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

PRESENT: LOBIS Justice PART 6

COLLETTI, PETER

-v-

WILLIAM SCHIFF, M.D.

INDEX NO. 105996/08

MOTION DATE 5/31/11

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-16
Answering Affidavits — Exhibits	17-30
Replying Affidavits	31-37

FILED

AUG 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/25/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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PETER COLLETTI,

Plaintiff,

- against -

WILLIAM SCHIFF, M.D.,

Defendant

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Index No. 105996/2008

Decision, Order, and Judgment

JOAN B. LOBIS, J.S.C.:

Defendant William Schiff, M.D., moves, by order to show cause, pursuant to C.P.L.R. Rule 3212, for an order granting him summary judgment dismissing this action in its entirety. Plaintiff opposes the motion.

This action sounding in medical malpractice and lack of informed consent arises out of a course of treatment for plaintiff's vision problems. In October 1999, several years prior to treating with Dr. Schiff, plaintiff underwent photorefractive keratectomy surgery (commonly known as LASIK surgery). In May 2000, plaintiff underwent a "touch up" of the right eye. In May 2005, plaintiff consulted with T.J. Huffnagel, M.D., of Stahl Eye Center to discuss how to improve his vision and, according to plaintiff, to discuss the option of a lens transplant. On August 12, 2005, plaintiff presented to Richard Braunstein, M.D., a refractive surgeon, complaining of blurry vision and glare in his right eye. Dr. Braunstein diagnosed early cataracts and referred plaintiff to Lama A. Al-Aswad, M.D., for a glaucoma evaluation. Dr. Al-Aswad identified him as a "glaucoma suspect."

On September 23, 2005, plaintiff presented to Dr. Schiff, a retinal specialist, for the first time. He had increased glare and wavy, blurry vision. Dr. Schiff found cataracts in both eyes and a mild macular pucker (also referred to as an epiretinal membrane) in the right eye. Dr. Schiff believed that the cataracts should be removed and plaintiff's vision retested thereafter. If plaintiff's vision after the surgery was 20/30 or worse, Dr. Schiff thought that the macular pucker should be removed.

In late November 2005, Dr. Al-Aswad noted that the visual acuity in the right eye had deteriorated to 20/80. Plaintiff also complained of ocular pressure. Dr. Al-Aswad treated the ocular pressure with drops and then a trabeculoplasty. On November 28, 2005, Dr. Braunstein performed cataract surgery with intraocular lens placement. Plaintiff asserts that this procedure was done to facilitate the surgery that Dr. Schiff would perform.

On December 12, 2005, plaintiff presented to Dr. Schiff, complaining of "a bit of glare in his right eye." According to the chart, acuity in the right eye was 20/70.2. Because plaintiff's vision was worse than 20/30, Dr. Schiff scheduled the surgery to remove the macular pucker for December 14, 2005. Dr. Al-Aswad cleared plaintiff for surgery, setting forth that ocular pressure was not a reason to delay the procedure. Dr. Schiff advised plaintiff of some risks of the surgery, although the parties dispute which risks were disclosed.

On December 14, 2005, plaintiff signed a consent form for anesthesia and operative procedure (described as a pars plana vitrectomy and membrane peel). The surgery was rescheduled

for December 15, 2005 and performed on that date without complications. Dr. Schiff certified the *consent* form the same day. Below the certification, Dr. Schiff handwrote a detailed statement of the risks involved, including recurrence of the pucker, loss of vision, and hypotony.

According to the operative report, an additional procedure, an endophotocoagulation for prophylaxis against retinal detachment, was performed on December 15, 2005. Plaintiff asserts that he was unaware of this procedure and did not consent to it. Plaintiff was discharged to his home the same day.

Plaintiff saw Dr. Schiff a few days after the surgery. At a second follow-up appointment on January 10, 2006, plaintiff complained of glare in his right eye. Dr. Schiff referred him to Ronald Gentile, M.D., at New York Eye and Ear Hospital. Plaintiff presented to Dr. Gentile on January 11, 2006, with continuing complaints of vision problems in his right eye. Dr. Gentile noted that plaintiff's visual acuity was 20/40+1 in his right eye. Dr. Gentile referred plaintiff to Paul A. Sidoti, M.D., at New York Eye and Ear Hospital. At two subsequent follow-up visits with Dr. Schiff, plaintiff complained of headache and glare. On March 17, 2006, plaintiff reported a decline in his visual acuity. By April 28, 2006, plaintiff demonstrated a 20/25+ visual acuity in his right eye. Further testing demonstrated, according to Dr. Schiff, a reasonable outcome for vitrectomy surgery. Plaintiff's last visit with Dr. Schiff occurred on September 15, 2006; he reported that his vision in his right eye was as if he were looking through water and that he was having trouble focusing, although he states that he was unable to describe the problem adequately at the time. He saw Dr. Gentile for three visits during this period. Dr. Gentile documented his vision as 20/30+2 on June

26, 2006; 20/25+ on September 16, 2006; and 20/30 -1+1 on September 25, 2006. Dr. Gentile noted that an issue of low intra-ocular pressure (hypotony) had resolved but that the epiretinal membrane had recurred in the right eye.

Plaintiff continued to see a number of ophthalmologists following his last visit to Dr. Schiff. As of his examination before trial, plaintiff was treating with Nathan Radcliff, M.D., a glaucoma specialist at Weill Cornell Medical Center. Now, Dr. Schiff seeks summary judgment, arguing that there are no issues of fact that his treatment of plaintiff was within accepted standards of medical care; that he obtained plaintiff's informed consent; and that there was no departure from accepted medical practice that proximately caused plaintiff's injuries.

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). To satisfy the burden, a defendant in a medical malpractice action must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citation omitted). Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

> must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff's injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a physician attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 73 A.D.3d at 207 (internal citations omitted). A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment, and "that a reasonably prudent patient would not have declined to undergo the [treatment] if he or she had been informed of the potential complications[.]" Koi Hou Chan, 66 A.D.3d 642, 643 (2d Dep't 2009); see also Public Health Law § 2805-d(1).

In support of summary judgment, Dr. Schiff offers the affirmation of Wayne Fuchs, M.D., a board certified ophthalmologist licensed to practice in New York. He opines that, upon review of the medical records and the deposition transcripts, Dr. Schiff did not depart from the standard of care nor proximately cause any of plaintiff's injuries. Dr. Fuchs asserts that the right eye vitrectomy and membrane peel were indicated and that plaintiff's informed consent was obtained. Dr. Fuchs maintains that Dr. Schiff discussed the risks and benefits of the procedure. He opines that the procedure and the follow-up care were appropriate. Although plaintiff complained of glare, Dr. Fuchs maintains that complaints of glare are not unusual for patients who have had their corneas reshaped by LASIK surgery or for patients on Cyclogel medication, which causes pupil dilation. Further, while plaintiff had complaints of vision problems in his right eye on September 15, 2006, his recorded visual acuity at that point was better than it was pre-operatively. Dr. Fuchs maintains

that plaintiff's opthalmological complaints are related to his comorbidities and not the right eye membrane peel and that recurrence of an epiretinal membrane is a known risk of a membrane peel.

In opposition, plaintiff offers his own affidavit as well as an expert's affirmation. Plaintiff sets forth that he first learned that he had a epiretinal membrane in 2005 from Dr. Huffnagel, who told him that removal of the membrane would not improve his vision. According to plaintiff, Dr. Braunstein did not think that a lens transplant was indicated nor did he think plaintiff had cataracts. Plaintiff asserts that at his first visit with Dr. Schiff, he did not recommend surgery for the membrane. Plaintiff claims that it was only when he encountered Dr. Schiff while waiting for an appointment with Dr. Al-Aswad that Dr. Schiff brought plaintiff into an examination room and told him that he was a good candidate for membrane peel surgery. Plaintiff sets forth that Dr. Schiff told him to first undergo cataract surgery so that Dr. Schiff would have a clearer view into the back of plaintiff's eye. Plaintiff maintains that Dr. Braunstein performed the cataract surgery at the sole direction of Dr. Schiff.

As to his informed consent claim, plaintiff admits that Dr. Schiff disclosed some risks of the vitrectomy and membrane peel procedure but contends that Dr. Schiff only disclosed to him the "minor risks" that Dr. Schiff said he must disclose "by law" and then assured him that "everything would be fine." Plaintiff further asserts that Dr. Schiff performed an unconsented-to laser procedure on the edges of his retina in addition to the vitrectomy and peel procedure, although plaintiff does not allege that this alleged laser procedure caused his claimed injuries.

Plaintiff further alleges that at a follow-up appointment on December 27, 2005, he told Dr. Schiff that light was not properly entering the back of his eye and that his retina felt thicker. Plaintiff asserts that at this visit, Dr. Schiff took pictures of his eye, but plaintiff discerned no differences between the images of his retina pre-operatively and post-operatively. Plaintiff states that Dr. Schiff told him that there was supposed to be a dimple in his retina but that the dimple was gone due to "his membrane," although Dr. Schiff opined that it was possible that the dimple could reform. However, Dr. Schiff assured him that the membrane was, indeed, peeled. Plaintiff alleges that at a subsequent follow-up appointment, Dr. Schiff squeezed his eye so hard that he screamed. Plaintiff states that Robert Lamonsoff, an optometrist on Long Island, told plaintiff that Dr. Schiff had "messed [him] up." Plaintiff alleges that Dr. Schiff's malpractice has caused him permanently distorted vision in his right eye, preventing him from being able to read, drive a car, or participate in activities he previously enjoyed, such as target shooting and studying languages.

Plaintiff's expert affirmation is from Calvin Grant, M.D., a board certified ophthalmologist licensed to practice medicine in the state of Illinois. Dr. Grant opines that, in his review of the medical records and deposition transcripts, Dr. Schiff departed from good and accepted medical practice in his care and treatment of plaintiff, and that said departures proximately caused plaintiff's claimed injuries. He opines that Dr. Schiff never completely excised plaintiff's epiretinal membrane, causing re-proliferation and progression of the epiretinal membrane. Additionally, Dr. Grant opines that plaintiff had glaucoma and that his "refractoriness for glaucoma management" made glaucoma progression a risk of the vitrectomy procedure. He opines that there is no indication that Dr. Schiff took precautions during the vitrectomy to decrease plaintiff's risk of experiencing

glaucoma progression. Dr. Grant believes that the procedures performed on plaintiff were elective and should not have been performed, and that it was a breach of the standard of care to do so. He opines that this breach directly caused plaintiff's pain, suffering, and ultimate irreversible vision loss.

In reply, Dr. Schiff argues that since plaintiff's expert failed to address the informed consent claim, this claim must be dismissed. Dr. Schiff further argues that Dr. Grant, as an out-of-state physician, cannot offer an affirmation.[1] Dr. Schiff asserts that, even if the court were to accept the affirmation, Dr. Grant mischaracterizes the record; fails to set forth the appropriate standard of care; and only offers a series of conclusions unsupported by scientific evidence. Dr. Fuchs offers a supplemental affirmation in the reply, setting forth that recurrence of an epiretinal membrane is a known risk of a membrane peel that would have been disclosed. Dr. Fuchs opines that there is no evidence that Dr. Schiff incompletely excised the membrane, but regardless, Dr. Grant fails to opine that incomplete excision of the epiretinal membrane during a membrane peel is a departure from the standard of care. In Dr. Fuchs' opinion, incomplete excision of the epiretinal membrane is not a departure and he states that it is common not to entirely remove the membrane during a membrane peel. He opines that there is no support for Dr. Grant's claims that plaintiff had refractory (uncontrolled) glaucoma prior to Dr. Schiff's surgery; rather, the records indicate that Dr. Al-Aswad, a glaucoma specialist, cleared plaintiff for surgery.

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[1] In accordance with a directive by the court, plaintiff's attorney subsequently submitted a certification of conformity stating that he is an attorney admitted in Illinois and can assert the correctness of the Illinois notary. Dr. Schiff objected to this certification in a letter, but that letter is not part of the formal record for this motion. The court will decide the merits of this motion.

Dr. Schiff has met his prima facie burden for summary judgment. Plaintiff's opposition is not sufficient to rebut this showing. While there may be factual disputes over what was said at various stages of the treatment, expert medical opinion evidence is the hallmark of medical malpractice lawsuits. See Rogues 73 A.D.3d at 207. These opinions "must be based on facts in the record or personally known to the witness . . . [and not] founded upon surmise or supposition." Gomez v. New York City Hous. Auth., 217 A.D.2d 110, 117 (1st Dep't 1995) (internal citations and quotations omitted). The only deviation from the standard of care that Dr. Grant specifies is his opinion that the procedure was elective and should not have occurred due to issues with the management of plaintiff's glaucoma. The record does not support this statement. Nowhere in the record is there support for the claim that plaintiff's glaucoma was refractory or resistant to treatment. Furthermore, Dr. Grant's claim that Dr. Schiff's procedure caused plaintiff's glaucoma to worsen is at odds with his claim that the glaucoma was hard or impossible to control prior to the surgery. Summary judgment on the medical malpractice cause of action is therefore granted. As to the informed consent claim, Dr. Grant's silence on the issue leaves Dr. Fuchs' conclusions on the matter unchallenged and warrants dismissal of the cause of action. See Oprhan v. Pilnik, 15 N.Y.3d 907 (2010). Accordingly, it is hereby

ORDERED that William Schiff, M.D.'s motion for summary judgment is granted in its entirety and the Clerk is directed to enter judgment in favor of said defendant, dismissing the action in its entirety.

Date: August 25 2011

JOAN B. LOBIS, J.S.C.