

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Forman v Whitney Ctr. for Permanent Cosmetics Corp.</b>                                                                                                                                                                     |
| 2018 NY Slip Op 30534(U)                                                                                                                                                                                                       |
| March 27, 2018                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 155762/15                                                                                                                                                                                                       |
| Judge: Lynn R. Kotler                                                                                                                                                                                                          |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

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

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8SUSAN FORMAN

INDEX NO. 155762/15

MOT. DATE

- v -

THE WHITNEY CENTER FOR PERMANENT COSMETICS CORP. et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss and/or summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). 12-25

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). 29-34

Replying Affidavits

NYSCEF DOC No(s). 35

This action arises from defendants' alleged negligence in the application of permanent cosmetic eyebrow tattooing to plaintiff's forehead on June 14, 2013. Defendants now move to dismiss pursuant to CPLR § 3211[a][1], [5] and [7] as well as for summary judgment pursuant to CPLR § 3212. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motion is decided as follows.

Plaintiff testified as follows at her deposition. Previously, plaintiff had cosmetic eyebrow tattoos first applied sometime in the "late 80s or early 90s" and subsequently had them refreshed from time to time. Plaintiff went to several spas/salons to have this work done over the years.

Defendant Melany Whitney, president of the corporate defendant, performed the procedure. Whitney explains in her sworn affidavit that the corporate defendant performs pigmentation procedures for cosmetic tattoos as permanent make-up and camouflage procedures for facial or surgical scars and skin imperfections.

Ultimately, on June 14, 2013, plaintiff attended an appointment on at defendant The Whitney Center for Permanent cosmetics Corp. (the "corporate defendant") to have her eyebrows tattooed. This was plaintiff's first visit to defendants' facility.

About the procedure, plaintiff testified as follows:

Q. And did she also show you what she was doing as she was pigmenting the eyebrows, as you wrote here in the email?

A. I approved – she showed me the eyebrows; I looked in the mirror, and the shape of it seemed fine and I approved that.

Dated: 3/27/18
  
 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☒ CASE DISPOSED    ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☒ GRANTED    ☐ DENIED    ☐ GRANTED IN PART    ☐ OTHER

3. Check if appropriate:

☐ SETTLE ORDER    ☐ SUBMIT ORDER    ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT    ☐ REFERENCE

...

Q. Did she also show you what she was doing, as she was pigmenting the eyebrows?

A. Yes.

Q. And did you approve of that as well?

A. Yes.

When asked at her deposition, "Did you approve the position of the eyebrows at that time", plaintiff answered yes. Plaintiff went on to further testify:

Q. You were satisfied with what she had drawn?

A. Yes, the shape was good.

Q. After she drew the brows above your eyes, did you sign a consent form?

A. Yes.

Whitney states in her affidavit that before she began the procedure, she reviewed the consent form with plaintiff. The consent form has been provided to the court, which is entitled "Informed Consent" and provides in pertinent part as follows:

I accept responsibility for determining the shape, color and placement of the pigments to be implanted and understand that my skin color and tone will modify the final color of the healed pigment.

...

I acknowledge that the procedure will result in a permanent change to my appearance and that no representations have been made to me as to the ability to later change or remove the result.

...

I acknowledge that the obtaining of Permanent Make-up procedure(s) is by my choice alone, and I consent to the application of the procedure and to its attendant risks...

I acknowledge that the Whitney Center is an independent contractor and in no way is affiliated with the doctor's office

...

I have read and understand the contents of each paragraph above. I acknowledge this is a contract and that I have received no warranties or guarantees with respect to the benefits to be realized from, or consequences of, the aforementioned procedure(s).

It is undisputed that plaintiff read, initialed and signed the consent form before the pigmentation process began.

However, plaintiff grew dissatisfied with the placement of the tattoos shortly after the procedure was performed. In an email dated June 30, 2013, plaintiff wrote to defendant about her disappointment with the work that defendants performed. Plaintiff, however, stated: "I know that Melany showed me the

eyebrows she planned to do before and as she was pigmenting them.” Plaintiff further stated, “I have only myself to blame – I absolutely did give the okay to Melany, not noticing how my other brows would still be there.” Plaintiff did not return to defendants’ facility for follow-up work, and thereafter had the cosmetic tattoos removed by laser.

### Parties’ arguments

Defendants argue that plaintiff, who was experienced with permanent make-up, approved the location of the cosmetic tattoos and therefore defendants were not negligent in the application of same. Further, defendants contend that plaintiff should have, but did not, return for a follow-up “perfecting session” which would have allowed defendants to address plaintiff’s concerns. Instead, plaintiff elected to have the eyebrow tattoos. Defendants further argue that the doctrine of *res ipsa loquitor*, which plaintiff asserts, does not apply here. Defendants also contend that plaintiff has not suffered any damages, based upon her bill of particulars.

In opposition to the motion, plaintiff’s counsel argues that the consent form should not bar her claims, because “the [consent] form at issue in no way expresses the intent of the parties to relieve the defendants from liability from any cause, and certainly does not express an intent to exculpate the defendants from their own negligence.” Plaintiff’s counsel goes on to argue that the consent form should not “release the defendants from liability for negligently tattooing the plaintiff’s forehead resulting in four instead of two eyebrows!”

Plaintiff has also annexed alleged photographs of the cosmetic tattoos which are not in admissible form because they are not properly authenticated. Therefore, the photographs cannot be considered in opposition to the motion.

### **Discussion**

At the outset, since issue has been joined, the court will consider the parties’ arguments as to summary judgment given its more exacting standard. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court finds defendant’s motion must be granted. Here, the record shows that plaintiff approved of the location of her cosmetic tattoos before the procedure was performed and it is undisputed that plaintiff fully knew and accepted the risks of the procedure. Plaintiff entered into a contract for services which she agreed to and approved and subsequently became dissatisfied with. There is no indication that defendants negligently performed said services.

Indeed, plaintiff had the same procedure performed numerous times, admitting that sometimes she was not happy with the results. Plaintiff fully knew the risks that the cosmetic tattoos were “permanent” in nature, and her belated lamentations about the shape or placement of the cosmetic tattoos is not something that defendants should reasonably account for. Indeed, such a duty of care would place an insurmountable burden on tattoo businesses in general, as defense counsel points out. For all of these

reasons, the court finds that no reasonable fact-finder could conclude on this record that the defendants were negligent when they placed the pigmentation onto plaintiff's forehead.

Indeed, plaintiff's failure to offer any admissible evidence beyond her attorney's claims, which are not based upon personal knowledge, is wholly insufficient to raise a triable issue of fact on this point. Accordingly, defendants' motion is granted to the extent that defendants are entitled to summary judgment dismissing plaintiff's complaint

### CONCLUSION

In accordance herewith, it is hereby:

**ORDERED** that defendants' motion is granted to the extent that defendants are entitled to summary judgment dismissing plaintiff's complaint; and it is further

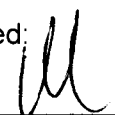
**ORDERED** that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

3/27/18  
New York, New York

So Ordered:

  
\_\_\_\_\_  
Hon. Lynn R. Kotler, J.S.C.