To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KEITH T. CLINKSCALES and GIA CLINKSCALES,

Plaintiffs,

-against-

JEAN R. TOSTANOSKI, M.D., JAY A. FLEISCHMAN, M.D., and HUDSON VALLEY EYE ASSOCIATES, LLP,

Defendant(s).

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DECISION AND ORDER
Index No.: 60704/2020
Motion Date: 09/20/2022
Seq. No. 1

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 33 were read on this motion (Seq. No. 1) by defendants for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Statement of Material Facts / Affirmation (Solimeo) / Exhibits A – N	1 – 17
Statement of Material Facts / Affirmation in Opposition (Gurren) / Exhibits 1 – 12 / Expert Affirmation (Lefkowitz)	18 – 32
Reply Affirmation (Solimeo)	33

Upon the foregoing papers, the motion is denied.

This action for medical malpractice arises out of defendants' treatment and care of plaintiff between January 2018 and March 2019 in connection with a cataract condition. Plaintiff alleges, in sum and substance, that defendants negligently treated a cataract condition, performed such treatment without obtaining a proper informed consent, and failed to coordinate treatment with plaintiff's prior treatment providers. Plaintiff alleges that he suffered a retinal tear and detached

retina, which required multiple further surgeries and procedures, and ultimately a permanent interference with his vision and the appearance of his right eye.

Plaintiff specifically alleges that Dr. Tostanoski neglected to consult with plaintiff's prior treating physicians, who had previously successfully treated plaintiff for the same condition; incorrectly diagnosed plaintiff with a senile (rather than a traumatic) cataract; improperly changed courses from a laser assisted cataract surgery to a manual surgery without obtaining an informed consent; failed to appreciate plaintiff's prior condition in post-operative treatment; and improperly referred plaintiff to Dr. Fleischman, a physician within her own practice, rather than back to plaintiff's prior treating physicians. Plaintiff alleges that Dr. Fleischman also neglected to consult with plaintiff's prior treating physicians; improperly decided to treat plaintiff's condition via laser vitreolysis, despite a known risk of retinal detachment, of which plaintiff was not informed. Plaintiff contends that Hudson Valley Eye Associates, LLP is vicariously liable for the acts of Dr. Tostanoski and Dr. Fleischman.

By Notice of Motion filed on May 11, 2022, defendants seek an order granting summary judgment dismissing the complaint against them. Defendants contend that neither Dr. Tostanoski nor Dr. Fleischman departed from good and accepted standards of care in their treatment of plaintiff, and that no act or omission by either physician proximately caused plaintiff's injuries, which defendants contend are the result of an incident in 2017 in which plaintiff was struck in the eye by a golf ball. Defendants further contend that plaintiff's claims of lack of informed consent are without merit.

Defendants submit the Affirmation of Robert Cykiert, M.D., a physician licensed to practice medicine in New York and board certified in ophthalmology. Dr. Cykiert opines that Dr. Tostanoski obtained an appropriate informed consent relating to the recommended cataract

surgery, and that Dr. Tostanoski appropriately changed plans from laser to manual surgery while fully informing plaintiff of the risks, benefits and alternatives, including aborting the surgery, and that additional written consent to the change was not required. Dr. Cykiert opines that the manual surgery was appropriately performed and completed without incident, at no time deviating from the standard of care, and that the cataract surgery was not a proximate cause of plaintiff's injuries. Dr. Cykiert further opines that Dr. Tostanoski's post-operative treatment of plaintiff, including the eventual referral to Dr. Fleischman, was at all times proper.

Dr. Cykiert opines that Dr. Fleischman's initial "wait and see" approach was well within the standard of care. After plaintiff returned to Dr. Tostanoski with new complaints nearly one year later, he was appropriately referred again to Dr. Fleischman, who is a retina and vitreous specialist. Dr. Cykiert opines that Dr. Fleischman appropriately recommended YAG vitreolysis to treat a large posterior vitreous detachment (PVD), and that Dr. Fleischman obtained an appropriate informed consent for such a procedure. Dr. Cykiert opines that the YAG vitreolysis was appropriately performed and did not cause plaintiff's eventual retinal tear and detachment, which Dr. Cykiert opines was caused by the prior golf ball injury.

In sum, Dr. Cykiert opines within a reasonable degree of medical certainty that there were no departures from accepted standards of care in defendants' treatment of plaintiff, and that plaintiff's claimed injuries were not caused by any act or omission on the part of the defendants. Defendants thus conclude that their motion should be granted, and the complaint should be dismissed.

In opposition, plaintiff submits the Affirmation of Todd A. Lefkowitz, M.D., a physician licensed to practice medicine in New York and board certified in ophthalmology. Dr. Lefkowitz opines that Dr. Tostanoski failed to obtain a proper informed consent to a manual cataract surgery.

Dr. Lefkowitz opines that good practice requires the physician to explain alternative procedures and the risks involved, and thus that the language in the consent obtained relating to laser surgery, indicating that conditions may arise which might require a different procedure, is not sufficient to meet the applicable standard. Dr. Lefkowitz further opines that Dr. Tostanoski departed from the applicable standard of care in failing to consider plaintiff's prior injury and treatment and to obtain the input of plaintiff's prior treating physicians, in failing to warn plaintiff of the potential complications of the chosen course of treatment, and in failing to supervise her referral of plaintiff to Dr. Fleishman, who subsequently performed a contraindicated procedure.

Dr. Lefkowitz opines that Dr. Fleischman's decision to treat plaintiff's PVD via vitreolysis was a departure from the standard of care, particularly in the case of a patient who, like plaintiff here, had a previous PVD which was successfully treated with "watchful waiting." Dr. Lefkowitz further opines that the standard of care required Dr. Fleischman to consult with plaintiff's prior treating physicians on this matter, which was not done. Dr. Lefkowitz opines that Dr. Fleischman failed to obtain a proper informed consent to the vitreolysis procedure, in that he failed to warn plaintiff of the risk of retinal detachment, which failure is confirmed by Dr. Fleischman's deposition testimony to the effect that there is no link between the procedure and retinal detachment.

Dr. Lefkowitz opines that the course charted by Dr. Tostanoski and Dr. Fleishman, and ultimate treatment of plaintiff via YAG vitreolysis, was the cause of plaintiff's retinal detachment. Dr. Lefkowitz opines that there is no evidence to support a conclusion that the detachment was caused by plaintiff's prior golf ball injury. Plaintiff thus concludes that the motion should be denied in its entirety.

In reply, defendants contend that the conclusions of plaintiff's expert are speculative and conclusory and thus insufficient to defeat summary judgment. Defendants contend that plaintiff's expert did not opine that a reasonably prudent person in plaintiff's position, having been fully informed of the risks of a manual cataract surgery, would not have consented to the manual surgery performed by Dr. Tostanoski, nor that the manual surgery was a proximate cause of plaintiff's injuries, and thus that the cause of action for lack of informed consent against Dr. Tostanoski must be dismissed. Defendants further contend that all claims of medical malpractice against Dr. Tostanoski should be dismissed, as Dr. Lefkowitz does not opine that the cataract surgery proximately caused plaintiff's injuries.

Defendants similarly contend that the cause of action for lack of informed consent against Dr. Fleischman must be dismissed, as Dr. Lefkowitz does not opine that a reasonably prudent person in plaintiff's position, having been fully informed of the risks of YAG vitreolysis, would not have consented to the procedure. Defendants further contend that the claims of medical malpractice against Dr. Fleischman must be dismissed because there is no contention that the YAG vitreolysis was performed improperly.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, 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 v Prospect Hosp.*, 68 NY2d 320, 324, [1986] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348, [2d Dept. 2002]):

> "It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

"On a motion for summary judgment dismissing a cause of action alleging medical malpractice, a defendant physician must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Monzon v Brown*, 130 AD3d 884, 885 [2d Dept 2015]). "Once such a showing has been made, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact. . . . Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (*Whitnum v. Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 497 [2d Dept 2016] [citations omitted]). If the plaintiff's expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *see Nelson v Lighter*, 179 AD3d 933 [2d Dept 2020]).

To establish a cause of action based on lack of informed consent under Public Health Law § 2805-d, a plaintiff must prove "(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]). A plaintiff's failure to present evidence establishing that an informed, reasonably prudent person would not have consented to the procedure warrants dismissal of this cause of action (*Thompson v Orner*, 36 AD3d 791 [2d Dept 2007]; *Innucci v Bauersachs*, 201 Ad2d 460 [2d Dept 1994]).

Informed Consent

Defendants on their motion made a prima facie showing that Dr. Tostanoski and Dr. Fleischman each obtained appropriate informed consent prior to performing the respective surgical procedures by submission of the Affirmation of Dr. Cykiert and the relevant deposition transcripts. In opposition, plaintiff failed to raise a triable issue of fact. Specifically, because plaintiff's expert, Dr. Lefkowitz, did not opine that an informed, reasonably prudent person in plaintiff's position would not have consented to the procedures, these claims must be dismissed.

Medical Malpractice

Defendants on their motion made a prima facie showing that the care and treatment rendered by Dr. Tostanoski and Dr. Fleischman was within the applicable standard of care, and that such care and treatment did not proximately cause plaintiff's injuries, by submission of the Affirmation of Dr. Cykiert. In opposition, plaintiff failed to raise a triable issue of fact as to a

malpractice claim in connection with the cataract surgery performed by Dr. Tostanoski, as plaintiff's expert, Dr. Lefkowitz, did not opine that this surgery was a proximate cause of plaintiff's injuries. Any claim of malpractice in connection with the cataract surgery performed by Dr. Tostanoski thus is dismissed.

However, plaintiff raised a triable issue of fact as to whether Dr. Tostanoski's pre- and post-operative care proximately caused plaintiff's injuries. Dr. Lefkowitz's opinions clearly describe a causal link between plaintiff's injuries and Dr. Tostanoski's alleged failure to consult with plaintiff's prior treating physicians and the failure to supervise plaintiff's care after the referral to Dr. Fleischman. Defendant's motion thus is denied insofar as it seeks dismissal of plaintiff's malpractice claim. Plaintiff likewise raised a triable issue of fact as to the claim of malpractice against Dr. Fleischman. Dr. Lefkowitz opined that the VAG vitreolysis procedure performed by Dr. Fleischman is contraindicated in the treatment of plaintiff's condition, and that the procedure proximately caused plaintiff's injuries. In short, with respect to plaintiff's malpractice claims, the "conflicting medical expert opinions present a triable issue of fact" (*Darwick v Paternoster*, 56 AD3d 714, 715 [2d Dept 2008] [citations omitted]).

Accordingly, it is hereby

ORDERED that the branch of the motion seeking summary judgment dismissing plaintiff's claims for lack of informed consent is granted; and it is further

ORDERED that the branch of the motion seeking summary judgment dismissing plaintiff's claims for malpractice is granted to the limited extent of dismissing any claim of malpractice relating to Dr. Tostanoski's performance of cataract surgery on plaintiff, and the motion is otherwise denied; and it is further

ORDERED that, within ten (10) days of the date hereof, plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendants; and it is further

ORDERED that within ten (10) days of service of notice of entry, plaintiff shall file proof of said service via NYSCEF; and it is further

ORDERED that the parties shall appear for settlement conference on March 2, 2023 at 10:00 a.m. in Courtroom 1201.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 13, 2022
White Plains, New York

E N T E R:

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF