SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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AREVIK KHURDAYAN,

Plaintiff,

- v -

RAMTIN KASSIR, M.D., NY SNORING AND SINUS CLINIC, NY SNORING AND SINUS, P.C., NEW YORK SNORING AND SINUS MEDICAL TREATMENT, P.C., PARK AVENUE PLASTIC SURGERY, PLLC, DANIELLE TOSI, and DANIELLE TOSI, M.D. LLC,

Defendants.

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INDEX NO. 159480/2017

MOTION DATE 08/30/2022

MOTION SEQ. NO. 009

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 276, 277, 278, 279, 281, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293

were read on this motion to/for SUMMARY JUDGMENT/PRECLUDE EXPERT .

The court's prior decision and order on motion, dated December 7, 2022, is recalled and vacated, upon the court's own motion, in order to correct the last sentence in Section V(C), to amend the decretal paragraph properly to describe the motion, and to correct typographical errors, and the following amended order is substituted therefor:

I. INTRODUCTION

This is an action, inter alia, to recover damages for breach of contract, medical malpractice based on departures from good and accepted practice, lack of informed consent, and fraud premised upon forgery. The defendants Ramtin Kassir, M.D., NY Snoring and Sinus Clinic, NY Snoring and Sinus, P.C., New York Snoring and Sinus Medical Treatment, P.C., and Park Avenue Plastic Surgery, PLLC (collectively the Kassir defendants), move pursuant to CPLR 3126 to preclude the plaintiff from relying upon her retained experts, and thereupon pursuant to CPLR 3212 for summary judgment dismissing, insofar as asserted against them, all

of the causes of action remaining in the amended complaint. The plaintiff opposes the motion. The motion is denied.

II. FACTUAL BACKGROUND

The crux of the plaintiff's claim is that, in February 2016, she underwent what she believed to be rhinoplasty for cosmetic purposes and septoplasty to straighten a deviated septum, that the Kassir defendants only performed rhinoplasty, and that someone forged her signature on numerous informational and consent forms by employing one non-genuine signature that was electronically auto-populated into numerous forms and documents. She claimed that, inasmuch as the Kassir defendants did not actually perform the septoplasty, she unnecessarily sustained continued and ongoing problems with breathing, nasal congestion, and impediments to nasal drainage that should have been addressed by the February 2016 surgery. She further claimed that, as a consequence, she was compelled to undergo an otherwise unnecessary second surgery, by a different physician, to rectify her deviated septum.

The Kassir defendants denied that they departed from good and accepted medical practice in performing the procedure that they performed or that anything that they did or did not do caused or contributed to any of the plaintiff's claimed injuries. They asserted that Kassir actually removed tissue from the plaintiff's septum during surgery, and that the essence of her claim is that Kassir did not perform any surgical procedure on her sinuses or on the elements of her ostiomeatal complex---forms of treatment that were not agreed upon that were the only procedures that could have corrected the plaintiff's breathing and nasal congestion problems. They further contended that they obtained the plaintiff's fully informed consent to all medical procedures, that the plaintiff knew that there was a possibility that a complete septoplasty might not be performed, and that they did not forge her signature on any documents, electronic or otherwise.

By order dated June 5, 2020, the court (Madden, J.) dismissed the causes of action to recover for engagement in deceptive business practices in violation of General Business Law §§

340 and 350 (second cause of action), fraud and fraudulent inducement premised upon alleged misrepresentations by the defendants (third cause of action), unjust enrichment (fourth cause of action), and promissory estoppel (fifth cause of action), and severed the remaining causes of action, which seek to recover for breach of contract, medical malpractice, lack of informed consent, and fraud premised upon forgery.

On November 19, 2013, Dr. Daniel B. Kuriloff had diagnosed the plaintiff with a deviated septum, but informed her that this condition might or might not be the cause of her reported breathing and nasal congestion problems. The plaintiff first contacted Kassir in June 2015, and first met with him on August 11, 2015, after having conducted independent lay research into septoplasty and rhinoplasty procedures. She sought advice from him concerning those procedures, including whether they were appropriate for her and the nature of any adverse effects, and further inquired about Kassir's experience and the cost of the procedures. The plaintiff completed and signed a patient questionnaire on her first visit with Kassir that, among other things, mentioned "Mona Lisa Cosmetic Surgery Center." Although the plaintiff conceded that the words "Mona Lisa" appeared at the very bottom of the second page of the two-page patient questionnaire; she asserted that the heading of both pages of the questionnaire stated, in much larger, all-capital-letter, boldface type, the names "NEW YORK SNORING & SINUS," followed on the next line, also in larger, all-capital-letter type, by "RAMTIN KASSIR, M.D., F.A.C.S." Kassir's administrative assistant, Araksya Hovespyan, a receptionist and cosmetic coordinator, took photographs of the plaintiff's face to show her the current cosmetic appearance of her nose and to "morph" the appearance of her nose to display how she might look after cosmetic surgery, although the parties dispute whether the photographs also were taken for the purpose of visualizing the plaintiff's septum. According to the plaintiff, at that consultation, Kassir assured her that if her septum was, in fact, deviated, he would straighten it.

The plaintiff thereafter returned to Kassir's office on December 22, 2015, at which time he advised her of the indications, risks, and benefits of, and alternatives to, a septo-rhinoplasty

procedure. The parties vigorously dispute whether the plaintiff consented to proceed with the procedures as she understood them, or as the Kassir defendants claim to have understood them, or as they may have been described in relevant consent forms.

According to the Kassir defendants, the plaintiff evinced her understanding that those procedures might result in an unsatisfactory cosmetic appearance or a recurrence of her original breathing and congestion disorders, although the plaintiff disputed whether she evinced her understanding as to her cosmetic appearance. As the Kassir defendants described it, the plaintiff, in connection with the non-cosmetic portion of the dual procedure, consented only to the straightening of her septum, but not to a procedure involving her sinuses. The plaintiff, however, asserted that it was not her understanding that she was consenting "only" to the straightening of her septum. While the Kassir defendants emphatically stated that the plaintiff did not consent to any surgical procedures on her sinuses, the plaintiff claimed that she did not refuse such consent, and that, in fact, she and those defendants never discussed any such consent. The Kassir defendants asserted that, while Kassir promised to repair any problem that he observed during the procedure, they did not contemplate that Kassir would examine the plaintiff's sinuses or elements of her ostiomeatal complex, while the plaintiff asserted that Kassir never ruled out examining or operating on her sinuses if that were necessary to relieve her breathing difficulties.

The plaintiff returned to Kassir's office on January 19, 2016 for a pre-operative visit, at which time, according to the Kassir defendants, Masoud Mojarradi, M.D., who was then employed by Kassir's practice as an administrator, provided the plaintiff with a package containing consent forms. The plaintiff disputed that Dr. Mojarradi provided her with such a package or such forms. Dr. Mojarradi testified at his deposition that he witnessed the plaintiff signing and initialing the consent forms via an electronic pad. He stated that, due to a "linkage issue" in the software, her one electronic signature and one electronic set of initials, appearing to depict the letters "RR" rather than "AK," inadvertently were copied onto numerous signature

lines on the septo-rhinoplasty form that were applicable not only to the plaintiff, but to nurses and anesthesiologists. The Kassir defendants conceded that the consent form included a paragraph designed to encompass every otolaryngology procedure performed by the office, in addition to the septo-rhinoplasty that was being considered for the plaintiff. The plaintiff, however, vigorously denied at her deposition that the one signature or set of initials that were inscribed onto the electronic pad were hers, contending that the signature and initials were forged on the electronic pad, that she never had seen that signature on those documents prior to the surgery, and that the consent form that she did sign several weeks later "says nothing about intent or design to encompass every ENT procedure."

On February 9, 2016, the day scheduled for the surgery, the plaintiff executed a different surgical informed consent form from those allegedly provided to her on January 19, 2016, in which she allegedly confirmed that Kassir warned her of the risks and consequences of the procedure, informed her of the alternative treatments thereto, described the risks of the alternative treatments, and explained the prognosis if no treatment were rendered. The Kassir defendants asserted that, at that point, the plaintiff knew that she ultimately might need revision surgery. In addition, they averred that the plaintiff also signed an informed consent for anesthesia on that date, affirming that she was aware there were no guarantees or promises with respect to the results. Although the plaintiff admitted that she signed those consent forms, she asserted that there was nothing in the forms concerning guarantees or promises.

The parties do not dispute that Kassir performed a rhinoplasty on February 9, 2016. According to the Kassir defendants, during the procedure, Kassir excised 4 millimeters (mm) of dislocated caudal septum that was suspicious as the cause of the plaintiff's nasal obstruction. In his notes, Kassir wrote "specimen removed: cartilage" and later testified at his deposition that the only piece of cartilage in the area of the surgery was from the septum. While the plaintiff did not dispute that Kassir made that entry, she asserted that there is no proof in the record itself that the only cartilage removed was from her septum.

The procedure cost $13,500, consisting of a $9,500 surgical fee, $2,200 operating room fee, and $1,800 anesthesia fee. The initial invoice that was provided to the plaintiff identified that it was a bill for rhinoplasty alone, and did not mention anything about septoplasty, but was later amended when the plaintiff mentioned to office managers for the Kassir defendants that she was supposed to have undergone septoplasty as well.

On February 10, 2016, the plaintiff had her first post-operative visit with Kassir via Skype. Although the Kassir defendants asserted that the plaintiff did not report any breathing difficulties at that visit, she contended that she did indeed report such difficulties, and that Kassir prescribed steroids to treat that condition. The plaintiff asserted that, when she asked for copies of her medical records at that time, she was told by the Kassir defendants simply that there were no records of her surgery. According to the Kassir defendants, at the plaintiff's next follow-up visit on May 31, 2016, she still had no complaints about breathing, but the plaintiff disputed this, asserting that she did indeed complain about breathing issues. As the Kassir defendants described it, at no point did the plaintiff report any medical issues to Kassir after the surgery, and she did not return for any follow-up care or contact Kassir with any medical concerns after May 31, 2016.

On March 28, 2017, the plaintiff consulted with otolaryngologist (ENT) and surgeon Lloyd Loft, M.D., and complained that she had difficulty in breathing. She testified at her deposition that she did not bring any records generated by the Kassir defendants to her appointment with Dr. Loft because she did not have those records in her possession. In his records, Dr. Loft noted that the plaintiff had "a previous history of rhinoplasty with details that are unavailable." Dr. Loft performed a nasal endoscopy, and documented a deviated septum, posteriorly to the left side, with inferior turbinate hypertrophy, and narrowing of the right and left middle meatus without polyps. Dr. Loft's impression was that the plaintiff suffered from "Chronic sinusitis and nasal obstruction refractory to medical management," and later added a note that her "chronic" nasal and sinus complaints may have been "multifactorial," including an "allergic"

component. He thus recommended a trial of the steroidal nasal inhalant Flonase and the antihistamine Claritin, with a follow-up in two weeks. The plaintiff complied with those recommendations. On April 11, 2017, Dr. Loft added chronic ethmoidal sinusitis and allergic rhinitis to his differential diagnosis "problem" list, and thereupon ordered a computed tomography (CT) scan of the plaintiff's sinuses that, according to the Kassir defendants, was intended to evaluate multifactorial sinus issues that were unresponsive to medical management. The plaintiff, however, denied that there is any written evidence that that was the precise purpose of performing the scan.

On May 8, 2017, the plaintiff underwent a CT scan that revealed a 2.5-centimeter cyst in the inferior left maxillary sinus, which the Kassir defendants asserted was in the cheek area, and not the nasal cavity and airway passage, although they conceded that there also was anatomic narrowing of the ostiomeatal units bilaterally. The plaintiff countered by quoting from an entry in an on-line medical dictionary, explaining that "[m]axillary sinuses, the largest of the paranasal sinuses, are pyramid-shaped cavities located in the maxillae. The base of the maxillary sinus forms the inferior part of the *lateral wall of the nasal cavity*" (emphasis added). The plaintiff noted that, in Dr. Loft's chart, he memorialized that "[t]here is a deviated septum and OMC [ostiomeatal complex] narrowing with some mild chronic sinusitis and turbinate hypertrophy." During the plaintiff's June 20, 2017 visit, Dr. Loft recommended that she undergo a submucousal resection of her deviated nasal septum, possible balloon sinuplasty, and inferior nasal turbinate radiofrequency reduction, in which radio waves are employed to burn off unwanted tissue. In his pre-operative diagnosis, Dr. Loft indicated that the plaintiff suffered from "(1) Deviated nasal septum. (2) Inferior nasal turbinate hypertrophy. (3) Chronic sinusitis."

In Dr. Loft's pre-operative notes, he described a "residual deviated septum with a posterior spur on the right side as well as a superior deflection on the left side." On January 28, 2019, Dr. Loft performed the procedures that he recommended, consisting of (1) submucous resection of deviated nasal septum, (2) bilateral inferior nasal turbinate radiofrequency reduction

with outfracture, (3) bilateral endoscopic ethmoidectomy, (4) bilateral endoscopic maxillary sinus surgery with middle meatal antrostomy, and (5) bilateral endoscopic frontal sinus surgery. Subsequent to undergoing those procedures, the plaintiff did not report any complaints with respect to breathing, testifying at her deposition that she healed well and had "no breathing issues whatever."

III. THE PLAINTIFF'S ALLEGATIONS

In her amended complaint, the plaintiff asserted that, on February 9, 2016, after administering general anesthesia to her, the Kassir defendants performed the "wrong procedure," that is, they performed cosmetic rhinoplasty only, instead of a complete, therapeutic septo-rhinoplasty. According to the plaintiff, they then "stonewalled" her requests to obtain her own medical records and ultimately fabricated new medical records.

Specifically, the plaintiff contended that, in summer 2015, she contacted Kassir's office, and complained that she then was suffering from breathing and sleeping problems, and had previously been diagnosed with a deviated septum. She averred that, at her first meeting with the Kassir defendants on August 11, 2015, she told Kassir and administrative personnel that she wanted her breathing problem corrected by a septoplasty, and made it clear to Kassir that she would only undergo a rhinoplasty for cosmetic purposes if the septoplasty were performed at the same time. As the plaintiff recounted it, in discussing the price for the procedures, Kassir's assistant stressed several times that the high price was justified by the fact that the two procedures would be performed simultaneously. The plaintiff contended that, at the August 11, 2015 appointment, Kassir assured her that he would ascertain what was "structurally wrong," although he could not guarantee that her breathing problem was in fact a structural issue. The plaintiff asserted that, on that date, Kassir wrote a progress note indicating that he had "discussed in detail" with the plaintiff that he intended to perform a "septo-rhinoplasty," that is, a combined septoplasty and rhinoplasty.

As alleged in the amended complaint, in December 2015 the plaintiff received a phone call from a member of Kassir's staff and was told that prices for surgical procedures were going to be increased in the new year, but that if she scheduled the surgery for a date prior to January 1, 2016, the costs of the combined procedure would be "grandfathered," and that she would be getting both surgeries “for the price of one.” When, according to the plaintiff, she informed the Kassir defendants that she wasn’t ready to schedule the surgery without another meeting, they scheduled a visit for December 22, 2015, at which Kassir generated a progress note stating that he advised the plaintiff that he would indeed perform a septo-rhinoplasty.

The plaintiff alleged in her amended complaint that, on February 9, 2016, Kassir performed surgery upon her, and wrote a progress note by hand on that date, indicating that he performed only a rhinoplasty, and not a septo-rhinoplasty, but that he simply removed some cartilage. As the plaintiff further averred, the written “Report of Operation” that Kassir allegedly signed by electronic means on February 11, 2016 indicated that he performed a septo-rhinoplasty. According to the plaintiff, Kassir also memorialized in that report that the plaintiff had been intubated, received general anesthesia, underwent the surgery, was later extubated, and sent to the recovery room in good condition.

In her amended complaint, the plaintiff further asserted that, on February 10, 2016, or one day after the surgery, Kassir did not perform an in-person post-operative examination but, instead, conducted a remote Skype conference. As alleged in the amended complaint, Kassir told the plaintiff that he had removed “a huge cyst,” and prescribed steroids, despite the fact that there was no mention in her chart of a cyst removal, a biopsy, or the prescription of steroids. As the plaintiff described it in her amended complaint, she appeared several weeks after the surgery for a follow-up examination with Kassir, at which she asked him about the large cyst, inquiring if it was benign or malignant. According to the plaintiff, Kassir seemed confused when asked about the cyst, and had no recollection of removing one. The plaintiff asserted that, when she then asked to see her medical records, Kassir’s administrative assistant, Hovsepyan,

informed her that there were no records or notes available, and that no details of her surgery were recorded in any form. She further stated that, at that same meeting, Hovsepyan presented an invoice to her that detailed only a rhinoplasty, and that when the plaintiff pointed out that the invoice should have reflected both the rhinoplasty and the septoplasty, Hovsepyan seemed "confused and hesitant," but reluctantly prepared and presented a new invoice that included both procedures.

The plaintiff additionally alleged that her recovery proceeded slowly in that, almost one year after the surgery, she still could not breathe properly, although she was satisfied with the cosmetic appearance of her nose. She asserted that she then sought the help of another ENT specialist who ordered a CT scan and other tests, and thereafter concluded, upon interpreting the scans and test results, that "nobody had ever performed a septoplasty" upon her.

In her amended complaint, the plaintiff averred that, although she ultimately was provided with the records referable to her procedure, they were "staggeringly incomplete, contradictory, and replete with obviously forged signatures," with no medical history having been memorialized, and no electrocardiogram study, blood pressure report, or oxygenation measurement, despite the fact that the plaintiff was intubated and placed under general anesthesia. She further asserted that the records included multiple consent forms that depicted signatures and initials purporting to be hers that were not hers, that looked nothing like her signature, and were identical to that of a nurse who signed other forms.

The plaintiff finally alleged in her amended complaint that Kassir's failure to perform the surgery agreed upon, his failure to take a proper medical history, and his failure to maintain appropriate records constituted medical malpractice, and that she suffered "serious harm" as a consequence of that negligence. As relevant here, she also asserted that the Kassir defendants failed to obtain her fully informed consent to the procedure, that their failure to perform the agreed-upon procedures constituted a breach of contract necessitating further expenditure to

complete the necessary surgical procedures, and that the forgery of her signatures and initials on numerous consent forms constituted a compensable fraud.

In her bill of particulars as to the Kassir defendants, the plaintiff asserted that they all departed from good and accepted practice in failing to properly examine her, in failing to take a proper medical history, and in failing to document, be aware of, and recognize the significance of her medical history. The plaintiff also faulted the Kassir defendants for failing to make or maintain proper medical, surgical, and anesthesia records, and for failing properly to map out the agreed-upon procedures and relevant anatomical structures pre- and intra-operatively. She alleged that the Kassir defendants were negligent in failing to undertake proper pre-operative studies, including a rhinoscopy, CT-imaging, and breathing tests

The plaintiff further asserted that the Kassir defendant were negligent in failing properly to perform all of the procedures to which she had agreed and consented prior to the surgery. In this regard, the plaintiff averred that the Kassir defendants failed properly to operate on and correct her deviated septum, despite the fact that they had agreed to perform that procedure in addition to a rhinoplasty.

In connection with the surgery itself, the plaintiff alleged in her bill of particulars that the Kassir defendants failed to monitor her heart rate, oxygenation levels, blood pressure, respiration rate, end-tidal blood carbon dioxide levels via capnography, and body temperature. She further asserted that they departed from good and accepted practice in failing properly to remove a polyp, to submit excised tissue for histopathologic analysis, to seek expert advice with respect to the significance of the polyp, to order an appropriate assessment of the polyp by a qualified specialist, to document the presence and removal of the polyp in a proper fashion, and to appreciate the significance of intra-operative bleeding.

The plaintiff also contended that the Kassir defendants failed adequately or properly to examine her post-operatively, provide adequate and proper post-operative care, or examine her in person subsequent to the procedure, inasmuch as Kassir only met with her via Skype. She

alleged that the Kassir defendants further departed from good practice in failing properly to prescribe medications to her post-operatively and failing properly to document the prescription of medications post-operatively.

The plaintiff further asserted that the Kassir defendants failed properly to train or supervise their staff in generating and maintaining medical records, and thus failed to inform her that Kassir did not perform the surgical procedure to which she agreed and consented. Additionally, she asserted that the Kassir defendants failed to maintain a safe surgical environment, negligently and carelessly caused her to require additional surgery, failed to advise her of the risks associated with the tests and procedures that were actually performed, failed to train, supervise, or monitor staff, and failed to prevent the forgery of informed consent forms. The plaintiff alleged that she explicitly provided informed consent for the Kassir defendants to perform a septo-rhinoplasty that included a complete septoplasty, but that they did not perform a septo-rhinoplasty, but only performed a rhinoplasty, and that she had not authorized them to perform only a rhinoplasty.

In her amended bill of particulars, she asserted that the Kassir defendants engaged in fraudulent and deceptive behavior by promising and contracting to perform specific medical procedures, and thereupon failing to perform the agreed upon procedures. She further asserted that they engaged in high-pressure sales tactics by promising “two procedures for the price of one,” but ultimately performed only one portion of the agreed-upon dual procedure, without her permission or informed consent. The plaintiff alleged that the Kassir defendants were liable for failing to revise their contract with her, and performed a procedure that was not contracted for.

As a consequence of these alleged departures, failure to obtain informed consent, breach of contract, and forgeries, the plaintiff asserted in her amended bill of particulars that she was compelled to undergo a second nasal procedure that was complicated by the initial surgical intervention, and was subjected to a potential risk of complications from the additional surgery, a potential for complications from a second administration of anesthesia, and emotional risk due

to the need for an additional surgery. She further asserted that she was subjected to the risk of future complications due to the Kassir defendants' failure to submit the removed polyp tissue for analysis. In addition, she averred that she sustained external and internal scarring, stenosis of her nasal airway, post-operative pain, numbness in her face, dry nasal membranes, atrophic rhinitis, neuro-sensory changes to the nose and face, exposure to opiate medications, and internal bleeding and blood loss. She also asserted that she lost both earnings and earning capacity, and was caused to endure severe emotional pain, suffering, and distress, and loss of enjoyment of life.

IV. PRECLUSION OF PLAINTIFF'S EXPERT AFFIRMATIONS

Initially, the Kassir defendants seek to preclude the plaintiff from relying upon her experts' affirmations and affidavit to oppose the instant summary judgment motion because she did not serve her CPLR 3101(d) expert disclosure statements in accordance with the deadline set forth in the preliminary conference order. The court denies that branch of their motion.

CPLR 3212(b) provides, in relevant part, that,

> "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit."

In this case, however, the court (Madden, J.) added a supplemental provision to the February 7, 2019 preliminary conference order, directing the plaintiff to serve her CPLR 3101(d) expert disclosure statements no later than 60 days after the filing of the note of issue, rather than permitting her to serve her statements 60 days prior to trial, as set forth in the standard preliminary conference order form applicable to medical malpractice actions.

The Kassir defendants correctly contend that, notwithstanding CPLR 3212(b), the law permits the court to preclude the consideration of an expert affirmation where, as here, a prior discovery order explicitly directed a party to exchange a CPLR 3101(d) statement on a date certain prior to the motion submission date (*see Theroux v Resnicow*, 72 Misc 3d 654, 660 [Sup

Ct, N.Y. County 2021]). Nonetheless, the question of whether to preclude the statements or permit their late service remains within the sound discretion of the court (*see id*.). After this court, by order dated September 30, 2021, extended the note of issue filing deadline until February 28, 2022, the plaintiff filed her note of issue on February 23, 2022. Consequently, to comply with the preliminary conference order, she would have had to serve her CPLR 3101(d) expert disclosure statement on or before April 25, 2022. The Kassir defendants made the instant motion on May 26, 2022 (*see* CPLR 2214). After several agreed-upon adjournments, the plaintiff served her three expert affirmations on August 1, 2022. Given the plaintiff's short delay in providing the expert affirmations, the court exercises its discretion and permits late service (*see Dantzig v Mueller*, 2022 NY Slip Op 33119[U], *29, 2022 NY Misc LEXIS 5623, *50 [Sup Ct, N.Y. County, Sep. 15, 2022] [Kelley, J.]; *St. Fleur v Union Health Ctr.*, 2022 NY Slip Op 30634[U], *7-8, 2022 NY Misc LEXIS 991, *10-11 [Sup Ct, N.Y. County, Feb. 28, 2022] [Kelley, J.]).

With respect to the Kassir defendants' additional arguments, as set forth in their reply affirmation, as to why the plaintiff's expert's affirmations and affidavit should be disregarded, a medical expert need not be licensed to practice medicine in New York for his or her affidavit to be considered by a court in connection with a summary judgment motion (*see Grey v Garcia-Fusco*, 2020 NY Slip Op 32280[U], *20 n 19, 2020 NY Misc LEXIS 3270, *30 n 19 [Sup Ct, N.Y. County, Jun. 16, 2020]; *Solano v Ronak Med. Care*, 2013 NY Slip Op 30837[U], *7, 2013 NY Misc LEXIS 170, *8-9 [Sup Ct, N.Y. County, Apr. 22, 2013]). Although the plaintiff's ENT expert, Nicoloas Bu-Saba, M.D., is a physician who is not licensed to practice medicine in New York, and thus cannot opt to submit an unnotarized affirmation in lieu of a notarized affidavit (*see* CPLR 2106[a] [limiting the option to employ an affirmation to a "physician . . . authorized by law to practice in the state"]), the court exercises its discretion and directs the plaintiff to submit the content of Dr. Bu-Saba's affirmation in the form of an affidavit (*see* CPLR 2001; *Matos v Schwartz,* 104 AD3d 650, 653 [2d Dept 2013]; *Winslow v Syed*, 2021 NY Slip Op 33230[U], *5-

6, 2021 NY Misc LEXIS 9432, *13 [Sup Ct, Dutchess County, Apr. 20, 2021]). Moreover, contrary to the Kassir defendants' contention, the affidavit of the plaintiff's handwriting expert, Joseph M. Rosowski, Sr., was indeed notarized.

The Kassir defendants correctly point out that Rosowski's affidavit, although executed in Pennsylvania, was not accompanied by the certificate of conformity required by CPLR 2309. A certificate of conformity is a written instrument, pursuant to which a person qualified by the laws of the country or state in which an affidavit or affirmation is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or affirmation has indeed been drafted, executed, and notarized in conformity with the laws of that country or state. A party's initial failure to submit the certificate, however, does not require the court to disregard the affidavit or reject the plaintiff's opposition papers, as the defect may be cured by the submission of the proper certificate nunc pro tunc (*see Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]). Similarly, the affidavit that Dr. Bu-Saba is directed to submit must also be accompanied by a certificate of conformity if, as anticipated, it is executed and sworn to in Massachusetts.

V. THE SUMMARY JUDGMENT MOTION

In support of their motion, the Kassir defendants submitted the pleadings, bills of particulars, transcripts of the parties' deposition testimony, relevant medical records, and a statement of material facts, along with the expert affirmation of Yael Halaas, M.D., a board-certified otolaryngologist, facial plastic and reconstructive surgeon, and head and neck surgeon.

In his affirmation, Dr. Halaas asserted that neither Kassir, individually, nor the Kassir defendants, through any current or former employees, departed from good and accepted medical practice in the care and treatment that they rendered to the plaintiff, that they all comported within the standards of care at all times, and no action or inaction on behalf of the Kassir defendants proximately caused any of the plaintiff's alleged injuries, including the

additional ENT surgery several years later, let alone any alleged pain and suffering or consequential economic damages.

Dr. Halaas asserted that Kassir properly examined the plaintiff before the proposed surgery, and "performed a complete physical examination prior to the surgery by taking a history." He asserted that the plaintiff did not report a history of sinusitis and that, as such, it could be inferred that the plaintiff did not consult Kassir for a sinus issue, did not present a history of recurrent or chronic sinus issues, and "made clear at her deposition that she did not consent Dr. Kassir to perform sinus surgery." As Dr. Halaas characterized it, the plaintiff presented to Kassir solely for cosmetic surgery on her nose, "during which it was hoped that her breathing issue could be resolved by work on her septum during the course of such surgery," and that rhinoplasty was the only procedure to which she consented With respect to the pre-operative examinations, Dr. Halaas stated that Kassir engaged in a few weeks of medical management before he made any surgical recommendations, that Kassir examined and took multiple photographs of the plaintiff's nose and nares (nostrils) with a headlight, and that he documented an obstructive piece of septum in one of the photos, ultimately removing that portion of presumed obstructive septum. He further opined that this was the basis for Dr. Loft's finding of "residual" septum. According to Dr. Halaas, Kassir's examination allowed him to observe any areas of concern within the confines of the surgical field in which he was going to operate when performing the procedure.

Despite his contention that the plaintiff only consented to a rhinoplasty, and that the primary reason that she presented to Kassir was for cosmetic surgery, Dr. Halaas concluded that a septo-rhinoplasty was properly indicated for the plaintiff and properly performed. In a somewhat contradictory fashion, he stated that, notwithstanding his opinion that Kassir properly performed a septo-rhinoplasty, had the plaintiff wanted to undergo a septoplasty or septo-rhinoplasty, she "could have re-presented to the ENT previously seen or another ENT, such as she did two years later with Dr. Loft, for just septoplasty." According to Dr. Halaas, the plaintiff

only asked Kassir to "specifically *examine* her deviated septum" (emphasis added). He concluded that "it was a proper exercise of medical judgment to recommend septo-rhinoplasty before further discussion and work up that could potentially lead to recommending complex sinus surgery," as it allowed Kassir both to provide the plaintiff with the cosmetic result that she desired, and rule in or out a deviated septum as the cause of her breathing problem. As Dr. Halaas described it, Kassir

> "appropriately recommended septo-rhinoplasty to both give the patient the appearance she wanted (plaintiff has not indicated to date any displeasure with the cosmetic result), and to evaluate a deviated septum as a possible cause of breathing issues. Therefore, this patient was a proper candidate for a septorhinoplasty,"

even though, according to him, she consented only to rhinoplasty.

Dr. Halaas went on to conclude that the Kassir defendants obtained proper clearance prior to the septo-rhinoplasty, and that, when the plan is for a septo-rhinoplasty, rather than complex sinus surgery, there is no indication for additional testing or a work-up. He reiterated that the plaintiff "specifically consulted and consented [sic] Dr. Kassir for a cosmetic procedure and to address her deviated septum, as possible cause of her breathing issue," that the Kassir defendants' records contained the medical clearance of plaintiff's primary care physicians, and that there was nothing contained in those records that would contraindicate a septo-rhinoplasty.

Notwithstanding his contention that the plaintiff only gave her consent for rhinoplasty, Dr. Halaas asserted that Kassir appropriately obtained the plaintiff's informed consent before performing a septo-rhinoplasty, inasmuch as he advised the plaintiff of the risks of a septo-rhinoplasty, including the recurrence of septal deviation and breathing issues, the worsening of that condition, and the need for future surgeries, as well as the risks inherent in any surgery, including infection, bleeding, and anesthesia-related complications. According to Dr. Halaas, Kassir also advised the plaintiff of the benefits of the procedure, including an appealing aesthetic result with possible alleviation of her breathing complaints, as well as the alternatives thereto, which was to forego surgery. Based on his review of the medical records, Dr. Halaas

asserted that the plaintiff acknowledged that she knew that the procedure might not solve her breathing problems, and that she might need to undergo subsequent procedures.

Although Dr. Halaas did not presume to have personal knowledge of whether Dr. Mojarradi provided the plaintiff with a packet of documents for her signature prior to the surgery, he asserted that she did in fact sign those documents, but that, in any event, "there is no question but that plaintiff signed additional surgical and anesthesia consent forms utilized by Dr. Kassir and Dr. Tosi respectively on the day of surgery." Accordingly, he concluded, contrary to his initial characterization of the plaintiff's consent, that the plaintiff,

> "an educated individual who did her own research into her condition, her breathing issue and Dr. Kassir's credentials, further contemplating the proposed surgery over a period of months before consenting to septo-rhinoplasty was aware of the risks, benefits, and alternatives, including the possibility that septo-rhinoplasty would not fix her breathing issue. *Under these conditions, plaintiff consented Dr. Kassir to perform elective septo-rhinoplasty*, and did not request a sinus work-up or consent Dr. Kassir to perform sinus surgery."

(emphasis added).

Dr. Halaas expressly opined that, despite the plaintiff's contention that Kassir performed only a rhinoplasty, Kassir in fact performed a septo-rhinoplasty on February 9, 2016, performed the septo-rhinoplasty appropriately, and performed it within the standard of care. As he described it,

> "when a surgeon removes a portion of the septum, that will be considered septoplasty. In the context of also performing rhinoplasty, this is referred to as septo-rhinoplasty, but it is also commonplace within the cosmetic surgical community to utilize this term interchangeably with rhinoplasty when septal work is performed,"

or, in other words, "Kassir excised 4 mm of the septum during the February 9, 2016 procedure. This constitutes a septoplasty." He noted that Kassir also performed a cosmetic rhinoplasty in the "standard fashion" by making incisions between the nostrils or at the base of the nose, readjusting or cutting of cartilage or bone, and connecting the incisions. Accordingly, Dr. Halaas concluded that Kassir performed both a septoplasty and a rhinoplasty, and did so in a common manner, and thus appropriately performed a septo-rhinoplasty, regardless of how this procedure

was characterized or identified throughout the records. He further concluded that, inasmuch as Dr. Loft noted two years later that he was going to perform a multifactorial sinus surgery on the plaintiff, and that a pre-surgical examination revealed that the plaintiff had "residual" septum, Kassir clearly had performed work on that anatomical structure. Thus, Dr. Halaas concluded that, in accordance with the commonly accepted definitions within the ENT and plastic surgery communities, and the interchangeability of the terms "septo-rhinoplasty" and "rhinoplasty," Kassir did, in fact perform a "septo-rhinoplasty" and not solely a cosmetic surgery.

Dr. Halaas further opined that Kassir properly instructed the plaintiff post-operatively, as he advised her to stay in an upright position, keep her head elevated, keep the nasal dressings dry, avoid hard contact with the nose, refrain from turning her head as much as possible, sneeze with her mouth open, apply an ice pack to the nasal area, and take pain medication that did not contain aspirin or salicylates. He explained that these instructions were appropriate to reduce swelling and discomfort, and allow proper healing. Dr. Halaas averred that Kassir also saw the plaintiff at regular intervals approximately three times after the surgery, including a post-operative meeting via Skype, that, during these meetings and visits, Kassir was able to observe that the incisions were clean and dry without redness, and that Kassir properly prescribed antibiotics and painkillers. He concluded that there was no indication that the plaintiff had any post-operative complications, and that, although she now claims that she continued to have breathing issues after the surgery, she did not raise that concern Kassir because she attributed it to normal post-operative swelling and healing. According to Dr. Halaas, however, such swelling and healing would have resolved within weeks, or two months at the most. He further noted that the plaintiff made no complaints about breathing to the Kassir defendants, and that there was no record of such complaints until she presented to Dr. Loft long after Kassir's surgery. Dr. Halaas opined that it was a well-known risk that a patient may continue to have breathing problems after septo-rhinoplasty. In this regard, he noted that the plaintiff testified at her deposition that Kassir had made her aware of this risk, and that although he advised her

that he would try to rectify her breathing problem due to a presumed septal defect, there was no guarantee that the deviated septum was the cause of the problem in the first instance. Dr. Halaas thus opined that the necessity of a second surgery, "almost exclusively focused on sinus issues, two years later does not implicate Dr. Kassir's surgical procedure in any way."

With respect to the plaintiff's allegations that she continued to suffer from breathing difficulties after Kassir's procedure, Dr. Halaas explained that chronic sinusitis would explain her continuing breathing difficulties better than a diagnosis of a deviated septum. As he phrased it,

> "[n]otably, sinusitis---which can be intermittent and seasonal---can cause the mucosa to get inflamed leading to enlarged turbinates (turbinate hypertrophy). Further, recurring or chronic sinus infections are related to the development of sinus retention cysts. Turbinate hypertrophy, with or without obstruction by sinus retention cystic disease, can cause intermittent breathing issues. That aside, a deviated septum, even after septo-rhinoplasty, can further deviate, and may or may not contribute to breathing issues. Here, it is notable that Dr. Loft's subsequent surgery focused on addressing sinus-related issues; it does not appear that the work performed on the 'residual' deviated' septum was thought to be 'the' cause of the breathing issue, and was worked on to help address other sinus issues, thought to be causing breathing issues. In fact, the cyst found, much like the deviation of the 'residual' septum, could have developed after the septo-rhinoplasty performed two years earlier. Nonetheless the location of the cyst found was not in the surgical field where Dr. Kassir was performing his septo-rhinoplasty."

Based upon his review of the records and testimony, Dr. Halaas concluded that the plaintiff had a chronic, but intermittent, issue with her sinuses, causing breathing issues. He asserted that Dr. Loft,

> "with the benefit of hindsight and knowing that septo-rhinoplasty had previously been performed two years earlier without resolution of plaintiff's complaint, undertook a 'kitchen sink' approach – with plaintiff's consent -- to address plaintiff's breathing problems, doing multiple procedures on plaintiff's sinuses and turbinates, including work on her 'residual' septum to assist in this regard,"

all of which were unrelated Kassir's surgery. In light of his conclusions in this regard, Dr. Halaas opined that Kassir's surgery did not cause the plaintiff to develop chronic sinusitis, and that none of the care at issue caused any of her alleged problems.

With respect to the breach of contract cause of action, Dr. Halaas asserted that the Kassir defendants did indeed perform the septo-rhinoplasty that the plaintiff had anticipated and

bargained for, "regardless of the interchangeable use" of the terms "rhinoplasty" and "septo-rhinoplasty" in medical or billing records, as Kassir removed 4 mm of tissue from the septum and mentioned a cartilage sample being removed during the surgery in his hand-written post-operative documentation. He further asserted that, to the extent that the plaintiff claimed that she paid for a procedure that Kassir did not perform, such a contention also was incorrect, explaining that "[t]he billing by defendants (again, regardless of whether the term rhinoplasty or septo-rhinoplasty was used in the billing) indicates that the surgical, facility and anesthesia fees totaled $13,500," and that such an amount, "for either septo-rhinoplasty or rhinoplasty, would be in accord with acceptable and reasonable fee structures in the New York metropolitan cosmetic surgery community at the time in question."

Dr. Halaas concluded that it was appropriate and within the standard of care for a staff member of the Kassir defendants, whether he or she was a former physician or not, to expedite the informed consent process after Kassir orally had provided complete information to the plaintiff at earlier visits. He further noted that, although the Kassir defendants furnished a generic consent form containing a paragraph that listed numerous ENT surgeries that, if previously planned and agreed upon, could be performed, it did not follow that a patient would be consenting to all of those ENT procedure being performed. In addition, he noted that Kassir maintained separate surgical consent forms that patients would sign on the day of surgery, and that the plaintiff has never disputed the authenticity of her signature on those forms. Dr. Halaas thus drew the legal conclusion that the allegations of forgery and lack of a truly informed consent had been rendered academic because the plaintiff concededly signed informed consent forms for surgery and anesthesia on the day that the surgery was performed, and that the alleged forgeries on the other consent forms did not affect her decision to undergo surgery or result in any damages.

Dr. Halaas alleged that the crux of the plaintiff's displeasure and the reason for her claims arose because the subject surgery did not resolve her breathing problem and because

she had a "misunderstanding" as to the nature of the surgery performed, believing that she paid for a septo-rhinoplasty but only received rhinoplasty. As he characterized it, this displeasure would only be relevant if a deviated septum were, in fact, the true cause of the plaintiff's breathing difficulties, which he concluded was not the case. Dr. Halaas thus further concluded that, even if Kassir had only performed rhinoplasty, he nonetheless remained unauthorized by the plaintiff to perform sinus surgery, which he asserted would have been necessary to treat the sinus problem that he postulated was likely the true cause of the plaintiff's difficulty in breathing. In this regard, Dr. Halaas explained that the plaintiff

> "had chronic sinusitis and associated complications known to cause breathing problems (turbinate hypertrophy and a sinus cyst). The sub-mucosal resection on the septum by Dr. Loft was not done, in my opinion, because it was 'the' cause of plaintiff's breathing issues, but to assist in addressing the sinus issues, which were the cause. Plaintiff's inflamed turbinate hypertrophy, combined with a nasal cyst, both likely the result of chronic sinusitis, caused intermittent obstruction and breathing issues. After Dr. Loft performed extensive sinus work on plaintiff, it appears her breathing improved."

Accordingly, Dr. Halaas concluded that even if Kassir did everything exactly as the plaintiff claimed should have been done, she still would have had breathing problems and still would have required the extensive sinus surgery undertaken by Dr. Loft two years later.

In opposition to the Kassir defendants' motion, the plaintiff relied on the documentation that they had submitted. She also submitted a counter statement of material facts, as well as the expert affidavit of forensic document examiner and handwriting expert Joseph M. Rosowski, Sr., the expert affirmation of board-certified otolaryngologist Nicolas Bu-Saba, M.D., who has a specialty in treating sinus problems and performing procedures on sinuses, and the expert affirmation of board-certified internist and emergency room specialist Sassan Naderi, M.D.

Rosowski compared known exemplars of the plaintiff's signature with 13 signatures, purporting to be hers, that were inscribed in her chart immediately above signature lines designated as "patient signature," "nurse," and "Anesthesiologist/CRNA." He concluded that these 13 signatures are identical copies of the same signature, as they "bear no variation

between each other," and he unambiguously opined that the initial signature was inscribed by somebody other than the plaintiff.

Dr. Bu-Saba concluded that the Kassir defendants departed from good and accepted medical practice, and that their departures caused or contributed to the plaintiff's injuries. As he explained it, the plaintiff suffered from a deviated nasal septum, diagnosed by at least three physicians, including Kassir, that contributed to her symptoms of nasal blockage and difficulty breathing through her nose. According to Dr. Bu-Saba, the plaintiff consulted Kassir for two symptoms: difficulty breathing through her nose and external nasal deformity. He opined that, inasmuch as Kassir's work-up of nasal blockage was limited to examining the plaintiff's nose with a headlight, the examination was not adequate for the "full visualization of the nasal passages including the posterior nasal cavities and nasopharynx to properly diagnose the cause for nasal blockage." Dr. Bu-Saba also noted that Kassir did not request further diagnostic work-up regarding the symptom of nasal blockage. Dr. Bu-Saba continued that, based on his review of the deposition transcripts, it was the plaintiff's understanding that the goals of the proposed septo-rhinoplasty were to address the external appearance of the nose via rhinoplasty and improve her nasal breathing via septoplasty. As he noted, the plaintiff expressly testified at her deposition that she had informed Kassir that she did not want to proceed with the surgery if it did not include correction of the nasal septum.

Upon his review of the medical records and Kassir's deposition testimony, Dr. Bu-Saba noted that, on February 9, 2016, Kassir performed only a rhinoplasty, while resecting a 4-mm segment of caudal septum. As Dr. Bu-Saba interpreted the relevant medical chart, "[t]he operative report and the medical records do not document any surgery on the remainder of the septum." He explained that

> "Kassir *did not resect the septal spur or address relevant deviated portions of the nasal septum* that likely contributed to Ms. Khurdayan's symptom of nasal blockage. Ms. Khurdayan's symptom of nasal blockage/nasal congestion persisted following the operation that was performed by Dr. Kassir. Clinical evaluation by Dr. Loft and sinus CT in 2017 documented the presence of

> persistent septal deviation. Ms. Khurdayan required a septoplasty in 2017 to address persistent septal deviation which was not corrected by Dr. Kassir and likely contributed to her persistent symptom of nasal blockage"

(emphasis added). He further explained that rhinoplasty and septo-rhinoplasty are not synonymous, in that septoplasty is surgery to correct a deviated nasal septum that is causing nasal blockage, while rhinoplasty is surgery to correct the external appearance of the nose. Dr. Bu-Saba stated that septoplasty is not required to achieve a rhinoplasty, and that septo-rhinoplasty "indicates performing a septoplasty AND rhinoplasty during the same operation." He concluded that, based on the medical records that were available for his review, Kassir "did not address all the relevant portions of the nasal septum that are deviated and likely contributed" to the plaintiff's nasal blockage when he performed the surgery on February 9, 2016, which left the plaintiff with persistent nasal blockage and required the septoplasty by Dr. Loft in 2019.

Dr. Naderi asserted that he was "very familiar" with the standards and practices for "providing surgery and surgical care; the requirements and limitations of seeking informed consent; and medical record-keeping." He based his opinions, in part, upon his "experience in performing surgery on the head and neck, and from . . . experience treating patients seeking surgery." Dr. Naderi opined that Kassir and his staff did not properly secure the plaintiff's informed consent to the procedure that they actually performed and that their medical record-keeping was "shockingly sloppy and inadequate."

Dr. Naderi agreed with Dr. Bu-Saba that the plaintiff made it clear to the Kassir defendants that she wished them to address both her deviated septum and cosmetic issues during one surgical procedure, and that the Kassir defendants clearly understood this request. He asserted that the plaintiff also made it clear to Kassir that Dr. Kuriloff, her prior treating otolaryngologist, was of the opinion that the deviated septum caused or at least contributed to her breathing problems. Dr. Naderi thus concluded that, on August 11, 2015, the plaintiff agreed to what she understood to be a procedure to address both breathing and cosmetic problems. In this regard, he noted that, when the plaintiff observed that administrative assistant

Hovespayan wrote on the surgical proposal that the procedure to be performed was a "Rhinoplasty NY - Facial," the plaintiff demanded and subsequently received a revised Surgical Proposal that indicated a proposed "Septorhinoplasty - Facial."

As Dr. Naderi explained it, although the plaintiff denied receiving or signing the consent forms that allegedly were provided to her on January 19, 2016, one of those forms clearly described the procedure to which the plaintiff actually was consenting, at least from the perspective of the Kassir defendants. He thus quoted from one of those forms as follows:

> "the following surgical, medical and/or diagnostic procedures are planned for me and I voluntarily consent and authorize the following procedures:
>
> "Attempt to: open up sinus drainage pathways, straighten crooked septum, trim large turbinates, remove nasal polyps. Possibility of cartilage grafts from my ears to my nose to improve breathing."

With respect to the documentation of the relevant examination, pre-operative care, surgery, and post-operative follow-up, Dr. Naderi asserted that the plaintiff was not able to obtain her medical records from the Kassir defendants until June 28, 2018, when their attorney produced certain records in the course of discovery in this litigation. He noted that those records consisted of 83 pages, but did not contain the nursing notes from the day of the surgery, any anesthesia record, or any record of drugs prescribed to the plaintiff. He further noted that it wasn't until August 13, 2020 that the Kassir defendants produced a "Certification of Records," along with what counsel represented to be the complete records referable to the plaintiff, this time totaling 248 pages.

Dr. Naderi opined that the purpose of seeking and obtaining the informed consent of patients, as distinct from simply getting their signatures on forms, is to ensure that they truly understand the risks of, and alternatives to, the procedure. He averred that there needed to be a conversation between the doctor and the patient and, thus, that good and appropriate medical practice required a discussion, significantly before the day of surgery, about what the nature and extent of the surgical procedure that would actually be performed, what the risks are, and what

the alternatives are. As Dr. Naderi, phrased it, "[t]ypically the informed consent conversation takes place a few weeks before the procedure." He explained that, in the plaintiff's case, the informed consent conversation was supposed to take place on January 19, 2016, but that, according to the plaintiff, the conversation did not take place on that day, nor did Kassir have that conversation with her prior to that time, despite his testimony to the contrary.

Dr. Naderi noted that Kassir testified several times that he did not remember whether he saw the plaintiff on January 19, 2016, and that it was "significant" that there were no progress notes or entries for that date, in light of the fact that Kassir entered progress notes into the plaintiff's chart when he saw her on August 11, 2015 and December 22, 2015. Since Kassir could not establish that he met with the plaintiff on January 19, 2016, Dr. Naderi concluded that, on that date, there was no qualified medical professional who was available to answer any questions that the plaintiff might have had that would fully have informed her of risks, benefits, and alternatives, and that, "[w]ithout a qualified doctor present to answer the patient's questions, there can be no informed consent." He asserted that this was critical, as the January 19, 2016 forms referenced surgery to open up the plaintiff's sinus drainage pathways and to straighten her crooked septum, while the forms that she admitted to signing on February 9, 2016 only referenced an "attempt to change shape of nose cosmetically." Dr. Naderi asserted that "[t]hese are two fundamentally different surgical procedures. And it is clear from Ms. Khurdayan's testimony that she would only undergo surgery if both problems were addressed during the same surgery." He stated that the absence of Kassir or a qualified physician to answer any anticipated questions on that date itself constituted a departure from good and accepted practice.

Although Dr. Naderi conceded that it was not uncommon or inappropriate to ask a patient to sign a consent form on the day of surgery, this approach would only be appropriate if there had been a prior, unrushed, meaningful conversation with a qualified doctor prior to that moment. He thus concluded that, to the extent that Kassir is relying on the informed consent

forms that the plaintiff signed on the day of surgery, while wearing a surgical gown, and just minutes before she received anesthesia, "that would be conduct inconsistent with the practice of good and appropriate medicine." Dr. Naderi further opined that, if the 25 pages of consent forms that the Kassir defendants purportedly provided to the plaintiff were neither actually provided to, nor executed by, the plaintiff, their inclusion in her medical record would be a departure from good and appropriate medical practice. He asserted that "[t]he requirement for complete and accurate medical records is sacrosanct in medicine. Doctors keep complete and accurate medical records not (just) for the possibility of litigation, but for patient safety. Failure to keep complete and accurate medical records is a departure from good and appropriate medical practice."

Dr. Naderi also faulted the Kassir defendants for the manner in which their system auto-populated a signature inscribed on an electronic pad that purported to be that of the plaintiff's, but which the plaintiff vigorously asserted was not hers, testifying at her deposition that "[t]hat is not even close. Even if I was on drugs and drunk that wouldn't be my signature." Since copies of that signature were, among other things, inserted above a signature line reserved for a nurse's signature, while the Kassir defendants essentially admitted that these nursing forms were signed by someone other than a nurse, and those forms were included in the Certified Medical Record, Dr. Naderi concluded that, "[i]rrespective of whose improper signatures actually appeared on the forms, . . . a falsification happened and the documents were included in the medical record are gross departure from good and appropriate medical practice." He asserted that, if the signature on the nursing form were indeed the plaintiff's, allowing a patient to sign a nursing form and including it in the medical record was a departure from good and appropriate medical practice, while that if the signature were made by somebody else, then the "patient signatures" on the January 19, 2016 forms were not the plaintiff's, and someone else signed those forms, thus constituting a "gross departure from good and appropriate medical practice." Dr. Naderi continued that, "[i]f there was a glitch in the EMR software that allowed people other

than the proper signatories to sign documents in the medical record, that too is a departure from good and appropriate medical practice."

Dr. Naderi further faulted the Kassir defendants for failing to provide the plaintiff with pre-operative instructions concerning eating and drinking in the hours prior to the surgery. He also alleged that it was departure from good and accepted practice for the administrative assistant of a medical practice to inform the plaintiff that no medical records existed memorializing her visits, treatment, and procedures, thus compelling the plaintiff to seek the intervention of the New York State Department of Health before they produced her records, and then only in the context and course of this litigation.

In their attorney's reply affirmation, the Kassir defendants reiterated their prior arguments and, as explained above, also challenged the validity of Dr. Bu-Saba's affirmation on the ground that he was not authorized to practice medicine in the State of New York, that he thus was required to submit an affidavit rather than an affirmation, and that his affirmation failed to include the required certificate of conformity in any event. They challenged Rosowski's affidavit on the grounds that it was not notarized and also failed to include the appropriate certificate of conformity. They further asserted that neither Dr. Bu-Saba nor Dr. Naderi were qualified by education, training, or experience to render the opinions that they propounded, and that those physicians did not identify any departures from practice or demonstrate the qualitative insufficiency of the plaintiff's consent in any event. They further argued that the plaintiff's experts provided no opinions as to how any alleged departures from accepted practice, including alleged deficiencies in record-keeping, or any alleged failure to obtain fully informed consent, proximately caused the plaintiff to sustain injuries.

The plaintiff "rejected" the reply affirmation, contending that it exceeded the 4,200 word limitation set forth in 22 NYCRR 202.8-b. In correspondence to the court, the Kassir defendants contended that their own word-processing application indicated that they did not exceed the

limitation set forth in that rule. The court denies the plaintiff's request that it disregard the Kassir defendants' reply affirmation, and considers it along with all of the other papers that were filed.

A. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see*

Koulermos v A.O. Smith Water Prods., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

B. BREACH OF CONTRACT

To recover for breach of contract, a plaintiff must show the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ*., 71 AD3d 80, 91 [1st Dept 2009]).

A breach of contract claim in relation to the rendition of medical services will withstand a test of legal sufficiency where a medical defendant "expressed a specific promise to accomplish some definite result" (*B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 81 [1st Dept 2015]; *see Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013]; *Scalisi v New York Univ. Med. Ctr*., 24 AD3d 145, 147 [1st Dept 2005]; *Chaff v Parkway Hosp.*, 205 AD2d 571, 613 [2d Dept 1994]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d 544, 545 [2d Dept 1994]; *Dodes v North Shore Univ. Hosp*., 149 AD2d 455, 456 [2d Dept 1989]; *Monroe v Long Is. Coll. Hosp*., 84 AD2d 576, 576-577 [2d Dept 1981]; *see also Robins v Finestone*, 308 NY 543, 546 [1955]; *Catapano v Winthrop Univ. Hosp*., 19 AD3d 355, 355-356 [2d Dept 2005]). Moreover, a breach of contract cause of action is stated where a patient enters into an oral agreement with a physician, pursuant to which the patient agrees to retain the physician's services in exchange for a specific promise that the physician would provide the patient with certain medical services in a particularized fashion, and the physician does not provide the services that were agreed to, or provide them in the manner agreed to (*see Duquette v Oliva*, 75 AD3d 727, 728 [3d Dept 2010]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d at 545).

The plaintiff's contention that the Kassir defendants promised to perform certain procedures, but failed to perform them, although disputed by the parties, implicates the question of whether they breached a contract. Justice Madden has already concluded that the plaintiff stated a cause of action to recover for breach of contract.

The Kassir defendants established, prima facie, that the plaintiff initially agreed only to a rhinoplasty, with an intra-operative examination to ascertain whether extensive work needed to be performed on her septum, and that, after obtaining the plaintiff's informed consent to a septo-rhinoplasty, they nonetheless performed the septo-rhinoplasty that the plaintiff had insisted that she had agreed to, by removing 4 mm of tissue from her septum. They thus made a prima facie showing that they did not breach a contract for the provision of medical services. In opposition, the plaintiff, with her own testimony, the medical records, and her expert affirmations, raised a triable issue of fact as to whether she entered into a contract with the Kassir defendants, pursuant to which they agreed to perform a complete, therapeutic septo-rhinoplasty that involved the full surgical correction of her deviated septum, whether they breached the contract by removing only a minuscule amount of tissue from the septum, and whether that breach of contract caused her to sustain damages, including continued breathing problems for almost two years, and the necessity and expense of a follow-up surgery to address the medical problem that she thought that the Kassir defendants had agreed to address. Hence, that branch of the Kassir defendants' motion seeking summary judgment dismissing the breach of contract cause of action insofar as asserted against them must be denied.

C. MEDICAL MALPRACTICE BASED ON DEPARTURE FROM ACCEPTED PRACTICE

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of

fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice,

and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24).

Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp*., 99 NY2d 542, 544 [2002]; *see Frye v Montefiore Med. Ctr*., 70 AD3d at 24). Thus, the affirmation of a plaintiff's expert should not be credited where it completely "is contradicted by the record" (*Mulroe v New York-Presbyt. Hosp*., 203 AD3d 665, 665 [1st Dept 2022]).

The courts of this State repeatedly have rejected the concept that only a specialist practicing in a defendant's particular specialty is competent to testify that the defendant departed from accepted practice in the specialty (*see Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247,1248 [4th Dept 2008]; *Julien v Physician's Hosp*., 231 AD2d 678, 680 [2d Dept 1996]; *Matter of Enu v Sobol*, 171 AD2d 302, 304 [3d Dept 1991]; *Joswick v Lenox Hill Hosp*., 161 AD2d 352, 355 [1st Dept 1990]; *cf. Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014] [expert failed to assert that he possessed necessary knowledge and training or explain how he came to it, and also failed to set forth the standard of care allegedly violated]).

> "To qualify as an expert, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, if a physician possesses the requisite knowledge and expertise to make a determination on the issue presented, he need not be a specialist in the field. The question of whether a physician may testify regarding the standard of accepted medical practice outside the scope of his specialty can be a troublesome one, but appellate courts have rejected claims

> of error directed at a physician's qualifications to offer an opinion outside the scope of his specialty when the witness's specialty is closely related to the specialty at issue"

(*Matter of Enu v Sobol*, 171 AD2d at 304 [citations omitted]). Thus, in *Fuller v Preis* (35 NY2d at 431), a neurologist was permitted to give an opinion in the closely related specialty of psychiatry on the issue of whether an accident was the proximate cause of a subsequent suicide. In *Humphrey v Jewish Hosp. & Med. Center* (172 AD2d 494 [2d Dept 1991]), a general surgeon was held to be qualified to render an opinion in the specialty of obstetrics and gynecology. And in *Matter of Sang Moon Kim v Ambach* (68 AD2d 986, 987 [3d Dept 1979]), the opinion testimony of a qualified neurosurgeon at a professional misconduct hearing was sufficient to permit a finding of gross negligence or gross incompetence of an orthopedic surgeon during spinal surgery. Hence, Dr. Bu-Saba, an otolaryngologist, is fully qualified to render an opinion as to the sufficiency of the care rendered by a fellow otolaryngologist such as Kassir, even if Dr. Bu-Saba, unlike Kassir, is not also a plastic surgeon.

The Kassir defendants established their prima facie entitlement to judgment as a matter of law in connection with the medical malpractice cause of action with their submissions, including their expert's affirmation, demonstrating that they in fact performed a septo-rhinoplasty by cosmetically altering the shape of the plaintiff's nose and removing 4 mm of tissue from her septum in an attempt to alleviate her breathing problems. They further demonstrated, prima facie, that a septoplasty need not involve a full correction of a patient's septum, and that they thus did not fail to perform any procedure that they were retained to perform. They further established that, even if they departed from good practice by performing an incomplete procedure, such a departure was not the proximate cause of the plaintiff's injuries, since Dr. Halaas asserted that it was sinusitis, rather than a deviated septum, that caused the plaintiff's breathing difficulties.

The plaintiff raised a triable issue of fact in opposition to this showing with Dr. Bu-Saba's affirmation, in which he categorically opined that Kassir did not perform septo-rhinoplasty but

only a cosmetic rhinoplasty, that this failure to perform the agreed-upon procedure left the plaintiff with an unresolved breathing difficulties directly caused by her deviated septum, and that had Kassir performed the proper surgery, those problems would have been alleviated, thus obviating the need for Dr. Loft's 2019 surgery.

A hospital or other medical facility is liable for the negligence or malpractice of its employees (*see Hill v St. Clare's Hospital,* 67 NY2d 72, 79 [1986]; *Bing v Thunig*, 2 NY2d 656, 667 [1957]; *Singh v Sukhu,* 180 AD3d 837, 839 [2d Dept 2020]; *Pollicina v Misericordia Hosp. Medical Ctr*., 158 AD2d 194, 199 [1st Dept 1990]). "Under the doctrine of respondeat superior, a corporation, including a professional services corporation, is liable for a tort committed by its employee" (*Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998], citing *Connell v Hayden*, 83 AD2d 30, 46 [2d Dept 1981]). Since Kassir is both the principal and an employee of the other named Kassir defendants, those defendants would be vicariously liable for Kassir's malpractice. Inasmuch as the plaintiff raised a triable issue of fact as to Kassir's malpractice, she thus also has raised a triable issue of fact as to whether the remaining Kassir defendants may be held liable for Kassir's malpractice.

Consequently, that branch of the motion seeking summary judgment dismissing the medical malpractice cause of action insofar as asserted against all of the Kassir defendants must be denied.

D. LACK OF INFORMED CONSENT

The elements of a cause of action for lack of informed consent are

> "(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"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *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]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless, a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity and benefits of the procedure, along with known risks and dangers, were discussed prior to the procedure (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

Here, the Kassir defendants established, prima facie, that they obtained the plaintiff's informed consent to perform a septo-rhinoplasty that involved minimal loss of tissue to her septum, relying upon Dr. Mojaraddi's deposition testimony that he provided the plaintiff with a packet of numerous consent forms on January 19, 2016, and that he witnessed her signing them, along with the plaintiff's own testimony that she signed a both rhinoplasty and anesthesia consent form immediately prior to undergoing surgery on February 9, 2016. They further made a prima facie showing that, even if they did not obtain the plaintiff's fully informed consent to the procedure that she ultimately underwent, she sustained no injuries as a consequence, since the outcome of the procedure would have been the same regardless of the plaintiff's knowledge.

In opposition, the plaintiff raised a triable issue of fact with her own testimony, in which she asserted that she was never provided with a packet of consent forms on January 19, 2016, that she never executed any such forms, and that she had no detailed discussion with Kassir concerning risks, benefits, and alternatives prior to that date. In addition, she raised a triable

issue of fact with Dr. Naderi's affirmation that the manner in which the Kassir defendants obtained any consent was qualitatively insufficient, inasmuch as (1) no qualified person spoke with her in detail about the relevant surgical risks, benefits, and alternatives at the time that she allegedly was signing the packet of forms, (2) that, had she actually been presented with those forms, she would have been consenting to sinus surgery and a complete septoplasty that altered the configuration of her deviated septum, and (3) that her execution of different forms on the date of surgery, solely addressed to rhinoplasty, did not provide her with information as to what procedure she was actually undergoing. Moreover, Dr. Bu-Saba's statements were sufficient to raise a triable issue of fact that, had the plaintiff been fully informed of what procedure she actually was to undergo, a rhinoplasty and complete, therapeutic septoplasty would have been performed, her septum would have been corrected, and, as revealed after her 2019 surgery with Dr. Loft, her breathing problems would have abated far sooner than they did. The court also notes that, in light of the problems with both the plaintiff's inability to obtain her records, and the bizarre history of her consent forms, Dr. Loft was never able to review what procedures previously had been performed on the plaintiff prior to his own intervention.

Although the court recognizes that, in some circumstances, a physician in one specialty will not have the requisite experience, training, and knowledge necessary to render an opinion as to whether a defendant in another specialty departed from standards of good practice (*see Newell v New York City Health and Hosps. Corp*., 204 AD3d 574 [1st Dept 2022] [internist not qualified to render opinion concerning qualitative sufficiency of consent for an appendectomy]; *Samer v Desai*, 179 AD3d 860 [2d Dept 2020] [general and vascular surgeon not qualified to render opinion as to orthopedics or family medicine]; *Bartolacci-Meir v Sassoon,* 149 AD3d 567 [1st Dept 2017] [general surgeon lacked any experience in gastroenterology]), here, Dr. Naderi did not express his opinion as to whether the surgery performed upon the plaintiff was indicated in the first instance, whether Kassir's surgical techniques departed from good practice, or whether Kassir was obligated to perform a complete septoplasty. Rather, Dr. Naderi only gave

his opinion that the information provided to the plaintiff was qualitatively insufficient, and that the manner in which the Kassir defendants purported to obtain the plaintiff's consent was qualitatively insufficient for any type of surgery, regardless of subspecialty. The court concludes that Dr. Naderi is qualified to render the opinion that he presented here.

In light of the foregoing, the court must deny that branch of the Kassir defendants' motion seeking summary judgment dismissing the lack of informed consent cause of action insofar as asserted against them.

E. FRAUD BASED UPON FORGERY

To assert a claim sounding in fraud, a plaintiff must allege an intentional misrepresentation of facts, made to induce him or her to rely on it, reasonable reliance of the damaged party on those facts, and damages (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A cause of action sounding in fraud must be pleaded with sufficient specificity, in that the "circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). A civil cause of action premised upon forgery arises from "'the fraudulent making of an instrument in writing to the prejudice of another's rights'" (*Levi v Utica First Insurance Co*., 2003 NY Slip Op 30097[U], *9, 2003 NY Misc LEXIS 2075, *12 [Sup Ct, N.Y. County, Sep. 9, 2003], quoting *Marden v Dorthy*, 160 NY 39, 54 [1899]; *see Piedra v Vanover*, 174 AD2d 191 [2d Dept 1992]; *see also Remington Paper Co. v O'Dougherty*, 81 NY 474, 491 [1880] ["[t]he forgery is the very fraud of which the plaintiff complains"]). As the court (Madden, J.) previously concluded, the complaint adequately pleaded a cause of action based on forgery, as the allegations in this regard were sufficiently specific (*see Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017]; *Matter of Kennelly v Mobius Realty Holdings, LLC,* 33 AD3d 380, 381-382 [1st Dept 2006]).

"Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular, N. Am. v Victory Taxi Mgt*., 1 NY3d 381, 384 [2004]). "[A]lthough an expert's opinion is not required to establish a triable issue of

fact regarding a forgery allegation" (*id.*), here, the plaintiff indeed provided a detailed expert affidavit from a handwriting expert, explaining why the obviously duplicated signatures and initials that appear in numerous places in the medical records, purporting to be those of the plaintiff, were clearly not hers, but resembled those of a nurse who signed other documents in the plaintiff's chart.

The Kassir defendants made a prima facie showing of entitlement to judgment as a matter of law with Dr. Mojaraddi's testimony that, on January 19, 2016, he provided the plaintiff with a packet of consent forms to be signed or initialed, that he witnessed the plaintiff signing and initialing the document, and that the disputed signature was electronically duplicated and auto-populated in numerous locations in the plaintiff's chart. In opposition to that showing, the plaintiff raised a triable issue of fact as to whether the signatures and initials were genuine or forged, by submitting her handwriting expert's affidavit and her own testimony, in which she insisted that those signatures and initials were not hers, and did not even look like hers, (*see Hollander v Lipman*, 65 AD3d 1086, 1087 [2d Dept 2009]; *Christie's [Int.], S.A. v Gugliarda,* 65 AD2d 714, 715 [1st Dept 1978], *mod other grounds*, 67 AD2d 854 [1st Dept 1979]). With respect to the issue of proximate cause, although the Kassir defendants established, prima facie, that the generation of the consent forms that the plaintiff purportedly signed in January 2016 did not cause or contribute to any injuries claimed by the plaintiff, the plaintiff raised a triable issue of fact as to whether those forms, to the extent they were indeed forged, were generated for the purpose of covering up the Kassir defendants' failure to perform a complete septo-rhinoplasty, and thus delay her from seeking follow-up treatment to address that failure. Hence, the court must deny that branch of the Kassir defendants' motion seeking summary judgment dismissing the fraud cause of action premised upon forgery insofar as asserted against them.

F. PUNITIVE DAMAGES

Although New York does not recognize an independent cause of action to recover punitive damages (*see Fiur Co. v Ataka & Co*., 71 AD2d 370, 375-376 [1st Dept 1979]), punitive damages are recoverable in connection with other cognizable causes of action. "Punitive damages generally are reserved for rare cases exhibiting malice, fraud, oppression, insult, wantonness, or other aggravated circumstances which effect a public interest" (*DeJesus v. DeJesus*, 2017 NYLJ LEXIS 2998, *8 [Civ Ct, Kings County, Oct. 23, 2017], quoting *Laurie Marie M. v Jeffrey T. M.,* 159 AD2d 52, 58 [2d Dept 1990]). Moreover, punitive damages are appropriate where the defendant's conduct was intentional and deliberate, and has the character of outrage frequently associated with crime (*see Launders v Steinberg*, 39 AD3d 57, 68 [1st Dept 2007]). Finally, punitive damages are meant to punish and deter the defendant and others similarly situated from engaging in the same conduct in the future (*see Seymour v Hovnanian*, 2020 NY Slip Op 33719[U], *13, 2020 NY Misc LEXIS 9639 [Sup Ct, N.Y. County, Nov. 9, 2020]).

"The claim for punitive damages in connection with the forgery claim is maintainable, as it sufficiently pleads conduct evincing a high degree of moral turpitude or demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Levi v Utica First Ins. Co.*, 2003 NY Slip Op 30097[U], *12-13, 2003 NY Misc LEXIS 2075, *17 [Sup Ct, N.Y. County, Sep. 9, 2003] [internal quotation marks omitted]).

VI. CONCLUSION

The Kassir defendants' remaining contentions are without merit.

In light of the foregoing, it is

ORDERED that the motion of the defendants Ramtin Kassir, M.D., NY Snoring and Sinus Clinic, NY Snoring and Sinus, P.C., New York Snoring and Sinus Medical Treatment, P.C., and Park Avenue Plastic Surgery, PLLC, to preclude the plaintiff from relying upon her experts' affirmations and affidavit, and thereupon for summary judgment dismissing the

remaining causes of action in the amended complaint insofar as asserted against the defendants Ramtin Kassir, M.D., NY Snoring and Sinus Clinic, NY Snoring and Sinus, P.C., New York Snoring and Sinus Medical Treatment, P.C., and Park Avenue Plastic Surgery, PLLC, is denied.

This constitutes the Amended Decision and Order of the court.

12/14/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**