

Siu-Sun Yao v Punsal
2022 NY Slip Op 31114(U)
February 10, 2022
Supreme Court, Nassau County
Docket Number: Index No. 611625/2018
Judge: Leonard D. Steinman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**SIU-SUN YAO, by his attorney-in-fact,
WENDY WEI-YUE LOU (a/k/a WENDY
LOU), and WENDY WEI-YUE LOU (a/k/a
WENDY LOU), Individually,**

**IAS Part 7
Index No. 611625/2018
Mot. Seqs. 001-002**

Plaintiffs,

-against-

DECISION AND ORDER

**REYNALDO M. PUNSAL, M.D., PHILIPP J.
UNDERWOOD, M.D., CLAIRE E. CARRAZCO,
M.D., ROHAN ARORA, MBBS, CLAUDIA
FRANCOISE EVE KIRSCH, M.D., AVI SETTON,
M.D., NORTH SHORE UNIVERSITY HOSPITAL
AT SYOSSET, NORTH SHORE UNIVERSITY
AT MANHASSET, and NORTHWELL HEALTH,
INC.,**

Defendants.

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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts submitted by the parties, were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmations & Exhibits.....	1
Plaintiff's Notice of Cross-Motion, Affirmation & Exhibits.....	2
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In this medical malpractice action, plaintiff Siu-Sun Yao claims damages as a result of alleged improper and negligent diagnostic assessment and treatment following the onset of a stroke. Wendy Wei-Yue Lou, Yao's wife, asserts a derivative claim for loss of services. Defendants now move for summary judgment pursuant to CPLR 3212 dismissing the

complaint.¹ Plaintiffs cross-move to preclude the application of CPLR Article 16 by any remaining defendant should summary judgment be granted in a co-defendants' favor. For the reasons set forth below, defendants' motion is granted in part and denied in part and plaintiffs' cross-motion is granted.

FACTS

On March 5, 2016, Yao experienced right-sided weakness and aphasia. He was transported by ambulance from his home to Syosset Hospital where he was evaluated by Dr. Reynaldo Punsal, an emergency department attending physician. Dr. Punsal initiated a "stroke code" and Yao underwent a non-contrast head CT. The hospital radiologist determined that there was "no acute intracranial pathology." Dr. Punsal's impression of Yao was an acute cerebrovascular accident ("CVA"). Within 32 minutes of Yao's arrival to Syosset Hospital, Dr. Punsal administered tissue plasminogen activator (tPA), a medication to dissolve blood clots, and ordered that Yao be transferred to North Shore University Hospital (North Shore) -- a designated stroke center -- for further stroke management and intervention. Ms. Lou provided her written consent for the tPA.

Upon arrival at North Shore, Yao was evaluated by emergency department attending physician Dr. Phillip Underwood and neurology stroke team resident Dr. Claire Carrazco, who assessed Yao's NIH stroke scale at 16 due to partial paralysis of the face, no effort of the right arm or leg against gravity, global aphasia and dysarthria. Within 15 minutes, Yao underwent a second non-contrast head CT as well as a CTA of his head and neck, with contrast. The radiological studies were reviewed by neuroradiology attending physician Dr. Claudia Kirsch and compared to the study performed at Syosset Hospital. Dr. Kirsch interpreted the CT as revealing a loss of gray-white distinction along the left frontal lobe [of the brain], which caused concern for a new evolving area of "ischemic" change.² The CTA

¹ Plaintiffs discontinued their claims against defendants Philipp J. Underwood, M.D., Reynaldo M. Punsal, M.D. and North Shore University Hospital d/b/a Syosset Hospital by stipulations dated January 31, 2019 and October 8, 2020.

² Ischemia is a restriction in blood supply.

of the head/neck with contrast revealed that major portions of the middle cerebral artery (MCA) were open, with a blockage in the smaller branches of the MCA (in the "distal M3").

Following the radiological studies, a three-way telephone conference was held between Dr. Kirsch, vascular neurology stroke attending physician Dr. Arora and neurointerventional radiology attending physician Dr. Avi Setton, during which it was determined that Yao was not a candidate for endovascular intervention.³

At his deposition, Dr. Setton testified that endovascular intervention was not indicated because Yao had no large vessel intracranial occlusion. Rather, the extracranial aspect of Yao's left internal carotid artery was blocked, with proximal branches of the left MCA (M1, M2 and the proximal portion of M3) open. Dr. Kirsch testified that endovascular treatment could have worsened Yao's condition. For example, going through an open vessel risks dissection of that vessel, which would kill the patient. Dr. Arora's notes reflect that Ms. Lou was informed that Yao was not a candidate for endovascular intervention due to "less likelihood of benefit of revascularization and high level of risk in attempting the procedure."

Dr. Arora set forth a plan for admission to the neurological ICU, repeat CT and MRI/MRA imaging in 24 hours to assess the evolution of the stroke, permissive hypertension and no anticoagulation for 24 hours. Dr. Arora recommended close following by neurosurgery to assess the anticipated eventual need for decompressive craniectomy.

At approximately 8:30 p.m. that same day, Yao was admitted to North Shore's neurological ICU. The following day, the repeat CT revealed evolution of Yao's left MCA infarction. The MRA revealed resolution of the extracranial left internal carotid artery occlusion. Mr. Yao underwent left decompressive craniectomy to address worsening cerebral edema and to prevent herniation.

On March 7, a post-operative CT revealed a subdural hematoma which required surgical evacuation. Yao remained at North Shore until March 29, 2016. To date, Yao suffers from aphasia.

³ Surgical intervention to remove a thrombus or blood clot from inside a blood vessel.

The crux of plaintiff's claims against defendant physicians is that they failed to timely and properly recognize that Yao was a candidate for endovascular intervention and perform such treatment. As against North Shore and Northwell Health, Inc.⁴, plaintiffs claim that they are vicariously liable for the negligence of the defendant physicians.

LEGAL ANALYSIS

Defendants' Summary Judgment Motion

A defendant seeking summary judgment in a medical malpractice action must make a *prima facie* showing either that he or she did not depart from the accepted standard of care or that any alleged departure was not a proximate cause of the plaintiff's injuries. *Keane v. Dayani*, 178 A.D.3d 797 (2d Dept. 2019); *see also B.G. v. Cabbad*, 172 A.D.3d 686, 687 (2d Dept. 2019). "In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's [complaint and] bill of particulars." *Wall v. Flushing Hosp. Med. Ctr.*, 78 A.D.3d 1043, 1045 (2d Dept. 2010). "Conclusory statements set forth in an affirmation of a medical expert which do not rebut or address the specific allegations of negligence made by the plaintiff in his or her complaint and bill of particulars are insufficient to make a *prima facie* showing that a defendant is entitled to summary judgment as a matter of law (citations omitted)." *Bender v. Rajpal*, 101 A.D.3d 662, 663 (2d Dept. 2012); *cf. Forrest v. Tierney*, 91 A.D.3d 707, 709 (2d Dept. 2012).

A failure to make a *prima facie* showing necessitates a denial of the motion, regardless of the sufficiency of the opposing party's papers. *Lee v. Second Ave. VII Partners*, 100 A.D.3d 601 (2d Dept. 2012), *citing Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986), *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

⁴The parent corporation of Syosset Hospital and North Shore.

“In order to establish the liability of a physician for a medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such a departure was a proximate cause of the plaintiff’s injuries.” *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 902 (2d Dept. 2012), quoting *Stukas v. Streiter*, 83 A.D.3d 18, 23 (2d Dept. 2011). “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.” *Gaspard v. Aronoff*, 153 A.D.3d 795, 797 (2d Dept. 2017), citing *Goldberg v. Horowitz*, 73 A.D.3d 691 (2d Dept. 2010); *Johnson v. Jamaica Hosp. Med. Ct.*, A.D.3d 881, 883 (2d Dept. 2005). Conflicting expert opinions supported by facts in the record are sufficient to raise an issue of fact regarding medical malpractice. *Hayden v. Gordon*, 91 A.D.3d 819 (2d Dept. 2012). But those opinions may not be couched in general or conclusory language.

In support of their motions, defendants submit, among other things, the expert affirmations of Joseph Jeret, M.D., a board-certified neurologist, Dr. Thomas Klie, D.O., board-certified in emergency medicine and Sudipta Roychowdhury, M.D., a board-certified radiologist who currently holds an appointment as an attending diagnostic and interventional neuroradiologist.

Regarding Dr. Kirsch and Dr. Setton, it is undisputed that Dr. Kirsch’s involvement was limited to interpreting CT and CTA scans performed upon Yao’s arrival to North Shore, comparing her findings with those of the radiological studies performed at Syosset Hospital and participating in the three-way telephone discussion with Dr. Setton and Dr. Arora. Dr. Setton also reviewed these images for purposes of participating in the multidisciplinary call.

Based on an independent review of the radiological studies performed on Yao at Syosset and North Shore, Dr. Roychowdhury opines that Dr. Kirsch appropriately interpreted the CT and CTA scans. Specifically, with respect to the non-contrast CT performed at North Shore, Dr. Roychowdhury asserts that it revealed loss of gray-white distinction along the left frontal lobe which caused concern of an ischemic change that was not present on the CT at Syosset, which is consistent with Dr. Kirch’s findings. Despite plaintiffs’ claims, Dr.

Roychowdhury asserts that it was not the standard of care in 2016 to document an ASPECTS score on a radiology report.

Further, with respect to the CTA, Dr. Roychowdhury reports that it revealed an occluded extracranial left internal carotid artery from a dissection, consistent with Dr. Kirsch's interpretation. According to Dr. Roychowdhury, Yao was not a candidate for endovascular intervention "given the lack of a large vessel intracranial occlusion and the fact that the proximal vessels of the MCA (M1 and M2) were open...."

Dr. Roychowdhury concludes that the care rendered by Dr. Kirsch and Dr. Setton was in accordance with good and accepted neuroradiology practice and did not cause or exacerbate Yao's injuries.

Dr. Jeret asserts that the standard of care as it existed in 2016 was for tPA to be administered to patients who are candidates for the medication within 4.5 hours from symptom onset. According to Dr. Jeret, Yao did not present with any contraindications to tPA. Dr. Jeret asserts that the only treatment available to address Yao's acute ischemic stroke was tPA, which was done in the appropriate time frame.

Dr. Jeret asserts that Yao was not a candidate for endovascular intervention because,

1) he had no large vessel *intracranial* occlusion (emphasis added); (2) intervention to retrieve clots is not performed on the M3 segment of the MCA as current devices as well as the devices in 2016 often cannot reach this location of the brain; (3) even if one were to attempt to retrieve a clot in the M3 segment, the physician would have to enter through a dissected and occluded vessel with the very real risk that a clot can embolize during this process and compromise the open M1 and M2 vessels or the internal carotid artery could rupture, thereby making the patient's stroke much worse; and (4) even if one were to attempt to stent the extracranial carotid (which is not standard of care) the patient would then require immediate anticoagulation with anti-platelet therapy which would increase risk for hemorrhagic transformation of the stroke and also would complicate a decompressive craniectomy if one became necessary for the development of malignant cerebral edema.

Jeret Aff. at ¶ 37.

Further, Dr. Jeret opines that there was no indication to perform an MRI while Yao was in the emergency department at North Shore, given the length of time required to

complete the study and the fact that the results would not have affected his immediate care. Dr. Jeret asserts that the standard of care is to perform an MRI within 24 hours of presentation to assess for evolution of the stroke, which was done in this case.

According to Dr. Jeret, Dr. Arora's determination that Yao was not a candidate for endovascular intervention was in accordance with good and accepted standards of care for the same reasons discussed above.

Dr. Jeret notes that Dr. Carrazco was a second-year neurology resident operating under the supervision of her attending, Dr. Arora, at the time of this incident. It is undisputed that Dr. Carrazco's substantive clinical involvement with Yao's care was limited to performing an initial neurological assessment upon his arrival to North Shore and assisting Dr. Arora in his performance of a telephone consultation. Dr. Jeret opines that Dr. Carrazco properly carried out the directives of Dr. Arora.

Based on his review of the evidence and underlying medical records, Dr. Jeret opines that Dr. Arora, Dr. Carrazco and North Shore's neurology staff members rendered treatment to Yao in accordance with good and accepted standards of medical practice and did not cause, contribute or exacerbate his injuries.

Defendants have set forth a *prima facie* case for dismissal. Their experts have set forth in fact-specific terms the basis of their conclusions that the defendants satisfied the standard of care applicable to the roles of each physician.

In opposition, plaintiffs submit the expert affirmations of two board-certified neurologists.⁵ Both experts opine that defendants Drs. Arora and Setton deviated from the standard of care in failing to recommend and/or perform an endovascular intervention, which was the proximate cause of Yao's left middle cerebral artery stroke. These experts assert that the standard of care in 2016 required endovascular intervention within 6 hours of onset of stroke symptoms if tPA was unsuccessful and occlusion persisted. According to the experts, Yao presented with both extracranial *and* intracranial occlusions, which could have been

⁵ The names of the experts are redacted, however, plaintiffs submitted unredacted versions to the court and defendants for review.

readily addressed surgically. The experts note that Yao did not have any contraindications to endovascular intervention as an ischemic stroke patient. Further, the experts assert that the treating physicians deviated from the standard of care in failing to discuss endovascular intervention options with Ms. Lou. The experts opine that the failure to perform endovascular intervention was the proximate cause of Yao's severe stroke.

Plaintiffs' submissions sufficiently create an issue of fact with respect to whether Dr. Arora and Dr. Setton deviated from the standard of care in failing to recommend and/or perform endovascular intervention. Therefore, summary judgment as to those defendants is denied. It follows that vicarious liability claims against North Shore and Northwell⁶ survive. *See Muslim v. Horizon Medical Group, P.C., et al.*, 118 A.D.3d 681 (2d Dept. 2014).

With respect to Dr. Kirsch, plaintiffs fail to rebut her *prima facie* showing of entitlement to summary judgment as they neither proffered an opinion of an expert within the field of neuroradiology nor did plaintiffs' experts lay a proper foundation to support the reliability of their opinions regarding that specialty and applicable standards of care. *See DiLorenzo v. Zaso*, 148 A.D.3d 1111 (2d Dept. 2017). Accordingly, summary judgment is granted in Dr. Kirsch's favor and all claims asserted against her are dismissed.

No arguments are advanced in opposition to Dr. Carrasco's motion. Therefore, summary judgment is granted as to Dr. Carrasco.

Plaintiffs' Cross-Motion

CPLR 1601(1) limits the liability that can be imposed upon a defendant that is jointly and severally liable for noneconomic loss in instances where that defendant's liability is found to be 50% or less of the total liability assigned to all persons liable. Under those circumstances, the joint and several liability of such a defendant shall not exceed his or her proportionate share of the total liability for the noneconomic loss. *See generally Rangolan v. County of Nassau*, 96 N.Y.2d 42 (2001).

⁶ Defendants contend that Northwell is not a proper party to this action. However, nowhere in the affidavit of Avraham Z. Schwartz, Vice President of Risk Management of Northwell, is it alleged that the remaining defendant physicians are not employees of Northwell. Therefore, Northwell has failed to sufficiently establish that it cannot be held liable for the acts or omissions of these defendants.


Here, plaintiffs contend that the remaining defendants should be precluded from obtaining the benefits of CPLR Article 16 as those benefits pertain to the acts or omissions of a defendant who was granted summary judgment. Indeed, summary judgment is the functional equivalent of a trial. *Drooker v. South Nassau Communities Hospital*, 175 Misc.2d 181 (Sup. Ct., Nassau Cty 1998). As a result, the limited liability benefits for the remaining defendants under CPLR Article 16 are forfeited as to the co-defendants who have been awarded summary judgment in their favor. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251 (2d Dept. 2012). Therefore, plaintiffs' cross-motion is granted.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: February 10, 2022
Mineola, New York

ENTER:



LEONARD D. STEINMAN, J.S.C.

ENTERED

Feb 16 2022

NASSAU COUNTY
COUNTY CLERK'S OFFICE