

<b>Denes v Do</b>
2024 NY Slip Op 35101(U)
December 16, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2022-50309
Judge: Edward T. McLoughlin
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At his deposition, plaintiff testified that he sustained a work-related injury on November 1, 2014, when fencing boards struck his left arm, severing a muscle tendon and tearing his rotator cuff. He filed a workers' compensation claim in connection with these injuries and underwent a surgery on his left shoulder in April 2015, followed by a second surgery in June 2021. On September 21, 2021, he attended the IME conducted by defendant on behalf of the workers' compensation carrier regarding his 2014 injury. Plaintiff noted that he had undergone other IMEs between his June 2021 surgery and the IME with defendant.

Plaintiff testified that defendant arrived late for the IME and began the IME by examining his right arm for 10 to 15 minutes. Plaintiff informed defendant that his right arm was not injured and that his injuries and pain were in his left arm, where he had undergone surgeries. Regarding defendant's examination of his right arm, plaintiff described her movements as "normal" and similar to prior IMEs, noting that the movements were neither abrupt nor painful (*see* Pltf Dep Tr, NYSCEF Doc. No. 40, at 86).

When defendant began examining plaintiff's left arm, plaintiff was seated on an exam table and defendant started by placing her hands on his fingers and palm. Plaintiff testified that defendant touched his left hand in a manner different from how she had touched his right hand. Defendant then extended plaintiff's left arm out in front of him and "ripped it up" behind his head "very fast" (*id.* at 92). As his arm was lifted past his ear, plaintiff heard a popping sound. When the sound occurred, he noticed that defendant's eyes "kind of lit up a little bit," and he asked her, "what are you doing?" (*id.*). He brought his arm back down and immediately felt "excruciating pain" (*id.* at 93). Defendant did not respond but instead proceeded to check his arm again. Before she continued, plaintiff told defendant that he had undergone a surgery on his left arm about three months earlier. He put his finger on her face mask and warned, "if you mess this up, we got problems" (*id.* at 92-93). Nevertheless, she took his arm again and moved it behind his head "real fast" (*id.* at 93). This movement caused

his arm to “pop[] again loud” (*id.* at 94). Plaintiff described the sensation as being the same type of feeling, with the same sound and in the same location as the first pop. Plaintiff testified that, after the second pop, defendant still did not say anything and continued to manipulate his arm. She brought his arm back from behind his head and, without stopping, “spun it around behind” his back (*id.* at 99). At that point, he heard another pop, just as loud as the first and second, in the same location and with the same sensation. Plaintiff said, “we’re all done here” (*id.* at 93). He got up and walked out of the examination room. Plaintiff described the pain as “excruciating” and testified that he was “furious” (*id.* at 95).

Upon returning home from the IME, plaintiff used an ice pack to alleviate the pain and discomfort in his left arm and contacted Dr. Victor Khabie, the orthopedic surgeon who had performed his prior shoulder surgeries. Plaintiff testified that he told Dr. Khabie exactly what had happened during the IME and requested an MRI. According to plaintiff, Dr. Khabie responded with shock, saying, “are you kidding me?” (*id.* at 101). Plaintiff had an MRI about a week after the IME and followed up with Dr. Khabie two weeks later. During the interim, he experienced ongoing pain, diminished strength, and an inability to move his left arm independently. At his follow-up appointment with Dr. Khabie, plaintiff was informed that the June 2021 surgical repair had been damaged, necessitating a revision surgery. Plaintiff testified that, at the time of the IME, he weighed approximately 245 pounds and stood 5 feet, 7 inches tall.

Defendant testified to the following at her deposition: She performed an examination of plaintiff on September 21, 2021, and prepared a report afterward which summarized his medical history, the examination, and her findings. Defendant did not have a clear, independent recollection of the IME beyond what was documented in her report and did not “recall anything outstanding about [plaintiff’s] exam or his visit” (*see* Def Dep Tr, NYSCEF Doc. No. 41 at 76). Defendant did not remember plaintiff putting a finger in her face or yelling at her, adding that if such incident had

occurred, she would have remembered it. She did not recall plaintiff vocalizing complaints, expressing anger or frustration, raising his voice, or making any type of threatening language, such as warning her there would be problems if he was hurt. She emphasized that she was particularly sensitive to issues related to medical malpractice and would have remembered if such incidents had occurred. Defendant reviewed plaintiff's medical records before conducting the IME and was fully aware that plaintiff had undergone a left shoulder surgery approximately 14 weeks earlier, including the nature of the surgery.

Defendant admitted to being late for the IME and testified that she never performed passive range-of-motion testing on plaintiff and that she listened to plaintiff's subjective complaints before proceeding with the IME. Defendant explained that she performed range-of-motion testing on plaintiff's right arm as a comparison and to demonstrate what he could expect on his injured side. Regarding the examination of plaintiff's left arm, defendant testified that the only testing she performed that involved applying pressure was the apprehension test, which she testified she conducted gently and within plaintiff's tolerable range. She emphasized the importance of being gentle, particularly with a patient who had undergone a rotator cuff tear surgery just weeks earlier. She denied ever forcefully lifting plaintiff's left arm from a resting position, raising it above his head, or pushing it back in a sudden or abrupt manner—stating that such an action would not be proper. She denied ever grabbing plaintiff's hand, jerking it up above his head, or pushing it back to cause a pop. She also denied ever repeating the motion behind his head, causing a second pop or forcing his arm behind his back. She testified that such actions were not part of her standard examination practices and would never occur during an IME. Defendant further noted that her height was 5 feet, 2 inches, and her weight was about 100 pounds at the time of the IME.

Defendant submitted an expert affirmation from Dr. Ronald Mann (hereinafter "Mann"), who stated that, based on his review of the relevant medical and radiological records, the deposition

testimony in this case, his familiarity with the applicable standard of care in 2021, his training and extensive experience in orthopedic surgery, and his ongoing study of medical practice, it is his opinion, within a reasonable degree of medical certainty, that defendant did not deviate from good and accepted medical practices during the IME and that defendant's actions did not proximately cause plaintiff's alleged injuries (*see* NYSCEF Docket No. 48).

Defendant contends that she is entitled to summary judgment dismissing the cause of action alleging negligence, asserting that the claim should be properly evaluated as one for medical malpractice. Defendant argues that Mann's expert affirmation establishes that the care provided to plaintiff fully adhered to good and accepted medical practices. Furthermore, defendant contends that she is entitled to summary judgment dismissing the cause of action alleging battery. Defendant argues that there is no evidence to suggest that she intentionally caused injury to plaintiff or acted maliciously in a manner that would satisfy the elements of a battery claim. Defendant argues that, at a minimum, she must be granted partial summary judgment for those allegations that plaintiff fails to adequately oppose or address.

In opposition, plaintiff submits, *inter alia*, an expert affidavit and his own affidavit. Plaintiff agrees that his negligence claim should be properly evaluated as a claim for medical malpractice. However, plaintiff contends that defendant's expert affirmation relies solely on defendant's deposition testimony and fails to address his deposition testimony, which he argues describes an account of a vicious battery committed by an impatient and angry doctor. Plaintiff argues that these two conflicting narratives cannot be resolved as a matter of law and must instead be determined by a factfinder. Consequently, plaintiff asserts that defendant has not established a *prima facie* case for dismissing the medical malpractice claim. Plaintiff contends that defendant has also failed to establish her *prima facie* entitlement to summary judgment dismissing the battery cause of action.

In reply, defendant argues, among other things, that the cause of action for battery must be dismissed because the record unequivocally demonstrates that defendant lacked the requisite intent to commit an intentional tort. Defendant further argues that plaintiff's expert report and affidavit are insufficient to overcome her prima facie showing of entitlement to summary judgment dismissing the medical malpractice claim.

#### DISCUSSION

It is well settled that “[t]he proponent of 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]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Once such a showing has been made, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d at 562). “Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues” (*10 Bethpage Rd., LLC v 114 Woodbury Realty, LLC*, 178 AD3d 751, 754 [2d Dept 2019] [internal quotation marks omitted]; see *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020]). “The function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist” (*Owens v City of New York*, 183 AD3d at 906; see *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]; *Gitlin v Chirinkin*, 98 AD3d 561, 561 [2d Dept 2012]). “Thus, a motion for summary judgment

should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2d Dept 2023]; see *Lee v South Nassau Communities Hosp.*, 231 AD3d 807, 809 [2d Dept 2024]).

Both parties correctly acknowledge that Plaintiff’s cause of action for negligence should be treated as a claim for medical malpractice (see *Bazakos v Lewis*, 12 NY3d 631, 634 [2009]). “The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*Ciceron v Gulmalico*, 220 AD3d 732, 734 [2d Dept 2023]; see *Neumann v Silverstein*, 227 AD3d 914, 916 [2d Dept 2024]). “Thus, a defendant moving for summary judgment must make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries” (*Miller-Albert v EmblemHealth*, 231 AD3d 1147, 1148 [2d Dept 2024]; see *Neumann v Silverstein*, 227 AD3d at 916). “To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice” (*Miller-Albert v EmblemHealth*, 231 AD3d at 1148; accord *Glassman v Caremount Med., P.C.*, 226 AD3d 878, 879 [2d Dept 2024]; see *Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1374 [4th Dept 2023]).

Here, defendant has failed to establish, prima facie, her entitlement to summary judgment dismissing the cause of action alleging medical malpractice. To meet her prima facie burden of demonstrating the absence of any deviation from good and accepted medical practice and that plaintiff was not injured thereby, defendant relies upon the expert affirmation of Mann. However, Mann’s affirmation is inadmissible and cannot be considered by this Court because it fails to comply with the requirements of CPLR 2106, as amended effective January 1, 2024. CPLR 2106, as amended effective January 1, 2024, allows a person to submit a statement that is subscribed and affirmed as true under

the penalties of perjury in lieu of an affidavit, but requires that such affirmation “shall be in substantially the following form: I affirm this \_\_\_ day of \_\_\_, \_\_\_, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.” Since the amended statute uses the word “shall,” the inclusion of the required language or language substantially similar thereto in an affirmation is mandatory (*see Diego Beekman Mut. Hous. Assn. Hous. Dev. Fund Corp. v Hammond*, 81 Misc 3d 1244[A], 2024 NY Slip Op 50144[U] [Civ Ct, City of NY 2024]). The purpose of the amendment to CPLR 2106 was to reduce the burden of seeking a notary public to obtain a sworn affidavit, not to lessen the import and seriousness of the statements made and the consequences of making false statements (*see Zhou v Central Radiology PC*, 84 Misc 3d 410, 419 [Sup Ct, Queens County 2024]).

Mann’s affirmation does not include the required or substantially similar language as mandated by CPLR 2106, rendering it inadmissible and devoid of probative value (*see Zhou v Central Radiology PC*, 84 Misc 3d at 419; *R.F. v L.K.*, 82 Misc 3d 1221[A], 2024 NY Slip 50358[U] [Sup Ct, Westchester County 2024]; *see also Great Lakes Ins. SE v American S.S. Owners Mut. Protection & Indem. Assn. Inc.*, 228 AD3d 429, 429 [1st Dept 2024] [the failure to incorporate language required by former CPLR 2106 (b) in an affirmation rendered the affirmation inadmissible]; *Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 778 [2d Dept 2008] [holding that the peer review reports that failed to comply with former CPLR 2106 did not constitute competent evidence to defeat the plaintiff’s motion for summary judgment]). Although plaintiff did not oppose defendant’s motion on this ground, it is necessary for this Court to address this issue *sua sponte* to preserve the integrity of New York’s laws and ensure compliance by all parties involved (*see Zhou v Central Radiology PC*, 84 Misc 3d at 419).

In any event, even if this Court were to consider Mann's affirmation, it would find that the affirmation is insufficient to demonstrate that defendant did not deviate from good and accepted medical practice or that any such deviation was not a proximate cause of plaintiff's injuries. Mann acknowledged in his affirmation that the IME involved manipulation of plaintiff's left arm and the application of pressure, noting that it is not unusual for such examinations to elicit discomfort from examinees. However, he relied on defendant's deposition testimony, crediting her statement that she conducted the examination gently and did not manipulate plaintiff's left arm beyond his comfort level. Mann dismissed plaintiff's conflicting deposition testimony in a conclusory manner, stating that plaintiff's claim of excessive force during the IME was without merit to a reasonable degree of medical certainty and that there was no evidence that defendant used excessive force at any time.

Contrary to Mann's conclusion, the discrepancy in weight and height between plaintiff and defendant does not render plaintiff's deposition testimony regarding forcible manipulation of his left arm implausible. The examination involved defendant manipulating only plaintiff's left arm while plaintiff was in a seated position, making the relative total weight and height of the individuals irrelevant or, at least, not determinative regarding the plausibility of plaintiff's account. Moreover, Mann failed to demonstrate that plaintiff's deposition testimony describing defendant's manipulation of his left arm was not credible as a matter of law, as the testimony is not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]).

Regarding causation, Mann opined that no act or omission by defendant proximately caused plaintiff's injuries. Mann cited plaintiff's preexisting degenerative condition in his left shoulder and asserted that the medical records showed a gradual worsening of pain over several weeks after the IME, which he claimed was inconsistent with an acute injury caused by the IME. However, the existence of a degenerative condition, alone, does not preclude the possibility that an acute injury

contributed to or exacerbated plaintiff's condition. Mann's conclusion regarding plaintiff's gradual pain worsening was improperly based solely on two records: a physical therapy note indicating pain at 6 out of 10 on the day of the IME and another session note from October 7, 2021, reporting pain at 8 out of 10. Moreover, Mann did not provide an opinion as to whether the alleged forcible manipulation could be a proximate cause of plaintiff's injuries.

Because Mann's affirmation relied upon the disputed fact that defendant did not forcibly manipulate plaintiff's arm, it is insufficient to establish, prima facie, that defendant did not deviate from accepted medical practice or that such a deviation was not a proximate cause of plaintiff's injuries (*see Corujo v Caputo*, 224 AD3d 729, 731 [2d Dept 2024]; *Hiegel v Orange Regional Med. Ctr.*, 219 AD3d 910, 913 [2d Dept 2023]; *Reiss v Sayegh*, 123 AD3d 787, 789 [2d Dept 2014]; *Faicco v Golub*, 91 AD3d 817, 818 [2d Dept 2012]). Given the deficiencies in the expert affirmation and the inclusion of plaintiff's deposition testimony in defendant's submissions, defendant failed to establish, prima facie, that no triable issues of fact exist regarding the medical malpractice cause of action (*see Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 913 [2d Dept 2022]; *Dyckes v Stabile*, 153 AD3d 783, 785 [2d Dept 2017]). The conflicting deposition testimony of plaintiff and defendant regarding whether the forcible manipulation occurred raised factual and credibility issues that must be resolved by the factfinder (*see Lavi v NYU Hosps. Ctr.*, 133 AD3d 830, 832 [2d Dept 2015]; *Zapata v Buitriago*, 107 AD3d at 979).

Because defendant failed to make a prima facie showing, the branch of her motion seeking summary judgment dismissing the cause of action alleging medical malpractice is denied, regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d 714, 717 [2d Dept 2022]; *Martinez v Orange Regional Med. Ctr.*, 203 AD3d at 913).

With respect to the cause of action alleging battery, defendant's submissions, which include plaintiff's deposition transcript, failed to eliminate material issues of fact as to whether defendant's manipulation of plaintiff's arm constituted a "bodily contact, made with intent, and offensive in nature" (*Cerilli v Kezis*, 16 AD3d 363, 364 [2d Dept 2005]; see *Preciado v Ravins*, 190 AD3d 991, 993 [2d Dept 2021]). Contrary to defendant's argument, the requisite intent is the "intent to cause a bodily contact that a reasonable person would find offensive," rather than an intent to cause harm or injuries (*Cerilli v Kezis*, 16 AD3d at 364; see *Young v Sethi*, 188 AD3d 1339, 1342-1343 [3rd Dept 2020]; *Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 35 [1st Dept 2001]). As defendant failed to make a prima facie showing, the branch of her motion seeking summary judgment dismissing the battery cause of action is also denied, regardless of the sufficiency of plaintiff's opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

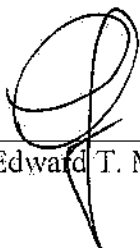
Based upon the foregoing, it is

ORDERED that defendant's motion for summary judgment dismissing the Complaint is denied; and it is further

ORDERED that counsel for the parties shall appear for a settlement conference in this matter on January 14, 2025, at 9:15 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 16, 2024  
Poughkeepsie, New York

  
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Hon. Edward T. McLoughlin, AJSC

To: Counsel of record via NYSCEF