

**Franklin v Cattani**

2012 NY Slip Op 33207(U)

December 7, 2012

Sup Ct, New York County

Docket Number: 800107/10

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS  
Justice

PART 6

Index Number : 800107/2010  
FRANKLIN, MARILYN  
vs.  
CATTANI, ROBERT V.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/6/12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 20, were read on this motion to (for) summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1-10  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 11-18  
Replying Affidavits \_\_\_\_\_ | No(s). 19-20

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION &  
ORDER

## FILED

DEC 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/7/12

JOAN B. LOBIS, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X

MARILYN FRANKLIN,

Plaintiff,

Index No. 800107/10

-against-

**Decision and Order**

ROBERT V. CATTANI, M.D.,

Defendant.

-----X

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

This medical malpractice case arises out of a cosmetic surgical procedure that the defendant, Robert V. Cattani, M.D., performed on the plaintiff, Marilyn Franklin. Dr. Cattani moves for summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules, claiming that Plaintiff has failed to establish a triable issue of fact. For the following reasons that motion is denied.

**FILED**

**DEC 11 2012**

Marilyn Franklin consulted Dr. Cattani at his Staten Island **NEW YORK** office on **FILED** March 19, 2008. In pertinent part, they discussed elective surgery for Ms. Franklin, including a lower face and neck lift as well as a fat transfer to her nasal labial folds. On February 21, 2009, Dr. Cattani performed the procedure at his office. Prior to surgery, he obtained a signed consent form from Plaintiff, dated the same day. The consent form referred to "Scarring" and "Hypertrophic scarring," among a "partial" list of potential complications. It did not mention keloid scarring specifically.

Following the procedure, Ms. Franklin saw Dr. Cattani for several follow up visits. Her first follow-up visit was on February 23, 2009. She visited him again on March 3, 2009, on March 9, 2009, and on April 10, 2009. During her follow-up visit on May 19, 2009, Dr. Cattani first administered kenalog injections to scarring that had developed following the surgery. He

administered additional injections on Ms. Franklin's visit on August 12, 2009, and on her visit on September 18, 2009.

On October 18, 2010, Ms. Franklin sued Dr. Cattani for medical negligence. The note of issue was filed on May 30, 2012, and Defendant Cattani served his summary judgment on July 27, 2012.

In his motion for summary judgment, Dr. Cattani argues, in pertinent part, that there was no departure from good and accepted medical practice and that if there was any departure it did not cause Ms. Franklin's injury. In support he attaches the affirmation of Dr. William B. Rosenblatt. Dr. Rosenblatt is a board certified plastic surgeon, who represents that he has been involved in hundreds of procedures similar to Plaintiff's.

Plaintiff opposes Defendant's motion for summary judgment. As a threshold matter, she contends that the motion is defective as untimely. In support of her opposition on the merits of the motion for summary judgment she submits the affirmation of Dr. Richard A. Marfuggi. In his affirmation, Dr. Marfuggi testifies that in preparing his opinion, he interviewed, examined, and photographed Ms. Franklin. He also reviewed Defendant Cattani's records relating to Ms. Franklin as well as reviewed the medical records of Dr. R.W. Urbanek, who subsequently treated Ms. Franklin for her alleged injuries arising out of the surgery performed by Dr. Cattani. Plaintiff claims that Defendant has failed to establish a prima facie case that he is entitled to summary judgment. She asserts that Defendant's expert opinion is conclusory and generalized, both as to any departure from standards of care or as to causation of injury, thus failing to show that her medical malpractice

cause of action has no merit. She further contends that even if Defendant were to have established a prima facie case, that showing would be rebutted by Dr. Marfuggi's affirmation.

This Court first considers the threshold issue raised whether Defendant's motion is untimely. Rule 3212(a) of the Civil Practice Law and Rules states, in pertinent part, that a "party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue." This Court's Part Rules require that "[s]ummary judgment motions must be made no later than 60 days after the filing of the Note of Issue." C.P.L.R. § 2211 provides that a motion on notice is made when served. In this case the record shows that the note of issue was filed on May 30, 2012, and served on July 27, 2012. Given service was within the 60 day time limit, Plaintiff's contention that the motion is untimely is not warranted.

This Court next considers the merits of Defendant's motion for summary judgment. It is "a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that [the movant] is entitled to judgment as a matter of law." Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (1st Dep't 2012), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). In a medical malpractice case, to establish entitlement to summary judgment, a physician must demonstrate that he did not depart from accepted standards of practice or that, even if he did, he did not proximately cause injury to the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). If the movant meets this burden, then the opposing party must proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Ostrov, 91 A.D.3d at 152, citing Alvarez v. Prospect

Hosp., 68 N.Y.2d 320, 324 (1986).

Having reviewed the parties' submissions, this Court concludes that Defendant Cattani is not entitled to summary judgment. First, this Court finds that Defendant has failed to establish a prima facie case that he is entitled to summary judgment. Defendant's expert, Dr. Rosenblatt, conclusorily opines that Dr. Cattani's conduct fell within acceptable standards of care. In discussing the surgery, Dr. Rosenblatt opines that "the incisions for the intended procedure were in the correct location and that the suture material used was appropriate." That opinion begs the question, however, whether those incisions were properly made and that suture material was properly applied. The statement that "Dr. Cattani appropriately performed the procedure in accordance with with good and accepted surgical technique" is further conclusory, relying on the same information that the incisions were in the correct location and that the suture material was appropriate. The statement the patient's scarring "was not as a result of any negligence or malpractice," notwithstanding its emphasis, or that the formation of the scarring was "not as a result of a departure from good and accepted surgical practice" is also conclusory.


Even assuming for the sake of argument that the affirmation of Defendant's expert were sufficient to establish a prima facie case, the affirmation of Plaintiff's expert would rebut that prima facie case. That affirmation, by Dr. Marfuggi, disputes Defendant's claim that he performed the surgery and postoperative care within the appropriate standards of reasonableness. Plaintiff's expert, unlike Defendant's, personally examined, interviewed, and photographed Plaintiff, in addition to reviewing the medical records relating to Plaintiff's alleged injuries. He compared the scarring that Plaintiff incurred following a 1997 hysterectomy with that which she experienced

following the 2009 procedure at issue in this case. Dr. Marfuggi opines that Defendant departed from accepted practices and caused plaintiff's "deformities and complaints" in several ways. For example, he disputes the claim that the scarring in this case was "unpredictable." Based on his analysis he opines that it reflects excess suture line tension. Dr. Cattani's failure to close Plaintiff's wounds in a tension-free manner is manifested by the cross hatch markings visible on Plaintiff's skin. He opines that Dr. Cattani further caused Plaintiff's lack of improvement of facial laxity in failing to adequately undermine the skin flaps, and that Defendant failed to adequately plicate the subcutaneous tissues. He suggests that Defendant's purportedly contemporaneous medical records exhibit signs that they were drafted with Plaintiff's causes of action in mind and contain self-serving comments that Plaintiff was "healing well." He further notes that based on his interview with Plaintiff, Ms. Franklin disputes the conversations purportedly memorialized in Dr. Cattani's notes. Based on this record, the Court finds that Dr. Cattani has not shown that there are no genuine issues of material fact regarding Plaintiff's claims arising from the surgery or that he is entitled to judgment as a matter of law on these claims. Accordingly, it is

ORDERED that Defendant's motion for summary judgment is denied; it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, January 15, 2013, at 9:30 a.m.

Dated: December 7, 2012

**FILED**  
 DEC 11 2012  
 NEW YORK  
 COUNTY CLERK'S OFFICE  
 ENTER:   
 JOAN B. LOBIS, J.S.C.