

| |
|--|
| J.M. v Wycoff Hgts. Med. Ctr. |
| 2022 NY Slip Op 35060(U) |
| December 5, 2022 |
| Supreme Court, Queens County |
| Docket Number: Index No. 706725/2015 |
| Judge: Peter J. O'Donoghue |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

J.M., an infant by her mother and natural guardian,
Alexa Fuentes and Alexa Fuentes, Individually

Index No.: 706725/2015

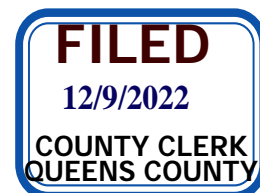
May 18, 2022

-against-

Motion Seq. Nos.: 4,6,7,9

WYCOFF HEIGHTS MEDICAL CENTER, ET. AL

X



The following papers read on the separate motions by defendant Sounder Eswar, M.D. (Seq. 4), defendant Clyde Gregoire, M.D. (Seq. 6), defendants Mohsen Samii s/h/a Mohsen Sammi, M.D. and Nahid Hedayati, as executor of the estate of Reza Hedayati, M.D. (Seq. 7) and defendant Maxim Tyorkin, M.D. (Seq. 9) for summary judgment dismissing plaintiffs' complaint.

Papers
Numbered

| | |
|---|-------------------|
| Notice of Motion (Seq. 4) – Affidavits – Exhibits | EF 317 – 347 |
| Notice of Motion (Seq. 6) – Affidavits – Exhibits | EF 368 – 374, 400 |
| Notice of Motion (Seq. 7) – Affidavits – Exhibits | EF 375 – 399 |
| Notice of Motion (Seq. 9) – Affidavits – Exhibits | EF 406 – 442 |
| Answering Affidavits – Exhibits | EF 462 – 482 |
| Reply Affidavits | EF 483 – 488 |

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

In this medical malpractice action, plaintiffs, an infant and her mother, allege that defendants Wyckoff Heights Medical Center, Saurabh Bahl, M.D., Patrisha Woolard-Pickens, M.D., Clyde Gregoire, M.D., Bernard Chukwuneke, M.D., Sahand Golshan-Khalili, M.D., Sounder Eswar, M.D., Moshen Sammi, M.D., Maxim Tyorkin, M.D., Jeffrey Fischbein, M.D., Kinjal Patel, DPM, Reza Hedayati, M.D., Geoffrey Achonu, M.D., Ilona Rozenberg, PA, Richard Kalker, PA, Kaitlyn B. Montgomery, PA, Mount Sinai Hospitals Group Inc., Christopher G. Strother, M.D. and Gene Schiappa, M.D. were negligent in failing to timely and properly diagnose and treat the infant plaintiff's osteosarcoma.

This action was commenced by the filing of a summons and verified complaint on June 26, 2015. Plaintiffs' verified complaint contains causes of action for failure to diagnose and negligent credentialing. By so-ordered stipulation dated March 11, 2022, this action was discontinued, with prejudice, against defendants Saurabh Bahl, M.D., Geoffrey Achonu, M.D., Sahand Golshan-Khalili, M.D., Kinjal Patel, DPM, Ilona Rozenberg, PA, Richard Kalker, PA and Kaitlyn B. Montgomery, PA.

Defendants Sounder Eswar, M.D., Clyde Gregoire, M.D., Maxim Tyorkin, M.D., Mohsen Samii s/h/a Mohsen Sammi, M.D. and Nahid Hedayati, as executor of the estate of Reza Hedayati, M.D. now move, in four separate motions, for summary judgment in their favor and dismissing the action in its entirety.

“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].)

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].)

Here, Dr. Sounder Eswar submitted the affirmation of Dr. Howard Goodman, a physician licensed and board certified in orthopedic surgery. Defendants Dr. Clyde Gregoire, Dr. Mohsen Samii and Nahid Hedayati, as executor of the estate of Reza Hedayati, M.D submitted the affirmation of Dr. Evan Mair, a physician licensed and board certified in diagnostic radiology. Dr. Maxim Tyorkin submitted the affirmation of Dr. Fazel A. Khan, a physician licensed and board certified in orthopedic surgery.

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 affirmations of Dr. Craig Mullen, a physician licensed and board certified in pediatric hematology/oncology and Dr. Jordan L. Haber, a physician licensed and board certified in radiology.

Dr. Eswar and Dr. Tyorkin are correct in that Dr. Mullen, a pediatric hematologist/oncologist, did not lay the requisite foundation to render an opinion as to Dr. Eswar and Dr. Tyorkin's actions as an orthopedist. (*DiLorenzo v Zaso*, 148 AD3d 1111, 1115 [2d Dept 2017].) "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." (*Samer v Desai*, 179 AD3d 860, 862-63 [2d Dept 2020] [citation omitted].) "Where no such foundation is laid, the expert's opinion is of no probative value." (*Montanari v Lorber*, 200 AD3d 676, 679 [2d Dept 2021].) Dr. Mullen did not state in his affirmation whether he had any specific training or expertise in orthopedic surgery, or set forth how he was, or became, familiar with the applicable standards of care in this specialized area of practice. (See *DiLorenzo v Zaso*, 148 AD3d at 1115.) Thus, Dr. Mullen's opinion is of no probative value and insufficient to defeat Dr. Eswar and Dr. Tyorkin's prima facie showing. (See *Laughtman v Long Is. Jewish Val. Stream*, 192 AD3d 677, 678 [2d Dept 2021].)

With respect to the remaining movants, although Dr. Haber opines as to Drs. Gregoire, Samii and Hedayati's departure, Dr. Haber's affirmation is insufficient to rebut their evidence of the lack of causation. Dr. Haber failed to articulate how the course of treatment for plaintiff would have been different if Drs. Gregoire, Samii and Hedayati had made a timely diagnosis. (See *Longhi v Lewit*, 187 AD3d 873 [2d Dept 2020], *lv denied* 36 NY3d 906 [2021]; *Goldsmith v Taverni*, 90 AD3d 704, 705 [2d Dept 2011].) Dr. Haber also failed to address Dr. Goodman's assertion that even if Dr. Eswar had ordered an MRI on July 9, 2012, it would not have shown an osteosarcoma because no

osteosarcoma was visualized on the MRI taken eight months later on March 25, 2013. (See *Piazza v NYU Hosps. Ctr.*, 208 AD3d 525, 526 [2d Dept 2022].)

Contrary to plaintiffs' contention, the unsigned depositions transcripts can be considered since they were certified by the court reporter and plaintiffs did not challenge the accuracy of the transcripts. (See *Yerry v Whole Food Mkt. Group, Inc.*, 208 AD3d 733, 734 [2d Dept 2022]; *Celestin v 40 Empire Blvd., Inc.*, 168 AD3d 805, 808 [2d Dept 2019].) The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, the separate motions by defendants Sounder Eswar, M.D., Clyde Gregoire, M.D., Mohsen Samii s/h/a Mohsen Sammi, M.D., Nahid Hedayati, as executor of the estate of Reza Hedayati, M.D. and Maxim Tyorkin, M.D. for summary judgment are granted and the complaint is hereby dismissed as to these defendants.

The Amended Caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

J.M., an infant by her mother and natural guardian,
Alexa Fuentes and Alexa Fuentes, Individually

Index No.: 706725/2015

-against-

Jeffrey Fischbein, M.D.

Dated: December 5, 2022

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

