177 [1st Dept 1974], *affd* 37 NY2d 79 [1975]). In this case, in order for the jury to find that the defendant was liable for damages, the jury would have to find that Dr. Nath departed from good and accepted practices when he performed the surgery on November 5, 2009 and that the departure was a substantial factor in bringing about an injury or causing an injury to the plaintiff that the defendant Nath is responsible for. Keeping in mind that "complications" that can typically arise out of cataract surgery are not the type of "injury" for which a physician is responsible, by answering "No" to Question 1-A on the verdict sheet, the jury found that on November 5, 2009 defendant Dr. Nath did not depart from good and accepted practice on ophthalmological surgery in how he performed plaintiff's left eye surgery. Moreover, by answering Question 1-A "No", the jury found that if in fact there was any injury or harm that arose as a result of the surgery, it was a complication for which defendant was not responsible.

Even assuming there was proof that defendant Nath departed from good and accepted medical practice in failing to refer plaintiff to a retina-vitreous eye surgeon, there was no evidence connecting this departure, to any injury that plaintiff incurred subsequent to the surgery on November 5, 2009 and prior to the surgery on November 12, 2009, thereby inviting speculation by the jury (*Goldleewska v Nizaikiewicz*, 8 AD3d 430 [2d Dept 2004]; (*Pellew v Goldstein*, 279 AD2d 512 [2d Dept 2001])(holding that there was no proof that the departure from accepted practice was

proximate cause of an injury or damage); *Migliaccio v Good Samaritan Hospital*, 289 AD2d 208 [2d Dept 2001] [holding that although there was sufficient evidence for the jury to conclude that the hospital departed from good and accepted medical practice in failing to contact a neurologist five (5) hours earlier when plaintiff first went to the emergency room, there was no rational process by which, on the basis of the evidence, the jury could have concluded that the plaintiff suffered a more substantial injury as a result of the delay. There was no expert testimony causally linking the delay with any injury that was separate and apart from the underlying injury caused by an intracranial hemorrhage that plaintiff first suffered when she first went to the emergency room]). The complications or injuries that arose out the surgery on November 5, 2009 cannot be the basis for plaintiff's medical malpractice claim for the period between November 5, 2009 and November 12, 2009. In this case, plaintiff presented no expert testimony causally linking the failure of defendant Nath in referring plaintiff to a retina-vitreous eye surgeon between November 5, 2009 and November 12, 2009 to a more substantial injury or a medical condition which arose subsequent to the November 5th surgery, and prior to the November 12th surgery.

POINT 3: No evidence of plaintiff's chance of a better outcome.

As an alternative cause of action, instead of plaintiff claiming that defendant physician's conduct caused the plaintiff to develop a particular condition that resulted in injury, here, plaintiff claims that by failing to refer plaintiff to a retina-vitreous eye surgeon after the November 5th surgery that developed complications, and before the November 12th surgery, the defendant deprived the plaintiff of the opportunity for a better outcome - the so-called "loss of chance" doctrine.

In *Goldberg v Horowitz*, 73 AD3d 691, 694 (2d Dept 2010), the Second Department held that "[a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, 'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the chance of a better outcome or increased [the] injury'" (citations omitted).

The trial record reflects that the expert witness testimony presented at trial in support of plaintiff's claim concerning chance of better outcome, i.e., retinal tear, relate to the surgeries performed on November 5 and November 12, and not to any treatment or care performed by Dr. Nath between November 5th and November 12th. Plaintiff must prove the departure is proximately related or caused some injury or "loss of chance" that arose between November 5 and November 12, 2009.

In this case, plaintiff's expert failed to present any legally sufficient evidence from which the jury could infer, with reasonable medical certainty that Dr. Nath's failure to refer plaintiff to a retina-vitreous eye surgeon between November 5, 2009 and November 12, 2009 decreased the plaintiff's chance of a better outcome or increased the injury.

IV. CONCLUSION

Thus, as there was no or insufficient evidence showing (i) that defendant's failure in referring plaintiff to a retina-vitreous eye surgeon from November 5 until November 9, 2009 was a departure from accepted standard of medical practice, (ii) that plaintiff suffered an injury between November 5, 2009 and November 12, 2009 that was a direct consequence of defendant's failure to refer plaintiff to a retina-vitreous eye surgeon, and (iii) that plaintiff suffered a loss of a chance of a better outcome, the Court finds that no jury could have reached the verdict in this case on these claims on any fair interpretation of the evidence. Therefore, the jury verdict was against the weight of the evidence.

Accordingly, as the court finds that the jury verdict is not supported by the evidence, the motion by defendant Sanjeev Nath, M.D., for an order pursuant to CPLR 4404(a) setting aside the jury verdict rendered on December 10, 2014 in favor of plaintiff is granted solely to the extent that the verdicts for $800,00.00 and $450,000.00 are set aside and vacated and a new trial is ordered limited to plaintiff's claim for damages based upon defendant failing to refer plaintiff to a retinal surgeon between November 5, 2009 and November 12, 2009. Plaintiff is directed to contact the clerk of Part 6 at (718) 298-1113 to schedule a date for a new trial.

The Court has considered the defendant's remaining arguments and finds them to be without merit, or moot.

The foregoing constitutes the decision and order of this Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: December 23, 2015

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Howard G. Lane, J.S.C.