Rogers v Aston
2018 NY Slip Op 31349(U)
June 22, 2018
Supreme Court, New York County
Docket Number: 805368/2015
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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MARY ROGERS,

INDEX NO. 805368/2015

Plaintiff,

-against-

SHERRELL J. ASTON, M.D., MANHATTAN EYE, EAR, AND THROAT HOSPITAL, A DIVISION OF LENOX HILL HOSPITAL, NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action seeking damages for alleged medical malpractice, plaintiff Mary Rogers ("plaintiff" or "Ms. Rogers") moves for summary judgment as to liability on her medical malpractice claim against defendants.[1] Defendant Manhattan Eye, Ear, and Throat Hospital, A Division of Lenox Hill Hospital ("Lenox Hill" or "the Hospital") opposes the motion and cross moves for summary judgment dismissing the complaint and all cross claims against it (motion seq. 005). Defendant Sherrell J. Aston, M.D. ("Dr. Aston") opposes plaintiff's motion and separately moves for summary judgment dismissing the complaint against him (motion seq. no. 007).[2] Plaintiff opposes Lenox Hill's cross motion and Dr. Aston's motion, and with respect to Dr. Aston's motion, cross moves for summary judgment as to liability on her claims for negligence/medical malpractice against defendants.[3]

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[1]Defendant Northwell Health s/h/a North Show Long Island Jewish Health System, Inc, was the corporate parent of Lenox Hill. By decision and order dated December 5, 2016, the action was dismissed against this defendant.

[2]Motion sequence nos. 005 and 007 are consolidated for disposition.

[3]Plaintiff's motion and cross motion both seek summary judgment against defendants as to negligence/malpractice claims.

Background

This action, which asserts claims for medical malpractice, lack of informed consent, res ipsa liquitor and assault and battery, arises out of a face lift, cheek lift and fat graft surgery performed on plaintiff Mary Rogers (hereinafter "Ms. Rogers" or "plaintiff") by Dr. Aston on October 6, 2015 at Lenox Hill. Dr. Aston is a private physician with privileges at the Hospital where he is co-chairman of plastic surgery department and the Site Director.

In her Bill of Particulars, plaintiff alleges that defendants committed malpractice in performing her surgery in an unsterile environment, causing the plaintiff to develop and infection, in preparing plaintiff for surgery, in failing to maintain and ensure a sterile environment, in failing to follow the proper policies and procedures regarding the sterilization of surgical instruments, and in failing to prevent plaintiff from developing a Mycobacterium abscessus infection on her face and abdomen, and in failing to conduct a thorough post-operative investigation. It is also alleged that defendants performed the surgery without plaintiff's consent, and removed fat from plaintiff's stomach without her consent, and failed to advise plaintiff of the risks of the surgery performed. It is further alleged that the doctrine of res ipsa liquitor applies as the injuries suffered by plaintiff do not occur in the absence of negligence, that the instrumentality that caused the injury was in the control of defendants and was not the result of the voluntary action of plaintiff. It is further alleged that the Hospital is vicariously liable for its agents, servants and employees and other medical staff involved in the care of plaintiff.

At her deposition, plaintiff testified that she met with Dr. Aston on April 23, 2015,[4] to

[4]Plaintiff testified that before the surgery in this case Dr. Aston had performed cosmetic surgery on her in 2008 and she was satisfied with the results (Plaintiff EBT 20). Dr. Aston's medical records indicate that the surgery involved the laser resurfacing of plaintiff's upper lip and

discuss the possibility of facial cosmetic surgery, and these discussions included the performance of fat grafting (fat transfer) around the eyes (Plaintiff EBT at 25-26). The surgery was scheduled for October 6, 2015. According to plaintiff, before the surgery she asked Dr. Aston for an explanation of what fat grafting entails and she inquired as to whether there was any risk, and Dr. Aston responded that he did not know of any risk (Id at 27-28).

At his deposition, Dr. Aston's testified that the night before Ms. Rogers' surgery he reviewed her preoperative photographs and determined that her face would be best treated by injecting fat, not just around the eyes as had been previously discussed, but also into her lower face and jawline (Dr. Aston's EBT at 80-84). He further testified that on the morning of the surgery before plaintiff was given anesthesia and before she signed the consent form, he explained to plaintiff why he felt it was a good idea to inject fat harvested from her stomach into the lower portion of her face along her jawline (Id at 143-149). During her deposition, plaintiff answered "yes" when asked whether she signed any papers relating to the surgery giving her consent for the procedure, and agreeing to undergoing the procedure (Plaintiff's EBT at 29).

The record contains a written consent form dated October 6, 2015, which is signed by Ms. Rogers, plaintiff, Dr. Aston and a witness, who Dr. Aston identified as Dana Panzer, a physician's assistant employed by the Hospital and which contains a handwritten description of the procedures to be performed, which Dr. Aston testified were written into the document by Ms.

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facioplasty (Dr. Aston's Motion. Exh. I).

Panzer, including "a fat grafting procedure to face.[5]"(Dr. Aston EBT at 145-146). According to Dr. Aston, Ms. Rogers confirmed that she was going to have it done and signed the consent (Dr. Aston's EBT at 144-148).

Before the surgery, Ms. Rogers was placed under general anesthesia. The surgery performed was a face lift, full-face laser resurfacing, and involved harvesting fat from Ms. Rogers' abdomen and injecting it into the deep layers of her skin on her eyelids, the lower portion of her face and along the jawline. (Dr. Aston's EBT at 89-90; Dr Aston's motion, Exh I). Dr. Aston testified that to harvest the fat, he used a 2.5 millimeter cannula, a tube-like instrument with 1 millimeter hole and a syringe on top (Id at p. 119-120). A small incision, about the size of the cannula or a millimeter larger, was made and the cannula was put into the fat, which is aspirated in the 20 cc syringe on top of the cannula (Id at 120-121). He then removed the cannula and the fat which was processed in a non-stick gauze, known as the Telfa (Id at 122). The fat was then prepared by removing the liquid from it by moving the fat back and forth on an instrument after which the fat was transferred to a new syringe which was used to inject the fat into each side of Ms. Rogers' lower face and into each of her lower eyelids (Id at 123).

Dr. Aston's assistant for the surgery, Alexander De La Rue ("De La Rue"), who is employed by the Hospital as a surgical technologist, obtained the instruments used in the surgery from a cart outside the operating room (De La Rue EBT, at p. 18). The instruments on the cart

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[5]In opposition to Dr. Aston's motion for summary judgment, plaintiff submits Ms. Panzer's affidavit in which she states that although her signature is on the consent form. she has "no recollection of [Ms. Rogers] or any involvement [she] may have had in her care on October 6, 2015.. [and that] she has not recollection or memory of anything said by Dr. Aston to [Ms. Rogers] which includes anything said by Dr. Aston regarding the type of procedures which were performed, the options, risks or benefits."

had already been processed, wrapped, and were supposed to be sterile (Id). When asked how he checks for sterility he testified "[t]he indicators...meaning [t]abs that let us–notifies us that the whole process had been met" (Id at 19).

On October 15, 2015, Ms. Rogers returned to her home in Florida. Five days later, she observed a pimple forming on her left cheek, at which point she called Dr. Aston and sent him a picture of it. In response, Dr. Aston prescribed antibiotics (i.e., Levaquin) and referred plaintiff to Dr. Vivian Hernandez ("Dr. Hernandez") (Plaintiff EBT at 31). On October 21, 2015, Dr. Hernandez aspirated one of the pustular skin lesions that had developed on Ms. Rogers face, and sent the fluid she extracted to be tested (Dr. Mbaga EBT at 11-12). On October 26, 2015, upon referral from Dr. Hernandez, Ms. Rogers met with an infectious disease specialist, Dr. Ines Mbaga ("Dr. Mbaga"), who suspected the cause of the now numerous skin lesions was a mycobacterial organism ("acid-fast bacilli")(Id at 14-15, 19).

On November 6, 2015, because the redness on Ms. Rogers' face had worsened and new lesions continued to appear, Dr. Mbaga and Dr. Hernandez determined that it was necessary for Ms. Rogers to be treated immediately with intravenous ["IV"] therapy (Id at 18-19). She was admitted to Boca Raton Regional Hospital that same day and underwent additional testing. The testing came back positive for Mycobacterium abscessus, "a bacterium distantly related to those that cause tuberculosis and leprosy," which typically causes infected skin to be "red, warm tender to the touch, swollen and/ or painful and can also cause development of "boils or pus-filled vesicles" (Plaintiff's Motion, Exhibit H, CDC Report, at 1).

Ms. Rogers was given IV antibiotic treatment for three days before being discharged to continue IV therapy at home for six weeks (Plaintiff's EBT at 43). During that time, and for the

subsequent eight months that Ms. Rogers was taking antibiotics, she continued to follow up with Dr. Mbaga as well as Dr. Hernandez, who drained her lesions (Dr. Mbaga EBT at 31). Ms. Rogers developed "scarring and hypopigmented (i.e. darker) areas of the skin where she had the nodular lesions [and].. a lot of scarring on her face, especially on both sides of her chin" (Id at 47, 50).

Malpractice Claim

Plaintiff seeks summary judgment as to liability on her malpractice claims against defendants, arguing that the record shows that the treating physicians all acknowledge that plaintiff's injuries were caused by ineffective sterilization of the surgical instruments and in particular, the cannula at the time of surgery. Specifically, plaintiff cites to the following excerpt from Dr. Aston's deposition testimony:

> Q: You can say pursuant to a reasonable degree of medical certainty that it [the infection and the bacteria] came from the cannula; isn't that correct, doctor?
>
> A: I would say it would appear it came from the cannula.[6]
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> ***
>
> Q: Did it end up being a complication from your surgery, the condition that she—
>
> A: Yes it did.
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> ***
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> Q: Do you agree with whatever you saw with respect to what Dr. Sandkovsky (i.e. a doctor in the Boca Raton hospital responsible for plaintiff's care) put in the records? Do you have any disagreement with

[6]Notably, Dr. Aston later testified that he did not determine since the time of the surgery that the bacteria came from the cannula (Dr. Aston EBT at 170).

what he said?

A: No.

Q: The fact that he reported that the bacteria, the source of the bacteria was a compromise of surgical instruments, you did not disagree with that; is that correct?

A: I did not disagree with that.

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Q: If this procedure, as far as you know was properly followed, there would be no bacteria in the cannula; isn't that correct, doctor?

A: If you had a sterile cannula, there would be no bacteria.

(Dr. Aston EBT at 110-111, 126-127, 159-160, 176-178, 181)

Plaintiff also relies on her own testimony that Dr. Gabriel Sandkovsky ("Dr. Sandkovsky"), the physician primarily responsible for her care during her stay at Boca Raton Regional Hospital, informed her that the infection was caused by a contaminated cannula used during surgery for the injection of fat from her abdomen into the face (Plaintiff's EBT 45-46). In addition, plaintiff cites Dr. Mbaga's deposition testimony in which she read Dr. Sandkovsky's progress notes stating "[p]atient with recent cosmetic surgery in New York, complicated by facial cellulitis and abscess" and agreed that the note associated the infection with the cosmetic surgery. (Dr. Mbaga EBT at 20-21). Plaintiff also points to Dr. Mbaga's response to a question as to whether she associated the mycobacteria in Ms. Rogers' face to a mycobacteria sustained during plastic surgery, Dr. Mbaga answered "[i]t has to be this***It has to be the assumption since she had a procedure and several days or weeks later she had nodular lesions in the sites where she had surgery" (Id at 21).

Plaintiff also submits an affidavit from her expert Dr. Scott Hultman[7] ("Dr. Hultman"), a who states that he is Board Certified in general surgery, plastic surgery, and surgical critical care, and that through his education and professional experience, he has "become intimately familiar with the proper plastic surgery techniques and procedures as well as the signs, symptoms, presentation, diagnosis and treatment of infectious diseases and proper policies and procedures regarding sterilization."

Upon review of the medical records, depositions and other pertinent documents and his examination of Ms. Rogers approximately 14 months after the surgery, Dr. Hultman opines, to a reasonable degree of medical certainty, that the defendants departed from accepted standards "by failing to properly sterilize the surgical instruments in question and by providing the surgeon with contaminated surgical instruments [and that] Dr. Aston departed by using contaminated instruments during the surgery." He further opines that the deviations of the defendants "proximately caused the injuries suffered by plaintiff, including the possibility of a better outcome." Dr. Hultman further opines that "[b]ased on my review of the records it is my opinion that defendants deviated from the standard of care by failing to follow proper plastic surgery standards of care by using a contaminated surgical instrument and failing to adhere to appropriate sterilization practices [and that]...as a result of the surgery and unsterile instruments used [during the October 6, 2015 surgery] Ms. Rogers developed a serious, advanced infection known as Mycobacterium absecessus."

In addition, Dr. Hultman opines that "the fact that [plaintiff] had a significant infection

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[7]Plaintiff substituted the affidavits she initially submitted for Dr. Hultman, and her other expert, Amy Smith, R.N., which substituted affidavits are accepted by the court in the place of the originally submitted affidavits.

of her abdominal wall indicated that the mechanical vector was either the infiltrating needle for the tumescent fluid, the fluid itself or the liposuction cannulas used to extract fat." He also opines that "[t]he development of the Mycobacterium absecessus at a surgical site does not ordinarily occur in the absence of someone's negligence, resulting in the use of a contaminated instrument." He notes that plaintiff "began exhibiting signs and symptoms of Mycobacterium absecessus within days of the surgery," and that "[t]here is an extreme probability that the Mycobacterium absecessus originated with surgical equipment used intraoperativelly during the surgery while [plaintiff] was anesthetized." He also notes that there was no investigation following the infection.

Plaintiff also relies on the expert affidavit of Amy Smith, a Registered Nurse (RN Smith), who has a master of Science in Nursing and Health Care Administration, from the University of Pennsylvania and Wharton Business School in 2000, and completed a Nursing Leaders Program in 2000 and Essentials of Project Management at Villanova University in 2010. RN Smith states that "[f]rom 2006-2013, [she] was the Vice President of Perioperative Services for a major hospital in New Jersey [where].... [she] was responsible for the operational, financial and clinical responsibility for 23 operating rooms,... same day surgery suites, ambulatory surgery center, Central Sterile Processing and pre-surgical screening," and that since 2014 she has worked as a consultant in the healthcare management field. She further states that through her "education and professional experience [she has] become intimately familiar with the signs, symptoms and presentation and prescribed treatment of infectious diseases as well as proper policies and procedures for sterilization."

RN Smith opines that "based upon [her] review of the medical records, depositions and

other pertinent documents... defendants deviated from standard of care in failing to follow appropriate sterilization practice and procedures in accordance with the CDC..., AAMI (the Association for the Advancement of Medical Instrumentation) and the IAHSMM (The International Association of Healthcare Central Service Material Management)." She further opines that:

> [A]s a result of the surgery and unsterile instruments used on [plaintiff] on October 6, 2015, [plaintiff] developed a serious advanced infection known as Mycobacterium abscessus ... the surgical instruments used on [plaintiff] were not properly and or effectively sterilized, had the instruments been properly sterilized [plaintiff] would not have been infected with Mycobacterium abscessus.. [and that] the development of Mycobacterium at the surgical site of [plaintiff's] surgery does not ordinarily occur in the absence of someone's negligence resulting in the use of a contaminated instrument [and that] it is extremely likely that [plaintiff] came in contact with Mycobacterium abscessus while under the care of defendants.

She opines that "the development of an infection within days of the surgery, the appearance of Mycobacterium on the face and abdomen, and the absence of a thorough investigation, indicate that defendants departed from the generally accepted practices, standards of care and proper sterilization protocols causing the injuries suffered by plaintiff." She also opines that as the Site Director of the Hospital Dr. Aston would have been involved in the investigation process, especially since it was his patient who had a serious infection.

In opposition to plaintiff's motion, and in support of its cross motion, Lenox Hill argues that the records including its expert affidavits, fact affidavits and sterilization records from Lenox Hill demonstrate that the claims regarding its alleged failure to sterilized the instruments should be dismissed. Lenox Hill also argues that the plaintiff's experts' opinions are conclusory and insufficient to raise an issue of fact, particularly with respect to the issue of causation, and the

complaint should be dismissed for failure to establish causation between an act or omission of Lenox Hill and plaintiff's injuries. Moreover, Lenox Hill argues that plaintiff's experts are not competent on the issue of sterilization.

In support of its cross motion, Lenox Hill submits the affidavit from a certified technologist, Charles Williams, who was a supervisor in the Sterile Processing Center at Lenox Hill for 17 years, including during the relevant period, whose opinion is based, upon, *inter alia*, the sterilization records related to the sterilization of Dr. Aston's surgical instruments from September 28 and October 5, 2015. He opines that "the instruments were sterilized at a time and temperature (that is 270° F for four minutes or greater) and appropriate biological and chemical indicators[8] (which are mechanisms to monitor sterilization effectiveness) were used. He also opines that staff at Lenox Hill complied with the standard of care and guidelines regarding the sterilization of surgical instruments.[9]

Lenox Hill also relies on the affidavit of William A. Rutala, Ph.D, M.P.H., who is the Director and co-founder of the Statewide Program for Infection Control and Epidemiology and a Research Professor for the Division of Infectious Diseases at the University of North Carolina's

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[8]Mr. Williams states that "[c]hemical indicators use chemical on small strips that change color to show specific parameters are met [while] [b]iological indicators use bacterial spores to determine if the sterilization process was effective."

[9]In reply, plaintiff argues that Mr. Williams' affidavit is not probative, asserting that at his deposition Mr. Williams could not identify what cannula or instruments were used in plaintiff's surgery(Williams EBT at 29-36), and that it is "pure speculation" that the trays of sterilized instruments made it to the operating room as Mr Williams testified that "we cannot determine what trays are actually used" (Id at 122). While these issues may be raised at trial to challenge Mr. Williams' credibility, his sworn statements may be taken into account on this summary judgment motion. Furthermore, as indicated herein, the Hospital also submits affidavits of experts whose opinion is consistent with that of Mr. Williams regarding the effectiveness of the Hospital's sterilization process.

School of Medicine. Upon review of the relevant documents, including records of sterilization of instruments during the relevant period, Dr. Rutala opines "to a reasonable degree of scientific, epidemiologic and medical certainty that Ms. Rogers' infection was not caused by contaminated surgical instruments or the failure to comply with infection prevention sterilization standards [and that]... no negligent act or omission on behalf of [Lenox Hill] was a proximate cause of plaintiff's injuries."

Specifically, he states that the sterilization records show that the instruments used in Dr. Aston's surgeries from September 2015 through October 5, 2015, including Ms. Rogers' surgery, "were sterile [and that] [t]here is no question that when the steam sterilizers operated at 270° F or greater for 4 minutes or longer and the process indicators (chemical and biological indicators) are acceptable, that all microorganisms associated with instruments are inactivated and the instruments are sterile." He then states that the sterilization records indicate that "the instruments used in Ms. Rogers' surgery were effectively processed and sterile [and that] [t]hese records included the time-temperature printout, chemical indicators, and biological indicators [which] are used internally by hospitals to ensure sterilizations and in this case, demonstrate the effectiveness of the sterilization process."

Dr. Rutala further states that "[b]ased on the materials reviewed there were no breaks in 'sterile' reprocessing of Ms. Roger's surgical instruments or breaches in aseptic technique during Ms. Rogers' surgery [and]... the staff were compliant with their policies and procedures as it pertains to reprocessing surgical instruments (e.g.,cleaning, packaging, sterilization, storage)." He also states that "the policies of [Lenox Hill] were consistent with the standard of care at the time."With respect to the cause of Ms. Rogers infection, Dr. Rutala states that "to a reasonable

degree of certainty the precise cause of Ms. Rogers' infection will never be known but surgical instruments is an extremely unlikely cause of her infection."

Dr Rutala further states that other possible causes of the infection include "contamination through skin; injection of substances contaminated with M. abscessus or through contaminated materials or products; contamination of a sterile cannula or other sterile instrument via tap water or through another breach (e.g., touch contamination) in sterile practices, contamination through tap water (or ice made from tap water) in the wound, or through a single-use, item, purchased as sterile, which was contaminated during surgery or could have been intrinsically contaminated when manufactured (e.g., needle)."

Lenox Hill also submits an affidavit of Dr. Louis Weiss, a Board Certified Infectious Disease Specialist, who opines that "the steam sterilization records which were produced during the discovery phase of this lawsuit proves to reasonable degree of medical certainty that all surgical instruments were sterilized in accordance with good and accepted practice, and pursuant to the standards of care applicable during the time frame at issue." These records further prove that "a failure in sterilization did not cause plaintiff's infection. Rather, plaintiff's infection was caused by an event which will never been known." With respect to causation, he opines that "the mere fact that a patient developed an infection post-operatively is not evidence of negligence or malpractice ...[and that] [s]ince the steam sterilization records conclusively establish that the surgical instruments were correctly sterilized...the etiology of Ms. Rogers' infection must have been secondary to other factor(s) that are not presently known."

Dr. Aston also opposes plaintiff's motion and separately moves for summary judgment arguing based on an affidavits of two experts, Paul R. Weiss, M.D., a Board certified plastic

surgeon, and Dial Hewlett, Jr., M.D., a physician Board certified in infectious disease medicine, who each opine that Dr. Aston conformed in all respects to good and accepted medical practice and did not proximally cause plaintiff's injuries.

Dr. Weiss opines, to a reasonable degree of medical certainty, based on his review of the medical records, deposition testimony and other relevant documents, "that the surgery performed on [Ms. Rogers]...was performed in complete accordance with good and accepted standards of medical practice and that there were no deviations or departures from accepted standards of surgical care by Dr. Aston that caused her infection." He also opines that "[f]at grafting utilizing fat harvested from a patient's abdomen is a common and acceptable adjunct to facial aesthetic surgery [and that][i]t is the standard of care to inject fat harvested from the patient's own abdomen into their face during a facioplasty in an attempt to achieve an optimal result." He further opines that it is "routine and within the standard of care for a plastic surgeon to review pre-operative photographs of a patient shortly before a patient's facioplasty surgery and make judgment calls at that time as to additional procedures that should be done to obtain the best surgical results [and that] [i]n this case, upon review of [plaintiff's] pre-operative photographs the night before her surgery, Dr. Aston appropriately determined that adding fat to [plaintiff's] lower face would improve her outcome."

As for plaintiff's infection, Dr. Weiss opines, to a reasonable degree of medical certainty that "Dr. Aston, the surgeon, cannot be held responsible for an infection alleged to have been caused by an improperly sterilized instrument [and that] ...surgical instruments used on patients at a hospital are sterilized by the hospital without the involvement of the surgeons," as evidenced by the record, including the deposition testimony of Hospital personnel. He further opines that to

a reasonable degree of medical certainty that "even when all sterilization protocols are followed, an organism, including mycobacterium abscessus may not be killed [and that] infection is a known risk of surgery." He also opines that Dr. Aston "had no role" in the sterilization of the fluids and solutions used during the surgery, including the tumescent fluid that plaintiff's expert opined as a possible source of the infection. He also opines that Dr. Aston's position as a Site Director at the Hospital "in no way made [him] in charge of overseeing investigations of postoperative infection." He further states that "upon learning of [plaintiff's] infection, Dr. Aston appropriately reported to one of the administrative personnel in the operating room who set in motion an investigation by the Hospital to attempt to determine the etiology of [plaintiff's] infection, [and that].... in any event there is not proximate causation between the failure to investigate and plaintiff's injuries."

As for Dr. Hewlett, upon review of the relevant documents and medical records, he opines to a reasonable degree of medical certainty that while "it is certainly possible that the cause of infection at issue is an instrument that was not effectively sterilized prior to being used on the patient [that]...Dr. Aston had absolutely no role in sterilizing either the surgical instruments or any fluids used during surgery, nor was he involved in overseeing the sterilization of instruments and materials used for [plaintiff's] surgery." He also opines that Dr. Aston "had a right to rely on the hospital to provide him with appropriately sterilized instruments and materials...[and] had no way to know there was mycobacterium absecessus organism in what he had a right to assume was a sterilized tray of instruments." He also notes that Dr. Aston was not responsible for disinfected [plaintiff's] face and abdomen prior to surgery," noting that the surgical technician, Mr. De La Rue testified that it was his responsibility. He also opines that

the Mycobacterium absecessus infection is "a known risk of any surgical procedure that can occur in the absence of negligence [and that] the infection can be resistant to even adequate sterilization procedures.

The court will first address plaintiff's motion and cross motion for summary judgment. As a preliminary matter, Lenox Hill's argument that plaintiffs' experts are not qualified to offer an opinion as to whether the instruments used in plaintiff's surgery were properly sterilized is without merit. For an expert's opinion to be probative, the expert must possess sufficient training, education and knowledge so that it can be inferred the information provided by the expert is reliable and, once an expert establishes that he or she "possesses the requisite knowledge necessary to make a determination of the issues presented...the issue of an expert's qualification must be left to trial." Limmer v. Rosenfeld, 92 AD3d 609, 609 (1st Dept 2012); Joswick by Joswick v Lenox Hill Hosp , 161 AD2d 352 (1st Dept 1990)(a physician need not be a specialist in a particularly field to qualify as an expert as long as the physician possession the requisite knowledge and the weight of the expert's opinion should be resolved at trial).

However, not every medical witness is qualified to given an opinion on medical issues outside his or her medical experience, education and training. See e.g., Ozugowski v City of New York, 90 AD3d 875 (2d Dept 2011) (physician who was internist and cardiologist failed to establish foundation for his opinion regarding psychiatric treatment); Applewhite v. Accuhealth, Inc., 81 AD3d 94, 100 (1st Dept 2010)(affidavit of nurse was of no probative value where departure concerns procedures for a home infusion where there was no evidence that "her general nursing experience afforded her any insight into those skills unique to home infusion nurses"); Elliot v. Long Island Home, Ltd., 12 AD3d 481, 482 (2d Dep't 2004) (registered nurse was not a

medical doctor and lacked the qualifications to render a medical opinion)

Here, the court finds that both of plaintiff's experts have established that they possess the requisite knowledge to provide a probative opinion on the issue of proper sterilization, based on their statements as to their relevant experience related to the sterilization process and that they are "intimately familiar with...the proper policies and procedures regarding sterilization.[10]"

As for the merits of plaintiff's motion and cross-motion,"[t]o establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of the injury." Zak v. Brookhaven Memorial Hosp. Medical Center, 54 AD3d 852, 852-853 (2d Dept 2008). Insofar as plaintiff relies on the doctrine of re ipsa liquitor,[11] the court notes that the doctrine has been applied to medical malpractice actions "to allow the fact finder to infer negligence from the mere happening of an event." States v. Lourdes Hospital, 100 NY2d 208, 210-211 (2003). There are three

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[10]Moreover, the cases relied on by Lenox Hill are not to the contrary since unlike plaintiff's experts, in those cases the experts were found not to have any experience in, or familiarity with, the area of specialization at issue. See e.g. Bartolacci-Meir v. Sasson, 149 AD3d 567 (1st Dept 2017)(general surgeon, without experience in gastroenterology, was not qualified to provide an expert opinion as to the standard of care for gastroenterologists); Lavi v. NYU Hospital Center, 133 AD3d 830 (2d Dept 2015)(pathologist who did not state that he had any training or expertise in endocrinology or testosterone replacement therapy or that he familiarized himself with the relevant literature in these subjects failed to lay an adequate foundation for reliability of his opinion as to defendant's departures in connection with prescribing testosterone replacement therapy).

[11]While the complaint asserts claims for medical malpractice (first cause of action) and res ipsa loquitor (third cause of action), the court notes that res ipsa loquitor is not a separate claim but "a doctrine that allows the jury to consider circumstantial evidence and to infer that the defendant was negligent in some unspecified way." Morejon v. Rais Const Co., 7 at 205-206.

prerequisites to invoking the doctrine. Kambat v. St Francis, 89 NY2d 489, 494 (1997). "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third and last, it must not have been due to any voluntary action or contribution on the part of the plaintiff." Id.; see also, James v. Wormuth, 21 NY3d 540 (2013).

Here, even assuming *arguendo* plaintiff has made a prima facie showing of medical malpractice based on the doctrine of res ipsa loquitur, as supported by her expert opinions and other evidence that the infection developed by plaintiff after the surgery does not happen in the absence of negligence, summary judgment is not properly granted in favor of plaintiff in light of defendants' evidence to the contrary, as discussed below, including the affidavits submitted by their experts who opined, *inter alia*, that the infection was not caused by improperly sterilized instruments.[12]

The next issue is whether defendants are entitled to summary judgment dismissing the medical malpractice claims asserted against them. A defendant moving for summary judgment

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[12]The court notes, however, that the doctrine of res ipsa loquitur "does not ordinarily or automatically entitle the plaintiff to summary judgment ... even if the plaintiff's circumstantial evidence is unrefuted." Simmons v Neuman, 50 AD3d 666, 667 (2d Dept 2008)(internal citation and quotation omitted) see also Barney-Yeboah v, Metro-North Commuter Railroad, 25 NY3d 945, 946 (2015)(vacating the Appellate Division's decision which reversed the trial court and granted summary judgment based on res ipsa loquitur, explaining that "[t]his is not the type of rare case in which the circumstantial proof presented by plaintiff 'is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable'"quoting Morejon v Rais Constr. Co., 7 NY3d 203, 209 (2006); but see, Legakis v. New York Westchester Square Medical Center, 144 AD3d 549, (1st Dept 2016)(granting summary judgment to plaintiff as to liability in medical malpractice action based on defendant doctor's testimony admitting that during surgery on plaintiff's knee he committed "an error" by placing a hot mallet on patient's left thigh and abdomen resulting in burns to those parts); Cianfrocco v. St Luke's Memorial Hosptial, 265 AD2d 849 (4th Dept 1999)(granting plaintiffs summary judgment as to liability against hospital where surgical sponge left in patient's abdomen during procedure),

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 AD3d 204, 206 (1st Dept 2010). 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. In claiming that any treatment did not depart from accepted standards, the movant must provide an expert opinion that is detailed, specific and factual in nature. See Joyner–Pack v. Sykes, 54 AD3d 727, 729 (2d Dept 2008). A defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio–Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept 2003)).

Here, the defendants have met this burden. With respect to Lenox Hill, the affidavits of Mr. Williams. Dr. Rutala, and Dr. Louis Weiss, make out a prima facie defense as to plaintiff's allegations that plaintiff's infection was not caused by a contaminated instrument or a failure to comply with effective sterilization procedures. and that no such departure and/or negligence was a proximate cause of plaintiff's injuries. Moreover, the opinions of Lenox Hill's experts are substantiated by sterilization records showing that the Hospital sterilized the instruments in accordance with applicable standards for time and temperature for sterilization. In addition, to the extent plaintiff's claim is based on res ipsa loquitor, Lenox Hill's experts opine that the infection can occur in the absence of the Hospital's negligence, including a breach of sterile

practices in the operating room, contamination of the wound through the skin or with tap water, injection of materials causing M abscessus, or through a single-use, item, purchased as sterile but subsequently contaminated, and that surgical instruments were an unlikely cause of plaintiff's infection.

As for Dr. Aston, the expert affidavits from Dr. Paul Weiss and Dr. Hewlett are sufficient to establish a prima facie defense based on their opinions that the surgery was performed in accordance with good and accepted practices; that fat grafting is a common and accepted procedure during a facioplasty; that Dr. Aston had no role in sterilization of the surgical instruments or fluids and solutions used during surgery, and that he had a right to rely on the Hospital to provide him appropriately sterilized instruments and materials. Dr. Hewlett also opines that Mycobacterium absecessus infection is a known risk of any surgical procedure, and that such an infection can occur even in the absence of negligence.

Based on defendants' prima facie showing, the burden shifts to plaintiff "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 NY2d 320, 324-325 (1986). Specifically, this requires that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact.... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion." Id. at 324–25. In addition, a plaintiff's expert's opinion "must demonstrate 'the requisite nexus

between the malpractice allegedly committed' and the harm suffered." Dallas-Stephenson v Waisman, 39 AD3d at 307 (1st Dept 2007). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002).

Here, plaintiff has submitted adequate evidence to support the application of res ipsa loquitur, including based on the opinions of her experts that the infection at the surgical site does not occur in the absence of negligence, which opinions are supported by the testimony of Dr. Aston and plaintiff's physician treating the infection. See Gonzalez v. Arya, 140 AD3d 925 (2d Dept 2016)(finding that plaintiffs raised issue of fact as to whether under the doctrine of res ipsa loquitur as to whether defendant's negligence proximately caused plaintiff's injuries where their expert's affirmation, demonstrated that the transmission of hepatitis C from one patient to another does not occur in the absence of negligence); Muniz v. American Red Cross, 141 AD2d 386, 388-389 (1st Dept 1988)(plaintiff's expert affidavit supplied a sufficient foundation to warrant an inference of negligence against the defendant blood center that the infection sustained by plaintiff could not have occurred if standard procedures involved in the sterilization of instruments were followed);Antoniato v. Long Island Jewish Medical Center , 58 AD3d 652, 655 (2d Dept 2009)(reversing trial court's dismissing medical malpractice action, finding that plaintiff met her burden of establishing that res ipsa loquitur was potentially applicable where she developed an infection following spine surgery even though plaintiff's expert did not know how the contamination occurred and there was no evidence that the surgeon or nurse in the operating room knowingly contaminated the needle or used a contaminated needle).

In reaching this conclusion, the court notes that, "'[t]o rely on res ipsa loquitur ... all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door.'" Gonzalez v. Arya, 140 AD3d at 927 quoting Kambat v St. Francis Hosp., 89 NY2d at 494-495 (citation and internal quotation marks omitted). Thus, while defendants posit other possible causes for plaintiff's infection, plaintiff has adequately raised a factual issue as to defendants' negligence and is not required to "conclusively eliminate[] the possibility of other causes of the infection.[13]" Id.

That said, however, plaintiff has not controverted Dr. Aston's showing that he is entitled to summary judgment dismissing the medical malpractice claim against him based on uncontroverted evidence that the Hospital was exclusively responsible for sterilization the instruments and any fluids used in the surgery. While plaintiff argues that Dr. Aston is "concurrently liable" with the Hospital, based on the holding in Rosario v. Brookdale University Hospital, 1 AD3d 496 (2d Dept 2003), such argument is unavailing. In Rosario, plaintiff was burned on the inner portion of her knee during her hospitalization while giving birth. The Appellate Division reinstated claims of medical malpractice against defendants finding that the doctrine of res ipsa loquitor was available to plaintiff against all the defendants, which included a doctor and various medical personnel employed by the

[13]Contrary to defendants' argument, the holding in McCarthy v. Westchester Hospital, 139 AD3d 825 (2d Dept 2016) is not controlling here. In McCarthy, the patient alleged he developed a salmonella hadar infection as the result of spinal discectomy and fusion surgery which involved a bone allograft manufactured by a third party. The court held that plaintiff failed to establish the applicability of res ipsa loquitur as plaintiff's expert failed to show that the injury was the result of an instrumentality exclusively within defendant's control since the infection may have been present in the bone allograft. Here, unlike in McCarthy, defendants were in complete control of the instrumentalities alleged to have caused the infection.

hospital, writing that "because defendants together exercised concurrent control over the examination room, the medical procedures, and the equipment used to perform them, the application of the doctrine is not defeated solely because the injured plaintiff, who was under the effects of various medications, could not identify the person who caused her injury." Id at 497. In contrast, here, there is no basis for holding Dr. Aston liable for malpractice based solely on his presence in the operating room since plaintiff's theory of liability, and her evidence submitted in opposition to the summary judgment motion, is that plaintiff was injured as a result of improperly sanitized instruments and not due to any conduct by Dr. Aston.

Finally, plaintiff's assertion that Dr. Aston departed from accepted practice by failing to investigate the cause of plaintiff's infection is unsupported by the record and, in any event, any such departure cannot be said to be a proximate cause of plaintiff's injuries.[14]

Accordingly, Dr. Aston is entitled to summary judgment dismissing plaintiff's medical malpractice claim against him, while the Hospital's motion for summary judgment as to this claim is denied. Plaintiff's motion and cross motion for summary judgment as to liability on her medical malpractice claim are also denied.

Lack of Informed Consent

"Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably

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[14]In reply, plaintiff alleges that the type of cannula used in Ms. Roger's surgery was "designed and created by Dr. Aston" such allegations do not provide a basis for liability as to Dr. Aston since there are no allegations or evidence that the cannula was defectively designed or that such defect proximately caused plaintiff's injuries.

foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation" (Public Health Law § 2805-d[1]. To prevail on a claim for lack of informed consent "it must ... be established that a a reasonably prudent person in the patient's position would not have undergone the treatment ... if [she] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought" (Public Health Law § 2805–d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003)(defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment").

In support of his summary judgment motion with respect to the claim for lack of informed consent, Dr. Aston relies on the affidavit of Dr. Weiss, who states, *inter alia*, that the informed consent given by plaintiff to Dr. Aston conformed with accepted standards of medical practice and that the consent form signed by plaintiff, which includes the procedure for fat injection, is sufficient documentation of such consent. Dr. Aston also submits his own affidavit in which he states that before the surgery, he "advised [Ms. Rogers] that one of the risks associated with the surgery was infection." He also points out that plaintiff testified that Dr. Aston advised her before surgery that he would be doing fat grafting utilizing fat harvested from around her belly

which she agreed to (Plaintiff's EBT at 26-28).

This evidence is sufficient to meet defendant's burden, and accordingly to controvert this showing, the plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). "Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan v. Pilnik, 15 NY3d at 908.

Here, plaintiff has met this burden. Specifically, in opposition to defendants' motion, plaintiff submits the affidavit of Angelo Scotti, M.D., who is a physician licensed to practice medicine in New Jersey and is board certified in the field of Infectious Disease Medicine. He opines that "Dr. Aston's failure to advise Ms. Rogers of the risks of his surgery including infection and Mycobacterium abscess, was a deviation from accepted medical practice [and that] ...it was a deviation from accepted medical practices, for Dr. Aston not to inform Ms. Rogers that he was adding to her surgery and also injecting fat in her face." Plaintiff also submits a second affidavit from Dr. Hultman, who likewise opines "Dr. Aston's failure to advise Ms. Rogers of the risks of his surgery, including infection and Mycobacterium absecessus was a deviation from acceptable practice [as was] ...not informing Ms. Rogers that he added to her surgery by injecting fact into her face."

In addition, in her own affidavit, plaintiff states, inter alia, that "[o]n October 6, 2015, prior to the surgery, I asked Dr. Aston about fat grafting, he only mentioned injecting fat into the eye area [and] I asked him about the associated risks and Dr. Aston stated he did not know of any

[and]...did not mention any risks of contracting any infection including Mycobacterium abscessus." She further states that "I do not recall signing any consent allowing Dr. Aston to inject fat into my face. I never gave Dr. Aston permission to operate and inject fat into my face except for my eye area. Dr. Aston never informed me that he was injecting fat into my face before surgery. Had Dr. Aston informed me of the risks of the surgery, I would not have elected to have the surgery." With respect to the consent form in the record, plaintiff states that "[p]rior to the surgery I was not aware of the fact that there was a consent form, which was hand written and illegible, signed minutes before going into the operating room changed or added to the procedure Dr. Aston previously discussed and agreed upon."

Accordingly, Dr. Aston's motion for summary judgment is denied as to plaintiff's claim against him for lack of informed consent.

The court reaches a different conclusion, however, as to Lenox Hill, which is entitled to summary judgment dismissing the informed consent claim based on unrefuted evidence submitted by Lenox Hill that Dr. Aston is a voluntary attending physician with privileges at the Hospital which allows him to admit private patients, but is not an employee of, or paid by, the Hospital, and that the Hospital "does not through its staff, direct the medical and treatment being provided to [private] patients, including [Ms. Rogers]." (Affidavit of Emily Weisenbach[15] ¶'s 3. 4).[16] As Dr. Aston is plaintiff's private physician, the Hospital cannot be held vicariously liable

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[15]Ms. Weisenbach is an Associate Executive Director of Human Resources at Lenox Hill and her statements are based on her review of Dr. Aston's medical staff file.

[16]As for Dr. Aston's role as co-chairman of the Department of Plastic Surgery and Plastic Surgery Site Director, the Hospital maintains that "his duties in these roles were administrative and not clinical." (Affidavit of Emily Weisenbach ¶ 3).

for his alleged failure to obtained informed consent to surgery, under the circumstances here, where plaintiff signed a consent form, and in the absence of evidence that Hospital knew or should have known that the consent obtained may have been insufficient. Bailey v. Owens, 17 AD3d 222, 223 (1st Dept 2005)(trial court properly dismissed claim for lack of informed consent against the hospital, where the consent form was signed and authorized surgery, and there was no evidence that hospital knew or should have known the surgeon may have been acting without plaintiff's informed consent); Sita v Long Island Jewish-Hillside Medical Center, 22 AD3d 743 (2d Dept 2005)(trial court should have dismissed informed consent claim against the hospital as there was "no indication that [the hospital] knew or should have known that the injured plaintiff's physician was acting without informed consent"). Thus, Lenox Hill is entitled to summary judgment dismissing the claim against it for lack of informed consent.

Assault and Battery

"To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact." Thaw v. North Shore Univ. Hosp, 129 AD3d 937, 938 (2d Dept 2015). "To establish a claim for assault or battery, it must be show that 'the defendant made bodily contact with the plaintiff and that the contact was either offensive in nature or without his her consent." Messina v. Matarasso, 284 AD2d 32, 34-35 (1st Dept 2001)(internal citations omitted). A claim for assault or battery is properly asserted against a medical professional based on evidence that plaintiff had given no consent to a procedure, such as "'where a physician ... performed an operation on a patient although the patient emphatically refused to consent to such operation.'" Id at 35 quoting Oates v. New York Hospital, 131 AD2d 368, 369 (1st Dept 1987). Thus, in Messina v. Matarasso,

supra, the First Department held that the patient's cause of action against the physician was for battery when it was based on allegations that the physician performed an unauthorized medical procedure on her breasts during cosmetic facial surgery.

That said, however, where there is evidence that a plaintiff was not fully advised of the risks and, benefits or alternatives to the surgery such failure is "a form of medical malpractice based on negligence," and is not an intentional tort. Id at 34. Thus, allegations that a physician exceeded the scope of consent, constitute a cause of action for malpractice and not for assault or battery. Ponholzer v. Simmons, 78 AD3d 1495, 1496 (4th Dept 2010), lv dismissed 16 NY3d 886 (2011). Here, as plaintiff signed a consent form and is alleging that Dr. Aston performed surgery beyond her consent and without of advising of the risks of the surgery, the claim is for lack of informed consent and not for assault or battery. Thaw v. North Shore Univ. Hosp, 129 AD3d at 938 (where plaintiff signs a consent to a procedure but denies that she gave permission to perform such procedure, there is no basis for asserting viable claims for assault or battery).

Accordingly, defendants are entitled to summary judgment dismissing the claim for assault and battery.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion and cross motion for summary judgment are denied; and it is further

ORDERED that Dr. Aston's motion for summary judgment is granted to the extent of dismissing the medical malpractice and res ipsa loquitur claims (first and third causes of action) and assault and battery claim (fourth cause of action); and it is further

ORDERED that Lenox Hill's motion for summary judgment is granted to the extent of dismissing the lack of informed consent claim (second cause of action) and assault and battery claim (fourth cause of action) against it; and it is further

ORDERED that the action shall continue as to the cause of action against Dr. Aston for lack of informed consent (second cause of action) and against Lenox Hill as to the medical malpractice claim based on a theory of res ipsa loquitur (first and third causes of action); and it is further

ORDERED that a pre-trial conference shall be on July 12. 2018 at 2:30 pm in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: June 22 2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.