

<b>Orfanos v Kastenbaum</b>
2020 NY Slip Op 31697(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 805101/2016
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 10**

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**SOPHIA RICHMAN ORFANOS AND SPYROS D.  
ORFANOS,**

**Index №. 805101/2016**

**Plaintiffs**

**-against-**

**DONALD KASTENBAUM, M.D., DAVID E. COHEN, M.D.  
AND MOUNT SINAI BETH ISRAEL HOSPITAL,**

**Defendants**

-----X  
**HON. GEORGE J. SILVER:**

In this medical malpractice action, defendants DONALD KASTENBAUM, M.D. (“Dr. Kastenbaum”) and MOUNT SINAI BETH ISRAEL HOSPITAL (“Mount Sinai”) (collectively, “defendants”) move for summary judgment and an order dismissing the complaint of plaintiff SOPHIA RICHMAN (“plaintiff”) as against them. Plaintiff opposes the application.

**BACKGROUND**

In this action, plaintiff alleges that Dr. Kastenbaum negligently performed a left total hip replacement (“THR”) on plaintiff at Mount Sinai on October 8, 2013 when he utilized a hip prosthesis with nickel and cobalt components despite plaintiff’s “known metal allergy.” As a result of Dr. Kastenbaum’s alleged negligence, plaintiff claims to have suffered an allergic reaction that required revision surgery to remove part of the hardware implanted during the left THR.

**ARGUMENTS**

In support of the instant motion, defendants allege that the allegations against them are without merit. In contrast to plaintiff’s claims, Dr. Kastenbaum states that he documented plaintiff’s past nickel sensitivity prior to surgery, and utilized a non-nickel hip implant. The implant—comprised of ceramic and titanium parts—was not removed during her subsequent surgery. Rather, approximately two (2) years later, nonparty Edward Adler, M.D. (“Dr. Adler”) removed the Dall-Miles grips and cables, which had been placed to ensure fracture fixation and prevent implant failure. After plaintiff ceased treatment with defendants, plaintiff developed a fluid collection around the trochanteric fixation, which Dr. Adler thought might be due to a metal sensitivity reaction. The grips and cables were made of vitallium, a cobalt-chromium alloy primarily comprised of cobalt (typically 60-65%).

Defendants argue that since plaintiff had no documented allergy or sensitivity to cobalt at any time prior to the THR, plaintiff cannot sustain a malpractice action them. Indeed, defendants highlight that plaintiff's pre-surgical patch testing conducted by co-defendant DAVID E. COHEN, M.D. ("Dr. Cohen") to rule out hypersensitivity to metals used in orthopedic prosthesis implants was negative as to nickel, cobalt, and all of the other metals tested. Nevertheless, based on an earlier patch test from 2004 that showed a sensitivity to nickel, Dr. Cohen recommended avoiding nickel in plaintiff's left hip prosthesis, which Dr. Kastenbaum did.

Defendants annex the affirmation of Russell E. Windsor, M.D. ("Dr. Windsor"), a board-certified orthopedic surgeon, who opines that Dr. Kastenbaum properly performed the THR, and that such a procedure was indicated. Dr. Windsor further affirms that the implant and components utilized by Dr. Kastenbaum were the best available for a patient with a past sensitivity to nickel. Dr. Windsor also confirms that Dr. Kastenbaum's decision to utilize trochanteric fixation (the grip and cables) was an appropriate exercise of medical judgment, and that the need for removal of hardware is a known risk of THR and not indicative of negligence. Dr. Windsor further explains that plaintiff properly consented to the surgery, which had been recommended to her by multiple surgeons, and that no alleged failure of defendants to inform plaintiff of any risks was the proximate cause of her injuries.

In light of plaintiff's medical records, the parties' deposition testimony, and Dr. Windsor's expert affirmation, defendants argue that they acted within the standard of care at all times in treating plaintiff prior to the left THR, which was properly performed, and post-operatively. Defendants further aver that the evidence demonstrates that plaintiff properly consented to the procedure. As there was no departure from the applicable standards of care, and no causal link exists between the medical treatment rendered and plaintiff's alleged injuries, defendants submit that they are entitled to summary judgment and the dismissal of plaintiff's claims as against them.

In opposition, plaintiff annexes the affirmation of Mark Berezin, M.D. ("Dr. Berezin"), a board-certified orthopedist who opines that defendants' utilization Dall-Miles grips and cables with a trochanteric osteotomy was an unnecessary part of plaintiff's operative procedure. Dr. Berezin further explains that the standard of care requires an orthopedic surgeon not to utilize Dall-Miles grips and cables if that surgeon does not know its full metallic content, especially where a patient has a known metal allergy. Here, plaintiff states that plaintiff's known allergy was to nickel rather than cobalt, and that it was a deviation from the standard of care for Dr. Kastenbaum, who knew about plaintiff's nickel allergy, not to guarantee the absence of nickel prior to performing the THR. Moreover, plaintiff states that contrary to Dr. Kastenbaum's testimony, plaintiff was never advised of the fact that Dr. Kastenbaum could not guarantee the absence of nickel prior to performing the procedure. Because plaintiff's subsequent hardware removal was directly linked to Dr. Kastenbaum's erroneous implantation of nickel-based components, Dr. Berezin opines that there can be no doubt that the injuries alleged in this lawsuit were proximately caused by defendants' negligence. Accordingly, plaintiff submits that judgment in defendants' favor is unwarranted.

In reply, defendants challenge the conclusions drawn by Dr. Berezin as speculative, and reiterate their belief that they are entitled to judgment in their favor.

## 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]).

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]; *Koeppele 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 have established a prima facie showing. To be sure, Dr. Windsor opines, based on the medical records, deposition transcripts, and other evidence, that defendants abided by the applicable standard of care in their treatment and care of plaintiff, and did not proximately cause the injuries alleged

(*Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]). Specifically, Dr. Windsor, a board-certified orthopedic surgeon, opines that Dr. Kastenbaum properly performed the THR, and that such a procedure was indicated. Dr. Windsor further affirms that the implant and components utilized by Dr. Kastenbaum were the best available for a patient with a past sensitivity to nickel. Relevantly, Dr. Windsor explains that the hardware at issue contained very little, if any, nickel, and that plaintiff's true sensitivity was to cobalt. Since Dr. Kastenbaum was unaware of plaintiff having a known sensitivity to cobalt, Dr. Windsor explains that it was not contraindicated for Dr. Kastenbaum to utilize the components that he used when performing the THR. Dr. Windsor further confirms that Dr. Kastenbaum's decision to utilize the grips and cables was an appropriate exercise of medical judgment, and that the need for removal of hardware is a known risk of THR and not indicative of negligence. Dr. Windsor further explains that plaintiff properly consented to the surgery, which had been recommended to her by multiple surgeons, and that no alleged failure of defendants to inform plaintiff of any risks was the proximate cause of her injuries. In fact, Dr. Windsor highlights that Dr. Kastenbaum explained to plaintiff that he could not guarantee the complete absence of nickel prior to installing the hardware. As Dr. Windsor's opinion is predicated upon ample support within the record, including a specific review of the relevant medical records and deposition testimony, Dr. Windsor has shown that plaintiff was treated in full accord with good and accepted standards of medical care, and that no actions on defendants' part proximately caused plaintiff's alleged injuries.

In opposition to defendant's prima facie showing, plaintiff raises a triable issue of fact with respect to whether Dr. Kastenbaum deviated from the applicable standard of care by utilizing Dall-Miles grips and cables even though he unaware of their exact metallic content, especially given plaintiff's known metal allergy. In addition, plaintiff raises a triable issue of fact with respect to plaintiff's informed consent to the procedure. To be sure, Dr. Berezin highlights that plaintiff had a known allergy to nickel that required Dr. Kastenbaum to guarantee the absence of nickel in any hardware prior to performing the THR. Dr. Berezin further explains that the grips and cables utilized by Dr. Kastenbaum conspicuously list the metallic content of all component parts. As such, Dr. Berezin states that Dr. Kastenbaum cannot disavow his responsibilities as an orthopedic surgeon based upon the perceived deficiencies of a manufacturer's labeling. Moreover, plaintiff states that contrary to Dr. Kastenbaum's testimony, plaintiff was never advised of the fact that Dr. Kastenbaum could not guarantee the absence of nickel prior to performing the procedure. Because plaintiff's subsequent hardware removal was directly linked to Dr. Kastenbaum's implantation of components with nickel-based content (however slight), Dr. Berezin states that defendants' negligence was the proximate cause of the injuries alleged in this lawsuit. As Dr. Berezin's opinion is supported by reference to evidence within the record, it sufficiently raises issues of fact with respect to Dr. Kastenbaum's implantation of hardware without full knowledge of its metallic content, and with respect to plaintiff's informed consent. On the latter claim, it is notable that in order to prevail on a lack of informed consent cause of action a plaintiff must establish the following: (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury (*Figueroa-Burgos v Bieniewicz*, 135 AD3d 810, 811-812 [2d Dept. 2016]).

Here, plaintiff has adequately refuted defendants' claim that plaintiff was specifically informed that Dr. Kastenbaum could not guarantee the metallic contents of the hardware utilized, making a subsequent hardware removal a known consequence of the procedure. To be sure, plaintiff denies ever receiving such information, and annexes support for the proposition that the metallic content of the hardware was readily ascertainable. As that issue cannot be reconciled by this court as a matter of law, an issue of fact has been raised with respect to informed consent that requires resolution by a jury.

However, plaintiff does not challenge defendants' prima facie showing with respect to the cobalt content of the grips and cables, thus entitling defendants to partial summary judgment and dismissal of any and all claims in the complaint and bill of particulars relating to the improper installation of hardware based on its cobalt, rather than nickel, content.

Notably, defendants' challenges to the speculative nature of plaintiff's expert's opinion are without merit. To be sure, plaintiff's expert has adequate credentials, and rendered his opinion based on evidence within the record (*see Atkins v Beth Israel Health Servs.*, 133 AD3d 491 [1st Dept 2015]; *Mustello v Berg*, 44 AD3d 1018 [2d Dept 2007]). The fact that Dr. Windsor disagrees with what the referenced evidence shows does not give this court license to discount plaintiff's expert's opinion. Indeed, the very fact that plaintiff's expert's opinion differs from that proffered by Dr. Windsor illustrates the existence of a triable issue of 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 A.D.3d 1009 [2d Dept 2016] [citations and internal quotation marks omitted]). Instead, the conflicts must be resolved by the fact finder (*id.*). Accordingly, it is hereby

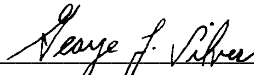
ORDERED that defendants' motion for summary judgment is granted solely to the extent that any and all claims in the complaint and bill of particulars relating to the improper installation of hardware based on its cobalt, rather than nickel, content, are dismissed; and it is further

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

ORDERED that the parties are directed to appear for a virtual or in-person conference before the court (the parties will be further notified of the conferencing approach in advance of the designated date) on June 26, 2020 (time to be determined). This constitutes the decision and order of the court.

This constitutes the decision and order of the court.

Dated: [May 7, 2020](#)

  
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GEORGE J. SILVER, J.S.C.