Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MDP
Justice

FREDERICK SINYAVSK x Index Number 701572 2018

-against- Motion Date April 27, 2022

EDWARD STEVEN BENNETT, M.D., IRINA DECTER, M.D., OMOLAYO OGUNDOLANI, P.A and NEW YORK-PRESBYTERIAN QUEENS HOSPITAL,

x Motion Seq. Nos. 4, 5, 6

The following papers numbered EF 71 – 145 read on the separate motions by defendant Irina Decter, M.D. (Seq. 4), defendants Edward Steven Bennett, M.D. and Omolayo D. Ogundolani, P.A. s/h/a Omolayo Ogundolani, P.A. (Seq. 5) and defendant New York-Presbyterian Hospital/Queens s/h/a New York Presbyterian Queens Hospital (Seq. 6) for summary judgment dismissing plaintiff's complaint.

| | Papers Numbered |
|---|---|
| Notice of Motion (Seq. 4) – Affidavits – Exhibits | EF 71 – 83 |
| Notice of Motion (Seq. 5) – Affidavits – Exhibits | EF 84 – 100 |
| Notice of Motion (Seq. 6) – Affidavits – Exhibits | EF 101 – 124 |
| Answering Affidavits – Exhibits | EF 125 – 139 |
| Reply Affidavits | EF 140 – 145 |

Upon the foregoing papers, it is ordered that the motions are consolidated for disposition and decided as follows:

In this medical malpractice action, plaintiff alleges that he sustained personal injuries due to the negligence of defendants Irina Decter, M.D. Edward Steven Bennett, M.D., Omolayo D. Ogundolani, P.A. s/h/a Omolayo Ogundolani, P.A. and New York-Presbyterian Hospital/Queens s/h/a New York Presbyterian Queens Hospital (hereinafter the defendant hospital).

This action was commenced by the filing of a summons and verified complaint on January 31, 2018. Plaintiff's verified complaint contains a cause of action for medical malpractice. Defendants move, in three separate motions, for summary judgment on the

grounds that the care and treatment rendered by defendants did not depart from the standard of care

"A defendant moving for summary judgment in a medical malpractice action must demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) with respect to at least one of the elements of a cause of action alleging medical malpractice (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries." (*Williams v Halstead*, 202 AD3d 891, 892 [2d Dept 2022], quoting *Russell v Garafalo*, 189 AD3d 1100, 1101 [2d Dept 2020].)

"[T]he defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars." (*Vargas v Lee*, 207 AD3d 684, 685 [2d Dept 2022], quoting *Wiater v Lewis*, 197 AD3d 782, 783 [2d Dept 2021].) A physician may establish that he or she did not depart or deviate from accepted medical practice in his or her treatment of the patient, and that he or she was not the proximate cause of the plaintiff's injuries through the submission of medical records and competent expert affidavits. (*See Shirley v Falkovsky*, 207 AD3d 679, 680 [2d Dept 2022]; *Joyner v Middletown Med., P.C.*, 183 AD3d 593 [2d Dept 2020].)

Under the doctrine of respondeat superior, a hospital may be held liable vicariously for the negligence or malpractice of its employees acting within the scope of employment. (*See Sessa v Peconic Bay Med. Ctr.*, 200 AD3d 1085, 1089 [2d Dept 2021].) "To establish its entitlement to summary judgment dismissing a claim of vicarious liability, a hospital must address and rebut any such allegations contained in the complaint and the bill of particulars." (*Mitchell v Goncalves*, 179 AD3d 787, 789 [2d Dept 2020].) "In the absence of such a showing, the hospital must establish either that the physician was not negligent or that the physician's negligence was not a proximate cause of the plaintiff's injuries." (*Sessa v Peconic Bay Med. Ctr.*, 200 AD3d at 1089.)

The burden then "shifts to the plaintiff to raise a triable issue of fact as to those elements on which the defendant met its prima facie burden of proof." (*Gaston v New York City Health & Hosps. Corp.*, 207 AD3d 705, 706 [2d Dept 2022], quoting *Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863 [2d Dept 2021].) General allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment. (*See Palagye v Loulmet*, 203 AD3d 729 [2d Dept 2022].) "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." (*Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715 [2d Dept 2022], quoting *Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017].)

"[A] medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field." (*Montanari v Lorber*, 200 AD3d 676 [2d Dept 2021], quoting *DiLorenzo v Zaso*, 148 AD3d 1111, 1112 [2d Dept 2017].) "However, the witness must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Id.* at 676.) "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." (*Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677, 678 [2d Dept 2021].) "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." (*Id.* at 678.)

Here, Dr. Decter submitted the affirmation of Dr. Jonathan S. Luchs, a physician licensed and board certified in diagnostic radiology. Defendants Dr. Bennett and PA Ogundolani submitted the affirmations of Dr. David A. Fisher, a physician licensed and board certified in radiology, and Dr. Gregory I. Mazarin, a physician licensed and board certified in emergency medicine. The defendant hospital submitted the affirmations of Dr. Andrew Leifer, a physician licensed and board certified in emergency medicine, and Dr. Stephen C. Machnicki, a physician licensed and board certified in radiology.

In support of the respective motions, the expert doctors reviewed the pertinent medical records, pleadings and deposition testimony of the parties, and opined, with a reasonable degree of medical certainty, that the moving defendants did not depart from the applicable standard of care and any alleged departures were not a proximate cause of plaintiff's injuries.

In opposition to defendants' prima facie showing, plaintiff submitted, inter alia, the affirmation of Dr. Jordan L. Haber, a duly licensed physician and a Diplomat and Fellow of the American College of Radiology. With respect to the liability of Dr. Decter, Dr. Haber failed to raise a triable issue of fact. Dr. Haber offered merely conclusory and speculative statements that do not address the specific assertions of Dr. Decter's expert. (*See Piazza v NYU Hosps. Ctr.*, 208 AD3d 525, 526 [2d Dept 2022]; *Frazier v Shteynberg*, 208 AD3d 458, 459 [2d Dept 2022]; *Townsend v Vaisman*, 203 AD3d 1199 [2d Dept 2022].) Moreover, Dr. Haber failed to explain or cite to facts in the record to support his opinion that the scaphoid fracture was present on the x-rays taken on August 18, 2015 and additional diagnostic testing was warranted. (*See Kim v N. Shore Long Is. Jewish Health Sys., Inc.*, 202 AD3d 653, 656 [2d Dept 2022].)

As to the liability of PA Ogundolani, Dr. Haber failed to articulate in his affirmation that he had any training in the field of emergency medicine or what, if anything, he did to familiarize himself with the applicable standard of care. (*See Samer v Desai*, 179 AD3d 860, 863 [2d Dept 2020]; *Feuer v Ng*, 136 AD3d 704, 707 [2d Dept 2016].) Therefore, Dr. Haber's affirmation lack probative value and his opinions as to PA Ogundolani's departure from good and accepted medical practice are conclusory and

speculative. (*See Pettway v Vorobyeva*, 202 AD3d 1116, 1117 [2d Dept 2022]; *Elstein v Hammer*, 192 AD3d 1075, 1079 [2d Dept 2021]; *Keane v Dayani*, 178 AD3d 797, 799 [2d Dept 2019].)

In regards to the defendant hospital's liability, plaintiff failed to raise a triable issue of fact in opposition to the defendant hospital's prima facie showing that it could not be held vicariously liable for the alleged medical malpractice of its own medical staff and the co-defendants. Dr. Haber's conclusions were conclusory and speculative, and he failed to address the specific assertions of the defendant hospital's experts. (*See Mirshah v Obedian*, 200 AD3d 868 [2d Dept 2021]; *Samer v Desai*, 179 AD3d at 863.)

Plaintiff did not oppose the branch of Dr. Bennett's motion seeking summary judgment in his favor. Therefore, that branch of Dr. Bennett's motion to dismiss all claims asserted against him is granted, without opposition.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, the separate motions by defendants Dr. Decter, Dr. Bennett, PA Ogundolani and the defendant hospital for summary judgment are granted.

The complaint is dismissed in its entirety.

Dated: December 1, 2022

PETER J. O'DONOGHUE, J..S.C.