Khan v Lisman
2019 NY Slip Op 33884(U)
December 23, 2019
Supreme Court, New York County
Docket Number: 805370/15
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NYLA KHAN,

Plaintiff,

INDEX NO. 805370/15

-against-

RICHARD DEAN LISMAN, M.D., RICHARD DEAN LISMAN, M.D., P.C.,

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

In this action seeking damages for medical malpractice and lack of informed consent, defendants move for summary judgment and plaintiff opposes.

On April 10, 2012, defendant Dr. Lisman performed surgery on plaintiff's right upper eyelid; at the time plaintiff was 17 years of age. The surgery is known as a Fasanella-Servat procedure and is used to correct eye ptosis, which is a droopy eyelid. Plaintiff's expert ophthalmologist opines that Dr. Lisman departed from the standard of care by removing excessive eyelid tissue, specifically that he removed "too much of the tarsal plate and conjunctiva," which shortened the posterior lamella of her eyelid and resulted in the gradual worsening of her lid and lash ptosis.[1] Plaintiff's expert opines that such departure caused plaintiff's entropion, lash ptosis, trichiasis, corneal irritation, corneal ulcers, swelling, scarring and eyelid immobility, and as a result plaintiff required multiple corrective surgeries, will require future surgeries, and must wear a contact lens 24 hours a day for the rest of her life to protect her

---

[1]Plaintiff's expert affirmation is limited to this one departure and is silent as to the lack of informed consent claim. The Court's analysis of defendants' motion, therefore, will be confined to this one departure, and any other departures alleged in the complaint or the bills of particulars, and the lack of informed consent claim, are hereby deemed abandoned.

eye from further damage, scarring and potential vision loss.[2]

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. See id; 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]).

"[T]o 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 expert attesting that defendant departed from good and accepted medical practice and that the departure was the proximate cause of the injuries alleged. See id. General and

---

[2]According to defendants' expert, "entropian" is a condition where the eyelid is rolled inward against the eyeball, resulting in irritation of the eye by the lashes; "trichiasis" is the ingrowth or introversion of the eyelashes resulting in the lashes touching the globe; and "lash ptosis" is when the eyelashes of the upper eyelid are displaced downward toward he visual axis.

conclusory allegations of malpractice are insufficient to defeat summary judgment, and plaintiff's expert must specifically address the opinions rendered by defendant's expert. See Perez v. Riverdale Family Medical Practice, PC, 177 AD3d 554 (1st Dept 2019); DiLorenzo v. Zaso 148 AD3d 1111 (2nd Dept 2017); Giampa v. Shelton, 67 AD3d 439 (1st Dept 2009); Browder v. New York City Health and Hospitals Corp, 37 AD3d 375 (1st Dept 2007). However, if the parties submit conflicting expert opinions that 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).

In support of summary judgment, defendants submit an expert affidavit of Dr. Henry M. Spinelli, a board certified plastic surgeon and ophthalmologist, who reviewed the pleadings, the bills of particulars, plaintiff's expert disclosure, party and non-party depositions, the expert's opinions, the relevant medical records, operative reports, pathology reports, diagnostic studies, photographs and medical reports. Dr. Spinelli opines that Dr. Lisman did not remove too much tarsus or eyelid tissue; the surgery corrected plaintiff's eyelid ptosis, which was the goal of the surgery; and Dr. Lisman did not damage plaintiff's eye lashes, nor cause any of her claimed injuries, including entropion, trichiasis, corneal irritation and scarring. Dr. Spinelli opines that Dr. Lisman acted within accepted standards of medical and reconstructive surgical care in treating plaintiff's congenital eyelid ptosis, a symptom of her chronic Marcus Gunn Syndrome; and her claimed injuries are the result of her chronic and congenital condition, and her prior and subsequent surgeries.

According to Dr. Spinelli, the record shows that plaintiff has Marcus Gunn syndrome, a rare genetic disorder that usually presents at birth and is characterized by the movement of one

upper eyelid in a rapid rising motion each time the jaw moves; it is believed to be due to abnormal stimulation of the levator muscle, which is the eye's main opening muscle and is connected by a thin sheath to the upper eyelid's supporting structure (tarsal plate) and skin. Dr. Spinelli opines that congenital ptosis in children can be caused by problems with the levator muscle, and children with the condition suffer from obstructed vision in the upper visual quadrants and frequently require surgery to elevate their eyelids for function and cosmetic purposes. Dr. Spinelli opines that "ptosis repair is a challenging oculoplastic surgical procedure"; there are several different procedures, including a Fasanella-Servat (posterior ptosis repair technique) and a Levator Resection (anterior and posterior approaches); and the complications following any ptosis surgery include dry eyes, under-correction or over-correction, lagophthalmos (inability to close the eyelids completely), asymmetric lid crease, entropian, trichiasis, infection, irritations, sensitivity to light, and the need for further corrective surgery for the eyelids or eyelashes.

Dr. Spinelli states that prior to Dr. Lisman's care, plaintiff had two levator resections to repair her congenital ptosis in 2001 and 2002; when she presented to Dr. Lisman in 2007 and 2012, she was "back to the ptotic position"; and plaintiff and her parents indicated that the right eyelid was progressively getting lower despite the two earlier surgeries. Dr. Spinelli opines that based on plaintiff's history and Dr. Lisman's own findings, Dr. Lisman recommended surgery on a different portion of the eyelid, since the levator muscle had already been operated on twice; and in accordance with accepted standards of care, Dr. Lisman appropriately decided to perform a modified Fasanella-Servat procedure.

Dr. Spinelli opines that on April 10, 2012 Dr. Lisman performed a modified Fasanella-Servat procedure, which deals with the tarsus, or underside of the lid, as opposed to the levator, the anterior side, and involves removing conjunctiva (tissue lining the inside the eyelid and covering the sclera, the white of the eye), and shortening the tarsus, using a posterior eyelid approach, with minimal scarring. He opines that Dr. Lisman appropriately placed two identical curved clamps on the superior border of the tarsus and a small amount of tarsus was shaved off to obtain adhesion; prior to that step, a suture was passed through the levator, to advance it down to the shortened tarsus and elevate the lid; the suture is run in continuous fashion and there are no exposed loops so it does not rub on the cornea; as a result the elevation of the lid is achieved not by tarsal resection by the "passage of the first and last bite of the running suture to advance the levator onto the roughed superior tarsal border."

Dr. Spinelli disputes plaintiff's claim that Dr. Lisman removed excessive or "too much" tarsus. He opines that although removal of a "large amount" of tarsus could result in entropian, permanent shortening and lagophthalmos, removal of a "small amount," i.e. anything less than 3 mm of vertical tarsus, is completely acceptable and would not cause entropion. Dr. Spinelli opines that Dr. Lisman removed two or less millimeters of tarsal height out of ten, and while the operative report states that a "moderate or large amount of tarsus was included in the clamp," the amount clamped was not excised in the procedure, but only clamped to allow ease of passage of the buried suture, and only a small amount of the superior tarsal border was excised above the clamps. Dr. Spinelli states that his opinion is supported by the pathologist's report, which indicates that only 1.8 x 0.3 x 0.2 cm (or 18 mm x 3mm x 2mm) was removed, which is a "*small* amount" of vertical tarsus excised and well within the accepted norms for the procedure.

Dr. Spinelli opines that "in theory," with every ptosis repair, a patient's lash ptosis will remain if a rotation is not incorporated into the closure, so once Dr. Lisman accomplished good lid height, he performed a standard closure to rotate the eyelashes externally to try to improve their appearance, by properly suturing the skin into the deep tissue to create the lid crease and fold and to rotate the lashes outward. The expert opines that even though plaintiff may have been dissatisfied with only a slight improvement to the position of her lashes, the records and testimony show that when she was under Dr. Lisman's care, she had no physical complaints about her lashes or corneal irritation. He opines that due to "no fault of Dr. Lisman," plaintiff's pre-existing lash ptosis was "under-corrected," and Dr. Lisman offered standard corrective options, including the conservative approach of lash curling, or an ambulatory procedure known as a marginal rotation and transverse blepharotomy. Dr. Spinelli points to Dr. Lisman's July 25, 2012 notes, which refer to this elective lash rotation procedure.

Dr. Spinelli opines that when plaintiff left Dr. Lisman's care in July 2012, she did not have entropion (eyelid rolled inward against the eyeball, so eye is irritated by the lashes), trichiasis (introversion of lashes so lashes touch the eye), sensitivity to light or corneal irritation; the testimony and pre-operative photographs from December 2007 and February 2012, show plaintiff's lash ptosis (lashes straight and pointing downward) before Dr. Lisman's surgery; and the post-operative notes and photographs show that she had a "good outcome, good lid height, the right pupil could be seen better, and [her] lash ptosis was not worsened during the surgery." Dr. Spinelli opines that the records and testimony demonstrate that trichiasis did not occur until several months after Dr. Lisman's surgery, and was the result of plaintiff's chronic condition that was "possibly worsened" by Dr. Wladid's subsequent procedures. Dr. Spinelli opines that the

testimony shows that plaintiff was "doing well" for seven to nine months after Dr. Lisman's surgery, and the records show that she did not see another doctor until 18 months later, after her lid and lash ptosis had gradually worsened due to the weakness of her levator muscle.

Dr. Spinelli opines that plaintiff's four subsequent surgeries, two by Dr. Wladis in 2014 and two by Dr. Collin in 2015 and 2016, "left her far worse" than when she was last seen by Dr. Lisman in July 2012. He opines that the medical records show that in January 2014, she was evaluated for dry eyes and her lashes touching her eye; and in April 2014 Dr. Wladis performed an extensive right upper eyelid levator resection and entropion repair, which further shortened her already shortened lid. Dr. Spinelli opines that plaintiff mistakenly believes that Dr. Wladis did not remove any tissue or muscle, as the pathology report shows the removal of 1.5 mm of levator tissue, which naturally increased plaintiff's corneal exposure and lagophthalmos (inability to close her eye). Noting that Dr. Wladis passed chromic sutures from along the posterior aspect of the eyelid through the eyelid crease and tied them into position, so as to create a crease, Dr. Spinelli opines that this procedure caused immobility of her globe, which she did not have when she left Dr. Lisman's care.

Dr. Spinelli opines that Dr. Wladis' surgery "did not work," as months later plaintiff was still complaining of dry eye and her eyelashes irritating her right eye; Dr. Wladis' notes from September and October 2014 indicate her dry eye syndrome was worse, the pain more severe, and she was complaining of sensitivity to light and her lashes rubbing on her eyes "more than before." He opines that Dr. Wladis's second surgery in November 2014 "also did not work," as the records from December 2014 through March 2015 show plaintiff continuing to complain of

dry eye and difficulty with her lashes, and her lagophthalmos (inability to close her eyes) had increased from 5 mm to 8 mm.

Addressing plaintiff's treatment with Dr. Collin in London, England that began in June 2015, Dr. Spinelli opines that Dr. Collin: 1) misinterpreted Dr. Lisman's notes when he mistakenly found that Dr. Lisman used a gold weight during plaintiff's surgery[3]; 2) failed to acknowledge that plaintiff had lash ptosis prior to Dr. Lisman's surgery; and 3) failed to consider the consequences of Dr. Wladis's two resection surgeries that took place after Dr. Lisman's surgery. Dr. Spinelli opines that after Dr. Lisman's surgery, plaintiff's congenital ptosis caused a gradual progression and her lashes continued to fall; the "drooping was the result of the highly abnormal muscle, and the loss of skin crease suggests disinversion from the muscle"; and by the time Dr. Colin saw plaintiff, she had two more resections by Dr. Wladis, which Dr. Spinelli opines contributed to her ptosis and corneal exposure. Dr. Spinelli notes that in June 2015 and August 2016, Dr. Colin performed two surgeries, which ultimately freed scar tissue and lowered the central peak in the right upper lid. He opines that plaintiff was ultimately happy with her lid height and lash direction, but she can only close her right eye 50% (lagophthalmos), which was not the case after Dr. Lisman's surgery; and given the increase in her lagophthalmos after the additional surgeries, it is "predictable that her principal problem would be exposure keratitis," which she did not have when she left Dr. Lisman's care in 2012.

In conclusion, Dr. Spinelli opines that Dr. Lisman exercised good judgment and performed the correct procedure for plaintiff, and her lack of complaints for months following

[3]While plaintiff originally alleged a departure based on Dr. Lisman's purported use of a "gold weight" during surgery, as noted above, she is no longer pursuing that claim and it has been deemed abandoned.

the April 2012 surgery, along with Dr. Lisman's pre-operative and post-operative photographs, demonstrate that the surgery dramatically helped plaintiff, as Dr. Lisman achieved the optimal lid correction, without complication; and while the surgery only slightly improved plaintiff's malpositioned lashes, her failure to follow Dr. Lisman's recommendations to improve her lash ptosis "resulted in an unfortunate course of events."

Based on the foregoing, defendants have made a prima facie showing of entitlement to judgment as a matter of law through the affidavit of their expert Dr. Spinelli. The burden shifts to plaintiff raise an issue of fact.

In opposition, plaintiff submits a redacted affirmation from an ophthalmologist licensed to practice medicine in the United Kingdom, and who provides "medical services in London and the greater London area" and examined plaintiff in June 2015.[4] In reply, defendants assert that plaintiff's expert is not qualified to give a competent medical opinion and the Court agrees.

Although a physician who obtained his experience and study in a foreign county, and resides in and is licensed to practice medicine in a foreign country, is not automatically disqualified as a medical expert, the physician must establish that he qualified to render an expert opinion in a New York court. See Bartolacci-Meir v. Sassoon, 149 AD3d 567 (1st Dept 2017) ;1 NY Evidence Proof of Cases §14:25. In other words, the physician must possess the requisite skill, training, education, knowledge or experience so as to furnish a reliable expert opinion as to the standard of care in the United States, whether acquired through practice, studies or some

---

[4]Although the name of plaintiff's expert is redacted, Dr. Spinelli believes that the expert's credentials and subsequent treatment of plaintiff, demonstrate that the affirmation is from Dr. Collin.

other way. See Perez v. Riverdale Family Medical Practice, PC, supra; Bartolacci-Meir v. Sassoon, supra; Nguyen v. Dorce, 125 AD3d 571 (1st Dept 2015).

Here, notwithstanding the extensive credentials of plaintiff's expert as an opthamologist educated and practicing in the United Kingdom, the expert fails to lay a foundation tending to support the reliability of his opinions. See Browder v. New York City Health & Hospitals Corp, supra. Plaintiff's expert merely states he is familiar with the "appropriate standard of care for different procedures and approaches to ptosis repair including but not limited to levator resection and for the Fasanella-Servant, and general ophthalmic surgical care." The expert, however, fails to state that he has the requisite knowledge of the standard of care in the United States, or to what extent, if any, the standard of care in the United States is similar to that in the United Kingdom. See Perez v. Riverdale Family Medical Practice, PC, supra; Lomax v. New York City Health & Hospital Corp, 176 AD3d 483 (1st Dept 2019); Nguyen v. Dorce, supra.

In any event, even if plaintiff's expert were qualified to render an opinion in this action, he fails to address or refute Dr. Spinelli's specific averments as to the issues of malpractice and causation, which are based on plaintiff's medical records from before, during and after Dr. Lisman's treatment. See Perez v. Riverdale Family Medical Practice, PC, supra; Sternberg v. Rugova, 162 AD3d 456 (1st Dept 2018); Giampa v. Shelton, supra; Abalola v. Flower Hospital, 44 AD3d 522 (1st Dept 2007).

The expert's conclusory and speculative opinion that Dr. Lisman removed "too much of the tarsal plate and conjunctive" is insufficient to raise an issue of fact.[5] See Wagner v. Parker 172 AD3d 954 (2nd Dept 2019); Kaplan v. Karpfen, 57 AD3d 409 (1st Dept 2008), lv app den 12

[5]As noted, above, this is the only departure at issue.

NY3d 716 (2009). The expert acknowledges that the pathology report shows that Dr. Lisman removed 1.8 x 0.3 x 0.2 cm of tarsus and conjunctiva. The expert, however, neither addresses nor refutes Dr. Spinelli's assertion that the removal of any amount less than 3mm is well within the standard of care, and here the amount was less than 3mm. See DiLorenzo v. Zaso supra; Giampa v. Shelton, supra; Browder v. New York City Health & Hospitals Corp, supra. Plaintiff's expert renders no opinion as to the appropriate amount of tissue Dr. Lisman should have removed, nor opines that the Fasanella-Servat procedure was contraindicated and that an alternative procedure was more appropriate. Moreover, while the expert states that he reviewed the "relevant records, operative records, diagnostic studies, photographs and medical reports," he does not state that he reviewed the detailed affidavit of defendants' expert, and neither mentions Dr. Spinelli's name nor refers to any of Dr. Spinelli's opinions.

In reply, defendants submit an additional affidavit from Dr. Spinelli who states that plaintiff's expert "omits the crucial fact that the vertical tarsus (the height) is the relevant portion," and that amount was small, i.e. less than 3mm (out of 10 mm).[6] Dr. Spinelli explains that the "tarsus is a quasi-elliptical semi-rigid structure which is supportive of the eyelid. Its length refers to the horizontal dimension (ear to nose), and is usually 2.0 cm (20mm). In the plaintiff's histology the 1.8 cm (18mm) is the corresponding length resected in Dr. Lisman's procedure and is a meaningless number in terms of its effects on eyelid position. . . . [T]he important number, in terms of eyelid position, is the vertical height (chin to hairline) resected. In the plaintiff's case, Dr. Lisman resected less than 3 mm, which is well within the accepted

---

[6]At oral argument, plaintiff was given an opportunity to submit a sur-reply, but the Court received no additional papers from plaintiff.

standard of care and within a surgeon's purview of good medical judgment in the medical community." Dr. Spinelli opines that while the lamella was shortened during Dr. Lisman's surgery, that was the goal of the surgery and was not contraindicated; and good lid height was achieved, which defendant's expert disregards. He opines that shortening the lamella is not the cause of plaintiff's deficient lid, and that plaintiff's expert disregards the significance and causal relationship of plaintiff's two prior levator resections in 2000 and 2001, and the two subsequent surgeries performed by Wladis in 2014.

Plaintiff's expert also fails to address or refute Dr. Spinelli's assertions that plaintiff suffered from eyelid ptosis and eyelash ptosis prior to Dr. Lisman's surgery, as evidenced by Dr. Lisman's pre-operative photographs showing that her lashes were straight and already pointing downward; Dr. Lisman's surgery was successful in correcting plaintiff eyelid ptosis by improving the height of her eyelid; Dr. Lisman's surgery did not worsen plaintiff's lash ptosis; Dr. Lisman recommended a separate procedure to improve the position of her lashes; when plaintiff left Dr. Lisman's care in July 2012, she had no physical complaints and had none of the claimed injuries, including entropian, trichiasis, corneal irritation or swelling, and eyelid immobility; the operative report of Dr. Wladis's first procedure in April 2014 shows that he manipulated the tarsal plate and the conjunctiva with sutures, which inherently causes scarring and contractures; and after Dr. Wladis's first procedure, plaintiff's condition and complaints worsened as to dry eye, light sensitivity, and eyelashes rubbing on her eyes, and as a result Dr. Wladis performed a second procedure in November 2014.

Thus, since plaintiff's expert is not qualified and offers only a conclusory opinion as to the alleged departure, plaintiff fails to raise an issue of fact so as to defeat defendants' motion, and

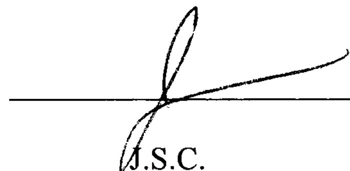
defendants are entitled to summary judgment dismissing the complaint. See Perez v. Riverdale Family Medical Practice, PC, supra; Nguyen v. Dorce, supra; Browder v. New York City Health & Hospitals Corp, supra.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

DATED: December 23 2019

ENTER:



J.S.C.

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