

**Delos-Santos v Kaisman**

2023 NY Slip Op 31258(U)

April 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 500375/2019

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams St., Brooklyn, New York, on the 11th day of April, 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

YISSEL DELOS-SANTOS,

Index No. 500375/2019

Plaintiff,

-against-

ARDEN KAISMAN, M.D., CENTRAL QUEENS DAY SURGICAL CENTER, INC., and NEW YORK SURGERY CENTER QUEENS, LLC d/b/a QUEENS SURGI-CENTER,

Defendants.

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc. No.</u>
Notice of Motion and Affidavits (Affirmations) and Exhibits.....	43-64
Answering Affidavit (Affirmation) and Exhibits.....	66-69
Reply Affidavit (Affirmation) and Exhibits.....	70
Stipulation of Adjournment.....	65

This action is to recover damages for medical malpractice and lack of informed consent. Defendant Arden Kaisman, M.D. moved for summary judgment dismissing the amended complaint and any crossclaims.<sup>1</sup> Plaintiff Yissel Delos-Santos opposed the motion.

<sup>1</sup> Central Queens Day Surgical Center, Inc. did not appear in the action. All claims were discontinued with prejudice against New York Surgery Center Queens, LLC d/b/a Queens Surgi-Center.

Plaintiff slipped and fell at her place of employment on January 27, 2015. She saw several medical providers, then Dr. Kaisman, a board-certified anesthesiologist with a sub-certification in pain management, on May 17, 2016. Plaintiff informed Dr. Kaisman that she had low back pain on her left side that radiated down to her lower left leg. Dr. Kaisman diagnosed plaintiff with a herniated disc at L5-S1 because of the accident. He performed two separate epidural injections and informed plaintiff that she was a candidate for an endoscopic lumbar discectomy, a surgical procedure performed using an endoscope to remove herniated disc material from the lower back that is pressing on a nerve or the spinal cord.

Plaintiff continued to have left-sided pain after the two epidural injections, so she agreed to undergo the endoscopic lumbar discectomy. Dr. Kaisman performed the procedure on October 5, 2016. Following the procedure, plaintiff complained that pain continued in both the left side of her back and left leg, but now she also had pain in the right side of her back and right leg.

Plaintiff alleged that Dr. Kaisman failed to provide informed consent and performed an endoscopic lumbar discectomy at L5—S1 on the right side of her spine instead of the left, where she complained of pain, causing an exacerbation of her existing injuries, and creating new injuries that she otherwise would not have had. Dr. Kaisman asserted that plaintiff was given appropriate information during two office visits, via a Spanish interpreter, where the risks and benefits of the procedure were discussed, including nerve damage. Plaintiff also signed a consent form on the day of surgery, which informed of the risk of nerve damage. Moreover, Dr. Kaisman argued that it did not matter where the procedure was performed right or left; rather, what mattered was that the device went into the disc and the disc material was removed.

### Medical Malpractice

“A physician [who moves] for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of plaintiff’s injuries.” *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018) quoting *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017). To sustain the burden, the physician “must address and rebut any specific allegations of malpractice set forth in a plaintiff’s bill of particulars.” *Mackauer*, 148 A.D.3d 873. “Conclusory statements set forth in an affirmation of a medical expert which do not refute or address the specific allegations of negligence made by a plaintiff in his or her complaint and bill of particulars are insufficient to make a prima facie showing that a defendant physician is entitled to judgment as a matter of law.” *Huichun Feng v. Accord Physicians, PLLC*, 194 A.D.3d 795, 148 N.Y.S.3d 234 (2d Dept 2021). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

“In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden.” *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). Accordingly, a plaintiff must submit the affidavit of “a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician’s opinion that the alleged departure was a competent producing cause of plaintiff’s injuries.” *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept.

2009). *See Sunshine v. Berger*, \_\_\_ N.Y.S.3d \_\_\_, 2023 NY Slip Op 01701 (2d Dept. 2023).

Here, Dr. Kaisman failed to establish prima facie entitlement to judgment dismissing the medical malpractice cause of action as the expert affirmation of David Abbatematteo, M.D., board certified in the fields of Anesthesiology and Pain Management, failed to address and rebut the specific allegations of malpractice outlined in plaintiff's complaint and bill of particulars and failed to eliminate all triable issues of fact. Moreover, Dr. Abbatematteo opined that "the objective of the procedure was to get into the disc and remove disc material. While he indicated that Dr. Kaisman "was certainly inside the disc" and that "[t]he fluoroscopic image show[ed] that contrast is in the appropriate location to access the L5-S1 disc," he failed to indicate whether Dr. Kaisman removed any material from plaintiff's disc or opine on whether that part of the procedure was correctly performed. Thus, the medical malpractice branch of the motion is denied, regardless of the sufficiency of plaintiff's papers.

#### **Lack of Informed Consent**

"[L]ack of informed consent is a distinct cause of action [which] requir[es] proof of facts not contemplated by an action based merely on allegations of negligence." *Jolly v. Russell*, 203 A.D.2d 527, 611 N.Y.S.2d 232 (2d Dept. 1994). To establish a cause of action for lack of informed consent, 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

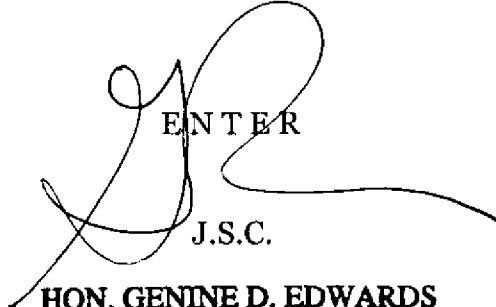
of informed consent is the proximate cause of the injury.” *Spano v. Bertocci*, 299 A.D.2d 335, 749 N.Y.S.2d 275 (2d Dept. 2002). “The mere fact that [a] plaintiff signed a consent form does not establish defendants’ prima facie entitlement to judgment as a matter of law.” *Godel v. Goldstein*, 155 A.D.3d 939, 64 N.Y.S.3d 127 (2d Dept. 2017), quoting *Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016).

Contrary to Dr. Kaisman’s contentions, the fact that plaintiff signed the consent form was not sufficient to establish his prima facie entitlement to judgment as a matter of law. Furthermore, the conflicting deposition testimony revealed a factual dispute as to whether plaintiff was adequately informed about the procedure, namely on which side of plaintiff’s back the procedure would be performed, and its risks. Thus, Dr. Kaisman failed to establish that no triable issues of fact exist as to plaintiff’s lack of informed consent claim. *Palmeiro v. Luchs*, 202 AD3d 989, 163 N.Y.S.3d 558 (2d Dept 2022).

Accordingly, Arden Kaisman, M.D.’s motion for summary judgment is denied. The parties shall appear for an Alternative Dispute Resolution conference on July 13, 2023, at 10:30AM.

This constitutes the Decision and Order of the Court.

For Clerks use only  
MG \_\_\_\_\_  
MD \_\_\_\_\_  
Motion Seq.#: 2

  
ENTER  
J.S.C.  
HON. GENINE D. EDWARDS