Akimov v Bilik
2024 NY Slip Op 31377(U)
April 16, 2024
Supreme Court, Kings County
Docket Number: Index No. 518206/2021
Judge: Ellen M. Spodek

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of April, 2024.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.

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BORIS AKIMOV and EUGENIA AKIMOVA,

Plaintiffs,

- against -

ILYA BILIK, M.D., F.A.C.P.,
BORIS KHORETS, M.D.,
NYU LANGONE HEALTH SYSTEM, and
SHEEPSHEAD BAY MEDICAL ASSOCIATES,

Defendants.

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DECISION, ORDER, AND JUDGMENT

Index No. 518206/21

Mot. Seq. Nos. 2-3

The following e-filed papers read herein: NYSCEF Doc Nos.:

Notice of Motion, Affirmations (Affidavits), and Exhibits Annexed	37-58; 59-78
Affirmations (Affidavits) in Opposition and Exhibits Annexed	79-84; 85-90
Reply Affirmations	91; 92

In this action to recover damages for medical malpractice and loss of services, defendants Ilya Bilik, M.D., F.A.C.P. ("Dr. Bilik"), and NYU Langone Health System ("NYU-Langone") jointly, and defendants Boris Khorets, M.D. ("Dr. Khorets"), and Sheepshead Bay Medical Associates, P.C., sued herein as Sheepshead Bay Medical Associates ("SBMA" and collectively with Dr. Khorets, the "Khorets defendants") likewise jointly, move for summary judgment dismissing the complaint, dated July 21, 2021, of plaintiffs Boris Akimov and Eugenia Akimova (collectively, "plaintiffs") as against them. Plaintiffs do not object to the dismissal of (and thus have effectively abandoned their claims as against) the remaining defendant NYU-Langone. *See 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 761-762 (2d Dept 2019);

Genovese v Gambino, 309 AD2d 832, 833 (2d Dept 2003). The balance of this Decision, Order, and Judgment addresses plaintiffs' claims as against Dr. Bilik and the Khorets defendants (collectively, "defendants").

Plaintiff Boris Akimov (the "patient"), with his wife suing derivatively, alleges that his primary-care physicians Drs. Bilik and Khorets individually (and their joint medical practice SBMA, vicariously) were negligent in failing to timely diagnose him with laryngeal cancer. After discovery was completed and a note of issue was filed, defendants timely moved for summary judgment dismissing the complaint insofar as asserted against them.

"A defendant seeking summary judgment in a medical malpractice action must establish, prima facie, that he or she did not deviate from accepted standards of medical care or that his or her acts were not a proximate cause of any injury to the plaintiff." *Jacob v Franklin Hosp. Med. Ctr.*, 188 AD3d 838, 839 (2d Dept 2020), *affd* 36 NY3d 1102 (2021). "[T]o defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing." *Stukas v Streiter*, 83 AD3d 18, 24 (2d Dept 2011). Thus, "where a defendant [healthcare provider], in support of [his or her] motion for summary judgment, demonstrates only that he or she did not depart from the relevant standard of care, there is no requirement that the plaintiff address the element of proximate cause in addition to the element of departure." *Stukas*, 83 AD3d at 25.

Here, Dr. Bilik individually, and the Khorets defendants separately, have demonstrated, prima facie, their entitlement to summary judgment as a matter of law by way of deposition

testimony, medical records, and the detailed expert affirmations of board-certified internists and primary-care physicians Lawrence Diamond, M.D. ("Dr. Diamond"), and Brian D. Feingold, M.D. ("Dr. Feingold"), on behalf of Dr. Bilik and the Khorets defendants, respectively, that neither defendant deviated from the accepted standards of medical care as primary-care physicians in failing to diagnose the patient's cancer, nor delayed in referring the patient to an ENT specialist for a laryngoscopy. Drs. Diamond and Feingold each addressed and rebutted the specific allegations of malpractice set forth in the complaint and bills of particulars. *See Sheppard v Brookhaven Mem. Hosp. Med. Ctr.*, 171 AD3d 1234, 1235 (2d Dept 2019). The defense experts explained how and why defendants as primary-care physicians did not depart from good and accepted medical practice, and their expert affirmations contain sufficient factual detail with respect to the alleged negligence and injuries. *See Elstein v Hammer*, 192 AD3d 1075, 1077 (2d Dept 2021).

In opposition, plaintiffs have failed to raise a triable issue of fact as to either the departure or the causation elements of the patient's medical malpractice claim as against either set of defendants. First and foremost, plaintiffs' expert is not a primary-care physician but a board-certified otolaryngologist, also known as an ear, nose, and throat ("ENT") specialist.[1] "While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . [,] the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." *Behar v Coren*, 21 AD3d 1045, 1046-1047 (2d Dept 2005)

[1] *See* Simon Best's Physician's Affirmation, dated February 13, 2024, ¶¶ 1-2 (NYSCEF Doc No. 80).

(internal quotation marks omitted), *lv denied* 6 NY3d 705 (2006). "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered." *Abruzzi v Maller*, 221 AD3d 753, 756 (2d Dept 2023).

Under the circumstances of this case, plaintiffs' expert, as an ENT specialist, has failed to establish that he possesses the skill, training, education, knowledge, or experience in the general field of primary-care medicine to provide a foundation to opine on the clinical standard of care applicable to primary-care physicians. *See Abruzzi*, 221 AD3d at 758; *Shectman v Wilson*, 68 AD3d 848, 850 (2d Dept 2009). Notably, plaintiffs' expert does not aver that he has ever treated any patient as a primary-care physician. His affirmation does not set forth how he has become familiar with the clinical standards of primary-care medicine. Rather, plaintiffs' expert merely states, in conclusory fashion, that as an ENT specialist, he has: (1) "proctored classroom instruction to medical students and practicing internists in the area of laryngeal anatomy and physiology"; (2) "given lectures on voice disorders to internal medicine practitioners [at] Grand Rounds at Medstar Harbor Hospital in Baltimore"; (3) "familiarized [himself] with the standards of care for internists based on [his] training, research and teaching"; and (4) "reviewed articles regarding the standards of care for internists in recognizing the signs and symptoms of laryngeal cancer."[2]

[2] *See* Simon Best's Physician's Affirmation, ¶¶ 4-5 (emphasis added in each instance). Contrary to Dr. Bilik's contention (in ¶ 13 of his counsel's reply affirmation), the "*Clinical Practice Guideline: Hoarseness (Dysphonia)*," published in OTOLARYNGOLOGY-HEAD & NECK SURGERY (2009), volume 141, pages S1-S31, is *not* "intended to be used [solely] by head and neck surgeons, nor is it narrowly "tailored to otolaryngology practitioners." Rather, the Guideline, by its express terms, "is intended for all clinicians who are likely to diagnose and manage patients with hoarseness." *See* Simon Best's Physician's Affirmation, Ex. A.

It is black-letter law that "[l]iability is not supported by an expert offering only conclusory assertions and mere speculation that the condition could have been discovered and successfully treated had the doctors not deviated from the accepted standard of medical practice." *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413, 413 (1st Dept 2013). Rather, "failing to investigate an otherwise unindicated disease is not malpractice." (*Id.*). Here, plaintiffs' expert, in opining (in ¶¶ 25, 27, and 29 of his affirmation) that the patient's cancer should have been discovered from and after the early part of 2017, improperly relies on information which could not have been known to defendants/primary-care physicians during the time they treated the patient. *See Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 358 (1st Dept 2006). Moreover, plaintiffs' expert's opinion is conclusory in nature because: (1) the patient had been examined by an ENT specialist whose examination in September 2016 failed to detect cancer,[3] and (2) the patient was subsequently examined by a pulmonologist whose testing in October-November 2018 likewise failed to detect cancer.[4] *See Shekhtman v Savransky*, 154 AD3d 592, 593 (1st Dept 2017).

Next, plaintiffs' expert's sweeping assertion that defendants had a total of nine missed opportunities (with one so-called opportunity being assigned to each of his nine office visits to defendants) to refer the patient for a laryngoscopy "based on the in-person examinations where hoarseness was persistently present and complained of by the [patient],"[5] mischaracterizes the

[3] *See* Patient's records with nonparty Dimitry Rabkin, M.D., P.C. (NYSCEF Doc No. 51).

[4] *See* Patient's records with nonparty Igor Chernyayskiy, M.D. (NYSCEF Doc No. 53).

[5] *See* Simon Best's Physician's Affirmation, ¶ 30 (emphasis added).

record because the patient did not so testify.[6] More fundamentally, plaintiffs' expert's opinion on that point is "based largely on hindsight reasoning." *Ortiz v Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 1095 (2d Dept 2017); *see also Clifford v White Plains Hosp. Med. Ctr.*, 217 AD3d 405 (1st Dept 2023), *lv denied* 40 NY3d 908 (2023); *Spiegel v Beth Israel Med. Ctr.-Kings Highway Div.*, 149 AD3d 1127, 1129 (2d Dept 2017).[7]

The remainder of plaintiffs' expert affirmation (at pages 23 through 26) faults defendants for keeping inaccurate/incomplete office records. A failure to document a good physical examination, however, is not equivalent to a failure to perform a good one. *See Rivera v Jothianandan*, 100 AD3d 542, 543 (1st Dept 2012), *lv denied* 21 NY3d 861 (2013). In any event, plaintiffs' expert's contention (in ¶ 33 of his affirmation) that "from 2013 through December of 2019, [the patient's] records from [SBMA] were not complete and accurate," represents a new theory of liability which plaintiffs improperly raised for the first time in opposition to defendants' motions. *See Campbell v Ditmas Park Rehabilitation & Care Ctr., LLC*, ___ AD3d

[6] The patient's pretrial testimony was too vague and self-contradictory to establish that he complained to either defendant of "laryngitis" and of a "lump [or mass] in his throat." *See Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 (2d Dept 2012); *Fernandez v Laret*, 43 AD3d 347 (1st Dept 2007). *Compare Solano v Ronak Med. Care*, 114 AD3d 592, 593 (1st Dept 2014) ("[T]he deposition testimony of the decedent's daughter was sufficient to create a triable issue of fact. Significantly, [the daughter] testified that, in September and/or November 2003, approximately one year before decedent was diagnosed with cancer, she accompanied him to visits with [defendant], at which she reported [to defendant] that decedent's throat and ear pain were continuing, his voice was deteriorating, he was losing weight, and that he was bleeding at night from his mouth onto his sheets. Such testimony placed decedent's symptoms and complaints squarely within the parameters identified by [defendant's own] expert as warranting referral to an otolaryngologist.").

[7] The recently decided case, *Santiago v Abramovici*, ___ AD3d ___, 2024 NY Slip Op 01831 (2d Dept, Apr. 3, 2024), is not to the contrary. There, the Second Judicial Department tersely held that "[u]nder the circumstances of this case, the affirmations of the plaintiff's experts were sufficient to raise triable issues of fact as to whether the defendant [primary-care physician] deviated from good and accepted medical practice in a manner that led to a delayed diagnosis of the plaintiff's multiple myeloma [cancer of the plasma cells] and whether the delayed diagnosis proximately caused the plaintiff's claimed injuries." *Santiago* is distinguishable from this case for three reasons. First, the *Santiago* plaintiff displayed the *objective signs* of cancer by way of his abnormal laboratory reports. Second, the *Santiago* plaintiff exhibited *subjective symptoms* of cancer in the form of his documented complaints to his primary-care physician of his severe back pain. Third and finally, *Santiago*'s counsel submitted an expert affirmation from a primary-care physician (as well as a separate expert affirmation from an oncologist), whereas plaintiffs here are relying on the expert affirmation of an ENT specialist.

___, 2024 NY Slip Op 01697, *2 (2d Dept 2024); *Winters v St. Vincent's Med. Ctr.*, 273 AD2d 465 (2d Dept 2000).

In light of dismissal of the patient's medical malpractice claim as against all defendants, dismissal of his wife's derivative claim is also warranted. *See Wijesinghe v Buena Vida Corp.*, 210 AD3d 824, 826 (2d Dept 2022).

The Court has considered the parties' remaining contentions and found them either moot or without merit in light of its determination.[8] All relief not expressly granted is denied.

Based on the foregoing, it is

ORDERED that in Seq. No. 2, the joint motion of defendants Ilya Bilik, M.D., F.A.C.P., and NYU Langone Health System for summary judgment is granted in its entirety; and it is further

ORDERED that in Seq. No. 3, the joint motion of defendants Boris Khorets, M.D., and Sheepshead Bay Medical Associates, P.C., sued herein as Sheepshead Bay Medical Associates, for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiffs' complaint is dismissed in its entirety as against all defendants, without costs and disbursements in each instance; and it is further

[8] The patient's post-deposition affirmation (at NYSCEF Doc Nos. 82 and 88) which his counsel submitted for the first time in opposition to defendants' motions cannot be considered. *See e.g. Tardio v Saleh*, 193 AD3d 901 (2d Dept 2021); *Doran v JP Walsh Realty Group, LLC*, 189 AD3d 1363, 1364 (2d Dept 2020). Lastly, the Court has overlooked, as non-substantive, plaintiffs' failure to submit the word-count certifications with their papers. *See Anuchina v Marine Transp. Logistics, Inc.*, 216 AD3d 1126, 1127 (2d Dept 2023).

ORDERED that counsel for the Khorets defendants is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

ENTER,

J. S. C.
HON. ELLEN M. SPODEK

KINGS COUNTY CLERK
FILED
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