

Pitang v Beacon Broadway Co., LLC

2024 NY Slip Op 32094(U)

March 21, 2024

Supreme Court, Bronx County

Docket Number: Index No. 27350/2017E

Judge: Myrna Socorro

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This opinion is uncorrected and not selected for official publication.

#6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 9

-----X
MANGUILBE PITANG
and AVEGNIDOU PITANG

Plaintiffs

Index No. 27350-2017E
Motion seq #6

-against-

Hon. Myrna Socorro
Justice Supreme Court

BEACON BROADWAY COMPANY, LLC, and
BEACWAY OPERATING, LLC, and EAST SIDE
PRIMARY MEDICAL CARE P.C., and DANIEL
P. KLEIN, M.D.,

Defendants

-----X
BEACON BROADWAY COMPANY, LLC., and
BEACWAY OPERATING, LLC.,

Third Party Plaintiffs

-against-

SKYLINE RESTORATION, INC.,
Third Party Defendant

-----X
The following papers were read on this motion (Seq. No. 6) by defendants East Side Primary Medical Care P.C., and Daniel P. Klein, M.D., for **summary judgment** noticed for January 13, 2023, and submitted on February 13, 2024.

Notice of Motion by Defendants East Side Primary Medical Care, P.C. and Daniel P. Klein, M.D. – Affirmation, Statement of Material Facts, and Exhibits	NYSCEF Doc. # 149-164
Plaintiffs’ Affirmation in Opposition	NYSCEF Doc. # 172
Defendants East Side Primary Medical Care, P.C.’s and Daniel P. Klein, M.D.’s Reply Affirmation	NYSCEF Doc. # 184

Motion by the defendants East Side Primary Medical Care, P.C. (“East Side”) and Daniel P. Klein, M.D. (“Klein”) (Mot. Seq. No. 6), for an order pursuant to CPLR §3212, dismissing the complaint in its entirety, is decided as follows:

Plaintiffs commenced the within action alleging Labor Law claims stemming from an alleged construction site accident resulting in an injury to plaintiff's right rotator cuff and based on medical care and treatment of plaintiff rendered by defendants East Side and Klein. On January 17, 2023, the Court, in a prior order (Lucindo Suarez, J.), dismissed the plaintiffs' Labor Law §240(1), §241(6), and §200 claims as against defendants Beacon Broadway Company, LLC and Beacway Operating, LLC.

Plaintiffs' allege in their complaint that defendants East Side and Klein deviated from the standard of care in the care and treatment of plaintiff Manguilibe Pitang by, *inter alia*, by negligently performing medical tests and diagnostic procedures; neglecting to "exercise that degree of care, caution, prudence, skill, ability, professional knowledge and training generally possessed by physicians, nurses and medical practices in the locality;" and failing to order a repeat test for Hepatitis C or to inform said plaintiff that a repeated test or another specific test was needed to confirm a Hepatitis C infection. Plaintiffs further allege in their bill of particulars that defendants East Side and Klein violated Education Law §§ 6530(3), (4), (5), and (6), as it relates to medical malpractice, by failing to ensure plaintiff Manguilibe Pitang received a second or more accurate test for Hepatitis C. Plaintiffs did not oppose or otherwise address the contentions made by defendants East Side and Klein in the branch of their summary judgment motion to dismiss any claim or theory of liability based on violations of Education Law §§ 6530(3), (4), (5), and (6). Therefore, the branch of defendants East Side's and Klein's summary judgment motion seeking dismissal of the complaint based upon alleged violations of Education Law §§ 6530(3), (4), (5), and (6), is hereby granted, without opposition, and will not be further addressed herein. Plaintiff Avegnidou Pitang also brings a derivative claim for loss of consortium and services.

In support of their motion for summary judgment, defendants East Side and Klein submit, *inter alia*, the affirmation of Michael Mark Fishkin, D.O. ("Fishkin"), a family medicine physician, and the medical records of Klein, Maxim Tyorkin, M.D. ("Tyorkin"), the orthopedic surgeon scheduled to perform arthroscopic surgery on plaintiff's rotator cuff, and Stephen Asiedu, M.D. ("Asiedu"), a physician that plaintiff sought for further Hepatitis C testing. Defendants East Side and Klein contend that the complaint should be dismissed, pursuant to CPLR 3212, and argue that they did not

deviate from good and accepted medical practice in the care and treatment of plaintiff Manguilibe Pitang to obtain surgical clearance. Said defendants also move to dismiss plaintiff Avegnidou Pitang's derivative claims.

Plaintiffs, in opposition, submit only the affirmation of their attorney. They argue that the moving defendants' motion should be denied as East Side and Klein deviated from the standard of care by failing to order a complete Hepatitis C screening or test that would confirm that plaintiff Manguilibe Pitang did not have Hepatitis C and therefore, would be timely cleared for the surgery to be performed by Tyorkin instead of the resulting delay, postponement of the surgery and "suffering with a torn rotator cuff" with pain. By administering the ELISA screening test, the plaintiffs contend that East Side and Klein did not ensure a PCR test was timely administered to avoid any delay in clearing plaintiff Manguilibe Pitang for surgery.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury." Frye v Montefiore Med. Ctr., 70 AD3d 15, 24 [1st Dept 2009]; see Roques v Noble, 73 AD3d 204, 206 [1st Dept 2010]; DeFilippo v New York Downtown Hosp., 10 AD3d 521 [1st Dept 2004].

A defendant physician moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice. See Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; see also Frye v Montefiore Med. Ctr., 70 AD3d 15 [1st Dept 2009].

Once defendant establishes *prima facie* entitlement to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and opining that the defendant's acts or omissions were a proximate cause of the plaintiff's injuries. See Roques v Noble, 73 AD3d 204 [1st Dept 2010]. "[G]eneral allegations of medical malpractice, that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical

malpractice are insufficient to defeat a malpractice defendant's motion for summary dismissal." Melendez v Parkchester Med. Servs., P.C., 76 AD3d 927, 927 [1st Dept 2010]; see Frye v Montefiore Med. Ctr., 70 AD3d at 24 [1st Dept 2009].

Defendants East Side and Klein established through Fishkin's expert affirmation that they did not deviate from the standard of good and accepted medical care in treating plaintiff Manguilibe Pitang, and, thus, they demonstrated their *prima facie* entitlement to summary judgment as a matter of law. Specifically, the moving defendants' expert opined that, based upon a review of said plaintiff's medical records from the time he presented to Klein on July 8, 2015 to obtain surgical clearance for a rotator cuff surgery scheduled for July 14, 2015, Klein properly evaluated the plaintiff, obtained a proper medical and social history of the plaintiff, properly conducted diagnostic tests, and ordered proper blood work, which included a complete blood count and comprehensive metabolic panels, in anticipation of the surgery. The opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v Lawrence Hosp., 69 AD3d 403, 404 [1st Dept 2010]. As such, Fishkin cites to plaintiff's medical records wherein care and treatment were rendered as follows:

- Upon the approval and scheduling of the surgery to repair plaintiff's right rotator cuff for July 14, 2015, the plaintiff was referred to Klein for surgical clearance;
- On July 8, 2015, Plaintiff Manguilibe Pitang presented to Klein to obtain surgical clearance and never treated with Klein before this date; Klein took said plaintiff's medical history which included a prior Hepatitis B infection; Klein physically examined the plaintiff and conducted an EKG that reported normal findings; Klein ordered bloodwork to include a complete blood count and comprehensive metabolic panel;
- On July 9, 2015, the labs reported two abnormal liver function results and Klein requested said labs to conduct tests for Hepatitis A, B, and C; the labs conducted an ELISA test;

- On July 11, 2015, a Saturday, the labs reported the plaintiff had a reactive or positive result for Hepatitis C beyond normal ranges from the ELISA test as conducted;
- On July 13, 2015, a Monday, Klein's office medical assistant contacted plaintiff Manguilibe Pitang to advise that he had a Hepatitis C reactive blood test result and that the surgery could not go forward the next day; Klein notified Tyorkin's office to put the surgery on hold; the assistant referred said plaintiff to his primary care physician for further testing to confirm whether plaintiff had a Hepatitis C infection;
- On July 17, 2015, plaintiff Manguilibe Pitang presented to Asiedu for further blood testing which came back negative for Hepatitis C; said plaintiff eventually obtained surgical clearance and on August 18, 2015, Tyorkin performed the right shoulder surgery.

According to the moving defendants' expert, Klein's office, at Klein's direction, timely referred plaintiff Manguilibe Pitang to his primary care physician or to return to Klein's office for further testing to confirm whether plaintiff had Hepatitis C. Fishkin concludes to a reasonable degree of medical certainty, that Klein properly performed a complete surgical clearance examination of said plaintiff as appropriate to his age, medical and social histories, and the injury for which he was to undergo surgery to repair; that Klein properly conducted the necessary and comprehensive blood work for surgical clearance; and that upon receiving abnormal liver function results, Klein properly ordered on the same date a complete hepatitis panel for Hepatitis A, B, and C, which was within generally accepted standards of care. Fishkin further opines to a reasonable degree of medical certainty that Klein properly instructed his office assistant to advise the plaintiff that his ELISA screen test was positive for Hepatitis C antibodies and to seek further testing from his primary care physician. Despite plaintiff's testimony that he recalled the assistant telling him outright that he had Hepatitis C, plaintiff Manguilibe Pitang did seek further testing from another physician (Asiedu) four days after communicating with Klein's assistant consistent with Klein's patient chart notes and Klein's testimony. It is therefore Fishkin's opinion, to a reasonable degree of medical certainty, that East Side and Klein did not depart from accepted standards of care in which Klein and his office

responded to the positive ELISA test results. Fishkin also opines that Klein complied with the standard of care when he first ordered the ELISA test to determine whether plaintiff Manguilibe Pitang had antibodies of the Hepatitis C in his system.

To the extent that the plaintiffs allege that East Side and Klein deviated from accepted standards of care by not immediately ordering a PCR test following a positive ELISA test, Fishkin opines that Klein's policy of advising patients to obtain follow-up testing within seven (7) days of an initial result was "prudent and reasonable" and that irrespective of whether Klein immediately ordered a PCR test or whether plaintiff sought re-testing on his own, the surgery would still be postponed upon Klein learning of the initial positive results from the ELISA screening.

In opposition, the plaintiffs failed to raise a triable issue of fact to preclude summary judgment in favor of East Side and Klein. The plaintiffs failed to submit a physician's expert opinion to rebut the moving defendants' *prima facie* showing to explain how East Side and Klein departed from the applicable standard of care and/or why the standard of care would require them to draw a larger blood sample in the event that if the ELISA test is positive, the labs could run a PCR test to confirm the Hepatitis C and avoid the one-month long delay of the plaintiff's planned surgery. *See Schreiber v New York City Health & Hosp. Corp.*, 216 AD3d 496 [1st Dept 2023].

As for plaintiffs' claims of emotional distress and the derivative claims for loss of services, the plaintiffs' allegations that what East Side and Klein did or say proximately caused plaintiffs' physical pain and emotional distress resulting in "a partial breakdown of the marriage" [NYSCEF Doc No. 154, exhibit c, bill of particulars] is speculative and conclusory absent admissible record evidence that East Side and Klein breached any applicable standard of care and that such breach caused the plaintiffs' alleged injuries. Plaintiffs' contend, through their counsel's affirmation, that differing versions of how the initial ELISA results were communicated to plaintiff Manguilibe Pitang raises triable issues of fact. However, whether Klein's assistant informed the plaintiff outright that he had Hepatitis C or whether Klein's assistant merely advised plaintiff to see his primary care physician for further evaluation following a positive ELISA test for Hepatitis C created only feigned issues of fact insufficient to defeat the moving defendants' motion. *See Bamberg-Taylor v Strauch*,

192 AD3d 401 [1st Dept 2021].

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movants were not addressed by the Court, it is hereby denied.

Accordingly, it is hereby,

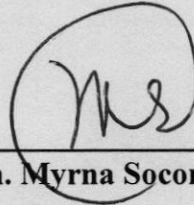
ORDERED, that the summary judgment motion by defendants East Side and Klein seeking dismissal of the complaint as against them, is **GRANTED**, and it is further

ORDERED, that the plaintiffs' claims against defendants East Side and Klein are dismissed; and it is further

ORDERED, that defendants East Side and Klein shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of the upload of this order in NYSCEF.

This constitutes the decision and order of this Court.

Dated: March 21, 2024



Hon. Myrna Socorro, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. THE MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT