

<b>Pabon v New York City Health &amp; Hosps. Corp.</b>
2022 NY Slip Op 32027(U)
June 27, 2022
Supreme Court, New York County
Docket Number: Index No. 805406/2016
Judge: Erika Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 10M

*Justice*

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ELVIN PABON,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION, THE CITY OF NEW YORK, BELLEVUE  
HOSPITAL CENTER AND PAUL P. HUANG M.D.,

Defendants.

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INDEX NO. 805406/2016MOTION DATE 01/21/2020MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 78

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court grants Defendants New York City Health and Hospitals Corporation's ("NYCHHC") and Paul P. Huang, M.D.'s ("Dr. Huang") motion for summary judgment and the court dismisses Plaintiff Elvin Pabon's ("Plaintiff") complaint as against Defendants NYCHHC and Dr. Huang.

Plaintiff brought this medical malpractice and lack of informed consent action against Defendants NYCHHC, The City of New York, Bellevue Hospital Center and Dr. Huang (collectively "Defendants").<sup>1</sup> Plaintiff alleged in substance that Defendants departed from accepted standards of care in their performance of a cervical fusion and laminectomy on Plaintiff on March 21, 2016, and their failure to implement a proper discharge plan. More specifically, Plaintiff alleges in substance that Defendants failed to discharge him to a rehabilitation center and failed to develop a proper discharge plan for him when they knew that he was homeless and

<sup>1</sup> Defendants The City of New York and Bellevue Hospital Center are no longer parties in this action.

required additional care and services. Plaintiff further alleges that Defendants failed to assess his cognitive abilities and impairment and his post-discharge needs for further care. Plaintiff further alleges in substance that Dr. Huang negligently performed and ordered a cervical laminectomy and instrumentation procedure and follow-up care and failed to obtain Plaintiff's informed consent. Plaintiff further alleges that Defendants' departure caused his injuries, which included complications from the surgery requiring a two-stage revision surgery in the summer of 2016.

Defendants NYCHHC and Dr. Huang now move under motion sequence 001 for summary judgment dismissal of Plaintiff's complaint. Defendants NYCHHC and Dr. Huang rely on the expert affirmation of Dr. Martin Zonenshayn, who opined that the care and treatment provided by Defendants NYCHHC and Dr. Huang was at all times within accepted medical practice and was not a proximate cause of Plaintiff's alleged injuries. Defendants NYCHHC and Dr. Huang further argue that on multiple occasions Plaintiff was advised, orally and in writing, of the benefits, alternatives and risks of the procedure, including that the potential for instrumentation failure and the need for further procedures. Defendants NYCHHC and Dr. Huang further argue in substance that Plaintiff suffered known and accepted complications of the surgery, likely because he continued smoking, was non-compliant with his discharge instructions and he failed to appear for his follow up appointments and treatment.

Additionally, Defendants NYCHHC and Dr. Huang argue in substance that Plaintiff was not a candidate for admission to a rehabilitation facility, that he had no medical need for rehabilitation and he refused to be discharged to a shelter. They further argue that Plaintiff abandoned his claims for lack of informed consent and causation by not adequately addressing them in his expert affidavit and that his claims regarding his need for rehabilitation was because he was homeless and not because he had a medical need. Medical personnel from multiple

disciplines cleared Plaintiff for discharge three days before he was actually discharged. They further argue in substance that Dr. Huang used his best judgment and chose to perform the operation utilizing the posterior approach.

Plaintiff opposes the motion and relies on his expert affidavit from Dr. John Czerwein. Plaintiff argues in substance that Defendants' expert failed to allege that Plaintiff's discharge plan was appropriate because they knew that he refused to go to the shelter system, that he was homeless and would be living on the streets and sleeping in the subways. Therefore, Plaintiff argues that his cervical fusion surgery was bound to fail because Plaintiff would not have the support that he needed to properly heal and recover. Plaintiff further argues that his infection was caused by Defendants' failure to implement a proper discharge plan and that when Plaintiff was finally discharged to a rehabilitation facility, he healed. Plaintiff argues that this proves that sending Plaintiff to a rehabilitation facility was the better choice.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the

injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the

defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1<sup>st</sup> Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, "a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and

alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff's) injuries" (*see* Public Health Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1<sup>st</sup> Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]).

Here, the court finds that Defendants NYCHHC and Dr. Huang made a prima facie showing that Defendants NYCHHC and Dr. Huang did not depart from good and accepted practice in their care and treatment of Plaintiff and that their actions or inactions were not the proximate cause of Plaintiff's alleged injuries. Plaintiff failed to raise a triable issue of fact and his expert failed to rebut Defendants NYCHHC's and Dr. Huang's expert opinions and arguments in support of dismissal. Additionally, the court finds that Plaintiff's expert's affidavit was conclusory and unsupported by the medical records or other evidence in the case.

Defendants NYCHHC and Dr. Huang demonstrated that they did not depart from good and accepted practice in their care and treatment of Plaintiff, including during the performance of the procedure, in Dr. Huang's decision to perform the operation utilizing the posterior approach, in their post-operative care and treatment of Plaintiff and in the manner in which they discharged Plaintiff without sending him to a rehabilitation facility. Defendants NYCHHC and Dr. Huang also demonstrated that people from multiple disciplines cleared Plaintiff for discharge to the community, that he was not a candidate for discharge to a rehabilitation facility, that there was no medical need to justify sending him to a rehabilitation center and that they worked with Plaintiff for an additional three days after he was cleared for discharge to arrange for a shelter, but Plaintiff refused to go.

Additionally, Defendants NYCHHC and Dr. Huang demonstrated that Plaintiff's informed consent was properly obtained prior to Dr. Huang's performance of the procedure, that Plaintiff's alleged injuries were known and accepted complications of the procedure and that such complications were fully explained to Plaintiff prior to the procedure. Furthermore, Plaintiff failed to rebut these claims and Defendants NYCHHC's and Dr. Huang's expert's opinions regarding causation.

Unfortunately, Plaintiff refused to go to a shelter upon his discharge and it appears that he was not in a position to comply with the discharge instructions and failed to appear for his follow-up treatment. As such, the court determines that Plaintiff's claims are better directed at the failures of the shelter and social services systems in New York City, which cannot be attributable to Defendants NYCHHC or Dr. Huang.

Therefore, the court grants Defendants NYCHHC's and Dr. Huang's summary judgment motion to dismiss Plaintiff's complaint.

The court has considered any additional arguments raised but not discussed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendants New York City Health and Hospitals Corporation's and Paul P. Huang, M.D.'s motion for summary judgment and the court dismisses Plaintiff Elvin Pabon's complaint as against Defendants New York City Health and Hospitals Corporation and Paul P. Huang, M.D.; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendants New York City Health and Hospitals Corporation and Paul P. Huang, M.D. as against Plaintiff Elvin Pabon, without costs to any party.

This constitutes the decision and order of the court.

*Erika M. Edwards*  
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6/27/2022

DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: