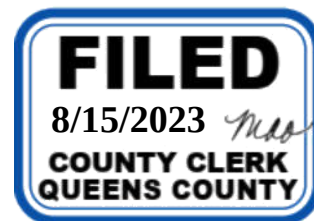


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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Gregorio v Kumar</b>                                                                                                                                                                                                        |
| 2023 NY Slip Op 35233(U)                                                                                                                                                                                                       |
| August 11, 2023                                                                                                                                                                                                                |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 702462/2021                                                                                                                                                                                           |
| Judge: Tracy Catapano-Fox                                                                                                                                                                                                      |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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ANTHONY GREGORIO,

Index No. 702462/2021

Plaintiff,

Part 6

-against-

Motion Date: July 26, 2023

Calendar No. 6

ASHISH KUMAR, M.D., VERONIKA BLINDER,  
DO, MAYRA MERCADO, PA, SILVIO TASSO, MD,  
LONG ISLAND JEWISH MEDICAL CENTER,  
NORTHWELL HEALTH, INC., MEDICAL HEALTH  
ASSOCIATES OF BELLEROSE, P.C., AND NORTH  
SHORE CARDIAC IMAGING, P.C.,

Sequence No. 4

Defendants.

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The following papers numbered EF-111 through EF-208 read on this motion by defendants ASHISH KUMAR, M.D., VERONIKA BLINDER, DO, LONG ISLAND JEWISH MEDICAL CENTER and NORTHWELL HEALTH, INC. for summary judgment and dismissal of plaintiff's Complaint with prejudice pursuant to CPLR §3212.

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF111-EF133

Affirmation in Opposition, Exhibits.....EF204-207

Reply Affirmation.....EF208

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Ashish Kumar, M.D., Veronika Blinder, DO, Long Island Jewish Medical Center and Northwell Health Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint with prejudice pursuant to CPLR §3212 is granted in part and denied in part. (*See Balgobind v. Long Is. Jewish Med. Ctr.*, 2023 NY Slip Op 03673 [2d Dept. 7/5/2023].) Plaintiff commenced this action for medical malpractice and lack of informed consent on February 2, 2021, and issue was joined on March 11, 2021.

Defendants argue that summary judgment is appropriate, as there are no triable issues of fact with regard to the care and treatment rendered to plaintiff. Defendants submit the pleadings, deposition testimony, plaintiff's medical records and expert affirmations of Dr. Robert Meyer and Avi Schwartz in support of their motion. They argue that defendant Dr. Kumar did not deviate from accepted standards of medical practice when treating plaintiff in the emergency room on October 23, 2019. Defendants further argue that Dr. Blinder cannot be liable to plaintiff as she was a third-year resident who did not perform independent acts of treatment or exercise independent medical judgment when caring for plaintiff. They argue that the medical records and deposition testimony demonstrate that Dr. Blinder worked under the supervision of Dr. Kumar, and Dr. Kumar's treatment did not so greatly deviate from normal practice to hold Dr. Blinder liable for failing to intervene. Defendants further argue that Dr. Kumar and Dr. Blinder's medical care was within accepted medical practice and was not the proximate cause of plaintiff's injuries. Defendants further argue that plaintiff's claim of lack of informed consent should be dismissed, as there are no issues of fact in dispute. Plaintiff's medical records from defendant Long Island Jewish Medical Center (hereinafter referred to as "LIJMC") demonstrate plaintiff signed the consent for treatment upon arrival in the emergency room on October 23, 2019. They also argue that since there is no evidence of malpractice or lack of informed consent against Dr. Kumar and Dr. Blinder, defendant LIJMC cannot be vicariously liable for plaintiff's injuries. Further, they argue there is no evidence that defendants LIJMC should be liable for negligent hiring and retention, as Dr. Kumar and Dr. Blinder acted appropriately and in accordance with acceptable medical standards and so there is no claim for punitive damages to support a claim for negligent hiring and retention of its employees. Finally, defendants argue that Northwell is a parent corporation that does not treat patients, and therefore had no duty to plaintiff for which it could be liable.

Defendants present Dr. Robert H. Meyer's affirmation in support of their motion. Dr. Meyer affirmed he is a physician licensed to practice medicine in New York and board certified in Emergency Medicine. He reviewed plaintiff's Bill of Particulars, medical records and deposition testimony of the parties in preparing his affirmation. Dr. Meyer acknowledged that plaintiff alleges moving defendants failed to timely diagnosis and treat his endocarditis and sepsis, resulting in injuries. However, Dr. Meyer opined with a reasonable degree of medical certainty that Dr. Kumar, Dr. Blinder and LIJMC rendered medical care and treatment to plaintiff on October 23, 2019 in accordance with appropriate standards of care and did not cause or contribute to plaintiff's alleged injuries. He opined that when a patient presents to the emergency room with generalized complaints of nausea, vomiting, fever and pain, the standard of care requires a complete history, physical examination and blood work or imaging studies, which defendants performed on plaintiff. Dr. Meyer opined with a reasonable degree of medical certainty that it was appropriate for Dr. Kumar to evaluate plaintiff for infection, as plaintiff no past medical history or physical examination findings consistent with endocarditis. He further opined to a reasonable degree of medical certainty that there was no reason for Dr. Kumar to consider a diagnosis of

endocarditis based upon plaintiff's presentation on October 23, 2019. Dr. Meyer opined that plaintiff's temperature and dehydration were sufficient explanations for plaintiff's elevated heart rate and lab values, that plaintiff improved after receiving fluids, and therefore hospitalization was not warranted. Dr. Meyer also opined to a reasonable degree of medical certainty that an infectious disease consult was not indicated on October 23, 2019 based upon plaintiff's medical condition.

Dr. Meyer also opined to a reasonable degree of medical certainty that Dr. Blinder's involvement in plaintiff's medical care was in accordance with good and accepted practices. He further opined that there is no evidence that Dr. Blinder, a third-year resident, exercised independent judgment in rendering plaintiff's care and treatment, and instead worked under the supervision of Dr. Kumar in treating plaintiff. Dr. Meyer also opined with a reasonable degree of medical certainty that defendants' emergency room treatment did not cause or contribute to plaintiff's subsequent diagnosis of endocarditis, and plaintiff's injuries were not the result of any act or omission by defendants. Dr. Meyer further opined that Dr. Kumar and Dr. Blinder rendered emergency medicine treatment in accordance with good and accepted practice on October 23, 2019 and did not cause, contribute to, or exacerbate plaintiff's alleged injuries.

Defendants also argue that all claims against defendant Northwell Health, Inc. must be dismissed, as it is a parent corporation that does not provide medical care and treatment to patients, as distinguishable from co-defendant LIJMC. They present the affirmation of Avraham Schwartz, Vice President of Risk Management from Northwell Health to demonstrate that it does not provide medical care, nor did it provide medical care to plaintiff and therefore owes no duty to plaintiff. He further affirmed that defendant LIJMC merely maintains professional liability insurance through Northwell Health, Inc., which is not affected by being a named party to the action, and therefore should be dismissed from the action.

Plaintiff opposed defendants' motion, arguing there are triable issues of fact in dispute. He argues that defendants failed to establish a prima facie case of entitlement to summary judgment, as Dr. Meyer's affirmation was speculative and conclusory. Plaintiff notes that Dr. Meyer's affirmation inadvertently references an "infant-plaintiff", which demonstrates the inconsistencies and incorrect statements made by Dr. Meyer. He also argues that Dr. Meyer's affirmation is inconsistent with Dr. Kumar's deposition testimony as to whether plaintiff had a fever, and whether an infection evaluation was needed. Plaintiff presents his expert affirmation, and argues that summary judgment is not appropriate due to the conflicting medical expert opinions. He also argues that there are issues of fact as to whether Dr. Blinder exercised independent medical judgment that warrant denial of summary judgment. Plaintiff argues that there are issues of fact as to defendant LIJMC's vicarious liability and defendant Northwell Health, Inc.'s exercise of control that would warrant denial of summary judgment. Finally, plaintiff argues that the expert affirmation relying upon minimum national standards of care and treatment is sufficient to raise triable issues of fact.

Plaintiff presents the expert physician affirmation in opposition to defendants' motion. The physician is duly licensed to practice medicine in Georgia and is board certified in Emergency Medicine. The expert reviewed the pleadings, plaintiff's medical records, parties' deposition testimony, defendants' summary judgment motions and expert affirmations in rendering his opinions. The expert opines within a reasonable degree of medical certainty that defendants deviated from minimum standards of good and accepted medical practices in treating plaintiff on October 23, 2019, resulting in a delayed diagnosis of endocarditis. The expert also opines within a reasonable degree of medical certainty that defendants were careless and negligent and departed from minimum national standards of good and accepted medical practice by failing to timely and properly diagnose plaintiff, failing to timely consult with other medical specialties, interpret blood tests, and supervise plaintiff's condition. The expert opined with a reasonable degree of medical certainty that Dr. Blinder and Dr. Kumar departed from the minimum national standards of good and medical practices by failing to appreciate the significance of plaintiff's symptoms in the emergency room resulting in an improper differential diagnosis, resulting in delayed diagnosis of endocarditis and increasing the risk of serious surgery requiring valve replacement.

The expert opined within a reasonable degree of medical certainty that plaintiff's presentation in the emergency room, medical history and lab work revealing elevated white blood counts indicated an underlying infection and chronic condition, which required appropriate and timely diagnostic evaluations that were not performed. Specifically, the expert opined within a reasonable degree of medical certainty that the blood work was incomplete and inappropriate, as it did not include a test for c-reactive protein. The expert opined that the test is indicated when there is a suspicion of inflammation such as that found with plaintiff, who complained of having persistent chills, fever, nausea and vomiting for three weeks. The expert further opined within a reasonable degree of medical certainty that defendants should have performed blood cultures, which would likely have been positive and led to a diagnosis of infection, referral to an infectious disease physician and ultimately leading to a diagnosis of endocarditis. The expert also opined that these failures were a substantial contributing factor to plaintiff's injuries. The expert relied upon defendants' deposition testimony, in which they discounted plaintiff's active fever and flu-like systems. The expert opined within a reasonable degree of medical certainty that had these failures not occurred, endocarditis would have been diagnosed earlier, and appropriate antibiotics would have commenced providing a far better chance that plaintiff would avoid valve replacement. The expert further opined that Dr. Kumar was responsible for Dr. Blinder's acts and omissions, and it is unclear from the records where Dr. Blinder exercised independent medical judgment.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause

of action.” (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff’s claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) However, a parent corporation will not be held liable for the torts or obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary. (*Potash v. Port Auth.*, 279 A.D.2d 562, 562 [2d Dept. 2001].)

A medical resident cannot be held liable for malpractice for assisting a doctor during a medical procedure, if the resident does not exercise any independent medical judgment and so long as the supervising doctor’s directions did not greatly deviate from normal practice that the resident should be liable for failure to intervene. (*Quille v. New York City Health & Hosp. Corp.*, 152 A.D.3d 808, 809 [2d Dept. 2017].)

Defendants established a prima facie entitlement to summary judgment for Dr. Blinder through the medical records, deposition testimony, and expert affirmations. (*See Soto v. Andaz*, 8 A.D.3d 470 [2d Dept. 2004].) Defendants’ deposition testimony established that plaintiff was treated by Dr. Blinder in her capacity as a third-year resident under Dr. Kumar’s supervision, and showed there was no exercise of independent judgment. Plaintiff failed to raise a triable issue of fact in dispute, as the expert affidavit makes conclusory and vague allegations to support a claim

that Dr. Blinder exercised independent medical judgment. (*See Poter v. Adams*, 104 A.D.3d 925 [2d Dept. 2013].) Therefore, summary judgment is warranted as to Dr. Blinder.

Defendants established a prima facie entitlement to summary judgment as to Northwell Health, Inc., through the medical records and affidavit of Avraham Schwartz. They established that Northwell is a parent corporation that does not provide medical care and treatment to patients. Plaintiff failed to raise a triable issue of fact in dispute, as plaintiff failed to demonstrate a duty owed by defendant Northwell, or that it exercised complete control and dominion over co-defendant LIJMC. Therefore, summary judgment is warranted as to defendant Northwell Health, Inc.

Defendants established a prima facie entitlement to summary judgment for Dr. Kumar through the medical records, deposition testimony, and expert affirmations. (*See Ajifowobaje v. Astramed Physicians, P.C.*, 71 A.D.3d 608 [2d Dept. 2010].) They established that Dr. Kumar provided accepted medical care to plaintiff, and there was no evidence that plaintiff had endocarditis at the time he treated plaintiff. (*See Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 A.D.3d 1093 [2d Dept. 2017].) Defendants' expert affidavit demonstrate that Dr. Kumar performed appropriate tests upon plaintiff, obtained blood work and performed a complete physical upon plaintiff based upon plaintiff's complaints. The expert affidavit also demonstrated that Dr. Kumar did not depart from good and accepted medical practice by failing to obtain a consult, as there was no evidence that plaintiff had more than an infection at the time he was in the emergency room. Defendants also established through expert testimony that there is no causal relationship between Dr. Kumar's medical care to plaintiff and plaintiff's endocarditis and other alleged injuries.

However, plaintiff raised a triable issue of fact through the parties' deposition testimony and plaintiff's expert affidavit, specifically as to whether defendant Dr. Kumar failed to properly perform and interpret complete blood tests and timely and appropriately perform diagnostic evaluations. It is noted that plaintiff's expert did not sufficiently demonstrate that Dr. Kumar departed from good and accepted medical practice in failing to refer plaintiff to an infectious disease physician, and therefore this claim is dismissed. However, plaintiff's expert affidavit raised an issue of fact as to whether Dr. Kumar's failure to properly perform and interpret complete blood tests, and timely and appropriately perform diagnostic evaluations were significant departures from accepted standards of medical care that were causally related to plaintiff's injuries, as these failures resulted in a delayed diagnosis and treatment by antibiotics rather than valve replacement. Further, as Dr. Kumar was an employee of defendant LIJMC, there are issues of fact as to whether the above departures were a substantial factor in causing plaintiff's injuries for which defendant LIJMC may be vicariously liable. Therefore, as there are conflicting expert opinions on relevant substantive matters as listed above, summary judgment is denied as to defendants Ashish Kumar, M.D. and LIJMC.

Defendants' argument that plaintiff's expert affidavit is deficient as lacking a certificate of conformity is without merit, as the absence of a certificate of conformity is a mere irregularity which can be disregarded in the absence of a showing of actual prejudice. (*See Christiana Trust v. McCobb*, 187 A.D.3d 983 [2d Dept. 2020].) As defendants failed to show actual prejudice by the lack of a certificate of conformity in accordance with CPLR §2309, this argument is rejected. Furthermore, defendants' argument that plaintiff's Statement of Material Facts should be rejected for failing to conform with 22 NYCRR §202.8(g)(d) is denied, as counsel's affirmation in opposition was the functional equivalent of a statement of material facts. (*See Hart v. City of Buffalo*, 2023 NY Slip Op. 03984 [4<sup>th</sup> Dept. 7/28/2023]; *Smith v. MDA Consulting Engrs., PLLC*, 210 A.D.3d 1448 [4<sup>th</sup> Dept. 2022].)

Accordingly, defendants Ashish Kumar, M.D., Veronika Blinder, DO, Long Island Jewish Medical Center and Northwell Health, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint with prejudice pursuant to CPLR §3212 is granted in part and denied in part, and it is hereby

ORDERED that summary judgment is granted as to defendant Veronika Blinder, DO, and plaintiff's claims against defendant Dr. Blinder are dismissed, and it is further

ORDERED that summary judgment is granted as to defendant Northwell Health, Inc., and plaintiff's claims against defendant Northwell are dismissed, and it is further

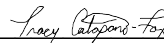
ORDERED that summary judgment is denied as to defendants Ashish Kumar, M.D. and Long Island Jewish Medical Center, and it is further

ORDERED that the parties shall appear in Courtroom 48 for a pretrial conference on October 11, 2023 at 9:30am.

This constitutes the decision and Order of the Court.

Dated: August 11, 2023



  
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Hon. Tracy Catapano-Fox, J.S.C.