Algieri v Norton
2021 NY Slip Op 33485(U)
April 7, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 605270/2018
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

ORIGINAL

INDEX No. 605270/2018
CAL. No. 202000569/MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10/14/20 (001)
MOTION DATE 11/12/20 (002)
ADJ. DATE 12/17/20
Mot. Seq. # 001 MD
Mot. Seq. # 002 MotD

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STEVEN ALGIERI and VICTORIA ALGIERI,

Plaintiffs,

- against -

JENNIFER V. NORTON, D.O., MARC DINOWITZ, D.O., PHILIPPE D. VAILLANCOURT, M.D., STEPHANIE SOOHOO, M.D., PECONIC BAY MEDICAL CENTER, EAST END EYE ASSOCIATES, LLP and SOUTH SHORE NERUROLOGIC ASSOCIATES, P.C.,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants Dinowitz and East End Eye Associates, filed September 16, 2020; by defendants Norton, Soohoo, and Peconic Bay Medical Center, filed October 14, 2020 ; Notice of Motion/Order to Show Cause and supporting papers ___; Answering Affidavits and supporting papers by plaintiffs, filed November 23, 2020; by plaintiffs, filed November 23, 2020 ; Replying Affidavits and supporting papers by defendants Dinowitz v East End Eye Associates, filed December 16, 2020; by defendants Norton, Soohoo, and Peconic Bay Medical Center, filed December 16, 2020 ; Other ____ ; it is

ORDERED that the motion by defendants Marc Dinowitz, D.O., and East End Eye Associates, LLP, and the motion by defendants Jennifer Norton, D.O., Stephanie Soohoo, M.D., and Peconic Bay Medical Center are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Marc Dinowitz, D.O., and East End Eye Associates, LLP, for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the motion by defendants Jennifer Norton, D.O., Stephanie Soohoo, M.D., and Peconic Bay Medical Center for summary judgment dismissing the complaint against them is granted to the extent of dismissing the complaint as asserted against Dr. Soohoo, and is otherwise denied.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Steven Algieri by defendants on September 11, 2016. Plaintiff alleges that defendants were negligent in, among other things, failing to timely diagnose a central retinal artery occlusion ("CRAO"), and failing to perform appropriate examinations and tests. Plaintiff also alleges a cause of action for negligent hiring against East End Eye Associates and Peconic Bay Medical Center. Victoria Algieri, plaintiff's wife, sues derivatively for loss of services.

The facts of this case, subject to some dispute, can be summarized as follows: plaintiff presented to the emergency room of Peconic Bay Medical Center ("PBMC") at approximately 12:30 am on September 11, 2016 with blurry vision in his left eye. Plaintiff was treated by Jennifer Norton, M.D., and radiology studies were interpreted by Stephanie Soohoo, M.D. Marc Dinowitz, D.O., of East End Eye Associates was called for an ophthalmology consultation, but never examined plaintiff. After discharge from PBMC later that morning, plaintiff presented to the emergency room at Stony Brook University Hospital where he was diagnosed with a CRAO.

Dr. Dinowitz and East End Eye Associates move for summary judgment dismissing the complaint against them on the grounds that they did not depart from good and accepted practices in the medical treatment they provided to plaintiff, and that such medical treatment did not cause his injuries. They submit, among other things, copies of the pleadings and the bill of particulars; the transcripts of the deposition testimony of plaintiffs, Dr. Norton, and Dr. Dinowitz; medical records; telephone records; and the expert affirmation of Mark Fleckner, M.D.

Dr. Norton, Dr. Soohoo, and PBMC also move for summary judgment dismissing the complaint against them on the grounds that they did not depart from good and accepted practices in the medical treatment they provided to plaintiff, and that such medical treatment did not cause his injuries. They submit, among other things, copies of the pleadings and the bills of particulars, the transcripts of their deposition testimony and the deposition testimony of plaintiffs, medical records, and the expert affirmations of Mark Silberman, M.D., Robert Zimmerman, M.D., and Robert Cykiert, M.D.

In opposition to both motions, plaintiffs argue that there are triable issues of fact as to whether the moving defendants deviated from the accepted standard of care, and whether such deviations caused

plaintiff's injuries. They submit, in opposition, the transcripts of the deposition testimony of Dr. Norton, and Dr. Dinowitz, the transcripts of their deposition testimony, medical records, and expert affirmations.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980])

Healthcare providers owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (***Dupree v Giugliano***, 20 NY3d 921, 958 NYS2d 312, 314 [2012]; ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice, and that such departure proximately caused his or her injuries (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***Macancela v Wyckoff Heights Med. Ctr.***, 176 AD3d 795, 109 NYS3d 411 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). To establish a prima facie entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that such departure did not proximately cause the plaintiff's injuries (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]; ***Wodzenski v Eastern Long Is. Hosp.***, 170 AD3d 925, 96 NYS3d 80 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, *supra*; ***Mitchell v Grace Plaza of Great Neck, Inc.***, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]). The defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; ***LaVecchia v Bilello***, 76 AD3d 548, 906 NYS2d 326 [2d Dept 2010]; ***Grant v Hudson Val. Hosp. Ctr.***, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]). However, "bare conclusory assertions by defendants that they did not deviate from good and accepted medical practices . . . do not establish that the cause of action has no merit so as to entitle defendants to summary judgment" (***DiLorenzo v Zaso***, 148 AD3d 1111, 1112, 50 NYS3d 503 [2d Dept 2017], quoting ***Winegrad v New York Univ. Med. Ctr.***, *supra* at 853; *see* ***Garcia-DeSoto v Velpula***, 164 AD3d 474, 77 NYS3d 887 [2d Dept 2018]).

If the defendant establishes a prima facie case of entitlement to summary judgment, the burden shifts to the plaintiff to submit evidentiary facts or materials that raise a triable issue as to whether a deviation or departure occurred and whether this departure was a competent cause of plaintiff's injuries (***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Makinen v Torelli***, 106 AD3d 782, 965 NYS2d 529 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). The plaintiff need only raise

a triable issue as to the elements on which the defendant met the prima facie burden (***Bueno v Allam***, 170 AD3d 939, 96 NYS3d 623 [2d Dept 2019]; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; ***Hernandez v Hwaishienyi***, 148 AD3d 684, 48 NYS3d 467 [2d Dept 2017]). "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 physician's summary judgment motion" (***Alvarez v Prospect Hosp.***, *supra* at 325; *see* ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.***, *supra*; ***Hernandez v Hwaishienyi***, *supra*). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (***Macancela v Wyckoff Heights Med. Ctr.***, *supra*; ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing and Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

The submissions of Dr. Dinowitz and East End Eye Associates established a prima facie case of entitlement to summary judgment dismissing the medical malpractice claim against them by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment rendered to plaintiff, and lack of proximate causation (*see* ***Joynes v Donatelli***, 190 AD3d 845, 2021 NY Slip Op 00304 [2d Dept 2021]; ***Larcy v Kamler***, 185 AD3d 564, 127 NYS3d 122 [2d Dept 2020]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Galluccio v Grossman***, 161 AD3d 1049, 78 NYS3d 196 [2d Dept 2018]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]). In his affirmation, Dr. Fleckner stated that he is board certified in ophthalmology and that he reviewed the complaint, the bills of particulars, the deposition testimony of the parties, and the medical records of PBMC and Stony Brook University Hospital. He opined within a reasonable degree of medical certainty that Dr. Dinowitz did not depart from any good and accepted medical practice in his treatment of plaintiff, and that such medical care was not a proximate cause of his alleged injuries.

Dr. Fleckner explained that a blockage of the retinal artery carrying oxygen to the nerve cells in the retina is similar to a stroke of the eye and results in severe vision loss. He stated that CRAO is an ocular emergency, as the retina suffers irreversible injury after only 90 minutes of blood flow loss. However, he stated that there is no generally accepted and effective treatment, and that most patients suffer severe and permanent visual loss even despite immediate attempts to preserve vision loss. Dr. Fleckner opined that plaintiff's "fate was already sealed" and his vision loss was permanent by the time he arrived at PBMC at approximately 12:40 a.m., at least 85 minutes after he first experienced vision loss. He stated that as Dr. Dinowitz was not contacted until 7:30 a.m., more than eight hours after the onset of symptoms and "well after" the treatment window had closed, plaintiff's vision loss was already permanent, so it was proper for Dr. Dinowitz to see plaintiff in his office for evaluation within the next two days. Dr. Fleckner stated that even if Dr. Dinowotz was called at 1:30 a.m., as Dr. Norton testified, there was no treatment that would have been effective even at this earlier hour, because it would have been more than two hours since the onset of symptoms, which is "well past" the time to initiate treatment. As Dr. Dinowitz met his initial burden as to the cause of action against him for medical malpractice, the burden shifted to the non-moving parties to submit admissible evidence raising a triable issue of fact (*see* ***Jagenburg v Chen-Stiebel***, *supra*; ***Williams v Bayley Seton Hosp.***, *supra*; ***Makinen v Torelli***, *supra*; ***Stukas v Streiter***, *supra*).

Dr. Norton, Dr. Soohoo, and PBMC also established prima facie entitlement to summary judgment dismissing the medical malpractice claim against them by demonstrating the absence of a deviation or departure from good and accepted standards of medical practice in the medical treatment rendered to plaintiff, and lack of proximate causation (*see* ***Joynes v Donatelli***, *supra*; ***Larcy v Kamler***, *supra*; ***Jagenburg v Chen-Stiebel***, *supra*; ***Galluccio v Grossman***, *supra*; ***Bongiovanni v Cavagnuolo***, *supra*). By his affirmation, Dr. Silberman stated that he is board certified in internal medicine, pulmonary medicine, critical care medicine, and emergency medicine and that he reviewed the complaint, bills of particulars, deposition testimony of the parties, and medical records of PBMC and Stony Brook University Hospital. He opined within a reasonable degree of medical certainty that Dr. Norton did not depart from any good and accepted medical practice in her treatment of plaintiff, and that her treatment was not a proximate cause of his alleged injuries.

Dr. Silberman explained that if a patient presents immediately for medical treatment of CRAO, efforts can be made to attempt treatment, including ocular pressure massage and rapid release, ocular paracentesis to remove fluid from the orbit, rebreathing carbon dioxide, or administering medication. He stated that these measures rarely result in benefit, but may have limited efficacy when undertaken within 20 to 60 minutes of the onset of vision loss. Dr. Silberman offered that as plaintiff presented to PBMC at 12:37 a.m., 82 minutes after the onset of symptoms at 11:15 p.m., emergency room maneuvers and interventions would not have effectively mitigated the vision loss due to CRAO. He stated that even when ocular massage, anterior chamber paracentesis, breathing carbogen, or medication management with intravenous mannitol or diamox are attempted, any increase in visual acuity is minimal when compared to those patients who do not receive such treatment. He also stated that thrombolytic therapy ("tPA") is ineffective at dissolving this type of embolus that is atheromatous in nature, and that the risk of hemorrhage from tPA outweighs any theoretical benefit. He opined that there is no medical evidence that tPA leads to improved outcomes, because the small percentage of CRAO patients that improve with tPA are consistent with the small percentage of patients that have spontaneous resolution without treatment. Dr. Silberman determined that by the time plaintiff presented to the hospital, there was nothing that could be done to mitigate the ischemic retinal damage that had already resulted from the CRAO.

Dr. Silberman further opined that Dr. Norton properly ruled out cerebral stroke, as she properly obtained a complete medical history and performed an appropriate and comprehensive head-to-toe examination with proper examination specific to the eye within 23 minutes of plaintiff's arrival at the emergency department. Dr. Silberman concluded that Dr. Norton properly checked plaintiff's visual acuity and performed a fundus examination, as a dilated eye examination was not indicated or within the standard of care for a emergency room physician to perform. He stated that Dr. Norton properly consulted with a neurologist and an ophthalmologist, and relied upon their medical advice. He also stated that Dr. Norton did not need to order additional testing or work-up of plaintiff, and that she properly discharged plaintiff from the hospital. Dr. Silberman determined that a CT scan of plaintiff's head and a CTA of plaintiff's head and neck were properly ordered in order to evaluate any possible central nervous system disease.

In his affirmation, Dr. Zimmerman stated that he is board certified in radiology and that he reviewed the bills of particulars, medical records of PBMC and Stony Brook University Hospital, CT

scan images, and pertinent deposition testimony. He opined within a reasonable degree of medical certainty that Dr. Soohoo did not depart from any good and accepted medical practice in her treatment of plaintiff, and that the care she provided was not a proximate cause of his alleged injuries.

Dr. Zimmerman explained that the purpose of the CT scan of plaintiff's head was to rule out neurological injuries such as a right occipital stroke, mass effect, midline shift, hemorrhage, or other structure abnormality of the brain given the studies ordered and the clinical history provided. He stated that the purpose of the head and neck CTA was to assess the patency of the arteries of plaintiff's head and neck to determine the degree of narrowing from atherosclerosis. He also stated that neither study has the diagnostic capacity to evaluate the central retinal artery due to its location and extremely narrow diameter. Dr. Zimmerman opined that Dr. Soohoo properly interpreted the CT scan of plaintiff's head and the CTA of plaintiff's head and neck. He stated that the findings properly were communicated to the clinicians caring for plaintiff and responsible for decision-making. He explained that it was the attending clinicians' responsibility to order additional diagnostic testing. He opined that Dr. Soohoo properly documented that an MRI examination could be obtained as clinically warranted and said that recommendation was appropriate. He stated that a subsequent MRI examination of plaintiff's brain and MRA of his head and neck did not reveal a CRAO, as such condition is diagnosed clinically, not radiologically.

Dr. Cykiert stated in his affirmation that he is board certified in ophthalmology and that he reviewed the bills of particulars, medical records of PMBC and Stony Brook University Hospital, and deposition testimony. He opined within a reasonable degree of medical certainty that the medical care provided to plaintiff by Dr. Norton, Dr. Soohoo, and PBMC was not a proximate cause of his alleged injuries.

Dr. Cykiert opined that CRAO is diagnosed based on symptoms and clinical examination of the eye. He explained that the retina is injured immediately upon CRAO, despite evidence of same evolving over time as the retinal cells slowly die from lack of blood. He stated that CRAO within the portion of the central retinal artery that runs within the optic nerve is never amenable to treatment due to the inability of the central retinal artery to dilate within the optic nerve secondary to its extremely narrow diameter. However, if CRAO occurred within the portion of the central retinal artery that runs outside of the optic nerve, there may be a "very small chance" that treatment could minimally restore vision, if diagnosed and treated within one hour, or "more realistically 15-20 minutes," of onset of symptoms. Dr. Cykiert explained that such treatment includes an ocular massage, paracentesis, breathing into a paper bag, breathing carbogen, and medication management with IV mannitol or diamox. He stated that there are no reliable, medically-based studies that support application of these treatments more than one hour after the onset of symptoms. Similarly, he stated that there is no medical evidence that blood clot dissolvers effectively alleviate CRAO. Dr. Cykiert explained that many examiners believe that the risks of tissue plasminogen activator ("tPA") outweigh the potential benefits in treating CRAO. He stated that the small percentage of patient that "do better" with tPA is similar to the percentage of patients that have spontaneous resolution.

Dr. Cykiert opined that when plaintiff presented to PBMC at 12:37 a.m., at least one hour and 22 minutes after he first appreciated his blurry vision, there was nothing that could be done to mitigate the

damage already caused by the CRAO. Dr. Cykiert opined that Dr. Norton properly and immediately ruled out cerebral or brain stroke by obtaining a complete history and performing an appropriate comprehensive fully body examination, including a specific examination to the eye, within 23 minutes of plaintiff's arrival to PMBC. He opined that Dr. Norton's finding of PERRLA (pupils equal, round, reactive to light, and accommodating) was consistent with the progression of the condition, as afferent pupillary defect had not yet manifested itself at the time of examination, because the cherry red that appears in the backdrop of the retina was reasonably not observed on Dr. Norton's examination. He also stated that it was not within the standard of care for Dr. Norton, an emergency room physician, to perform a dilated pupil eye examination. Dr. Cykiert determined that a CT scan of plaintiff's head and a CTA of his head and neck was properly ordered. He explained that the purpose of the imaging was not to diagnose CRAO, because radiological imaging is non-diagnostic for this condition. He also explained that there is no known and accepted treatment for CRAO, but that work-up of the etiology of the occlusion is important to determine an appropriate course of preventative medical therapy to prevent CRAO of the other eye, as well as future neurologic devastation secondary to a stroke of the brain. The burden, therefore, shifted to the non-moving parties to submit admissible evidence raising a triable issue of fact (*see* ***Jagenburg v Chen-Stiebel***, *supra*; ***Williams v Bayley Seton Hosp.***, *supra*; ***Makinen v Torelli***, *supra*; ***Stukas v Streiter***, *supra*).

By his affirmation, plaintiff's ophthalmology expert stated that he is board certified in ophthalmology and reviewed pertinent medical records and the deposition testimony of the parties. He opined within a reasonable degree of medical certainty that Dr. Dinowitz, East End Eye Associates, Dr. Norton, and PBMC departed from good and accepted medical practice in their treatment of plaintiff, and that such medical care was a proximate cause of his injuries.

Plaintiff's ophthalmology expert opined that the accepted standard of care requires expeditious action to increase ocular circulation, and that several therapeutic measures are required to be initiated in a timely fashion. He explained that irreversible retinal damage occurs with no recovery of vision at approximately six hours, but that vision recovery after six hours has been reported and is dependent on the patient's retinal tolerance for lack of blood flow. He also stated that the earlier a patient is treated for vision loss, the better the outcome. Plaintiff's ophthalmology expert opined that therapeutics increase a patient's chance of vision recovery and that without therapeutics a patient's chance of vision recovery is "generally zero." He stated that "it was a departure from good and accepted medical practice by the defendants in failing to perform these interventions". The expert stated that he personally utilized therapeutic interventions in his practice and has successfully mitigated loss of vision.

Plaintiff's ophthalmology expert further explained that carbogen inhalation, acetazolamide, ocular massage and paracentesis, and tPA are therapies used to treat CRAO. He stated that ocular massage should be conducted with every patient with a CRAO. He explained that in 2016, tPA, a "clot buster," was the standard of care in treating a stroke such as CRAO. The expert further explained that while tPA carries a risk of bleeding, once a CT scan demonstrated that there was no intra-cranial bleed, tPA should have been administered. The expert determined that as Dr. Norton saw plaintiff between 12:43 a.m. and 1:00 a.m. and called Dr. Dinowitz between 1:00 a.m. and 2:00 a.m., both physicians were well within the six-hour time frame, which started at the onset of symptoms at 11:15 p.m., for all the suggested treatments to minimize permanent injury to plaintiff's eye. He opined that the onset of

plaintiff's CRAO was within the acceptable 4½-hour time frame for the initiation of tPA therapy. He explained that while there are risks involved with the subject treatments, namely, loss of vision, the benefits of the treatments outweighed any potential risks in plaintiff's case, as he suffered loss of vision anyway due to lack of intervention. He opined that all of these therapies were indicated for plaintiff, and that Dr. Dinowitz and Dr. Norton departure from the good and accepted medical practice by failing to perform these interventions. The expert concluded that had timely interventions been performed, it would have substantially increased plaintiff's chances for recovery, because without such interventions, he has been left with a severe and permanent visual deficit.

Plaintiff's ophthalmology expert opined that Dr. Dinowitz failed to timely perform therapeutic measures. He explained that as the ophthalmologist on call, it was incumbent upon Dr. Dinowitz to immediately come to the hospital to evaluate and manage plaintiff's ocular emergency. He stated that had Dr. Dinowitz done so, plaintiff would still have been within the time window to perform treatment to substantially improve his chances of recovering some vision. Plaintiff's ophthalmology expert opined that Dr. Dinowitz also failed to provide any guidance to the emergency department and Dr. Norton as to treatments that could help minimize damage to plaintiff's eye. He stated that Dr. Dinowitz should have instructed Dr. Norton to perform an ocular massage while he was on his way to the hospital.

Plaintiff's ophthalmology expert also opined that Dr. Norton deviated from the standard of care by failing to provide an ocular massage despite knowing of the treatment and believing that plaintiff was suffering from CRAO. He stated that because the CTA confirmed that there was no bleeding, plaintiff had a clot. Therefore, had Dr. Norton performed the ocular massage to break up the clot, his chances for recovery would have substantially increased. The expert opined that Dr. Norton's failure to perform the interventions decreased Mr. Algieri's chances for recovery and that without them the plaintiff "has been left with a severe and permanent visual deficit".

Plaintiff's ophthalmology expert concluded that the emergency room department, Dr. Norton, and Dr. Dinowitz allowed plaintiff's condition to completely deteriorate and failed to provide any treatment at all to mitigate the permanent damage occurring in his left eye. He further opined that to permit this progression without treatment was a deviation from good and accepted medical practice and was a proximate cause of plaintiff's permanent loss of vision in his left eye.

By his affirmation, plaintiff's emergency medicine expert opined that he is board certified in emergency medicine and that he reviewed medical records and the deposition testimony of the parties. He opined within a reasonable degree of medical certainty that Dr. Norton and PBMC departed from good and accepted medical practice in their treatment of plaintiff, and that such medical care was a proximate cause of his injuries. Specifically, he opined that Dr. Norton and PBMC failed to timely perform therapeutic measures and failed to timely obtain an in-person ophthalmology consultation, and that these failures materially decreased plaintiff's chance for restoration of his vision.

Plaintiff's emergency medicine expert opined that therapeutics increase a patient's chance of vision recovery and that without therapeutics, a patient's chance of vision recovery is "generally zero." He stated that to do nothing falls below the standard of care, as patients must be given a chance to recover some or all of their lost vision. He stated that while success is not guaranteed, physicians must

provide all treatments to maximize a patient's chance of recovery. Plaintiff's emergency medicine expert opined that therapies used in the treatment of CRAO include carbogen inhalation, acetazolamide, ocular massage and paracentesis, and tPA. He stated that an ocular massage is like CPR for the eye and should be performed by every emergency medicine physician whose differential diagnosis includes CRAO. He also stated that the other therapies must be performed by a ophthalmologist. Plaintiff's emergency medicine expert opined that while there is no definitive consensus as to the time frame in which to treat CRAO, the suggested time period is approximately six hours for the suggested treatments. He stated that the earlier a patient is treated for vision loss, the better the expected outcome. He explained that as Dr. Norton saw plaintiff approximately 12:43 a.m. to 1:00 a.m. and called Dr. Dinowitz between 1:00 a.m. and 2:00 a.m., both physicians were well within the six-hour time frame to perform all the suggested treatments to minimize permanent injury to plaintiff's eye.

Plaintiff's emergency medicine expert opined that Dr. Norton deviated from good and accepted medical practice by failing to perform an ocular massage, which she knew of and was trained to perform as a emergency medicine physician. He stated that plaintiff's chances for recovery would have substantially increased had Dr. Norton performed an ocular massage. Plaintiff's emergency medicine expert also opined that it was incumbent upon Dr. Norton to advise and insist that Dr. Dinowitz come to the hospital immediately to treat plaintiff's eye, and to perform an ocular massage while waiting for Dr. Dinowitz. He explained that if Dr. Dinowitz still refused to come to the hospital, Dr. Norton was required to urgently contact the chief of ophthalmology, chief of emergency services, or chief of surgery to have them convince Dr. Dinowitz to come to the hospital. He continued that if those measures were still unsuccessful, Dr. Norton had the responsibility to ask that the plaintiff be transferred to the nearest hospital with the necessary emergency specialty services available. The emergency medicine expert stated that failure to do the foregoing was a deviation from the standard of care.

Plaintiff's emergency medicine expert opined that the emergency room department, Dr. Norton, and Dr. Dinowitz allowed plaintiff's condition to progressivly deteriorate, as his vision was blurry upon arrival to PBMC, blotchy at 5:00 am, and only a pin hole of light when discharged at 8:30 a.m. He stated that to permit plaintiff's vision to continually decrease and to not provide any treatment to mitigate his progressive loss of vision was a deviation from good and accepted medical practices, and a proximate cause of his permanent loss of vision. He concluded that had timely interventions been performed early in plaintiff's presentation and prior to progression of complete vision loss, his chances for recovery would have substantially increased.

As plaintiffs' experts described the applicable standards of care under the circumstances, how Dr. Dinowitz, East End Eye Associates, Dr. Norton, and PBMC departed or deviated from the applicable standards of cares, and that these departures were the proximate causes of plaintiff's injuries, their affirmations are sufficient to raise triable issues of fact (*see* ***Joynes v Donatelli***, *supra*; ***Larcy v Kamler***, *supra*; ***M.C. v Huntington Hosp.***, 175 AD3d 578, 106 NYS3d 382 [2d Dept 2019]; ***Memoli v Winthrop-University Hosp.***, 147 AD3d 931, 47 NYS3d 128 [2d Dept 2017]). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred and whether such departure was a proximate cause of the alleged injuries, an order granting summary judgment is not appropriate as to Dr. Dinowitz, East End Eye Associates, Dr. Norton, and PBMC (*see* ***Rich v Donnenfeld***, 138 NYS3d 381, 2021 NY Slip Op 01078 [2d Dept 2021];

Jagenburg v Chen-Stiebel, *supra*). In opposition, the affirmations of plaintiffs' attorney and experts failed to substantively address the prima facie showing made by Dr. Soohoo. Therefore, the complaint is dismissed as asserted against Dr. Soohoo.

East End Eye Associates and PBMC failed to establish entitlement to summary judgment dismissing the cause of action for negligent hiring against them, as their submissions and the affirmation of their attorney failed to address the allegation. Having determined that they failed to meet their prima facie burden as to the cause of action for negligent hiring, it is unnecessary to consider whether plaintiff's papers in opposition are sufficient to raise a triable issue of fact as to that specific issue (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by Dr. Dinowitz and East End Eye Associates is denied. The motion by Dr. Norton, Dr. Soohoo, and Peconic Bay Medical Center is granted to the extent of dismissing the complaint as asserted against Dr. Soohoo, and is otherwise denied.

The unredacted affirmations of plaintiffs' medical experts submitted for in camera review will be returned by mail to plaintiffs' counsel.

Dated: APR 07 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**