

McNeill v Gewirtz
2024 NY Slip Op 35326(U)
March 14, 2024
Supreme Court, Bronx County
Docket Number: Index No. 20178/2019E
Judge: Joseph E. Capella
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART 23-----X
ELLA MCNEILL,

Plaintiff,

- against -

ANDREW GEWIRTZ and UPTOWN HEALTHCARE
MANAGEMENT, INC., d/b/a EAST TREMONT
MEDICAL CENTER,Defendants.
-----XIndex #: 20178/19
DECISION/ORDER

Present:

Hon. Joseph E. Capella
J.S.C.

The following papers numbered 1 to 3 read on this motion dated May 30, 2023.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTIONS	1
ANSWERING AFFIDAVITS	2
REPLY AFFIDAVITS	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THESE MOTIONS IS
DECIDED AS FOLLOWS:

Motion by defendant, Andrew Gewirtz (an ophthalmologist), for summary judgment (CPLR 3212) and dismissal of plaintiff's complaint, which alleges medical malpractice and lack of informed consent, is granted in part. This action concerns the care and treatment plaintiff received after she presented to Uptown Healthcare from July 20, 2016, through February 16, 2017, for evaluation of her complaints of blurry vision and irritation to her eyes. On January 9, 2017, plaintiff underwent a cataract removal procedure on her right eye performed by Dr. Gewirtz. According to plaintiff's bill of particulars, Dr. Gewirtz failed to, *inter alia*, provide a properly sized and *appropriate* (emphasis added) lens, recommend conservative treatment, and overall departed from the standard of care in *performing* (emphasis added) the surgery. The initial burden is on Dr.

Gewirtz to make a *prima facie* showing of an entitlement to summary judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact. (*Alvarez v Prospect*, 68 NY2d 320 [1986].) If he does, then the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to create issues of fact to warrant a trial (*Alvarez*, 68 NY2d 320), and denial of summary judgment.

In support of the motion is an expert affirmation from Dr. Scott Greenbaum, a board certified ophthalmologist, who opines that the Dr. Gewirtz rendered treatment that was in accordance with the standard of care, and did not proximately cause or contribute to the injuries alleged by plaintiff. Dr. Greenbaum opines that Dr. Gewirtz did not depart from good and accepted practice in using his medical judgment to determine that plaintiff's cataracts were causing her impaired vision. He opines that the lens used during the operation was appropriate and within the accepted standards, and was not the cause of plaintiff's postoperative complaints. Dr. Greenbaum opines that based on the operative report, all appropriate steps were taken, and all aspects of the surgery were performed with the proper technique. He also notes that following surgery, plaintiff had posterior capsular opacification, which is a known potential secondary result that can occur with modern day cataract surgery and occurs as a natural reaction of the body to the procedure, unrelated to surgical technique.

Another known natural secondary result of maintaining an intact capsule is the potential growth of lens cells on the posterior capsule than can opacify the lens, which

occurs naturally and is not related to surgical technique, and occurs in the absence of negligence. Dr. Greenbaum notes that Dr. Gewirtz appropriately recommended a YAG laser procedure to remove the scar tissue, which is a simple outpatient procedure. Lastly, as to informed consent, Dr. Greenbaum notes that Dr. Gewirtz testified that it was his custom and practice to discuss the procedure, including the risks and benefits with a patient when deciding whether to proceed with surgery, and plaintiff signed numerous consent forms on the day of her cataract surgery. Based on the aforementioned, the Court is satisfied that Dr. Gewirtz has met his burden for summary judgment, (*Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Kaffka v NY Hospital*, 228 AD2d 332 [1st Dept 1996]), which now shifts to plaintiff to demonstrate that issues of fact exist to warrant a trial.

In opposition, plaintiff provides an expert affirmation from a board certified ophthalmologist, who opines that Dr. Gewirtz departed from accepted standards of care in performing unnecessary surgery that exacerbated plaintiff's pre-existing stable and mild glaucoma to a more severe form of the disease due to the manipulation of her eye during surgery. According to plaintiff's expert, Dr. Gewirtz should have recommended a change in the prescription of plaintiff's glasses in a conservative attempt to correct her vision without surgery, and thus avoid the sequelae of this surgery. Plaintiff's expert also opines that Dr. Gewirtz departed from accepted standards in failing to properly perform plaintiff's right phacoemulsification procedure, causing injury to her pupil and the development of membrane on the retina, indicators that there were deficiencies in the

performance of the procedure. He states that the lens inserted by Dr. Gewirtz was not only miscalculated, but after the procedure, the lens was displaced inferiorly. According to plaintiff's expert, Dr. Gewirtz failed to properly perform the calculations for the power (strength) of plaintiff's lens placed in the right eye, which resulted in the lens being too strong. This resulted in plaintiff's right eye being near sighted while her left eye was far sighted, and this disparity caused her to experience a condition called Aniseikonia.

Lastly, plaintiff's expert opines that Dr. Gewirtz departed from accepted standards of care in failing to obtain plaintiff's informed consent. According to plaintiff's expert, Dr. Gewirtz has no memory of discussing the risks and alternatives with plaintiff, and plaintiff believed that she was having glaucoma surgery and not cataract surgery. According to Dr. Gewirtz, the first three departures raised by plaintiff's expert are novel allegations that were not included in the complaint and bill of particulars. However, the bill of particulars does allege a failure to provide an appropriate lens, recommend conservative treatment, and in performing the surgery. Overall, viewing the evidence in a light most favorable to plaintiff, (*O'Sullivan v Presbyterian*, 217 AD2d 98 [1st Dept 1995]), the Court is satisfied that his expert raised sufficient issues of fact regarding the aforementioned four departures. Therefore, that portion of Dr. Gewirtz's motion for summary judgment seeking dismissal of the aforementioned four departures is denied, and that portion seeking dismissal of the remaining departures alleged in the complaint is granted. Dr. Gewirtz is directed to serve a copy of this decision with notice of entry upon

all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

3/14/24
Dated

Hon. _____

Joseph E. Capella, J.S.C.