Briggs v Shahine
2022 NY Slip Op 35061(U)
December 1, 2022
Supreme Court, Queens County
Docket Number: Index No. 716146/2019
Judge: Peter J. O'Donoghue
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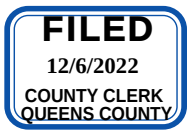
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE O'Donoghue IA Part MD
Justice

SHEENER BAILEY BRIGGS x Index

Plaintiff Number 716146/2019

-against-



Motion
Date May 11, 2022

AYMAN SHAHINE, M.D.,

Defendant.

Motion Seq. No. 2

x

The following numbered papers read on this motion by the defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 37-53
Answering Affidavits - Exhibits.....	EF 55-61
Reply Affidavits.....	EF 62

Upon the foregoing papers it is ordered that the motion is determined as follows:

This medical malpractice action is based on the defendant's purported failure to properly perform a cosmetic procedure known as a Brazilian Butt Lift (the BBL procedure). According to the plaintiff, the BBL procedure, which the defendant performed in April 2016, resulted in bodily deformities, permanent scarring, loss of muscle tone around her bowel, and fecal incontinence. The plaintiff's complaint asserts causes of action for medical malpractice, general negligence, lack of informed consent, fraud, and gross negligence. The plaintiff alleges that the defendant was negligent in, among other things, performing the BBL procedure without the requisite training or licensing, performing the BBL procedure in a reckless manner such that subsequent revision surgeries were necessary, improperly administering anaesthesia, failing to have adequately trained staff evaluate the plaintiff, and failing to have anaesthesiologists and nurses available for the

BBL procedure. Discovery now having been completed, the defendant moves for summary judgment dismissing the complaint.

The plaintiff's medical malpractice cause of action

"[T]he requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of medical practice, and evidence that such deviation or departure was a proximate cause of injury or damage" (*Raucci v Shinbrot*, 127 AD3d 839, 841 [2d Dept 2015]; *see Dixon v Chang*, 163 AD3d 525, 526 [2d Dept 2018]). "[A] defendant physician seeking summary judgment 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" (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]; *see Matthis v Hall*, 173 AD3d 1162, 1163 [2d Dept 2019]). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars" (*Mackauer v Parikh*, 148 AD3d 873, 876 [2d Dept 2017]; *see Kogan v Bizekis*, 180 AD3d 659, 660 [2d Dept 2020]). However, where a defendant's expert merely recounts the treatment rendered and provides a conclusory opinion that this treatment did not represent a departure from good and accepted medical practice, a defendant has failed to meet its prima facie burden (*see Barlev v Bethpage Physical Therapy Assoc., P.C.*, 122 AD3d 794, 784 [2d Dept 2014]; *Couch v County of Suffolk*, 296 AD2d 194, 198 [2d Dept 2002]). A defendant's failure to meet its prima facie burden requires denial of the motion for summary judgment, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In support of his motion, the defendant submits, among other things, the pleadings, the transcripts from the depositions of the plaintiff and the defendant, the plaintiff's medical records, and affirmations from two expert physicians. The first expert affirmation is from Theodore Diktaban, M.D. Diktaban is board certified in plastic surgery and otolaryngology, and is an Assistant Attending Plastic Surgeon at Lenox Hill Hospital. Based on his review of, among other things, the pleadings, the plaintiff's medical records, and the relevant deposition transcripts, Diktaban opines, within a reasonable degree of medical certainty, that the defendant did not depart from the standard of car in treating the plaintiff, and that in any event, the defendant's treatment did not cause or contribute to the plaintiff's fecal incontinence.

The second expert affirmation is from Marvin L. Corman, M.D. Corman is board certified in general surgery and colon and rectal

surgery. Corman attests that he has more than fifty years of experience as a practicing surgeon, and that he is a Professor of Surgery at Stony Brook University and a Staff Surgeon at Stony Brook Medical Center. Corman asserts that he reviewed, among other things, the pleadings, the plaintiff's medical records, and the relevant deposition transcripts. Corman further asserts that he performed a physical examination of the plaintiff. Corman opines, within a reasonable degree of medical certainty, that the defendant's treatment of the plaintiff did not proximately cause the plaintiff's fecal incontinence. In particular, Corman opines that the defendant's performance of the BBL procedure did not cause the plaintiff's fecal incontinence because the injections that were done during the procedure were not located near the plaintiff's anal sphincter or levator muscles, the muscles that control fecal continence.

The defendant failed to establish, prima facie, that he did not depart from the standard of care in performing the April 2016 BBL procedure (*see Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 913 [2d Dept 2022]). The defendant relies solely on the Diktaban affirmation in an effort to establish that no departure from the standard of care occurred here. However, Diktaban failed to address many of the allegations of negligence asserted against the defendant, including allegations that the defendant was negligent in improperly administering sedatives and anaesthesia, performing the BBL procedure without proper medical training, in leaving the plaintiff unattended, and failing to have anesthesiologists and nurses available (*see Oliver v New York City Health & Hosps. Corp.*, 178 AD3d 1057, 1058-1059 [2d Dept 2019]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2d Dept 2010]). To the extent that Diktaban addressed the plaintiff's allegations of negligence that were related to the BBL procedure, these explanations merely amount to conclusory assertions that each of the defendant's actions during the procedure did not represent a departure from the standard of care. These assertions, however, are insufficient to rebut the plaintiff's specific allegations of negligence (*see Nodar v Pascaretti*, 200 AD3d 697, 699 [2d Dept 2021]; *Wei Lin v Sang Kim*, 168 AD3d 788, 788-789 [2d Dept 2019]). Critically, Diktaban failed to set forth the standard of care relevant to performing a BBL procedure or provide any substantive explanation as to how the defendant's actions during the April 6, 2016 surgery did not deviate from the standard of care (*see Ojeda v Barabe*, 202 AD3d 808, 810 [2d Dept 2022]).

The defendant also failed to establish, prima facie, that his treatment of the plaintiff did not proximately cause the plaintiff's alleged injuries (*see Smarkucki v Kleinman*, 171 AD3d 1118, 1119 [2d Dept 2019]). With respect to the allegations that

the BBL procedure led to the development of fecal incontinence and the loss of muscle tone around the bowel, Corman opined that it is common for women with an extensive obstetrical history to develop decreased anal sphincter tone and weakened levator muscles in the pelvis, which would result in fecal incontinence. Corman further opined that "it is also common for a patient who has undergone sleeve gastrectomy to develop postsurgical dumping syndrome, which results in loose, watery stool." Corman noted that the plaintiff carried five children to term and had also undergone a sleeve gastrectomy in August 2012. Thus, Corman opined, within a reasonable degree of medical certainty, that the plaintiff's lax sphincter tone and inability to squeeze levator muscles was the result of her prior vaginal deliveries and surgical history. Corman's opinion, however, is speculative (*see Wodzenski v Eastern Long Is. Hosp.*, 170 AD3d 925, 926-927 [2d Dept 2019]). Notably, while Corman acknowledges that "[f]ecal incontinence is largely caused by global and/or localized damage or weakness to the anal sphincter, levator muscles in the pelvis, and/or immediately surrounding nerves and by loose stool," his affirmation fails to affirmatively demonstrate that the plaintiff's fecal incontinence was not caused by nerve damage. Corman merely opines, in a conclusory fashion, that because the plaintiff gave birth to multiple children and had a sleeve gastrectomy, that this was the proximate cause of her injuries.

Moreover, in reaching this conclusion, Corman's opinion fails to address conflicting evidence in the record (*see Abakpa v Martin*, 132 AD3d 924, 927 [2d Dept 2015]; *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]). In particular, the plaintiff explicitly testified that, following both her sleeve gastrectomy and the delivery of her youngest child, she did not experience any episodes of fecal incontinence. The plaintiff also testified that her episodes of fecal incontinence began immediately after the BBL procedure. Absent any substantive explanation of how or when the weakening of the anal sphincter and levator muscles in the pelvis occurs after a sleeve gastrectomy or childbirth, Corman's opinion is insufficient to establish prima facie entitlement to summary judgment. Finally, both Corman and Diktaban assert that the injections done during the BBL procedure were not made near the plaintiff's anal sphincter or levator muscles. However, in light of Corman's failure to affirmatively demonstrate that the plaintiff's fecal incontinence was not caused by nerve damage, this assertion, standing alone, is insufficient to meet the defendant's prima facie burden.

It is noted that neither of the defendant's experts addressed the other injuries that were alleged by the plaintiff, including deformed buttocks, deformed waistline and permanent scarring.

Thus, the defendant failed to establish, prima facie, that the BBL procedure did not proximately cause these injuries (*see Smarkucki*, 171 AD3d at 1119). The branch of the defendant's motion to dismiss the plaintiff's medical malpractice cause of action is therefore denied, regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853).

The plaintiff's cause of action for lack of informed consent

"[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Jolly v Russell*, 203 AD2d 527, 528 [2d Dept 1994]; *see Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 670 [2d Dept 2014]). "To establish a cause of action for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to inform the patient of reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar 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" (*Xiao Yan Ye v Din Lam*, 191 AD3d 827, 829 [2d Dept 2021]; *see* Public Health Law § 2805-d[1]; *Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]). "The third element is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" (*Trabal v Queens Surgi-Center*, 8 AD3d 555, 556-557 [2d Dept 2004]). Although the mere fact that a plaintiff signed a consent form does not establish a defendant's entitlement to summary judgment (*see Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]), a defendant may nevertheless meet its prima facie burden by demonstrating (1) that the plaintiff signed a detailed consent form after being apprised of alternatives and foreseeable risks, (2) that a reasonably prudent person in the plaintiff's position would not have declined to undergo the surgery, or (3) that the actual procedure performed for which there was no informed consent was not a proximate cause of the alleged injuries (*see Pirri-Logan v Pearl*, 192 AD3d 1149, 1151 [2d Dept 2021]).

In support of this branch of his motion, the defendant relies on the plaintiff's medical records and the parties' deposition testimony. These submissions establish prima facie entitlement to summary judgment dismissing the plaintiff's cause of action predicated on lack of informed consent (*see Pirri-Logan*, 192 AD3d at 1152 [2d Dept 2021]; *Kelapire v Kale*, 189 AD3d 1197, 1199 [2d Dept 2020]). In particular, the plaintiff testified that she

specifically asked about risks of the BBL procedure, and the defendant testified that he explained the risks, benefits, and alternatives of the BBL procedure to the plaintiff. Moreover, the plaintiff's medical records contain a detailed consent form, signed by the plaintiff, which is specific to liposuction and fat transfer procedures such as the BBL procedure at issue here.

In opposition, the plaintiff failed to address the defendant's prima facie showing with respect to this cause of action. Thus, this branch of the defendant's motion is granted.

The plaintiff's remaining allegations

In addition to the causes of action for medical malpractice and lack of informed consent, the plaintiff's complaint also sets forth claims for fraud, general negligence, and gross negligence. However, the defendant's moving papers failed to address these causes of action. Thus, the branch of the defendant's motion to dismiss these causes of action is denied, regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853).

Accordingly, it is

ORDERED that the branch of the defendant's motion to dismiss the plaintiff's cause of action predicated on lack of informed consent is granted; and it is further,

ORDERED that the defendant's motion is otherwise denied.

Dated: December 1, 2022

PETER J. O'DONOGHUE, J.S.C.

FILED
12/6/2022
COUNTY CLERK
QUEENS COUNTY