

**Peynado v Woodhull Med. Ctr.**

2023 NY Slip Op 32928(U)

August 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 502285/2018

Judge: Consuelo Mallafre Melendez

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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 22nd day of August 2023.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
MILTON PEYNADO,

Plaintiff,

-against-

WOODHULL MEDICAL CENTER and MENTAL HEALTH CENTER and NEW YORK CITY HEALTH and HOSPITALS CORPORATION,

Defendants.

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

**DECISION & ORDER**

Index No. 502285/2018  
Mo. Seq. 2

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

NYSCEF #s: 39 – 41, 43 – 54, 57 – 59, 60 – 61, 62, 64 – 66

Defendants, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION S/H/A WOODHULL MEDICAL CENTER and MENTAL HEALTH CENTER and NEW YORK CITY HEALTH and HOSPITALS CORPORATION, move this court for an order pursuant to CPLR § 3212 granting summary judgment to the defendants, and move this court for an order pursuant to CPLR § 3211 dismissing plaintiff’s complaint with prejudice.

This case involves treatment of plaintiff at Woodhull Medical and Mental Health Center on October 10, 2017. Milton Peynado presented to the emergency department of Woodhull Medical Center on October 9, 2017, complaining of pain in his left arm, tingling for three days and difficulty sleeping. An EKG was performed which showed an abnormality and a myocardial

scan and a thallium stress test was ordered. The Lexiscan Nuclear Stress Test was commenced as planned the next morning on October 10, 2017, at approximately 10:35 AM. He was injected with nuclear isotope materials (Thallium) at approximately 10:35 AM. Shortly thereafter, at approximately 10:38 AM, while in the Nuclear Medicine area at Woodhull, plaintiff fell. Plaintiff needed to use the restroom and claims that he stood up from having been lying on the examination table and fell shortly after standing and beginning to walk. He fractured his nose, multiple teeth and was sutured inside his mouth. After he was examined, and his injuries were evaluated an alternative to the Lexiscan Nuclear Stress Test was ordered: a cardiac stress test which was performed at approximately 12:17 PM. For the cardiac stress test, the patient was administered the vasoactive medication, Regadenoson, which dilates arteries throughout the body, including the heart. The record shows Regadenoson was administered at approximately 12:17 PM. See Exhibit B, Woodhull Records, 38. Also, at approximately 12:17 PM, technetium, a radiotracer, was administered with a pharmacologic agent to simulate exercise in an effort to perform a complete cardiac stress test. That test was completed, and no complications were noted.

Plaintiff alleges defendant's departures from the standard of care are the proximate cause of plaintiff's acute loss of consciousness and facial injuries. Plaintiff alleges defendant deviated from the standard of care by conducting the stress test despite plaintiff's elevated blood pressure. Plaintiff also alleges defendant deviated from the standard of care in permitting plaintiff to stand up on his own after the stress test was completed and plaintiff wanted to go to the bathroom.

“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].

Defendant’s expert, Jonathan W. Weinsaft, M.D., a physician board-certified in Cardiology and Nuclear Cardiology, established that they are qualified to opine as to the care and treatment rendered to the plaintiff by NEW YORK CITY HEALTH AND HOSPITALS CORPORATION in this case. Plaintiff’s expert, a physician board-certified in Internal Medicine and Cardiovascular Medicine, established that they are qualified to opine as to the care and treatment rendered to the plaintiff by NEW YORK CITY HEALTH AND HOSPITALS CORPORATION.

As a preliminary matter, Plaintiff's opposition and expert affidavit do not dispute, discuss or in any way respond to defendant's motion for summary judgment seeking dismissal of the claims for negligent hiring and credentialing. Plaintiff's failure to oppose these allegations requires the Court to dismiss these claims in their entirety.

Defendant established their prima facie burden to warrant summary judgment. Defendant's expert, Dr. Weinsaft, in his affidavit relies on facts found in the record and discusses the alleged claims in the supplemental verified bill of particulars that plaintiff lost consciousness "due to an allergic/adverse reaction to contrast materials". Defendant's expert opines plaintiff was an appropriate candidate for nuclear stress test based on his past medical record of hypertension, diabetes, abnormal ECG, and complaints of left shoulder and arm pain. Dr. Weinsaft opines plaintiff had a vasovagal reaction (such as a sudden drop in one's blood pressure or heart causing the person to faint). Defendant's expert opines NYC Health + Hospitals met the standard of care in administering thallium and other contrast materials to conduct the stress test. Further, Dr. Weinsaft opines less than 1% of patients have an adverse reaction to thallium. Defendant's expert opines the standard of care does not test for allergies to thallium or other contrast material before administration for testing purposes when there is no record of allergies to medications. Defendant's expert opines there was no departure from the standard of care by the Woodhull staff to recognize plaintiff's possible predisposition to adversely react to thallium and other contrast material.

Moreover, Dr. Weinsaft opines there was no departure from the standard of care by the Woodhull staff in monitoring the plaintiff post-injection, in failing to prevent plaintiff from falling, or in causing or allowing plaintiff to lose consciousness. The expert opines the standard of care is to allow patients to go to the restroom unaccompanied during a stress test and it is not

the standard of care to accompany patients to the restroom post-injection of thallium. The expert opines plaintiff had a vasovagal syncope reaction (an exaggerated change in a patient's hemodynamic status, such as a sudden drop in one's blood pressure or heart rate causing the person to faint). Defendant's expert opines Woodhull did not deviate from the standard of care by permitting plaintiff to go to the bathroom on his own post-injection of thallium as there was no indication that plaintiff was going to fall prior to the syncope. The expert opines plaintiff's injuries were not caused by any negligent treatment provided by NYC Health + Hospitals, rather by a sudden syncopal event. Defendant's expert opines NYC Health + Hospitals did not deviate from the standard of care in monitoring the plaintiff.

In opposition, plaintiff fails to raise an issue of fact to withstand summary judgment. Plaintiff's expert in his/her affidavit relies on facts not in the record and misstates the facts in this case.

Plaintiff's expert opines that before the thallium was administered the plaintiff's resting blood pressure was recorded at 156/115, an extreme elevation of blood pressure especially in a patient being evaluated for the possibility of an acute coronary syndrome. The expert opines that the patient should not have been subjected to the stress test given this blood pressure reading, rather the test should have been postponed until the plaintiff's diastolic blood pressure was lower than 95 mm Hg. The expert that the plaintiff's high blood pressure required the administration of Regadenoson which is a pharmacologic agent that dilates arteries in the body, including the heart putting him in extreme risk of having his blood pressure acutely fall to dangerously low levels. Plaintiff's expert opines defendant deviated from the standard of care by conducting the stress test while plaintiff's blood pressure was elevated. The expert opines the standard of care is to not

have subjected Plaintiff to the test with a blood pressure level that required the injection of Regadenoson, which was a major factor in his loss of consciousness.

Defendants note that the theory of plaintiff's elevated blood pressure of 156/115 prior to the stress test is misstated by plaintiff's expert as the record states the patient's pressure before the test was 125/87. See Exhibit B, Woodhull Records, 105. The 156/115 blood pressure reading was taken after plaintiff's fall. See Exhibit B, Woodhull Records, 110. There is no record to support plaintiff's expert's contention that plaintiff's blood pressure immediately prior to the fall was 156/115.

Plaintiff's expert also states defendant had plaintiff lying down during the administration of the stress test and allowed him to get up for the bathroom from this position, which was a departure from the standard of care. The expert opines the standard of care required plaintiff to be in a sitting position with medical staff present to assess the plaintiff's blood pressure when the study was completed, and based on those vital signs, determine if plaintiff required medical supervision to stand up and use the restroom. The expert opines plaintiff's vitals would have revealed low blood pressure and, in that instance, "the standard of care would have required sitting him down, providing him with intravenous fluids (to increase his blood pressure) and to accommodate his need to use the bathroom with a urinal or a commode." The expert opines the fall in plaintiff's blood pressure, his abrupt syncope, and facial injuries is a result of defendant allowing plaintiff to stand up on his own without checking his blood pressure. The expert opines this was a departure from the standard of care. Plaintiff's expert opines all these departures from the standard of care are the proximate cause of plaintiff's "acute loss of consciousness and for his fall that fractured his nose, teeth and required sutures".

While Plaintiff's expert bases his/her opinion that plaintiff was lying down they do not reference any evidence to support this claim. On the other hand, Defendant notes that in the 50-h, Plaintiff testified that he was sitting down when he was given Thallium. See Exhibit D, 50-h Transcript 33:22 – 34:15. Further, Plaintiff's expert speculates that Plaintiff's blood pressure was low before he proceeded to the bathroom. The record is clear that the blood pressure reading before his fall, at about 8:28am, was 125/87.

Further in reply, defendants object to new allegations of medical malpractice alleged in plaintiff's opposition particularly the administration of Regadenoson. The Court agrees this is a new allegation raised in opposition to this motion. This is improper and does not raise an issue of fact. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars." *Anonymous v. Gleason*, 175 A.D.3d 614, 617 [2d Dept. 2019][internal citations omitted]; *Bacalan v. St. Vincents Catholic Med. Centers of New York*, 179 AD3d 989 [2d Dept. 2020]. Notwithstanding, the record shows Regadenoson was administered after the fall at approximately 12:17 PM. See Exhibit B, Woodhull Records, 38.

In sum, defendant establishes a prima facie entitlement to summary judgment, however, plaintiff fails to raise an issue of fact through the opinions of his expert which are conclusory, speculative, and not supported by the record. *Forrest v. Tierney*, 91 AD3d 707 [2d Dept. 2012]; *DiMitri v. Monsouri*, 302 AD2d 420 [2d Dept. 2003]. "An expert opinion that is contradicted by the record cannot defeat summary judgment." *Bartolacci-Meir v. Sassoon*, 149 AD3d 567, 572 [1<sup>st</sup> Dept. 2017]; *Schwartz v. Partridge*, 179 AD3d 963 [2d Dept. 2020].

Accordingly, Defendant's motion for summary judgment is GRANTED as to all claims sounding in medical malpractice. Additionally, as aforementioned, as the claims for negligent

hiring and credentialing were not opposed these claims are dismissed. The complaint is dismissed in its entirety, with prejudice.

This constitutes the decision and order of the court.

**ENTER.**



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**Hon. Consuelo Mallafre Melendez**

**J.S.C.**