

Thomas v Sun
2023 NY Slip Op 32828(U)
August 14, 2023
Supreme Court, Kings County
Docket Number: Index No. 508276/2020
Judge: Consuelo Mallafré Meléndez
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At an IAS Term, Part 7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of August 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
JERRY THOMAS and SHANA THOMAS,

Plaintiffs,

-against-

CALVIN SUN, M.D., NEW YORK CITY HEALTH &
HOSPITALS CORPORATION, MATHIEU FRANCOIS, M.D.
and MATHEIU FRANCOIS, M.D, P.C.,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 3: 72 – 74, 75 – 86, 101

Seq. 4: 87 – 88, 89 – 92, 95 – 98, 99, 101 – 103

DECISION & ORDER

Index No. 508276/2020

Mo. Seq. 3 & 4

Defendant, CALVIN SUN, M.D. (hereinafter Sun, M.D.), moves this court for an order pursuant to CPLR §3212, seq. #3, granting summary judgment and dismissing plaintiff’s complaint in its entirety as to CALVIN SUN, M.D. Defendant, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (hereinafter “HHC”), moves this court for an order pursuant to CPLR § 3212, seq. #4, granting summary judgment and dismissing plaintiff’s complaint as to NYCHHC for the acts of Tiffany Cohen, M.D., and a medical resident and other staff or in the alternative 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. Plaintiffs’ submitted opposition to these motions.

This case involves treatment of Plaintiff at the emergency department of Kings County Hospital Center for an infection, perianal abscess, and diabetes. Plaintiff presented to Kings County Hospital complaining of weakness, vomiting, no appetite for three days. He had two bouts of watery diarrhea, one bout of non-bloody, vomiting and another bout of diarrhea the day prior to admission. He also felt fever and chills the day prior. He gave a history of feeling a "bump on the inside of his right buttocks." Plaintiff was seen and evaluated by Defendant Dr. Sun, an NYCHHC medical resident and Dr. Cohen. The movants are employed by NYCHHC. Plaintiff later was diagnosed with Fournier's gangrene.

“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 [internal citations omitted].” *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]. “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 v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. “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]. However, “expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted].” *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

As to the experts’ opinions, case law is clear that “mere conclusions, expressions of hope or unsubstantiated allegations are insufficient” to raise a triable issue of fact to defeat a motion for summary judgment on the issue of liability. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]. “General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment.” *Salvia v. St. Catherine of Sienna Med. Ctr.*, 84 A.D.3d at 1054, citing *Heller v. Weinberg*, 77 AD3d 622, 623 [2d dept. 2010].

The motion of NYCHHC is denied. NYCHHC’s expert’s opinion is conclusory and does not discuss the extent of evaluations, if any, performed after Dr Sun’s shift concluded. The expert fails to discuss lab results and the patients’ newly discovered diabetes. Further there is no discussion of these findings in relation to the patient’s abscess. However, even if the court were to find that NYCHHC met its burden warranting summary judgment, the affirmation of Plaintiff’s expert raises issues of fact precluding it. Plaintiff’s expert opines, in detail, that Dr. Cohen was required, under accepted standards of care, to perform her own, independent assessment regarding whether the patient could be safely discharged or required admission to the hospital. The motion of Defendant Sun, M.D. is also denied. While Dr. Sun establishes their prima facie burden on summary judgment, Plaintiff’s expert raises issues of fact in their detailed affirmation, which is well based on the medical record and testimony of the defendants. Among the deviations noted, Plaintiff’s expert opines that plaintiff’s lab data evidenced SIRS which, in the presence of an infection, becomes sepsis. The expert notes that there was evidence that the abscess was infected as initial labs were significant for an elevated white blood cell count of

16.45 with 78% neutrophils. These, the expert states, indicate infection. The expert notes that the plaintiff's vitals were significant for a temperature of 103.1, pulse of 134, respiratory rate of 20, which he opines were elevated. The expert also opines that plaintiff was diagnosed to have an uncontrolled diabetes as evidenced by lab findings.

Significantly, Plaintiff's expert opines that no attempts to explore or further open the abscess were made. The expert states that the location of this abscess in the perianal or inner buttock area is should have been of particular concern to Dr. Sun and explains that due to extensive soft tissue, which is easily penetrated and dissected by bacterial infections, abscesses in this region can extend much deeper than they appear on the surface. At a minimum, a digital rectal exam (palpating the inside of the rectum) to feel for an abscess is mandatory to determine if the abscess extends into the perirectal area which would require surgical treatment, however even a digital rectal exam can be unreliable. Therefore, the expert opines that a CT scan of the pelvis be performed. Additionally, the expert states that

“(s)uperficial abscesses, however, usually do not have systemic symptoms that Mr. Thomas presented with such as fever, tachycardia, and elevated white blood cell count unless the abscess is spreading through the skin as a cellulitis or extending much deeper than appears as a deep space abscess, both of which would be especially dangerous in a severe diabetic. Given the location of this abscess, the systemic signs of infection with sepsis, and the uncontrolled diabetes, the standard of care would have been to perform a digital rectal exam and if no perirectal extension was noted, either open up the abscess more to explore the depth of it, or if there was concern for damaging adjacent structures performing a CT scan to determine the extent of the abscess, with surgical consult if additional findings were noted. Even if the abscess was not found to be deeper or more extensive, given that Mr. Thomas was septic and immunosuppressed, and given the particularly aggressive nature of the bacteria that can infect these regions leading to Fournier's gangrene, the standard of care required that Mr. Thomas be started on IV antibiotics and admitted to the hospital for treatment of his sepsis and hyperglycemia and to observe for progression”.

Lastly, the question of whether the treatment of the subsequent treating physician at the hospital and/or the treatment rendered by the subsequent private physician was a proximate cause of plaintiff's injuries remains an issue of fact for trial. The matter before this court is the treatment rendered by Defendant Dr. Sun and the NYCHHC defendants, not the defendant physician who saw the patient after the treatment at issue herein. As discussed above, plaintiff's expert sets forth in detail opinions as to liability and proximate cause that warrant denial of this motion.

In accordance with the above, the motions of defendant NYCHHC and defendant Sun, M.D. are DENIED.

This constitutes the decision and order of the court.

ENTER.



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