

<b>Whittle v Chang Soo Kim</b>
2021 NY Slip Op 33581(U)
July 20, 2021
Supreme Court, Westchester County
Docket Number: Index No. 64724/2019
Judge: Linda S. Jamieson
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To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

\_\_\_\_\_  
JASON WHITTLE,

Index No. 64724/2019

Plaintiff,

-against-

DECISION AND ORDER

CHANG SOO KIM, M.D,

Defendant.

\_\_\_\_\_  
X

The following papers numbered 1 to 5 were read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation and Exhibits	1
Statement of Material Facts	2
Affidavit and Affirmation in Opposition	3
Counterstatement of Material Facts	4
Reply Affirmation	5

Defendant brings his motion seeking summary judgment dismissing the complaint in this medical malpractice action.

The facts are not in dispute. After losing a lot of weight, plaintiff went to see defendant in March 2018 to discuss removal of excess skin on his abdomen and chest. In April 2018,

plaintiff executed two eleven-page consent forms,<sup>1</sup> initialing each page and signing at the end to indicate that he understood all of the risks involved in the surgery. The risks were not insignificant. In May 2018, defendant performed the first surgery on plaintiff, which was an "abdominoplasty with rectus muscle plication and liposuction of the abdomen, waist, and chest, and direct excision of gynecomastia through a peri-areolar incision."

In September 2018, plaintiff went back to defendant seeking additional plastic surgery. In November 2018, plaintiff executed a two-page informed consent form, which generically listed the risks of the surgery. In January 2019, defendant performed the second surgery on plaintiff. In March 2019, plaintiff again sought surgery from defendant. In April 2019, he signed another two-page consent form, and defendant performed a third surgery. Plaintiff's complaints arise from the results of this last surgery.

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<sup>1</sup>At his deposition, plaintiff repeatedly denied discussing the risks of the surgery with defendant. Defendant testified to the contrary. Regardless of their differing deposition testimony, the fact is that plaintiff initialed and signed these lengthy and detailed consent forms.

A review of plaintiff's expert's report<sup>2</sup> reveals that plaintiff has abandoned all claims arising from anything other than the third surgery. Specifically, plaintiff's expert states in the report that, when discussing the possibility of a third surgery, that "It is here that I am of the opinion that Dr. Kim's care and treatment of Mr. Whittle began to deviate from accepted standards of care. . . . It is my opinion, within a reasonable degree of medical certainty, that Dr. Kim should have advised Mr. Whittle against having a third surgery (the second revision surgery) on April 15, 2019." All claims relating to the other surgeries and treatment are thus dismissed.

#### Analysis

"A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact with respect to at least one of the elements of a

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<sup>2</sup>Defendant argues that the Court should ignore plaintiff's expert's affidavit because the doctor's name has been redacted. While there is caselaw that supports this position, *Colletti v. Deutsch*, 150 A.D.3d 1196, 1198, 54 N.Y.S.3d 657 (2d Dept. 2017) ("A redacted physician's affidavit should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify the expert by name and does not tender an unredacted affidavit for in camera review. Such an affidavit is insufficient to raise a triable issue of fact."), in this action plaintiff did offer an explanation and to produce it to the Court ("The original signature on the expert's Affidavit of Merit has been redacted pursuant to CPLR Section 3101(d) but can be submitted to the court for in-camera inspection upon request."). The Court thus considers the affidavit since if it had wanted to see the doctor's name, it merely had to ask.

cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries. Where a defendant physician makes a prima facie showing on both elements, the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element." *Rosenthal v. Alexander*, 180 A.D.3d 826, 827, 118 N.Y.S.3d 658, 659 (2d Dept. 2020).

In this action, defendant has made such a showing with respect to the third surgery. Defendant testified that he discussed the risks of the third surgery with plaintiff extensively, and his expert contends that he performed it according to the accepted community standards of practice.

In opposition to this prima facie showing, however, plaintiff argues that they did not have a detailed discussion of the risks involved. A review of the informed consent form for this surgery demonstrates that, contrary to the lengthy forms that plaintiff signed in connection with the first surgery, this time it was merely a generic form with the name of the surgery handwritten in. The issue of informed consent must thus be left to a jury. *Walker v. Saint Vincent Cath. Med. Centers*, 114 A.D.3d 669, 670-71, 979 N.Y.S.2d 697, 699 (2d Dept. 2014) ("the fact that the plaintiff signed a consent form does not establish

Blackman's entitlement to judgment as a matter of law. The consent form signed by the plaintiff was generic, and aside from a handwritten notation that the plaintiff was consenting to 'right inguinal hernia repair,' it did not contain any details about the operation. The form did not disclose the risks specific to the hernia repair operation, or alternatives to that operation."). The Court must deny the motion on the issue of informed consent.

The Court also must deny the motion with respect to the manner in which defendant performed the third surgery. Defendant ignores plaintiff's expert's statement that by removing the fascia, which defendant admittedly did, he deviated from the accepted standards of care. According to plaintiff's expert, and unaddressed by defendant's expert, "Fascia is the layer of fibrous connective tissue that surrounds muscles, blood vessels and nerves. It is a band or sheath of connective tissue, primarily collagen beneath the skin that attaches, stabilizes, encloses and separates muscles and other internal organs. The fascia removed by Dr. Kim was the protective tissue between the skin and muscle. Removal of the fascia left the skin adherent to the muscle. This creates an unnatural situation as tissues become stuck down and cause discomfort. The chest will appear sunken in and adherent to underlying tissue. The skin will no longer glide naturally over the underlying musculature with arm,

shoulder and neck motion. This is precisely what occurred in this case." A jury must decide whether this was malpractice or not.

Accordingly, the motion is denied with respect to the third surgery, but granted with respect to all other claims of medical malpractice.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
July 20, 2021



HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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