Massre v Beraka
2018 NY Slip Op 31632(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 157970/14
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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ALLEN MASSRE,

INDEX NO. 157970/14

Plaintiff,

- against -

GEORGE BERAKA, M.D.,

Defendant.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged medical malpractice and lack of informed consent, defendant George Beraka, M.D. ("Dr. Beraka" or "defendant") moves for summary judgment dismissing the complaint against him. Plaintiff Allen Massre ("Mr. Massre" or "plaintiff") opposes the motion.

Background

This action seeks damages arising out of corrective surgery for gynecomastia, a condition in which female like breasts develop in a male, which was performed by Dr. Beraka on plaintiff on April 28, 2011. With respect to the medical malpractice claim, the Bill of Particulars alleges that Dr. Beraka deviated from accepted medical practice in negligently performing the surgery, and in negligently removing excessive fatty breast tissue resulting in a crater deformity, and that Dr. Beraka's negligence resulted in bilateral crater deformities, bilateral nipple areola retraction, and bilateral chest asymmetry. With regard the claim for lack of informed consent, the Bill of Particulars alleges that Dr. Beraka failed to disclose to plaintiff the risk of a crater deformity.

The following facts are based on Dr. Beraka's deposition testimony and the medical records relating to plaintiff's diagnosis and treatment for gynecomastia, including the surgery.[1]

[1]Plaintiff was not deposed and does not submit an affidavit in opposition to the motion. Accordingly, the facts in the record are based on Dr. Beraka's deposition testimony and medical

Plaintiff first consulted with Dr. Beraka on March 2, 2011, at which time Dr. Beraka diagnosed plaintiff with Class Two gynecomastia, which is moderate form of the condition, and determined that plaintiff was a good candidate for corrective surgery. According to Dr. Beraka, at this consultation, he discussed possible complications that could arise from the surgery with plaintiff, and that "one of the more common complications of this kind of surgery was an undesirable cosmetic result; in other words, no particular result is guaranteed" (Defendant EBT, at 17-18). Plaintiff saw Dr. Beraka for a pre-operative visit on April 21, 2011, and Dr. Beraka testified that, as indicated in his office notes from that visit, he discussed with plaintiff "[l]imitations, scars [and] more common complications" (Id, at 23).

On the date of the surgery, plaintiff signed a "Patient Consent For Surgery," which states, *inter alia*, that "the surgical procedure(s) have been explained to me in detail by Dr. Beraka as well as the indications for surgery and alternative forms of treatment...[and that] Dr. Beraka has explained to me the risks, complications and consequences associated with [gynecomastia correction] [and that] Dr. Beraka has disclosed to me the alternatives to surgery as well as the reasonably foreseeable risks and benefits...[and that] I understand there are no guarantees of any sort about the surgical outcome or the recovery" (Notice of Motion, Exh F). The form also states that plaintiff "had the opportunity to review this form and to discuss the procedure thoroughly with Dr. Beraka [and that]... I have been given the opportunity to ask all and any questions ...and I am satisfied that I have been adequately informed." Id.

Dr. Beraka testified that during the surgery he used a technique known as "tumescent liposuction" in which the surgeon "infiltrates a substantial volume of [a balanced salt solution containing lodocaine and Epinephrine].. into the areas to be liposuctioned, ...which is recorded

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records, including the operative report.

...as 275 cc's [i.e. cubic centimeters] into both breasts." (Id at 35-36). He subsequently extracted 250 cc's of tissue and [the previously injected solution] from the right breast and 225 cc's from the left breast via liposuction using a "feathering...[which] means that you do just a little bit of liposuction at the edges and a lot in the center, so that you get a smooth result" (Defendant deposition, at 36, 40). Dr. Beraka estimated that about a third of the amount extracted is tissue, and the other two-thirds is solution. (Id., at 37). According to Dr. Beraka, he made an inferior circumareolar incision, and, according to the sheet on which the nurse recorded amounts, 11 grams of breast tissue was resected from the right breast and 7 grams was resected from the left breast. (Id., at 38).[2] Dr. Beraka then closed the incision in four layers: fascia, fat, subcutaneous tissue, and the skin. (Id., at 39-40). Dr. Beraka testified that "more tissue was removed from the right side [than the left side] because that side was slightly larger" but otherwise both sides of chest were treated the same (Id, at 30).

The Operative Report states that: "[c]onservative contouring liposuction of the anterior chest was performed according to predetermined markings. Slightly more tissue was removed on the right side as this was the larger side. A short inferior circumareolar incision was made to expose the subareolar breast tissue which was conservatively resected leaving a 1 cm disc of tissue under the areola." (Notice of Motion, Exh G). The report does not describe the procedure specifically with respect to the left breast but states that the procedure was completed "bilaterally." (Id). The report also indicates that "satisfactory flatness, symmetry and contour of the anterior chest was achieved." (Id).

On April 30, 2011, plaintiff came to the office after the nurse reported that plaintiff "wasn't managing his drains well"(Id., at 47). Dr. Beraka testified that the left side drain was

[2]The amounts referred to in Dr. Beraka's testimony were recorded on document entitled Operating Room Circulation Record. (Plaintiff's Opp. Exh. C)

not functioning, so it was replaced; plaintiff complained of pain on the left drain site, but according to Dr. Beraka there was no sign of infection, which was the case when plaintiff returned to the office on May 2, 2011. Dr. Beraka testified that on May 3, 2011, plaintiff spoke to him on the phone and told him that his nipples were numb, and that on May 5, 2011, Dr. Robert Jetter, who was covering for him, saw plaintiff. Plaintiff also complained of pain on his left side, and testified that a sensation of something being in his left chest, and with respect to these complaints, Dr. Beraka testified that "[s]urgery can cause a disruption of normal sensation in the area operated on, so that patients can feel all sorts of things, that something is there, that something hurts..." (Id., at 66).

On May 6, 2011, Dr. Beraka saw plaintiff, and observed signs of an infection including "slight erythema (i.e. redness) around the left [drain site] and ...some pain and tenderness on left side." (Id., at 67, 68). According to Dr. Beraka, he was "highly suspicious" that cellulitis was present, that same day plaintiff underwent a sonogram, which did not indicate abnormal fluid collection or abscess. (Id., at 69). On May 7, 2011, plaintiff returned to the office, and in defendant's note from the visit, Dr. Beraka indicated that the "right side is fine. The left side is swollen" and there is "no clinical seroma,"[3] or collection of fluid (Id., at 74). However, he found that there were signs of "lateral left cellulitis." (Id.). According to Dr. Beraka, he took a sample of fluid from the left drain site and sent it for culture, and started the plaintiff on antibiotics; the culture found "a staph aureus infection, which is one of the more common pathogens in wound infections." (Id., at 79).

On May 9, 2011, plaintiff was seen in the office, and fluid taken from the left breast showed there was still an infection. Plaintiff was also seen on May 10, and May 12, 2011, and

[3] Dr. Beraka testified that "seroma is a collection of serum, which is a collection of clear fluid." (Id., at 75).

on the second visit, Dr. Beraka noted that there were improvements, including that "pain was much better, swelling was much better." (Id., at 92).

On May 19, 2011, plaintiff was examined by Dr. Beraka and his notes indicate that no fluid was detected in the tissue, no active infection was found, and no erythema was present (Id., at 92, 94). The left chest wall was still firm, which Dr. Beraka testified was an "expected after effect of an infection" (Id., at 94). The note also indicated that "right chest was swollen and soft, but no fluid on the right side either." (Id., at 93). Dr. Beraka testified that the right side "was swollen in relation to the left . . . the left was quite indurated,[4] which makes it more rigid and so, in comparison the contralateral side, can look fuller or swollen." (Id., at 95).

On May 23, 2011, Dr. Beraka saw plaintiff and indicated that with respect to the right side, he observed "no signs or symptoms of fluid, Some asymmetry secondary to infection of the left side. Some swelling persists." (Id at 98.). He testified that asymmetry in this context means that "one side looked slightly different than the other." (Id., at 99). Dr. Beraka testified that he thought "the asymmetry of the chest wall was caused by the infection," (Id., at 103). He also testified that based on his May 7, 2011 note, "the left side looked a little more prominent that the right." (Id., at 107).

On June 14, 2011, plaintiff had another appointment with Dr. Beraka, and the notes from this visit state that "[i]nduration gone. Right chest looks good. Left chest some inferior indentation. Nipple looks good. Drains scars inverted." (Id., at 108). The note also indicates that "patient very unhappy and accusatory," and complains of "pain on right side," right deformity," "asymmetry," "'lump' on right nipple scar," and "drain scars." (Id., at 108-109). Dr. Beraka testified that he wrote the right chest looked good, by which meant that "it looked much better

[4] Dr. Beraka testified that induration means "firmness." (Id., at 94).

than on May 23." (Id., at 109). According to Dr. Beraka , he did not see a lump on scar on the right nipple. Dr. Beraka testified that there was indentation on the left chest, under the areola complex, and that the "most likely cause of the indentation was the skin folding over itself" (Id., at 111). Dr. Beraka did not warn plaintiff that one of the risks of the procedure is that there might be indentation caused by loose folding skin, as his "impression before the surgery was that this was a young man with tight skin and he would not have a problem with loose skin." (Id., at 112).

On November 9, 2011, plaintiff returned to defendant's office. Plaintiff complained of bilateral intermittent pain, which Dr. Beraka testified was "very rare" six months post-surgery (Id., at 120). Dr. Beraka testified that he observed some prominence lateral to the right nipple which he testified was "most likely due to internal scar tissue." (Id., at 121). He further testified that plaintiff complained of, and he observed "a slight crease inferior to the right nipple," which was not supposed to occur, as well as a crease interior in the left breast, which he attributed to plaintiff's poor skin elasticity (Id., at 122-124). According to Dr. Beraka, he did not test the elasticity of plaintiff's skin prior to surgery, because plaintiff is a 29-year-old, and "it's a very safe assumption that the skin is going to be quite elastic and tight" and that it not his custom to test patients of this age for skin elasticity (Id., at 123). Dr. Beraka considered a fat transfer to the creases but decided against it as he believed "the problem [was not] . . . over-resection [of fat] . . . at the time of the surgery . . . [but] skin collapsing." (Id., at 125).

The last time Dr. Beraka saw plaintiff was February 27, 2012, at which time he observed that there was asymmetry and creases which were "probably permanent" (Id., at 134).

In support of his summary judgment motion, Dr. Beraka submits the expert affidavit of Dr. Paul Striker, a physician licensed to practice in the State of New York, who completed post-

graduate training in plastic surgery. After reviewing the Bill of Particulars, the deposition transcript, Dr. Beraka's records, all other relevant medical records, and conducting his own examination of the plaintiff, Dr. Striker opines that to a reasonable degree of medical certainty, that Dr. Beraka's "treatment of plaintiff was, at all times, in accordance with good and accepted standards of medical care [and that] . . . within a reasonable degree of medical certainty . . . plaintiff's injuries were not caused by any act of negligence of the defendant." (Dr Striker's Aff. ¶'s 2,3).

Dr. Striker opines that "the surgical technique described in Dr. Beraka's operative report is in accordance with good and acceptable standards of medical care." (Id. ¶ 6). Specifically he notes that the operative report indicates that Dr. Beraka left " a 1 cm disc of tissue under the areola...[which] ...is vital to prevent nipple retraction (to prevent the nipples from having the appearance of sinking in)... [and that] [u]pon my physical examination of plaintiff on November 21, 2016, I did not observe that Mr. Massre had any nipple retraction." He further opines that the amount of tissue removed during gynecomastia corrective surgery "is a matter of judgment of the surgeon, [and that] [i]n this case a 1 cm disc of tissue was a sufficient amount to prevent nipple retraction." (Id.). He also opines that "Dr. Beraka made predetermined markings on Mr. Massre's chest and used his best judgment in what was the appropriate amount of tissue to remove . . . and that even if a surgeon misjudges how much tissue to remove, an error of judgment is not considered a departure." (Id.).

As for the techniques used in the surgery. as testified by Dr. Beraka, that is the feathering technique and two incisions, Dr. Striker opines that the feathering technique is "the best technique to use during liposuction to get a smooth result . . . [and that] two incisions makes the healing process less prone to irregularities." (Id ¶ 7). With respect to plaintiff's complaint of

nipple numbness on May 5, 2011, Dr. Striker opines "that it is normal for the patient to experience numbness of the nipple after the [gynecomastia] surgery," and he also opines that "Dr. Beraka timely recognized the infection and properly treated the infection with the correct antibiotics [and] . . . cultured the fluid for sensitivity and timely referred [plaintiff] to an infectious disease specialist." (Id. ¶'s 10, 14).

As for the creases in plaintiff's chest, Dr. Striker further opines "that skin does not drape in a perfectly predictable fashion ...[and that] the creases on Mr. Massre's chest were not due to any negligence in Dr. Beraka's surgical technique, but due to the resulting infection, which is a known risk of the procedure, as well as plaintiff's poor skin elasticity... [and that] the way skin heals does not implicate a departure" (Id ¶ 18). Dr. Striker also states that defendant documented and that he "did not observe any central concavity on Mr. Massre's chest" which indicates that the creases were not due to over-resection [and that] ... in my physical examination of Mr. Massre, I did not observe any central concavity which would suggest there was an over resection." He opines "to a reasonable degree of medical certainty that the infection was the cause of the creases in plaintiff's chest wall. " (Id. ¶'s 19). He also states that "deep 'crater' deformities were not present [and that] Mr. Massre purposefully exaggerated creases by intentional unilateral or bilateral contraction of the pectoralis major muscles..." (Id ¶ 24).

As for the allegations of lack of informed consent, Dr. Striker opines that "an appropriate informed consent was obtained by Dr. Beraka from Mr. Massre prior to the procedure" (Id, ¶ 25). In support of this opinion, Dr. Striker cites Dr. Beraka's deposition testimony that he discussed the possible complications that could occur from the procedure during plaintiff's initial meeting with Dr. Beraka and at his pre-operative visit, and that the risks discussed included "hematoma, infection, an undesirable cosmetic result, prominent scarring and problems

with sensations." (Id. ¶ 26). He further notes Dr. Beraka's testimony that a saucer deformity or crater deformity would be "undesirable result," and points to Dr. Beraka's testimony that he advised plaintiff that there could possibly be nipple retraction and numbness (Id.). Additionally, Dr. Striker points out that plaintiff "signed an informed consent document . . . indicating that he understood all of the risks of the procedure and agreed to proceed." (Id., ¶ 27).

In opposition, plaintiff submits the affidavit with the name of the expert redacted (hereinafter "plaintiff's expert") who is a board certified plastic surgeon and an attending physician in the tristate area, and licensed to practice medicine in New York State (plaintiff's expert Aff. ¶ 1).[5] Upon review of the relevant medical records, plaintiff's expert opines that Dr. Beraka "departed from the acceptable medical practice in several areas" (Id ¶ 2).

With respect to the surgery, plaintiff's expert opines that the surgery "was performed in a negligent and careless manner." (Id. ¶ 3). Based on the Operative Report and Dr. Beraka's deposition testimony, plaintiff's expert opines that Dr. Beraka did not know "the exact amount of tissue/fat removed from the liposuction" which could have been determined "by simply utilizing a calibrated beaker/container into which the aspirate could be placed, [and that this] was "a departure from good and acceptable practice" and that knowing the exact amount removed "is crucial to the success of the surgery in achieving the desired result." (Id. ¶ 4). With respect to the location of the incision, based on the Operative Report, plaintiff's expert states that it "is unclear where [defendant] made the incision for the liposuction."[6]

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[5]Plaintiffs submitted the un-redacted medical expert affidavit to the court, thus the use of an expert affidavit, with the expert's name redacted, is proper. See CPLR 3101(d)(1)(I); Frye v. Montefiore Med. Ctr., 70 AD3d 15, 22 (1st Dept 2009).

[6]Plaintiff's expert also states that based on the Surgical Pathology Report "the right breast specimen measured 3 X 3 X 1.5 cm and the left breast measured 4 X 3.5 X 1.8 cm [which]...establishes a direct contradiction to Dr. Beraka's claim that he removed a larger amount of breast tissue from the right breast...." (Id. ¶ 6).

Plaintiff's expert next opines that Dr. Beraka departed from good and accepted practice when he unnecessarily "violated the pectoralis major muscle fascia. [since] gynecomastia correction, by any standard method, does not involve the violation of the pectoralis major muscle fascia." (Id. ¶ 7). He opines that Dr. Beraka "injured, damaged or improperly and needlessly opened the pectoralis major muscle fascia creating the need for repair of the fascia tear as described in Dr. Beraka's deposition testimony that during the surgery, four layers were closed, one of which was the fascia." (Id.). Plaintiff's expert states that the opening of the fascia violated "the natural border between muscle and the breast tissue [and that] [d]uring healing, the nipple areola would become attached directly to the muscle causing the nipple areola complex to be pulled inward each time the pectoralis major muscle contracts.[7]" (Id). Plaintiff's expert states that "the fascial layer was violated either during the liposuction, during the direct excision, during the placement of the drains, or through some combination of the three" and opines that this was "a departure from good and accepted practice and explains the cause of [plaintiff's] post-operative chest indentations and deformities." (Id.). Plaintiff's expert further states that "this may also explain the basis for . . . [the] adhesions which [Dr. Beraka] claimed were caused by the left chest wound infection." (Id.). Additionally, plaintiff's expert opines that "the use of a circum-areolar incision, instead of the standard infra-areolar incision, for correction of gynecomastia in the absence of excess skin, increases the risk of post-operative complications including chest wall deformities[8] " (Id.).

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[7] At oral argument, defendant raised the issue that the Bill of Particulars does not allege that any departure caused the nipple areola complex to connect to the pectoralis muscle. At a bench conference, the court held that since this issue was not raised in defendant's papers, plaintiff did not have an opportunity to respond, and that the court would consider the issue when it is properly before the court.

[8] Plaintiff's expert further opines that defendant departed from good and accepted medical practice based on evidence of poor record keeping. However, there is no evidence that issues

As to the opinion of defendant's expert that the chest deformities resulted from the infection, plaintiff's expert disagrees and opines that "a unilateral chest wall infection can not result in bilateral chest wall deformities," and, that instead, plaintiff's chest wall deformities were the result of the "use of non-standard, circum-areola incisions, bilateral over-resection of breast tissue, failure to adequately feather the dissection margins, and violation of the pectoral fascia layer" (Id. ¶ 13). Specifically, he opines that "[t]here is no basis for [defendant's expert] opinion that the 'creases' are 'sequelae from subsequent infection.'" (Id ¶ 16).

Plaintiff's expert further opines that while "[s]aucer deformity and nipple retraction are well documented, known, complications of gynecomastia correction surgery [they] are avoidable or substantially mitigated with proper surgical technique [and that] [t]he most common proximate cause of saucer deformity is asymmetric breast tissue resection." (Id. ¶ 17). In this case, he opines that these complications were the result of defendant's failure to "properly feather the margins of liposuction and over-excised the central breast tissue [and that] he did not maintain an adequate nipple areola pedicle base thickness and that he did violate the pectoralis major muscle fascia" (Id.). He further opines that "the bilateral occurrence of both saucer deformity and nipple areola retraction cannot be explained in the absence of operative negligence on the part of [Dr.] Beraka" (Id.).

With respect to claim of lack of informed consent, and "[p]reoperative diagnosis of poor skin tone and loose skin to such a degree that the proposed operation entailed additional risks of skin folding over itself resulting in a chest wall deformity, required [Dr.] Beraka to inform [plaintiff] of the added risks as part of the informed consent process[9] (Id., ¶ 12). "Failure to so

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related to record keeping was a substantial factor in causing plaintiff's injuries, such that would provide a basis for a claim for malpractice..

[9]Plaintiff's expert opines that Dr. Beraka's failure to examine for, diagnose, and/or document findings of [poor skin tone or loose skin] is a departure from good practice" (Id ¶ 12), but does

advise [plaintiff] of these additional risks, if present, was a substantial departure from good practice" (Id.).

In reply, defendant relies on his counsel's affirmation, and does not submit a further affidavit from Dr. Striker. Defendant argues, inter alia, that the exact amount of fat/tissue removed is not required, citing Dr. Striker's opinion that the amount extracted is judgment call for the surgeon, that it was not necessary for the doctor to record where the incisions are made, as they are visible upon examination of the patient, and that it is speculation for the plaintiff's expert to say that Dr. Beraka cut the pectoralis major muscle fascia.[10]

Discussion

A defendant moving for summary judgement in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific, and factual in nature. See Joyner–Pack v. Sykes, 54 Ad3d 727, 729 (2d Dept 2008). A 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 AD3d 403, 404 (1st Dept 2010). A

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not allege that such failure was a substantial factor is causing plaintiff's injuries such that the alleged departure would be a basis for the medical malpractice claim.

[10]To the extent defendant's counsel's arguments are not based on Dr. Striker's expert opinion, they are of no probative value. See generally Mosberg v. Elahi, 80 NY2d 941 (1992) (In medical malpractice actions an expert medical opinion is required to demonstrate merit).

defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 Ad2d 225, 226 (1st Dept 2003)).

If the movant makes a prima facie showing, then the burden 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). Specifically, this requires plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact . . . General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Id. at 324-325. In addition, a plaintiff's expert opinion "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered." Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 307 (1st Dept 2007). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. N.Y. Downtown Hosp., 99 N.Y.2d 542 (2002). At the same time, it is well settled that when competing experts present adequately supported but differing opinions as the propriety of the medical care, summary judgment is not properly granted. See Florio v. Kosimar, 79 Ad3d 625 (1st Dept 2010).

With respect to the departures related to defendant's performance of the corrective gynecomastia surgery upon the plaintiff, the defendant met his burden of showing that defendant did not commit malpractice based on his expert's testimony that Dr. Beraka's techniques, including his method of feathering for liposuction and his use of two incisions, were in

accordance with good standards of medical care, and that any alleged injury suffered by plaintiff were not the result of any techniques used during the surgery, but was caused by an infection. As for the departure related to removal of excessive fatty breast tissue, the defendant met his burden based on his expert's opinion that it is matter of judgment on the part of the doctor to decide how much tissue to remove, and that even if a doctor misjudges how much tissue is required to be removed, it would not be a deviation from acceptable medical care, and that any creases in the skin were not due to over-resection but to plaintiff's poor skin elasticity and the way plaintiff's skin healed, and that there was no chest concavity which would indicate over-resection.

In opposition, plaintiff controverts defendant's showing as to the departure related to surgical techniques based on the opinion of his expert that the surgery was performed negligently in that Dr. Beraka unnecessarily violated the pectoralis major muscle fascia, and through his use of a circum-areola incision instead of the standard infra-areolar incision, and that this negligence resulted in plaintiff's chest deformities, including nipple retraction. With respect to the removal of fat tissue, plaintiff's expert controverts defendant's showing based on his opinion that Dr. Beraka departed from accepted practice by failing to precisely measure the exact amount of tissue/fat removed by liposuction, and that Dr. Beraka over-excised the breast tissue, which resulted in plaintiff's injuries, including a saucer deformity and creases. Specifically, with respect to causation, plaintiff's expert affidavit is sufficient to raise an issue of fact as to whether the plaintiff's bilateral chest deformities were caused by Dr. Beraka's malpractice, including his departures related to surgical techniques and the removal of excess fat/tissue, as opposed to an infection.

The remaining issues concern the lack of informed consent claim. "Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits

involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Public Health Law § 2805–d(1). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was indisputably informed of the foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003) (defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment").

Once defendant meets his burden, in order to make out a claim for lack of informed consent, plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise him of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). "Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan, 15 NY3d at 908.

Here, defendant has met his burden on the claim based his expert's opinion that Dr. Beraka obtained plaintiff's informed consent, together with his testimony that he explained the risks of the surgery to plaintiff, and the consent form in the record signed by plaintiff in which he acknowledged the defendant had explained risks of the surgery and alternatives to the surgery and had opted to proceed.

In opposition, plaintiff has not controverted this showing. Plaintiff's expert opines that if defendant had known of plaintiff's poor skin tone or loose skin as an additional risk of surgery, which turned out to be present, defendant would have been required to inform plaintiff of the

added risks. However, the record is devoid of evidence that if informed of the risks caused by plaintiff's skin condition, a reasonable person would not have had the surgery, including any evidence that plaintiff would have opted not to have the surgery if warned of such risks. See Orphan v. Pilnik, 15 NY3d at 908 (affirming dismissal of lack of informed consent claim when, *inter alia*, the evidence proffered by plaintiff did not establish that a fully informed reasonable person would have declined the procedure); compare Andersen v. Delaney, 269 AD2d 193, 193 (1st Dept 2000) (holding that "plaintiff's testimony that she would not have consented to the surgery had she been fully informed of the risks involved... is sufficient to raise a question of fact as to whether a reasonably prudent person, fully informed, would have refused the operation"). Accordingly, defendant's motion for summary judgment dismissing the claim for lack of informed consent is granted.

In view of the above, it is

ORDERED that defendant's motion to summary judgment is granted only to the extent of dismissing the claim for lack of informed consent and the medical malpractice claim shall continue; and it is further

ORDERED that the parties shall appear for a previously scheduled pretrial conference in Part 11, room 351, 60 Centre Street, New York, NY on July 12, 2018 at 10:00 am.

DATED: July 10, 2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.