Mendez v Family Medicine at Nagle Ave. Practice
2021 NY Slip Op 31467(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 162266/2015
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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INDEX NO. 162266/2015

MOTION DATE 04/07/2021

MOTION SEQ. NO. 001

ISABEL MENDEZ and CELSO FLORES

Plaintiffs,

- v -

FAMILY MEDICINE AT NAGLE AVENUE PRACTICE, as a subsidiary of the NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., FAMILY MEDICINE AT NAGLE AVENUE PRACTICE, as a subsidiary of NEW YORK PRESBYTERIAN/ WEILL CORNELL MEDICAL CENTER, FAMILY MEDICINE AT NAGLE AVENUE PRACTICE, as a subsidiary of NEW YORK PRESBYTERIAN/COLUMBIA UNIVERSITY MEDICAL CENTER, KIMBERLY CARTER, M.D., NEW YORK-PRESBYTERIAN/ COLUMBIA UNIVERSITY MEDICAL CENTER, LEWIS SELLINGER, M.D., ROBINSON ALCANTARA, M.D., LA CLINICA DE LAS AMERICAS, HARLEM HOSPITAL CENTER, and NEW YORK CITY HEALTH AND HOSPTIALS CORPORATION,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 105, 107, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, and 123 (Motion 001)

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for medical malpractice, commenced on November 30, 2015, the defendants Family Medicine at Nagle Avenue Practice, as a subsidiary of the New York Presbyterian Healthcare System, Inc., Family Medicine at Nagle Avenue Practice, as a subsidiary of New York Presbyterian/Weill Cornell Medical Center, and Family Medicine at Nagle Avenue Practice, as a subsidiary of New York-Presbyterian/Columbia University Medical Center (collectively FMNAP), together with the defendants New York-Presbyterian/Columbia University Medical Center (NYPH), and Kimberly Carter, M.D. (collectively, with FMNAP, the NYPH defendants), move pursuant to CPLR 3212 for summary judgment dismissing the

complaint insofar as asserted against them on the ground that the action is time-barred as to them. The plaintiffs oppose the motion.

The motion is granted to the extent that the complaint is dismissed (a) in its entirety insofar as asserted Carter, (b) as against the remaining NYPH defendants as to any alleged departure from good medical practice occurring prior to May 30, 2013, and (c) as to all claims against the remaining NYPH defendants alleging lack of informed consent. The motion is otherwise denied. In opposition to the NYPH defendants' prima facie showing of entitlement to judgment as a matter of law in this regard, the plaintiffs failed to raise a triable issue of fact as to whether the limitations period applicable to the alleged acts of malpractice committed by those defendants between 2004 and 2011 was tolled by the continuous treatment doctrine until January 3, 2015, the last date that the plaintiff Isabel Mendez treated with any of the NYPH defendants for any medical condition. Hence, the only claim asserted against the NYPH defendants that is not time-barred is the malpractice claim alleged against the institutional NYPH defendants based on their failure to diagnose a lodged IUD and perforated uterus at the plaintiff's October 26, 2013 appointment and examination.

On June 24, 2004, Carter implanted an IUD into Mendez's uterus at FMNAP, a clinic affiliated with NYPH. Mendez returned to FMNAP on July 20, 2004 for a follow-up visit. Carter did not have any other interaction with Mendez thereafter, and left FMNAP's employ in 2005. Despite the insertion of the IUD, Mendez became pregnant. Mendez presented for prenatal treatment at NYPH on December 19, 2005, at which point her chart indicated that she was pregnant. Mendez again presented to NYPH on December 28, 2005, and on 12 occasions between January 3, 2006 and July 14, 2006, for prenatal care visits. There is no indication in Mendez's 2005 and 2006 medical charts that Mendez complained that the IUD had malfunctioned, or that NYPH personnel were investigating a possible failure or migration of the IUD.

On July 16, 2006, Mendez presented to the NYPH Emergency Department, and was admitted to NYPH, where she gave birth that day to a live-born female. She remained at NYPH for several days thereafter. On August 18, 2006, she once more presented to the NYPH, this time for a post-partum examination.

Thereafter, the plaintiff did not receive any treatment at either FMNAP or NYPH until February 14, 2011, when she presented to NYPH complaining that she had suffered from one day of suprapubic abdominal pain, back pain on her left, which was greater than the pain on her right, fever, chills, nausea, and vomiting. She was hospitalized at NYPH between February 14, 2011 and February 21, 2011, diagnosed with acute pyelonephritis (an inflammation of the kidney typically caused by a bacterial urinary tract infection), treated with antibiotics, and discharged from NYPH on February 21, 2011. NYPH's charts reflect that the symptoms and complaints either had improved or resolved by the time of Mendez's discharge. In any event, upon her discharge, Mendez was advised to "[c]all your doctor for any new onset of pain, change in intensity or quality of pain or change in functions." There is no indication that Mendez presented to NYPH for a follow-up visit in connection with the urinary tract infection. Although several notes written during Mendez's 2011 hospitalization mention that there were "no visible strings" connected to the IUD, and one set of notes mentioned a sonogram to confirm, the references in the 2011 notes were not to any contemporaneous observations, examinations, or diagnostic tests, but to observations, examinations, and tests made and conducted in 2005 and 2006, during her pregnancy. There are also references in the 2011 notes to "back pain," but these entries do not reference the IUD.

Mendez's only other encounters with NYPH during that year were on April 16, 2011 and July 23, 2011. As to the April 16, 2011 visit, Mendez's chart includes a notation that she had developed pain after having taken the antibiotics since February, that she exhibited "left groin pain when she walks," and that palpation and observation revealed the existence of a "ball" in her left groin area that she had felt for over 15 years and thought was enlarged, affected her

walking, and limited her in the activities of daily living. Upon examination, NYPH's providers noted that there was a 4 cm muscular structure in Mendez's left side that, although not enlarged, was slightly tender to palpation. She was instructed to return for an investigation of pathology of the muscular structure, but she never did. NYPH's chart does not reflect the reasons for her July 23, 2011 visit or the complaints she then made, if any.

Mendez next presented to NYPH on October 26, 2013, when she complained that she had been suffering from back pain for three to four days, explaining that she had recently lifted heavy grocery bags. She reported "numbness tingling sensations down to her R[ight] L[ower] E[xtremity]; denies urinary symptoms," and also denied that she was suffering from "fever/chills, nausea/vomiting [sic], urinary frequency, dysuria, or hematuria." She was discharged in stable condition, prescribed painkillers, and advised to follow up with her primary care physician if symptoms persisted.

Only one day before that visit to NYPH, however, Mendez presented to the defendant La Clinica de las Americas (La Clinica), a family health-care clinic affiliated with the defendant New York City Health and Hospitals Corporation (NYC HHC), complaining of the very same right-side abdominal and leg pain that for which she was seen the very next day at NYPH. With this visit to La Clinica, Mendez commenced a long-term a course of treatment at that facility with Dr. Lewis Sellinger, who had become Mendez's regular obstetrician/gynecologist. The parties' submissions indicate that Mendez returned to La Clinica on September 26, 2014, complaining of lower abdominal pain, an again on October 31, 2014 for her annual OB/GYN checkup, at which it was noted that her uterus was "tense and tender." When Mendez again returned to La Clinica on December 3, 2014, an examination revealed, for the first time, that her IUD had migrated. Upon returning to La Clinica on December 15, 2014, Dr. Sellinger recommended that she undergo a total abdominal hysterectomy to address the problem with her IUD and relieve the problems arising in connection with her uterus.

Despite Mendez's December 3, 2014 diagnosis and 14-month course of examinations at La Clinica, Mendez nonetheless ultimately presented again to NYPH on January 3, 2015, complaining of nausea and abdominal pain on her right side that had been persisting for approximately the entire period of time over which she was being examined and treated at La Clinia. Her NYPH chart noted that she was able to "[v]oid[ ] without discomfort, urine clear/yellow. No complaints of discomfort or discharge." At the time, Mendez was 47 years of age. Her chart reported that

> "The pain has been coming and going all of this time-it started after she had her IUD placed 10 years ago- got pregnant anyway (not ectopic-has an 8-y/o child) and afterwards continued to have the pain-it usually is R[ight] L[ower] Q[uadrant] and comes on just after menses (as it is now)- *had an eval about 5 years ago for this same pain and was told that her IUD had either 'moved' or was 'stuck' (?)- that it would be too expensive to retrieve it- so to leave it and the uterus would eventually 'accept it' (?).* She denies urinary symptoms, denies NA//D, denies fever, denies any associated symptoms at all"

(emphasis added). A review of Mendez's NYPH charts and progress notes from 2011, comprising more than 450 pages, reveals, however, that no one at NYPH had memorialized either any such discussion or those particular complaints. After taking an X-ray on January 3, 2015, NYPH personnel concluded that the IUD had migrated and lodged so as to overlay Mendez's sacrum, thus confirming Dr. Sellinger's diagnosis at La Clinica. Mendez thereafter went to Harlem Hospital in March 2015 to have the IUD removed and undergo a hysterectomy, at which point it was revealed, among other things, that her uterus had become perforated.

According to the plaintiffs' bills of particulars, the NYPH defendants negligently treated Mendez "during a continuous course of treatment which began on or about May 14, 2004 and continued through on or about January 3, 2015." In particular, the plaintiffs alleged that the NYPD defendants improperly inserted the IUD into Mendez's uterus, failed adequately to observe her following insertion of the IUD, failed to remove the IUD after its initial insertion in light of Mendez's complaints, adverse effects, and symptoms, failed to diagnose Mendez with a retained, embedded, improperly positioned, displaced, migrated, and/or extra-uterine IUD,

misdiagnosed Mendez with an IUD expulsion, failed to diagnose uterine perforation, and failed to obtain an informed consent and disclose the risk, benefits, and alternatives to the treatments that were rendered to her. In their amended and supplemental bills of particulars, the plaintiffs allege that NYPH defendant departed from accepted standards of care by ignoring Mendez's complaints of cramping and abdominal pain following the insertion of the IUD, failing to observe Mendez in connection with her complaints of pelvic pain, failing to take cultures and order a pelvic ultrasound, failing to remove the IUD, and advising the plaintiff that her continued abdominal pain was normal.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id*.; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-

404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

On a motion for summary judgment dismissing a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise triable issue fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is 2½ years, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is 2½ years from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C*., 112 AD3d 499 [1st Dept 2013]).

The "continuous treatment" provision of CPLR 214-a posits that the limitations period "does not begin to run until the end of the course of treatment when the course of treatment

which includes the wrongful acts or omissions has run continuously and is *related to the same original condition or complaint*" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp*., 242 AD2d 674, 676 [1st Dept 1997]). The continuous treatment toll, however, is personal to the patient, and does not apply to toll a spouse's derivative cause of action to recover for loss of consortium (*see Devadas v Niksarli*, 120 AD3d 1000, 1008 [1st Dept 2014]; *Wojnarowski v Cherry*, 184 AD2d 353, 354-355, [1st Dept 1992]).

Although CPLR 214-a provides that "where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery, or the date of discovery of facts, which would lead to such discovery, whichever is earlier," the NYPH defendants correctly argue that an IUD is not a "foreign object" that was not intended to be implanted or inserted, but a "fixation device" that was indeed intended to be implanted and inserted (*see Rockefeller v Moront*, 81 NY2d 560, 563-565 [1993]; *Rodriguez v Manhattan Med. Group*, 77 NY2d 217 [1990], *Flanagan v Mount Eden Gen. Hosp*., 24 NY2d 427, 430 [1969]; *Newman v Keuhnelian*, 248 AD2d 258, 250 [1st Dept 1998]; *see also Walton v Strong Mem. Hosp*., 25 NY3d 554, 566-567, 571 [2015]; *Owen v Mackinnon*, 6 AD3d 684 [2d Dept 2004]). Hence, the NYPH defendants established that the plaintiffs are not entitled to the benefit of the one-year discovery rule set forth in CPLR 214-a, and the plaintiff failed to raise a triable issue of fact in opposition to that showing.

The NYPH defendants also established, prima facie, that all causes of action against the defendant Carter are time-barred. Carter inserted Mendez's IUD on June 24, 2004, and never treated Mendez after that. Consequently, the NYPH defendants demonstrated, prima facie, that the toll for continuous treatment cannot be imputed to Carter for negligently implanting or inserting the IUD in the first instance. In opposition to this showing, the plaintiffs failed to raise a

triable issue of fact as to whether Mendez treated with Carter at any time after 2004, let alone that Mendez treated "continuously" with her. Hence, summary judgment must be awarded to Carter dismissing the complaint against her in its entirety.

With respect to the causes of action asserted against the remaining NYPH defendants, those defendants established, prima facie, that the treatments that they rendered to Mendez in connection with her conditions and complaints from June through July 2004, December 2005 through August 2006, February 2011, April 2011, and July 2011 were unrelated to complaints arising from a migrating or lodged IUD or a concomitantly perforated uterus. Specifically, the NYPH defendants demonstrated that, when Mendez returned to NYPH in February 2011 after a 4½-year hiatus, she was treated for *left-side* back pain and a urinary tract infection that had inflamed her kidneys, both of which resolved after she was prescribed antibiotics, with a follow-up visit in April 2011 for *left-side* groin pain.

The plaintiffs' expert suggests in his or her affirmation that Mendez's 2011 complaints could be attributed to a migrated or lodged IUD or a perforated uterus, and that NYPH was negligent in failing to take the necessary X-rays or CT scans to determine whether the IUD had migrated or lodged, or the uterus had been perforated. The expert's affirmation, however, failed to raise a triable issue of fact as to whether Mendez's October 26, 2013 visit to NYPH to address *right-side leg pain* constituted a continuation of treatment for maladies on the *left side* of her body that had resolved after her treatment in 2011. The affirmation includes only conclusory statements that Mendez's complaints in 2011 were related to IUD migration, and provides no explanation as to why Mendez's complaints of discomfort to three different parts of her body on three different occasions were related to the same condition. Nor did the plaintiffs' expert conclude that the antibiotics prescribed to treat Mendez's urinary tract infection in February 2011 somehow masked any ongoing or lingering effects of a migrating IUD.

Moreover, the absence from the 2011 NYPH charts of any mention of a conversation between Mendez and her health-care providers regarding a migrated IUD in the course of her

urinary tract infection treatment,---despite her description of such a conversation during her January 3, 2015 visit---suggests that Mendez had not sought treatment in 2011 for discomfort arising from the migration of the IUD (*see generally De Jurenev v A.H. Robins Co*., 114 AD2d 333 [1st Dept 1985]). The expert's affirmation in this regard simply is not supported by the record.

Hence, the plaintiffs failed to raise a triable issue of fact as to whether Mendez's complaints or conditions from 2004 until 2011---all of which concerned only the initial implant of the IUD, a pregnancy and childbirth, a urinary tract infection that affected Mendez's left lower back, and a complaint of pain in the left-groin area---were related to the complaints of right-side abdominal and lower quadrant pain that she made to NYPH on October 26, 2013. The plaintiffs' failure in this regard, standing alone, is a sufficient basis on which to award summary judgment to the NYPH defendants dismissing the complaint as to any allegations of malpractice occurring prior to May 30, 2013 (the date 2½ years prior to the commencement of this action), as the continuous treatment doctrine may not be applied to toll the limitations period where, as here, the later, post-May 30, 2013 complaints were unrelated to Mendez's earlier complaints, conditions, and examinations.

In any event, the NYPH defendants further made a prima facie showing that, even if those earlier complaints or treatments were somehow related to a migrating IUD or lower right abdominal pain, the gaps in treatment between the 2004-2011 visits and May 30, 2013 rendered the complaints made at the October 26, 2013 visit so attenuated from prior visits and treatments as to constitute a mere "resumption" of treatment instead of a continuation of treatment (*see Waring v Kingston Diagnostic Radiology Ctr*., 13 AD3d 1024, 1026 [3d Dept 2004]; *Fox v Glens Falls Hosp*., 129 AD2d 955, 957 [3d Dept 1987]; *cf. Alvarez v New York City Health & Hosps. Corp*., 257 AD2d 516, 516-517 [1st Dept 1999] [where plaintiff told hospital personnel that she did not intend to return for further treatment, and sought treatment elsewhere, her later appointment at the hospital cannot be deemed continued treatment for

limitations purposes, but only a resumption of treatment]). As noted, only one day prior to the critical October 26, 2013 NYPH visit, Mendez began a long-term course of examinations and treatment at La Clinica, and later at NYC HHC's Harlem Hospital, concerning her complaints of lower right quadrant abdominal pain. The plaintiffs have not explained the reason for Mendez's October 26, 2013 essentially duplicative NYPH visit in this context and, hence, have failed to raise a triable issue of fact overcoming the inference that she had interrupted, or even abandoned, her previous relationship with NYPH in order to obtain treatment from another health-care provider.

Contrary to the NYPH defendants' contention, however, the Appellate Division, First Department, has not adopted the bright-line rule articulated by the Appellate Division, Second Department in decisions such as *Sherry v Queens Kidney Ctr*. (117 AD2d 663, 664 [2d Dept 1986]), to the effect that, even where treatment is sought for the same condition over a long period of time, "that treatment is not considered continuous when the interval between treatments exceeds the period of limitation." Rather, in those situations where the later complaints are indeed related to the earlier complaints, examinations, and treatment, the First Department has articulated a more nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in his or her condition (*Devadas v Niksarli*, 120 AD3d at 1006). Even where a "plaintiff pursued no treatment for over 30 months after" the initial, allegedly negligent surgical treatment (*id*. at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his '[doctor] for life,' and that the efficacy of the [treatment] was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed"

(*id*.at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id*. at 1007).

Applying the First Department's articulation of the law, as this court must (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]), the NYPH defendants nonetheless made the necessary prima facie showing. They established that any ongoing relationship of trust and confidence between Mendez and the NYPH defendants had been severed when she began to treat at La Clinica, and the plaintiffs failed to raise a triable issue of fact in opposition to that showing. Moreover, "[w]here, as here, plaintiff did not seek corrective treatment and, in fact, allegedly did not even know that further treatment was necessary, there is no sound basis for applying the continuous treatment doctrine" (*Risz v Cohen*, 73 NY2d 98, 104 [1989]) to the gap in treatment from 2006 to 2011.

Nor does a failure to make a proper diagnosis, in and of itself, establish an ongoing course of treatment, as such a claim constitutes a "self-contradictory proposition" (Nykorchuck v Henriques, 78 NY2d at 259; *see Young v New York City Health & Hosps. Corp*., 91 NY2d 291 297 [1998]; *Toxey v State of New York*, 279 AD2d 927, 928 [3d Dept 2001]).

Nonetheless, in the plaintiff's expert's affirmation, the expert opined that the NYPH defendants

> "departed from good and accepted medical care and practice on October 26, 2013, when plaintiff presented to the emergency department of New York Presbyterian Hospital with complaints of lower back pain, numbness and tingling going down the right lower extremity. It is my opinion within a reasonable degree of medical certainty that plaintiff's complaints of lower back pain, numbness and tingling sensations going down the right lower extremity were related to an IUD migration and defendants' failure to diagnose the IUD migration was a departure from good and accepted medical care and practice."

Where, as here, the NYPH defendants did not support their motion with an expert's affirmation opining that they did not commit malpractice on October 26, 2013, and they did not argue that an alleged departure committed subsequent to May 30, 2013 was time-barred, they have failed to establish their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as was premised on the October 26, 2013 visit. They are thus not entitled to dismissal of that claim regardless of the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). In any event, the plaintiffs' expert's opinion in this regard is adequately supported by the record, and would nonetheless have been sufficient to defeat summary judgment as to any claim premised on negligence committed by NYPH on October 26, 2013 (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *Cruz v St. Barnabas Hospital,* 50 AD3d 382 [1st Dept 2008]).

Inasmuch as the claim related to Mendez's October 26, 2013 treatment at NYPH did not involve informing her of the risks and dangers of any particular treatment or procedure, or obtaining her consent to any such particular treatment or procedure, and that is the only claim that has been interposed in a timely fashion, all causes of action alleging lack of informed consent must be dismissed.

Accordingly, it is

ORDERED that the motion of the defendants Family Medicine at Nagle Avenue Practice, as a subsidiary of the New York Presbyterian Healthcare System, Inc., Family Medicine at Nagle Avenue Practice, as a subsidiary of New York Presbyterian/Weill Cornell Medical Center, Family Medicine at Nagle Avenue Practice, as a subsidiary of New York-Presbyterian/Columbia University Medical Center, New York-Presbyterian/Columbia University Medical Center, and Kimberly Carter, M.D., for summary judgment dismissing the complaint insofar as asserted against them is granted to the extent that

(1) all causes of action in the complaint are dismissed in their entirety insofar as against Kimberly Carter, M.D

(2) the causes of action alleging lack of informed consent are dismissed, and

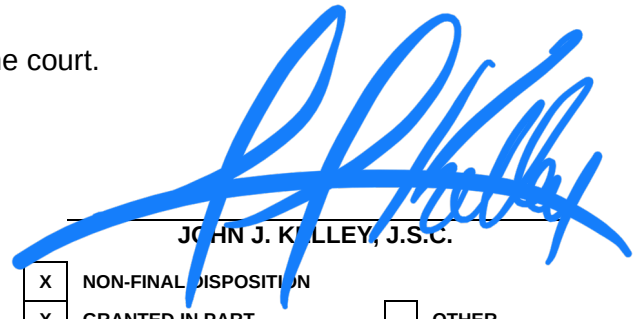
(3) the causes of action asserted against the defendants Family Medicine at Nagle Avenue Practice, as a subsidiary of the New York Presbyterian Healthcare System, Inc., Family Medicine at Nagle Avenue Practice, as a subsidiary of New York Presbyterian/ Weill Cornell Medical Center, Family Medicine at Nagle Avenue Practice, as a subsidiary of New York-Presbyterian/Columbia University Medical Center, and New York-Presbyterian/Columbia University Medical Center alleging that those defendants committed medical malpractice based on a departure from good and accepted medical care and practice prior to May 30, 2013, and all derivative causes of action premised thereon, are dismissed,

and the motion is otherwise denied; and it is further,

ORDERED that those causes of action are dismissed; and it is further,

ORDERED that the allegations in the plaintiffs' bills of particulars referable to the departures from good and accepted medical practice and the lack of informed consent set forth in the dismissed causes of action are stricken.

This constitutes the Decision and Order of the court.



4/27/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	[X]	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**