

**Presman v Dong-Seok Lee**

2023 NY Slip Op 34763(U)

October 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 522862/2018

Judge: Ellen M. Spodek

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At MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 2nd day of Oct., 2023.

PRESENT:

HON. ELLEN M. SPODEK,  
Justice

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

Index No.: 522862/2018

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ALLA PRESMAN, as the Administrator of the Estate of  
ALEKSANDR YUZHUK, deceased,

**DECISION AND ORDER**

*MS#3*

Plaintiff,

-against-

DONG-SEOK LEE, M.D., LAURA G. BEITIA, M.D.,  
MANJIL CHATTERJI, M.D., PHILIP J. TORINA, M.D.,  
MARCO A. HARMATY, M.D., and THE MOUNT SINAI  
HOSPITAL,

Defendants.  
-----X

Motion and Supporting Papers  
Affirmation in Opposition  
Reply Affirmation

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Defendants Dong-Seok Lee, M.D., Laura G. Beitia, M.D., Manjil Chatterji, M.D., Philip J. Torina, M.D., Marco A. Harmaty, M.D., and The Mount Sinai Hospital move pursuant to CPLR 3212, for an Order granting summary judgment, and dismissing the Complaint as against the moving defendants with prejudice. Plaintiff Alla Presman opposes.

## Factual Background

Decedent, Aleksandr Yuzhuk first presented to the Mount Sinai Cancer Center on October 23, 2015. *Exhibit N, p. 187-194*. He was seen at Mount Sinai by Ju-Hyung Park, NP and defendant Dr. Dong-Seok Lee, a Thoracic Surgeon. Mr. Yuzhuk, then 65-years-old, reported that a 2.3 cm. right lower lobe lung nodule was seen on a CT scan during a workup for shortness of breath at an outside hospital. *Exhibit N, p. 188*. His medical history showed hypertension, diabetes mellitus, and Barrett's Esophagus. *Exhibit N, p. 188*. Mr. Yuzhuk also reported that he quit smoking cigarettes about 2 weeks earlier. *Exhibit N, p. 189*.

Dr. Lee examined Mr. Yuzhuk, reviewed the outside radiology studies, and spoke with Mr. Yuzhuk about his options, including CT-guided biopsy and surgical biopsy, to rule out malignancy. *Exhibit N, p. 189-190*. Labs were drawn and Dr. Lee recommended a CT-guided biopsy, PET scan, and pulmonary function tests. *Exhibit N, p. 190-194*. The pulmonary function tests were performed on November 2, 2015. *Exhibit N, p. 070-071*.

Mr. Yuzhuk underwent a PET scan for initial diagnosis and staging, which was reported on October 30, 2015. *Exhibit P, p. 036-037*. The PET scan revealed a 2.3 cm hypermetabolic right lower lobe pulmonary mass within the superior segment of the right lower lobe with a Standardized Uptake Value (SUV) max of 16.2, most likely representing a primary lung malignancy. *Exhibit P, p. 036-037*. There was also a small right lower paratracheal lymph node with SUV max of 4.2 that was worrisome for metastatic disease, and for which a biopsy was recommended for further evaluation. There was no hypermetabolic hilar or axillary lymphadenopathy and there were multiple other nodules scattered throughout both lungs that were not FDG avid. *Exhibit P, p. 036*.

On November 9, 2015, Mr. Yuzhuk underwent a CT-guided biopsy of the pulmonary nodule in the right lower lobe, which was positive for malignant cells. *Exhibit N, p. 723*. On November 11, 2015, Mr. Yuzhuk underwent a flexible bronchoscopy and endobronchial ultrasound. During the

flexible bronchoscopy and endobronchial ultrasound, the right lower paratracheal lymph node was identified. However, despite attempting multiple passes with the aspiration needles, the samples were non-diagnostic. *Exhibit N, p. 704-705.*

On November 13, 2015, Mr. Yuzhuk returned to see Dr. Lee for a follow-up appointment. *Exhibit N, p. 178-182.* Dr. Lee advised Mr. Yuzhuk that the endobronchial ultrasound was non-diagnostic and recommended surgical resection of the right lower lobe nodule, pending the results of a CT head. *Exhibit N, p. 181.* The plan was for Mr. Yuzhuk to undergo cardiac evaluation and a video-assisted thoracoscopic surgery (VATS) right lower lobectomy was scheduled for November 18, 2015. The CT of the head was performed on November 13, 2015 and revealed no intracranial abnormality and no evidence of intracranial metastatic disease. *Exhibit P, p. 034-035.*

On November 18, 2015, Mr. Yuzhuk was admitted to Mount Sinai for the planned surgery with Dr. Lee. *Exhibit N, p. 514.* Mr. Yuzhuk was brought into the OR and Dr. Lee performed a flexible bronchoscopy, VATS with right lower lobectomy, and mediastinal lymph node dissection. *Exhibit N, p. 539-542.* Dr. Lee noted that the mass was easily identified within the right lower lobe. *Exhibit N, p. 541.* During the course of the surgical resection, lymph nodes from levels 9, 11, 7, and 4 were identified and sent as specimens to pathology. *Exhibit N, p. 540-541.* Dr. Lee performed the bronchial dissection and the lower lobe was mobilized, divided, and placed into a LapSac, removed from the chest, and sent as a specimen to pathology. *Exhibit N, p. 541.* The access incisions were closed, the skin was cleaned and dried and steri-strips and sterile dressings were applied. *Exhibit N, p. 541.*

Mr. Yuzhuk was transported to the recovery room in stable condition. *Exhibit N, p. 541.* Mr. Yuzhuk remained at Mount Sinai until November 23, 2015, when he was cleared for discharge home. *Exhibit N, p. 609.* Upon discharge, Mr. Yuzhuk was instructed to return to see Dr. Lee in 1-2 weeks for post-operative follow-up. *Exhibit N, p. 518.*

The surgical pathology results were reported on November 30, 2015. *Exhibit N, p. 643-646.* The diagnosis was moderately differentiated squamous cell carcinoma, keratinizing type, measuring 2.3 cm at its greatest dimension. *Exhibit N, p. 643.* A synoptic report was prepared, which included the pathologic staging. *Exhibit N, p. 644-645.* According to the pathology report, the pathologic staging was pT1bN0Mx. *Exhibit N, p. 644-645.*

On December 4, 2015, Mr. Yuzhuk was seen for a post-operative visit with Dr. Lee. *Exhibit N, p. 173-177.* Mr. Yuzhuk reported that he was breathing well and experiencing post-operative pain, which he rated as a 5 on a scale from 1 to 10. *Exhibit N, p. 174-175.* A chest x-ray was performed to evaluate Mr. Yuzhuk's post-operative pneumothorax, which was improved. *Exhibit N, p. 176; Exhibit P, p. 009.* Dr. Lee prescribed Dilaudid and Ibuprofen for pain control. *Exhibit N, p. 176.* The plan was for Mr. Yuzhuk to follow up in 6 months for a CT scan. *Exhibit N, p. 176.*

Dr. Lee testified at his deposition that, in November 2015, he recommended that patients diagnosed with Stage I lung cancer undergo follow-up CT scan surveillance every 6 months for 5 years. *Exhibit J, p. 106-107.* After 5 years, if all of the scans have been clean, the patient Mr. Yuzhuk could begin following up on a yearly basis. *Exhibit J, p. 107.*

On December 13, 2015, Mr. Yuzhuk presented to the ED at Mount Sinai with complaints of pain and swelling at the surgical site. *Exhibit N, p. 476.* A review of his systems was positive for cough and a physical exam revealed normal effort and breath sounds, with tenderness and local erythema at the suture site and in the right upper quadrant of the abdomen. *Exhibit N, p. 478.* Mr. Yuzhuk reported that he had been doing well and was seen for a follow-up appointment on December 4, 2015, but since then had experienced increased pain at the surgical site that was tender to touch. *Exhibit N, p. 479.* A chest x-ray and CT were performed and Mr. Yuzhuk was seen by Cardiothoracic Surgery. *Exhibit N, p. 480; 487-490.*

The chest x-ray was clear, the CT showed post-operative changes, and Mr. Yuzhuk was diagnosed with postoperative pain. *Exhibit N, p. 500-502; Exhibit P, p. 045-046.* He was discharged home that evening with instructions to follow up with his primary care physician and Thoracic Surgery. *Exhibit N, p. 483.*

On December 18, 2015, Mr. Yuzhuk followed up with Dr. Lee for complaints of right incisional pain. *Exhibit N, p. 168-172.* An ultrasound of the right upper quadrant was noted to be negative and Mr. Yuzhuk reported that he was taking Oxycodone and Neurontin and had stopped taking Dilaudid. *Exhibit N, p. 170.* Dr. Lee noted that Mr. Yuzhuk complained of pain along the right anterior chest under the nipple and was sensitive to touch anterior to the access incision. *Exhibit N, p. 172.* Dr. Lee's assessment was likely persistent post-operative pain and hyperesthesia. Dr. Lee instructed Mr. Yuzhuk to continue taking Neurontin, prescribed a Lidocaine patch, and planned to refer him to the Pain Clinic if the complaints persisted. *Exhibit N, p. 172.*

Mr. Yuzhuk returned to see Dr. Lee on January 15, 2016 to follow up on a chest x-ray ordered by his primary care physician that showed right effusion. *Exhibit N, p. 164-167.* Mr. Yuzhuk also reported a recent cough. Dr. Lee examined Mr. Yuzhuk and reviewed the chest x-ray ordered by Mr. Yuzhuk's primary care physician. *Exhibit N, p. 167.* A chest x-ray performed earlier that day at Mount Sinai was reviewed and noted to show a stable, small amount of loculated fluid. *Exhibit N, p. 166-167.* Dr. Lee reassured Mr. Yuzhuk and told him that he would be scheduled for a follow-up appointment and CT scan in 5 months. *Exhibit N, p. 167.*

Mr. Yuzhuk was seen by Dr. Lee for a follow up appointment on May 27, 2016. *Exhibit N, p. 155-159.* Mr. Yuzhuk reported that he had a cough at night with yellow sputum production that began that day and that his pain was now completely controlled. *Exhibit N, p. 156-157.* He denied shortness of breath, chest pain, new onset hemoptysis, and appetite changes. *Exhibit N, p. 157.* The surveillance CT scan revealed resolution of the previously noted loculated fluid and Dr. Lee noted what appeared

to be dense soft tissue along the right lateral wall of the mid-trachea. *Exhibit N, p. 159*. Dr. Lee documented that, given Mr. Yuzhuk's reported symptoms and the CT findings he recommended a bronchoscopy with possible biopsy. *Exhibit N, p. 159*. Mr. Yuzhuk consented to undergo the bronchoscopy, which was scheduled for June 8, 2016. *Exhibit N, p.158-159*.

On June 8, 2016, Mr. Yuzhuk presented to Mount Sinai for a flexible bronchoscopy with Dr. Lee. *Exhibit N, p. 443*. Dr. Lee documented that, given Mr. Yuzhuk's reported dry cough and a questionable finding on the surveillance CT chest scan, he recommended bronchoscopic examination. *Exhibit N, p. 461-462*. Dr. Lee performed the procedure and noted that no endobronchial lesions were observed. *Exhibit N, p. 461-462*. Mr. Yuzhuk was discharged with prescriptions for acetaminophen, albuterol, amitriptyline, Nexium, and Flomax. *Exhibit N, p. 447*.

Mr. Yuzhuk returned to see Dr. Lee on September 16, 2016 for a follow-up appointment and continued complaints of a dry cough. *Exhibit N, p. 150-154*. Mr. Yuzhuk reported that the cough began after surgery the year before and that he experienced shortness of breath after coughing episodes, with some pain in the left shoulder area. *Exhibit N, p. 151*. Mr. Yuzhuk denied fever, chills, new onset hemoptysis, and appetite changes. A chest x-ray performed that day revealed mildly improved pleural fluid and/or thickening in the right lung base compared to January 15, 2016 and no evidence of pulmonary disease. *Exhibit N, p. 153; Exhibit P, p. 008*. Dr. Lee noted that there was no clear etiology for Mr. Yuzhuk's cough. *Exhibit N, p. 154*.

On November 18, 2016, Mr. Yuzhuk returned to see Dr. Lee for a follow-up appointment and surveillance CT scan. *Exhibit N, p. 145-149*. Mr. Yuzhuk reported that his cough had improved and he was sleeping better. *Exhibit N, p. 146*. He also noted an upper right abdomen lump with dull, aching pain for the last 2 weeks, which his primary care physician advised was most likely a hernia. Mr. Yuzhuk denied shortness of breath, fever, chills, new onset hemoptysis, and appetite changes. *Exhibit N, p. 146*. Dr. Lee reviewed the imaging from Mr. Yuzhuk's surveillance CT chest scan,

which he read as showing stable, sub-centimeter right upper lobe nodules. *Exhibit N, p. 148-149*. The plan was for Mr. Yuzhuk to return for follow up and CT surveillance in 6 months. *Exhibit N, p. 149*.

Initially, the Radiology report from the November 18, 2016 CT chest was read as showing stable right upper lobe nodules and no evidence of pulmonary disease. *Exhibit P, p. 021-022*. Subsequently, upon further review, the Radiologist, Dr. David Yankelevitz, added an addendum to the report documenting a new pleural based abnormality with soft tissue density measuring 23x14 mm in the anterior aspect of the right upper lobe at the level between the 5th and 6th anterior ribs., for which a PET/CT scan should be considered for further evaluation. *Exhibit P, p.020-021*. Dr. Lee testified that the Radiologist contacted him to report the addendum and new pleural based abnormality, which led Dr. Lee to contact Mr. Yuzhuk and recommend a PET scan for further examination. *Exhibit J, p. 141, 151-152*.

On December 9, 2016, Mr. Yuzhuk underwent a PET scan to further evaluate the pleural based abnormality and examine whether there were any other sites of disease. *Exhibit P, p. 002-003*. The PET scan revealed a new hypermetabolic mass in the anterior right chest wall, fifth intercoastal space abutting the right fifth rib with no obvious destructive changes that was highly concerning for metastatic disease. The mass measured 2.7 cm x 1.7 cm and the SUV max was 27.1. The subcentimeter right paratracheal hypermetabolic lymph node was again seen, with an SUV max of 3.9 (previously 4.2).

Mr. Yuzhuk presented for a follow-up appointment with Dr. Lee on December 16, 2016, accompanied by the plaintiff. *Exhibit N, p. 135-139*. Mr. Yuzhuk reported a worsening dry cough when supine and a new complaint of progressively worse sharp right flank pain rated as a 10 on a scale from 1 to 10. *Exhibit N, p. 136*. Mr. Yuzhuk denied abdominal pain, shortness of breath, fever, chills, new onset hemoptysis, and appetite changes. The PET scan results were reviewed with Mr.

Yuzhuk and the plaintiff, blood was drawn, and Dr. Lee recommended a CT guided biopsy of the chest wall mass to rule out metastatic disease. *Exhibit N, p. 139.*

On December 27, 2016, Mr. Yuzhuk underwent a CT guided lung biopsy performed by Dr. Michael Chung at Mount Sinai. *Exhibit P, p. 004.* The specimen was evaluated by Pathology and found to be positive for malignant cells, most consistent with squamous cell carcinoma. Dr. Lee testified that because Mr. Yuzhuk was diagnosed with recurrent disease, he referred Mr. Yuzhuk to a Medical Oncologist. *Exhibit J, p. 28.*

On January 9, 2017, Mr. Yuzhuk was seen by Dr. Jorge Gomez, the Medical Oncologist, to discuss potential treatment options for his recurrent disease. *Exhibit N, p. 129- 134.* Dr. Gomez noted that since this was potentially a single site recurrence, surgery may be appropriate. Dr. Gomez noted that Mr. Yuzhuk wanted to pursue surgical resection. *Exhibit N, p. 134.*

An MRI of Mr. Yuzhuk's brain on January 9, 2017 revealed no evidence of metastases. *Exhibit P, p. 010. 23.* On January 11, 2017, Mr. Yuzhuk was admitted to Mount Sinai for the planned surgical resection of the chest wall mass with Dr. Lee. *Exhibit N, p. 200.* Plastic Surgery was consulted intraoperatively to assist with muscle flap coverage for a chest wall reconstruction necessitated because the chest wall mass involved two ribs, which also needed to be resected. *Exhibit N, p. 232-238.* A doctor from Plastic surgery participated in the surgery both before and after Dr. Lee resected the chest wall mass. Once the chest wall mass was resected, mesh was placed and secured to the ribs and soft tissue around the defect and the Plastic Surgeon proceeded with muscle flap placement and closure. *Exhibit N, p. 233-234; 237-238.* Mr. Yuzhuk was transported to the recovery room in stable condition. *Exhibit N, p. 236.*

On January 17, 2017, Mr. Yuzhuk was discharged home from Mount Sinai with instructions to follow up with Dr. Lee in 1-2 weeks. *Exhibit N, p. 205.* Pathology examined the chest wall mass and reported a diagnosis of squamous cell carcinoma, measuring 3.0 cm at its greatest dimension,

poorly differentiated, non-keratinizing type, within the bone and adjacent soft tissue and extending to the inked soft tissue margin. *Exhibit N, p. 349-351. 24.* On January 27, 2017, Mr. Yuzhuk presented to Dr. Lee for a follow-up appointment. *Exhibit N, p. 124-128.* Mr. Yuzhuk was feeling well since surgery and reported right-sided dull procedural pain, controlled with Dilaudid. *Exhibit N, p. 126.* An examination revealed bilateral lower extremity 2+ edema, for which the plaintiff gave Mr. Yuzhuk 40 mg of Lasix. *Exhibit N, p. 127.* Mr. Yuzhuk was ambulating without difficulty and denied new cough, shortness of breath, fever, and chills.

Dr. Lee referred Mr. Yuzhuk to Radiation Oncology to discuss radiation therapy and noted that Mr. Yuzhuk was scheduled for follow-up with Medical Oncology. *Exhibit N, p. 128.* Dr. Lee also instructed Mr. Yuzhuk to return in 6 months for a follow-up CT scan, however Mr. Yuzhuk did not return to see Dr. Lee following the January 27, 2017 appointment.

Mr. Yuzhuk transferred his medical care to Memorial Sloan Kettering Cancer Center (hereinafter referred to as “MSK”) To guide Mr. Yuzhuk’s care, MSK requested Mr. Yuzhuk’s pathology from Mount Sinai. The November 18, 2015 surgical pathology, as well as the other pathology specimens maintained by Mount Sinai, were transferred by Mount Sinai to MSK. MSK directed that the November 18, 2015 surgical pathology undergo molecular testing to identify potentially actionable genetic alterations. The testing was performed using MSK’s targeted tumor-sequencing test called “MSKIMPACT.” The test, which can detect more than 468 gene mutations and other critical genetic changes in cancer, revealed no clinically actionable driver mutations for which a targeted therapy is FDA-approved. *Exhibit O, p. 147; 1719; 1936-1940.*

Mr. Yuzhuk’s chest wall recurrence was treated at MSK. On November 27, 2017, a CT scan of the brain revealed multiple brain metastases. *Exhibit O, p. 93-95.* On December 26, 2017, Mr. Yuzhuk passed away. *Exhibit O, p. 68.*

## Discussion

Plaintiff indicates in her Memorandum of Law that she does not oppose Defendants' motion insofar as it seeks summary judgment in favor of Defendant Drs. Beitia, Chatterji, Torina, and Harmaty. *NYSCEF Doc. No. 130, at 2*. Accordingly, all claims against these Defendants are dismissed.

On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the prima facie burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries. *Brinkley v. Nassau Health Care Corp., 120 A.D.3d 1287 (2d Dept. 2014)*; *Stukas v Streiter, 83 AD3d 18, 24-26 (2d Dept. 2011)*.

Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact. *Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)*; *Brinkley v. Nassau Health Care Corp., supra*; *Fritz v. Burman, 107 A.D.3d 936, 940 (2d Dept. 2013)*; *Lingfei Sun v. City of New York, 99 AD3d 673, 675 (2d Dept. 2012)*; *Bezerman v. Bailine, 95 AD3d 1153, 1154 (2d Dept. 2012)*; *Stukas v. Streiter, at 24*. A plaintiff succeeds in a medical malpractice action by showing that a defendant deviated from accepted standards of medical practice and that this deviation proximately caused plaintiff's injury. *Contreras v Adeyemi, 102 AD3d 720, 721 (2d Dept. 2013)*; *Gillespie v New York Hosp. Queens, 96 A.D.3d 901, 902 (2d Dept. 2012)*; *Semel v Guzman, 84 AD3d 1054, 1055-56 (2d Dept. 2011)*. The plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing. *Stukas, at 24*.

In support of their motion, Defendants submit the affirmations of Dr. Benjamin E. Lee, a physician licensed to practice in the State of New York and board certified in Thoracic and Cardiac Surgery; Dr. Seena C. Aisner, a physician licensed to practice in the State of New York and board

certified in Pathology; Dr. Jeffrey G. Schneider, a physician licensed to practice in the State of New York and board certified in Internal Medicine with a sub-certification in Medical Oncology; Dr. Lawrence H. Schwartz, a physician licensed to practice in the State of New York and board certified in Radiology; and Dr. Robert T. Grant, a physician licensed to practice in the State of New York and board certified in plastic and reconstructive surgery. In support of her opposition, plaintiff submits the affirmations of a physician licensed to practice in the State of New York and board certified in Thoracic and Cardiac Surgery, and a second physician also licensed to practice in the State of New York and board certified in Medical Oncology and Hematology.

As to the claims against Dr. Lee and Mount Sinai, Defendants have met their initial burden of making out a *prima facie* case for entitlement to summary judgment. They submitted five expert affirmations in relevant fields who opine that the Defendants here did not depart from the standard of care and that any possible departures did not proximately cause Mr. Yuzhuk's illness or death. The burden then shifted to the plaintiff to refute the Defendants' contentions with evidence sufficient to create triable issues of fact.

"Expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. 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" *Lowe v. Japal*, 170 AD3d 701, 702-703, 95 N.Y.S.3d 363 (2d Dept 2019) (internal quotation marks, brackets, and citations omitted). "An expert opinion that is contradicted by the record cannot defeat summary judgment" *Schwartz v Partridge*, 179 AD3d 963, 964, 117 N.Y.S.3d 300 (2d Dept 2020).

Here, plaintiff's experts do not address any departures from the standard of care by Mount Sinai. They focus instead on the conduct of Dr. Lee. Plaintiff's experts claim to have reviewed the record and the documents submitted by Defendants, however neither expert directly addresses any of

the expert affirmations submitted by Defendants. They do not mention any of the five experts by name. They do not directly reference or refute the contentions of any of the five experts. They do not refer to the Defendants' expert affirmations in any capacity. They simply offer their own opinions as to the relevant standards of care in this case. These affirmations are conclusory and insufficient to meet the plaintiff's burden, because they do not address specific assertions made by the movants' experts. *Tsitrin v New York Community Hosp.*, 154 A.D.3d 994 (2<sup>nd</sup> Dept. 2017); *Hernandez v Nwaishienyi*, 148 A.D.3d 684 (2<sup>nd</sup> Dept. 2017); *Brinkley v Nassau Health Care Corp.*, 120 AD3d at 1290 (2<sup>nd</sup> Dept. 2014); *Forrest v Tierney*, 91 AD3d 707, 709, 936 (2<sup>nd</sup> Dept 20122012); *Graziano v Cooling*, 79 AD3d 803, 804-805, 913 (2<sup>nd</sup> Dept. 2010).

Accordingly, the defendants' motion for summary judgment is granted in its entirety. The claims against Mount Sinai and Dr. Lee are dismissed. This constitutes the decision and order of the Court.

ENTER:

  
 J.S.C.

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