

Sherman v Gerut

2021 NY Slip Op 33515(U)

March 30, 2021

Supreme Court, Nassau County

Docket Number: Index No. 615836/2018

Judge: Christopher G. Quinn

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 22**

**Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court**

ESTHER SHERMAN,

Plaintiff,

INDEX NO: 615836/2018

MOTION SEQ. No. 1 - MG

-against-

**ZACHARY GERUT, M.D. and ZACHARY
GERUT, M.D., F.A.C.S., P.C.,**

Defendants.

The following papers were read on this motion:

- (1) Notice of Motion/Affirmation/Exhibits A-I**
- (2) Affirmation in Opposition/Exhibits 1-2**
- (3) Reply**

In this medical malpractice action the defendants seek an Order dismissing the claims against them and granting them summary judgment pursuant to CPLR § 3212. Plaintiff opposes.

In her complaint the plaintiff claims that the defendants were negligent in their post-operative care and treatment of her, resulting in permanent injury. Plaintiff, then 30 years old, sought the services of DR. GERUT seeking a conchal otoplasty, or mini tummy tuck, after having had three C-sections. She also sought cosmetic surgery for treatment of her ears, which she felt were protruding. The surgery was performed on December 14, 2017. It consisted of a

conchal otoplasty, surgery for her ears and a suction-assisted lipectomy. As part of the surgery there was an incision along the area of a C-section scar, excising a long lenticular area of skin and tissue. Plaintiff claims that she was injured as a result of defendants' failure to aggressively monitor and drain a seroma "collection of fluid", resulting in permanent damage.

The medical records of the plaintiff reveal that she was seen at her first post operative visit with defendants on December 15, 2017. The dressing on her ears was changed and she was told to return in a week. Plaintiff claims that she developed a seroma and within four days of her surgery reported a fullness of her abdomen to defendant DR. GERUT who saw her on December 18, 2017. DR. GERUT found there was no evidence of hematoma and the suture lines were intact. The doctor attempted an aspiration, but no fluid drained. The doctor told her to come back in a week.

The plaintiff returned on December 22, 2017, four days later. She claims the doctor informed her that there was a seroma under the incision in her abdomen. An aspiration was again attempted but no fluid drained. Plaintiff states that she complained of pain and complained that her left ear still protruded. She was prescribed Analgesics, and told her to come back in a week.

Plaintiff returned on December 26, 2017 at which time she was again diagnosed with a seroma. On this visit the seroma was drained. She claims the defendant told her to return in ten days. She returned three days later on December 29, 2017 at which time her seroma was again drained. It was drained again on January 2, 2018.

Plaintiff claims that she returned to the defendants on January 15, 2018 complaining of a protrusion of her lower abdomen. No more fluid was drained. She claims that the doctor

advised her it was scar tissue and would improve over time. She claims that on February 6, 2018 she saw defendant GERUT who advised her again that she had significant scar tissue. The doctor stated that there was no seroma. She complained about the appearance of her left ear and stated that she thought the dressings had been improperly placed.

On March 6, 2018 the plaintiff and her husband met with defendant GERUT to express their displeasure with the surgical results. There are no medical notes regarding this visit.

In support of their motion for summary judgment the defendants offer an affidavit from a New York State Board Certified plastic surgeon who reviewed the case and records and affirms that DR. GERUT did not breach any duty owed to the plaintiff and did not depart from any good and accepted medical standards of care or practice in his treatment of the plaintiff. The expert states that GERUT did not do anything to cause or exacerbate the plaintiff's alleged injuries. He addresses all forty seven of plaintiff's allegations of malpractice in his affirmation (Motion, Exh. C).

In opposing summary judgment plaintiff provides a document she claims is an expert affirmation. The document states it was created by an unnamed plastic surgeon. It fails to state whether this doctor is licensed in New York, or the United States. The statement is unsigned. The statement reads that upon review of the patient's treatment records, the defendants departed from accepted standards of care in the field of plastic surgery, and that these departures resulted in the plaintiff's injuries. The anonymous writer states that the standard of care for treatment of a seroma is to drain it early and frequently along with compression therapy. It opines that DR. GERUT was not diligent in managing this, allowing the patient to schedule her own appointments. He opines that the patient should have been seen every 48 hours. It does not state that any failure to see the patient every 48 hours is a departure from acceptable standards of care.

It does not state that any other actions or omissions of the defendants was a departure. It does not state what injury was caused by the defendant's treatment of the plaintiff.

Based on the proof and arguments presented, the motion for summary judgment dismissing the complaint is Granted in its entirety.

In this instance the defendants have made a *prima facie* showing that they are entitled to summary judgment as a matter of law based on the respective deposition testimony of the plaintiff and defendants, the medical reports and records, as well as the expert affidavit from the plastic surgeon who states that the defendants' treatment of the plaintiff did not deviate from good and accepted medical practice, and did not cause the injury complained of by the plaintiff [*Bumbaca v. Bonanno*, AD3d (2nd Dept 2007); *Thompson v. Orner*, 36 AD3d 791 (2nd Dept 2007)].

As to the plaintiff's opposition, the Court notes that the unsworn statement, of an unnamed medical doctor, as submitted, fails to raise a triable issue of fact. The only one of plaintiff's claims that he addresses is the alleged negligence by the defendants in the post surgical care of the plaintiff. This statement is insufficient [*Capobianco v. Marchese*, 125 AD3d 914 (2nd Dept 2015); *Colletti v. Deutsch*, 150 AD3d 1196 (2nd Dept 2017)].

As to her claims regarding lack of informed consent, the records presented demonstrate that the plaintiff was fully apprised of all the risks and benefits of her surgery and consented to them. The Court notes specifically that at her deposition she testified that she did not want an abdominoplasty, and that she made it clear to the defendant, yet in her Complaint she alleges he committed malpractice in not performing one (Motion, Exh. D). The fact that the results were

not to her liking, is not an injury. Dissatisfaction with a cosmetic result is not a proper basis for a medical malpractice claim [*James v. Decorato*, 9 NYS 3d 593 (NY SupCt 2015)].

Summary judgment is a drastic remedy which deprives a party to litigate, and his day in Court, and accordingly it should not be granted where there is any doubt as to the existence of a triable issue of fact [*Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978)]. On a motion for summary judgment the moving party must demonstrate, by evidentiary facts, that he is entitled to judgment as a matter of law, whereupon the burden is shifted to the opponent to show that an issue of fact exists [*Piccolo v. De Carlo*, 90 AD2d 609 (3rd Dept. 1982)].

In reviewing a defendant's motion for summary judgment the Court must view the evidence in the light most favorable to the plaintiff and draw all inferences in her favor. The proof presented does not raise a triable issue of fact on this issue [*Roussos v. Cicotta*, 2005 NY App. Div. Lexis 1988 (2nd Dept. 2005)]. The Court finds that plaintiff has failed to come forward in proof, in evidentiary form, establishing that an issue of fact exists as to any alleged negligence on the part of defendant which resulted in her alleged injuries.

Based on the proof and arguments presented, the defendant's motion is Granted.

It is **SO ORDERED**.


HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: March 30, 2021

ENTERED

Apr 02 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE