Walker v Rosenfeld Plastic Surgery
2021 NY Slip Op 34149(U)
December 23, 2021
Supreme Court, Queens County
Docket Number: Index Number 715338/2017
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

CHEVIE WALKER, x

Plaintiff,

-against-

ROSENFELD PLASTIC SURGERY, NACHMAN ROSENFELD, M.D.,P.C. and NACHMAN ROSENFELD, M.D.,

Defendants.
x

Index Number 715338 2017

Motion Date August 18, 2021

Motion Seq. No. 12

The following numbered papers have been read on this motion by defendants seeking summary judgment dismissing plaintiff's complaint, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavit - Exhibits	EF 145-E176
Answering Affidavit - Exhibits	EF 177-E196
Reply Affirmation	EF 197

Defendants' motion for summary judgment is **granted** as set forth below.

Plaintiff seeks damages for personal injuries allegedly resulting from the medical care and treatment rendered by defendants, for the purpose of performing an abdominoplasty, umbilicus revision, and liposuction in 2015. Plaintiff commenced this action, pro se, in November 2017 by the service of a summons and complaint, alleging causes of action for medical malpractice, negligence, and lack of informed consent, among others. Answers on behalf of the defendants were served. In November 2018, plaintiff discontinued the action against defendant, New York Surgery Center Queens, and served an amended summons and complaint against the Rosenfeld defendants in April 2019. A bill of particulars, and two amended bills of particulars, were served in late December 2019 and early February 2020.

Plaintiff has been deposed, and defendants have responded to plaintiff's interrogatories. Defendant, Nachman Rosenfeld, is the principal of defendants, Rosenfeld Plastic Surgery, and Nachman Rosenfeld, M.D., P. C. Defendants seek summary judgment dismissing plaintiff's complaint, by asserting "that there was no departure from good and accepted medical practice, or that the plaintiff was not injured thereby" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; *see Huichun Feng v Accord Physicians, PLLC,* 194 AD3d 795 [2d Dept 2021]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Only if a prima facie demonstration has been made, does the burden shift to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see Alvarez v Prospect Hospital*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Roos v King Constr.*, 179 AD3d 857 [2d Dept 2020]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact (*see Ayotte v Gervasio*, 81 NY2d 1062; *Khadka v American Home Mortg. Servicing, Inc.*, 139 AD3d 808 [2016]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

By submitting the affidavits or affirmations of medical experts, who through review of the medical records conclude that defendants' treatment of plaintiff were consistent with the good and accepted standards of medical care, and that no lack of care or alleged omission was a proximate cause of, or contributing factor to, plaintiff's injuries, defendants can meet their prima facie burden (*see Larcy v Kamler*, 185 AD3d 564 [2d Dept 2020]; *Williams v Nanda*, 177 AD3d 938 [2d Dept 2019]; *Michel v Long Island Jewish Medical Center*, 125 AD3d 945 [2015]). Here, defendants established prima facie entitlement to summary judgment based on the submission of office records, signed authorizations and consent forms, and operative reports, all exchanged previously, and of Nachman Rosenfeld's own affidavit, opining "to a reasonable degree of medical certainty," and "which (was) detailed, specific, and factual in nature indicating that (his) treatment of ... plaintiff did not depart from good and accepted medical practice (*Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *see Marine v Camissa*, 107 AD3d 672 [2d Dept 2013]; *Makinen v Torelli*, 106 AD3d 782 [2d Dept 2013]).

"In order to establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant[ ] breached that standard of care, and (3) that the breach of the standard was the proximate cause of the injury" (*Deadwyler v North Shore Univ. Hosp. At Plainview*, 55 AD3d 780, 781 [2d Dept 2008] [internal quotation marks omitted]; *see Rucigay v Wyckoff Hgts. Med. Ctr.*, 194 AD3d 865 [2d Dept 2021]; *Pieter v Polin*, 148 AD3d 1193 [2d Dept 2017]). "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (*Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1000 [2d Dept 2016]; *see Aaron v Raber*, 188 AD3d 967 [2d Dept 2020]).

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person may conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury" (*Berger v Shen*, 185 AD3d 539, 541 [2d Dept 2020] quoting *Gaspard v Aronoff*, 153 AD3d 795, 796 [2d Dept 2017]; *see Hilt v Carpentieri*, 198 AD3d 625 [2d Dept 2021]; *Bacchus-Sirju v Hollis Women's Ctr.*, 196 AD3d 670 [2d Dept 2021]). Plaintiff's medical expert's opinion would be sufficiently stated even if he or she "is unable to quantify the extent to which defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury" (*Lopes v Lenox Hill Hosp.*, 172 AD3d 699, 702 [2d Dept 2019] quoting *Gaspard v Aronoff*, at 796-797; *see Walsh v Akhund*, 198 AD3d 1010 [2d Dept 2021]).

In the case at bar, plaintiff proffered the affidavit of Douglas A. Taranow, D.O., FACOS, a plastic surgeon, sworn to on August 11, 2021, who opined that "ANY surgeon who fails to obtain cultures for a post surgical patient who develops foul smelling drainage

which lingers days-weeks is in deviation of the accepted standards of care." While such an expert opinion is sufficient to raise an issue of fact as to a possible "deviation" on the part of defendants, it is devoid of any mention of whether such "deviation" caused plaintiff's alleged injuries. As both elements, *i.e.*, a deviation and proximate cause, are required, plaintiff has failed to adduce the requisite expert testimony to establish a connection between the alleged departure from the accepted standards of care, and plaintiff's injuries (*see Berger v Shen*, at 542; *Kelly v New York City Health & Hosps. Corp.*, 194 AD3d 1032 [2d Dept 2021]). Further, such affidavit fails to address the additional issues raised by plaintiff regarding defendants' alleged failures to obtain informed consent; to advise plaintiff of foreseeable risks, etc., of the surgical procedures performed; to advise plaintiff of alternative methods; and/or to treat plaintiff with alternative methods.

While "[s]ummary judgment may not be awarded in a medical malpractice action where the parties adduce conflicting opinions of medical experts, which present a credibility question requiring a jury's resolution" *(Berger v Hale*, 81 AD3d 766, 766 [2011]; *see Pistone v American Biltrite, Inc.*, 194AD3d 1085 [2d Dept 2021]; *Elstein v Hammer*, 192 AD3d 1075 [2d Dept 2021]; *Cox v Herzog*, 192 AD3d 757 [2d Dept 2021]; *Macancela v Wyckoff Hgts. Med. Ctr.*, 175 AD3d 795 [2d Dept 2019]), such is not the factual situation herein. Here, plaintiff's opposition fails to rebut defendants' entitlement to summary judgment, and defendants' motion is granted.

Plaintiff's remaining contentions are either without merit, or need not be addressed in light of the foregoing determination.

Accordingly, the motion by defendants, seeking summary judgment dismissing plaintiff's complaint, is granted.

Dated: December 23, 2021

HON. CHEREE A. BUGGS, J.S.C.

FILED
12/27/2021
COUNTY CLERK
QUEENS COUNTY