SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHY J. KING** **PART** **06**

Justice

----------X

SAMANTHA THOMPSON,

Plaintiff,

- v -

GORDON ANDAN, M.D., LUCJA MAZUR, NEW YORK SURGICAL ARTS, P.C.,

Defendants.

----------X

INDEX NO. 805405/2020

MOTION DATE 05/24/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 112

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing papers, defendants Gordan Andan M.D. ("Dr. Andan"), Lucja Mazur ("Mazur") and New York Surgical Arts, P.C. ("NYSA") move for summary judgment, pursuant to CPLR §3212, or in the alternative, seek partial summary judgment pursuant to CPLR §3212 and §3212(e), as to any moving defendant on any theory of liability which the Court determines plaintiff has failed to raise an issue of fact.

Plaintiff submits opposition to the motion.

BACKGROUND

On November 2, 2020, plaintiff presented to the offices of NYSA for the liposuction procedure to be performed by Dr. Andan. Prior to the surgery, Dr. Andan conducted an examination of the plaintiff, pre-operative photographs were taken, and Dr. Andan confirmed with plaintiff that the areas she wished to have liposuctioned were her abdomen, sides and back. Plaintiff also requested pricing information in the event she wanted a Brazilian butt lift, which

involved the transfer of fat to her buttocks. Plaintiff signed a four-page "Liposuction and Fat Grafting/Transfer Consent Form," which outlined the risks, benefits and alternatives to the procedure. Plaintiff acknowledged the risks and benefits of the surgery, as explained to her by Dr. Andan, and she elected to go forward with the surgery.

The post operative report indicates that Defendant Mazur and non-party Stephanie Zitvogel ("Zitvogel") were Dr. Andan's medical assistants. During the procedure, while using a cannula to introduce a local anesthetic in plaintiff's left lateral chest wall, a two-inch piece of the tip of the instrument broke off inside plaintiff. Dr. Andan attempted to locate the object for approximately ten minutes but was unsuccessful. According to his deposition testimony, Dr. Andan completed the procedure, and did not immediately notify plaintiff of the complication because she was still under the effects of anesthesia. Dr. Andan's plan was to have plaintiff return to the office so that he could inform her in person and remove the cannula tip. Zitvogel testified that Dr. Andan had an ultrasound machine delivered to the office after November 2, 2020, specifically to be used to help locate the piece of cannula. On November 5, 2020, plaintiff was unable to come to Dr. Andan's office, and he informed her of the surgical complication via a Facetime cell phone call. He thereafter provided a prescription for an x-ray to be done.

Plaintiff did not return to Dr. Andan's office, and instead sought treatment elsewhere. On November 19, 2020, plaintiff was seen by non-party plastic surgeon Dr. Lawrence Bass. She advised him that she had a scheduled breast reduction on December 3, 2020, with Dr. Oriana Cohen at NYU. Dr. Bass recommended that the cannula be removed at the time of the proposed surgery. On November 20, 2020, Dr. Bass spoke with Dr. Cohen who agreed with that plan. On December 4, 2020, plaintiff underwent surgery with Dr. Cohen for breast reduction. During that operation, Dr. Cohen removed the piece of cannula.

Plaintiff commenced the underlying medical malpractice action by the filing of a Summons and Verified Complaint on or about December 9, 2020. Plaintiff's complaint contains two causes of action. The first cause of action sounds in medical malpractice for injuries allegedly sustained during the surgical procedure performed by Dr. Adnan on November 2, 2020. Plaintiff's second cause of action alleges negligent hiring of defendants Dr. Andan and Mazur by NYSA.

Issue was joined on behalf of the defendants with the service of a Verified Answer on January 19, 2021. Defendants now make the instant motion for summary judgment.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a 666 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 (*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 [b]). The facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). A movant's failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id*.; *see Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]). The movant must affirmatively demonstrate the merit of its defense (*see Koulermos v A.O. Smith Water Prod*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*Vega*, 18 NY3d at 503).

"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]). Here, the gravamen of plaintiff's medical malpractice cause of action includes, *inter alia*, claims that defendants departed from accepted standards of medical/surgical care on November 2, 2020, in failing to use due care in providing medical examinations, evaluations, consultations and procedures which includes dates of "all prior consultations and communications regarding the subject plastic surgery"; failing to order, perform, recommend or provide precautions necessary to avoid the injuries complained of; in allowing surgical equipment to break during surgery and leaving a two-inch metal tip in plaintiff's body; failing to inform plaintiff of the risks involved in the surgery; failing to properly maintain and/or inspect the surgical equipment; and failing to promptly inform the plaintiff of the foreign body following the surgery, and the need for follow-up care and additional surgery.

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*, 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, 956 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812, 814 [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*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935, 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 Hosp.*, 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] [internal quotation marks omitted]). Furthermore, 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, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr*., 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 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 opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728, 730 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856, 857 [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*, 68 NY2d at 325; *see Frye*, 70 AD3d at 24).

In support of their motion for summary judgment, defendants submit an affidavit of their medical expert, Dr. Robert Grant, a board-certified physician in General Surgery and Plastic Surgery, together with the pleadings, deposition testimony of the parties, and relevant medical records.

Dr. Grant opines, with a reasonable degree of medical certainty, that the pre-op communications between plaintiff and Dr. Andan's office were entirely appropriate as defendants provided information about the procedure, answered plaintiff's questions regarding the surgery and recovery time, obtained necessary pictures of the plaintiff to evaluate whether the requested procedure was appropriate, and advised plaintiff of the need for pre-op clearance. Further, he opines that when plaintiff presented to NYSA on November 2, 2020, Dr. Andan performed a thorough pre-operative evaluation, and that the pre-op evaluation was in keeping with good and accepted medical practice as he properly familiarized himself with the plaintiff's medical history, her anatomy and any issues that might have posed an increased risk of injury during surgery. Dr. Grant opined that prior to the surgery, plaintiff was presented with a detailed consent form that clearly outlined the risks, benefits and alternatives, and that the consent form signed by plaintiff provided entirely appropriate information regarding the most common risks, benefits and alternatives to the surgery and was a more than reasonable disclosure to the plaintiff.

Dr. Grant opines, within a reasonable degree of medical certainty, that the infiltration cannula at issue in this case was appropriately inspected by Dr. Andan immediately prior to the surgery, and that he observed no obvious breaks in the instrument, and did not observe any problems with it during his inspection. Additionally, he opines, as explained by Dr. Andan, that

the cannula was sterilized and kept in a protective pouch before being used in the surgery. Dr. Grant further opines that Dr. Andan properly maintained the equipment in question, appropriately inspected the infiltration cannula before using it, and took appropriate steps to try to prevent the happening of any instrument failure or breakage.

Dr. Grant opines, with a reasonable degree of medical certainty, that there is no evidence that Dr. Andan was negligent in the manner in which he used the infiltration cannula, and that the fact that the tip of the cannula broke during the surgery is not an indication of negligence on the part of Dr. Andan or any of the defendants; nor is the fact that the tip of the cannula broke off a departure from the standard of care. It is Dr. Grant's opinion, within a reasonable degree of medical certainty, that there was nothing Dr. Andan did or failed to do during the procedure that caused the infiltration cannula to break.

Dr. Grant opines, with a reasonable degree of medical certainty, that when Dr. Andan became aware that the cannula broke, and he was unable to locate it during the surgery, it would not have been appropriate to perform an exploratory surgery to locate and remove the cannula at that time. According to Dr. Grant, when faced with these circumstances, specifically without being able to pinpoint the location of the piece of cannula, any attempt at removal on November 2, 2020, risked greater harm to plaintiff. Dr. Grant opines, within a reasonable degree of medical certainty, that Dr. Andan used reasonable medical judgment by electing to leave the broken cannula tip in place as the foreign body was sterile, and embedded in muscle or soft tissue which presented minimal risk to the patient. Additionally, Dr. Grant opines that Dr. Andan properly documented the occurrence in an addendum to his operative note, and in subsequent progress notes.

Dr. Grant further opines, within a reasonable degree of medical certainty, that Dr. Andan's decision as to when to inform the plaintiff about the complication was reasonable and appropriate

under the circumstances, as plaintiff was still recovering from anesthesia, which may have impaired her ability to comprehend and appreciate the information. Additionally, he notes that providing such information to the individual who was picking up the plaintiff from the office post-operatively would raise privacy concerns relating to plaintiff's health records. Dr. Grant opines, to a reasonable degree of medical certainty, that the decision to develop a treatment plan to remove the foreign object, and inform the plaintiff of the complication after the effects of the anesthesia had worn off was entirely appropriate. Moreover, he opines that "waiting until November 5, 2020, to inform plaintiff about the complication did not result in any injury or worsening of the condition" and that "the treatment for the removal of the piece of cannula was exactly the same regardless of when Dr. Andan informed the plaintiff." Dr. Grant points to the fact that plaintiff's breast surgeon, Dr. Cohen, advised her of the complication on November 20, 2020, and waited until December 4, 2020, to remove the piece of cannula when she performed an unrelated breast surgery. Additionally, Dr. Grant points to Dr. Cohen's records, which indicate that plaintiff suffered no ill consequences from the foreign object being in her body for approximately 31 days, and that there was no damage to the skin or any internal structures, no infection, and that the broken piece of instrument was removed without difficulty, as explained in Dr. Cohen's operative report.

Finally, Dr. Grant opines, to a reasonable degree of medical certainty, that defendants' care and treatment of the plaintiff was at all times within the accepted standards of medical care, and that there were no acts or omissions by them that proximately caused the injuries claimed by plaintiff.

Based on the foregoing, defendants, Dr. Andan, and NYSA, have established their *prima facie* entitlement to judgment as a matter of law that there was no departure from the standard of care that proximately caused plaintiff's injury.

Defendant Mazur, a medical assistant, has also established *prima facie* entitlement to judgment as a matter of law regarding plaintiff's medical malpractice claims through the affidavit of Dr. Grant who opines that "as a medical assistant, Mazur's involvement was limited; she was not providing medical care and treatment to the plaintiff, she could not and did not prescribe any medications, she was not responsible for making any medical decisions or diagnosis, nor was she responsible for developing a plan of care for the patient to deal with the surgical complication that arose." Further, defendant Mazur is not a member of the medical profession that is subject to a suit based on malpractice (*see Lazzaro v County of Nassau*, 245 AD2d 342 [2d Dept 1997]).

Defendants have established their *prima facie* entitlement to summary judgment as to plaintiff's claim regarding the lack of informed consent. To establish a cause of action of lack of informed consent, plaintiff must show that the doctor failed to disclose a reasonably foreseeable risk; that a reasonable person, informed of the risk, would have opted against the procedure; that the plaintiff sustained an actual injury; and that the procedure was the proximate cause of that injury (Public Health Law § 2805–d[1][3]; *Messina v Matarasso*, 284 AD2d 32, 34 [2001]; *Eppel v Fredericks*, 203 AD2d 152, 153 [1994]) A defendant may satisfy his or her burden of demonstrating a *prima facie* entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, was discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In the case at bar, the record shows that informed consent was properly obtained by Dr. Andan allowing plaintiff to make a decision as to whether to proceed with surgery. The risks and benefits of the surgery were discussed with the plaintiff. Significantly, plaintiff was

provided with a detailed consent form on November 2, 2020, which she read and signed thereby acknowledging that the risk and benefits of the surgery were explained to her. The case law is well settled that a "defendant [makes] a prima facie showing of informed consent by submitting deposition testimony and medical records establishing that he had informed plaintiff of the risks associated with the procedures, including scarring, and that she had signed written consent forms indicating her understanding of those risks" (*Lynn G. v. Hugo*, 96 N.Y.2d 306, 309 [2001]).

As to plaintiff's cause of action arising out of negligent hiring, plaintiff alleges that NYSA failed to investigate the qualifications, competency, and capabilities of Dr. Andan and Mazur prior to granting or renewing of privileges or employment, and had such inquiries been obtained, privileges and/or employment would not have been granted and/or renewed.

In order to establish a cause of action based on negligent hiring and supervision, it must be shown that the defendant knew or should have known that an individual had a propensity for the conduct which allegedly caused the injury (*Jackson v New York Univ. Downtown Hosp*., 69 AD3d 801, 801 [2d Dept 2010]; *Flanagan v Catskill Reg'l Med. Ctr*., 65 AD3d 563, 566 [2d Dept 2009]). This demonstration is a "prerequisite to sustaining a cause of action alleging negligent hiring or supervision" (*Flanagan*, 65 AD3d at 566).

Here, NYSA has established its entitlement to summary judgment as to plaintiff's cause of action for negligent hiring, since defendants have established that they did not deviate from the standard of care in plaintiff's care and treatment and did not proximately cause any of plaintiff's alleged injuries.

In opposition to the defendants' motion, plaintiff submits the affidavit of a board-certified Plastic and Reconstructive Surgeon. Plaintiff's expert opines that defendants departed

from good and accepted medical practice in failing to properly report an adverse event to the patient in a timely fashion. Additionally, plaintiff's expert opines that defendants failed to properly document and record details of the events in the medical record in a timely fashion, and that Dr. Adnan failed to take immediate action to confirm the location of the foreign body. Finally, plaintiff's expert opines that Dr. Andan acted on the presumption that the foreign body was not presenting a danger to the patient, and that within a reasonable degree of medical or surgical certainty, Dr. Andan's failure to immediately take action to confirm that the foreign body was indeed in a safe location was a departure from good and accepted medical and surgical practice.

Plaintiff, in opposition, has failed to rebut defendants' *prima facie* showing to entitlement to summary judgment, since plaintiff's expert fails to opine that any of the alleged departures set forth in the expert's affidavit were the proximate cause of plaintiff's alleged injuries. "Expert testimony is necessary ... to establish proximate cause" (*Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d 672, 674 [2d Dept 2019], quoting *Dray v Staten Is. Univ. Hosp.*, 160 AD3d 614, 618 [2d Dept 2018] [internal quotation marks omitted]). Thus, where a physician did not proximately cause an injury or damage, there can be no liability (*see Kaffka v New York Hosp.*, 228 AD2d 332, 333 [1st Dept 1996]).

Further, plaintiff failed to rebut defendants' *prima facie* showing that informed consent was provided, thus, plaintiff has failed to raise a triable issue of fact as to that claim.

Plaintiff has also failed to raise a triable issue of fact as to her cause of action that NYSA was negligent in hiring Dr. Andan and Mazur. In particular, plaintiff failed to "demonstrate a connection or nexus between the plaintiff's injuries and alleged [employer's] malfeasance" in negligently hiring, supervising, or retaining the tortfeasor (*Gonzalez v City of New York*, 133

AD3d 65, 70 [1st Dept 2015]). Thus, defendant NYSA, is entitled to summary judgment on plaintiff's cause of action for negligent hiring.

Accordingly, it is hereby,

ORDERED, that the motion of defendants, GORDON ANDAN, M.D., LUCJA MAZUR, and NEW YORK SURGICAL ARTS, P.C. is granted, and defendants are entitled to summary judgment and dismissal of the complaint in its entirety; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

7/14/2023
DATE

KATHY J. KING, 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