SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

PHYLLIS HAWKINS,

Plaintiff,

- against -

PROHEALTH CARE ASSOCIATES, LLP and GARY KAPLAN, M.D.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 603982/17
Motion Seq. No.: 01
Motion Date: 05/29/19
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about May 8, 2017. *See* Defendants' Affirmation in Support Exhibit B. Issue was joined on or about August 11, 2017. *See* Defendants' Affirmation in Support Exhibit C.

Counsel for defendants submits, in pertinent part, that, "[p]laintiff claims that Dr. Kaplan was obligated to assist her off an examination table on May 14, 2015. The plaintiff fell when

descending from the table, fracturing her left ankle. On April 21, 2015 at 4:23 a.m., the 73 year old plaintiff presented to the Emergency Room with her husband. Her husband claimed that she was normal at 11:00 p.m. the evening before but woke up at 3:00 a.m. confused, weak, with slurred speech and unable to recognize her family. Her husband reported that she had gone to NSUH - Manhasset six days before with hallucinations and gait imbalance. RN Aman Valani found the plaintiff to be disoriented to person, place and time.... At 5:55 a.m., a CT Scan of the brain was conducted and compared with a CT Scan performed on April 14, 2015. It revealed stable moderate chronic white matter microvascular disease, but no acute findings.... On April 22, 2014, an MRI of the brain revealed no acute findings. An MRA of the brain was performed later that day revealing nonocclusive atherosclerotic changes affecting the proximal right posterior cerebral artery. She was discharged with the findings of resolved altered mental status and told to follow up with her primary care physician.... On May 14, 2015, the plaintiff presented to neurologist, Dr. Gary Kaplan, after having been referred from Dr. Steven Goldberg. The plaintiff was accompanied by her husband who provided much of the history. The plaintiff reported that she was there because her 'brain shut down.'... The plaintiff's medical history included diabetes, hypertension, GERD, anxiety[,] irritable bowel syndrome, lower back pain, arthritis and hyperlipdemia. Her medications included Lipitor, Metformin, Losartan, Lexapro and Remeron. The plaintiff was a retired legal secretary. She claimed to not actually have hypertension, but that she treated with Losartan for renal protection due to her diabetic condition.... Dr. Kaplan performed a neurologic exam which was essentially normal. Physical examination revealed no pronator drift and strength in the upper and lower extremities of 5/5 both proximally and distally bilaterally. Bulk and tone were normal. There is (*sic*) no extinction

of double simultaneous stimuli and distal proprioception was intact. Finger-to-nose and heel-to-shin maneuvers were done well bilaterally. Usual gait and heal-toe tandem gait were performed well, which was normal. Deep tendon reflexes were 2+ bilaterally at the biceps, knees, and trace at the ankles. Plantar response was silent bilaterally.... Dr. Kaplan prescribed an EEG and planned to review the Plainview Hospital records. Dr. Kaplan then noted: As the patient was getting off of the exam table and stepping on to the floor, she lost her footing and fell to her left, twisting her left ankle. She did not hit her head and was helped onto a chair. She was sent for an x-ray off (*sic*) the left ankle and foot and left ankle fracture was noted at the distal fibula. Dr. Scott Koenig saw her in orthopedic consultation after the x-ray and cast her left ankle and will be seeing her in follow up...." *See* Defendants' Affirmation in Support Exhibits I-K.

In further support of the motion, counsel for defendants submits the transcripts from the Examination Before Trial ("EBT") testimony of plaintiff and her husband, James Hawkins. *See* Defendants' Affirmation in Support Exhibits E and G. Counsel for defendants asserts, in pertinent part, that, "[b]ased on the admissions of the plaintiff and her husband, she never felt imbalance in a sitting position and had never required assistance before ascending or descending an examination table.... Obvious from the testimony is that the plaintiff and her husband only claim that she felt something during the heel to toe gait test, not while walking normally. Although Mr. Hawkins testified that the gait test was done as they were walking down the hallway to the office and exam room, and alternatively, Mrs. Hawkins testified that the gait test was done while walking from Dr. Kaplan's office to the exam room, they both agree that during the gait test was the only time she felt an issue with balance. Based on the testimony, it is clear that plaintiff did not fall during the gait test. Mrs. Hawkins walked back from the hyperbole of

bouncing off the walls by admitting she does not recall if she struck the wall and even seemed to admit that she completed the test as requested by Dr. Kaplan saying, "I know I just walked the way he told me'.... Mr. Hawkins testified that her only problem was that she veered to the right and that she was never really in danger of falling. Ultimately, Mrs. Hawkins testified that she was able to walk the 15 to 20 feet between Dr. Kaplan's office and the examination room without falling:... Mr. Hawkins established that Mrs. Hawkins had never needed assistance getting on or descending from an examination table prior to the subject fall.... While sitting on the examination table, Mrs. Hawkins was able to take her sneakers off unassisted:... The plaintiff confirmed that she never felt imbalance while sitting on the examination table:... The plaintiff testified that she did not ask anyone for help getting off of the examination table and that she felt she did not need help getting off of the examination table:... The plaintiff testified that she began to get off of the examination table in a controlled fashion and did not slide off the table uncontrollably:... Based on the plaintiff's explanation, it is clear that she did not fall from any imbalance experienced while walking. She did not even fall from any imbalance experienced while sitting on or getting off of the table. The plaintiff simply failed to completely plant her foot onto the stool which caused the ankle to invert, come to the ground as an inverted ankle and result (*sic*) in a left ligamentous SE4 ankle fracture. This fracture is commonly caused by patients putting pressure on an ankle in the inverted position and is wholly consistent with this scenario." *See* Defendants' Affirmation in Support Exhibits A, E and G.

Also in support of the motion, defendants submit the Expert Affidavit of Elliot Salamon, D.O., a board certified neurologist. *See* Defendants' Affirmation in Support Exhibit A. Counsel for defendants contends, in pertinent part, that, "[i]n his Expert Affirmation, Dr. Salamon opines within a reasonable degree of medical certainty that Dr. Kaplan did not depart from the standard

of care in his treatment of plaintiff. After summarizing all of the plaintiff's pertinent treatment, Dr. [Salamon] addressed each of the plaintiff's allegations in the Complaint and Bill of Particulars and offered multiple, detailed and factually-supported expert opinions establishing that the treatment rendered by Dr. Kaplan was done in accordance with good and accepted medical practice. Dr. Salamon first opines within a reasonable degree of medical certainty that there was no obligation for Dr. Kaplan to assist the plaintiff off the examination table based on her medical history, signs, symptoms and complaints:..." *See id.*

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[t]he defendant's (*sic*) motion should be denied since questions of fact exist as to the issue of whether the defendant(s) departed from the standard of care in their treatment of the plaintiff and the determination as to proximate cause is a question to be answered by the trier of fact. The plaintiff must be afforded the opportunity to present her cause before a jury for determination."

Counsel for plaintiff further contends, in pertinent part, that, "[t]he defendant (*sic*) claims that there was no obligation for the defendant, Dr. KAPLAN to assist the plaintiff off the examination table.... Both the plaintiff and her husband testified at their depositions that the purpose of the visit to Dr. Kaplan was for treatment of her balance issues.... Furthermore, plaintiff and her husband both testified that she had difficulty performing the heel to toe test.... Defendant KAPLAN's own notes from the visit on May 14, 2015, state: 'He helped her up to the bathroom and then she had difficulty maintaining her balance on the toilet seat.'... Dr. KAPLAN ignored plaintiff's complaints of imbalance, medical history and poor performance while performing the heel to toe test which should have alerted him to the fact that she needed assistance getting down from the exam table. New York Courts have held that expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish

proximate cause ***unless*** the matter is one which is within the experience and observation of the ordinary juror. [citations omitted]. In the case at bar the matter in question is whether the defendant should have left an elderly patient complaining of imbalance unattended and unguarded on an examination table which is well within the experience and observation of an ordinary juror. Through the deposition testimony of the defendant, plaintiff and non-party witness, and the notes of Dr. Kaplan[,] plaintiff has met their (*sic*) burden to establish the existence of a material issue of fact as to whether defendant deviated from the standard of care when he left the plaintiff unattended and unassisted on the exam table. Therefore, the defendant's (*sic*) motion must fail." *See* Defendants' Affirmation in Support Exhibits E-G and J.

Counsel for plaintiff further argues, in pertinent part, that, "[c]ontrary to defendant's (*sic*) claims, based on plaintiff's poor performance during the heel to toe test, complaints of imbalance while seated and past medical history contained in defendant's notes, Dr. Kaplan should have been concerned for a fall risk whether plaintiff was seated or walking. Plaintiff's fall and subsequent injury were the foreseeable result of the defendant turning his back on a (*sic*) elderly patient who had complained of recent imbalance while seated."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of

law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

"'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice,

and that such departure was a proximate cause of the plaintiff's injuries.'" *Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016) *quoting Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011).

"A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v Streiter*, *supra* at 23; *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012). Expert evidence is required when evaluating the "performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). Additionally, the conclusions reached by the defendant and his or her expert(s) must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013).

"In order to establish the liability of a professional health care provider for medical malpractice, a plaintiff must prove that the provider '"departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries."' *Schmitt v. Medford Kidney Ctr.*, 121 A.D.3d 1088, 996 N.Y.S.2d 75 (2d Dept. 2014) *quoting DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012) *quoting Stukas v.*

Streiter, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011) *citing Fink v. DeAngelis*, 117 A.D.3d 894, 986 N.Y.S.2d 212 (2d Dept. 2014). "'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016) *quoting Stukas v. Streiter*, *supra*. "A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v Streiter*, *supra* at 23. Expert evidence is required when evaluating the "performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). The conclusions reached by the defendant must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden." *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012).

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury." *Semel v. Guzman*, 84 A.D.3d 1054, 924 N.Y.S.2d 414 (2d Dept. 2011) *citing Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept. 2005); *Goldberg v. Horowitz*, 73 A.D.3d 691, 901 N.Y.S.2d 95 (2d Dept. 2010). *See also Skelly–Hand v. Lizardi*, 111 A.D.3d 1187, 975 N.Y.S.2d 514 (2d Dept. 2013). A plaintiff is not required to eliminate all other possible causes. *See Skelly–Hand v. Lizardi*, *supra* at 1189. "'The plaintiff's evidence may be deemed legally sufficient even if [her] expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.'" *Alicea v. Ligouri*, 54 A.D.3d 784, 864 N.Y.S.2d 462 (2d Dept. 2008) *quoting Flaherty v. Fromberg*, 46 A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept. 2007) *citing Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept. 2003); *Wong v. Tang*, 2 A.D.3d 840, 769 N.Y.S.2d 381 (2d Dept. 2003); *Jump v. Facelle*, 275 A.D.2d 345, 712 N.Y.S.2d 162 (2d Dept. 2000) *lv denied* 95 N.Y.2d 931, 721 N.Y.S.2d 607 (2000) *lv denied* 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

Plaintiff has failed to produce any evidence whatsoever to demonstrate an issue of fact which precludes summary judgment. Furthermore, the Court does not find that the issues in the instant matter are ones that are within the experience and observation of the ordinary juror. Counsel for plaintiff's Affirmation in Opposition is non-detailed, conclusory and fails to rebut the Expert Affirmation submitted by defendants.

Therefore, based upon the above, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
December 11, 2019

ENTERED
DEC 12 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE