

| |
|--|
| Randazzo v N.Y.C. Advanced Footcare, P.C. |
| 2019 NY Slip Op 30483(U) |
| February 20, 2019 |
| Supreme Court, Queens County |
| Docket Number: 805267/13 |
| Judge: Joan A. Madden |
| 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
COUNTY OF NEW YORK: PART 11

-----X
ROSALBA RANDAZZO,

INDEX NO. 805267/13

Plaintiff,

-against-

N.Y.C. ADVANCED FOOTCARE, P.C., and
PAUL DRUCKER, D.P.M.,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action for podiatric malpractice, defendant Dr. Paul Drucker moves for summary judgment and plaintiff opposes.¹

Plaintiff’s first saw Dr. Drucker on March 2, 2011. She testified that she presented with complaints of pain and a burning sensation underneath her feet when wearing shoes with heels. She also testified that Dr. Drucker took an x-ray and pointed out the bunions on both sides of her feet; he told her the bunions would get bigger and suggested surgery .² On March 18, 2011, Dr. Drucker performed surgery on plaintiff’s right foot, which included a tailor’s bunionectomy with

¹On March 19, 2018, this Court issued an order discontinuing the action against co-defendant NYC Advanced Footcare, P.C.

²Dr. Drucker’s medical records indicate that he made the following findings and diagnoses: 1) hallux valgus left and right; 2) osteoarthritis 1st MTPJ left and right; 3) hallux interphalangeous left and right; 4) plantar flexed 2nd metatarsal left and right; 5) tailor’s bunion left and right; 6) subungual exostosis left hallux; 7) semi rigid hammertoes 2nd, 3rd, 4th and 5th right and left foot. As to some of those conditions, Dr. Drucker explained at his deposition that a tailor’s bunion is a “bunion or protrusion on the outside of the foot behind the little toe”; hammertoes are “contracted digits”; and hallux valgus is a “rotation of the big toe and a lateral deviation or a deviation towards the second toe, sometimes with a bump of the first metatarsal and sometimes without.”

an osteotomy right 5th, an akin osteotomy right, and an osteotomy 5th metatarsal right.

Plaintiff alleges Dr. Drucker departed from good and accepted podiatric practice by: 1) failing to perform a tendon balance by cutting the flexor tendon and leaving the extensor apparatus intact causing the extension of the joint and dorsi flexion of the second toe; 2) changing the angulation of the head of the metatarsal on the 5th toe making the joint incongruous and causing degenerative changes in the joint; 3) and surgically producing an excessive elevation of the right 2nd metatarsal which increased the weight borne by the first metatarsal causing joint pain. Plaintiff also asserts a claim for lack of informed consent. In the Bill of Particulars, plaintiff alleges that the foregoing departures were a substantial factor in causing a “change of gait,” and injuries including sharp pain, burning, pinching and cramping radiating from the bottom of the right heel through the ankle and metatarsal; functional limitations with difficulty navigating steps, walking and standing for extended periods of time; and the inability to wear “normal shoes” for extended periods of time.

A defendant moving for summary judgment 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, defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature. Id; see Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2nd Dept 2008). Expert opinion must be based on facts in the record or those personally known to the expert, and the opinion of defendant’s expert should specify “in what

way” the patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hospital, 69 AD3d 403, 404 (1st Dept 2010). Defendant’s expert opinion must “explain ‘what defendant did and why.’” Id (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

In a medical malpractice action, “to avert summary judgment, plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries.” Roques v. Nobel, *supra* at 207. To meet this burden, “plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.” Id. Where the parties’ conflicting expert opinions are adequately supported by the record, summary judgment must be denied. See Frye v. Montefiore Medical Center, 70 AD3d 15 (1st Dept 2009); Cruz v. St Barnabas Hospital, 50 AD3d 382 (1st Dept 2008).

Applying the foregoing standards, the Court finds that Dr. Drucker has failed to establish prima facie entitlement to judgment as a matter of law. In support of the motion he submits the expert affirmation of Dr. DeLauro, who is board certified in podiatric medicine and surgery. Dr. DeLauro simply opines without factual detail or explanation that based on his review of the surgical report and the films taken during and post surgery, “the surgical procedures were done correctly, the bones which were cut during the surgery were properly positioned, healed properly, and remained in good position, in accordance with accepted podiatric practice.” This conclusory statement fails to identify the surgical procedure performed by Dr. Drucker, the specific bones that were cut, and the positioning of the bones. Absent such information, Dr. DeLauro’s opinions lack a factual predicate, including his opinion that the injuries alleged in the

bill of particulars “are not physically located at the surgical site” and were not “caused or created as a result” of the surgery.

Dr. DeLauro’s statements as to the lack of informed consent claim are likewise conclusory. A defendant moving for summary judgment on a lack of informed consent claim must make a prima facie showing that a plaintiff was informed of any foreseeable risks, benefits and alternatives of the treatment rendered. See Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2nd Dept 2009); Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003). Here, Dr. DeLauro merely states that Dr. Drucker “did advise and inform” plaintiff of the risks of and alternatives to the surgery and obtain a consent form” prior to surgery, without providing any factual details to the specific risks, benefits and alternatives to the surgery. The mere fact plaintiff signed a consent form does not establish defendant’s prima facie entitlement to judgment as a matter of law. See Godel v. Goldstein, 155 AD3d 939 (2nd Dept 2017); Santiago v. Filstein, 35 AD3d 184 (1st Dept 2006).

Thus, since Dr. DeLauro’s conclusory affirmation is not “detailed, specific and factual in nature,” it is insufficient to establish Dr. Drucker’s prima facie entitlement to judgment as a matter of law. See Diaz v. New York Downtown Hospital, 99 NY2d 542 (2002); Craig v. St. Barnabas Nursing Home, 129 AD3d 643 (1st Dept 2015).

However, even if Dr. Drucker had made out a prima facie case, plaintiff has made a sufficient showing to deny summary judgment. Plaintiff submits her own affidavit and the name-redacted expert affidavit of a podiatrist who is board certified by the American Board of Foot and Ankle Surgery.³ Plaintiff’s expert reviewed the pleadings, the bill of particulars, the depositions,

³At oral argument, plaintiff’s counsel provided the Court with an unredacted copy of the expert’s affidavit.

plaintiff's affidavit and the relevant medical records.

Plaintiff's expert opines that "a review of the post-surgery x-rays indicate that the fifth toe osteotomy was done incorrectly as [Dr. Drucker] changed the angulation of the head of the metatarsal and made the joint incongruous causing degenerative changes in the joint." Plaintiff's expert also opines that Dr. Drucker's "improper surgery produced excessive elevation of the right 2nd metatarsal thereby increasing the weight borne by the first metatarsal and causing joint pain," and as a "result of the mal positioning of the 5th metatarsal head, there is increased plantar pressure across the metatarsal phalangeal joint resulting in the hyperkeratotic tissue across the metatarsal phalangeal joint." The expert additionally opines that the "end of the second toe is dorsiflexed," and that Dr. Drucker "wrongfully cut the flexor tendon on the underside of the toe which caused the joint to dorsiflex." Plaintiff's expert opines that Dr. Drucker "cut the flexor tendon and left the extensor apparatus intact which caused the loss of balance to the joint," and that the "extensor tendon overpowered the flexor tenor and extended the joint and dorsiflexed the end of the toe." The expert opines that "[e]ach of these deviations and errors in performance of this surgery resulted in change of gait which resulted in the injuries set forth in the bill of particulars."⁴ In view of the foregoing, plaintiff's expert has provided sufficient factual details as to the nature of the errors in the manner in which the surgery was performed, so as to raise issues of fact as to her malpractice claim. See Roques v. Nobel, *supra* at 206; see Joyner-Pack v. Sykes, *supra* at 729.

⁴Plaintiff's expert's use of hyper-technical medical terminology undermines the purpose of an expert affidavit which is to explain the medical issues in terms understandable to a layperson.

Plaintiff likewise raises issues of fact as to her lack of informed consent claim. In her affidavit, she states that Dr. Drucker did not discuss any of the risks prior to performing the surgery. She also states that Dr. Drucker “never recommended” any conservative treatment or non-surgical options, and had she been aware of “less invasive alternatives, and if Dr. Drucker had spelled out the risks of his surgery, I would certainly have chosen conservative treatment . . . and would never have consented to this complex surgery.” Notably, while plaintiff acknowledges signing the informed consent form on March 2, 2011, the date of her first visit with Dr. Drucker, the handwritten description of the “operation” on that form is completely illegible.

Accordingly, it is

ORDERED that defendant’s motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for the pre-trial conference previously scheduled for March 1, 2019 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: February 20, 2019

ENTER:



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