| **Stoller v Goluboff** |
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| 2024 NY Slip Op 33753(U) |
| October 15, 2024 |
| Supreme Court, Kings County |
| Docket Number: Index No. 519768/19 |
| Judge: Ellen M. Spodek |
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At an IAS Term, Part 63 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 15 day of October, 2024.

PRESENT:

HON. ELLEN M. SPODEK,
Justice.
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ROBERT STOLLER,

Plaintiff,

- against -

ERIK GOLUBOFF, M.D.,
MOUNT SINAI HOSPITALS,
MOUNT SINAI/BETH ISRAEL MEDICAL CENTER,
STEVEN GRUBER, M.D., NEW JEWISH HOME,
THUKHA HENRY, M.D., AMNA BUTTAR, M.D.,
ERIC KIRSCHNER, M.D., and
NEW YORK-PRESBYTERIAN HOSPITAL,

Defendants.
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**DECISION AND ORDER**

Index No. 519768/19

Mot. Seq. No. 2, 3 + 4

| The following e-filed papers read herein: | NYSCEF Doc Nos.: |
|---|---|
| Notice of Motion, Affirmations, and Exhibits Annexed ..... | 64-79 |
| Affirmations in Opposition and Exhibits Annexed .......... | 153-165 |
| Reply Affirmations and Exhibits Annexed................ | 167-169 |

In this action to recover damages for (among other things) medical malpractice and lack of informed consent, defendants Erik Goluboff, M.D. ("Dr. Goluboff"), Steven Gruber, M.D. ("Dr. Gruber"), Beth Israel Medical Center (sued herein as Mount Sinai/Beth Israel Medical Center) ("BIMC"), and The Mount Sinai Hospital (sued herein as Mount Sinai Hospitals) ("MSH") jointly move for summary judgment dismissing the Verified Complaint as against each of them.[1]

[1] Defendants Thukha Henry, M.D. ("Dr. Henry"), and Amna Buttar, M.D. ("Dr. Buttar") (Mot. Seq. No. 3), and separately defendants Eric Kirschner, M.D. ("Dr. Kirschner"), and New York-Presbyterian Hospital ("NYPH") (Mot. Seq. No. 4), were dismissed from this action without opposition by bench orders issued on July 30, 2024. Remaining defendant Jewish Home Lifecare Manhattan (sued herein as New Jewish Home) ("NJH") was dismissed from this action by Stipulation of Discontinuance Without Prejudice that was "so ordered" on October 6, 2020 (NYSCEF Doc No. 48).

Plaintiff Robert Stoller ("plaintiff") does not oppose dismissal of all his claims as against Dr. Gruber and MSH.[2] Nor does he oppose dismissal of his second cause of action sounding in lack of informed consent as against Dr. Goluboff and BIMC (collectively, "defendants"). Likewise, he does not oppose dismissal of his fourth cause of action sounding in negligent hiring/credentialing as against BIMC. *See Clarke v New York City Health & Hosps.*, 210 AD3d 631, 633 (2d Dept 2022); *Carcia v Greif*, 182 AD3d 464, 466 (1st Dept 2020); *Wright v Morning Star Ambulette Servs., Inc.*, 170 AD3d 1249, 1252 (2d Dept 2019). The remainder of this Decision and Order addresses plaintiff's first cause of action sounding in medical malpractice as against Dr. Goluboff and, vicariously, as against his employer, BIMC.

**Summary**

On April 27, 2017, plaintiff, age 69, underwent a radical cystoprostatectomy (surgical removal of bladder and prostate) with an ileal conduit diversion. Dr. Goluboff, a urologist, performed the cystoprostatectomy at BIMC. To construct the ileal conduit, a distal portion of plaintiff's ileum was snipped off from both sides. The ureters were implanted in the proximal end of the ileal segment with a refluxing technique. A stoma for urinary diversion was created. The anastomose of the ileal segment was supported by the internally inserted stents (one stent per ureter). On May 3rd, plaintiff was discharged from BIMC to a rehabilitation facility where he resided until May 8th.

[2] *See* Plaintiff's Affirmation in Opposition to the Summary Judgment Motion of Dr. Goluboff and Mount Sinai/Beth Israel Medical Center, dated June 4, 2024, note 2 (NYSCEF Doc No. 153).

Post-cystoprostatectomy, plaintiff experienced significant complications, both in the short term (within the first 30 days) and in the long term (beyond the first 30 days and within the initial 12 months). From May 8th through May 10th, then again from May 19th through May 20th, and once again from May 24th through May 30th, he was hospitalized at BIMC for fascial dehiscence (surgically repaired by Dr. Goluboff), for weakness and general dizziness, and for a urinary tract infection, respectively.

From May to December 2017, plaintiff underwent a series of three CT scans: the first on May 19, 2017, the second on August 25, 2017, and the third and final on December 8, 2017 (the "May 2017 scan," "August 2017 scan," and "December 2017 scan," respectively) (NYSCEF Doc Nos. 161, 162, and 163, respectively). The first scan, performed in May 2017, found, "[s]tatus post cystoprostatectomy, with associated mild bilateral hydroureteronephrosis, left greater than right and left perinephric stranding."

The second scan, performed in August 2017, revealed a "[n]ew [finding] from [the] prior [May 2017 scan], there [was] circumferential wall thickening and enhancement at the left renal pelvis and proximal ureter. . . . This maybe causing the mild left obstructive change, with delayed nephrogram."

The third and final scan, performed in December 2017, raised red flags regarding the ongoing deterioration of plaintiff's left kidney and ureter, as follows:

> "Left kidney with delayed nephrogram consistent with obstruction. The degree of wall thickening and enhancement in the region of the left renal pelvis and ureter [were] decreased although not entirely resolved. There [was] essentially an obstruction or partial obstruction at the anastomosis with

> the ileal conduit[,] and there [was] some persistent inflammation in the left ureter. [T]his is producing a significant degree of obstruction."

On December 12th, plaintiff emailed Dr. Goluboff with concerns about "a delay in [the] pick[-]up of contrast in the left ureter" during the nephrogram portion of the December 2017 scan.[3] Dr. Goluboff e-mailed plaintiff back with a reassurance, "No big problem. We'll discuss [at plaintiff's next scheduled visit with Dr. Goluboff on January 4, 2018]" (NYSCEF Doc No. 164).

The three consecutive scans, viewed side by side, reflected that plaintiff's left ureter was becoming more and more narrow. According to plaintiff's expert urologist, a ureter narrowing or stricture at the level of the ureteroenteric anastomosis – known as a ureteroenteric stricture ("UES") – is a common complication of radical cystoprostatectomy (or cystectomy) with urinary diversion, particularly in the left ureter because of the intraoperative maneuvers involving the sigmoid mesentery.[4]

Concurrently with his development of the UES, plaintiff's creatinine levels, though fluctuating from visit to visit to Dr. Goluboff, were rising overall and eventually exceeded, and stayed outside, the normal range. Dr. Goluboff never checked on plaintiff's glomerular filtration rate, which (according to plaintiff's expert urologist) is a more precise test of kidney function than creatinine, as more fully explained in the margin.[5]

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[3] "[A] nephrogram is a diagnostic test of the function and flow of urine through the kidneys." Plaintiff's expert urologist's affirmation, dated May 28, 2024, page 13, n 5 (NYSCEF Doc No. 155).

[4] Id. at page 8, para. 30.

[5] "The two most useful indicators of kidney health are the glomerular filtration rate ('GFR') and creatinine. GFR tests kidney function by estimating how much blood per minute passes through the network of blood vessels that are the
(footnote continued)

The record reflects that Dr. Goluboff persistently ignored the radiographic findings of the UES until the January 4, 2018 visit. At that visit, Dr. Goluboff discussed the December 2017 scan with plaintiff, but downplayed its significance as nothing more than "some left[-sided] hydro[nephrosis] [, and that the December 2017 scan] was otherwise essentially negative. Will observe for now." Ending his visit with plaintiff, Dr. Goluboff ordered a follow-up in three months. Dr. Goluboff explained at his pretrial deposition (at page 201, lines 16-18 and 24-25) that his plan of plaintiff's care at the January 4th visit was "similar [to that] from the last [preceding] visit," meaning that it "involve[d] [plaintiff] coming back in three months for another CT [scan] and [for] another creatinine [measurement]."

In February 2018, plaintiff, on his own, obtained and read the CT scan reports. Thereupon, he promptly ended his patient-physician relationship with Dr. Goluboff and sought a second opinion. Two months later in April 2018 (or 12 months after his cystoprostatectomy with Dr. Goluboff), plaintiff underwent urinary decompression in the form of the left-sided nephrostomy tube and nephroureteral stent placement.

Allegedly as the result of the UES, plaintiff's left kidney is atrophic and functioning at only 11.4% of its capacity (the normal range is 45-55%), while his right kidney is

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'cleaning units' of the kidneys. Creatinine is a waste product that comes from the normal wear and tear of the body's muscles. It is filtered from the body via the kidneys. If the kidneys are not functioning properly, creatinine levels will rise. Therefore, creatinine is another way to test kidney function. Generally, when one kidney is not functioning properly, the other kidney will compensate for the loss of function. Consequently, when assessing whether one kidney is injured, as opposed to testing if both kidneys are injured, GFR is a superior test compared to creatinine, because GFR measures kidney capacity whereas creatinine only measures the end product of filtration, which may be skewed by the compensatory efforts of the healthy kidney." Plaintiff's expert urologist's affirmation, ¶¶ 14-17.

functioning at 88.6% to compensate for the lost contralateral capacity. He suffers from chronic kidney disease at stage 3B/A2. He requires a life-long nephrostomy tube and nephroureteral stent exchange, to be performed by an interventional radiologist every three months, to relieve his left-kidney chronic obstruction.

In September 2019, plaintiff commenced this action sounding in medical malpractice (among other claims) against defendants (among others). After discovery was completed and a note of issue was filed, defendants moved for summary judgment dismissing all claims as against them. Although plaintiff alleged in his bills of particulars in support of his medical malpractice claim that the cystoprostatectomy was improperly performed and listed numerous other deviations from the standard of care for the period from April 6, 2017 to July 9, 2019, his expert opposition is limited to the post-cystoprostatectomy care for the period from May 2017 to January 4, 2018; namely, that Dr. Goluboff "fail[ed] to timely diagnose [and timely treat or to further investigate by way of referrals] the . . . [potential UES] . . . , which was seen developing in the May 2017, August 2017, and December 2017 CT scans."[6]

## Discussion

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact." *Goldin Real Estate, LLC v Shukla*, 227 AD3d 674, 676 (2d Dept 2024). "Upon a motion for summary judgment, the court's

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[6] Plaintiff's expert urologist's affirmation, dated May 28, 2024, ¶¶ 4 and 42 (NYSCEF Doc No. 155).

role is limited to one of issue finding rather than issue determination." *Goldin Real Estate*, 227 AD3d at 676. "It is not the function of a court . . . to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Matter of Salvatore L. Olivieri Irrevocable Tr.*, 208 AD3d 489, 491 (2d Dept 2022) (internal quotation marks omitted). "The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury." *Fairchild v Lerner*, 229 AD3d 506, 507-508 (2d Dept 2024) (internal quotation marks omitted). "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 AD3d 1287, 1288 (2d Dept 2014); *Stukas v Streiter*, 83 AD3d 18, 24-26 (2d Dept. 2011). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Idi Jewels, Inc. v Abramov*, 193 AD3d 699, 699 (2d Dept 2021) (internal quotation marks omitted). Where a defendant makes a prima facie 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." Quinones v Winthrop Univ. Hosp., ___ AD3d ___, 2024 NY Slip Op 04406, *1-2 (2d Dep 2024) (internal quotation marks omitted). "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 AD3d 1149, 1150 (2d Dept 2021). "Summary judgment is not appropriate in a medical

malpractice action where the parties adduce conflicting medical expert opinions." *Gardiola v Sung Chui Park*, 229 AD3d 602, 603 (2d Dept 2024).

Defendants have established a prima facie entitlement to judgment as a matter of law through the submission of the patient's medical records and the detailed affirmations of their experts, Guarionex Joel DeCastro, M.D., a urologic oncologist, and David S. Goldfarb, M.D., a nephrologist. Both experts opined within a reasonable degree of medical certainty that Dr. Goluboff (and vicariously BIMC) did not depart from the accepted standards of medical practice and that, in any event, any alleged departures on his part were not a proximate cause of plaintiff's UES with the left-kidney atrophy and functional loss. *See Torres v Yakobov*, 222 AD3d 692, 693-694 (2d Dept 2023); *Getselevich v Ornstein*, 219 AD3d 1493, 1495 (2d Dept 2023).

In opposition, plaintiff submitted an expert affirmation from a Board-Certified urologist who generally concluded (in ¶ 60) that Dr. Goluboff, as plaintiff's treating urologist, deviated from the accepted standards of medical practice by failing to timely identify and treat his developing UES from May 2017 through January 4, 2018, and that such deviations were substantial contributing factors of his left-kidney injuries. More specifically, plaintiff's expert urologist opined (in ¶¶ 40 and 61) that: (1) the August 2017 scan was significant for its finding of the "left renal pelvis concentric narrowing, *i.e.*, narrowing of the ureter due to an excessive tissue reaction (inflammation or stricture), which 'may be causing the mild left obstructive change [a UES], with delayed nephrogram'"; (2) the accepted standards of practice required that Dr. Goluboff "further

investigate the potential [UES] or treat it, given the findings in [the August 2017] scan, the history of [the cystoprostatectomy] with ileal conduit, [plaintiff's] complaints of left flank pain [to Dr. Goluboff at his visit shortly after the August 2017 scan], and the passage of time [from the cystoprostatectomy and the fascial repair surgery,] such that the initial inflammation should have subsided"; and (3) "had Dr. Goluboff adequately monitored the developing [UES] following the August 2017 CT scan, the [UES] could have been confirmed and addressed medically prior to the advancement of [plaintiff's] condition to stage 3 chronic kidney disease and atrophy of the left kidney, thus preventing further injury to [his] left kidney."

Plaintiff also submitted an expert affirmation from Michael J. Ross, M.D. ("Dr. Ross"), the Chief of the Division of Nephrology at the Albert Einstein College of Medicine at Montefiore Medical Center; a Professor of Medicine at Albert Einstein College of Medicine at Montefiore Medical Center and a Professor of Developmental and Molecular Biology at Albert Einstein Montefiore Medical Center as well the expert nephrologist for since-dismissed defendant Dr. Kirschner, who concurred with plaintiff's expert urologist's opinion (in ¶ 61) that the August 2017 scan marked the turning point in plaintiff's kidney health. In particular, Dr. Ross explained (in ¶¶ 48-50) that:

> "[T]he CT scan imaging done in May of 2017 reflected some evidence of mild to moderate hydronephrosis. It is further my opinion with reasonable certainty that the August 2017 CT imaging reflected subtle suggestions of obstruction of the kidney. It is my opinion with reasonable medical certainty that . . . the obstruction most likely began in or around August 2017. . . .
>
> An occluded ureter which has gone untreated for a week or so would likely result in little to no kidney injury. However, a ureter which is occluded and

> has gone untreated for several weeks or months, eventually results in destruction or permanent damage to the kidney. By December of 2017, the CT scan results reflected significant blockage of the kidney, which in my opinion with reasonable medical certainty was occurring for months before December of 2017. . . .
>
> Ultimately, however, it is my opinion with reasonable medical certainty that the degree of obstruction that had occurred by February of 2018, to cause an atrophic shrunken left kidney resulting in 11.4% total kidney function in that kidney by May of 2019, indicates that irreversible damage to the kidney had already been done between August and December of 2017."

Based on the conflicting expert proof and viewing the medical record in a light most favorable to plaintiff, he has raised triable issues of fact as to whether Dr. Goluboff (and vicariously BIMC) failed to timely diagnose and treat plaintiff's left-kidney UES from and after August 26, 2017 (when the attending radiologist's final report of the August 2017 scan was prepared) and through January 4, 2018 (when plaintiff last visited with Dr. Goluboff), and/or to make a timely referral of plaintiff to an interventional radiologist or to another specialty during that period, and, in so failing, allegedly causing plaintiff to sustain a permanent injury to his left kidney requiring life-long nephrostomy tube and nephroureteral stent exchange. *See Friedman v Vitale*, 224 AD3d 888, 891 (2d Dept 2024); *Fiszer v Gliwa*, 223 AD3d 881, 883 (2d Dept 2024); *Shirley v Falkovsky*, 207 AD3d 679, 681 (2d Dept 2022).

## Conclusion

Based on the foregoing, it is

**ORDERED** that the initial branch of the joint motion of defendants Dr. Goluboff, Dr. Gruber, BIMC, and MSH for summary judgment dismissing plaintiff's complaint as

against Dr. Gruber and MSH is granted without opposition, and defendants Dr. Gruber and MSH are dismissed from this action with prejudice, and without costs or disbursements; and it is further

**ORDERED** that the action is severed and continued against remaining defendants Dr. Goluboff and BIMC; and it is further

**ORDERED** that the next branch of the joint motion for summary judgment dismissing plaintiff's second cause of action sounding in lack of informed consent as against Dr. Goluboff and BIMC, and his fourth cause of action sounding in negligent hiring/credentialing as against BIMC is granted without opposition, and such causes of action are dismissed as against Dr. Goluboff and BIMC, as applicable, with prejudice, and without costs or disbursements; and it further

**ORDERED** that the final branch of the joint motion for summary judgment dismissing plaintiff's first cause of action sounding in medical malpractice as against Dr. Goluboff and, vicariously, as against BIMC is granted to the extent that such claim is dismissed, with the exception of the surviving and unaffected portions of such claim as are set forth in the immediately following decretal paragraph; and it is further

**ORDERED** that the action shall proceed on plaintiff's first cause of action sounding in medical malpractice as against Dr. Goluboff and BIMC solely on the issues of whether Dr. Goluboff (and vicariously BIMC) failed to timely diagnose and treat plaintiff's left-kidney UES from and after August 26, 2017 (when the attending radiologist's final report of the August 2017 scan was prepared) and through January 4, 2018 (when plaintiff last

visited with Dr. Goluboff), and/or to make a timely referral of plaintiff to the interventional radiology or to another specialty during that period, and, in so failing, allegedly causing plaintiff to sustain a permanent injury to his left kidney requiring life-long nephrostomy tube and nephroureteral stent exchange; and it is further

**ORDERED** that to reflect the dismissal of defendants Dr. Gruber and MSH, the prior dismissal of defendants Dr. Henry, Dr. Buttar, Dr. Kirschner, and NYPH, and the prior stipulated dismissal of defendant NJH from this action, the caption is amended to read in its entirety as follows:

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ROBERT STOLLER,

Plaintiff,

- against - Index No. 519768/19

ERIK GOLUBOFF, M.D., and
MOUNT SINAI/BETH ISRAEL MEDICAL CENTER,

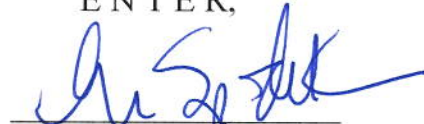
Defendants.
- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - X

; and it is further

**ORDERED** that defendants' counsel is directed to electronically serve a copy of this Decision and Order with notice of entry on plaintiff's counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the Decision and Order of the Court.

ENTER,



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