SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ELISA LESER

Plaintiff(s),

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, VIVIA FRANCOIS, M.D., and SANTOSH BELBASE, M.D.,

Defendants,

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SHORT FORM ORDER
Index No.: 503178/2018
Mo. Seq.: 001

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 24, 25-41; 46-49; 50.

Defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, VIVIA FRANCOIS, M.D., and SANTOSH BELBASE, M.D., move for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the plaintiff's Complaint and this action as to the moving Defendants; directing the entry of judgment with prejudice in favor of the moving Defendants; and pursuant to CPLR § 3212 (e) and (g), granting partial summary judgment as to any Defendant and any claim and/or theory of liability as to which the Court finds that plaintiffs have failed to raise an issue of fact. Plaintiff submitted opposition to this motion.

Defendants' motion for summary judgment is denied for failure to sustain their prima facie burden. "'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]; see *Donnelly v. Parikh*, 150 AD3d 820, 822 [2d Dept. 2017]; *Leavy v. Merriam*, 133 AD3d 636, 637 [2d Dept. 2015]; *Lesniak v.*

Stockholm Obstetrics & Gynecological Servs., P.C., 132 AD3d 959, 960 [2d Dept. 2015]. "Thus, in moving for summary judgment, a physician defendant must establish, prima facie, 'either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.'" *Hutchinson*, 132 AD3d at 1039, citing *Lesniak*, 132 AD3d at 960; see *Stukas*, 83 AD3d at 23. "[B]are conclusory assertions" by "defendants that they did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle defendants to summary judgment." *J.P. v. Patel*, 195 AD3d 852, 853 [2d Dept. 2021] citing *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 [1985]. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause (internal citations omitted)." *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. "'When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.'" *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo,* 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. "Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve." *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.,* 133 A.D.3d 830, 832 [2d Dept. 2015].

Defendants' expert Alan Z. Segal, M.D., a physician board certified in Neurology Vascular Neurology, and neurocritical care established that he is qualified to opine as to the care and treatment rendered to the plaintiff in this case. Defendants' expert Andrew Sama, M.D., a physician board certified in Emergency Medicine, who has diagnosed, managed, and treated hundreds of patients with and/or for strokes, also established expertise to opine as an expert as to the care and treatment at issue in this case. Plaintiff's expert, a physician board certified in

Neurology, established that they are qualified to opine as to the care the plaintiff received in this case.

Here, Defendants do not establish that the treatment did not deviate from the standard of care because the experts fail to consider Plaintiff's inability to speak as a sign or symptom of a stroke in their stated opinions. Each of Defendants' experts make conclusory statements indicating that at the time, Plaintiff's inability to speak could have been attributed to her intoxication from consuming alcohol and cocaine, while gleaning over her inability to speak as being a sign and/or symptom of stroke. Defendants' experts fail to establish why any other possible causes of the patient's inability to speak were not considered, even hours after she presented to the hospital and still could not speak. Defendants' expert, Dr. Segal, even states in his affirmation, the fact that the patient was non-verbal was an indication that the plaintiff was possibly suffering a stroke, while simultaneously dismissing the importance of this indication as being the *only* indication of stroke because of the plaintiff's alcohol and drug use just prior to arriving at the hospital.

The plaintiff's blood alcohol content was .085 when it was taken approximately ten hours after the plaintiff had presented to the hospital, just after Dr. Francois learned of the plaintiff's cocaine usage. Both of Defendants' experts, contend that the plaintiff's blood alcohol content would have been higher upon her arrival to the emergency department. However, that statement is speculative. Each of Defendants' expert affirmations is devoid of any information regarding the plaintiff's blood alcohol content upon arrival to the hospital. Therefore, the opinions of the Defendants' experts are speculative and conclusory.

Additionally, even if Defendants had established their prima facie burden, the plaintiff's expert raises an issue of fact in opposition. Defendants' experts state that "there is no effective

and/or accepted treatment or surgical options available" for a cocaine induced vasospasm. In opposition, Plaintiff's expert indicates that the indicated treatment for the Plaintiff's condition was "infusion of anticonstrictive agents (e.g. verapamil, milrinone and nimopidine)" in addition to further therapy and depending on the results of indicated timely work up. The conflicting expert affirmations create an issue of fact.

Accordingly, the motion is DENIED. All relief not expressly granted has been considered and DENIED.

This constitutes the decision and order of the Court

Dated: April 12, 2023

ENTER.

Hon. Consuelo Mallafre Melendez, J.S.C.