

**Abuladze v Long Is. Fertility, PLLC**

2022 NY Slip Op 34930(U)

April 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 501708/18

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part <sup>63</sup> of the Supreme Court of the State of New York, County of Kings, to be held at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 27 day of April 2022.

**PRESENT:**

HON. ELLEN SPODEK  
Justice

(AP) (68102)  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
MAYA ABULADZE,

Plaintiff,

*501708/18*  
Index No.: ~~5017008/2018~~

-against-

**ORDER**

*ms# 5 & 6*

LONG ISLAND FERTILITY, PLLC and SHER  
INSTITUTE FOR REPRODUCTIVE MEDICINE,  
NEW YORK CITY, LLC,

Defendants.

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UPON a review of the Motion for Summary Judgment on behalf of defendant LONG ISLAND FERTILITY, PLLC dated December 13, 2021, including the expert affirmation of George D. Kofinas, MD, the Motion for Summary Judgment on behalf of defendant LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC dated December 20, 2021 including the expert affirmation of Kristin Ivani, PhD., plaintiff's Affirmation in Opposition to the Motions for Summary Judgment dated February 4, 2022 and February 21, 2022 and the Affirmation in Reply of defendant LONG ISLAND FERTILITY, PLLC dated February 16, 2022 and the Affirmation in Reply of defendant LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC, dated March

21, 2022 and the motions having come before the Hon. Ellen Spodek, J.S.C. of the Kings County Supreme Court for oral argument on April 12, 2022, a decision was rendered on the record as follows:

“It is well established that ‘the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’ (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, ‘the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action’ (Alvarez, 68 N.Y.2d at 324). The ‘facts must be viewed in the light most favorable to the non-moving party’ (Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and ‘[a] shadowy semblance of an issue’ are insufficient to defeat summary judgment (S.J. Capelin Assoc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (Putrino v. Buffalo Athletic Club, 82 N.Y.2d 779, 781 [1993]).” (Stonehill Capital Management, LLC v. Bank of the West, 28 N.Y.3d 439, 448 [2016])

“In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider “departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries.”” (Schmitt v. Medford Kidney Ctr., 121 A.D.3d 1088, 1088 [2nd Dept. 2014] [quoting DiGeronimo v. Fuchs, 101 A.D.3d 933, 936 [2nd Dept 2012]]; Fink v. DeAngelis, 117 A.D.3d 894, 896 [2nd Dept. 2014]; Stukas v. Streiter, 83 A.D.3d 18, 23 [2nd Dept. 2011]). “A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not

proximately cause the plaintiff's injuries." (Michel v. Long Is. Jewish Med. Ctr., 125 A.D.3d 945, 945 [2nd Dept. 2015], lv denied, 26 N.Y.3d 905 [2015]; see also Barrocales v. New York Methodist Hosp., 122 A.D.3d 648, 649 [2nd Dept. 2014]; Berthen v. Bania, 121 A.D.3d 732, 732 [2nd Dept. 2014]; Trauring v. Gendal, 121 A.D.3d 1097, 1097 [2nd Dept. 2014]; Stukas, 83 A.D.3d at 23). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden." (Gillespie v. New York Hosp. Queens, 96 A.D.3d 901, 902 [2nd Dept. 2012]).

""[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment (citations omitted)."" (Bendel v. Rajpal, 101 A.D.3d 662, 663 [2nd Dept. 2012] [quoting Bezerman v. Bailine, 95 A.D.3d 1153, 1154 [2nd Dept. 2012]]; see also Savage v. Quinn, 91 A.D.3d 748, 749 [2nd Dept. 2012]; Myers v. Ferrara, 56 A.D.3d 78, 84 [2nd Dept. 2008]). Rather, plaintiff's expert must specifically address the defense expert's allegations. DiLorenzo v. Zaso, 148 A.D.3d 1111 (2d. Dept., 2017).

In light of the above, it has been consistently held that where an affirmation of plaintiff's expert fails to address specific assertions made by the defendant's expert, the plaintiff fails to raise a triable issue of fact. Ahosha, supra at 593; see also Gullo v. Bellhaven Center for Geriatric and Rehabilitative Care, Inc., 157 A.D.3d 773 (2d Dept., 2018); Tsirtin v. New York Community Hospital, 154 A.D.3d 994 (2d Dept., 2017); DiLorenzo, supra; Feuer v. Ng, 136 A.D.3d 704 (2d Dept., 2016); Berthen v. Bania, 121 A.D.3d 732 (2d Dept., 2014); Geffner v. North Shore Univ. Hospital, 57 A.D.3d 839 (2d Dept., 2008).

New York Courts have consistently held that a plaintiff, in order to raise a triable issue of fact and defeat a motion for summary judgment in a medical malpractice action, must show through a medical expert both a deviation from accepted standards of medical care and that the

treatment rendered by the moving Defendant was a proximate cause of the Plaintiff's injuries. Amsler v. Verrilli, 119 A.D.2d 786, 501 N.Y.S.2d 411 (2d. Dept. 1986). See e.g., Kaffka v. New York Hosp., 228 A.D.2d 332, 644 N.Y.S.2d 243 (1st Dep't 1996) appeal denied, 89 N.Y.2d 913, 676 N.E.2d 496, 653 N.Y.S.2d 914; Prete v. Rafla-Demetrious, 224 A.D.2d 674, 638 N.Y.S.2d 700 (2d Dep't 1996); Canter v. Mulnick, 93 A.D.2d 751, 461 N.Y.S.2d 305 (1<sup>st</sup> Dep't 1983), aff'd, 60 N.Y.2d 689, 455 N.E.2d 1257, 468 N.Y.S.2d 462.

This action surrounds Plaintiff's allegations that an embryo was improperly frozen and/or thawed resulting in a failure to retrieve the subject embryo. The vial was frozen at LONG ISLAND FERTILITY, PLLC and ultimately thawed at LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC. Unfortunately, the embryo was never retrieved.

In support of their motions, LONG ISLAND FERTILITY, PLLC submitted the expert affirmation of Dr. George D. Kofinas and Defendant, LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC, submitted the expert affirmation of Dr. Kristen Ivani. Both experts opined that Defendants, at all times, provided services consistent with the standard of care and that their actions were not the proximate cause of Plaintiff's alleged injuries. The Court recognized that Defendants met their *prima facie* burden in support of summary judgment.

In opposition, Plaintiff failed to submit an expert affirmation to address specific assertions made by the Defendants' experts and thus, failed to raise a triable issue of fact.

**ORDERED** that the motions for Summary Judgment on behalf of LONG ISLAND FERTILITY, PLLC and LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC are hereby **GRANTED** in their entirety pursuant to CPLR §3212, thereby dismissing all causes of action asserted in plaintiff's Complaint with prejudice;

The cause of action for medical malpractice is hereby dismissed as plaintiff failed to submit a medical expert affirmation in opposition to defendants' Summary Judgment Motions which established a *prima facie* showing of entitlement to Summary Judgment through the expert affirmations of George D. Kofinas, M.D. and Kristin Ivani, PhD.

Plaintiff's causes of action sounding in Lack of Informed Consent pursuant to New York State Public Health Law §2805-d, Intentional and Negligent Infliction of Emotional Distress, Fraud, Misrepresentation and Breach of Contract are dismissed with prejudice.

Specifically, plaintiff's Cause of Action for Intentional Infliction of Emotional Distress is hereby dismissed in its entirety with prejudice as it is barred by the one-year statute of limitations pursuant to CPLR §215(3); plaintiff's Cause of Action for Negligent Infliction of Emotional Distress is hereby dismissed in its entirety with prejudice as defendants LONG ISLAND FERTILITY, PLLC and LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC established that defendants' conduct was not egregious to sustain a cause of action for negligent infliction of emotional distress as such an action must be "premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety," Passucci v. Home Depot Inc., 67 A.D. 3d 1470 (4<sup>th</sup> Dept. 2009) and that the conduct alleged is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community," Murphy v. American Home Products Corp., 58 N.Y.2d 293, 303 (1983).

Plaintiff's Causes of Action sounding in Fraud and Misrepresentation are hereby dismissed in their entirety with prejudice as plaintiff alleged damages that are not separate and distinct from those flowing from the alleged medical malpractice cause of action wherein the alleged fraud is part and parcel of the alleged malpractice, Romatowski v. Hitzig, 227 A.D.2d 870 (3d Dept., 1996), Luciano v. Levine 232 A.D.2d 378 (2d Dept., 1996).

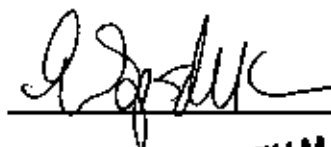
Plaintiff's Cause of Action for Breach of Contract is hereby dismissed in its entirety with prejudice as defendants established that the cause of action is legally redundant in a medical malpractice action and may not be pursued unless plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result, Winegrad v. Jacobs, 171 A.D. 2d 525 (1<sup>st</sup> Dept. 1991), Mitchell v. Spataro 89 A.D.2d 599 (2<sup>nd</sup> Dept., 1980), Catapano v. Winthrop University Hospital, 19 A.D.3d 355 (2d Dept., 2005), Dodes v. North Shore University Hospital, 149 A.D.2d 455 (2d Dept., 1989).

Accordingly, Defendants LONG ISLAND FERTILITY, PLLC and LIBERA MEDICAL, PLLC d/b/a SHER FERTILITY INSTITUTE s/h/a SHER INSTITUTE FOR REPRODUCTIVE MEDICINE NEW YORK CITY LLC motions for summary judgment are hereby GRANTED and defendants are hereby ordered to enter judgment with the Clerk of the Court dismissing all claims with prejudice.

This hereby constitutes the Order of the Court.

Dated: April 27, 2022

ENTER:



J.S.C. HON. ELLEN M. SPODEK

KINGS COUNTY CLERK  
FILED  
2022 MAY -4 AM 9:32

