

**Kroslak v Chin**

2019 NY Slip Op 34543(U)

February 4, 2019

Supreme Court, Dutchess County

Docket Number: Index No. 52124/2016

Judge: Edward T. McLoughlin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
RUSSELL J. KROSLAK and CYNTHIA A. KROSLAK,

Plaintiffs,

DECISION and ORDER

- against -

Index No. 52124/2016

SIMON CHIN, M.D., JANE BEDERKA, R.N.F.A.,  
CHRISTIE SACCO, M.D. and NORTHERN  
WESTCHESTER HOSPITAL,

Defendants.

-----X  
McLOUGHLIN, EDWARD T., AJSC

The following papers were considered on the motion of defendant Simon Chin, M.D., made pursuant to made pursuant to CPLR §3212, seeking summary judgment and dismissal of the complaint as against the plaintiffs:

- Notice of Motion
- Attorney Affirmation/Physician's affidavit/Exhibits
- Affirmation in Opposition/Physician's affidavit
- Reply Affirmation

In this action for medical malpractice, the plaintiff, Russel J. Krosiak, alleges that the defendant was negligent while performing suturing during a medical procedure. Specifically, the plaintiff alleges that the while the defendant was suturing the plaintiff, a portion of the suture needle broke off inside of the plaintiff, and that subsequent to this, the defendant failed to locate the needle piece prior to completing the surgery. It is further alleged that such action by the defendant necessitated an additional surgery to remove the piece of needle left inside the plaintiff. The plaintiff asserts that such actions did not conform to the accepted standards of medical care resulting in personal injury and damage sustained by the plaintiff.

## ANALYSIS

In order to establish liability for medical malpractice, a plaintiff must prove that the defendant deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries. On a motion for summary judgment, a defendant has the burden of establishing the absence of any departure from good and accepted medical practice or that the defendant was not injured thereby. Meade v. Yland, 140 AD3d 931 (2nd Dept. 2016). Where such a showing is made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to rebut the prima facie showing and establish the existence of material issues of fact. Wixted v. Schoenfeld, 137 AD3d 1263 (2nd Dept. 2016).

Not surprisingly, this case involves a battle of experts.

Each side has presented affidavits to support their respective positions.

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination is the key to the procedure. Matter of Suffolk County Department of Social Services v. James M., 83 NY2d 178; Sillman v. 20th-Century Fox Film Corp., 3 NY2d 395. In making this determination, the Court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 NY2d 625; Nash v. Port Washington Union Free School District, 83 AD3d 136 (2nd Dept. 2011). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. Winegrad v. New York University Medical Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY2d 557. If a party makes a prima facie showing of its entitlement to summary judgment, the opposing party bears the burden of

establishing the existence of a triable issue of fact. Alvarez v. Prospect Hospital, 68 NY2d 320.

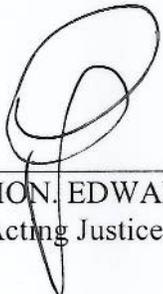
Here, in opposition, plaintiff raised triable issues of fact. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Elmes v. Yelon, 140 AD3d 1009 (2nd Dept. 2016); Guctas v. Pessolano, 132 AD3d 632 (2nd Dept. 2015). Conflicting expert opinions raise credibility issues which are to be resolved by the fact finder. Nisanov v. Khulpateea, 137 AD3d 1091 (2nd Dept. 2016). Given the identification of the issues, notably the issues of the differing opinions between the parties' experts, and the applicable law, the Court finds that this case must proceed to trial.

Accordingly, it is hereby

ORDERED, that the motion of the defendant, Simon Chin, M.D., made pursuant to CPLR §3212 for dismissal of the complaint, as against plaintiffs, is denied; and it is further

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York  
February 4, 2019



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HON. EDWARD T. McLOUGHLIN  
Acting Justice Supreme Court

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