

**St. Fleur v Union Health Ctr.**

2022 NY Slip Op 30633(U)

February 28, 2022

Supreme Court, New York County

Docket Number: Index No. 805166/2018

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 56M

Justice

ELDA ST. FLEUR, Plaintiff, INDEX NO. 805166/2018, MOTION DATE 11/17/2021, MOTION SEQ. NO. 002

- v -

UNION HEALTH CENTER, QUEST DIAGNOSTICS INCORPORATED, and SOUSSAN AYOUBCHA, M.D.,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97 were read on this motion to/for JUDGMENT - SUMMARY

In this action to recover damages for medical malpractice, premised upon the reporting of a false positive blood test for HIV/AIDS, Union Health Center, Inc. (UHC), incorrectly sued herein as Union Health Center, and Soussan Ayubcha, M.D., incorrectly sued herein as Soussan Ayoubcha, M.D., together move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed insofar as asserted against the movants.

The plaintiff had been a patient at UHC since January 26, 2012. On March 30, 2016, Ayubcha assumed her care. On September 19, 2017, Ayubcha examined the plaintiff, ordered laboratory tests and bloodwork, and referred the plaintiff to Quest Diagnostics Incorporated (Quest) on September 19, 2017 so that she could have her blood drawn. The results of that blood test reported that the HIV-1/2 AG/AB 4th Generation Reflex test was repeatedly reactive, but the HIV-1/2 Antibody Differentiation assay results from the same sample reported that she was negative. Consequently, the laboratory performed an HIV-1 RNA test, which was negative, documenting no laboratory evidence of HIV infection.

After receiving these results from Quest, Ayubcha prepared correspondence, dated September 21, 2017, to inform the plaintiff that she wished to discuss them. On September 29, 2017, the plaintiff called UHC to schedule a follow-up visit with Ayubcha to discuss the blood test results. At the October 3, 2017 consultation, Ayubcha advised the plaintiff that, although the initial reflex test was repeatedly reactive, the RNA test was negative and that she ultimately was HIV negative. Ayubcha had planned to arrange for the plaintiff to undergo repeat testing in one month, three months, and six months. The plaintiff followed up with Ayubcha on March 9, 2018 and discussed the prior false positive blood test at length. On March 9, 2018, the plaintiff had her blood drawn at Quest, and the results revealed that, this time, the HIV-1/2 AG/AB 4th Generation Reflex test was nonreactive. On March 15, 2018, Ayubcha discussed the test results with the plaintiff, informing her that she was HIV negative.

The crux of the plaintiff's claim is that the reporting of the initial positive HIV reflex test result arose from Quest's malpractice in performing the test, and that Ayubcha and UHC departed from good and accepted medical practice when they negligently informed the plaintiff that she was HIV positive when, in fact, she was not.

In support of their motion, the movants submit the pleadings, the plaintiff's bills of particulars, medical records, transcripts of the parties' depositions, and the expert affirmation of Irwin Ingwer, M.D., a physician board-certified in internal medicine and treatment of infectious diseases.

Dr. Ingwer opined that "the care and treatment rendered to Elda St. Fleur by Dr. Ayubcha and Union Health Center were in accordance with the accepted standards of medical practice and [were] not a proximate cause of the alleged injuries of the plaintiff." Specifically, he averred that the movants acted within the applicable standard of care by disclosing to the plaintiff her false positive HIV result, explaining that other tests performed at the same time were negative, and formulating a plan for follow-up testing to confirm her HIV status. As he explained it:

"Ayubcha acted appropriately by sending correspondence to the plaintiff to discuss the test results as discussing HIV false positives are better suited in face to face communications due to the complicated nature of explaining false positives.

"It is my opinion that on October 3, 2017, Dr. Ayubcha appropriately disclosed to the plaintiff that she had initially tested repeatedly reactive with respect to the HIV-1/2 AG/AB4th Generation Reflex test, but that the HIV-1 RNA test was negative.

"HIV false positives occur in 0.04% of HIV testing. The fact that the plaintiff's HIV-1/2 AG/AB 4th Generation Reflex test was repeatedly reactive, was not a deviation in the standard of care."

He continued that Ayubcha's follow-up plan for testing in one month, three months, and six months was within the standard of care because Ayubcha wanted to ensure that the plaintiff was HIV negative, and remained so in those time periods. Dr. Ingwer further opined that there was no causal link between the care rendered by Ayubcha and Union Health Center and the plaintiff's alleged injuries of confusion and severe emotional distress, as there was no deviation from the standard of care by Ayubcha or Union Health Center.

In opposition to the motion, the plaintiff submitted medical records, deposition transcripts, her attorneys' affirmation, and her own affidavit. In her own affidavit, the plaintiff essentially asserts that Ayubcha did not properly explain the results of all of the various HIV tests and, thus, led her to believe that she was HIV positive when she was in fact HIV negative. She does not submit an expert affirmation or affidavit from a physician or health-care provider setting forth why Ayubcha's explanations, or at least the plaintiff's version of them, deviated or departed from good and accepted medical practice. Nor does she submit an expert affirmation or affidavit explaining how such a deviation caused or contributed to her injuries.

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 his or her 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 his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her 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]).

“To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury” (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable

issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (see *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; see generally *Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (see *Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id.*, quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (see *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (see *Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a

matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains “[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice” (*Alvarez v Prospect Hosp.*, 68 NY2d at 325; see *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff’s injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant’s favor (see *Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Where the expert’s “ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; see *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24).

“Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause” (*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 551 [2d Dept 2018], quoting *Burns v Goyal*, 145 AD3d 952, 954 [2d Dept 2016]). Thus, where a moving defendant in a medical malpractice action makes a prima facie showing that he or she did not depart from good and accepted practice, or that the treatment rendered to the plaintiff did not cause or contributed to the plaintiff’s injuries, the plaintiff, to defeat summary judgment, must submit an expert affirmation or affidavit in opposition; a plaintiff’s failure to submit such an expert affirmation or affidavit under such circumstances requires the court to award summary judgment to the moving defendant (see *Bethune v Monhian*, 168 AD3d 902, 903 [2d Dept 2019]; *Koster v Davenport*, 142 AD3d 966, 969 [2d Dept 2016]; *Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 497 [2d Dept 2016]; *Roques v Noble*, 73 AD3d at 207; *Bailey v Owens*, 17 AD3d 222, 223 [1st Dept 2005]; cf. *Williams v Sahay*, 12 AD3d at 368 [unsworn affidavit of unnamed expert that was not affirmed under the penalties for perjury is insufficient to raise triable issue of fact as to defendants’ alleged malpractice]).

Contrary to the plaintiff's contention, the fact that the movants supported their summary judgment motion with the affirmation of an expert who had not yet been disclosed when the plaintiff filed her note of issue on July 22, 2021 does not require this court to ignore that affirmation.

"CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time (see *LaMasa v Bachman*, 56 AD3d 340, 869 NYS2d 17 [1st Dept 2008]). [E]ven where one party requests trial expert disclosure during discovery pursuant to CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony"

(*Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439, 440 [1st Dept 2013], quoting *Rivers v Birnbaum*, 102 AD3d 26, 36-37 [2d Dept 2012]). Prior to 2015, it was clear that a motion court had discretion to consider or ignore an expert affirmation submitted in connection with a summary judgment motion where (a) the expert had not been disclosed prior to the submission of the motion or the filing of the note of issue or (b) prior discovery orders had directed that disclosure by a date certain (see *DeSimone v City of New York*, 121 AD3d 420, 421 [1st Dept 2014]; *Rivers v Birnbaum*, 102 AD3d at 39-43). In 2015, the Legislature amended CPLR 3212(b) to provide that

"[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, *the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit*"

(CPLR 3212[b]; L 2015, ch 529 [emphasis added]). Despite this amendment, at least one court has concluded that a motion court still has discretion to ignore such an expert affirmation on a summary judgment motion as a sanction for a party's failure to provide a CPLR 3101(d) expert exchange within the time frame set forth in prior discovery orders (see *Theroux v Resnicow*, 72 Misc 3d 654, 659-660 [Sup Ct, N.Y. County 2021]; cf. *Cruz v 1142 Bedford Ave., LLC*, 192 AD3d 859, 863 [2d Dept 2021] [suggesting that, notwithstanding CPLR 3212(b), a motion court

retains discretion to consider or ignore expert affirmation where expert was not disclosed prior to filing of note of issue]).

To the extent this court retains discretion to consider or ignore the movants' expert affirmation, it exercises its discretion and considers that affirmation.

Based on all of their submissions, the movants established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not deviate or depart from good and accepted medical practice and that any care, treatment, and advice that they rendered to the plaintiff did not cause or contribute to any claimed injuries. Since the plaintiff did not oppose the motion with an expert affirmation or affidavit, she has failed to raise a triable issue of fact in opposition to the movants' showing. Hence, the motion for summary judgment must be granted.

The court further notes that, in opposition to the defendants' motion, the plaintiff failed timely to submit a statement of contested material facts, as required by 22 NYCRR 202-8-g(b), which provides that

“the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.”

As further set forth in the Rules of Court,

“[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party”

(22 NYCRR 202.8-g(c)). The plaintiff served the required statement subsequent to the movants' service of their reply affirmation and, thus, in an untimely fashion. The plaintiff did so without requesting the court to extend her time pursuant to CPLR 2001 and 2004. Although the court may, in its discretion, overlook the defects in the plaintiff's papers in this regard (*see Mackins v City of New York*, 2021 NY Slip Op 32440[U], 2021 NY Misc LEXIS 6031, \*8-9 [Sup Ct, N.Y.

County, Nov. 24, 2021)), in light of this court's determination on the merits of the motion, it is irrelevant whether the movants' statement of material facts was admitted or not.

In light of the foregoing, it is

ORDERED that the motion of the defendants Union Health Center and Soussan Ayoubcha, M.D., for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against Union Health Center and Soussan Ayoubcha, M.D.; and it is further,

ORDERED that the action is severed against the defendants Union Health Center and Soussan Ayoubcha, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the defendants Union Health Center and Soussan Ayoubcha, M.D., and against the plaintiff, dismissing the complaint insofar as asserted against the defendants Union Health Center and Soussan Ayoubcha, M.D.

This constitutes the Decision and Order of the court.

2/28/2022  
DATE

  
JOHN V. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT