

**Leiman v White**

2022 NY Slip Op 32522(U)

July 26, 2022

Supreme Court, New York County

Docket Number: Index No. 805097/2016

Judge: Erika M. 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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MARISA LEIMAN,

Plaintiff,

- v -

CHARLES WHITE, DPM, SEAPORT ORTHOPAEDIC ASSOCIATES, P.C., HUDSON SPINE AND PAIN MEDICINE, P.C., NEW YORK-PRESBYTERIAN/LOWER MANHATTAN HOSPITAL, KATHLEEN DOHERTY, MD, ELVIRA VILLAFUERTE, MD, INGRID VOIGT, NAMITA KEDIA, MD and MARK GALLIGUEZ,

Defendants.

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INDEX NO. 805097/2016
MOTION DATE 11/15/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, the court grants in part Defendants The New York and Presbyterian Hospital s/h/a New York-Presbyterian/Lower Manhattan Hospital’s (“NYPH”), Kathleen Doherty, MD’s (“Dr. Doherty”), Elvira Villafuerte, MD’s (“Dr. Villafuerte”), Ingrid Voigt P.A. s/h/a Ingrid Voigt’s (“PA Voigt”), Namita Kedia, MD’s (“Dr. Kedia”) and Mark Galliguez P.A. s/h/a Mark Galliguez’s (“PA Galliguez”) (collectively, “Defendants”) summary judgment motion to dismiss Plaintiff Marisa Leiman’s (“Plaintiff”) complaint under motion sequence 001, to the extent that: (1) the court grants the portion of the motion seeking to amend the caption to delete the names of Dr. Kedia and PA Galliguez as defendants in this action, since Plaintiff previously discontinued the action against these two defendants; (2) the court denies as moot the portion of the motion seeking dismissal of Plaintiff’s complaint against Defendants Dr. Kedia and PA Galliguez; (3) the court denies as moot the portion of the motion seeking dismissal

of Plaintiff's lack of informed consent claims against all Defendants, as Plaintiff subsequently withdrew these claims; and (4) the court denies dismissal of Plaintiff's medical malpractice claims as against the remaining moving Defendants.

Plaintiff filed this medical malpractice and lack of informed consent action against Charles White, DPM, Seaport Orthopaedic Associates, P.C., Hudson Spine and Pain Medicine, P.C., and Defendants, however, Defendants Charles White, DPM and Seaport Orthopaedic Associates, P.C. failed to appear in this action. In a Stipulation, dated February 7, 2022, Plaintiff discontinued the action as against Defendants Dr. Kedia and PA Galliguez. Additionally, Plaintiff subsequently withdrew her lack of informed consent claims against all Defendants.

Plaintiff alleges that the remaining moving Defendants departed from accepted standards of medical practice by failing to diagnose and treat a sesamoid fracture in Plaintiff's left foot, which caused Plaintiff's pain and injuries to exacerbate, requiring surgical intervention and additional damages. Plaintiff further alleges in substance that on August 31, 2013, an overweight woman wearing heels stepped on the top of Plaintiff's left foot between her big toe and second toe, causing pain, bruising and swelling. On September 4, 2013, she went to NYPH's Emergency Department because she was having pain, swelling and bruising in her foot. Plaintiff further alleges that she advised PA Voigt that she had pain between her big toe and second toe and that there was more bruising and swelling in that area, however PA Voigt indicated that Plaintiff complained of pain between her 4<sup>th</sup> and 5<sup>th</sup> metatarsals. PA Voigt ordered an x-ray of Plaintiff's left foot, which was interpreted by Dr. Doherty who noted that there was "fragmentation of the lateral first metatarsal sesamoid, which could represent ununited ossification centers versus subacute fracture; recommend clinical correlation with site of pain, no other potential fractures or dislocations." Plaintiff was discharged and Plaintiff alleges that PA Voigt failed to instruct her to

stay off of her feet and failed to provide her with instructions regarding treatment of a fracture. Plaintiff returned to NYPH on November 13, 2013 because she still had pain in her foot. PA Galliguez ordered another x-ray, Dr. Doherty interpreted it and she indicated that there was no fracture. Dr. Kedia was the attending physician. Again, Defendants discharged Plaintiff without advising her to have no weight bearing and they did not advise her that she had a fracture which required immediate treatment by a specialist. However, Plaintiff was instructed to follow-up with the podiatry clinic.

Plaintiff further alleges that she was subsequently treated by Dr. Whitman on November 14, 2013, who x-rayed her foot and gave her pain medication. She was treated by Dr. White at Seaport Orthopaedic Associates, P.C., who examined Plaintiff's foot, ordered another x-ray and diagnosed Plaintiff with a left foot fibular sesamoid severe comminuted fracture with fragmentation, mal alignment of fragments. On December 24, 2013, he performed a sesamoid excision to remove the fractured sesamoid. On January 3, 2014, he performed a left foot incision and drainage. Plaintiff further alleges in substance that she suffered complex regional pain syndrome (CRPS), requiring her to be bed-ridden and to take pain medications, sympathetic nerve blocks, three spinal cord stimulator surgeries, physical therapy and other damages.

Defendants now move for summary judgment dismissal of Plaintiff's complaint and for deletion of their names from the caption under motion sequence 001. Defendants rely on the expert affirmations of Dr. Gerald S. Brody, Dr. Stephen Macknicki and Dr. Russell R. Caprioli and argue that Defendants did not deviate from accepted standards of medical practice and that Defendants alleged actions of inactions did not cause or contribute to Plaintiffs alleged injuries.

Defendants further argue that PA Voigt's and Dr. Villafuerte's treatment of Plaintiff on September 4, 2013 was within the standard of care and nothing that they did or failed to do

caused or contributed to Plaintiff's alleged injuries. Defendants argue in substance that based on PA Voigt's examination of Plaintiff, she had ecchymosis and tenderness over the 4<sup>th</sup> and 5<sup>th</sup> metatarsal heads, but no fracture or trauma in that area. Defendants argue that Plaintiff's discharge instructions advising her to take Ibuprofen, wear hard-soled shoes, to stay out of work for three days and follow-up with her primary care provider within seven days if she did not feel better, was appropriate and that there was no need to refer Plaintiff to a specialist. Defendants also argue that PA Voigt's error in writing that the injury was to the right foot instead of the left foot did not contribute to Plaintiff's alleged injuries.

Defendants further argue that Dr. Doherty's interpretations of Plaintiff's x-rays were appropriate and within the standard of care. Defendants argue that the x-rays did not reveal any fractures, dislocations or soft tissue injuries over Plaintiff's 4<sup>th</sup> and 5<sup>th</sup> metatarsal heads. Additionally, Dr. Doherty correctly noted a lateral 1<sup>st</sup> metatarsal sesamoid fragmentation and that it was appropriate for Dr. Doherty to consider ununited ossification centers versus a subacute fracture as differential diagnosis.

Defendants also argue that NYPH cannot be held liable because none of the Defendants deviated from the appropriate standard of care and they did not cause or contribute to Plaintiff's alleged injuries.

Defendants also argue that earlier diagnosis or treatment of the sesamoid fragmentation would not have prevented Plaintiff's need for the sesamoidectomy and that Plaintiff's alleged injury was not consistent with someone's heel stepping on the top of her foot. Additionally, Defendants argue there was no acute fracture of the sesamoid, but that Plaintiff was born with a genetic variant where the sesamoids developed with ununited ossification centers, meaning that there was a split of the sesamoids.

In reply, Defendants argue in substance that Plaintiff's expert is not qualified to offer opinions on New York's standards of emergency medicine or radiology practices and his opinions are speculative, conclusory and unsupported by the facts. Therefore, Defendants argue that Plaintiff failed to adequately oppose Defendants' prima facie entitlement to summary judgment and they failed to raise any issues of material facts.

Plaintiff opposes Defendants' motion and relies on the expert affirmation of Dr. Warren Hammerschlag. Plaintiff argues in substance that Defendants failed to establish their prima facie entitlement to summary judgment in their favor, or alternatively, that issues of fact exist. Also, Plaintiff argues that the court should deny Defendants' motion because they provided the court with incomplete hospital records which do not include Plaintiff's discharge papers and which were not certified.

Plaintiff argues in substance that Defendants deviated from accepted standards of medical practice in that PA Voigt failed to properly examine Plaintiff's 1<sup>st</sup> metatarsal; Dr. Doherty failed to report a comminuted fracture of the lateral sesamoid of Plaintiff's left foot after interpreting Plaintiff's x-rays; PA Voigt, Dr. Villafuerte and NYPH failed to diagnose, treat and advise Plaintiff that she had a comminuted fracture; they failed to provide her with proper discharge instructions, including that she should not weight bear; and they failed to advise her to immediately see a specialist in September 2013 for treatment of a comminuted fracture. Plaintiff further argues that such departures deprived Plaintiff of the substantial possibility that her fracture would heal without surgery and caused her injuries.

Additionally, Plaintiff argues in substance that questions of fact exist, including whether the x-rays taken on September 4, 2013 showed a comminuted fracture of the lateral sesamoid on Plaintiff's left foot and whether Plaintiff advised PA Voigt that she had pain between her big toe

and second toe, which was consistent with increased swelling and bruising in this area and consistent with the location where the woman stepped on the top of her foot. Plaintiff argues that PA Voigt incorrectly noted that Plaintiff complained of injuries to the area between her 4<sup>th</sup> and 5<sup>th</sup> metatarsals. Therefore, Plaintiff argues that Defendants experts failed to discuss Plaintiff's testimony regarding the correct location of her pain, swelling and bruising. Plaintiff further alleges that PA Voigt advised her that she had no fracture in that area, but that she had a fracture on the outside of her big toe, which was not where she was stepped on by the woman. After both visits to the emergency room, Plaintiff argues that she was not given any instructions on how to treat the fracture to the outside of her big toe and that she was told that she did not have a fracture in the area where she was experiencing pain.

Plaintiff further argues that Dr. Whitman and Dr. White, who both took x-rays, advised her that she had bone fragments, that she should not be walking and Dr. White advised her that she needed to have them removed immediately.

Plaintiff also argues that Dr. Villafuerte should be held responsible for PA Voigt's negligence as her supervising physician.

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 [1st 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 [5th 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]).

Here, the court finds that Defendants established prima facie evidence of their entitlement to summary judgment in their favor as a matter of law, however the court accepts the merits of Plaintiff's expert's opinions and finds that Plaintiff raised material issues of fact to be tried regarding her medical malpractice claims against the moving defendants. Such issues of fact include, but are not necessarily limited to, whether the remaining moving Defendants deviated from accepted standards of medical practice in their care and treatment of Plaintiff's left foot; whether the x-rays taken on September 4, 2013 showed a comminuted fracture of the lateral sesamoid on Plaintiff's left foot; whether Plaintiff complained of pain, swelling and bruising between her 1<sup>st</sup> and 2<sup>nd</sup> metatarsals or between her 4<sup>th</sup> and 5<sup>th</sup> metatarsals; whether Defendants' failed to diagnose and treat a comminuted fracture on Plaintiff's left lateral sesamoid or whether Plaintiff had a genetic variant in which she was born with an ununified ossification of the center of the sesamoid; and whether Defendants' actions or inactions caused or contributed to Plaintiff's sesamoidectomy and other alleged injuries and damages.

Therefore, the court denies dismissal of Plaintiff's medical malpractice claims against the remaining moving Defendants.

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

As such, it is hereby

ORDERED that the court grants in part Defendants The New York and Presbyterian Hospital s/h/a New York-Presbyterian/Lower Manhattan Hospital's, Kathleen Doherty, MD's,

Elvira Villafuerte, MD's, Ingrid Voigt P.A. s/h/a Ingrid Voigt's, Namita Kedia, MD's and Mark Galliguez P.A. s/h/a Mark Galliguez's summary judgment motion to dismiss Plaintiff Marisa Leiman's complaint under motion sequence 001, to the extent that:

(1) the court grants the portion of the motion seeking to amend the caption to delete the names of Namita Kedia, MD and Mark Galliguez P.A. s/h/a Mark Galliguez as defendants in this action;

(2) the court denies as moot the portion of the motion seeking dismissal of Plaintiff's complaint against Defendants Namita Kedia, MD and Mark Galliguez P.A. s/h/a Mark Galliguez, as Plaintiff discontinued the action against Namita Kedia, MD and Mark Galliguez P.A. s/h/a Mark Galliguez;

(3) the court denies as moot the portion of the motion seeking dismissal of Plaintiff's lack of informed consent claims against all Defendants, as Plaintiff withdrew these claims; and

(4) the court denies dismissal of Plaintiff's medical malpractice claim as against Defendants The New York and Presbyterian Hospital s/h/a New York-Presbyterian/Lower Manhattan Hospital, Kathleen Doherty, MD, Elvira Villafuerte, MD and Ingrid Voigt P.A. s/h/a Ingrid Voigt and the remainder of the motion; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendants Namita Kedia, M.D. and Mark Galliguez P.A. s/h/a Mark Galliguez as against Plaintiff Marisa Leiman, without costs to any party; and it is further

ORDERED that the court amends the caption to delete the names of Defendants Namita Kedia, MD and Mark Galliguez P.A. s/h/a Mark Galliguez as Defendants in this action as follows:

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MARISA LEIMAN,

Plaintiff,

-against-

CHARLES WHITE, DPM, SEAPORT ORTHOPAEDIC ASSOCIATES, P.C., HUDSON SPINE AND PAIN MEDICINE, P.C., NEW YORK-PRESBYTERIAN/LOWER MANHATTAN HOSPITAL, KATHLEEN DOHERTY, MD, ELVIRA VILLAFUERTE, MD and INGRID VOIGT,

Defendants.

-----X  
and it is further;

ORDERED that counsel for Defendants Namita Kedia, MD and Mark Galliguez P.A. s/h/a Mark Galliguez shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within ten (10) days of the date of this order, who is directed to mark the court’s records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that the remaining parties are directed to appear before the court for a status conference, to set a trial date and settlement conference on August 30, 2022, at 9:30 a.m. in Part 10, located in room 412, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

*Erika M. Edwards*  
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7/26/2022

DATE

ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE