

Toresco v Schumacher

2025 NY Slip Op 33931(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 805272/2020

Judge: Kathy J. King

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

PRESENT: HON. KATHY J. KING **PART** **06**

Justice

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LINDA TORESCO,

Plaintiff,

- v -

MICHAEL A. SCHUMACHER, D.P.M.,

Defendant.

INDEX NO. 805272/2020

MOTION DATE 12/20/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30-44, 53-56, 57 were read on this motion to/for JUDGMENT - SUMMARY.

In this medical malpractice action, Defendant, Michael A. Schumacher, D.P.M. (Dr. Schumacher”), moves for an order granting summary judgment dismissing the Plaintiff’s complaint in its entirety with prejudice.

Plaintiff, Linda Toresco (“Plaintiff”), opposes the motion.

BACKGROUND

On February 1, 2016, Plaintiff, then 73 years-old, presented to Defendant, Dr. Schumacher, with complaints of discomfort on her left foot. Plaintiff had undergone a bunion surgery performed by another podiatrist approximately six years before she went to Dr. Schumacher. Plaintiff presented with years of metatarsophalangeal (“MTP”) joint bunion pain and non-antalgic gait and normal ankle joint range of motion in both feet. Antero-Posterior (“AP”) and standing x-rays of the left foot revealed no fracture and confirmed hallux valgus with first MTP joint, degenerative joint disease (“DJD”), and evidence of previous first MTP joint surgery. Dr. Schumacher diagnosed Plaintiff with hallux valgus rigidus, hammertoe on toes two through five, and left foot metatarsalgia on her left foot.

On April 20, 2017, Plaintiff returned to Dr. Schumacher and upon examination, he noted that her left bunion and hammertoe pain continued. However, his evaluation from February 1, 2016 remained unchanged, and he discussed conservative versus surgical options.

Plaintiff returned to Dr. Schumacher again on July 7, 2017, complaining of increased left bunion and hammertoe pain and indicated that she wanted to undergo surgery. Dr. Schumacher documented that the nature of her problems and treatment options were discussed, and both surgical and conservative treatment options were explored including a discussion of the risk, benefits, and alternatives. Surgery was scheduled for the end of July 2017 and Dr. Schumacher ordered pre-operative x-rays. Dr. Schumacher documented that the new x-rays showed that the second and third MTP joints had degenerative joint disease, and that the deviation had increased since the prior x-ray in 2016. Dr. Schumacher discussed the surgical plan with Plaintiff, which now included a first MTP joint fusion with metatarsal head resection at toes two through five. Plaintiff then presented to Manhattan Surgery Center on July 19, 2017, for the surgery, and executed consent forms for both surgery and anesthesia prior to surgery. Dr. Schumacher noted that the surgery was completed without complication. Plaintiff was discharged later that day.

Plaintiff had five post-operative visits with Defendant from July to November 2017. On November 7, 2017, Plaintiff's fifth and final visit to Dr Schumacher, she indicated that she had left big toe joint pain, as well as pain to the side of her right foot over the past five days. Dr. Schumacher took an x-ray of the left foot which revealed that the two bone screws had started to back out and the bone shifted up. He documented the left first MTP joint non-union on that day. He also documented that he discussed the nature of Plaintiff's problems as well as potential treatment options, including resumed use of the CAM walker boot and use of a bone stimulator to

address non-union. Dr. Schumacher recommended that Plaintiff return to his office within one week or sooner with any problems.

On December 13, 2017, Plaintiff sought a second opinion from non-party Dr. Christopher Hubbard (“Dr. Hubbard”). Dr. Hubbard noted that Plaintiff had complaints of persistent pain, swelling, and deformity since her surgery in July 2017. An x-ray of Plaintiff’s left foot revealed non-union of the first MTP joint with lucency surrounding two cannulated screws. A standing CT scan revealed similar findings. Dr. Hubbard recommended arthrodesis revision given the duration of time since the July surgery, minimal consolidation, and hardware lucency. He noted that this would include hardware removal and local bone graft plus allograft.

On February 5, 2018, at Mount Sinai Beth Israel, Plaintiff underwent revision surgery with Dr. Hubbard, wherein bone graft and marrow were mixed and placed at the fusion site, along with additional bone tissue. Dr. Hubbard secured a dorsal revision plate with screws and performed additional bone graft. He noted in his operative report that Plaintiff had non-union and prominent hardware six months after surgery.

On September 2, 2020, Plaintiff filed a Complaint asserting a cause of action sounding in medical malpractice against Dr. Schumacher. Specifically, Plaintiff alleges that Dr. Schumacher’s failure to perform pre-operative tests and studies were departures from the accepted standards of care and proximately caused Plaintiff’s injuries. Plaintiff also alleges that Defendant’s failure to use the fixation plate during the surgery on July 19, 2017 was a departure from the accepted standard of care and that this departure caused her injury in the form of a failed procedure, the need for a second otherwise unnecessary surgery, and long and protracted periods of post-operative pain, suffering, and limited mobility.

Additionally, Plaintiff asserts a cause of action for lack of informed consent.

Issue was joined by service of a verified answer on January 29, 2021, and Defendant now moves for summary judgment dismissing Plaintiff's complaint in its entirety, pursuant to CPLR 3212, with prejudice.

DISCUSSION

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice, and by establishing that the Plaintiff was not injured by such treatment (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *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 204, 206 [1st Dept 2010]; *Joyner-Pack v Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]).

In support of his motion, Defendant submits the affidavit of medical expert Dr. Michael J. Trepal ("Dr. Trepal"), a board-certified Podiatric Surgeon and Fellow of the American College of Foot and Ankle Surgeons, who opines, to a reasonable degree of medical certainty, that Defendant's care was at all times within the standard of good and accepted medical practice. Dr. Trepal opines that Dr. Schumacher's initial plan in February 2016 to perform first MTP joint fusion and second and third MTP joint capsulotomy was appropriate and indicated to address Plaintiff's longstanding left foot pain. Dr. Trepal explained that the MTP joint capsulotomy, or the cutting of

joint capsule, would release the tight structures causing the hammertoe to relax and resume its normal flattened posture.

Dr. Trepal further opines that Dr. Schumacher appropriately obtained new pre-operative x-rays to evaluate for surgery and determine whether any changes had occurred after Plaintiff's delay in returning for over a year between February 2016 and April 2017, and her ultimate decision to proceed with surgery in July 2017. Dr. Trepal states that Dr. Schumacher correctly adjusted his surgical plan to include metatarsal head resection, rather than MTP joint capsulotomy, to address the worsened joint disease and deviation, and Plaintiff's hammertoe deviation. In addition, Dr. Trepal opines that Dr. Schumacher rendered excellent postoperative care. According to Dr. Trepal, full fusion can take five to six months, so the lack of fusion on x-ray at two and a half months did not warrant intervention.

The Court finds that the Defendant has established prima facie entitlement to judgment as a matter of law based on Dr. Trepal's expert affirmation, which demonstrates that the care and treatment provided by Defendant was consistent with the standards of good and accepted medical practice at all times, and that Plaintiff's alleged injuries were not caused by any action or omission by the Defendant. (*Ducasse v New York City Health & Hospital Corp.*, 148 AD3d 434, 436 [1st Dept 2017]).

Once the defendant meets their burden, the burden shifts to the plaintiff, who must rebut the defendant's prima facie showing (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Generally, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Murphy v Chinatown Cardiology, P.C.*, 220 AD3d 539, 540 [1st Dept 2023] [quotation marks and citations omitted]).

In her opposition,¹ Plaintiff submits the affirmation of a medical expert, board-certified in Podiatric Surgeon,² who opines, with a reasonable degree of medical certainty, that the Defendant departed from the accepted standard of medical practice by failing to order a vitamin D study before the July surgery to determine whether the Plaintiff was suffering from diminished bone density. According to Expert A, diminished bone density will significantly impact the surgical approach (if surgery was indicated at all) and play a significant role in the Plaintiff's ability to properly heal following the type of surgery that Dr. Schumacher ultimately performed. Expert A further opined that Dr. Schumacher further departed from the standard of medical care by failing to order vascular studies pre-operatively, failing to use a fixation plate to assist with the MTP fusion, and advising the Plaintiff to stop using a CAM walker and start wearing sneakers on October 2, 2017, three months after the surgery. Expert A concluded that these departures, were a direct and proximate cause of injury suffered by Plaintiff and required her to obtain an otherwise unnecessary revision and repair surgery by Dr. Hubbard that carried with it a long period of post-operative pain and physical limitations.

The Court finds that Expert A raises triable issues of fact rebutting the Defendant's prima facie entitlement to summary judgment (*see Johnson v St. Barnabas Hosp.*, 52 AD3d 286 [1st Dept 2008], appeal denied 11 NY3d 705 [2008]; *Landau v Rappaport*, 306 AD2d 446 [2d Dept 2003]; *Nabozny v Cappelletti*, 267 AD2d 623 [3d Dept 1999]; *Johnson v Jacobowitz*, 65 AD3d 610 [2d Dept 2009]). "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility

¹ Pursuant to CPLR 2001, this Court will exercise its discretion to excuse the late filing of the Plaintiff's opposition papers. (*see 794 Lexington Realty LLC v 794 Lexington Inc.*, 76 Misc 3d 1225[A], 2022 NY Slip Op 51048[U] [Sup Ct, NY County 2022]).

² Plaintiff redacts the name of her expert pursuant to CPLR 3101(d). Plaintiff's expert is hereinafter referred to as Expert A.

issues which can only be resolved by a jury” (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; see *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

Accordingly, the Defendant’s motion for summary judgment as to medical malpractice cause of action is denied.

As to the branch of Defendant’s motion seeking summary judgment regarding Plaintiff’s lack of consent claim, it is well settled that a defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]). 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 cause of action where a patient signs a consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (see *Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]); *Johnson v Staten Is. Med. Group*, 82 AD3d 708, 709 [2d Dept 2011] [holding that where the plaintiff signed an informed consent form, the form itself was sufficient to carry the defendants’ prima facie burden on summary judgment]).

Defendant’s expert Dr. Trepal provided, to a reasonable degree of medical certainty, that Defendant obtained Plaintiff’s informed consent for the first MTP joint fusion surgery with metatarsal head resection, discussed the risks, benefits, potential complications, and the postoperative course associated with such surgery, and obtained a signed consent form. Dr. Trepal indicated that the consent form explained the nature and purpose of the procedure, and informed

Plaintiff of the expected risks, benefits, and possible complications, as well as the alternative methods of treatment or likely clinical outcome if she elected to not undergo the procedure.

Plaintiff testified that she signed the consent form prior to obtaining surgery.


Accordingly, the Court finds that Defendant has made a prima facie showing for summary judgment as to the lack of informed consent cause of action. While Expert A states that Defendant did not inform Plaintiff of the risks, benefits, and alternatives of treatment, Plaintiff, in opposition, fails to address the consent form in the Defendant’s moving papers. As a result, Plaintiff fails to rebut Defendant’s prima facie showing as to lack of informed consent (see *Etkin v Marcus*, 74 AD2d 633 [2d Dept 1980]; *Pirri-Logan v Pearl*, 192 AD3d 1149 [2nd Dept 2021]).

Based on the foregoing, it is hereby

ORDERED, that Defendant’s motion for summary judgment is granted to the extent of dismissing Plaintiff’s lack of informed consent claim, and in all other respects the motion is denied; and it is further

ORDERED that the Defendant is to serve a copy of this order upon the Plaintiff with notice of entry within twenty (20) days of entry of this order.

This constitutes the Decision and Order of the Court.

10/10/2025					
DATE			KATHY J. KING, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE