SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON **PART** 30M

Justice

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DAVID GORDON,

Plaintiff,

- v -

NEW YORK PRESBYTERIAN HEALTCARE SYSTEM, INC, THE NEW YORK AND PRESBYTERIAN HOSPITAL, FOOT ASSOCIATES OF NEW YORK PC,ROBERT FRIDMAN, EAST COAST ORTHOTIC & PROSTHETIC CORP.

Defendant.

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INDEX NO. 452570/2017

MOTION DATE 03/20/2023, 03/20/2023, 03/20/2023

MOTION SEQ. NO. 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 286, 289, 291, 292, 293, 294, 295, 296, 297, 298, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 360, 361, 362, 363, 364, 365, 375, 378, 379, 380

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 287, 288, 290, 299, 300, 301, 302, 303, 304, 305, 306, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 366, 367, 368, 369, 370, 371, 372, 376, 381, 382, 385

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 307, 308, 309, 310, 311, 312, 313, 314, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 373, 377, 383, 384

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

Upon the foregoing documents, it is ordered that the motions for summary judgment of defendants Robert Fridman, D.P.M., Foot Associates of New York, P.C. (Mot. Seq. No. 005) and New York Presbyterian Hospital s/h/a New York-Presbyterian Healthcare System Inc. and The New York and Presbyterian Hospital (hereinafter "NYPH") (Mot. Seq. No. 007) are granted and the complaint and all cross claims are severed and dismissed as against these defendants. The

motion for summary judgment of the defendant East Coast Orthotic and Prosthetic Corp. (hereinafter "East Coast") (Mot. Seq. No. 006) is denied.

This is an action for alleged podiatric malpractice rendered to a diabetic 58 -year-old plaintiff from January 16, 2015, through March 13, 2015. It is claimed that defendants improperly diagnosed and treated a fracture of the left ankle joint/Charcot's ankle by, *inter alia,* ordering and casting a CROW boot that was improperly fit and too tight, leading to a two-inch laceration, lack of circulation, necrosis and ultimately bilateral below the knee amputations.

FACTUAL BACKGROUND

Plaintiff, whose medical history includes diabetes, high blood pressure, hyperlipidemia, obesity, and hemodialysis three times a week for end stage renal failure, claims to have fractured his left ankle in an automobile accident in October of 2014. Three months later, plaintiff presented to NYU's emergency room for complaints of hematuria and pain in his left ankle. A January 14, 2015 x-ray noted likely chronic malleolar fracture with deformity suggestive of Charcot arthropathy[1].

On January 16, 2015, plaintiff had a single office visit with the defendant podiatrist, Dr. Robert Fridman, at Foot Associates of New York, P.C. (hereinafter "Foot Associates"). During that visit Dr. Fridman performed a physical examination and ordered an x-ray, performed at NYPH (*see* NYSCEF Doc. No. 275), that revealed severe Charcot ankle fracture-dislocation with neuropathic changes. The doctor prescribed a CAM boot (*see* NYSCEF Doc. No. 349) and CROW boot (*see* NYSCEF Doc. No. 277) for which plaintiff was measured, and the CROW

[1] A foot condition which causes weakening of the bones in the foot or ankle, typically occurring in diabetic patients who have numbness or loss of sensation in their lower extremities. As the disorder progresses, the joints collapse, there is bone destruction, bony disruption, and dislocation of the joints. The bones are weakened enough to fracture, and with continued walking, the foot eventually changes shape (*see* NYSCEF Doc. No. 243, para 35). Dr. Fridman testified that his treatment plan was to stabilize the plaintiff to make sure the deformity did not progress further.

boot made and fitted by East Coast, which maintained an office across the hall from Dr. Fridman. Dr. Fridman was not involved in the molding or fitting of the CROW boot. The temporary CAM boot was dispensed to the plaintiff for offloading until the CROW boot was made, and Dr. Fridman instructed plaintiff to follow-up with him when the CROW boot was ready. Plaintiff missed two scheduled follow up appointments and never returned to Dr. Fridman after his initial visit.

Plaintiff returned to East Coast on March 13, 2015, to try on the CROW boot, and purportedly complained that the boot was "very very tight." East Coast's John Arguelles, an orthotic fitter and cast technician, used a heat torch to stretch the boot, and advised plaintiff that by the time he got home, (an hour and a half later), the boot would be "broken in." When plaintiff arrived home, he noticed that his boot was full of blood and that his left ankle had a two-inch laceration.

A few days later, plaintiff attended his dialysis appointment wearing the temporary CAM boot. His nephrologist at NY Renal placed plaintiff on Vancomycin for a superficial laceration on his left foot. Plaintiff was instructed to follow up with his podiatrist (he had an upcoming appointment with Dr. Fridman on March 23rd) as well as his primary care physician. On March 26, 2015, plaintiff informed Dr. Alvis at NY Renal that he had skipped his recent podiatry appointment because his ankle was improving. Mr. Gordon refused to remove the dressing so that Dr. Alvis could examine the wound. By his April 4, 2015 dialysis appointment, plaintiff complained of pain and bleeding to his left foot. Dr. Alvis ordered IV Vancomycin to be administered on Saturday, April 4, 2015, and on Tuesday, April 7, 2015. Plaintiff underwent the IV treatments but refused to go to the ER as instructed. He had chills during dialysis on April 7,

2015 and by April 8, 2015 plaintiff was admitted to NYPH Queens with a diagnosis of sepsis secondary to osteomyelitis. He underwent a left below the knee amputation on April 10, 2015.

Plaintiff purportedly had no complaints regarding his right ankle until after a car accident nine months later, in January of 2016. By July 21, 2016, he reported a superficial right foot laceration for which he was given Vancomycin. On August 8, 2016 plaintiff presented to NYU with a complaint of two months worsening ankle pain, and skin breakdown at the right lateral malleolus. Plaintiff was diagnosed with right Charcot ankle with surrounding soft tissue infection with a lateral purulent draining wound. He underwent a below the knee amputation for his right lower extremity, due to gangrene, on August 19, 2016.

The only treatment rendered by NYPH was the taking and radiological interpretation of an x-ray ordered by Dr. Fridman on January 16, 2015.

MOTION 005: SUMMARY JUDGMENT BY ROBERT FRIDMAN, D.P.M. and FOOT ASSOCIATES

Dr. Fridman and Foot Associates move for summary judgment on the grounds that Dr. Fridman (1) acted within the standard of care in treating plaintiff's left Charcot ankle by, *inter alia,* prescribing the CAM walker and CROW boot; (2) Dr. Fridman's treatment was not a proximate cause of plaintiff's bilateral amputations, and (3) Foot Associates may not be found vicariously liable for Dr. Fridman's conduct. These defendants emphasize that the ulcer on plaintiff's left foot did not develop until two months after the doctor's sole interaction with the plaintiff, and that plaintiff's complaints as to his right foot were made over a year after plaintiff stopped treating with defendant. Movants maintain that no proximate cause exists between Dr. Fridman's involvement and plaintiff's subsequent injuries, including the development of necrosis and the ultimate need for amputation(s).

In support of Motion Seq. No. 005, Dr. Fridman and Foot Associates attach, *inter alia*, the expert affidavit of John Doolan, D.P.M. (*see* NYSCEF Doc. No. 243) who opines to a reasonable degree of podiatric certainty, that it is "entirely within the standard of care" for a podiatrist to (1) defer to the orthotist for the molding and fitting of a CROW boot (*id.*, para 6) and (2) treat Charcot foot by offloading with a CAM walker or CROW boot. Contrary to what is alleged in the Verified Bill of Particulars, Dr. Doolan attests that Dr. Fridman was not required to be present for the molding or fitting of the CROW boot; that he appropriately took a full medical history and appropriately ordered an x-ray of the left ankle; that no other diagnostic tests were indicated or warranted at the time of plaintiff's initial visit, and that Dr. Fridman was not required to refer plaintiff to an orthopedic specialist. Dr. Doolan concludes that plaintiff was not a candidate for immediate surgery due to his multiple health issues and the fact that his Charcot's foot condition had already advanced to the point where surgery was impossible.

In opposition to the motion plaintiff submits, *inter alia*, the expert affidavits of pedorthist, Spencer Weisbond, C. Ped. (*see* NYSCEF Doc. No. 329) and Rebecca Pruthi, D.P.M. (*see* NYSCEF Doc. No. 333), neither of whom oppose Dr. Doolan's findings regarding Dr. Fridman and/or Foot Associates, but rather, focus their expertise on the alleged departures made by East Coast.

MOTION 006: SUMMARY JUDGMENT BY EAST COAST

East Coast moves for summary judgment, maintaining that (1) its fabrication and issuance of the CROW boot was in accordance with Dr. Fridman's prescription; (2) the CROW boot had no structural defects and no features capable of causing the laceration described by plaintiff; (3) plaintiff's left ankle wound and resultant amputations were the cause of his own negligence in failing to abide doctor's orders; (4) even if plaintiff proved that East Coast

negligently issued the CROW boot, plaintiff's own pre-existing medical conditions necessitated amputation of his left lower leg; (5) plaintiff's right leg wound and amputation are not causally related to East Coast because of the superseding events where plaintiff injured his right leg from a fall out of bed and an automobile accident nine months after wearing the CROW boot for one hour, and (6) plaintiff had no contract with East Coast.

In support of its motion, East Coast attaches the affidavit of its principal, Vincent Benenati (*see* NYSCEF Doc. No. 279), who sets forth that "the molding of plaintiff for the CROW *likely* occurred in Dr. Fridman's office" (*id.*, para. 8; emphasis supplied) and that plaintiff and East Coast "never entered into a contract for any purpose" (*id.,* para. 11). Also submitted are the affirmations of Martin H. Mendelbaum, CPO, a certified prosthetist, and orthotist (*see* NYSCEF Doc. No. 284), who examined the subject CROW boot and found it free of defects (*i.e.*, no exposed plastic or other components in the area covering the outside of the left ankle) and "fabricated consistent with the standards and practices of the orthotics field" (*id.*, para. 15) and notably, podiatrist Edwin W. Wolf, D.P.M., MS (*see* NYSCEF Doc. No. 285) who opines that plaintiff's left wound laceration, infection and amputation did not develop because of any action or inaction by East Coast but resulted from plaintiff's underlying medical conditions and failure to seek or obtain medical treatment and follow medical advice. Dr. Wolf is emphatic that plaintiff's subsequent development of the right ankle ulcer (in June, July, and August of 2016), gangrene and right leg amputation did not arise because of the CROW fabricated by East Coast over a year earlier. He concludes that "based on the medical history, condition, and prognosis of plaintiff, to a reasonable degree of podiatric medical certainty, plaintiff more likely than not would have required an amputation of his left foot and/or ankle within a year of

receiving the confirmed Charcot diagnosis from Dr. Fridman irrespective of whether he experienced a laceration from his CROW on March 13, 2015" (*id.*, para. 17).

In opposition to East Coast's motion, plaintiff attaches the affidavit of Spencer Weisbond, C. Ped. (*see* NYSCEF Doc. No. 316) and the affirmation of Rebecca Pruthi, D.P.M. (*see* NYSCEF Doc. No. 320). For his part, pedorthist Weisbond offers a detailed explanation following his inspection of the subject CROW boot. He found, *inter alia*, that modification of the boot with the heat gun created a ledge that was not smooth and that forced plaintiff's left outer ankle bone into a position that was unsafely too narrow, causing the laceration. According to the pedorthist, even wearing the CROW boot for a short time in this condition would cause a laceration on this plaintiff's vulnerable skin, and "the CROW boot device did not match [plaintiff's] actual architecture resulting in a misfit based on the technician's attempted contraindicated and negligent effort at adjustment" (*id.*, para. 32). In Mr. Weisbond's opinion, the CROW boot should have been sent back to the factory to be remade, or at the very least sent back to the laboratory for a more adequate, specific, and thorough adjustment.

Dr. Pruthi opines to a reasonable degree of medical and podiatric certainty that "given a patient of Mr. Gordon's weight of 300 plus pounds and height of 6 feet 6 inches and his many various and severe maladies and comorbidities that the tight misfitting CROW boot was a substantial factor and competent producing cause for the open two-inch laceration, the consequential infectious process...advancing related necrosis and osteomyelitis and the consequential amputations of the limbs..." (*id.*, para. 27). She opines that had plaintiff seen someone "properly, sufficiently and more skilled at the March 13, 2015 fitting, a better outcome other than what happened to him would have been expected" (*id.*, para. 29).

MOTION 007: SUMMARY JUDGMENT BY NYPH

NYPH moves for summary judgment on the grounds that there are no independent theories of malpractice alleged against NYPH, and NYPH is not vicariously responsible for the care and treatment rendered by co-defendants. NYPH emphasizes that its only involvement in plaintiff's care was by way of the taking, interpreting, and billing plaintiff for the one x-ray performed on January 16, 2016. It is uncontroverted that Dr. Fridman was not employed by NYPH.

In support of its motion, NYPH attaches the affirmation of expert podiatrist, Kevin T. Jules (*see* NYSCEF Doc. No. 222) who is unequivocal that: (1) there are no allegations that the x-ray performed by NYPH was misread; (2) the care rendered by Dr. Fridman was within the standard of care and was not a proximate cause of the injuries claimed; (3) Dr. Fridman was correct to dispense the temporary CAM boot and order a CROW boot, and (4) plaintiff presented with a high risk and low reward if he was surgically referred instead of prescribed a CROW boot, because plaintiff was suffering end stage of Charcot.

Radiologist Jonathan Luchs, M.D. (*see* NYSCEF Doc. No. 223) is emphatic that the ankle x-ray films interpreted by NYPH's radiologist were entirely within the accepted standards of radiological practice and was not a proximate cause of plaintiff's injuries.

In opposition, plaintiff maintains that a question exists as to who gave East Coast permission to occupy, do business and maintain an office on NYPH owned and managed premises, and that there is an actual or apparent legal relationship between East Coast and NYPH. Plaintiff has no proof of such allegations.

APPLICABLE LAW AND ANALYSIS

In considering a motion for summary judgment, the Court is required to review the record in the light most favorable to the non-moving party (*Dallas-Stephenson v. Waisman,* 39 AD3d 303, 308 [1st Dept. 2007]). Summary judgment proceedings are for issue spotting, not issue determination (*Suffolk County Dept. of Soc. Servs. v. James M.*, 83 NY2d 178, 182 (1994) and a motion for summary judgment must be denied where facts are shown "sufficient to require a trial of any issue of fact" (*see* CPLR 3212[b]). Critically, "it is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v. American Lung Assn.*, 90 NY2d 93 [1997]). "Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether her [or she] is ruling on a motion for summary judgment or for a directed verdict" (*Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 [1986]).

"The essential elements of medical or podiatric malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury" (*Hayden v. Gordon*, 91 AD3d 819, 820 [2d Dept. 2012]; [*internal quotation marks omitted*]).

A defendant physician moving for summary judgment in a medical malpractice action must make a *prima facie* showing of entitlement to judgment as a matter of law by showing that "in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged" (*Roques v. Noble,* 73 AD3d 204, 206 [1st Dept. 2010]). To satisfy this burden, a defendant must present expert opinion testimony that is based on the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific and factual in nature (*Joyner-Pack v.*

Sykes, 54 AD3d 727, 729 [2d Dept. 2008]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Perre v. Vassar Bros. Hosp.*, 52 AD3d 670 [2d Dept. 2008], *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once a defendant has met his or her burden on the motion, the plaintiff must "submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant-physician that he was not negligent in treating plaintiff, so as to demonstrate the existence of a triable issue of fact. General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [the physician's] summary judgment motion" (*Alvarez v. Prospect Hospital*, 68 NY320, 324-325 [1986]). Thus, in opposing the motion, plaintiff's expert "must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v. Waisman*, 39 AD3d 303 [1st Dept. 2007], *quoting Ferrara v. South Shore Orthopedic Associates, P.C.*, 178 AD2d 364, 366 [1st Dept. 1991]). Moreover, plaintiff's expert must address and refute the specific assertions of defendants' experts with respect to negligence and causation (*see Janelle M. v. New York City Health & Hospitals Corp.*, 148 AD3d 519 [1st Dept. 2017]).

In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to defeat summary judgment. Where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept. 2009]).

Here, the defendants Dr. Robert Fridman and Foot Associates have made a *prima facie* showing of entitlement to judgment dismissing the complaint through, *inter alia*, the affirmation

of Dr. Doolan who attests that defendants' treatment of Mr. Gordon's Charcot disease was within the acceptable standard of care, that Dr. Fridman correctly prescribed the CAM and CROW boots to alleviate left Charcot, and that no proximate cause exists between Dr. Fridman's treatment during his sole encounter with plaintiff, and plaintiff's subsequent injuries. Plaintiff has offered no expert opinion or evidence in opposition to the motion, and since Dr. Doolan's opinions are unrefuted, summary judgment is awarded to Dr. Fridman and his practice, Foot Associates of New York, P.C., dismissing the plaintiff's complaint.

New York Presbyterian Hospital has also made a *prima facie* showing of entitlement to judgment through, *inter alia*, the affirmations of an expert podiatrist and expert radiologist, who attest that the January 16, 2015 x-ray was interpreted correctly, and that Dr. Fridman complied with the acceptable standards of podiatric care during his sole visit with plaintiff. Plaintiff's claim against NYPH is for vicarious liability only. Since there is no question that neither Dr. Fridman nor East Coast were employed by the hospital, and since it is undisputed that East Coast did not lease its office space from NYPH but rather, paid rent to Columbia University, then NYPH is entitled to summary judgment dismissing plaintiff's complaint.

While East Coast Orthotic & Prosthetic Corp. has made a *prima facie* showing of entitlement to summary judgment through the affirmations of its prosthetist Martin H. Mendelbaum, and its expert podiatrist Dr. Wolf, plaintiff has successfully opposed defendant's motion through the expert affirmations of Dr. Ruth Pruthi, D.P.M. and plaintiff's board certified pedorthist, Spencer Weisbond, both of whom set forth detailed departure(s) made by East Coast as supported by factual references to the record.

Specifically, Mr. Weisbond sets forth that East Coast departed from the standard of care when it (1) constructed a left CROW boot device that did not match plaintiff's actual

architecture; (2) provided a device that was not consistent with and up to the standards and practices in the field of orthotic healthcare; (3) failed to correctly adjust the size of the boot with a "heat gun," because the impression made was one inch below the lateral malleolus of the device, rendering the device to tight and (4) allowed the unlicensed uncertified fitter, John Arguelles, to work unsupervised. Mr. Weisbond's opinion that these deviations from and below the standards of good and proper orthotic care were a substantial contributing factor that caused plaintiff to sustain a two-inch laceration resulting in loss of circulation, necrosis, an infectious process, osteomyelitis, and amputation of the left limb below the knee sufficiently raise an issue of fact to defeat summary judgment. Dr. Pruthi's unequivocal opinion that East Coast departed from the standard of care by providing a misfitting CROW boot to a "diabetic patient of Mr. Gordon's weight of 300 plus pounds and height of 6 feet 6 inches, with his many various, and severe maladies and co-morbidities, and that the tight, misfitting CROW boot was a substantial factor and competent producing cause for the open two-inch laceration" and sequalae likewise raises a triable issue sufficient to defeat East Coast's motion for summary judgment.

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Dr. Fridman and Foot Associates of NY (Motion Seq. No. 005) to dismiss the complaint is granted; and it is further

ORDERED that the motion for summary judgment of defendant NYPH (Motion Seq. No. 007) to dismiss the complaint is granted; and it is further

ORDERED that the motion for summary judgment of defendant East Coast (Motion Seq. No. 006) is denied; and it is further

ORDERED that plaintiff's Second Cause of Action against East Coast for breach of contract is severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint and all cross claims as against the defendants Dr. Robert Fridman, Foot Associates of New York, P.C., and NYPH; and it is further

ORDERED that the parties appear for a pre-trial conference via Microsoft Teams on **May 16, 2023 at 10:30 a.m.**

3/27/2023
DATE

JUDITH N. MCMAHON, J.S.C.

Hon. Judith N. McMahon
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE