SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X

ELSA FREDERICK,

Plaintiff,

- v -

KHALED OSMAN, M.D., D.O, ABEER DABBAS, P.A., and BRIGHT MEDICAL, P.C.,

Defendants.

----------X

INDEX NO. 805151/2017

MOTION DATE 05/05/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice and lack of informed consent, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff does not oppose the motion. The motion is granted, and the complaint is dismissed.

The crux of the plaintiff's claim is that the defendants improperly performed a liposuction procedure upon her, thus causing her to sustain injuries.

Prior to 2015, the plaintiff had a history of controlled diabetes, as well as a history of surgical cosmetic procedures, including an abdominoplasty, also known as a "tummy tuck," that had been performed by Samuel Rhee, M.D., and a mammoplasty that had been performed by Scott Glasberg, M.D. She first presented to the defendant Khaled Osman, M.D., D.O., on April 10, 2015, seeking a liposuction consultation. Osman advised the plaintiff that, because she had a tummy tuck prior to any liposuction, she likely would have a worse result than if she had undergone the liposuction procedure first. Upon examining the plaintiff, Osman noted a small amount fat subcutaneously over her stomach, measuring 1.2-1.5 centimeters deep. He also

noted the presence of scars at the site of the tummy tuck, specifically across the plaintiff's abdomen and below her navel, as well as the fact that her right flank was lopsided. The plaintiff returned to Osman's office on April 22, 2015, at which time he again described the procedure to her, indicating that it would involve three steps---tumescent anesthesia, which he explained as entailing the injection of "numbing" fluid into the skin while she was awake, laser "melting" of the fat, and suction of the fat. According to the defendants, the plaintiff consented to go forward with the procedure, at which point Osman provided her with pre-surgical instructions.

Osman performed a laser liposuction procedure on the plaintiff on May 1, 2015. According to Osman's operative report, the plaintiff laid on the bed comfortably, and denied dizziness. He first applied the topical antibiotic ointment Betadine to the surgical site, and then administered tumescent anesthesia to the plaintiff's abdomen, at which point Osman examined her sides. Osman then applied the laser treatment and removed 1,000 milliliters (ml) of liquified fat, noting the discharge and suctioning of 150 ml of serosanguinous fluid. When Osman spoke to the plaintiff the next day, she complained of nausea, vomiting, weakness, and pain. Osman responded that these symptoms could be secondary to the pain medication he had prescribed. At the plaintiff's next follow-up visit on May 7, 2015, she denied the presence of any pain, although Osman noted mild swelling at the surgical site, but no erythema or discharge, and normal skin temperature. The May 7, 2015 appointment was the plaintiff's last visit with Osman. More than one year later, the plaintiff underwent another liposuction procedure, this time performed by Dr. Rhee. According to the defendants, there is no record of any further treatment, and no record of a second revision procedure.

In her complaint, the plaintiff specifically alleged that, on or about May 1, 2015, the defendants rendered treatment to her, consisting of liposuction surgery and contouring, and continued to treat her for a period of time thereafter. She further averred that they departed from good and accepted medical practice in the course of the surgery and post-operative care,

and that they permitted unlicensed, unskilled, and unqualified persons to perform the liposuction surgery and contouring.

In her bill of particulars, the plaintiff again alleged that in that the defendant Khaled Osman, M.D., D.O., departed from good and accepted medical and surgical practice in negligently performing liposuction surgery to her abdomen with contour of the bilateral flanks. She asserted that the procedure was contraindicated, and that Osman failed to know the proper procedures for liposuction surgery and contouring, thus subjecting her to an "ineffective procedure." In addition, the plaintiff asserted that Osman negligently and carelessly created serious and irreversible complications or to guard against their development. The plaintiff further contended in her bill of particulars that Osman failed to take a proper medical history, failed to obtain appropriate, complete, and proper medical records, and failed to generate medical records describing the applicable signs, symptoms, recommendations, treatment, diagnosis, and other appropriate information. Moreover, she stated that Osman failed to possess the appropriate and requisite medical knowledge due to his lack of cognizance and awareness of appropriate medical texts, journals, and literature. Additionally, she claimed that Osman failed to obtain her fully informed consent to the procedure.

The plaintiff also alleged in her bill of particulars that, as a consequence of Osman's negligence, she sustained "severe depression extending from the lower abdominal into the bilateral flanks," significant lipodystrophy to the upper abdomen, dimpling, wrinkling, scarring, and tethering of the skin, and bulging of her bilateral flanks, all of which necessitated two revision liposuction procedures, and engendered emotional distress and physical pain.

In support of their motion, the defendants submitted the pleadings, the plaintiff's bill of particulars, the parties' deposition transcripts, relevant medical and surgical records, discovery conference orders, an attorney's affirmation, and the expert affirmation of board-certified plastic surgeon William Rosenblatt, M.D., who averred that he had significant experience performing liposuction procedures. In his affirmation, Dr. Rosenblatt initially opined that the liposuction

procedure was indicated. As he explained it, a liposuction is an elective procedure, and is indicated whenever a patient has unwanted fatty tissue, a condition which the plaintiff confirmed at her deposition, and which was further corroborated by Osman's observation that she manifested 1.2 cm to 1.5 cm of fat subcutaneously around the abdomen and a lopsided right flank. Dr. Rosenblatt averred that these are all reasons for a patient to undergo liposuction. He expressly concluded that the plaintiff did not have any contraindications to laser liposuction, such as pregnancy, cancer, vascular conditions, uncontrolled diabetes, and liver disease, and explicitly opined that controlled diabetes is not a contraindication to laser liposuction. Dr. Rosenblatt noted that, while a history of an abdominoplasty may lead to a worse result, it is not a contraindication to the liposuction, and Osman appropriately warned the patient of that risk.

Dr. Rosenblatt concluded that the defendants properly performed the liposuction, inasmuch as it was the standard of care to employ tumescent anesthesia as a numbing agent during the procedure, and Osman appropriately exercised his medical judgment in determining the amount of fat to suction out. Dr. Rosenblatt explained that, during the procedure, the surgeon makes an incision into the abdomen and inserts a laser into the fat tissue under the skin to liquify the fat, then employs a cannula to suction out the liquified fat and any other fluids. He noted that bleeding is a known complication of laser liposuction. He further explained that, after the procedure, the surgeon relies on his or her visual observations to ensure that he or she had removed an appropriate amount of fat. In this regard, Dr. Rosenblatt stated that there were no other tests for the surgeon to perform

Upon his review of the relevant operative note, Dr. Rosenblatt concluded that Osman performed the laser liposuction in the standard, customary fashion, with no documentation of any untoward or unusual events. Moreover, inasmuch as he opined that revision procedures are a known risk of any liposuction, he concluded that the fact that the plaintiff underwent a revision surgery did not implicate any problem with Osman's surgical technique or his treatment

of the plaintiff. Dr. Rosenblatt concluded that a patient can have dimples in her abdomen in the absence of negligence, as that, too, is a known complication of the liposuction or any cosmetic procedure to the abdomen.

Based on the plaintiff's history of cosmetic surgery, and Osman's deposition testimony concerning his conversations with the plaintiff, Dr. Rosenblatt concluded that Osman obtained the plaintiff's fully informed consent to the liposuction procedure.

In addition, Dr. Rosenblatt opined "that no action or failure to act on behalf of the defendants proximately caused the patient any injury" that she alleged in her bill of particulars, reiterating his opinion that bleeding, dimpling, scarring, and the need for a revision procedure are known and accepted risks of any laser liposuction procedure. He thus concluded that, although the plaintiff may indeed have ended up with scarring and dimpling, and the need for a revision procedure, those outcomes occurred despite the fact that Osman properly performed the procedure, and possessed all of the knowledge and skill necessary to perform it.

The plaintiff submitted no opposition to the defendants' summary judgment motion.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact

(*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr*., 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc*., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record,

addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Moreover, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to

preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

Even where an adverse outcome is a known risk of a surgical procedure, a plaintiff may raise a triable issue of fact as to whether a physician committed malpractice by showing that the outcome was caused by improper surgical or medical technique, rather than by an unexplained or incidental event (*see Bengston v Wang*, 41 AD3d 625, 626 [2d Dept 2007]; *see also Hoffman v Taubel*, 2021 NY Slip Op 31523[U], *4-5, 2021 NY Misc LEXIS 2379, *8-9 [Sup Ct, N.Y. County, Apr. 30, 2021] [Kelley, J.], *affd* 208 AD3d 1099 [1st Dept 2022]; *Mathias v Capuano*, 2015 NY Slip Op 32160[U], *5-6, 2015 NY Misc LEXIS 4141, *12-14 [Sup Ct, Suffolk County, Nov. 5, 2015]; *cf. Henry v Duncan*, 169 AD3d 421, 421 [1st Dept 2019] [plaintiff failed to raise triable issue of fact in opposition to physician's showing that injury was a "known risk that may occur despite competent surgical care having been provided"]).

The defendants established, prima facie, that neither Osman nor the defendant Abeer Dabbas, P.A., departed from good and accepted practice in recommending the liposuction procedure, in the manner in which they performed or assisted in any aspect of that surgery, and in the manner in which they provided post-operative care. In addition, the defendants made a prima facie showing that none of the steps that they took or did not take caused or contributed to the plaintiff's injuries. In opposition to those showings, the plaintiff did not oppose the motion at all, let alone oppose it with the affirmation of an expert in plastic surgery, and thus failed to raise a triable issue of fact. Consequently, summary judgment must be awarded to the defendants dismissing the medical malpractice cause of action.

Lack of informed consent is an independent cause of action, and not a "theory" underlying other claims seeking to recover for conscious pain and suffering (*see Barkakos v Avellini*, 185 AD2d 805, 805 [2d Dept 1992]). Since the complaint did not set forth such a cause of action independently of the medical malpractice cause of action, the plaintiff did not properly

assert such a cause of action. Nonetheless, since she asserted in her bill of particulars that the defendants failed to obtain her fully informed consent, the court will address the issue.

The elements of a cause of action to recover for lack of informed consent are

> "(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]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst*., 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

The defendants established, prima facie, their entitlement to judgment dismissing any implied lack of informed consent cause of action. The plaintiff, in declining to oppose the motion, did not address the qualitative sufficiency of that consent or whether a reasonable person nonetheless would have proceeded with the surgery had he or she been properly advised of the risks and benefits. Hence, the plaintiff failed to raise a triable issue of fact in opposition to that showing, and summary judgment must be awarded to the defendants dismissing that claim.

Where a physician working for a professional corporation renders medical care to a patient "within the scope of his or her employment" for that corporation, the corporation may be held vicariously liable for the negligence of the physician (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]). Inasmuch as this court has concluded that both Osman and Dabbas are entitled to summary judgment, it concludes that the defendant Bright Medical, P.C.,

as their employer, also is entitled to summary judgment dismissing the complaint insofar as asserted against it.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted, without opposition, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

7/14/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE