SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DANIELA CIOCCA,

Plaintiff,

- v -

RITA SHATS, M.D., and NEW LOOK NEW LIFE SURGICAL ARTS,

Defendants.

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INDEX NO. 805214/2022

MOTION DATE 10/14/2025
10/14/2025

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 75, 77, 79, 82, 83, 84

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 55, 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, 80, 81, 85

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for medical malpractice based on alleged departures from good practice, lack of informed consent, common-law negligence, and breach of contract, the defendant New Look New Life Surgical Arts (New Look) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it (MOT SEQ 001). The plaintiff opposes that motion. The defendant obstetrician/gynecologist (OB/GYN) and self-described cosmetic gynecologist Rita Shats, M.D., separately moves for the same relief as to her (MOT SEQ 002). The plaintiff opposes that motion as well. New Look's motion is granted to the extent that it is awarded summary judgment dismissing the breach of contract cause of action insofar as asserted against it, and so much of the medical malpractice cause of action, insofar as asserted against it, as was premised upon Shats's alleged abandonment of the plaintiff and allegations that the surgical procedure that is the subject of this action was medically unnecessary. Shats's motion is granted to the extent that she is awarded summary

judgment dismissing the common-law negligence cause of action insofar as asserted against her, and so much of the medical malpractice cause of action, insofar as asserted against her, as was premised upon her alleged abandonment of the plaintiff and allegations that the procedure was medically unnecessary. The motions are otherwise denied, since the parties' submissions reflect the existence of triable issues of fact as to whether Shats departed from good and accepted practice in performing cosmetic surgery upon the plaintiff and in failing to obtain her fully informed consent to the surgery, whether New Look is vicariously liable therefor, and whether New Look negligently hired or retained Shats to perform cosmetic surgery at its facility despite actual or constructive knowledge that she was not qualified to perform such surgery. There are also triable issues of fact as to whether this tortious conduct caused or contributed to the plaintiff's injuries.

The crux of the plaintiff's claim is that, on January 4, 2022, Shats negligently performed a vaginal rejuvenation procedure upon her at New Look's facilities, including the improper performance of vaginoplasty, labiaplasty, and perineoplasty surgeries. In her bill of particulars as to Shats, she additionally alleged that Shats performed medically unnecessary procedures, and that Shats was not qualified to perform procedures that she did perform. The plaintiff further asserted that Shats deviated from accepted standards of cosmetic surgical practice, failed to consider the risks, hazards, and dangers of the treatment that was rendered, and failed to inform the plaintiff as to the true nature of her condition both before and after the treatment that she rendered. In addition, the plaintiff averred that Shats failed to take proper, prudent, and reasonable steps to prevent injury, and ultimately abandoned the plaintiff, thus failing and neglecting to take any steps to rectify and/or mitigate the adverse conditions caused by the procedures. Moreover, she alleged that Shats failed to inform her of the risks and hazards of the procedures, or of any alternatives thereto, thus failing to obtain fully informed consent. In her bill of particulars as to New Look, the plaintiff reiterated her allegations as to Shats, and

added that New Look negligently hired Shats, since Shats was not qualified to perform the subject procedures.[1]

The plaintiff further alleged in both of her bills of particulars that, as a consequence of the defendants' wrongful acts, she was caused to have her labia amputated, and sustained or experienced significant labial scalloping, slits in her labia, permanent disfigurement of the labia, and physical discomfort, thus necessitating future correction surgery.

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 Flanders v Goodfellow,* 44 NY3d 57, 62-63 [2025]; *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]; *see Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that 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

[1] The court notes that, while allegations of negligent hiring, training, supervision, and retention constitute a cause of action independent of a medical malpractice cause of action, and the plaintiff did not separately plead a such cause of action, the court will address that claim as if it had been separately pleaded (*see Burgos v Lau*, 2025 NY Slip Op 33250[U], *2 n 2, 2025 NY Misc LEXIS 7290, *2 n 2 [Sup Ct, N.Y. County, Aug. 28, 2025] [Kelley, J.]; *Estate of Gebert v Huntington Hills Ctr. for Health*, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; *see also Taylor v Methodist Hosp*., 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004] [deeming allegation of "negligent credentialing" to constitute an independent cause of action]).

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 the burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case, but 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]). Even where an adverse outcome is a known risk of a surgical procedure, a plaintiff may raise a triable issue of fact as to whether a physician committed malpractice by showing that the outcome was caused by improper surgical or medical technique, rather than by an unexplained or incidental event (*see Matney v Boyle,* 237 AD3d 1382, 1384-1385 [3d Dept 2025]; *Bengston v Wang*, 41 AD3d 625, 626 [2d Dept 2007]; *see also Hoffman v Taubel*, 2021 NY Slip Op 31523[U], *4-5, 2021 NY Misc LEXIS 2379, *8-9 [Sup Ct, N.Y. County, Apr. 30, 2021] [Kelley, J.], *affd* 208 AD3d 1099 [1st Dept 2022] [merely because the transection of a ureter is a known risk of a hysterectomy, it does not follow that a surgeon or a surgeon's assistant is excused from properly performing the procedure]; *Mathias v Capuano*, 2015 NY Slip Op 32160[U], *5-6, 2015 NY Misc LEXIS 4141,

*12-14 [Sup Ct, Suffolk County, Nov. 5, 2015]; *cf. Henry v Duncan*, 169 AD3d 421, 421 [1st Dept 2019] [plaintiff failed to raise triable issue of fact in opposition to physician's showing that injury was a "known risk that may occur despite competent surgical care having been provided"]). The law does not require a health-care provider to guarantee a good result (*see Saliaris v D'Amelia*, 143 AD2d 996, 996 [2d Dept 1988]), and, although an outcome or result may truly be unfortunate, "'a bad result does not, ipso facto, support a claim for medical malpractice'" (*Saliaris v D'Amelia*, 143 AD2d at 996-997; quoting *Schoch v Dougherty*, 122 AD2d 467, 468 [3d Dept 1988]; *see Nestorowich v Ricotta,* 281 AD2d 870, 871 [4th Dept 2001], *affd* 97 NY2d 393 [2002]; *Bobek v Crystal*, 291 AD2d 521, 523 [2d Dept 2002]; *Nabozny v Cappelletti*, 267 AD2d 623, 628 [3d Dept 1999]; *Zito v Friedman*, 77 AD2d 514, 515 [1st Dept 1980] [jury must be instructed that a bad result by itself is not proof of malpractice]).

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]; *see generally Kristie M. v. Mercy Hosp. of Buffalo,* 240 AD3d 1228 [4th Dept 2025]; *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]; *Jones v Ricciardelli*, 40 AD3d 935, 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 the burden on a summary judgment motion, 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, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 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; *Luu v Paskowski*, 57 AD3d 856, 857 [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 also Pancila v Romanzi,* 140 AD3d 516, 516 [1st Dept 2016]; *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd sub nom. Callistro v Bebbington*, 20 NY3d 945 [2012]; *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).

In support of its motion, New Look submitted the pleadings, the plaintiff's bill of particulars as to it, transcripts of the parties' deposition testimony, relevant medical and hospital records, the note of issue, selected correspondence, an attorney's affirmation, and the expert affirmation of board certified OB/GYN, urogynecologist, and cosmetic surgeon Christian

Quintero, M.D., M.B.A., FPMRS, FAACS, who opined that New Look did not depart from good and accepted practice, and that nothing that it or its healthcare personnel did or did not do caused or contributed to the plaintiff's injuries.

Dr. Quintero noted that Shats performed the subject procedures, and that only Shats was involved in the execution and performance thereof. He explained that labiaplasty is a surgical procedure to reduce or increase the size of a woman's labia, while a perineoplasty is a surgery that tightens the area between the anus and the vagina, also known as the perineum. As Dr. Quintero described it, these procedures are performed to improve sexual satisfaction, restore function, and help narrow the vaginal opening after childbirth or trauma. He further asserted that vaginoplasty is a procedure to construct or repair the vagina, which can be performed after a vaginal delivery of an infant, such as the plaintiff here experienced, which stretches and loosens vaginal muscles, and which can affect sexual function.

According to Dr. Quintero, the plaintiff is taking no issue with the outcome of the perineoplasty and vaginoplasty phases of the procedure, but only with the outcome of the labiaplasty phase. He asserted that the labiaplasty phase of the plaintiff's procedure involved removing excess tissue on the labia minora with a scalpel, and then stitching the loose edge before allowing it to heal. As Dr. Quintero read the operative report, on the date of the surgery, Shats measured the plaintiff's labia with a ruler and marking pen, held the labia herself, along with any clumps of tissue that she used, and personally made the requisite incisions. He asserted that no one who was then employed by New Look participated in any aspect of the labiaplasty phase of the surgery. Dr. Quintero averred that Shats then sutured the labia, employing 3-0 vicryl, 2-0 vicryl, and a monocryle stitch. He opined that the labiaplasty phase of the procedure only required the "presence" of one surgeon, and that Shats properly and appropriately performed the procedure on her own. Dr. Quintero further concluded that the manner in which Shats measured the plaintiff's labia, and performed the tasks of cutting and suturing, was consistent with good and accepted practice. He asserted that there were no

complications or untoward events that occurred during the procedure. Dr. Quintero stated that, after Shats performed the labiaplasty, there was an expected amount of postoperative swelling before the plaintiff's fatty tissue was reabsorbed. Moreover, he averred that the size of a labia postoperatively is variable, depending on the healing process of each patient, and that the variation in the size of the plaintiff's labia was an expected outcome, and not due to any departure from accepted standards.

In support of her motion, Shats relied on many of the same documents that New Look had submitted, including Dr. Quintero's expert affirmation. She also submitted an attorney's affirmation and the plaintiff's bill of particulars addressed to her. Shats argued that Dr. Quintero established that she did not depart from good and accepted practice in the manner or technique that she employed in performing the surgery, and that the condition of the plaintiff's labia subsequent to the labiaplasty was a known and expected consequence of the procedure.

Relying on the plaintiff's chart and the parties' deposition testimony, Shats's attorney noted that the plaintiff first consulted with Shats at New Look on or about November 8, 2021, concerning a possible labiaplasty, vaginoplasty, perineoplasty, and the injection of a platelet-rich plasma into the clitoral area, known as an O-shot. Counsel asserted that, on December 17, 2021, the plaintiff's primary care physician, Douglas Zeiger, M.D., cleared her for surgery. She explained that, on January 4, 2022, Shats performed the above-referenced procedures, and she described the marking, cutting, and suturing in detail in the operative notes, which reported no complications. According to Shats's attorney, the relevant New Look chart reflected that the plaintiff tolerated the procedures well, with no postoperative complaints or bleeding, and was discharged to her home in stable condition on January 4, 2022. She further asserted that Shats provided the plaintiff with postoperative discharge instructions, including instructions on wound care and when to contact a physician about possible complications. Counsel further noted that the plaintiff, at her own deposition, testified that she had no concerns about the results of the vaginoplasty or perineoplasty phases of the procedure that Shats had performed.

According to Shats's attorney, after the procedures had been performed, the plaintiff and Shats exchanged text messages, in which they discussed baths and ointments to promote healing, along with the plaintiff's concerns about asymmetry, in response to which Shats assured the plaintiff that she could perform revisions if the plaintiff remained dissatisfied with the surgery. Shats's attorney further noted that the plaintiff made postoperative visits to Shats on January 10, 2022 and January 28, 2022, at which they discussed possible revision due to the uneven appearance of the labia. Shats's attorney explained that a revision surgery was initially planned for March 2022, but did not proceed.

Shats's attorney further argued that, although Shats's motion was made slightly more than 60 days after the filing of the note of issue, and, thus, beyond the date fixed by the court in several case management orders, the court nonetheless should consider the motion, since New Look's motion was timely, and Shats relied upon the same evidence as New Look, addressed identical issues, and was premised upon the same expert's opinion. The court agrees with Shats, and will consider her motion, since, apart from the negligent hiring claim, which was, in effect, asserted only against New Look, New Look addressed all of the plaintiff's contentions that would make it vicariously liable if Shats herself were found liable for malpractice, lack of informed consent, and other types of common-law negligence (*see Tkacheff v Roberts*, 147 AD3d 1271, 1273 n 3 [3d Dept 2017]; *Levinson v Mollah*, 105 AD3d 644, 644-645 [1st Dept 2013]; *Filannino v Triborough Bridge & Tunnel Auth*., 34 AD3d 280, 281 [1st Dept 2006]).

In opposition to both of the defendants' motions, the plaintiff also relied on many of the same documents that they had submitted. She also submitted a statement of allegedly undisputed material facts, an attorney's affirmation responsive to each motion, additional medical records, and the expert affidavit of board-certified general surgeon and plastic and reconstructive surgeon Suma Maddox, M.D., who opined that Shats departed from good and accepted practice, thus causing the plaintiff's claimed injuries.

Based on her review of the parties' deposition testimony and relevant medical records, Dr. Maddox first articulated additional facts concerning the plaintiff's medical history and presentation to the defendants. According to Dr. Maddox, the plaintiff sought treatment at New Look to address loss of vaginal sensitivity that she had experienced after giving birth to a child. She asserted that the plaintiff initially underwent several laser treatments at New Look, which she found to be ineffective. As Dr. Maddox explained it, on November 8, 2021, following the plaintiff's third and final laser treatment, medical staff at New Look asked the plaintiff if she would like to be examined by Shats to explore the possibility of surgical options to address her issues, after which the plaintiff met with Shats, who examined her and discussed surgical options. Dr. Maddox asserted that the relevant chart indicated that the consultation was for a proposed labiaplasty, vaginoplasty, perineoplasty, and O-shot, and that Shats recommended fat grafting to the labia majora, while the plaintiff testified that Shats had assured her that vaginal sensitivity could be enhanced by enlarging the labia majora and reducing the labia minora, since the enlargement of the labia majora would create more surface area.

Dr. Maddox noted that Shats's preoperative report indicated a diagnosis of labial hypertrophy, vaginal laxity, perinea redundancy, and loss of volume of the labia majora bilaterally. In addition to the planned labiaplasty, perineoplasty, and vaginoplasty, and O-spot injection, Shats planned for a transfer of fatty tissue to the labia majora, which was performed by New Look surgeon Claudia Kim, M.D., via liposuction for fatty tissue harvesting that was to be injected into the labia majora. Dr. Maddox further pointed out that the operative report identified Dr. Kim as an "assistant" with respect to the remaining phases of the procedure.

As Dr. Maddox interpreted the operative report, the operation was performed under general anesthesia, administered by Frederick Axelrod, M.D., while the report described the procedure as follows:

> "Patient was placed in dorsal lithotomy position, prepped and draped in usual sterile fashion.

> "Markings performed along perineum, labia minora, and vagina. Tumescent local anesthetic injected along the markings.
>
> "Labia minora was grasped with alyce clamps, was carefully reexamined for symmetrical incision via bovie 30/30 cutting mode, post resection, good hemostasis noted, tissue reapproximated 2 layer closure, 3-0 monocryl suture. vicryl,
>
> "Attention turned to the perineum and vaginal canal, redundant tissue grasped with Alyce clamps, resected with bovie 30/30 setting, vaginal closure performed using 3-0 vicryl, 3 layer closure, perineum closed 2 layer closure, 3-0 monocryl suture.
>
> "Labia majora was marked, 3 symmetric needle incisions made through which fat was transferred.
>
> "Finally 3 CC p[latelet] r[ich] p[lasma] injected into clitoral area.
>
> "Good hemostasis noted."

Although the operative report included an entry that recited "markings performed," Dr. Maddox noted that there was no documentation of measurements as to where the labia majora or minora were marked, and that, when asked about this at her deposition, Shats replied "[t]here is no indication where it was marked, except it was marked on the patient." Shats further testified that, in connection with whether she employed a measurement system to ensure symmetry in a labia procedure, she employed "anatomy, patient anatomy, where you could see the change in color of the labia majora from the outer to the inner part. I used a ruler, it's actually, on the marking pen too, so those are my techniques."

Dr. Maddox further noted that, when the plaintiff next saw Shats on January 10, 2022, Shats wrote in the chart that the plaintiff expressed concern that her left and right labia were slightly uneven, that Shats also wrote "if need be, will correct," and that Shats had testified at her deposition that she had urged the plaintiff to wait before taking any corrective action because some of the suture "can pop out or pull back. Sometimes, I've seen that where the skin is pulled back because the stitch is holding it back." Dr. Maddox also asserted that Shats's notes of the January 28, 2022 follow-up encounter reported that the plaintiff was unhappy with the results of the procedure, inasmuch as the left labia was smaller than the right. At that visit,

Shats and the plaintiff discussed performing revision procedure on March 11, 2022 to make "it look right and better." As Dr. Maddox summarized the plaintiff's deposition testimony, the plaintiff averred that her postoperative concerns included her estimation that "about 60 percent" of the left labia minora and a small portion of the right labia minora appeared "amputated," and that the plaintiff felt that the labia majora were made too large during the enhancement portion of the procedure, and that there were slits in her left labia that made it look like a "petal leaf."

On February 7, 2022, the plaintiff saw plastic surgeon Gary Alter, M.D., for a second opinion, after which Dr. Alter wrote in the plaintiff's chart that he observed a moderate protuberance of the clitoral hood, scalloping of the upper protuberance of the right labia majora, and multiple scalloping of the upper protuberance of the left labia minora, with a "messy middle 1/3." On May 23, 2022, Dr. Alter and the plaintiff made initial plans for the plaintiff to undergo a left clitoral hood flap and right labia minora reduction, to be followed by a labia majora reduction, but the records do not reflect that the plaintiff has yet to submit to those procedures.

Dr. Maddox opined that Shats lacked the experience and credentials necessary to have permitted her to perform the January 4, 2022 surgery. As Dr. Maddox explained it, Shats is an obstetrician and a gynecologist, but not a plastic surgeon, and that, although Shats testified that she refers to herself as a "cosmetic gynecologist," Dr. Maddox concluded that this entails the practice of plastic cosmetic surgery, and that Shats herself admitted that cosmetic gynecology is not a subspecialty recognized by the American Board of Surgeons. In this respect, Dr. Maddox further noted that Shats testified that she was not board certified in surgery, did not pass the board examinations referable to minimally invasive surgery, and had never engaged in any fellowships or obtained any certifications in plastic surgery. Dr. Maddox took issue with Dr. Quintero's opinion that Shats was qualified to perform the subject procedure, asserting that Dr. Quintero did not explain how or why he arrived at this conclusion, and did not reference any aspect of Shats's education, training, or experience to support his opinion regarding the adequacy of Dr. Shats' qualifications. In response to Dr. Quintero's opinion that the subject

procedure only required the “presence” of a surgeon, Dr. Maddox averred that, “[r]egardless of New York professional standards or requirements, the January 4, 2022 surgery should have been performed by a specialist in the field of cosmetic vaginal surgery.” Dr. Maddox also opined that Shats's description of her post-residency clinical training further established that she did not have adequate experience to perform the subject procedure since, according to Shats, she attended an approximately two-week cosmetic gynecology course, during which she only "assisted" in labiaplasty procedures on only two live patients, and did not act as lead surgeon. According to Dr. Maddox, the term “assisted” likely meant that Shats was merely observing the attending physician. She stated that, although Shats received a certificate declaring her proficiency, nobody had observed her actually performing the surgery and that, as such, this program would not have provided Shats with the training and experience necessary to perform labiaplasties and other related procedures on patients.

Dr. Maddox also expressly disagreed with Dr. Quintero's opinions regarding the method by which Shats performed the surgery. Initially, Dr. Maddox noted that, in his description of the procedure, Dr. Quintero employed terms such as “ruler” and “marking pen,” but that those terms were not documented in Shats’s operative note, but only were mentioned during Shats’s deposition testimony. Dr. Maddox opined that the standard of care required that the excess labia minora be marked, leaving a cuff of 1 centimeter (cm) to 1.5 cm in order to retain a functional seal to the introitus, that is, the vaginal opening. She asserted that a cuff of that size would create a safe distance necessary to prevent over-resection and complications arising therefrom. Dr. Maddox expressly averred that these markings should have been made along the entire length of the labia, and, had Shats competently made such markings, the surgery would not have resulted in such “egregious asymmetry of the labia minora.” In addition, she concluded that a resection procedure employing a bovie cautery is not advisable when dealing with such very thin tissue, because it can cause a burn or thermal injury and create uneven edges, as the thermal injury will extend beyond the border. Dr. Maddox thus opined that

Shats's lack of experience and unskilled manner in performing the January 4, 2022 procedure directly caused an uneven labia minora and "scalloping."

Dr. Maddox also rejected Dr. Quintero's conclusions that the variation in the size of the labia minora was an "expected outcome," and that this variation was not due to any departure from the standard of care. As she explained it, the phase of the operation involving the labia is cosmetic, and did not produce a desirable outcome, and that the records indicated that the plaintiff would not have undergone such a procedure if it was expected that it would result in uneven labia minora. Dr. Maddox further faulted Dr. Quintero for failing to address the fact that the subject procedure caused "scalloping" to the plaintiff's labia, which she characterized as an undesirable cosmetic result. She explained that scalloping can occur following a trim resection, such as Shats performed on the plaintiff, if the suture is pulled too tight, which can strangulate the blood supply, cause scarring, and shorten the surviving labium, and that this occurrence likely caused scalloping to the plaintiff postoperatively. In this respect, Dr. Maddox found it "concerning" that, at her deposition, Shats testified that she was unfamiliar with the term "scalloping," which Dr. Maddox asserted is commonly used in relevant literature and is a known risk associated with the manner of operation that she performed, a further indication of Shats's "lack of experience and low level of proficiency in performing cosmetic vaginal procedures."

In reply, both of the defendants submitted attorneys' affirmations, in which counsel argued that Dr. Maddox's opinions were conclusory, speculative, and not supported by the relevant medical records. Shats's attorney further contended that, although Dr. Maddox had concluded that Shats was not qualified to perform the subject procedure, Dr. Maddox did not specify what experience or training Shats should have obtained before being deemed qualified.

The court concludes that both defendants established their prima facie entitlement to judgment as a matter of law in connection with the medical malpractice cause of action. In opposition to the motions, Dr. Maddox did not address the issue of whether Shats "abandoned" the plaintiff. Indeed, the plaintiff elected to discontinue her treatment with Shatz, and sought a

second opinion from Dr. Alter slightly more than one week after her last visit with Shatz. Moreover, Dr. Maddox did not opine that the surgery was not medically necessary. Hence, those branches of the defendants' seeking summary judgment dismissing those claims must be granted. With respect to the remainder of the medical malpractice cause of action, however, the plaintiff raised triable issues of fact with Dr. Maddox's affirmation. Contrary to the defendants' contentions, the court concludes that the opinions of the plaintiff's expert were "neither conclusory nor speculative, as [they] established the elements of a medical malpractice claim by specific factual references to the care and treatment" of the plaintiff's decedent (*Wiands v Albany Med. Ctr.*, 29 AD3d 982, 984 [2d Dept 2006]). It is well settled that a battle of experts, such as presented here, raises credibility issues which must be resolved by a fact finder and which preclude summary judgment (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 25). Specifically, Dr. Maddox explained why the technique that Shats employed was improper, and that Shats's failure appropriately to mark and calibrate the surgical area led to the adverse outcome and the potential need for additional surgery. Hence, the court denies those branches of Shats's motion which sought summary judgment dismissing the medical malpractice cause of action insofar as asserted against her, except with respect to the claims that she abandoned the plaintiff and that the procedure was not medically necessary.

"'In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself'" (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213 [2d Dept 2018]). Since it is undisputed that Shats was employed by New Look at the time that she performed the subject procedure, to the extent that there are triable issues of fact in connection with the medical malpractice cause of action insofar as

asserted against Shats, there are triable issues of fact as to whether New Look may be held vicariously liable therefor. Hence, the court denies that branch of New Look's motion which sought summary judgment dismissing the medical malpractice cause of action insofar as asserted against it, except with respect to the claims that Shats abandoned the plaintiff and that the subject procedure was not medically necessary.

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]). 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 619, 620 [3d Dept 1999], 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]). Hence, where a defendant establishes his or her prima facie entitlement to judgment as a matter of law in connection with a lack of informed consent cause of action by submitting an expert affirmation from a physician, a plaintiff can only raise a triable issue of fact by submitting "an expert affirmation stating with certainty that the information defendant[ ] allegedly provided to plaintiff before the [medical] procedures at issue departed from what a reasonable practitioner would have disclosed" (*Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]). Expert testimony, however, is not necessary with respect to the issue of whether a reasonably prudent person, fully informed, would not have consented to the treatment (*see Gray v Williams*, 108 AD3d 1085, 1086-1087 [4th Dept 2013]; *Hugh v*

Ofodile, 87 AD3d 508, 509 [1st Dept 2011]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept 2000]; *Hardt v LaTrenta*, 251 AD2d 174, 174 [1st Dept 1998]; *Osorio v Brauner*, 242 AD2d 511, 511-512 [1st Dept 1997]).

"'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]). Nonetheless, a defendant may satisfy the 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 detailed consent form, and there is also evidence that the necessity of or indication for the procedure, along with known risks and dangers, were discussed prior to the surgery (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In support of their motions, both defendants relied upon Dr. Quintero's affirmation, in which he asserted that Shats, in her role as the surgeon, was the appropriate person with whom the plaintiff discussed the risks of the procedure, and that it was proper that no other healthcare personnel from New Look was involved in the planning or execution of the surgery. More specifically, Dr. Quintero averred that Shats discussed the risks and benefits of the procedure with the plaintiff during the consultation, including the risks of bleeding, wound dehiscence, infection, asymmetry, and need for further surgery. He further stated that Shats did not harbor any concerns that a labiaplasty might be contraindicated by virtue of the plaintiff's anatomy. According to Dr. Quintero, Shats showed the plaintiff photographs of prior labiaplasties that she had performed on other patients, and discussed her preferred technique, consisting of a "trim" with a semilunar incision. Moreover, he adopted Shats's testimony that there is no particular technique that constitutes the sole "standard of care" for a labiaplasty. Dr. Quintero further noted that, on January 4, 2022, the plaintiff signed a consent form with New Look, in which she agreed to undergo the procedures, including fat transfer, labiaplasty, vaginoplasty, and perineoplasty, and agreed that Shats would perform these procedures. He asserted that the

plaintiff acknowledged certain risks that were identified in the consent form, including disappointment and anxiety during the healing process, pain, swelling, and scarring, and further acknowledged that no guarantees were being made about the results of the surgery.

Dr. Maddox, however, explained that the only preoperative documentation appears to be a note handwritten by Shats, which read “Patient here for consult for labiaplasty, vaginoplasty, perineoplasty o shot injection. Discussed options, recovery, risk benefits. Also, recommended fat grafting to labia majora.” She asserted that this note did not specifically document what potential risks of the procedure were discussed with the plaintiff, and that she did not see any indication in the records that Shats informed the plaintiff that uneven labia and scalloping were “expected” or likely outcomes of the surgery. Dr. Maddox averred that Shats explicitly should have informed the plaintiff that bleeding, infection, pain, numbness, scarring, wound complication, asymmetry, vaginal dryness, and irregular contours were risks of the procedure. She thus opined that neither New Look nor Shats properly obtained the plaintiff’s fully informed consent to the procedure, or appropriately counseled her prior to performing the procedure.

With respect to her opinion that the defendants failed to obtain the plaintiff’s fully informed consent, Dr. Maddox also adverted to the plaintiff’s deposition testimony, in which the latter averred that Shats held herself out to be a cosmetic specialist, and that the plaintiff believed that New Look specialized in plastic surgery. Dr. Maddox further concluded that Shats should have fully disclosed that she was not a board-certified plastic surgeon, and informed the plaintiff about the extent of her particular training and experience. Dr. Maddox recounted the plaintiff’s deposition testimony that Shats arrived late for the procedure, and did not discuss the procedure any further with the plaintiff at that time. Dr. Maddox also faulted Shats for failing to advise the plaintiff of alternatives to the procedure, including alternative surgical techniques, and that Shats inappropriately discussed with the plaintiff only “the technique that [Shats] prefer[red]," consisting of a trim resection. Dr. Maddox additionally asserted that the defendants failed to obtain the plaintiff’s fully informed consent because they falsely represented to the

plaintiff that Shats was a "cosmetic" gynecologist. She asserted that these failures were a proximate cause of the injuries that the plaintiff sustained, including a partial amputation of the labia minora, scalloping, and disfigurement, which she characterized as permanent in nature unless the plaintiff submits to further corrective surgery. Thus, the court must deny those branches of the defendants' motions seeking summary judgment dismissing the lack of informed consent causes of action insofar as asserted against each of them.

To establish a claim sounding in common-law negligence, the plaintiff must prove that the defendants owed her a duty of care and breached that duty, and that the breach proximately caused her injuries (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). "Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" (*Scott v Uljanov*, 74 NY2d 673, 674, 675 [1989], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence" (*Mendelson v Clarkstown Med. Assoc.*, 271 AD2d 584, 584, [2d Dept 2000]; *see Bleiler v Bodnar*, 65 NY2d at 72; *Morales v Carcione*, 48 AD3d 648, 649 [2d Dept 2008]; *Levinson v Health S. Manhattan*, 17 AD3d 247, 247 [1st Dept 2005]). To establish a cause of action to recover for negligent hiring, supervision, training, and retention of health-care personnel, a plaintiff must demonstrate that the defendants either "knew, or should have known," of their employees' "propensity for the sort of conduct which caused the [patient's] injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; *see Kuhfeldt v New York Presbyt./Weill Cornell Med. Ctr.*, 205 AD3d 480, 481-482 [1st Dept 2022]).

The defendants established, prima facie, that Shats was sufficiently experienced and education to be able to perform the subject procedure. In this respect, Dr. Quintero explained that Shats was a board-certified OB/GYN, participated in additional training in connection with

gynecological procedures, and performed approximately 150 labiaplasties since she began her residency in 2003, and, thus, was "well qualified" to perform all phases of the subject procedure. He further noted that she sits on the quality assurance board at Richmond University Medical Center, and is an associate professor at New York Medical College and St. George's University, as well as a partner in her own medical practice in addition to her current work as an independent contractor for New Look. The plaintiff, however, raised a triable issue of fact with Dr. Maddox's affirmation in connection with whether Shats was in fact qualified to perform the several phases of the subject procedure because she was not a surgeon, but only an OB/GYN, and did not have the requisite training or experience as a plastic or cosmetic surgeon, and as to whether New Life knew, or should have known, that Shats did not possess the necessary qualifications to perform what Dr. Maddox characterized as plastic surgery (*cf. Shewbaran v Laufer,* 177 AD3d 510, 511 [1st Dept 2019] [in connection with negligent hiring cause of action, plaintiff failed to raise triable issue of fact as to whether "any of the persons involved in plaintiff's care was unqualified" or had a history of negligent conduct]).

The plaintiff's claim alleging negligent hiring sounds in common-law negligence (*see Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015] [negligent hiring cause of action against medical practice is subject to three-year limitations period, and allegations of medical malpractice and lack of informed consent did not, in and of themselves, place defendants on notice of negligent hiring cause of action]). Here, as in *Calamari,* the common-law negligence cause of action, as set forth in the complaint, did not place the defendants on notice of a negligent hiring cause of action. Unlike Calamari, however, the plaintiff clearly and expressly stated in her bill of particulars that New Look was negligent in their hiring of Shats to perform cosmetic surgery.[2] Hence, that branch of New Look's motion seeking summary judgment

[2] The court notes that all of the plaintiff's other allegations concerning breaches of a duty of care either are couched in the defendants' failure to perform a surgical procedure in a proper manner or their failure to obtain her fully informed consent to the subject procedure, and, thus, fall outside the ambit of a general common-law negligence cause of action.

dismissing the claim alleging negligent hiring insofar as asserted against it, as subsumed in the common-law negligence cause of action, must be denied. Since Shats was not responsible for New Look's hiring practices, she must be awarded summary judgment dismissing the negligent hiring claim and common-law negligence cause of action insofar as asserted against her

On September 15, 2022, the plaintiff and Shats entered into a stipulation, pursuant to which the plaintiff agreed to withdraw the breach of contract cause of action insofar as asserted against Shats. The plaintiff did not, however, expressly withdraw that cause of action insofar as asserted against New Look. 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 plaintiff has not identified any specific promise made to her by New Look, over and above its implied promise to provide her 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 plaintiff's breach of contract cause of action clearly alleged only medical negligence, since that claim asserted that the defendants failed to perform the subject medical procedures---the vaginoplasty, labiaplasty, and perineoplasty surgeries, along with the O-shot---in a manner that comported with good and accepted medical practice, and to follow up with her to assure that no adverse effects had been caused by that procedure. In opposition to the defendants' prima facie showing that they did not enter into a specific contract with the plaintiff, and made no specific promises as to the outcome of the procedure that they performed, including the appearance of the plaintiff's vagina and labia after the surgery, the plaintiff failed to raise a triable issue of fact. Hence, that branch of New Look's motion seeking summary judgment dismissing the breach of contract cause of action insofar as asserted against it must be granted.

In light of the foregoing, it is

ORDERED that the motion of the defendant New Look New Life Surgical Arts for summary judgment dismissing the complaint insofar as asserted against it (MOT SEQ 001) is granted only to the extent that it is awarded summary judgment dismissing the breach of contract cause of action insofar as asserted against it and so much of the medical malpractice cause of action, insofar as asserted against it, as was premised upon Rita Shats, M.D.'s alleged abandonment of the plaintiff and allegations that the procedure was medically unnecessary, that

cause of action and those claims are dismissed insofar as asserted against New Look New Life Surgical Arts, and its motion is otherwise denied; and it is further,

ORDERED that the motion of the defendant Rita Shats, M.D., for summary judgment dismissing the complaint insofar as asserted against her (MOT SEQ 002) is granted only to the extent that she is awarded summary judgment dismissing the common-law negligence cause of action insofar as asserted against her and so much of the medical malpractice cause of action, insofar as asserted against her, as was premised upon her alleged abandonment of the plaintiff and allegations that the procedure was medically unnecessary, that cause of action and those claims are dismissed insofar as asserted against Rita Shats, M.D., that branch of her motion seeking summary judgment dismissing the breach of contract cause of action insofar as asserted against her is denied as academic, and her motion is otherwise denied on the merits; and it is further,

ORDERED that, on the court's own motion, the attorneys for all of the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on December 18, 2025, at 11:30 a.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

11/24/2025
DATE

JOHN J. KELLEY, J.S.C.

MOTION 001:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[ ]	**DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**
MOTION 002:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[ ]	**DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**