

Agaveva v Filstein

2025 NY Slip Op 30420(U)

January 23, 2025

Supreme Court, New York County

Docket Number: Index No. 805396/2018

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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ALONA AGAEVA and ELKHAN AGEV,
Plaintiffs,

INDEX NO. 805396/2018

MOTION DATE 01/21/2025

MOTION SEQ. NO. 003

- v -

MARK FILSTEIN, M.D., and "JOHN DOE,"
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 were read on this motion to/for JUDGMENT - SUMMARY.

In this action, inter alia, to recover damages for medical malpractice based on alleged departures from good and accepted medical practice and breach of contract, the defendant Mark Filstein, M.D., moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiffs oppose the motion, and cross-move for summary judgment on the issue of liability on the medical malpractice cause of action. Filstein opposes the cross motion. The motion is granted, the cross motion is denied, and the complaint is dismissed insofar as asserted against Filstein.

The crux of the plaintiffs' claim is that Filstein departed from good and accepted medical practice by removing an excessive amount of cartilage from the nose of the plaintiff Alona Agaeva in the course of performing a rhinoplasty procedure upon her, failed to take timely and proper steps to prevent her nose from collapsing, and failed to timely and properly to lengthen her nose. They further alleged that Filstein breached a contract between Agaeva and him by "agreeing to perform proper surgery on her deviated septum," but instead "failed to properly perform said deviated septum surgery." The plaintiffs made these allegations in their complaint,

and further asserted that Filstein expressly admitted that he “messed up,” admitted that the adverse outcome was his “fault,” and agreed to revise the surgery without charge. In their bill of particulars, the plaintiffs reiterated these allegations, and asserted that, as a consequence of Filstein’s malpractice and breach of contract, Agaeva sustained a collapsed nose, swelling and discoloration of a semi-permanent nature, and disfigurement, requiring her to undergo reconstructive surgery involving the removal of part of a rib to repair her nose, which, in turn, resulted in her expenditure of an additional \$15,000.00 out of her own pocket.

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-Sturup 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). Stated another way, "[e]xpert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause" (*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 551 [2d Dept 2018], quoting *Burns v Goyal*, 145 AD3d 952, 954 [2d Dept 2016]). Thus, where a moving defendant in a medical malpractice action makes a prima facie showing that he or she did not depart from good and accepted practice, or that the treatment rendered to the

plaintiff did not cause or contribute to the plaintiff's injuries, the plaintiff, to defeat summary judgment, must submit an expert affirmation or affidavit in opposition; a plaintiff's failure to submit such an expert affirmation or affidavit under such circumstances requires the court to award summary judgment to the moving defendant (see *Benedetto v Tannenbaum*, 186 AD3d 1596, 1598 [2d Dept 2020]; *Bethune v Monhian*, 168 AD3d 902, 903 [2d Dept 2019]; *Koster v Davenport*, 142 AD3d 966, 969 [2d Dept 2016]; *Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 497 [2d Dept 2016]; *Roques v Noble*, 73 AD3d at 207; *Bailey v Owens*, 17 AD3d 222, 223 [1st Dept 2005]; cf. *Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004] [unsworn affidavit of unnamed expert that was not affirmed under the penalties for perjury is insufficient to raise triable issue of fact as to defendants' alleged malpractice]).

In support of his motion, Filstein submitted the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, relevant medical records, the note of issue, an attorney's affirmation, a statement of allegedly undisputed material facts, and the expert affirmation of board-certified plastic surgeon and otolaryngologist Theodore Diktaban, M.D.

Dr. Diktaban opined that Filstein did not depart from good and accepted medical practice, and that nothing that Filstein did or did not do caused or contributed to Agaeva's claimed injuries. Upon reviewing the medical records and deposition testimony, Dr. Diktaban noted that the plaintiff first presented to Filstein on February 2, 2018, when she was 33 years old, complaining of cosmetic dissatisfaction with an open rhinoplasty that another plastic surgeon had performed in 2008. As he explained it, Agaeva specifically complained that her nose was too large, without a well-defined bridge. Upon physical examination, Filstein reported his impression that Agaeva's nose "looked like the bony pyramid was rasped down to flatten the dorsal hump without lateral infractures," while the dorsal septum was "lumpy," the mid vault was "narrow," and the lower lateral cartilages had been "partially resected and uneven with the tip deviation." Dr. Diktaban asserted that, at that time, Filstein noted that Agaeva would need a

reduction of the bony pyramid structure with lateral infractures, the smoothing out of the dorsal septum, and tip correction.

According to Dr. Diktaban, Filstein explained the nature of the rhinoplasty procedure to Agaeva in detail, including the risks and potential complications thereof, such as infection, bleeding, prolonged swelling and bruising, and asymmetry of the nostrils, as well as palpable or visual deformity. As he interpreted Filstein's chart, Dr. Diktaban concluded that Filstein explained to Agaeva that final healing would take at least one year, particularly because Filstein would be performing a second rhinoplasty subsequent to an old open rhinoplasty. Crucially, Dr. Diktaban adverted to Filstein's deposition testimony, in which Filstein read his chart notes verbatim, which recited that "[n]o promises were made regarding happiness or satisfaction with the results. Will look at before and after pictures of my other rhinoplasty cases."

Filstein performed the rhinoplasty upon Agaeva under anesthesia on February 22, 2018, which, as Dr. Diktaban explained it, involved the administration of a nasal block, intra-cartilaginous incisions to the right and left lower cartilage, dissection, trimming, Aufricht retractor introduction, and percutaneous osteotomy, after which Filstein evaluated Agaeva's profile. Dr. Diktaban reiterated Filstein's conclusion that the outcome was "as desired by the patient pre-operatively," and noted that, after completion of the osteotomy, Filstein closed the incision, applied steri-strips, and placed an Aquaplast splint over Agaeva's nose.

Dr. Diktaban further reported that, based on his review of the relevant chart, Agaeva saw Filstein for her first follow-up appointment on March 1, 2018, at which Filstein remarked that the healing was progressing well, and thereupon removed the splint, although Filstein did report that the tip of Agaeva's nose was swollen and indurated, but that the contour of the nose was improved and that he did not observe much bruising. On April 12, 2018, Agaeva saw Filstein for her second postoperative follow-up appointment, at which she told Filstein that she was not satisfied with the shape of her nose and that the new shape was not what she had expected. According to Dr. Diktaban, Filstein reported that the swelling had abated and that everything

was healing well, although Filstein apparently was not clear about what aspects of the new shape were unsatisfactory to Agaeva. On June 21, 2018, Agaeva had a third postoperative appointment with Filstein, at which she complained that her nose was too long, the tip of the nose was too thick, and that her dorsum was too low, although Filstein asserted that this outcome was what Agaeva had approved preoperatively. Filstein's chart reflected that he informed Agaeva at that appointment that the tip of her nose was still swollen, and allegedly reminded her that it could take up to one year before the tip reverted to normal size. Filstein also apparently recommended that Agaeva consider augmenting it with a dorsal implant. This was the final encounter that Agaeva had with Filstein.

Agaeva thereafter met with facial plastic surgeon Joshua D. Rosenberg, M.D., on June 26, 2018, reiterating the complaints that she had made to Filstein. Dr. Rosenberg diagnosed Agaeva with chronic sinusitis, and, upon performing a nasal endoscopy, concluded that Agaeva suffered from a long-standing nasal obstruction with notable anatomic deformity and failed medical management. After recommending that Agaeva undergo a revision septoplasty, bilateral turbinectomy, and anterior nasal stenosis repair with cartilage grafting, Dr. Rosenberg performed those procedures upon Agaeva on September 11, 2018.

Dr. Diktaban opined that Filstein performed the February 22, 2018 rhinoplasty upon Agaeva fully in accordance with applicable standards of care in the field of cosmetic plastic surgery. Specifically, he concluded that Filstein made no mistakes during the procedure, inasmuch as he properly prepared Agaeva for the surgery, properly placed a nasal pain block employing Lidocaine and a 1% solution of Epinephrine, and appropriately employed the 10-year-old incisions as a guide for making the new incisions with a #15 blade on both the left and right sides of Agaeva's nose. Dr. Diktaban further asserted that Filstein properly dissected and trimmed the remnants of the lower lateral cartilage to improve the appearance of the nasal tip, and appropriately made a transfixion incision of the caudal end of the septum, thereupon connecting with the intra-cartilaginous incision bilaterally. In addition, Dr. Diktaban concluded

that Filstein properly performed a scissor dissection over the dorsum, thus “skeletonizing” the dorsum, after which he appropriately introduced a Aufricht retractor, and “sharply separated” intra-nasal mucosa from the septum by means of a #11 blade. He further asserted that a right-angled septal scissor was properly employed to “evenly lower the septal portion of the dorsal hump.” Dr. Diktaban opined that Filstein thereafter appropriately employed the bilaterally guarded osteotome for resection of the dorsal bony hump, thus producing what he characterized as an “open roof.” According to Dr. Diktaban, Filstein then correctly performed a percutaneous osteotomy, employing a 2-millimeter straight osteotome, placing the “low to high” fracture line on both the left and right sides, and thereafter “infractur[ing]” the bones using manual pressure.

Dr. Diktaban concluded that the outcome that Filstein had observed upon completing the active portion of the procedure was, in fact, the outcome that Agaeva had desired, and that Filstein appropriately closed up the surgical site using proper sutures and a splint. As he explained it, although Agaeva expressed dissatisfaction with the shape of her nose during her second and third postoperative appointments with Filstein,

“[i]n cosmetic plastic surgery, the provider cannot guarantee satisfaction or happiness with the results. Due to [the] cosmetic and aesthetic nature of the procedure, the patient may be dissatisfied and unhappy with the results despite lack of negligence by the provider.”

Moreover, Dr. Diktaban opined that, even though Agaeva pursued follow-up treatment and surgery with Dr. Rosenberg, “[d]espite adverse inference of subsequent procedure, neither pre-operative nor peri-operative or post-operative findings by Dr. Rosenberg demonstrate or indicate any departure from good and accepted practice in [the] care and treatment rendered to plaintiff by Dr. Filstein.”

With his submissions, Filstein established his prima facie entitlement to judgment as a matter of law in connection with the medical malpractice cause of action.

In opposition to Filstein's motion, and in support of their cross motion, the plaintiffs relied upon the same documentation as had been submitted by Filstein, and also submitted an attorney's affirmation, a memorandum of law, and the February 1, 2023 report of an independent medical examination that had been conducted by plastic and reconstructive surgeon Peter Taub, M.D. The plaintiffs did not submit an affirmation or affidavit from a retained expert physician.

In his unaffirmed and unsworn report, Dr. Taub averred that his examination revealed that, "[o]n anterior view, the dorsum is augmented and deviated to the right. The junction between the graft and the nose is noticeable and palpable. The tip defining points are not divergent." Dr. Taub did not express any opinion as to whether Filstein committed malpractice. In their complaint, the plaintiffs had asserted that, at some time subsequent to the surgery, Filstein had admitted, in general terms, that "I messed up. It is my fault," although they did not identify what, in particular, he allegedly admitted to having messed up. At her deposition, Agaeva asserted that "[e]very single doctor said that he messed up, Filstein. Including Filstein." She further asserted that "I loved the fact that he admitted that he messed up," and "it meant a lot to me, you know, instead of blaming it on, oh, your nose is just retarded or crooked. He said 'I messed up.'" She further testified that "[i]t was, like, he knew that he messed up" and that "he understands that he messed up." At her deposition, however, Agaeva did not describe what it was that Filstein allegedly had "messed up," and did not identify any particular surgical technique or improper surgical step constituting a departure from good and accepted practice---such as removing an excessive or insufficient amount of cartilage, improperly employing surgical tools, improperly making incisions, improperly performing an infracture of osseous material, misplacing skin or cartilage, or improperly suturing the incision sites---that Filstein admitted to having committed. Nor did the plaintiffs submit an affirmation or affidavit from any other physician who examined or treated Agaeva averring that Filstein "messed up" in any

particular manner. Moreover, at his own deposition, Filstein never admitted either to have “messed up,” or to have told Agaeva that he did so.

The plaintiffs argued that the statements purportedly made by Filstein, standing alone, not only raised a triable issue of fact as to whether Filstein committed malpractice, but that these statements supported their contention that they are entitled to judgment as a matter of law on the issue of liability. “[W]hile hearsay may be used to defeat summary judgment so long as it is not the only evidence relied on” (*Mosqueda v Ariston Dev. Group*, 155 AD3d 504, 505 [1st Dept 2017]; see *Oliveira v Top Shelf Elec.*, 230 AD3d 1035, 1035 [1st Dept 2024]; *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018]; *Briggs v 2244 Morris L.P.*, 30 AD3d 216, 216 [1st Dept 2006]), Filstein’s alleged admissions are insufficient to defeat summary judgment here “since they are the only evidence relied on” (*Mosqueda v Ariston Dev. Group*, 155 AD3d at 505) by the plaintiffs with respect to the issue of whether Filstein departed from good and accepted practice. In any event, the court disagrees with the plaintiffs’ contention that Filstein’s alleged statements constituted party admissions with respect to the issue of his departure from accepted medical standards. Even if Filstein did assert that he “messed up,” or that he was “at fault,” he never conceded that the treatment that he actually rendered constituted a deviation or departure from good and accepted practice, or that he was careless or negligent (*cf. Adams v Agrawal*, 187 AD2d 886, 887 [3d Dept 1992] [in an action commenced by summons with notice, defendant physician’s alleged admission that he “had injected too much dye in [the plaintiff] and that it damaged [his] kidneys” was sufficiently specific to support a motion for leave to serve a late complaint, which requires a showing of merits]).

The court notes that this action appears to present the situation in which Agaeva is simply dissatisfied with the result of plastic surgery. “Dissatisfaction with a cosmetic result is not a proper basis for a medical malpractice claim” (*Sherman v Gerut*, 2021 NY Slip Op 33515[U], *5, 2021 NY Misc LEXIS 12315, *5 [Sup Ct, Nassau County, Mar. 30, 2021]).

Hence, Filstein must be awarded summary judgment dismissing the medical malpractice cause of action insofar as asserted against him.

In light of the court's determination of Filstein's motion, the plaintiffs' cross motion must be denied. In any event, even if the court had accepted Filstein's purported admissions as sufficient to raise a triable issue of fact, a party admission constitutes evidence insufficient to support the affirmative award of summary judgment (*see Kramer v Oil Servs., Inc.*, 56 AD3d 730, 730 [2d Dept 2008]; *see also Delgado v Martinez Family Auto*, 113 AD3d 426, 429 [1st Dept 2014] [Freedman, J., dissenting]).

To establish a cause of action alleging breach of contract, a plaintiff ultimately must demonstrate the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]; *see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). A breach of contract claim in relation to the rendition of medical services will withstand a test of legal sufficiency where a medical defendant "expressed a specific promise to accomplish some definite result" (*B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 81 [1st Dept 2015]; *see Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013]; *Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005]; *Chaff v Parkway Hosp.*, 205 AD2d 571, 613 [2d Dept 1994]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d 544, 545 [2d Dept 1994]; *Dodes v North Shore Univ. Hosp.*, 149 AD2d 455, 456 [2d Dept 1989]; *Monroe v Long Is. Coll. Hosp.*, 84 AD2d 576, 576-577 [2d Dept 1981]; *see also Robins v Finestone*, 308 NY 543, 546 [1955]; *Catapano v Winthrop Univ. Hosp.*, 19 AD3d 355, 355-356 [2d Dept 2005]). Moreover, a breach of contract cause of action may also be stated where a patient enters into an oral agreement with a physician, pursuant to which the patient agrees to retain the physician's services in exchange for a specific promise that the physician would provide the patient with certain medical services in a particularized fashion, and the physician does not provide the services

that were agreed to, or provide them in the manner agreed to (*see Duquette v Oliva*, 75 AD3d 727, 728 [3d Dept 2010]; *Nicoleau v Brookhaven Mem. Hosp.*, 201 AD2d at 545).

In the instant dispute, however, the plaintiffs have not identified any specific promise made by Filstein over and above his alleged promise to provide Agaeva with good medical care. “[A] claim sounds in medical malpractice when the gravamen of the complaint is negligence in furnishing medical treatment” (*Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 146-147 [1st Dept 2005]; *see Weiner v Lenox Hill Hosp.*, 88 NY2d 784 [1996]; *Payette v Rockefeller Univ.*, 220 AD2d 69, 71 [1st Dept 1996]). In this case, the plaintiffs’ breach of contract claim clearly alleged only negligence, since that claim asserted that the defendants failed to perform the subject medical procedure---a rhinoplasty---in a manner that comported with good and accepted medical practice, and to follow up with Agaeva to assure that no adverse effects had been caused by that procedure. In opposition to Filstein’s prima facie showing he did not enter into a specific contract with Agaeva, and made no specific promises as to the outcome of the procedure that he performed, the plaintiffs failed to raise a triable issue of fact. Hence, that branch of Filstein’s motion seeking summary judgment dismissing the breach of contract cause of action must be granted.

With respect to the defendant denominated as “John Doe,” the plaintiffs made no showing of any efforts that they made to identify this fictitious defendant. Since he or she never was identified, the plaintiffs are precluded from relying on CPLR 1024 to maintain this action against that party (*see generally Fountain v Ocean View II Assocs., L.P.*, 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed as against him or her.

Accordingly, it is,

ORDERED that the motion of the defendant Mark Filstein, M.D., for summary judgment dismissing the complaint insofar as asserted against him is granted, and the complaint is dismissed insofar as asserted against Mark Filstein, M.D.; and it is further,


ORDERED that, on the court’s own motion, the action is severed as against the defendant Mark Filstein, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Mark Filstein, M.D.; and it is further,

ORDERED that, on the court’s own motion, the complaint is dismissed insofar as asserted against fictitious defendant “John Doe.”

This constitutes the Decision and Order of the court.

1/23/2025
DATE



JOHN J. KELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE