

**Melamed v Zaltsman**

2024 NY Slip Op 31829(U)

May 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 524538/17

Judge: Genine D. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24<sup>th</sup> day of May 2024.

P R E S E N T:

HON. GENINE D. EDWARDS,

Justice.

-----x  
GARY MELAMED, as Executor of the Estate of  
SEYMOUR GALITZER, Deceased,

Plaintiff,

- against -

HELEN ZALTSMAN, M.D.,  
HAYM SOLOMON HOME FOR THE AGED, LLC,  
VENUS CALLA, M.D., and  
NEW YORK-PRESBYTERIAN/BROOKLYN HOSPITAL,

Defendants.  
-----x

**DECISION, ORDER, AND JUDGMENT**

Index No. 524538/17

Mot. Seq. No. 5-7

The following e-filed papers read herein:

NYSCEF Doc No.:

Notices of Motion, Affirmations, and Exhibits.....87-117; 119-140; 141-161  
Affirmations in Opposition and Exhibits.....169-170, 174-175; 176-177, 180; 181-182, 185  
Reply Affirmations and Exhibits.....190; 191-192; 193

In this action to recover damages for (among other things) negligence, medical malpractice, wrongful death, and violation of Public Health Law § 2801-d, Venus Calla, M.D. (“Dr. Calla”), and New York-Presbyterian Brooklyn Methodist Hospital, sued herein as New York-Presbyterian/Brooklyn Hospital (“Methodist”), jointly, Haym Solomon Home for the Aged, LLC (“HSHA”) individual, and Helen Zaltsman, M.D. (“Dr. Zaltsman”), likewise individually, each move for summary judgment dismissing the complaint of Gary Melamed, as executor of the Estate of Seymour Galitzer, deceased (“plaintiff”). Plaintiff stipulated to the voluntary discontinuance of all his claims as against Dr. Calla. Further, plaintiff did not object to the dismissal of (and thus effectively abandoned) his informed consent and negligent

hiring claims as against Methodist and HSHA. *See e.g. Harsch v. City of N.Y.*, 78 A.D.3d 781, 910 N.Y.S.2d 540 (2d Dept. 2010). The remainder of this decision, order, and judgment addresses plaintiff's claims sounding in negligence, medical malpractice, and wrongful death as against each of Methodist, HSHA, and Dr. Zaltsman (collectively, "defendants") as well as his additional claim predicated on the alleged violation of Public Health Law § 2801 as against HSHA.

### Summary

Plaintiff's decedent, Seymour Galitzer (the "patient"), age 80, was hospitalized at Methodist's acute rehabilitation unit ("ARU") from November 27, 2015<sup>1</sup> to December 11, 2015.<sup>2</sup> On December 11, the patient was transferred from Methodist's ARU to a rehabilitation facility owned and operated by HSHA<sup>3</sup> where Dr. Zaltsman was assigned as his attending physician.<sup>4</sup> The patient stayed at HSHA until the early morning of December 21 when he was emergently transferred to nonparty Coney Island Hospital ("CIH"), with complaints of fever, chills, and decreasing mental status.<sup>5</sup> His condition at the time of his admission at CIH was

---

<sup>1</sup> All references are to calendar year 2015, unless otherwise indicated.

<sup>2</sup> *See* Plaintiff's Verified Bill of Particulars as to Methodist, dated Nov. 19, 2018, ¶ 1.

<sup>3</sup> *See* Plaintiff's Verified Bill of Particulars as to HSHA, dated Nov. 6, 2018, ¶¶ 3 (a) and 14 (d).

<sup>4</sup> *See* Plaintiff's Verified Bill of Particulars as to Dr. Zaltsman, dated Oct. 9, 2018, ¶ 1.

<sup>5</sup> *See* CIH's records, "ED [Note] – Initial History & Physical," page 4 of 541.

“guarded.”<sup>6</sup> His health deteriorated during the course of his stay at CIH. On December 25, the patient passed away at CIH.<sup>7</sup>

Approximately two years later on December 20, 2017, plaintiff, as the executor of the patient’s Estate, commenced this action.<sup>8</sup> Each defendant, as well as Dr. Calla, joined issue. After discovery was completed and a note of issue was filed, the instant motions were timely served. On October 13, 2023, the Court reserved decision on the instant motions.

### Standard of Review

“In moving for summary judgment dismissing a cause of action alleging medical malpractice, a defendant must establish, prima facie, that there was no departure or deviation from the accepted standard of care or that such departure or deviation was not a proximate cause of any injury to the plaintiff.” *Attia v. Klebanov*, 192 A.D.3d 650, 143 N.Y.S.3d 408 (2d Dept. 2021). “[T]o sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars.” *Wiater v. Lewis*, 197 A.D.3d 782, 783, 153 N.Y.S.3d 176 (2d Dept. 2021).

---

<sup>6</sup> See CIH’s records, “ED Disposition Note/Med Reconciliation,” page 8 of 541.

<sup>7</sup> See CIH’s records, “Death Note,” page 10 of 541 (“[The patient] was a[n] 80 year old male with a recent history of multiple embolic strokes requiring a ventilator. Incidentally, masses suspicious for malignancy were found in both his lungs and liver. He coded twice today at Coney Island Hospital where 1 shock was applied, [and] multiple doses of epinephrine were given. During the code, [the patient’s] nephew . . . decided on DNR . . . . He was pronounced dead at 12/25/2015 4:49 pm.”).

<sup>8</sup> Plaintiff is an attorney who was selected by the patient, before his death, to serve as the executor under his last will and testament. Plaintiff “has no personal knowledge relative to the claims herein and makes no claims in any individual capacity. His sole relation to [the patient] of any relevance is that he has the capacity to prosecute this [action] on behalf of the [patient’s] Estate.” See Plaintiff’s Verified Bill of Particulars as to HSHA, ¶ 1. The patient’s distributees under his will are his two sisters, both of whom reside on the West Coast. *Id.* ¶ 22 (a)-(b).

“Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to the elements on which the defendant met the prima facie burden.” *Piazza v. NYU Hosps. Ctr.*, 208 A.D.3d 525, 173 N.Y.S.3d 293 (2d Dept. 2022).

“To rebut the defendant’s prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert’s allegations.” *Pirri-Logan v. Pearl*, 192 A.D.3d 1149, 145 N.Y.S.3d 545 (2d Dept. 2021). “General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant [provider’s] summary judgment motion.” *Myers v. Ferrara*, 56 A.D.3d 78, 864 N.Y.S.2d 517 (2d Dept. 2008). “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.” *Tsitrin v. New York Community Hosp.*, 154 A.D.3d 994, 62 N.Y.S.3d 506 (2d Dept. 2017) (internal quotation marks omitted).

“Liability under the Public Health Law contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient.” *Moore v. St. James Health Care Ctr., LLC*, 141 A.D.3d 701, 35 N.Y.S.3d 464 (2d Dept. 2016) (internal quotation marks omitted); *see also Novick v. South Nassau Communities Hosp.*, 136 A.D.3d 999, 26 N.Y.S.3d 182 (2d Dept. 2016).

### Discussion

On their separate motions for summary judgment, each defendant established its (or her) respective prima facie entitlement to judgment as a matter of law on the causes of action sounding in medical malpractice, negligence, and wrongful death as to all defendants, and, in addition, as to the Public Health Law claim as to HSHA. Defendants did so through the submission of: (1) in the case of Methodist, an affirmation of its expert psychiatrist, Karen Pechman, M.D.; (2) in the case of HSHA, an affirmation of its expert internist and geriatrician, Mark Steven Lachs, M.D., and (3) in the case of Dr. Zaltsman, an affirmation of her expert pulmonologist, intensivist, and palliative care specialist, Umesh K. Gidwani, M.D., each of whom addressed the specific allegations of medical malpractice, negligence, and wrongful death (and in the case of HSHA, the additional claim predicated on the alleged violation of the Public Health Law) set forth in plaintiff's bills of particulars as to the respective defendants. *See Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023); *Bacalan v. St. Vincent's Catholic Med. Ctrs. of N.Y.*, 179 A.D.3d 989, 118 N.Y.S.3d 147 (2d Dept. 2020).

In opposition to defendants' respective prima facie showings, plaintiff's expert internist and geriatrician, Aldo Arpaia, M.D. ("Dr. Arpaia"), failed to raise a triable issue of fact as to any of the defendants.<sup>9</sup> Most fundamentally, Dr. Arpaia, improperly alleged, for the first time

---

<sup>9</sup> See Dr. Arpaia's Expert Affirmations, each dated July 26, 2023.

in this action, a new theory of liability by claiming that each defendant should have (but failed to have):

(1) stopped oral Midodrine (a blood pressure-increasing medication) on which the patient had been started by his private attending, nonparty Jerome Dubroff, M.D. (“Dr. Dubroff”), for his orthostatic hypotension during his hospitalization at Methodist for syncope from November 25 to November 27, which hospitalization preceded his transfer to Methodist’s ARU on November 27;<sup>10</sup>

(2) periodically reassessed the patient’s blood-pressure levels and resumed his antihypertensive medication(s), which Dr. Dubroff stopped when he placed the patient on Midodrine; and

(3) provided the patient with “a full work-up so as to adequately determine the source of his orthostatic hypotension” in order “to ascertain whether [such source] was autonomic or syncopal” (collectively, the “hypertension theory of liability”).<sup>11</sup>

Plaintiff’s belated addition of the hypertension theory of liability in opposition to defendants’ motions undisputedly prejudiced them because the substance of Dr. Arpaia’s testimony was not readily discernable either from the numerous and generalized allegations set

---

<sup>10</sup> To be clear, the alleged liability of the initial defendant – Methodist – commenced on November 27 when the patient was transferred to Methodist’s ARU (*i.e.*, its acute rehabilitation unit). See Plaintiff’s Verified Bill of Particulars as to Methodist, ¶ 1 (pegging the commencement date of Methodist’s liability at November 27). The patient’s immediately preceding hospitalization at Methodist from November 25 to November 27 for syncope, which had been overseen by his private attending, Dr. Dubroff, was outside the scope of Methodist’s alleged liability.

<sup>11</sup> See Dr. Arpaia’s Expert Affirmation as to Methodist, ¶¶ 12, 23-27; Dr. Arpaia’s Expert Affirmation as to HSHA, ¶¶ 7, 16, 23-26, 29, 31; Dr. Arpaia’s Expert Affirmation as to Dr. Zaltsman, ¶¶ 7, 16, 24-27, 30, 32.

forth in the bill of particulars or from the statements in plaintiff's expert disclosure. Indeed, plaintiff's expert disclosure was intended for a different medical expert than Dr. Arpaia. Plaintiff's expert exchange notified defendants that his medical expert was "expected to provide testimony regarding the applicable standards of medical care and practice as they pertain to Physical Medicine and Rehabilitation." At odds with plaintiff's expert disclosure, however, Dr. Arpaia was an internist and geriatrician (rather than a psychiatrist), who opined on the applicable standards of care in the fields of internal medicine and geriatrics.

As a general matter, "a plaintiff may successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by [his or her] submissions." *Mainline Elec. Corp. v. Pav-Lak Indus., Inc.*, 40 A.D.3d 939, 836 N.Y.S.2d 294 (2d Dept. 2007). Here, however, plaintiff's inexcusable delay in first presenting his hypertension theory of liability in opposition to defendants' motions – approximately five years after the inception of this action and without disclosing it in his expert exchange – warranted the Court's rejection of this new theory of liability. *See Bacalan v St. Vincent's Catholic Med. Ctrs. of N.Y.*, 179 A.D.3d 989, 118 N.Y.S.3d 147 (2d Dept. 2020); *Balashanskaya v. Polymed Community Care Ctr., P.C.*, 122 A.D.3d 558, 996 N.Y.S.2d 127 (2d Dept. 2014); *Langan v. St. Vincent's Hosp. of N.Y.*, 64 A.D.3d 632, 882 N.Y.S.2d 500 (2d Dept. 2009); *Winters v St. Vincent's Med. Ctr. of Richmond, HBBA, Inc.*, 273 A.D.2d 465, 711 N.Y.S.2d 892 (2d Dept. 2000).

Further, Dr. Arpaia's expert affirmations failed to address the specific assertions made by defendants' respective experts and were otherwise conclusory and unsupported by the

evidence. *See Choida v. Schirripa*, 188 A.D.3d 978, 135 N.Y.S.3d 481 (2d Dept. 2020); *Jacob v. Franklin Hosp. Med. Ctr.*, 188 A.D.3d 838, 135 N.Y.S.3d 430 (2d Dept. 2020), *affd* 36 N.Y.3d 1102, 144 N.Y.S.3d 412 (2021).

The remaining evidence relied upon by Dr. Arpaia in opposition to defendants' motions – the patient's alleged pressure sores, malnutrition, and dehydration – was also insufficient to raise a triable issue of fact. *See Weston v. Staten Is. Care Ctr., LLC*, 223 A.D.3d 769, 203 N.Y.S.3d 390 (2d Dept. 2024).

### Conclusion

Based on the foregoing and after oral argument, it is

**ORDERED** that the branch of Dr. Calla and Methodist's joint motion for summary judgment dismissing all claims as against Dr. Calla is granted in its entirety without opposition, and it is further

**ORDERED** that the remaining branch of Dr. Calla and Methodist's joint motion for summary judgment dismissing all claims as against Methodist is granted in its entirety, and it is further

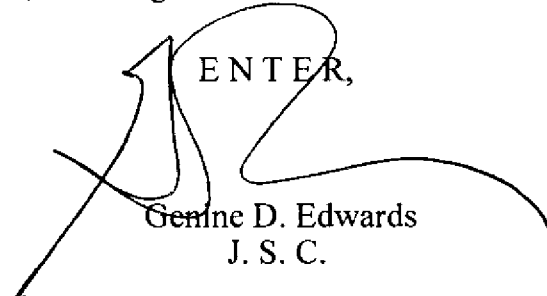
**ORDERED** that the motion of Haym Solomon Home for the Aged, LLC for summary judgment is granted in its entirety, and it is further

**ORDERED** that the motion of Helen Zaltsman, M.D., for summary judgment is granted in its entirety, and it is further

**ORDERED** that plaintiff's complaint is dismissed in its entirety as against each of Dr. Calla, Methodist, Haym Solomon Home for the Aged, LLC, and Helen Zaltsman, M.D., without costs and disbursements in each instance, and it is further

**ORDERED** that Methodist's counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on plaintiff's counsel and on co-defendants' respective counsel, as well as to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

ENTER,  
  
Genine D. Edwards  
J. S. C.