

**Sampath v New York-Presbyt. Healthcare Sys., Inc.**

2023 NY Slip Op 33800(U)

October 18, 2023

Supreme Court, New York County

Docket Number: Index No. 805114/2018

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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<p>ALLAN SAMPATH,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>NEW YORK- PRESBYTERIAN HEALTHCARE SYSTEM, INC., THE NEW YORK AND PRESBYTERIAN HOSPITAL, NEW YORK- PRESBYTERIAN LAWRENCE HOSPITAL, MAURY GREENBERG</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>INDEX NO.</b> <u>805114/2018</u></p> <p><b>MOTION DATE</b> <u>12/15/2020</u></p> <p><b>MOTION SEQ. NO.</b> <u>001</u></p>
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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

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

Upon the foregoing documents, Defendant, Maury Greenberg, M.D. (“Dr. Greenberg”), moves, pursuant to CPLR 3212, for dismissal of the complaint in its entirety. Defendant New York Presbyterian Hospital s/h/a “New York Presbyterian Healthcare System, Inc., The New York and Presbyterian Hospital, New York-Presbyterian Lawrence Hospital” (“NYPH”) cross moves, pursuant to CPLR 3212, for dismissal of all claims contained in plaintiff’s complaint (“Dr. Greenberg and NYPH collectively referred to as “Defendants”).<sup>1</sup> Plaintiff, Allan Sampath (“Sampath”), opposes the motion and cross moves, pursuant to CPLR 3212, for summary judgment in his favor.

**BACKGROUND FACTS**

On November 10, 2017, plaintiff fell at his sister’s home, causing left eye pain and swelling. He presented to the Emergency Department at NYPH for treatment on November 11, 2017, where it was documented that plaintiff had a history of a prior failed corneal transplant and a history of

<sup>1</sup> The Court notes that defendant Greenberg adopts and incorporates the arguments set forth by NYPH in support of its motion for summary judgment.

blindness in the left eye. Plaintiff was examined by Dr. Greenberg, who noted plaintiff's history of corneal transplant, placement of a glaucoma valve and blindness of his left eye. Upon examination, Dr. Greenberg found the left eye had no light perception and the cornea to be opacified, with inflamed conjunctiva and tearing, without discharge. Plaintiff complained of pain in the left eye, which was tender on palpation. A CT of the left eye was performed, and the findings were consistent with plaintiff's previous surgical history, showing a deformity of the left globe, and swelling in the soft tissue of the left periorbital and left frontal calvarium. No infection or fracture was seen on the CT. Dr. Greenberg consulted with an Ophthalmology resident from the Harkness Eye Center, who recommended that after ruling out infection and/or fracture, the plaintiff should be given an antibiotic and instructions to follow-up with his eye doctor on November 13, 2017. Dr. Greenberg discharged plaintiff the same day and prescribed antibiotic eye drops, oral antibiotics and bacitracin ointment for a forehead abrasion.

On November 12, 2017, plaintiff presented to St. John's Riverside Hospital with complaints of bleeding from his left eye and left eye pain. He was diagnosed with a lacerated left eye with open globe rupture, and was transferred to Westchester Medical Center ("WMC") on November 13, 2017, for further evaluation and treatment. At WMC, the treating Ophthalmologist, Dr. Irina Koreen ("Dr. Koreen"), recommended that he undergo a primary enucleation, which is the removal of the eye that leaves the eye muscles and remaining orbital contents intact, with placement of silicone implants. Dr. Koreen explained the risks and benefits of repairing the globe or a primary enucleation surgery, which was confirmed by plaintiff at his deposition. Plaintiff elected to undergo the enucleation procedure, which took place on November 13, 2017.

Plaintiff commenced the underlying action sounding in medical malpractice against defendants and alleges that defendants failed to diagnose a left eye globe rupture on November 11, 2017, and that the two-day delay in diagnosing the condition necessitated the enucleation, or removal of his left eye,

rather than a repair of the left eye globe. Plaintiff's complaint also alleges a cause of action for lack of informed consent.

### **THE INSTANT MOTIONS**

In support of their motions for summary judgment, defendants argue that there was no delay in diagnosis and treatment, and that, in any event, defendants' treatment did not impact the plaintiff's outcome, and cause the alleged injuries. Additionally, defendants also contend that summary judgment is warranted based on plaintiff's lack of informed consent claim.

Plaintiff opposes defendants' motion, and cross moves for an order granting summary judgment as a matter of law, alleging that defendants deviated from the standard of care and treatment of the plaintiff, by, *inter alia*, failing to timely diagnose the nature and severity of plaintiff's injury; failing to timely and properly treat plaintiff's injury; and failing to give plaintiff the appropriate discharge and follow up instructions. Sampath claims that as a result of these negligent acts, he was caused to suffer a left globe rupture, and ultimately the enucleation of his left eye, causing, among other things, eye deformity, headaches, dizziness, pain, suffering, depression, and anxiety. Plaintiff also cross moves based on lack of informed consent.

Defendants, in opposition, argue that the plaintiff's cross motion should be denied.

### **DISCUSSION**

"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 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]).

In a medical malpractice action, a defendant must provide evidentiary proof in the form of expert opinions and/or factual evidence demonstrating: (1) that the defendant did not deviate from

accepted standards of care and practice; and/or (2) defendant's conduct was not a proximate cause of plaintiff's alleged injuries (*see McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549 [2d Dept 2018]).

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 this 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]).

Once defendant establishes prima facie entitlement to judgment as a matter of law, 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 v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

Defendants submit the affirmation of Dr. Koreen, a physician board certified in Ophthalmology, in support of their motions for summary judgment. Dr. Koreen also treated plaintiff for his left eye injury, and performed the enucleation procedure on November 13, 2017. Dr. Koreen's

opinion is based upon a reasonable degree of medical certainty upon review of the pleadings, deposition testimony of the parties, and relevant medical records.

Dr. Koreen opines that the alleged delay in diagnosing plaintiff's globe rupture was not a substantial factor in causing the alleged injuries, and that even if plaintiff had been emergently transferred to an outside hospital from NYPH on November 11, 2017, for an ophthalmological evaluation, the outcome would have been the same. She further opines that the alleged delay did not impact the prognosis, plan of treatment, the surgical options or the ultimate outcome, and that the risk of a delayed diagnosis, which is infection, did not occur.

Contrary to plaintiff's contentions, Dr. Koreen opines that the trauma to the eye sustained from the fall on November 10<sup>th</sup>, 2017, caused a previously placed corneal graft to dehisce (gape or burst open). According to Dr. Koreen, there was no benefit to repair and preserve the globe because plaintiff already had no light perception in the left eye, and would be at a high risk of ophthalmia, complete blindness, post-surgical infection, and chronic pain in the eye. Based on this medical evaluation, it was Dr. Koreen's recommendation that the enucleation surgery be performed. She opines, to a reasonable degree of medical certainty, that the alleged delay in diagnosis of the globe rupture did not cause any difficulty in the enucleation operation.

Based on the foregoing, Dr. Koreen recommended that an enucleation be performed, and opines that this recommendation would have been the same on November 11, 2017. She opines that the alleged delay in diagnosis did not have any impact on plaintiff developing post-operative eye pain, or increase his post-operative eye pain, and that eye pain is normal and expected following an enucleation. Finally, as to plaintiff's chronic eye pain and headaches, and the injuries allegedly sustained by plaintiff, Dr. Koreen opines that they are unrelated to the alleged delay in diagnosis of the globe rupture, or to the alleged delay in performing the enucleation. Plaintiff was fitted for a prosthesis in February 2018, and based on Dr. Koreen's review of the records relating to the fitting of

the eye prosthesis, she opines that it is highly plausible that these complaints are causally related to a poorly fitted prosthesis, and not the result of the alleged delay in performing the enucleation.

Based on Dr. Koreen's affidavit, the Court finds that defendants have established entitlement to summary judgment as a matter of law by demonstrating that the alleged delay in diagnosing plaintiff's globe rupture was not the proximate cause of plaintiff's alleged injuries. In cases involving an alleged delay in diagnosis or treatment, a defendant is entitled to summary judgment if defendant establishes that the delay was not a proximate cause of the alleged injuries (*see Lyons v DeNise*, 118 AD3d 554 (1st Dept 2014); *Mignoli v Oyugi*, 82 AD3d 443 (1st Dept 2011); *Pichardo v Herrera-Acevedo*, 77 AD3d 641 (2d Dept 2010); *Mann v. Cassidy*, 2018 NY Slip Op 31619(U), \*7 (Sup Ct, NY County 2018). Since the moving parties have established their prima facie showing on the issue of causation, the nonmoving party is required only to "rebut" as to the element of this cause of action. "A party's prima facie showing of entitlement to judgment as a matter of law shifts the burden to the nonmoving party, not to prove his or her entire case, as he or she will have the burden of doing at trial, but merely to raise a triable issue of fact with respect to the elements or theories established by the moving party" (*Stukas v Streiter*, 83 AD3d at 25).

In opposition, plaintiff has raised an issue of fact, rebutting defendants' prima facie showing, through the expert affirmation of Dr. Barry Drucker ("Dr. Drucker"), a board-certified Ophthalmologist, who opines to a reasonable degree of medical certainty, based on a review of the record.

Dr. Drucker opines that Dr. Greenberg's examination of plaintiff's left eye using palpation caused the uveal tissue to expand and the expulsion of a portion of the iris, which gave the appearance of the eye bleeding. The Court notes that, contrary to defendants' contentions, the palpation of plaintiff's eye was noted in the medical record of plaintiff's November 11, 2023, NYPH visit. While Dr. Koreen opines that plaintiff's eye condition had not changed between his November 11, 2017, visit

to NYPH and his presentation to WMC on November 13, 2017, Dr. Koreen's affirmation is silent about whether Dr. Greenberg's palpation of plaintiff's left eye was damaging and appropriate in light of the injury, and whether her opinion would remain the same that an enucleation rather than a repair was the only prudent course of treatment. In contrast, plaintiff's expert opines that in palpating the eye Dr. Greenberg damaged plaintiff's eye, and the resulting rupture should have been closed and the uveal tissue repaired on November 11, 2017. The Court notes that while plaintiff's expert affirmation addresses alleged departures from the standard of care, the issue of whether the damage to plaintiff's eye caused the globe rupture and the resulting enucleation, rebuts defendants' prima facie showing, and raises a triable issue of fact precluding summary judgment in favor of defendants.

Further, defendants argue that summary judgment should be granted because plaintiff failed to lay the necessary foundation regarding Dr. Drucker's qualifications to render an opinion. In this regard, the Court finds defendants are without merit since Dr. Drucker is a board-certified Ophthalmologist. "[O]nce a medical expert establishes his or her knowledge of the relevant standards of care, he or she need not be a specialist in the particular area . . . to offer an opinion" (*Matter of Solano v City of Mount Vernon*, 108 AD3d 676, 677 [2d Dept 2013] [internal quotation marks omitted]).

Turning to that prong of defendants' motion seeking dismissal of plaintiff's claim based on lack of informed consent, a plaintiff in a medical malpractice action 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

(*Gilmore v Mihail*, 174 AD3d 686, 688 [2d Dept 2019] [internal quotation marks omitted]; *see also* Public Health Law § 2805-d; *Smith v Fields*, 268 AD2d 579 [2d Dept 2000]).

A review of the record shows that upon plaintiff's transfer to WMC, plaintiff consented to the enucleation surgery. Plaintiff's deposition testimony demonstrates that he was informed of the risks and benefits of the enucleation surgery, and according to Dr. Koreen, who performed the procedure, plaintiff was advised of the risks and/or benefits, which was memorialized in her operative note and the written consent form. Further, Dr. Drucker's opinion, in opposition, that defendants failed to properly inform plaintiff of the risk of "losing his eye" if he waited to be treated is conclusory. As such, the Court finds that defendants have established their entitlement to summary judgment as a matter of law.

As to plaintiff's cross motion, the Court finds that plaintiff's cross-motion for summary judgment is timely. Defendants' summary judgment motions were filed on December 15, 2020, pursuant to CPLR § 3211(a); plaintiff's cross-motion was filed on January 29, 2021; and both motions were noticed to be heard on the same day. Since the motion and cross motion were filed and noticed pursuant to CPLR §§ 3212 and 2215 respectively, and the substantive issues contained in plaintiff's cross motion are the same as those raised by defendants' moving papers, plaintiff's cross motion is timely (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75 (1st Dept 2013)).

Assuming arguendo that plaintiff has met his prima facie burden as to summary judgment as a matter of law, plaintiff's cross motion is denied since there are issues of fact raised by defendants' and plaintiff's experts, as set forth above.

Accordingly, it is hereby,

**ORDERED**, that the branch of defendants' summary judgment motion seeking dismissal of plaintiff's cause of action based on lack of informed consent is granted; and it is further

**ORDERED**, that defendants' summary judgment motion is in all other respects denied; and it is further

**ORDERED**, that plaintiff's cross-motion for summary judgment is denied.

10/18/2023

DATE

*Kathy S. King*  
KATHY S. KING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE