Blanco v Coccaro
2025 NY Slip Op 35361(U)
January 15, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 620073/2021
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 620073/2021
CAL. No. 202400653MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 9/25/24
ADJ. DATE
Mot. Seq. # 001 MD

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VIRGINIA BLANCO and GARY RIDENTE,

Plaintiffs,

- against -

STEPHEN COCCARO, M.D., SUFFOLK PLASTIC SURGEONS, P.C. and SUFFOLK AMBULATORY SURGERY, PLLC,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants, filed August 29, 2024; Other __; it is

ORDERED that the motion by defendants Stephen Coccaro, M.D., Suffolk Plastic Surgeons, P.C., and Suffolk Ambulatory Surgery, PLLC, for summary judgment dismissing the complaint against them is denied.

Plaintiff Virginia Blanco commenced this action to recover damages for injuries she allegedly sustained as a result of medical malpractice committed by the defendants from September 16, 2020 through April 6, 2021. It is alleged that defendants were negligent in, among other things, failing to properly perform bilateral breast augmentation and mastopexy, failing to provide proper and timely post-operative care, failing to properly evaluate plaintiff pre-operatively, allowing an unnecessary delay in treatment, and failing to refer plaintiff for wound care. Decedent's spouse, Gary Ridente, asserts a derivative claim for loss of services.

Defendants now move for an order granting summary judgment dismissing the complaint against them, arguing that there is no evidence of a deviation from the generally accepted standard of medical care, and that there is no causation between the treatment rendered and the injuries alleged. In support of

the motion, defendants submit the pleadings, transcripts of the parties' deposition testimony, plaintiff's medical records, and the affirmation of Joseph Feinberg, M.D. Plaintiff does not submit opposition to the motion.

The facts of this case are summarized as follows. On September 21, 2020, plaintiff presented to Dr. Coccaro's office for an initial consultation to discuss removal of her implants from a prior breast augmentation procedure in 2008, and a fat transfer to her breasts. Dr. Coccaro recommended implants in lieu of a fat transfer and a bilateral areolar reduction. After meeting with plaintiff on September 21, 2020, Dr. Coccaro planned for a bilateral areolar reduction, bilateral mastopexy revision, liposuction, bilateral capsulectomy, removal of the prior breast implants, and replacement with silicone implants. On December 28, 2020, plaintiff presented to Dr. Coccaro for a pre-operative appointment, during which she signed multiple consent forms.

Plaintiff presented to Dr. Coccaro for the planned surgery on January 13, 2021. After the surgery, she was prescribed gabapentin, Tylenol, and Lovenox. At her first post-operative visit on January 14, 2021, she was noted to have decreased swelling. One day later, on January 15, 2021, plaintiff's spouse left a message for Dr. Coccaro, advising plaintiff was complaining of pain and swelling in her left breast. Plaintiff was instructed to send photographs via e-mail, and Dr. Coccaro prescribed hydrocodone and advised plaintiff to apply a warm compress. Plaintiff next presented to Dr. Coccaro on January 18, 2021, and he observed an area of cyanosis on her left areola. Dr. Coccaro ordered nitro-paste to be applied twice daily to the left areola, and advised plaintiff to follow up in one week. Dr. Coccaro spoke with plaintiff twice on January 20, 2021, as she had reported that the area of cyanosis had increased. Dr. Coccaro advised plaintiff to continue the nitro-paste and warm compresses.

Plaintiff returned to Dr. Coccaro on January 29, 2021 with necrotic tissue of her left areola. Dr. Coccaro performed a debridement of 3 centimeters of skin on the left areola. He advised plaintiff to continue applying bacitracin ointment and to follow up two weeks later. When plaintiff presented to Dr. Coccaro on February 3, 2021, a second debridement of her left areola was performed. On February 8, 2021, plaintiff presented to Dr. Coccaro with an open wound with red and inflamed skin, and a complaint about residual sutures. Dr. Coccaro prescribed an antibiotic and advised plaintiff to apply Aquaphor. On February 12, 2021, plaintiff returned to Dr. Coccaro with complaints of a four millimeter open wound, and bacitracin was again recommended. On February 18, 2021, additional residual sutures were removed, and Dr. Coccaro noted that plaintiff was healing.

Finally, on March 15, 2021, plaintiff returned to Dr. Coccaro complaining of an open wound and some "droopiness" and pain in her breasts. Dr. Coccaro noted a 26 by 11 millimeter open wound on the left areola. He also noted no signs of infection and that the wound was healing. Plaintiff was advised to return for a follow up appointment in two weeks. Plaintiff did not return to Dr. Coccaro's office after that date.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century Fox***

Film Corp., 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The elements of malpractice are "a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (***Barnaman v Bishop Hucles Episcopal Nursing Home***, 213 AD3d 896, 898, 184 NYS3d 800, 803 [2d Dept 2023]; *see* ***Blank v Adiyody***, 220 AD3d 832, 833, 198 NYS3d 172, 174 [2d Dept 2023]). Accordingly, a defendant moving for summary judgment dismissing a medical malpractice cause of action has the burden of establishing "the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (***Campbell v Ditmas Park Rehabilitation & Care Ctr., LLC***, 225 AD3d 835, 836, 208 NYS3d 220, 222-223 [2d Dept 2024]; *see* ***Xie v New York City Health & Hop. Corp.***, 226 AD3d 751, 209 NYS3d 105 [2d Dept 2024]; ***Friedman v Vitale***, 224 AD3d 888, 206 NYS3d 656 [2d Dept 2024]). "To make this prima facie showing, the movant must 'address and rebut any specific allegations of malpractice set forth in the plaintiff's . . . bill of particulars' " (***Kelly v Ahn***, 224 AD3d 673, 674, 205 NYS3d 137, 139 [2d Dept 2024], quoting ***Barnaman v Bishop Hucles Episcopal Nursing Home***, 213 AD3d 896, 898, 184 NYS3d 800, 803). Once the defendant makes its prima facie showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarellos v Tassinari***, 222 AD3d 815, 201 NYS3d 489 [2d Dept 2023]; ***Persuad v Hassan***, 220 AD3d 895, 198 NYS3d 196 [2d Dept 2023]).

To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must prove: (1) that the person providing the professional treatment failed to disclose alternatives to such treatment, and failed to inform the plaintiff of the reasonably foreseeable risks of such 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 situation would not have undergone the treatment had he or she been fully informed of the risks; and (3) that the lack of informed consent was a proximate cause of the plaintiff's injuries (*see* Public Health Law § 2805-d [1]; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Dyckes v Stabile***, 153 AD3d 783, 785, 61 NYS3d 110 [2d Dept 2017]; ***Schussheim v Barazani***, 136 AD3d 787, 24 NYS3d 756 [2d Dept 2016]). To establish the proximate cause element, a plaintiff must show that the operation, treatment or procedure for which there was no informed consent was a substantial cause of the injury (***Figueroa- Burgos v Bieniewicz***, 135 AD3d 810, 23 NYS3d 369 [2d Dept 2016]; ***Trabal v Queens Surgi-Center***, 8 AD3d 555, 779 NYS2d 504 [2d Dept 2004]). However, the mere fact that a plaintiff signed a consent form prior to treatment does not establish the defendant's prima facie entitlement to judgment as a matter of law (*see* ***Whitnum v Plastic & Reconstructive Surgery, P.C.***, 142 AD3d 495, 36 NYS3d 470 [2d Dept 2016]; ***Schussheim v Barazani***, 136 AD3d 787, 24 NYS3d 756; ***Walker v Saint Vincent Catholic Med. Ctrs.***, 114 AD3d 669, 979 NYS3d 697 [2d Dept 2014]).

Here, viewing the evidence in the light most favorable to plaintiff, defendants failed to eliminate triable issues of fact as to whether Dr. Coccaro deviated from good and accepted medical practice (*see* ***Ciceron v Gulmatico***, 220 AD3d 732, 197 NYS3d 556 [2d Dept 2023]; ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]). By his affirmation, Dr. Feinberg merely recounted the relevant treatment that Dr. Coccaro provided to plaintiff, and then opined, in a conclusory manner, that Dr. Coccaro's treatment was appropriate and within the standard of care, while failing to set forth what the requisite standard of care was at the time (*see* ***Ojeda v Barabe***, 202 AD3d 808, 158 NYS3d 870 [2d Dept 2022]; ***Nodar v Pascaretti***, 200 AD3d 697, 158 NYS3d 211 [2d Dept 2021]; ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887). Moreover, Dr. Feinberg's affirmation failed to address all allegations of negligence raised in the bill of particulars, including allegations that Dr. Coccaro failed to timely and properly refer plaintiff for wound care, failed to timely and properly evaluate plaintiff pre-operatively, failed to order or administer silver iron cream dressings, Hydrogel, or Alginate cream, and failed to act upon plaintiff's open wound (*see* ***Ojeda v Barabe***, 202 AD3d 808, 158 NYS3d 870; ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887; ***Refuse v Wehbeh***, 167 AD3d 956, 89 NYS3d 302 [2d Dept 2018]).

Additionally, defendants' submissions were insufficient to establish their prima facie entitlement to summary judgment dismissing the claim for failure to obtain informed consent (*see* ***Lavi v NYU Hosps. Ctr.***, 133 AD3d 830, 21 NYS3d 143 [2d Dept 2015]). Defendants' submissions failed to eliminate triable issues of fact as to whether Dr. Coccaro informed plaintiff of the foreseeable risks associated with, and the alternatives to, the subject procedures, including the bilateral areolar reduction (*see* ***Thomas v Eckhert***, 229 AD3d 1237, 215 NYS3d 238 [4th Dept 2024]; ***Mirshah v Obedian***, 200 AD3d 868, 158 NYS3d 226 [2d Dept 2021]; ***Lavi v NYU Hosps. Ctr.***, 133 AD3d 830, 21 NYS3d 143). Defendants submit the medical records, signed consent forms, and Dr. Coccaro's deposition testimony, wherein he testified that his standard practice is to "go over generals" with the patient, then have the nurse "go through specifics," and that he then comes back into the room and asks the patient whether she has any questions or concerns. However, defendants also submitted plaintiff's deposition testimony, wherein she testified that Dr. Coccaro did not discuss with her any risks associated with the procedures, nor any alternatives. She further testified that she would not have had the areolar reduction performed if she was aware of the risks.

Accordingly, defendants' motion for summary judgment dismissing the complaint against them is denied.

Dated: January 15, 2025

David T. Reilly, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION