NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PETER J. O'DONOGHUE IA Part MD
Justice

ISHAK PERDJA ,

Plaintiff
-against-

AMB MEDICAL SERVICES, P.C, et. al.,

Defendants

Index Number 714880 2018

Motion Date October 13, 2021

Motion Seq. No. 2

The following papers read on this by defendant Olga Slootsky sued herein as Olga Slotsky, N.P. for an order granting summary judgment dismissing the complaint with prejudice.

	Papers Numbered
Notice of Motion-Affirmations-Exhibits-Statement of Material Facts-Memorandum of Law.....	EF 78-100
Opposing Affirmations-Affidavits-Exhibits-Statement of Material Facts-Affidavit of Service.....	EF 154-157
	EF 142-150
Reply Affirmation-Reply Memorandum of Law...	EF 168-169

Upon the foregoing papers this motion is determined as follows:

On December 26, 2017, plaintiff Ishak Perdja commenced the within action for negligence/medical malpractice under Index Number 717840 2017, against AMB Medical Services PC (AMB), Nilofar Hava, M.D. and Barry S. Maizel, M.D. Defendant AMB served an answer and interposed nine affirmative defenses. Defendant Hava served an answer and interposed nine affirmative defenses. Defendant Maizel served an answer and interposed seven affirmative defenses.

On September 7, 2018, plaintiff commenced an action for negligence/medical malpractice against Danielle V. Antoine also known as Danielle Vilsaint Antoine, under Index Number 713777/2018. Ms. Antoine is alleged to be a registered nurse or nurse practitioner, employed by AMB. Defendant Antoine served an answer and interposed eight affirmative defenses.

On September 28, 2018, plaintiff commenced an action for negligence/medical malpractice against Olga Slotsky N.P., under Index Number 714880/2018. Olga Slootsky, incorrectly named herein as Olga Slotsky, is alleged to be a registered nurse or nurse practitioner employed by AMB. Defendant Slootsky served an answer and interposed thirteen affirmative defenses.

This Court in an order dated January 25, 2019, granted plaintiff's motion to consolidate all three actions. In an order dated February 13, 2019 and entered on February 21, 2019, this Court, among other things sua sponte modified its order of January 25, 2019, and consolidated all three actions for all purposes under Index Number 714880/2018, amended the caption accordingly, and ordered that the pleadings in each action shall stand as the pleadings in the consolidated action. This court notes that there are no cross claims asserted against any of the co-defendants.

Plaintiff pursuant to a telephone conference in this Part, was directed to file the Note of Issue by May 17, 2021, and to serve all motions for summary judgment by July 13, 2021. The within motion is timely.

Plaintiff alleges that defendant AMB does business under the name Doc Care at a facility located in Ridgewood, New York. As to all defendants plaintiff alleges that they improperly prescribed Theoretic, an anti-hypertensive medication, and failed to properly monitor him while he was taking said medication, causing him to suffer an electrolyte imbalance resulting in atrial fibrillation, hospitalization and the need to be on anticoagulation therapy.

With respect to Olga Slootsky, plaintiff in his bill of particulars alleges that the "negligence and malpractice occurred on and after the time Plaintiff was switched from Atenolol 100 mg. and Hydrochlorothiazide 12.5 mgs. to Tenoretic (100-25) believed to be on or about April 15, 2016 and continued thereafter through March 14, 2017. However based upon the medical records, it took place from on or about October 28, 2016 through November 2016". Plaintiff alleges that Slootsky was negligent in that she improperly prescribed medication to and for the plaintiff without appropriate consideration for his medical history and were not appropriately monitoring same; that she improperly prescribed and continued to prescribe Tenoretic 100/25 mg for the plaintiff; that she failed to timely and appropriately "take blood" and monitor plaintiff's electrolytes, including sodium at appropriate intervals after prescribing Tenoretic for the plaintiff; that she failed to monitor plaintiff's blood chemistries and electrolytes at appropriate and short intervals (less than six month intervals) after prescribing Tenoretic, particularly in the face of plaintiff's medical history and a drop in plaintiff's sodium level below normal after the administration of the said Tenoretic; that she continued and failed to alter the medication (Tenoretic); that she

caused, permitted and allowed plaintiff's sodium levels to be, become and remain at low and abnormal levels; that she failed to take new comprehensive metabolic panels when defendants knew same were needed; that plaintiff had an electrolyte imbalance; and that she continued to prescribe Tenoretic in the face of such electrolyte imbalance. It is alleged that as a result of the alleged negligence and malpractice plaintiff suffered from an electrolyte imbalance, hyponatremia and atrial fibrillation; fatigue; was required to be on anticoagulation therapy; dietary restrictions; reduced life expectancy; high risk for stroke or heart attack; high risk from complications due to anticoagulation therapy such as hemorrhage or organ damage; and pain and suffering.

It is undisputed that AMB does business as Doc Care, and that plaintiff was treated by defendants at its facility in Ridgewood, New York. Plaintiff starting treating at Doc Care, a multi-specialty group in or about 2006. In March 2015, plaintiff presented to Doc Care, where he was seen by Nurse Practitioner Slootsky for a physical examination and medication refills. After examining plaintiff, it was determined that Vytorin, a cholesterol medication, and Tramadol, given for pain were to be discontinued, and that plaintiff would continue taking Atenolol, a anti-hypertensive and Hydrochloroathiazide (HCTZ), a diuretic.

On November 10, 2015, plaintiff was seen by Nurse Practitioner Antoine for a routine follow-up and renewal of his prescription medications. Plaintiff was treated by Dr. Sherman, a cardiologist, at Doc Care on December 5, 2015. Plaintiff testified at his deposition that he had previously been diagnosed with high blood pressure and that in December 2015, Dr. Sherman changed his medication from Atenolol and Hydrochlorothiazide to Tenoretic. Plaintiff was examined by Nurse Practitioner Antoine on April 5, 2016, at which time he was given a prescription for Tenoretic 100mg/25mg tablets, one time a day.

Plaintiff testified that he had been treated by Dr. Hava, a family care physician, at Doc Care; that he never talked to Hava about Tenoretic, and that Hava never prescribed any blood pressure medication.

On October 28, 2016, plaintiff was seen by Nurse Practitioner Slootsky, at which time he complained of diarrhea, loss of appetite and feeling nauseous. It was noted that he had weakness and fatigue for the last six months, and that while traveling to Albania over several weeks he had diarrhea and bloating. Plaintiff testified at his deposition when he returned from a three month trip to Albania, he had a stomach problem, vomiting and was very tired. Based on his symptoms and a breath test, it was noted that he was likely suffering from H. Pylori, a bacterial infection. Blood work taken at an outside laboratory on October 29, 2016 revealed a low sodium level of 131, which had remained unchanged since blood chemistry tests performed in April 2016.

On November 4, 2016, plaintiff was seen by Nurse Practitioner Slootsky who referred him to Dr. Maizel, a gastroenterologist, in order to address his stomach complaints. There is no evidence that Slootsky prescribed Tenoretic or its generic equivalent to the plaintiff.

Plaintiff was seen Dr. Maizel at Doc Care, on November 17, 2016. At this time plaintiff had already been placed on a course of amoxicillin, clarithromycin, and omeprazole, which was to conclude the next day. Maizel instructed plaintiff to have a repeat breath test in 6 weeks and a follow-up in 7 weeks. Plaintiff saw Dr. Sherman again on November 19, 2016 and December 10, 2016. On January 5, 2017, plaintiff underwent a H. Pylori breath test, which was negative. He saw Dr. Maizel on January 12, 2017, at which time the H. Pylori had resolved. Maizel prescribed Prevacid for plaintiff's pre-existing GERD, and did not see plaintiff after said visit.

Plaintiff was seen by Nurse Practitioner Guerrero at Doc Care on March 13, 2017, for complaints of chest pain, shortness of breath and increased anxiety. It was noted that plaintiff had returned from the Dominican Republic a week ago and had started to feel sick upon his return. He was instructed to increase his fluid intake and to take tylenol if his temperature was over 101.5. He was also given a prescription for Levaquin 500 mg. He returned on March 14, 2017, and was seen by Dr. Bigman, who referred him to Long Island Jewish Medical Center (LIJ) to rule out a potential TIA, CVA or any other cardiac related problem.

Plaintiff went to the emergency room of LIJ on March 14, 2017 with complaints of nausea, fatigue, shortness of breath, wheezing, chest pain and abdominal pain. He was ultimately diagnosed with hyponatremia and atrial fibrillation, and was treated with an IV saline and heparin therapy. He was discharged from the hospital to his home on March 21, 2017, and instructed to see Dr. Saber as an outpatient.

A defendant moving for summary judgment in a medical malpractice must make a prima facie showing either that there was no departure from accepted community standards of medical practice, or that any departure was not a proximate cause of the plaintiff's injuries (*see Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677 [2d Dept 2021]; *Schwartz v Partridge*, 179 AD3d 963, 964 [2d Dept 2020]; *DiLorenzo v Zaso*, 148 AD3d 1111, 1112, [2d Dept 2017]). Where a defendant meets its prima facie burden as to both the departure element and the proximate cause element, "the burden shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element" (*Stukas v Streiter*, 83 AD3d 18, 25 [2d Dept 2011]; *see Simpson v Edghill*, 169 AD3d 737, 738 [2d Dept 2019]; *Swanson v Raju*, 95 AD3d 1105, 1107 [2d Dept 2012]). "[W]here the moving defendant addressed the elements of both departure and proximate cause, the plaintiff [is] required to raise a triable issue of fact as to both of those

elements" in order to avoid dismissal (*Stukas v Streiter*, 83 AD3d at 26; *see Spilbor v Styles*, 191 AD3d 772 [2d Dept 2021]; *DiMitri v Monsouri*, 302 AD2d 420, 421[2d Dept 2003]). In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on "specifically cited evidence in the record" (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 995-96 [2d Dept 2017], quoting *Roca v Perel,* 51 AD3d 757, 759 [2d Dept 2008]; *see Brinkley v Nassau Health Care Corp.,* 120 AD3d 1287, 1290 [2d Dept 2014])

" 'While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable' " (*Roizman v Stromer*, 185 AD3d 978, 980 [2d Dept 2020], quoting *Behar v Coren*, 21 AD3d 1045, 1046-1047 [2d Dept 2005], quoting *Postlethwaite v United Health Servs. Hosps*., 5 AD3d 892, 895 [3d Dept 2004]). "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" (*Behar v Coren*, 21 AD3d at 1047; *see DiLorenzo v Zaso*, 148 AD3d 1111, 1113 [2d Dept 2017]). Where no such foundation is laid, the expert's opinion is of no probative value, and is therefore insufficient to meet a party's burden on a summary judgment motion *(see Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d at 677; *Roizman v Stromer*, 185 AD3d at 981; *Korszun v Winthrop Univ. Hosp*., 172 AD3d 1343, 1345 [2d Dept 2019];*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 550 [2d Dept 2018]; *DiLorenzo v Zaso,* 148 AD3d at 1115, quoting *Feuer v Ng*, 136 AD3d 704, 707 [2d Dept 2016]; *Behar v Coren*, 21 AD3d at 1047).

Here, defendant Slootsky has established her prima facie entitlement to judgment as a matter of law dismissing the complaint with prejudice, by submitting an expert affirmation from Gerald M. Gacioch, a physician licensed in the State of New York and board certified in internal medicine and cardiovascular disease. Dr. Gacioch states that he has extensive experience training, supervising and working in coordination with other medical personnel, including but not limited to physicians and nurse practitioners; that he is fully familiar with the roles and duties as it pertains to said medical professionals in the medical practice; and that he is familiar with the standard of care as it relates to nurse practitioners and as it relates to the management and treatment of cardiovascular diseases. He sets forth in his affirmation a detailed account of the plaintiff's treatment by defendant Slootsky which is based upon his review of the pleadings, the bill of particulars, the various medical and hospital records, pharmacy records, and the deposition transcripts. Dr. Gacioch opines with a reasonable degree of medical certainty that Ms. Slootsky did not deviate from the standard of care when treating plaintiff at all times, and specifically in October and November 2016, and that there were no negligent acts or omissions on the part of Ms. Slootsky that caused or contributed

to the plaintiff's alleged injuries. He specifically rebuts each allegation made in the plaintiff's bills of particulars (*see Pirri-Logan v Pearl*, 192 AD3d 1149[2d Dept 2021]; *Gilmore v Mihail*, 174 AD3d 686, 687 [2d Dept 2019]; *Khosrova v Westermann*, 109 AD3d 965, 966 [2d Dept 2013]; *Andreoni v Richmond*, 82 AD3d 1139, 1139 [2d Dept 2011]).

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff has submitted a single affirmation in opposition to separate motions for summary judgment by all of the defendants. It is noted that many of the assertions set forth in said affirmation do not apply to Ms. Slootsky's care and treatment of the plaintiff, who she saw on two occasions. Plaintiff's expert a name redacted physician licensed to practice in the State of New York, is board certified in internal medicine and pulmonology. Said affirmation lacks probative value as it fails to specify how said physician became familiar with the applicable standards of care for nurse practitioners (*see Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677 [2d Dept 2021]; *Korszun v Winthrop Univ. Hosp*., 172 AD3d at 1345; *DiLorenzo v Zaso*, 148 AD3d at 1112). Rather, said doctor sets forth his or her experience in internal medicine and pulmonology, and offers a general standard of care for a patient who is prescribed a diuretic. Furthermore, said affirmation is conclusory and speculative and fails to address each of specific assertions made by the defendant's expert as regards Ms. Slootsky (*see Pirri-Logan v Pearl*, 192 AD3d at1149; *Gilmore v Mihail*, 174 AD3d at 687–688).

Finally, it is well settled that "[a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars" (*Anonymous v Gleason*, 175 AD3d 614, 616-17 [2d Dept 2019], quoting *Palka v Village of Ossining*, 120 AD3d 641, 643, [2d Dept 2004]; *see Samer v Desai*, 179 AD3d 860, 861-64 [2d Dept 2020]; *Hanson v Sewanhaka Cent. High Sch. Dist*., 155 AD3d 702, 703[2d Dept 2017]; *Shaw v City of New York*, 139 AD3d 698, 699–700 [2d Dept 2016]; *Garcia v Richer*, 132 AD3d 809, 810 [2d Dept 2015]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]). Here, plaintiff's expert improperly asserts for the first time that Doc Care and each health care provider including Slootsky should have indicated or flagged the plaintiff's chart for critical factors; that each health care provider including Slootsky should have reviewed plaintiff's chart for one or two prior visits and for the last lab report; and that Slootsky failed to direct the staff to follow up with blood work. These claims must be disregarded as they were not alleged in either the complaint or verified bill of particulars.

In view of the foregoing, the within motion to dismiss the complaint with prejudice is granted.

Dated: February 28, 2022

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Peter J. O'Donoghue, J.S.C.