

Depompe v Al Moutran
2022 NY Slip Op 34141(U)
December 2, 2022
Supreme Court, New York County
Docket Number: Index No. 805066/2014
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS PART 10M

Justice

-----X

SCOTT DEPOMPE,

Plaintiff,

- v -

HOMERE AL MOUTRAN, M.D., PETER D. CONSTANTINO,
M.D., NEW YORK HEAD AND NECK INSTITUTE and
LENOX HILL HOSPITAL,

Defendants.

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INDEX NO. 805066/2014

MOTION DATE 05/13/2022,
05/13/2022

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 116, 118, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 119, 149, 151, 152, 153

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument held before this court on October 15, 2022, the court grants Defendants Homere Al Moutran, M.D.’s (“Al Moutran”) and Lenox Hill Hospital’s s/h/a New York Head and Neck Institute’s (“NYHNI”) and Lenox Hill Hospital’s (“Lenox Hill”) motion for summary judgment dismissal of Plaintiff Scott Depompe’s (“Plaintiff”) complaint, filed under motion sequence 002.

Additionally, the court grants in part Defendant Peter D. Costantino, M.D.’s s/h/a Peter D. Constantino, M.D.’s (“Costantino”) motion for summary judgment to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff’s medical malpractice claim, but denies dismissal of Plaintiff’s lack of informed consent claim.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendants Dr. Al Moutran, Lenox Hill, NYHNI and Dr. Costantino (collectively, “Defendants”) regarding his care and treatment involving a surgery to remove two titanium plates around his left eye on August 25, 2011, at Lenox Hill. Plaintiff was a professional boxer and he suffered a fractured left cheek. In 2004, he had surgery requiring two periorbital plates. Plaintiff wanted to remove the plates because he had discomfort, a bulge in the area and he wanted to return to boxing. Plaintiff alleges in substance that Defendants deviated from accepted standards of medical practice in the pre-operative evaluation and performance of the surgery and that their actions or inactions were the proximate cause of his injuries. Plaintiff further alleges that Defendants’ negligence caused him to suffer entropion, which caused his left lower eyelid to turn inward and his lower left eyelashes to rub against the surface of his left eye.

Defendants Dr. Al Moutran, Lenox Hill and NYHNI now move for summary judgment dismissal of Plaintiff’s complaint under motion sequence 002. The movants rely on the expert affirmation of Dr. David I. Kutler and argue in substance that all of Plaintiff’s allegations of negligence were attributable to Dr. Costantino, who was the attending surgeon in charge of Plaintiff’s care, and not Dr. Al Moutran, who was a fellow under the direct supervision and control of Dr. Costantino. Additionally, the movants argue that Dr. Al Moutran was not negligent in his care and treatment of Plaintiff, he made no independent medical decisions, he followed the directions provided to him by Dr. Costantino and there were no independent negligent acts or omissions committed by Dr. Al Moutran.

The movants further argue that Dr. Costantino is not an employee of Lenox Hill or NYHNI, so Lenox Hill and NYHNI cannot be held vicariously liable for Plaintiff’s injuries caused by Dr. Costantino’s alleged negligence. Additionally, the movants argue that no Lenox

Hill or NYHNI employee committed any independent negligent act or omission and they properly carried out all reasonable medical tasks as instructed by Dr. Costantino.

Defendant Dr. Costantino moves for summary judgment dismissal of Plaintiff's complaint under motion sequence 003. Dr. Costantino relies on the expert affirmation of Peter Rubin, M.D. and argues in substance that he did not deviate from good and accepted standards of medical care when he treated Plaintiff, including his performance of the elective periorbital plate resection surgery on August 25, 2011, and his pre-operative and post-operative care from May 2, 2011 to October 3, 2011. Dr. Costantino further argues that Plaintiff's entropion is a known risk of the procedure. He argues that Plaintiff's informed consent in conformance with accepted standards of care was obtained prior to the procedure, that he advised Plaintiff multiple times of the risks, benefits and alternatives to the proposed surgery, which included entropion, ectropion, scarring, and the risk that he may not be able to remove the plates in their entirety.

Dr. Costantino also argues that Plaintiff signed a written surgical consent form, which included the following:

the purpose of the surgical procedure(s)/invasive test(s)/procedure(s) and/or treatment(s) has/have been explained to me and I have also been informed of the expected benefits and possible complications, attendant discomforts and risks that may arise, as well as possible alternatives to proposed treatment, including no treatment. The attendant risks of no treatment have also been discussed. I have been given an opportunity to ask questions, and all of my questions have been answered fully and satisfactorily.

Dr. Costantino also argues that none of his alleged departures were the proximate cause of Plaintiff's alleged injuries. He further argues that Plaintiff's expert affirmation is conclusory, speculative, unsupported by the evidence and is insufficient to have any probative value.

Plaintiff only opposes the portions of Lenox Hill's, NYHNI's and Dr. Costantino's motions regarding Plaintiff's lack of informed consent claim. Plaintiff fails to oppose Dr. Al

Moutran's motion or the portions of the motions seeking dismissal of Plaintiff's medical malpractice claim.

As to his lack of informed consent claim, Plaintiff relies on his expert affirmation from an ophthalmological surgeon and argues in substance that Defendants Dr. Costantino, Lenox Hill and NYHNI failed to make a prima facie showing of entitlement to summary judgment in their favor, that their experts' affirmations are conclusory and insufficient and that Plaintiff's expert's opinion raised triable issues of fact.

Plaintiff further argues that Defendants Dr. Costantino, Lenox Hill and NYHNI had a duty to disclose to Plaintiff the well-known and reasonably foreseeable risks of the surgery, including the risk of developing post-operative entropion at his left lower eyelid, the risk that they might not be able to remove the titanium plates from his left orbit, and that Plaintiff had an increased risk of developing these post-operative complications because of his previous surgery in 2004. Plaintiff further argues in substance that Defendants failed to advise him of such risks and had they done so, then he, or any reasonable patient, would not have consented to undergo this elective surgery.

Plaintiff further argues that Defendants' failure to obtain Plaintiff's informed consent prior to the surgery was a proximate cause of his injuries, which included entropion, and its associated sequelae, including trichiasis; posterior lamellar shortening; scleral show; constant pain, irritation, discomfort, redness, and dryness at the plaintiff's left eye; orbicularis overriding; blurry vision; photophobia; and corneal irritation and corneal abrasion; among other conditions. Plaintiff further alleges in substance that he continues to require treatment, including medication to his left eye, painful plucking of his lower eyelashes and he wears tape to pull the inverted eyelid away from his eyeball.

Plaintiff further argues that the medical records do not mention that entropion is a known risk of the procedure, nor do they mention canthotomy or canthopexy. Additionally, a pre-operative surgical risk form is missing or did not exist and it was Dr. Costantino's usual custom and practice of his office, NYHNI, to have the patient sign the form. Plaintiff also argues that Defendants failed to produce a surgery packet that was supposedly provided to Plaintiff. Plaintiff argues that the consent form was generic and did not mention the type of procedure performed, nor any risks of the procedure. Plaintiff further argues that Dr. Costantino repeatedly advised him that the surgery would be simple, quick and without any surgical risks or complications.

Furthermore, Plaintiff argues that his deposition testimony and the testimony of his parents and friend demonstrate that neither Dr. Costantino, nor any Lenox Hill physician, discussed any surgical risks with Plaintiff while he was present in the pre-surgical area and Plaintiff disputes Dr. Costantino's claims that he fully advised Plaintiff of the risks.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical malpractice action, a defendant doctor or provider moving for summary judgment must establish 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]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, 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 the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the

defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1st Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]; CPLR 3212[b]).

In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment,

but not for negligent treatment provided by an independent physician who is retained by the patient himself (*see e.g. Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

For a plaintiff to prevail on a lack of informed consent claim, “a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff’s circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff’s) injuries” (*see Public Health Law § 2805-d; Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

A lack of informed consent claim is limited "to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (*see Public Health Law § 2805-d[2]; Ortiz v Vernenkar*, 101 AD3d 637, 637-638 [1st Dept 2012]).

As to motion sequence 002, the court finds that Defendants Dr. Al Moutran, Lenox Hill and NYHNI demonstrated their prima facie entitlement to summary judgment in their favor as a matter of law and Plaintiff failed to raise a triable issue of fact sufficient to defeat this motion. As mentioned above, Plaintiff failed to oppose the motion as to Dr. Al Moutran and his medical malpractice claims against any defendant.

The court finds that the movants demonstrated that Dr. Costantino was the attending physician responsible for Plaintiff’s care and treatment and that, as a fellow, Dr. Al Moutran, was supervised by Dr. Costantino and there were no independent negligent acts or omissions on the part of Dr. Al Moutran. The movants also demonstrated that at all relevant times, Dr. Costantino was employed by North Shore University Hospital, which is a distinct entity from

Lenox Hill Hospital or NYHNI. Therefore, Lenox Hill and NYHNI are not vicariously liable for Dr. Costantino's alleged negligence.

Additionally, the court finds that Plaintiff failed to raise a material issue of fact regarding any independent negligent acts or omissions committed by any of Lenox Hill's or NYHNI's employees. Also, Lenox Hill and NYHNI are not responsible for obtaining Plaintiff's informed consent prior to the procedure, but that Dr. Costantino, as a private physician/treating surgeon, was responsible for doing so.

Therefore, the court grants Defendants Dr. Al Moutran's, Lenox Hill's and NYHNI's motion for summary judgment in their favor and the court dismisses the complaint against them.

As to motion sequence 003, the court finds that Dr Costantino demonstrated his prima facie entitlement to summary judgment in his favor as a matter of law. Although Plaintiff failed to oppose Dr. Costantino's motion as to Plaintiff's medical malpractice claim, Plaintiff raised triable issues of fact as to Plaintiff's lack of informed consent claim against Dr. Costantino. Therefore, the court grants the portion of the motion seeking dismissal of Plaintiff's medical malpractice claim, but denies the portion of the motion seeking dismissal of Plaintiff's lack of informed consent claim.

The court finds that Plaintiff demonstrated that several triable questions of fact remain regarding whether Dr. Costantino properly obtained Plaintiff's informed consent in accordance with good and accepted medical practice prior to the procedure, including, but not necessarily limited to, whether he properly and adequately advised Plaintiff of the reasonably foreseeable risks of the procedure, including, but not necessarily limited to, entropion. Furthermore, the court finds that Plaintiff's expert's affirmation is sufficient to support Plaintiff's claims that questions of fact exist requiring a trial in this action as to Plaintiff's lack of informed consent claim.

Therefore, the court grants Dr. Costantino's motion in part to the extent that the court dismisses Plaintiff's medical malpractice claim against Dr. Costantino, but denies dismissal of Plaintiff's lack of informed consent claim against Dr. Costantino.

The court has considered any additional arguments raised by the parties, but not specifically addressed herein and denies any requests for relief, not specifically granted herein.

As such, it is hereby

ORDERED that, as to motion sequence 002, the court grants Defendants Homere Al Moutran, M.D.'s and Lenox Hill Hospital's s/h/a New York Head and Neck Institute's and Lenox Hill Hospital's motion for summary judgment; dismisses Plaintiff Scott Depompe's complaint as against Defendants Homere Al Moutran, M.D., New York Head and Neck Institute and Lenox Hill Hospital; and directs the Clerk of the Court to enter judgment in favor of Defendants Homere Al Moutran, M.D., New York Head and Neck Institute and Lenox Hill Hospital as against Plaintiff Scott Depompe, without costs to any party; and it is further

ORDERED that, as to motion sequence 003, the court grants in part Defendant Peter D. Costantino, M.D. s/h/a Peter D. Constantino, M.D.'s motion for summary judgment to the extent that the court grants the portion of the motion seeking dismissal of Plaintiff Scott Depompe's medical malpractice claim and the court dismisses this claim, but the court denies dismissal of Plaintiff Scott Depompe's lack of informed consent claim against Defendant Peter D. Costantino, M.D.; and it is further

ORDERED that the court severs and continues Plaintiff Scott Depompe's lack of informed consent claim against Defendant Peter D. Costantino, M.D.; and it is further

ORDERED that the court amends the caption in this matter to delete the names of the defendants for whom dismissal was granted and to correct the spelling of Dr. Peter D.

Costantino, M.D.’s last name and the court directs the Clerk of the Court to amend the caption to the following:

-----X
SCOTT DEPOMPE,

Plaintiff,

-against-

PETER D. COSTANTINO, M.D.,

Defendant.

-----X
and it is further

ORDERED that counsel for Defendants Homere Al Moutran, M.D. and Lenox Hill Hospital s/h/a New York Head and Neck Institute and Lenox Hill Hospital shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within twenty (20) days of the date of this order, who is directed to mark the court’s records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that the remaining parties are directed to appear for a status conference, settlement conference and to set a trial date on February 9, 2023, at 9:30 a.m. in Part 10, located at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.


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12/2/2022
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: