

<b>Crittenden v Blum</b>
2020 NY Slip Op 31017(U)
March 4, 2020
Supreme Court, Bronx County
Docket Number: 22188/2017E
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX PART 19A**

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**FRANK CRITTENDEN and ELIZABETH  
WILLIAMSON-CRITTENDEN**

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**Plaintiffs**

**-against-**

**YOSSEF BLUM AND MONTEFIORE MEDICAL  
CENTER**

**Defendant**

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**HON. GEORGE J. SILVER:**

In this medical malpractice action, defendants YOSSEF BLUM, M.D. (“Dr. Blum”) and MONTEFIORE MEDICAL CENTER (“Montefiore,” collectively “defendants”) move, pursuant to CPLR §3212, for summary judgment and an order dismissing the complaint of plaintiffs FRANK CRITTENDEN (“plaintiff”) and ELIZABETH WILLIAMSON-CRITTENDEN (collectively “plaintiffs”) as against them. Plaintiffs oppose defendants’ application.

**BACKGROUND AND ARGUMENTS**

This lawsuit arises from damages for personal injuries allegedly sustained by plaintiff as a result of defendants’ alleged negligent care and treatment of plaintiff’s left knee condition from December 2, 2014 through June 20, 2016. Specifically, plaintiffs allege that Dr. Blum overstuffed plaintiff’s patellofemoral joint,<sup>1</sup> and failed to adequately resect the bone at the distal portion of the left patella during a total knee arthroplasty<sup>2</sup> performed at Montefiore on December 2, 2014. Plaintiff further alleges that Dr. Blum improperly managed plaintiff’s post-operative complaints, and failed to obtain informed consent prior to operating on plaintiff.

Contrary to plaintiff’s allegations, defendants submit that plaintiff’s surgery and recovery were managed appropriately, and in accordance with accepted standards of surgical care. In support of the instant motion, defendants annex the expert affirmation of Douglas B. Unis, M.D. (“Dr Unis”), a board-certified orthopedic surgeon who opines that Dr. Blum did not depart from good and accepted medical care during his treatment of plaintiff. Specifically, Dr. Unis explains that Dr. Blum performed surgery on plaintiff only after exhausting all conservative treatment options. Indeed, Dr. Unis observes that at the time plaintiff presented to Dr. Blum, plaintiff was suffering from degenerative joint disease of the left knee, also known as arthritis.

<sup>1</sup> The patellofemoral joint is where your patella (kneecap) and femur (thigh bone) meet at the front of your knee.

<sup>2</sup> Otherwise known as a total knee replacement. This is a surgical procedure whereby the diseased knee joint is replaced with artificial material.

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Dr. Unis notes that Dr. Blum proceeded to treat plaintiff with noninvasive treatment. After that treatment failed, Dr. Unis explains that plaintiff elected to proceed with a total knee arthroplasty. The procedure itself, according to Dr. Unis, was performed within a normal timeframe. With reference to the operative report, Dr. Unis further states that Dr. Blum meticulously sized various components involved in the surgery, and utilized proper surgical technique. In Dr. Unis' opinion, there is nothing in the operative report of Dr. Blum that would evidence an overstuffed joint. In addition, it is Dr. Unis' opinion that Dr. Blum did not depart from good and accepted medical care in his post-operative management of plaintiff's complaints by noting that Dr. Blum appropriately offered plaintiff manipulation to improve his range of motion, but that plaintiff declined such post-operative intervention.

With respect to Dr. Blum allegedly proximately causing plaintiff's injuries, Dr. Unis opines that complications following a total knee arthroplasty are common, and can occur in the absence of negligence, especially for a patient with plaintiff's presenting symptoms and complaints. Moreover, Dr. Unis states that the fact that plaintiff underwent a subsequent revision surgery does not, in and of itself, mean that the initial surgery performed by Dr. Blum was done improperly.

Finally, defendants submit that plaintiffs' lack of informed consent claim cannot survive where there is ample evidence that plaintiff was advised of the possible risks of the total knee arthroplasty before consenting to the procedure. In addition, in the absence of any viable claims against Dr. Blum, defendants contend that Montefiore must be dismissed from this lawsuit, since there are no additional or independent claims of negligence against the institution. Lastly, assuming that all of plaintiffs' other claims are dismissed, defendants argue that a derivative claim of loss of services for plaintiff's spouse cannot survive. Based on a review of all the evidence submitted in connection with their instant application, defendants contend that they are entitled to judgment in their favor.

In opposition, plaintiffs state at the outset that defendants have disingenuously misrepresented relevant facts by failing to reference claims articulated in plaintiffs' Amended Bill of Particulars served on August 5, 2019. Notably, plaintiffs served an Amended Bill of Particulars on August 5, 2019 before filing a note of issue on August 15, 2019. Defendants claim that they never received plaintiffs' Amended Bill of Particulars, and therefore catered their motion to the claims previously articulated in plaintiffs' other Bills of Particulars. Most glaringly, plaintiffs argue that Dr. Unis' proffered opinion does not mention the material fact articulated in plaintiffs' Amended Bill of Particulars that plaintiff presented pre-operatively with a valgus left knee,<sup>3</sup> as noted in Dr. Blum's office notes and operative report. Plaintiffs' expert opines that plaintiff's valgus knee was a critical finding, as its presence dictated the way plaintiff's surgery should have been performed. Significantly, plaintiffs' expert explains that because plaintiff had a valgus knee, Dr. Blum was required to do an adequate distal femur resection and/or adequate ligament release for his treatment to comport with accepted standards of medical care. Because Dr. Blum did neither measure, plaintiffs' expert contends that Dr. Blum's treatment did not comport with accepted standards of care, and therefore proximately caused the injuries alleged in this lawsuit.

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<sup>3</sup> Knee valgus is when the knee 'falls' inward due to hip adduction and hip internal rotation. It can also be thought of as the knee 'caving in' during hip flexion.

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Even if the court were to overlook the claims articulated in plaintiffs' Amended Bill of Particulars, plaintiffs contend that judgment in defendants' favor would still be unwarranted on account of other departures in plaintiff's care that proximately caused the injuries alleged. To be sure, plaintiffs' expert identifies Dr. Blum's departures as also including Dr. Blum's failure to properly appreciate that plaintiff's knee joint was overstuffed, and similarly failing to appreciate the significance of plaintiff's post-operative complaints and limitations in the ensuing months post-surgery. These additional departures, plaintiffs' expert contends, do not warrant a finding of judgment in defendants' favor.

In reply, defendants challenge plaintiffs' assertion that plaintiffs' Amended Bill of Particulars was properly served upon defendants. To be sure, defendants contend that plaintiffs' Amended Bill of Particulars should be discounted by the court. Even if it were considered, defendants reiterate that they are entitled to judgment in their favor on account of Dr. Blum's actions comporting with accepted standards of medical practice, and not proximately causing the injuries alleged. As a result, defendants restate their position that they entitled to summary judgment.

### DISCUSSION

In an action premised upon medical malpractice, a defendant doctor or hospital establishes prima facie entitlement to summary judgment when he or she establishes 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. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept. 2009]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept. 2008]; *Germaine v Yu*, 49 AD3d 685 [2d Dept 2008]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]; *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004]). In claiming that treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature (*see e.g., Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). The opinion must be based on facts within the record or personally known to the expert (*Roques*, 73 AD3d at 207, *supra*). Indeed, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]). Thus, a defendant in a medical malpractice action who, in support of a motion for summary judgment, submits conclusory medical affidavits or affirmations, fails to establish prima facie entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]; *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars do not establish prima facie entitlement to summary judgment as a matter of law (*Cregan*, 65 AD3d at 108, *supra*; *Wasserman*, 307 AD2d at 226, *supra*). To be sure, the defense expert's opinion should state "in what way" a patient's treatment was proper and explain the standard of care (*Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010]). Further, it must "explain 'what defendant did and why'" (*id. quoting Wasserman v. Carella*, 307 AD2d 225, 226 [1st Dept 2003]).

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Once the defendant meets its burden of establishing prima facie entitlement to summary judgment, it is incumbent on the plaintiff, if summary judgment is to be averted, to rebut the defendant's prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The plaintiff must rebut defendant's prima facie showing without “[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence” (*id.* at 325). Specifically, to avert summary judgment, the plaintiff must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries (*Coronel v New York City Health and Hosp. Corp.*, 47 AD3d 456 [1st Dept. 2008]; *Koeppe v Park*, 228 AD2d 288, 289 [1st Dept. 1996]). To meet the required burden, the 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 (*Thurston*, 66 AD3d at 1001, *supra*; *Myers*, 56 AD3d at 84, *supra*; *Rebozo*, 41 AD3d at 458, *supra*).

Here, defendants' submission of deposition transcripts, medical records and an expert affirmation based upon the same appear, at first glance, to meet the criteria of establishing a prima facie defense entitling them to summary judgment (*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). To be sure, Dr. Unis opines, based on his review of the pertinent records and relevant issues, that Dr. Blum's treatment of plaintiff's knee comported with accepted standards of surgical practice, and did not proximately cause injury to plaintiff, as the treatment rendered was medically necessary and voluntarily undertaken. However, defendants' submission does not address some of the claims contained in plaintiffs' Amended Bill of Particulars, most notably the claim that Dr. Blum failed to appreciate plaintiff's valgus knee. A party is permitted to amend a bill of particulars once as of right prior to filing the note of issue (CPLR §3042[b]). Further, a supplemental bill of particulars may be served without leave of court up to 30 days before trial, provided no new cause of action is alleged and no new injury is claimed (CPLR §3043[b]). Here, plaintiffs' Amended Bill of Particulars was filed prior to the note of issue and does not allege a new injury, but rather serves to amplify existing claims that have already been made in this lawsuit. As such, plaintiffs did not require leave of this court when serving their Amended Bill of Particulars. As such, the Amended Bill of Particulars is not a nullity, and as defendants did not address its contents when making the instant motion, defendants have failed to set forth a prima facie defense entitling them to summary judgment on every cause of action except plaintiffs' cause of action alleging a lack of informed consent. To be sure, defendants did set forth a prima facie showing with respect to plaintiffs' lack of informed consent claim by highlighting testimony and records reflecting that plaintiff was informed of the risks of plaintiff's knee procedure, and acquiesced to it by signing a written consent form (*see Lynn G. v. Hugo*, 96 NY2d 306 [2001]). Indeed, the evidence in this case includes a signed consent form from November 25, 2014 for the left total knee replacement, and notes that the form was signed following consultation with Dr. Blum concerning the risks and benefits of the surgery. As such, defendants have met their burden of proof for entitlement to summary judgment with respect to plaintiffs' lack of informed consent claim. As such, the claim is dismissed as a matter of law.

With respect to plaintiffs' other claims, however, even assuming that defendants had set forth a prima facie showing on those claims, plaintiffs' have raised triable issues of fact sufficient to preclude a finding of summary judgment. To be sure, plaintiffs' expert opines that Dr. Blum's actions ran athwart of the standard of care insofar as Dr. Blum did not do an adequate distal femur resection and ligament release. By doing

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neither measure, plaintiffs' expert contends that Dr. Blum allowed plaintiff's knee joint to become overstuffed, and therefore proximately caused the injuries alleged in this lawsuit. Setting aside those claims reflected in plaintiffs' Amended Bill of Particulars, plaintiffs' expert challenges the observations of Dr. Unis, and explains that Dr. Blum's departures extend far beyond the valgus deformity. To be sure, in contrast to Dr. Unis' assertions, plaintiffs' expert identifies Dr. Blum's departures as including Dr. Blum's failure to properly appreciate that plaintiff's knee joint was overstuffed, and similarly failing to appreciate the significance of plaintiff's post-operative complaints and limitations in the ensuing months post-surgery. In addition, plaintiffs' expert observes that Dr. Blum utilized improperly sized components, and did not appreciate during an intraoperative trial that plaintiff's leg would not straighten or bend. These additional departures, plaintiffs' expert contends, have led to plaintiff suffering from permanent knee weakness and limited range of motion, even after revision surgery. As such, plaintiffs' expert submits that it is axiomatic that defendants' actions have proximately caused permanent injury. As plaintiffs' expert opinion is detailed and supported by findings within the record, sufficient issues of fact exist to keep plaintiffs' remaining claims in the case. Consequently, summary judgment is denied with respect to plaintiffs' remaining claims.

To be sure, even if a prima facie case is assumed to have been established, the conflicting testimony advanced raises triable issues of fact sufficient to defeat defendants' motion. Indeed, the weight to afford Dr. Unis' testimony relative to that of plaintiffs' expert is for a jury rather than a judge to decide. The very fact that plaintiffs' expert's opinions differ from those proffered by Dr. Unis illustrates the existence of issues of triable fact. To be sure, "[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Elmes v. Yelon*, 140 AD3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*). Consequently, plaintiffs have sufficiently shown that issues of fact surrounding plaintiff's care and treatment preclude a finding of summary judgment in defendants' favor.

The court has considered defendants remaining grounds for dismissal, and finds them unavailing.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent that the court dismisses plaintiffs' claim of a lack of informed consent; and it is further

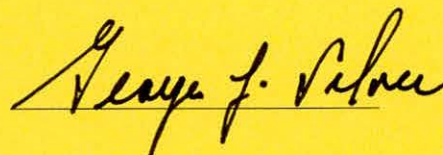
ORDERED that defendants' motion for summary judgment is otherwise denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing plaintiffs' lack of informed consent claim; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference before the court on April 1, 2020 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: March 4, 2020



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HON. GEORGE J. SILVER