

Sam-Kabba v Katzman
2025 NY Slip Op 35482(U)
February 13, 2025
Supreme Court, Nassau County
Docket Number: Index No. 606458/2022
Judge: Sarika Kapoor
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

-----X
ISHMAIL SAM-KABBA,

Plaintiffs,

- against -

BARRY M. KATZMAN, M.D., and KATZMAN
ORTHOPEDICS P.C.,

Defendants.
-----X

TRIAL/IAS PART 32
Index No.: 606458/2022

DECISION AND ORDER

Motion Seq. Nos.: 002

Motion Submission Date:
11/06/2024

NYSCEF docs. 27-67 were read and considered in deciding this motion.

Relief Requested

The defendants move for summary judgment dismissing the complaint.

Background

On May 17, 2022, the plaintiff commenced this action to recover damages for medical malpractice and lack of informed consent, arising out of shoulder surgery performed by the defendant Barry M. Katzman, M.D. (hereinafter Dr. Katzman) on December 24, 2020. The plaintiff alleges, in sum and substance, that the surgery was improperly performed, resulting in the need for a second procedure which was performed by Nicholas De Bellis, M.D., a different orthopedic surgeon (hereinafter Dr. De Bellis), on January 13, 2022. The defendants separately answered the complaint on July 22, 2022.

Motion Sequence 002

The defendants move for summary judgment dismissing the complaint. In support of the motion, the defendants submit, inter alia, the expert affirmation of Konrad I. Gruson, M.D. (hereinafter Dr. Gruson), a physician duly licensed to practice in the State of New York. Dr. Gruson states, among other things, that he has a clinical practice focused exclusively in the care and repair of shoulders at Montefiore Medical Center, where he has been the Director of the Medical Student Orthopedic Sub-Internship since July 2014. He states that, in preparing this affirmation, he reviewed the bills of particulars; the parties' deposition transcripts; the records of Dr. Katzman and the defendant Katzman Orthopedics P.C. (hereinafter Katzman Orthopedics); the records of North Shore Queens Surgical Center, South Island Orthopedics, the practice of Nicholas De Bellis, M.D.; and the records of East Hills Surgery Center, where Dr. DeBellis's procedure

took place. Dr. Gruson opines, inter alia, that Dr. Katzman's treatment of the plaintiff was within the standard of care. Dr. Gruson states that, at the first office visit, Dr. Katzman reasonably provided a cortisol injection, and it was only after conservative treatment failed that surgery was discussed. Dr. Gruson further opines that Dr. Katzman appropriately discussed surgery and the risks. Dr. Gruson states that the procedure performed by Dr. Katzman was consistent with Dr. Katzman's examination of the plaintiff and the recent radiology studies. Dr. Gruson opines that Dr. Katzman "performed a textbook shoulder arthroscopy" and there is no indication that anything that Dr. Katzman did caused the alleged ongoing pain, or that he did not do something that allowed pain to continue. Dr. Gruson further states that the subsequent surgical procedure performed by Dr. DeBellis, to perform a "SLAP" tear repair, was unnecessary, as it is Dr. Gruson's opinion, to a reasonable degree of medical certainty, that the plaintiff did not have a SLAP tear.

In opposition, the plaintiff submits, among other things, the expert affirmation of Hervey Sicherman, M.D. (hereinafter Dr. Sicherman), a physician duly licensed to practice medicine in the State of New York. He states that he is Board Certified by the American Board of Orthopedic Surgeons and as a Fellow of the American College of Surgeons. He states that, thought his surgical career, he has regularly performed shoulder arthroscopies. Dr. Sicherman opines, inter alia, that Dr. Katzman departed from good and accepted medical practice in his care and treatment of the plaintiff by failing to properly repair the plaintiff's Type 2 SLAP tear, and that Dr. Katzman's departures were the proximate cause of the plaintiff's injuries, which include, but are not limited to, more than a year of severe right shoulder pain and limitation of function, futile and painful physical therapy sessions, and the need for a second major shoulder arthroscopy to repair the Type 2 SLAP tear which should have been properly repaired during the surgical procedure performed by Dr. Katzman. Dr. Sicherman opines, to a reasonable degree of medical certainty, that the Type 2 SLAP tear which Dr. De Bellis found and properly repaired on January 13, 2022, was present at the time of the surgery performed by Dr. Katzman on December 24, 2020, and the tear should have been repaired by Dr. Katzman, which would have avoided the need for a second surgery and avoided the severe shoulder pain experienced by the plaintiff after the surgery performed by Dr. Katzman.

In an attorney affirmation in reply, counsel for the defendants argues, inter alia, that the plaintiff's expert did not address the cause of action alleging lack of informed consent and, therefore, at the very least, that cause of action should be dismissed.

Discussion

"The essential elements of medical malpractice are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury" (*Sunshine v Berger*, 214 AD3d 1020, 1022 [2d Dept 2023] [internal quotation marks omitted]). "On a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant . . . has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*id.* at 1022 [internal quotation marks omitted]). "A defendant moving for summary judgment in a medical malpractice case must demonstrate the absence of any material issues of fact with respect to at least one of these elements (*Glassman v Caremount Medical, P.C.*, 226 AD3d 878, 879 [2d Dept 2024]). "[T]o defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's

prima facie showing” (*Stukas v Streiter*, 83 AD3d 18, 24 [2d Dept 2011]). “Where a defendant makes a prima facie showing on both elements, ‘the burden shifts to the plaintiff to rebut the defendant’s showing by raising a triable issue of fact as to both the departure element and the causation element’” (*Sunshine v Berger*, 214 AD3d at 1022, citing *Stukas v Streiter*, 83 AD3d at 25).

Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting the affidavit of Dr. Gruson, who opined that Dr. Katzman did not depart from the standard of care and that, even if there was a departure, any departure was not a proximate cause of the plaintiff’s injuries (*see Simpson v Edghill*, 169 AD3d 737, 738 [2d Dept 2019]). In opposition, however, the plaintiff raised a triable issue of fact through the affirmation of Dr. Sicherman, who opined, inter alia, that the Dr. Katzman departed from good and accepted medical practice in his care and treatment of the plaintiff by failing to properly repair the plaintiff’s Type 2 SLAP tear, and that Dr. Katzman’s departures were the proximate cause of the plaintiff’s injuries (*see Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 740-741 [2d Dept 2017]). Accordingly, that branch of the defendants’ motion which is for summary judgment dismissing the cause of action alleging medical malpractice must be denied.

“To establish a cause of action for malpractice based on lack of informed consent, [the] plaintiff must prove (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” (*Mattocks v Ellant*, 231 AD3d 813, 817 [2d Dept 2024] [internal quotation marks omitted]).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent by submitting, inter alia, the plaintiff’s medical records from his treatment with Dr. Katzman, the affirmation of Dr. Gruson, and transcripts of the parties’ deposition testimony. In opposition, the affidavit of Dr. Sicherman failed to raise a triable issue of fact, as Dr. Sicherman failed to address the assertions regarding informed consent. Accordingly, that branch of the defendants’ motion which is for summary judgment dismissing the cause of action alleging lack of informed consent must be granted.

The parties’ remaining contentions have been considered and do not warrant discussion.

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Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the defendants' motion which is for summary judgment dismissing the cause of action alleging medical malpractice is **DENIED**; and it is further,

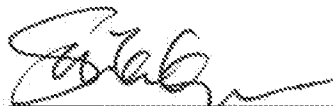
ORDERED that the branch of the defendants' motion which is for summary judgment dismissing the cause of action alleging lack of informed consent is **GRANTED**.

Any request for relief not specifically granted herein is **DENIED**.

This shall constitute the decision and order of this Court.

Dated: February 13, 2025
Mineola, New York

ENTER:



HON. SARIKA KAPOOR, A.J.S.C.

ENTERED

Feb 20 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE