Gonzalez v Heath
2019 NY Slip Op 30100(U)
January 10, 2019
Supreme Court, New York County
Docket Number: 805332/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11
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MAURICIO GONZALEZ,

INDEX NO. 805332/14

Plaintiff,

-against-

BARBARA HEATH, P.A., NAVARRA RODRIGUEZ, M.D., and MANHATTAN PHYSICIAN'S GROUP,

Defendants.
--X
JOAN A. MADDEN, J.:

Defendants Barbara Heath, P.A. ("P.A.Heath") and Navarra Rodriguez, M.D. (Dr. Rodriguez") (together the "Rodriguez defendants") move for summary judgment dismissing the complaint against them (motion sequence no. 002). Defendant LHHN Medical, P.C. d/b/a Manhattan's Physician Group s/h/a Manhattan Physician's Group ("MPG") moves for summary judgment dismissing the complaint against it (motion sequence no. 003).[1] Plaintiff opposes the motions except he withdraws his claims against defendants for negligent hiring, negligent supervision and lack of informed consent.

Background

This is an action for medical malpractice involving allegations of negligence with respect to defendants' alleged failure to treat and properly diagnose a deep vein thrombosis and/or pulmonary embolism in the then 39-year old plaintiff who had suffered an Achilles tendon rupture.

On June 7, 2013, the plaintiff, presented for an appointment with Thomas Youm, M.D.,

[1]Motion sequence nos 002 and 003 are consolidated for disposition.

of RYC Orthopedics[2] after suffering an injury the previous day while playing basketball. After a physical examination, Dr. Youm diagnosed plaintiff with a torn Achilles tendon. Plaintiff decided to move forward and scheduled the repair surgery for June 13, 2013.

On or about June 11, 2013, plaintiff presented to New York University Hospitals Center primarily to obtain clearance for the June 13, 2013 surgery. According to plaintiff, in the days leading up to the surgery he "started getting fevers and a very sharp pain in [his] upper thorax, abdomen area" (Plaintiff's EBT at 108). Plaintiff testified that while the anesthesiologist was checking him, he had a violent spasm in his thorax and that, as a result, Dr. Youm told him he was canceling the surgery and that plaintiff should get clearance for the surgery from his primary care physician. (Id at 108-109)

On June 13, 2013, plaintiff presented to MPG for a physical exam and was seen by Barbara Heath, who is Board Certified physician's assistant ("P.A. Heath"), and works under the guidance of Dr. Rodriguez (Id at 112, Heath EBT at 12) P.A. Heath testified that she is allowed to make medical decisions regarding patients while her supervising physician is not present within the premises so long as the supervising physician is available for telephone consults when necessary (Id 12-13). MPG's medical records show that at the June 13, 2013 examination, plaintiff reported three days of intermittent sharp pain in his left upper abdominal area of moderate severity, and was experiencing malaise and a fever (Rodriguez defendants' motion, Exhibit M). P.A. Heath testified that while plaintiff reported a fever, there was no documented fever (Heath EBT at 87). The medical records show that plaintiff's temperature was 98.8° and that his pulse and respirations were noted to be normal, he had a pulse rate of 116 per minute, he

[2]Defendants Thomas Youm, M.D. and RYE Orthopedics moved for summary judgment dismissing the complaint against them (motion sequence no. 001). After the motion was made, plaintiff withdrew and discontinued his claim against these defendants, and by order dated October 25, 2018, the court dismissed all claims and cross claims against them.

did not have a cough, his lungs were clear, and that he was negative for chest pain or irregular heartbeat Further, a chest x-ray and blood tests and clearance for the surgery was postponed pending results of these tests. (Exhibit M.).

Plaintiff testified that his complaints at the time he saw P.A. Heath were "[c]rippling pain in [his] thorax, top left shoulder, a low-grade fever, weakness, palpitations like my heart was working overtime" (Plaintiff EBT at 112). He also testified that he told P.A. Heath that he had "a violent spasm" in his thorax, and he experienced similar spasms up until the date of the June 25, 2013 surgery (Id at 162-163). Plaintiff also testified that at the June 13 exam he told P.A. Heath that "the pains were crippling [and] that [he had] never felt these pains before..and recall[ed] highlighting the fever" (Id at 116). He testified that he took Tylenol the morning of the examination and that week his fever "fluctuated anywhere from normal to low hundreds" (Id at 117).

On June 20, 2013, plaintiff re-presented to MPG as a follow-up for medical clearance for the right Achilles tendon repair. The medical records indicate that during this visit, plaintiff noted that he felt better than when he had presented to the office on June 13, 2013, and he denied chest pain, shortness of breath, palpitations, cough, fever and chills (Exhibit M). He had a temperature of 99° and his pulse rate was 99, which P.A. Heath testified was normal (Heath EBT at 60). A physical examination revealed that plaintiff had no chest wall tenderness and his respirations were normal; plaintiff also underwent a repeat chest x-ray and the impression from the radiologist was peri-bronchial thickening with no change (Exhibit M; Heath EBT at 60). P.A. Heath concluded that the findings were indicative of a likely viral pneumonia and plaintiff was cleared for surgery (Ex. M).

Plaintiff testified that at the June 20 exam he discuss with P.A. Heath "[his] fevers,

weakness and pain" and that the pain was coming from "[his] thoracic region and my left shoulder" (Plaintiff's EBT at 126, 128). As for P.A. Heath's response to his description of the pain, he testified that "we came to the consensus that it might have just been because of the crutches that [he] was feeling pain but that [he] had no outward symptom of anything else that would prevent [him] from rescheduling [the surgery]" (Id at 129). As for his fever, plaintiff testified that he thought his fever was normal when he saw P.A. Heath on the morning of June 20 but that on the days leading up to that morning he recalled that his fever "ranged from normal to lower hundreds on all those days..." (Id at 132).

On June 25, 2013, plaintiff presented to New York University Hospitals Center and Dr. Youm performed the Achilles ruptured tendon repair surgery. At the conclusion of the surgery, plaintiff was stable and transferred to the recovery room.

Post-operatively, on June 28, 2013, plaintiff again presented to MPG and was seen by P.A. Heath, complaining of fever, fatigue and malaise. Plaintiff testified that he was prompted to see P.A. Heath because his "health condition deteriorated significantly," and he had "increased pain in his thorax region, increased fever, increased palpitations, back pain ...[and] [his] energy was very low, very little strength, [d]ifficulty swallowing, difficulty chewing, some shortness of breath" (Plaintiff's EBT at 197-198). The medical records show that plaintiff reported that had a daily temperature 99.5-99.8° [and that] despite taking Percocet ...feeling fatigued and general malaise." Plaintiff reported no cough, reported no shortness of breath, no chest pain but had only been resting with no exertion. (Exhibit M.; Heath EBT at 72-73). The record shows that plaintiff was negative for chest pain and irregular heart beat and that his temperature was 98.9 and pulse rate was 111 per minute (Exhibit M).

Dr. Rodriguez testified that she was the supervising provider for P.A. Heath and in that

role that "we would often review cases, talk about shared patients that we had both seen, talk about how we managed cases review cases," and that her "usual practice would be to review or discuss [cases] on a weekly or bi-weekly basis (Rodriguez EBT at 9, 10). She also testified that she "was always available to review, answer questions for P.A. Heath" (Id at 13). Dr. Rodriguez responded no when asked her look back review of the June 13, June 20 and June 28 evaluations by P.A. Heath, revealed any signs of deep vein thrombosis or pulmonary embolism that required further work up or testing (Id at 78).

On July 1, 2013, the plaintiff presented to the emergency room at Columbia Presbyterian Medical Center where he complained of fevers, an aching pain of the left flank, and an inability to get out of bed (Rodriguez defendants' motion, Exhibit N). Upon arrival, plaintiff had a temperature of 99.68,° heart rate of 40 and had chest pain, pleurisy, tachycardia, pulmonary embolism and tachypnea (Id). A CT angiogram of the chest was taken and revealed "a large bilateral pulmonary emboli" (Id).

Plaintiff was hospitalized and treated and was discharged on July 6, 2013. Plaintiff did not suffer any other deep vein thrombosis or pulmonary embolism, or other medical conditions following his discharge.

This action, which was commenced is September 2014, seeks damages for injuries resulting from the negligence of medical malpractice of PA Heath and Dr. Rodriguez in connection with their alleged failure to properly diagnose and treat plaintiff's deep vein thrombosis ("DVT") and/or pulmonary emboli while employed by MPG.

The Bill of Particulars alleges, *inter alia*, that defendants were negligent:

> in failing to diagnose and/or manage plaintiffs pulmonary emboli, which were aggravated and exacerbated and/or resulted from the June 25, 2013 surgery; failing to attend to plaintiff's pulmonary emboli and allowing same to deteriorate; failing to appreciate and/or impart the risk of

> developing or worsening pulmonary emboli as a result of the June 25, 2013 surgery and postsurgery course of treatment and therapy; failing to take an adequate history and failing to consider pulmonary emboli as a differential diagnosis; failing to order testing for pulmonary emboli and deep vein thrombosis; failing to prescribe blood thinners; failing to call in pulmonary specialists; failing to heed the consultation of the radiologist on June 13, 2013 who recommended a follow up X-ray; failing to perform a complete workup and improperly performing a workup of the plaintiff; failing to properly follow, monitor, assess, and observe plaintiffs' condition; failing to properly read or communicate the chest X-rays on June 13, 2013 and June 20, 2013; failing to keep proper medical records in that the review of systems and physical exam indicate normal while the reasons for visit demonstrate plaintiffs symptoms on June 13, 2013; June 20, 2013, and June 28, 2013, and failing to supervise and monitor employees, physician assistants, and P.A. Heath, during plaintiffs visits to MPG on June 13, 2013; June 20, 2013, and June 28, 2013.

With respect to MPG, the Supplemental Bill of Particulars alleges that MPG is vicariously liable for the acts and negligence of P.A. Heath and Dr. Rodriguez.

As for injuries, the Bill of Particulars alleges that as a result of defendants' negligence and malpractice, plaintiff has suffered the following injuries: "multiple bilateral pulmonary emboli, multiple right lower extremity DVTs, clots, severe pulmonary hypertension, panic attacks, anxiety, generalized weakness, sleep disorder, back pain, and shortness of breath [and that]... the aforesaid injuries have caused plaintiff severe pain, mental anguish, shock to his nerves and nervous system, together with tenderness, stiffness."

Following the completion of discovery, defendants moved for summary judgment dismissing the complaint against them.

The Rodriguez defendants argue that they are entitled to summary judgment as the record demonstrates that they did not depart from good and accepted practice in their treatment of plaintiff, and that presence of an injury alone is insufficient to provide a basis for their liability. As for PA. Heath's role in examining, diagnosing and treating plaintiff, these defendants assert

that pursuant to 10 NYCRR § 94.2,[3] physician assistants, like P.A. Heath, are permitted to examine, assess, diagnose, and treat the patient without having a physician present during each and every one of the exams. Accordingly, they argue that it was appropriate to have Dr. Rodriguez supervise P.A. Heath without personally seeing plaintiff on June 13, 2013, June 20, 2013 and June 28, 2013.

In support of their arguments, the Rodriguez defendants submit the affirmation of Randolph Cole, M.D., a physician licensed to practice medicine in New York who is Board

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[3]10 NYCRR section 94.2 provides, in relevant part that:

(a) A licensed physician assistant or a registered specialist assistant may perform medical services but only when under the supervision of a physician. Such supervision shall be continuous but shall not necessarily require the physical presence of the supervising physician at the time and place where the services are performed. The licensed physician assistant or registered specialist assistant shall retain records documenting the continuous supervision by the physician who is responsible for such supervision.

(b) Medical acts, duties and responsibilities performed by a licensed physician assistant or registered specialist assistant must:

(1) be assigned to him or her by the supervising physician;

(2) be within the scope of practice of the supervising physician; and

(3) be appropriate to the education, training and experience of the licensed physician assistant or registered specialist assistant.

(c) No physician may employ or supervise more than four licensed physician assistants and two registered specialist assistants in his or her private practice.

(d) No physician may supervise more than six licensed physician assistants or registered specialist assistants or any combination thereof in a hospital setting, no matter if the licensed physician assistants or registered specialist assistants are employed or contracted by a hospital....

(f) A physician supervising or employing a licensed physician assistant or registered specialist assistant shall remain medically responsible for the medical services performed by the licensed physician assistant or registered specialist assistant whom such physician supervises or employs.

Certified in Pulmonology, Critical Care and Internal Medicine, and who has treated patients in a variety of settings and is familiar with the signs and symptoms of DVT's and pulmonary embolisms.

Upon reviewing the pleadings, the deposition transcripts and the medical records, Dr. Cole opines, to a reasonable degree of medical certainty, that "both P.A. Heath and Dr. Rodriguez acted in accordance with the standard of accepted medical practice and procedures in treating the plaintiff. At all times herein, P.A.Heath as well as Dr. Rodriguez acted in accordance with the standard of care and provided appropriate medical and diagnostic care and appreciated plaintiff's complaints, signs and symptoms, and ordered appropriate testing (Cole Aff. ¶ 4). He further opines that "over the course of the treatment an appropriate differential diagnosis was formulated, and tests were appropriately interpreted and findings noted to ensure appropriate follow-up was given" (Id)

He further opines that "during the course of treatment, including plaintiff's visits on June 13, June 20, and June 28, 2013 that plaintiff did not exhibit symptoms of diagnosable or pulmonary embolism ("PE")" (Id ¶ 5). In particular, Dr. Cole states that "from June 1-July 1, 2013, the plaintiff did not exhibit any symptomatology related to a DVT or PE, such as sudden shortness of breath, chest pain, coughing of blood, fainting, rapid pulse. erythema, and edema in the affected leg...[and that] there was no indication that a DVT or PE could be diagnosed during the interactions" (Id).

With respect to the June 13 visit, Dr. Cole notes the medical records "show that the patient was negative for chest pain, irregular heartbeat, and his respirations were noted to be 18 which was noted to be normal. P.A. Heath confirmed that the patient did not present with any complaints of shortness of breath, and his objective temperature at that point was 98.8°, and his

pulse was not abnormal. Further, a chest x-ray was ordered and revealed no focal infiltrate and some tiny pleural effusions" (Id ¶ 8). He opines that the findings were not consistent with a diagnosis of PE or DVT [and that] ..[t]he fact that the patient had tiny pleural effusions or a heart rate of 116 does not equate with a pulmonary embolism or DVT" (Id). He likewise opines that the June 20 visit did not indicate that plaintiff was suffering from DVT or pulmonary embolism since plaintiff "denied chest pain, shortness of breath, palpitations, cough, fever or chills. His temperature was noted to be 99°and his pulse rate was 99. Additionally, a physical exam was notable for among other things, no chest wall tenderness, and respirations were normal (Id ¶ 9). He also notes that plaintiff "reported that he felt better, the lab results were negative, he did not complain of shortness of breath... (Id).

As for the June 28 visit, Dr. Cole opines that "while the patient had a subjective complaint of an elevated temperature between 99.5 to 99.8 despite taking Percocet, and general feelings of fatigue and malaise, the fact that he did not have a cough or shortness of breath in my opinion with a reasonable degree of medical certainty, indicated that there were no clear signs of a diagnosable pulmonary embolism or DVT. The patient's pulse of 111 could have been caused by past surgery recovery, pain or anxiety and was not symptomatology of a DVT/pulmonary embolism. Additionally, the lab work and blood count were normal for that day" (Id ¶ 11).

Dr. Cole opines that "within a reasonable degree of medical certainty that the timing of the symptomatology on July 1st which led the patient to the emergency room as reflected in the Presbyterian chart indicating the complaints of fatigue, lethargy and shortness of breath over the past 3 days, indicates that the pulmonary embolism that resulted in the diagnosis of the symptomatology occurred shortly before the July 1st presentation and was not diagnosable prior to that" (Id ¶ 14).

As for P.A. Heath's role in the treatment, he states that in accordance with 10 NYCRR 94.2, relating to Physician's Assistance in the State of New York, P.A. Heath is permitted to see patients under the supervision of a physician and the physician need not be present. In this regard he opines that:

> PA Heath was a qualified, experienced PA who was able to see the patient independently, assess his complaints, make a diagnosis and effectuate treatment plans, Dr. Rodriguez was available to answer any questions that the PA had and there was no need for [Dr. Rodriguez] to be physically present during the course of the plaintiff's examinations to fulfill that duty. Thus, it was wholly appropriate for PA Heath to see the patient without Dr. Rodriguez being physical present during the examinations. Further, her actions were not contraindicated by normal medical practice and .. wholly comported with the standard of care.

(Id ¶ 6).

As for Dr. Rodriguez, Dr. Cole opines that "she acted within the standard of care in accordance with 10 NYCRR 94.2 (f)[4] [and that]... Dr. Rodriguez, who did not see the patient, had no independent duty to see the patient acted in accord with good practice by conferring with PA Heath and confirming that there were no sign or symptoms of a DVT or PE that required further workup or testing and thereby confirmed that the standard of care was met" (Id ¶ 7).

MPG also moves for summary judgment arguing that the record demonstrates that it, through its employees P.A. Heath and Dr. Rodriguez, provided good and appropriate treatment to plaintiff and assert plaintiff has not alleged any independent act or omission by MPG that caused or contributed to any injury to him. In support of its arguments, MPG relies on Dr. Cole's affirmation.

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[4]10 NYCRR 94.2 (f) states that a physician supervising or employing a licensed physician's assistant or registered special assistant shall remain medically responsible for the medical services performed by the licensed physician's assistant or registered special assistant whom such physician supervises or employs.

Plaintiff opposes the motion, arguing that defendants have not met their burden or, at the very least, that the record raises triable issues of fact as to defendants' malpractice, and point out that defendants submit only seven pages of plaintiff's deposition testimony and that their expert fails to consider plaintiff's testimony as to his different complaints and symptomatology.

In support of its opposition, plaintiff submits the affirmation of Wifredo Talavera, M.D., a physician licensed to practice medicine in New York who is Board Certified in Internal Medicine and Pulmonary Medicine. Upon review of the pleadings, deposition testimony and relevant medical records, Dr. Talavera opines, to "a reasonable degree of medical certainty that the medical care provided by [defendants] demonstrates departures from the standard of care, and was the proximate cause of any of the alleged injuries" (Talavera Aff ¶ 2). He opines that defendants "failed to properly evaluate, assess and diagnose plaintiff's pulmonary emboli symptoms, and follow the plaintiff, which ultimately resulted in a failure to diagnose the pulmonary emboli which existed during the course of [defendants'] treatment of the plaintiff between June 13, 2013 and July 1,2013" (Id ¶ 4).

Dr. Talavera further opines that defendants had "multiple opportunities to diagnose and/or manage plaintiff's DVT and/or pulmonary emboli, and their multiple failures between June 13, 2013 and July 1, 2013 are departures from the standard of care" (Id ¶ 20). Specifically, he states that "[u]pon each presentation to the defendants after the Achilles tendon rupture tear, between June 13, 2013 and July 1, 2013, the plaintiff was at a high risk of deep vein thrombosis and pulmonary emboli and defendants failed to appreciate and, or impart the risk of developing or worsening pulmonary emboli as a result of the Achilles tendon rupture" (Id). He opines that "[DVT] is common in patients who sustain an Achilles tendon rupture [and that] [p]laintiff's clinical condition included left upper quadrant pain, tachycardia, fever, shortness of breath,

weight loss and post Achilles tendon rupture, which should have led defendants to consider DVT and pulmonary emboli as a differential diagnosis. Left upper quadrant abdomen is equivalent to the lower chest wall and is chest pain" (Id)

Dr. Talavera also opines that "the X-ray exams of the chest on 6/13/13 indicated plural effusions, and that is related to PE and not to viral syndrome [and that] [d]efendants failed to properly read or communicate the X-ray exams of the chest on 6/13/13 and 6/20/13 [and]...misdiagnosed plaintiff's complaints of chest pain, fever, shortness of breath, tachycardia, weight loss and abnormal chest x-ray as a viral syndrome" (Id).

Specifically, with respect to the care and treatment provided to plaintiff on June 13, 2013, Dr. Talavera opines "with a reasonable degree of medical certainty that the care and treatment rendered on this date was wholly inappropriate and that additional testing was warranted in the face of these findings. [Plaintiff] testified that he also complained of pain in his thorax (chest), heart palpitations as if his heart was working overtime, and crippling pains. If his fever was low, it was because he was taking Tylenol. These symptoms were the result of a PE or DVT and he was suffering from either on that date. But the fact that the patient had tiny pleural effusions or a heart rate of 116 does equate with a pulmonary embolism or DVT" (Id ¶ 12). He also opines that P.A. Heath's diagnosis of viral pneumonia was erroneous (Id ¶ 13).

As for the care and treatment provided in connection with the June 20, 2013 examination, Dr. Talavera opines that "with a reasonable degree of medical certainty that on the 20th, an inappropriate evaluation of the patient took place and P.A. Heath did not act in accordance with standard of care [and that]... plaintiff's DVT or pulmonary embolus was present and worsening" (Id ¶ 14). With respect to the June 28, 2013 examination, he opines that based on "plaintiff's complaints of an elevated temperature between 99.5 to 99.8 and heart rate of 111... and general

feelings of fatigue and malaise" and in light of plaintiff's testimony of "increased pain in his thorax region, increased fever, increased palpitations, back pain and was very morbid" .. [t]here were clear signs of a diagnosable pulmonary embolism or DVT" [but that] P.A. Heath simply diagnosed plaintiff with 'fever'" (Id ¶ 16). He opines that "the workup was inappropriate and the standard of care was not met" (Id).

Dr. Talavera also opines that defendants "failed to keep proper medical records in that the review of systems and physical exam indicate normal while the reasons for visit demonstrate plaintiff's true symptoms on 6/13/13, 6/20/13, 6/28/13" (Id ¶22). He further opines that "defendants ...failed to supervise and monitor the employees, physician assistants, [including P.A. Heath] during plaintiff's visits to [MPG] on 6/13/13, 6/20/13, 6/28/13 [and that] Dr. Rodriguez failed to properly follow, monitor, assess and observe the plaintiff's condition and committed malpractice in that she failed to diagnose and/or manage plaintiff's pulmonary emboli and institute DVT and pulmonary emboli treatment on each visit" (Id). He further opines that "P.A. Heath was not competent or qualified to determine and provide medical clearance for the ankle surgery" (Id).

With respect to causation, Dr. Talavera opines that "to a reasonable of medical certainty that there were departures from the standard of care for a medical practitioner on the part of [defendants] as set forth above [and that] [t]hose departures deprived [plaintiff] of the opportunity for a prompt diagnosis of his Pulmonary emboli, and earlier intervention [and that]...[a]s a result of the above departures from acceptable medical care, [plaintiff] sustained permanent and significant injuries,... which include pulmonary emboli, permanent chest pain, shortness of breath, pulmonary restrictions, lung damage, heart congestive failure, impact on activities of daily living..." (Id ¶'s 23, 24). In particular, he opines that "within a reasonable

degree of medical certainty that the findings of Columbia Presbyterian Medical Center, the timing of the symptomatology, the complaints of fatigue, lethargy and shortness of breath, indicates that the pulmonary embolism, that resulted in the diagnosis of the symptomatology, occurred long before the July 1, 2013 presentation to Columbia Presbyterian and was diagnosable prior to that [date]" (Id ¶ 19).

Discussion

A defendant moving for summary judgment 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 Dep't 2010). To satisfy this 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 Dep't 2008). Expert opinion must be based on the facts in the record or those personally known to the expert. 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 Dep't 2010). A defendant's expert opinion must "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dep't 2003)).

If the movant makes a prima facie showing in medical malpractice action, the burden shifts to the party opposing the motion "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. Specifically, this requires, in a medical malpractice action, 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['s]... summary judgment motion." Id. at 324–25. "The law is well settled that when competing experts present adequately supported but differing opinions on the propriety of the medical care, summary judgment is not proper." See Rojas v. Palese, 94 AD3d 557 (1st Dep't 2012). 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 303, 307 (1st Dept 2007)(internal citations and quotations omitted). 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, assuming *arguendo* that defendants have made a prima facie showing entitling them to summary judgment based on the expert opinion of Dr. Cole that they provided appropriate medical and diagnostic care, that Dr. Rodriguez appropriately supervised P.A. Heath, and that during the time that plaintiff was examined by defendants, plaintiff did not exhibit any symptomatology related to a DVT or PE, plaintiff has submitted sufficient evidence to controvert this showing. Specifically, based on the expert opinion of Dr. Talavera, which is supported by

the record, including the deposition testimony of plaintiff, MPG's records, and the records of Columbia Presbyterian, plaintiff has raised factual issues as to whether defendants departed from accepted medical practice in failing to properly assess and diagnose plaintiff for a DVT and/or pulmonary embolism. In addition, while defendants point to regulations permitting P.A. Heath to see patients under the supervision of a physician who is not present, the record and Dr. Talavera's opinion are sufficient to raise issues of fact as to whether Dr. Rodriguez adequately supervised and reviewed P.A. Heath's care and diagnosis of plaintiff's condition.[5]

As for causation, plaintiff has demonstrated that "the requisite nexus between the malpractice allegedly committed and the harm suffered" (Dallas-Stephenson v Waisman, 39 AD3d at 307), based on Dr. Talavera's opinion that defendants' departures from the standard of care resulted in a delay in diagnosing plaintiff's DVT and pulmonary embolism, and were a substantial factor in causing his injuries.

Conclusion

In view of the above, it is

ORDERED that motions for summary judgment by defendants Barbara Heath, P.A. Navarra Rodriguez, M.D. and by LHHN Medical, P.C. d/b/a Manhattan's Physician Group s/h/a Manhattan Physician's Group are denied; and it is further

ORDERED that the pre-trial conference scheduled for January 10, 2019 at 10 am is adjourned to February 21, 2019 at 10:30 am.

DATED: January 10, 2019

[5]Dr. Talavera's opinion that P.A. Heath was not qualified to provide plaintiff with clearance for surgery is not substantiated. However, defendants' expert, Dr. Cole does not provide a specific basis for his opinion that P.A. Heath was qualified.