

**Rodriguez v Malik**

2021 NY Slip Op 33983(U)

September 28, 2021

Supreme Court, Queens County

Docket Number: Index No. 716519 2019

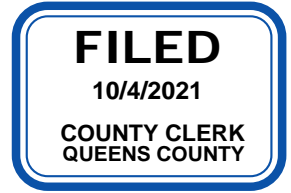
Judge: Peter J. O'Donoghue

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE PETER J. O'DONOGHUE  
Justice

IA Part MD

DENISE RODRIGUEZ,  
  
Plaintiffs,  
  
- against -

Index  
Number 716519 2019  
  
Motion  
Date June 2, 2021

SAJID MALIK, M.D. and MALIK EYE CARE,

Motion Seq. Nos. 1

The following papers read on this motion by defendants Sajid Malik, M.D. and Malik Eye Care for an order granting summary judgment dismissing the complaint and directing the Clerk of the Court to enter judgment accordingly.

Papers  
Numbered

Notice of Motion-Affidavit-Affirmation-Exhibits-Statement of Material Facts- Memorandum of Law-Affidavit of Service.....	EF 21-36
Opposing Affirmations- Affidavit (Exhibits)-Memorandum of Law-Statement of Material Facts-Affidavit of Service.....	EF 40-45
Reply Affirmation.....	

Upon the foregoing papers the motion is determined as follows:

Plaintiff Denise Rodriguez commenced the within action to recover damages for medical malpractice and lack of informed against defendant Sajid Malik, M.D. an ophthalmologist, and Malik Eye Care, arising from cataract surgery that Dr. Malik performed on the plaintiff on March 15, 2019. The complaint, as amplified by the bills of particulars, alleges that defendants committed medical malpractice by failing to properly detect, suspect, evaluate, diagnose and/or treat plaintiff's medical condition; failing to take an accurate

history; failing to perform necessary and/or adequate diagnostic tests and/or procedures; failed to prescribe and or administer appropriate medication; allowed plaintiff's medical condition to deteriorate, thereby worsening her medical condition; failing to provide timely treatment; failing to timely and/or properly seek or obtain proper and/or necessary evaluation, treatment, assistance or consultation regarding plaintiff's condition; failing to properly chart entries; failing to properly perform surgery of the right eye; performing unnecessary, traumatic, improper and/or inadequate surgery; by failing to obtain informed consent from plaintiff and/or her family concerning the surgical procedure; failing to warn of the risks of the procedure performed; and failing to recommend, prescribe and/or administer alternative treatments for the plaintiff's medical condition.

“In a medical malpractice action, a defendant moving for summary judgment bears the initial burden of establishing either that there was no departure from good and accepted medical practice or that any departure was not a proximate cause of the plaintiff's injuries” (*Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). “ ‘In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars’ ” (id. at 660, quoting *Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 [2d Dept 2019]). To rebut the defendant's prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert's allegations (see *Pirri-Logan v Pearl*, 192 AD3d 1149 [2d Dept 2021]; *DiLorenzo v Zaso*, 148 AD3d 1111, 1112 [2d Dept 2017]). “Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions” (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]). “General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion” (*Pirri-Logan v Pearl*, 192 AD3d at 1149, quoting *Myers v Ferrara*, 56 AD3d 78, 84 [2d Dept 2008]).

“To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (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” (*Pirri-Logan v Pearl*, 192 AD3d at 1149, quoting *Godel v Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 A.D.3d 939, 941–942 [2d Dept 2017][internal quotation marks omitted]; see Public Health Law § 2805–d). While the signing of a generic consent form by the plaintiff does not establish that a defendant is entitled to summary judgment (see *Godel v Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 AD3d at 942), a defendant can establish entitlement to

summary judgment by demonstrating that the plaintiff signed a detailed consent form after being apprised of alternatives and foreseeable risks, by demonstrating that a reasonably prudent person in the plaintiff's position would not have declined to undergo the surgery, or by demonstrating that the actual procedure performed for which there was no informed consent was not a proximate cause of the injury (*see Gilmore v Mihail*, 174 AD3d at 688; *Khosrova v Westermann*, 109 AD3d 965, 967 [2d Dept 2013]; *Johnson v Staten Is. Med. Group*, 82 AD3d 708, 709–710 [2d Dept 2011]).

Here, defendants have established their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleges a claim for medical malpractice by submitting an expert affirmation from Robert Cykiert, M.D., a physician licensed in the State of New York and board certified in ophthalmology. The affirmation sets forth a detailed account of the plaintiff's diagnosis and treatment by defendants beginning in January 2009, and the cataract surgery performed based upon the medical records, Dr. Malik's operative report, the post-operative medical records, and the parties' deposition testimony. Dr. Cykiert opines with a reasonable degree of medical certainty that the March 15, 2019, surgery did not depart from good and accepted standards of medical practice and was not a proximate cause of the injured plaintiff's injuries, and he specifically rebutted each allegation made in the plaintiff's bills of particulars (*see Pirri-Logan v Pearl*, 192 AD3d at 1149; *Gilmore v Mihail*, 174 AD3d 686, 687 [2d Dept 2019]; *Khosrova v Westermann*, 109 AD3d 965, 966 [2d Dept 2013]; *Andreoni v Richmond*, 82 AD3d 1139, 1139 [2d Dept 2011]). Defendants' expert opines with a reasonable degree of medical certainty that "performing cataract surgery in this case was appropriate and in conformity with accepted standards of good medical practice because her cataract was progressing and significantly interfering with her vision". He further states that "in a patient with corneal guttata that may progress to corneal endothelial dystrophy, it is usually best to operate on the cataract sooner rather than later, because as the cataract progresses it becomes more difficult to remove it and the surgery puts more stress and risk on the cornea."

This Court finds that with respect to the claim of medical malpractice, as amplified by the bill of particulars, plaintiff's expert her treating physician Douglas Buxton, licensed in the State of New York, and board certified in ophthalmology, cataract/implant surgery, penetrating keratoplasty and laser in situ keratomileusis (Lasik) has failed to address each of the specific assertions made by the defendant's expert (*see Gilmore v Mihail*, 174 AD3d at 687–688). To the extent that Dr. Buxton opines with a reasonable degree of medical certainty that performing cataract surgery on plaintiff's right eye, "rather than continuing to monitor her vision, especially when Mrs. Rodriguez was not properly advised of the actual risks, was a departure from good medical practice and a proximate cause of the injuries/complications she thereafter sustained to her right eye", goes to the claim of lack of informed consent and not that of medical malpractice. To the extent that he opines that

surgery was not indicated, said statement is speculative and conclusory and is not supported by the evidence in the record. Plaintiff, thus, has failed to raise a triable issue of fact with respect to the claim for medical malpractice.

In opposition, plaintiff’s expert Dr. Buxton opines that Dr. Malik departed from good medical practice by failing to properly and fully explain the enhanced risks plaintiff faced with cataract surgery due to her pre-existing Fuchs’ Dystrophy, including the likelihood that she would develop irreversible corneal edema post-operatively, require additional treatment including a corneal transplant and be at risk for other related complications or refrain from performing cataract surgery and continuing monitoring the patient’s cataract and the progression of her vision. Dr. Buxton opines, based upon the standard consent form, plaintiff’s medical history, and the parties’ deposition testimony, Dr. Malik failed to explain the specific risks and related complications of irreversible corneal edema and the need for a corneal transplant. He states that prior to cataract surgery plaintiff’s vision in her right eye was “less than perfect but functional”, and that defendants’ failure to adequately explain the risks did not permit her to exercise informed consent. Dr. Buxton opines that if plaintiff “was adequately informed of the risks she faced she would have refused that surgery”. He further opines that said departures were competent producing causes of the injuries/complications plaintiff sustained in right eye after her cataract surgery on March 15, 2019.

With respect to the claim of lack of informed consent, although defendants’ expert opines that Dr. Malik informed the plaintiff of the alternatives and risks of the surgery, and that her injuries were not caused by a lack of informed consent, he does not opine that a reasonably prudent patient in the same position as the plaintiff would not have undergone cataract surgery if she had been fully informed. Rather, defendants’ expert opines that “the majority of patients with corneal guttata and Fuchs’ dystrophy and operable cataracts agree to undergo cataract surgery despite the relatively low risk of aggravation of Fuchs’ dystrophy and the possibility of additional surgery”. The governing standard, however, is not whether a majority of patients in the patient’s position would not have declined to undergo surgery.

Accordingly, defendants’ motion is granted insofar as it seeks to dismiss the first cause of action for medical malpractice is granted and is denied as to the second cause of action for lack of informed consent. The Clerk of the Court is directed to enter a judgment dismissing only the first cause of action for medical malpractice.

Dated: September 28, 2021

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J.S.C.

