

Sabia v Keyhani

2019 NY Slip Op 34663(U)

November 3, 2019

Supreme Court, Westchester County

Docket Number: Index No. 65934/2017

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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ANDREA SABIA,

Plaintiff,

Index No. 65934/2017

– against –

KAYVAN KEYHANI M.D. and KAYVAN KEYHANI M.D.,
P.C.,

DECISION & ORDER

Defendants.

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In an action to recover damages for personal injuries, etc., the defendants move for summary judgment, pursuant to CPLR 3212, dismissing the complaint:

Papers Considered

1. Notice of Motion/Affirmation of Montgomery L. Effinger, Esq./Exhibits A-K;
2. Affirmation of Charles E. Luceno, Esq. in Opposition/Exhibit A;
3. Reply Affirmation of Montgomery L. Effinger, Esq.

Factual and Procedural Background

Plaintiff commenced this action against Kayvan Keyhani, M.D. and Kayvan Keyhani M.D., P.C., for medical malpractice. Plaintiff began treating with Dr. Keyhani on July 2, 2015, complaining of eye irritation, swelling of the eyelashes and upper lids impairing peripheral vision, and itchiness. Plaintiff testified at her deposition that her eyelashes were irritating her eyes and affected her vision. Dr. Keyhani diagnosed plaintiff with lash ptosis and floppy eyelid syndrome. On November 10, 2015, she underwent surgery for bilateral upper lid floppy eye syndrome repair with full thickness lid reconstruction via edge resection.

The complaint alleges that the defendant failed to diagnose the plaintiff's condition, failed to take timely and proper tests, carelessly and negligently performed the operative vertical incision, failure to render timely medical care and treatment, failed to timely call consultants, and negligently caused eyelid deformity.

Defendants move for summary judgment dismissing the complaint and submit an affidavit of Harvey S. Rosenblum, M.D., an ophthalmologist specializing in cataract

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microsurgery, intraocular lens implantation, glaucoma, laser vision correction, and ophthalmic plastic surgery.

According to Dr. Rosenblum, the plaintiff's diagnosis of floppy eyelid syndrome and lash ptosis were correct, and the examination, surgery, and treatment conformed with good and accepted standards of ophthalmological care. Dr. Rosenblum opined that the initial treatment plan using a Fox Shield in the left eye at night was appropriate and the bilateral upper lid floppy eyelid repair with full thickness wedge excision was the correct procedure for plaintiff's condition. Moreover, Dr. Rosenblum opined that there was no evidence that the defendant failed to contact any consultant for advice and that because the treatment conformed with good and accepted practices, additional consultations were not necessary.

Dr. Rosenblum referred to plaintiff's deposition testimony that she was not concerned with the cosmetic outcome and only desired the procedure so that she could see. Her complaints relating to the aesthetic quality of the result, according to Dr. Rosenblum, fail to evince improper surgical technique or malpractice. The procedure performed was to address her medical condition; this was not cosmetic surgery to improve or alter plaintiff's appearance. The plaintiff's appearance following surgery was consistent with good and accepted surgical practices. Dr. Rosenblum opines that the existence of minimal scarring, as reviewed in the photographs submitted, is not indicative of any breach of good and accepted standards of care. There was no departure from accepted medical standards that proximately caused plaintiff's injuries.

Dr. Rosenblum opines, with a reasonable degree of medical certainty, that the surgery was performed without errors or omissions. In response to the patient's symptoms and underlying floppy eye syndrome, the appropriate surgical course was followed in conformity with all applicable accepted standards. The type of surgery performed was appropriate for addressing plaintiff's medical condition. The surgery was conducted without complications and the repair was successful. Plaintiff's subjective dissatisfaction with the results of the procedure do not evince improper medical care or treatment. The plaintiff's follow-up visits confirmed the propriety of the procedure and showed improvement. The discomfort and problems associated with her eyelashes was successfully eliminated by the procedure and plaintiff conceded that her eyelashes were no longer in her eyes.

In opposition, plaintiff argues that Dr. Keyhani departed from good and accepted medical practice and that such departures caused plaintiff's injuries. Plaintiffs submit a redacted expert affirmation of a board-certified plastic surgeon. Plaintiff's expert "takes issue" with Dr. Rosenblum's statements regarding the plaintiff's appearance and opines that while the plaintiff did not consult with the defendant for a cosmetic issue, it does not abrogate the surgeon's obligation to achieve an appropriate cosmetic result. Plaintiff's expert opines that the choice of the surgical approach the defendant performed was a wedge resection with a vertical incision which was likely to cause visible scarring.

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Plaintiff's expert opines that it was not the standard of care for Dr. Rosenblum to suggest that the cosmetic disfigurement is irrelevant because plaintiff consulted for a medical issue. According to plaintiff's expert the cosmetic result must be addressed by the surgeon prior to the procedure to explain the risks, benefits, and alternatives. On the basis of plaintiff's deposition testimony, her expert states that Dr. Keyhani did not provide a sufficient description of the procedure or an adequate response to plaintiff's concerns. Plaintiff's expert refers to plaintiff's deposition testimony that when she asked what her eyes might look like after surgery, Dr. Keyhani was not clear about said it would be fine. Plaintiff's expert opines, "[i]f the discussion by the Defendant with the Plaintiff is as the Plaintiff testified to in her deposition, it is my opinion with a reasonable degree of medical certainty that the Defendant Kayvan Keyhani, M.D., did not provide appropriate information to his patient and deviated and departed from the standard of care".

Discussion

"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" (*Leavy v Merriam*, 133 AD3d 636, 637 [2d Dep't 2015]). A physician moving for summary judgment in a medical malpractice action must establish, prima facie, either that there was no departure from accepted community standards of medical practice, or that any alleged departure was not a proximate cause of the plaintiff's injuries (see *Aronov v Soukkary*, 104 AD3d 623, 624 [2d Dep't 2013]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2d Dep't 2012]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"A plaintiff cannot rebut a defendant physician's showing that he or she was not negligent and defeat a motion for summary judgment by offering an expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" (*Shectman v Wilson*, 68 AD3d 848, 849 [2d Dept 2009]; see also *Alvarez v Prospect Hosp.*, 68 NY2d at 324-325; *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801 [2d Dept 2008]).

Here, Dr. Kehani made a prima facie showing of entitlement to summary judgment by demonstrating through expert opinion that he did not deviate from the accepted standards of medical practice or that any alleged departure was not a proximate cause of plaintiff's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Reustle v Petraco*, 155 AD3d 658 [2d Dept 2017]). Moreover, plaintiff testified that after the surgery her ability to see was restored because the eyelashes were no longer in her eyes. In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert affidavit fails to establish that the defendant departed from accepted medical standards or that any such departure was a proximate cause of plaintiff's injuries. Plaintiff's expert also failed to address elements set forth by defendants' expert regarding causation (see *Sukhraj v New York City Health*

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& *Hosps. Corp.*, 106 AD3d 809 [2d Dept 2013]; *Dolan v Halpern*, 73 AD3d 1117 [2d Dept 2010]).

Defendant also made a prima facie showing of entitlement to summary judgment dismissing the lack of informed consent cause of action. Dr. Keyhani demonstrated that he disclosed the inherent risks of the surgery to plaintiff. He testified that he told the patient there would be scarring and there would be a notch where the eyelid came together. Dr. Rosenblum avers that the disclosure was proper and neither the surgery and treatment performed by Dr. Keyhani, nor any lack of informed consent, proximately caused any injuries to plaintiff (see *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]; *Mondo v Ellstein*, 302 AD2d 437 [2d Dept 2003]). Plaintiff, in opposition, failed to raise an issue of fact (see *Agnese v Cattani*, 291 AD2d 515 [2d Dept 2002]). Plaintiff testified at her deposition that prior to surgery, Dr. Keyhani informed her that he was going to cut her eyelids and take away some of the skin to tighten the lid so it wouldn't droop over her eyes. While plaintiff testified that she felt that Dr. Keyhani should have given her a picture of what she would look like after the surgery, the record is devoid of any evidence that any lack of informed consent proximately caused any injury (see *Zapata v Buitriago*, 107 AD3d 977).

Accordingly, it is

ORDERED that defendant's motion for summary judgment, pursuant to CPLR 3212 is GRANTED and the complaint is dismissed.

Dated: White Plains, New York
November 3, 2019



HON WILLIAM J. GIACOMO, J.S.C.