SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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TARA PUCCINO,

Plaintiff,

- v -

ANDREW JACONO and NEW YORK CENTER FOR FACIAL PLASTIC AND LASER SURGERY,

Defendants.

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INDEX NO. 805102/2021

MOTION DATE 10/15/2024

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 69, 71, 72, 73, 74

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, and lack of informed consent, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff's attorney submits an affirmation, in which he averred that, despite numerous good-faith attempts to obtain an affirmation or affidavit from an expert for the purpose of opposing the motion, he could not do so, and, hence, could not in good faith submit substantive opposition to the motion. The motion is granted, and the complaint is dismissed.

The crux of the plaintiff's claims is that, on July 7, 2020, the defendants negligently performed a rhytidectomy, otherwise known as a face lift, a superficial musculo aponeurotic system lip lift, and a revision rhinoplasty upon her, thus causing iatrogenic injuries to her facial and hypoglossal nerves, as well as facial asymmetry and deformity. She also alleged that the defendants did not provide her with proper post-operative care. In addition, the plaintiff alleged that the defendants did not obtain her fully informed consent to the procedures, in that they did not inform her of the risks and benefits thereof, or the alternatives thereto.

It is well settled that the movant on 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] [citations omitted]). The motion must be supported by evidence in admissible form (*see 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). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (*see Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

"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 Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *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]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician moving for summary judgment must establish 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]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept 2019]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24), or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *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]). 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 Hospital,* 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]). Moreover, as noted, 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 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 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/or 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]). 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 v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

The defendants established their prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action by submitting the pleadings, the bills of particulars, relevant medical records, the transcripts of the parties' deposition testimony, a statement of allegedly undisputed material facts, and a memorandum of law, along with the expert affirmations of board-certified plastic surgeon Robert Grant, M.D., and board-certified internist, neurologist, and psychiatrist David Kaufman, M.D.

Dr. Grant opined that the defendant plastic surgeon, Andrew Jacono, did not commit malpractice, and that nothing that Jacono did or did not do caused or contributed to the plaintiff's alleged injuries. He explained, in detail, the reasons why he concluded that Jacono did not deviate or depart from the standard of care in the field of plastic surgery when he performed the three procedures that are the subject of this action, and in providing postoperative care to the plaintiff. He opined that the plaintiff presented to Jacono for the

purpose of undergoing a facelift and revision of a prior rhinoplasty and that, according to the plaintiff's deposition testimony, she also agreed to undergo a lip lift. Dr. Grant opined that each of these procedures was indicated, in that they "had the desired aesthetic outcome," as "driven by the patient's requests," and that preoperative photographs revealed that the plaintiff's requests for aesthetic improvement were reasonable.

Dr. Grant opined that Jacono employed appropriate and acceptable surgical technique in performing all three procedures that are the subject of this action, and explained in detail those methods and techniques, and why they were employed within the applicable standard of care, particularly because Jacono remained "below . . . the facial nerves the plaintiff claims were injured." He thus asserted that

> "Jacono took all appropriate steps to avoid injuries to the facial nerves. Therefore, even if the marginal mandibular branch of the facial nerve had been injured during the subject surgery, it would not have been through any negligence by Dr. Jacono. Rather, it would have been a recognized risk of this type of surgery in general."

Dr. Grant expressly rejected any potential argument that any injury to a facial nerve, including, but not limited to the marginal mandibular of the facial nerve, could occur only if Jacono had been negligent, describing such a contention as "meritless." He further opined that, inasmuch as Jacono did not perform any surgery on or near the hypoglossal nerve, Jacono did not do anything that would have affected that nerve. Moreover, upon noting that the plaintiff made no complaints with respect to any sequellae of the procedures until almost three months after they were performed, Dr. Grant concluded that nothing that Jacono did or did not do caused or contributed to the conditions of which the plaintiff complained. In this regard, Dr. Grant asserted that all of the after-the-fact complaints that she made either were "theoretically related to the hypoglossal nerve, which was not in the operative field," or were complaints of edema, "which were properly addressed by the injection of steroids to reduce swelling" at that time. Hence, he concluded that no additional postoperative treatment or referrals were warranted.

Dr. Kaufman agreed with Dr. Grant's conclusions, and opined that, from a neurological perspective, Jacono did not depart from good and accepted practice, and that nothing that he did or did not do caused or contributed to any neurological conditions of which the plaintiff complained.

In opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law in connection with the medical malpractice cause of action, the plaintiff submitted no substantive opposition and, hence, failed to raise a triable issue of fact. Consequently, the defendants must be awarded summary judgment dismissing that cause of action insofar as asserted against Jacono.

The elements of a cause of action to recover for lack of informed consent are:

> "(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"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst*., 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony'" (*King v Jordan*, 265 AD2d at 260, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]). Nonetheless, "expert testimony concerning what a reasonable person would have done in plaintiff's position is not necessary to maintain a cause of action premised upon lack of

informed consent" (*Gray v Williams*, 108 AD3d 1085, 1087 [4th Dept 2013]; *see Hugh v Ofodile*, 87 AD3d 508, 509 [1st Dept 2011]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept 2000]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]; *see Godel v Goldstein*, 155 AD3d 939, 942 [2d Dept 2017]). Nonetheless, 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 claim where a patient signs a detailed consent form, and there is also evidence that the necessity and benefits of the procedure, along with known risks and dangers, were discussed prior to the procedure (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In his affirmation, Dr. Grant described both the conversations that the plaintiff had with Jacono, and the contents of the consent form that the plaintiff signed, and concluded that Jacono fully informed the plaintiff of all possible risks, including nerve damage, that could occur in connection with the procedures that he performed upon her. Inasmuch as the plaintiff submitted no substantive opposition to the motion, she did not raise a triable issue of fact in opposition to the defendants' showing in this regard. Hence, that branch of the defendants' motion seeking summary judgment dismissing the lack of informed consent cause of action insofar as asserted against Jacono must be granted.

Where a physician working for a professional corporation renders medical care to a patient "within the scope of his or her employment" for that corporation, the corporation may be held vicariously liable for the negligence of the physician (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]). Where, as here, the court has concluded that the physician is entitled to summary judgment, and there has been no allegation that the corporation committed any independent acts of negligence or failure to obtain informed consent, summary judgment must be awarded to the corporation as well. Hence, summary judgment must be awarded to

the defendant New York Center for Facial Plastic and Laser Surgery dismissing the complaint insofar as asserted against it.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted, without substantive opposition, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

1/16/2025
DATE

JOHN J. KELLEY, 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**