Leo v Kruter
2024 NY Slip Op 35171(U)
August 15, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 612702/2020
Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 612702/2020
CAL. No. 202301392MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 2/13/24
ADJ. DATE 5/28/24
Mot. Seq. # 002 MotD

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DEBORAH LEO and CRAIG LEO,

Plaintiffs,

- against -

LAURA KRUTER, M.D., KAVITA MARIWALLA, M.D. and MARIWALLA DERMATOLOGY PLLC,

Defendants.

KELNER & KELNER, ESQS.
Attorney for Plaintiffs
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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants, filed January 12, 2024; Answering Affidavits and supporting papers by plaintiff, filed May 8, 2024; Replying Affidavits and supporting papers by defendants, filed May 27, 2024; Other __; it is

ORDERED that the motion by defendants Laura Kruter, M.D., Kavita Mariwalla, M.D., and Mariwalla Dermatology PLLC for summary judgment dismissing the complaint against them is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This is a medical malpractice action to recover damages for injuries allegedly arising from the treatment of plaintiff Deborah Leo by defendants Laura Kruter, M.D., Kavita Mariwalla, M.D., and Mariwalla Dermatology PLLC from February 27, 2018 through April 17, 2018. The pleadings, as amplified by the bills of particulars, allege that defendants were negligent in, among other things, failing to develop a pre-operative wound closure plan, failing to consult with and involve a plastic surgeon, removing excessive tissue, creating excessive tension during the wound closure, and failing to undermine the surrounding skin during a Mohs procedure and wound closure on plaintiff's left cheek on

March 19, 2018. In addition, plaintiff alleges a cause of action for failure to obtain informed consent for the Mohs procedure. Plaintiff's spouse, Craig Leo, asserted a derivative claim, which was discontinued via a stipulation of partial discontinuance signed September 21, 2021.

Defendants now move for summary judgment dismissing the complaint against them on the grounds that they did not depart from accepted standards of medical care, that Dr. Kruter's actions did not proximately cause plaintiff's alleged injuries, and that plaintiff's lack of informed consent claim is without merit. In support of their motion, they submit, among other things, the affirmation of Desiree Ratner, M.D., the pleadings, the parties' deposition transcripts, and various medical records. In opposition, plaintiff argues that there are triable issues of fact as to whether defendants departed from accepted standards of care and whether such departure caused plaintiff's injuries, and that there are conflicting expert opinions precluding summary judgment in favor of defendants.

Deborah Leo testified that on February 27, 2018, she sought treatment from Dr. Kruter at Mariwalla Dermatology due to a red legion on her left cheek. She testified that she consented to Dr. Kruter performing a shave biopsy of the legion. She testified that, a few days after the biopsy, Dr. Kruter called to inform her she had basal cell carcinoma, which would require Mohs surgery. Plaintiff testified that before the scheduled surgery date she called Dr. Kruter to ask to reschedule it, stating that she wanted Dr. Landon, a plastic surgeon, to close the wound, but that she could not get an appointment with him. She testified that Dr. Kruter informed her that "she does it all the time. It is a very small area. She is more than capable of closing, and we take [care] of our own." Plaintiff testified that she returned to Mariwalla Dermatology on March 19, 2018 for the Mohs procedure. At her deposition, plaintiff identified her signature on the Mohs procedure consent form, and testified that she understood that scarring was a risk of the procedure. She testified that after the procedure was completed, Dr. Kruter placed the sutures, gave plaintiff a mirror to look at the wound and stated, "don't freak out," and informed plaintiff she could return in the fall after the scar heals for microneedling "to help fix it." On March 26, 2018, plaintiff returned to have the sutures removed, which was done by a medical assistant. Plaintiff testified that the medical assistant instructed her to return in "three to six months" to follow up with Dr. Kruter. Plaintiff testified that after the sutures were removed, the wound was "abnormally raised," that "it looked like I had a little piece of skin that was sticking out," and that she did not believe it could heal.

Deborah Leo further testified that on April 3, 2018, she saw Dr. Landon, a plastic surgeon, who "was not happy with what [her] face looked like." She testified that she did not make any complaints to Dr. Landon other than those concerning the appearance of the scar. She further testified that Dr. Landon informed her that a Mohs procedure wound typically takes "months" to heal, and that scars tend to improve in appearance over time, which plaintiff testified she "already knew." Plaintiff testified that Dr. Landon performed surgery to repair the wound on April 24, 2018. Plaintiff further testified that while she still has a scar, she is happier with her appearance, and that she believes the scar she currently has it what she should have had as a result of the Mohs procedure performed by Dr. Kruter.

Laura Kruter testified that during the four years she was employed at Mariwalla Dermatology, she performed approximately 20 to 40 Mohs procedures per month. She testified that she first saw

plaintiff on February 27, 2018, that she examined plaintiff's face and noted multiple lesions, and that she performed a shave biopsy on one of the lesions. After the results came back positive for basal cell carcinoma, she recommended plaintiff proceed with the Mohs procedure. Dr. Kruter testified that before proceeding with the surgery, she evaluates the patient and "how she moves, how the skin moves. I'm looking at the lines . . . so if visible, any wrinkles that can give us some clues as to how to plan the reconstruction," explaining that wrinkle lines can be useful when trying to "blend a scar." She further testified that the surgery was performed in two stages, and that after the "Stage 1" removal of a layer of skin, it was discovered that residual tumor was still present, so plaintiff was brought back to the operating room for a "Stage 2" removal of another layer of tissue in order to clear the tumor. She testified that after the second removal stage, "there was no residual tumor seen." Dr. Kruter testified that she next formulated a plan for reconstruction, and that her plan was to perform "a primary closure or a side-to-side closure called a complex repair." When asked whether she performed an undermining of the various anatomic layers, she could not specifically recall, but testified that she assumes so "because that's very standard," and she explained that undermining redistributes the tension of a wound. When asked about "Langer lines," she testified that it is something she would consider and "attempt to respect while placing a scar" in an attempt to make the scar "more cosmetically pleasing." She further testified that she used a marker to make markings on plaintiff's face as a guide for the reconstruction. Dr. Kruter estimated that it could take "up to a year or more" for a wound like plaintiff's to mature and heal.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The elements of malpractice are "a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (***Barnaman v Bishop Hucles Episcopal Nursing Home***, 213 AD3d 896, 898, 184 NYS3d 800, 803 [2d Dept 2023]; *see* ***Blank v Adiyody***, 220 AD3d 832, 833, 198 NYS3d 172, 174 [2d Dept 2023]). Accordingly, a defendant moving for summary judgment dismissing a medical malpractice cause of action has the burden of establishing "the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (***Campbell v Ditmas Park Rehabilitation & Care Ctr., LLC***, 225 AD3d 835, 836, 208 NYS3d 220, 222-223 [2d Dept 2024] [internal quotation marks omitted]; ***Xie v New York City Health & Hop. Corp.***, 226 AD3d 751, 209 NYS3d 105 [2d Dept 2024]; ***Friedman v Vitale***, 224 AD3d 888, 206 NYS3d 656 [2d Dept 2024]). "To make this prima facie showing, the movant must 'address and rebut any specific allegations of malpractice set forth in the plaintiff's . . . bill of particulars' " (***Kelly v Ahn***, 224 AD3d 673, 674, 205 NYS3d 137, 139 [2d Dept 2024] [internal quotation marks omitted]). Once the defendant makes its prima facie showing, the burden shifts to the plaintiff to demonstrate the

existence of a triable issue of fact as to the elements on which defendant met its prima facie burden (*see* ***Weston v Staten Is. Care Ctr., LLC***, 223 AD3d 769, 770, 203 NYS3d 390, 392 [2d Dept 2024]; ***Weintroub v Maimonides Med. Ctr.***, 222 AD3d 915, 916, 202 NYS3d 269, 271 [2d Dept 2023]). General and conclusory allegations of medical malpractice, "unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant [provider's] summary judgment motion" (***J.P. v Patel***, 195 AD3d 852, , 854, 150 NYS3d 120, 122; *see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Neumann v Silverstein***, 209 NYS3d 584, 2024 NY Slip Op 02712 [2d Dept 2024]; ***Barnaman v Bishop Hucles Episcopal Nursing Home***, 213 AD3d 896, 184 NYS3d 800).

Defendants' expert, Dr. Desiree Ratner, who is board-certified in dermatology and micrographic surgery and dermatologic oncology, affirmed that she reviewed the deposition transcripts, bills of particulars, pleadings, plaintiff's medical records, and pre-operative and post-operative photographs in preparing her opinion. She opines that "all of the allegations in [the] pleadings are completely without merit," and that defendants' care and management of plaintiff at all times conformed with good and accepted medical practice and did not proximately cause plaintiff's injuries. She opines, within a reasonable degree of medical certainty, that at the time of plaintiff's visits to Dr. Landon in April 2018, her wound was healing appropriately and improving as expected, and that plaintiff's wound would have continued to heal and improve with the passage of time. She also opines that a Mohs procedure wound and related scarring can take between six and twelve months to fully heal. Dr. Ratner opines that the revision surgery performed by Dr. Landon approximately one month after the Mohs procedure was premature and was not medically indicated. She opines that Mohs surgeons are trained in closing wounds, that they routinely perform Mohs procedures without involving plastic surgeons, and that Dr. Kruter was not negligent in failing to include a plastic surgeon to close the wound. Dr. Ratner further opines that "plaintiff's claims that excessive tissue was removed during the procedure, that there was improper matching of the skin edges during closure, that there was excessive tension upon the tissue and that the skin in the area of the malar fat pad was insufficiently undermined are all also without merit." Finally, as to Kavita Mariwalla, Dr, Rater notes that she did not treat plaintiff, and therefore did not deviate from the standard of care or cause plaintiff's injuries.

Here, as to Dr. Kruter and Mariwalla Dermatology, the defendants' submissions fail to establish a prima facie case of entitlement to summary judgment dismissing the medical malpractice claim against them by demonstrating the absence of a departure from good and accepted medical practice, or that any such departure did not proximately cause plaintiff's injuries (*see* ***Ciceron v Gulmatico***, 220 AD3d 732, 19 NYS3d 556 [2d Dept 2023]; ***Martir v St. Luke's-Roosevelt Hosp. Ctr.***, 219 AD3d 423, 195 NYS3d 461 [1st Dept 2023]; ***Martinez v Orange Regional Med. Ctr.***, 203 AD3d 910, 165 NYS3d 573 [2d Dept 2022]). Defendants' expert merely opined, in a conclusory manner, that Dr. Kruter's treatment did not represent a departure from good and accepted medical practice and that plaintiff's claims "are all . . . without merit" (*see* ***Wei Lin v Sang Kim***, 168 AD3d 788, 89 NYS3d 688 [2d Dept 2019]). Defendants' expert likewise stated in conclusory fashion that Dr. Kruter's treatment "was not a proximate cause to any of the plaintiff's claimed damages" (*see* ***Martir v St. Luke's-Roosevelt Hosp. Ctr.***, 219 AD3d 423, 195 NYS3d 461).

However, as to Kavita Mariwalla, defendants met their prima facie burden of establishing that she did not treat the plaintiff, and thus, did not deviate from good and accepted medical practice, nor was she a proximate cause of plaintiff's claimed injuries. Neither plaintiff's expert's affirmation nor her attorney's affirmation address the issue of Kavita Mariwalla's alleged malpractice. Accordingly, as she owed no duty to plaintiff, defendants' motion for summary judgment is granted as to Kavita Mariwalla (*see* ***McAlwee v Westchester Health Assoc.***, 163 AD3d 549, 80 NYS3d 401 [2d Dept 2018]; ***Burtman v Brown***, 97 AD3d 156, 945 NYS2d 673 [1st Dept 2012]).

Where a plaintiff in a medical malpractice case alleges a lack of informed consent, the plaintiff must also 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" (***Roy v Lent***, 219 AD3d 525, 525-526, 193 NYS3d 283, 285 [2d Dept 2023]; ***Ciceron v Gulmatico***, 220 AD3d 732, 197 NYS3d 556 [2d Dept 2023]; ***Palagye v Loulmet***, 203 AD3d 724, 164 NYS3d 192 [2d Dept 2022]; *see* Public Health Law § 2805-d [1]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (*see* ***Romanelli v Jones***, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; ***Gilmore v Mihail***, 174 AD3d 686, 105 NYS3d 504 [2d Dept 2019]; ***Figueroa-Burgos v Bieniewicz***, 135 AD3d 810, 23 NYS3d 369 [2d Dept 2016]). "A defendant can establish entitlement to summary judgment by demonstrating that the plaintiff signed a detailed consent form after being apprised of alternatives and foreseeable risks, by demonstrating that a reasonably prudent person in the plaintiff's position would not have declined to undergo the surgery, or by demonstrating that the actual procedure performed for which there was no informed consent was not a proximate cause of the injury" (***Pirri-Logan v Pearl***, 192 AD3d 1149, 1151, 145 NYS3d 545, 549 [2d Dept 2021]; ***Gilmore v Mihail***, 174 AD3d 686, 105 NYS3d 504).

Defendants failed to submit sufficient evidence to establish a prima facie case of entitlement to summary judgment dismissing the cause of action premised on lack of informed consent (*see* ***Walker v Saint Vincent Catholic Med. Ctrs.***, 114 AD3d 669, 979 NYS2d 697 [2d Dept 2014]). During her deposition, Dr. Kruter testified that plaintiff signed an informed consent for the Mohs procedure. When asked whether, as a matter of custom and practice, she would discuss the risk of scarring, Dr. Kruter testified that it is part of the informed consent. When asked whether she discusses that over the phone, she testified, "not in detail, but it's something that, you know, the patient reviews and signs before we start the procedure." Dr. Kruter could not recall whether plaintiff signed the consent form before the day of the procedure. She further testified that patients typically signed the consent forms in the procedure room, in the presence of a nurse. When asked whether, as a matter of custom and practice, she would have a discussion with the patient about the consent form, she testified, "I think the nurse had gone over the consent forms, but I don't recall." Notably, plaintiff testified that on March 16, 2018, she called defendants' office to reschedule the surgery because she "wanted a plastic surgeon to close, and [she] wanted Dr. Landon to close" but that she could not get an appointment with Dr. Landon. She further testified that Dr. Kruter told her that she does these procedures all the time, that it is a very small area,

and that she is more than capable of closing the wound. Plaintiff testified that after that conversation, she agreed to proceed with the procedure. In her affirmation, Dr. Ratner opines that informed consent was obtained prior to the procedure, noting that plaintiff signed a written informed consent form which noted the risk of post-operative scarring, and the need for possible scar revision surgery in the future.

The fact that plaintiff signed a consent form does not establish defendants' entitlement to summary judgment (*see* ***Walker v Saint Vincent Catholic Med. Ctrs.***, 114 AD3d 669, 979 NYS2d 697). Dr. Kruter could not recall having a discussion with plaintiff about the alternatives and risks associated with the procedure (*see* ***Guinn v New York Methodist Hosp.***, 212 AD3d 787, 183 NYS3d 431 [2d Dept 2023]; ***Kleinman v North Shore Univ. Hosp.***, 148 AD3d 693, 48 NYS3d 455 [2d Dept 2017]). Additionally, defendants' expert does not state that alternatives were ever discussed with plaintiff, and the consent form, while it mentions alternative procedures, does not state what those alternatives are. Moreover, defendants' expert's affirmation, which states, in conclusory language, that informed consent was obtained, fails to establish that a reasonably prudent person in plaintiff's position would not have declined to undergo the procedure if he or she had been fully informed, nor that the Mohs procedure was not a proximate cause of plaintiff's claimed injury (*see* ***Kleinman v North Shore Univ. Hosp.***, 148 AD3d 693, 48 NYS3d 455).

Accordingly, defendants' motion for summary judgment dismissing the complaint against them is granted as to Kavita Mariwalla, and is otherwise denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 8.15.24

LINDA KEVINS, JSC

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION