

Mullings v Memorial Sloan Kettering Cancer Ctr

2022 NY Slip Op 34979(U)

January 28, 2022

Supreme Court, Bronx County

Docket Number: Index No. 29988/18

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 23

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MULLINGS, MONICA

Index No. 029988/2018E

-against-

Hon. JOSEPH E. CAPELLA

MEMORIAL SLOAN KETTERING

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 004)
for SUMMARY JUDGEMENT DEFENDANT noticed on 7/28/2021.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
MEMORANDUM DECISION FILED HEREWITH**

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 1/28/22

Hon. 
JOSEPH E. CAPELLA J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 23

Case Disposed
Settle Order
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index #: 29988/18
DECISION/ORDER

-----X
MONICA MULLINGS,

Plaintiff,

- against -

Present:
Hon. Joseph E. Capella
J.S.C.

MEMORIAL SLOAN KETTERING CANCER CTR,
MONICA MORROW, M.D., and ANDREA PUSIC, M.D.,

Defendants.

-----X
The following papers numbered 1 to 3 read on this motion.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS GRANTED AS FOLLOWS:

Defendants move for summary judgment (CPLR 3212) and dismissal of the instant medical malpractice and negligence action. The medical malpractice alleged in the complaint can be summarized as follows: the right total mastectomy performed by defendant, MONICA MORROW, M.D., in July 2016 was not necessary and Dr. Morrow failed to remove the saline breast implant; and the placement of a right silicone implant by defendant, ANDREA PUSIC, M.D., in January 2017 was not a proper procedure and the tissue expansion bag and saline breast implant were not removed before the silicone implant was placed. As for negligence, the complaint alleges that defendants "breached their duty to follow-up and monitor the July 2016" procedure, which "fell below the

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standard of care.”¹ Lastly, plaintiff claims that defendant, MEMORIAL SLOAN KETTERING CANCER CTR, is vicariously liable for Dr. Morrow and Dr. Pusic.

As defendants are the movants seeking summary judgment relief, it is their initial burden to make a *prima facie* showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 325 [1986].) In other words, defendants must provide evidentiary proof in the form of expert opinions and/or factual evidence that establishes that they did not deviate from accepted standards of care and practice, or that any departure was not a proximate cause of plaintiff’s injuries. (*Korszun v Winthrop*, 172 AD3d 1343 [2nd Dept 2019].) If they do, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 325), and denial of summary judgment.

In support of their summary judgment motion, defendants include an affirmation from Dr. Justin M. Sacks, a board certified plastic surgeon. According to Dr. Sacks, plaintiff’s allegation that the surgery performed by Dr. Morrow in July 2016 was not necessary is baseless given that plaintiff’s biopsy confirmed that she had invasive carcinoma in her right breast, which was a new primary cancer. He also notes that Dr.

¹ Plaintiff’s third cause of action is erroneously labeled as one for negligence. Its allegation that defendants “breached their duty to follow-up and monitor the July 2016” procedure, which “fell below the standard of care,” bears a greater relationship to the rendition of medical treatment. As such, the third cause of action is more appropriately characterized as one for medical malpractice rather than negligence.

Pusic's operative report confirmed that Dr. Morrow had, in fact, removed the right saline implant. Dr. Sacks goes on to state that after the saline implant was removed by Dr. Morrow, Dr. Pusic proceeded with the reconstruction and irrigated the right breast pocket with normal saline and Bacitracin, which is in full compliance with the standard of care. As for the January 2017 surgery by Dr. Pusic, Dr. Sacks opines that this was the proper procedure that provided plaintiff with complete right breast reconstruction with a silicone implant after the total mastectomy. In addition, he states that the operative and pathology reports reveal that Dr. Pusic removed the underlying tissue expander. Dr. Sacks opines that the sterilization technique used by Dr. Pusic was in conformance with the standard of care, and there is no evidence demonstrating that plaintiff developed an infection or contamination between January 2017 and May 2018. Overall, Dr. Sacks' detailed expert medical opinions demonstrated that the care and treatment rendered by defendants was well within accepted standards of medical care. Given the aforementioned, the court is satisfied that defendants have met their burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist to warrant a trial.

First, plaintiff's opposition papers do not address the complaint's mislabeled negligence claim. And second, plaintiff does not include an expert's opinion in her opposition papers, and instead relies upon unsubstantiated assertions or speculations by plaintiff and her attorney. (*Alvarez*, 68 NY2d 320.) The lack of an expert medical

opinion to demonstrate nonconformity with accepted medical practice is fatal to plaintiff's summary judgment burden. (*Fiore v Galang*, 64 NY2d 999 [1985]; *Wiesenthal v Weinberg*, 17 AD3d 270 [1st Dept 2005]; *Perez v NYC Health & Hospital*, 81 AD3d 448 [1st Dept 2011].) Therefore, defendants motion for summary judgment is granted and this action is dismissed in its entirety. Defendants are directed to serve a copy of this decision with notice of entry by first class mail upon plaintiff within 20 days of receipt of copy of same. This constitutes the decision and order of this court.

1/28/22
Dated

Hon. _____


Joseph E. Capella, J.S.C.