

**Camacho v Tenner**

2024 NY Slip Op 34487(U)

December 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 510284/2021

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

**At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of December 2024.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ALYSA CAMACHO,

Plaintiff,

-against-

**DECISION & ORDER**

Index No. 510284/2021  
Mo. Seq. 4 & 5

SCOTT TENNER, BROOKLYN  
GASTROENTEROLOGY and ENDOSCOPY,  
PLLC and QUEST DIAGNOSTICS INCORPORATED,

Defendants.

-----X  
**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 4: 86 – 87, 88 – 100, 123, 124 – 125, 129 – 130, 131 – 132

Seq. 5: 101 – 103, 104 – 120, 126 – 128, 133 – 135

Defendant Quest Diagnostics Incorporated (“Quest Diagnostics”) moves (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor.

Defendants Scott Tenner, M.D. (“Dr. Tenner”) and Brooklyn Gastroenterology and Endoscopy (“Brooklyn Gastroenterology”) separately move (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing all claims against them, or granting partial summary judgment for any claims on which there are no triable issues of fact.

Plaintiff opposes the motion of Dr. Tenner and Brooklyn Gastroenterology only.

Dr. Tenner and Brooklyn Gastroenterology submitted an affirmation of partial opposition to co-defendant Quest Diagnostics’s motion, only to the extent of disputing certain portions of the statement of material facts related to Dr. Tenner. They do not substantively oppose the motion as to Quest Diagnostics’s liability.

Quest Diagnostics’s motion for summary judgment (Seq. No. 4) is therefore **granted** without opposition, and all claims against Quest Diagnostics are dismissed.

Plaintiff commenced this action on May 3, 2021, asserting claims of medical malpractice in connection to the diagnosis and treatment of an acute kidney injury in December 2020.

Plaintiff was 18 years old at the time of the events. On December 6, 2020, she saw an urgent care physician at CityMD about frequent diarrhea, abdominal pain, and nausea over the past week, along with one episode of vomiting. She was given a list of gastroenterologists to follow up with.

She first presented to Dr. Tenner at Brooklyn Gastroenterology on December 7, 2020, with the same complaints of abdominal pain, nausea, and diarrhea. After physical examination and taking her medical history, Dr. Tenner's impression was likely viral enteritis, and he prescribed medication to relieve her diarrhea symptoms and heartburn. He also discontinued her from Cipro (an antibiotic prescribed the previous day at CityMD) and ordered a comprehensive blood panel, stool analysis, and parasite testing.

Samples were collected the same day by Quest Diagnostics. Their records indicate that initial results of the comprehensive metabolic panel were "reported" on December 8, 2020, with other tests still pending (including celiac disease comprehensive panel and stool cultures for certain toxins, bacteria, and parasites). The blood panel showed elevated Blood Urea Nitrogen (BUN) of 24 (7-20 normal) and Creatinine (Cr) of 1.58 (0.5-1.0 normal). All tests were completed and the final results were reported on December 16, 2020.

Dr. Tenner testified that he reviewed the final results of all the labs on December 16, and he reached out to Plaintiff through his assistant to schedule urinalysis and repeat bloodwork on December 18 and a follow-up appointment on December 20. The December 18 bloodwork revealed a further increase in BUN (38) and Creatinine (2.86).

Plaintiff saw Dr. Tenner again on December 20, 2020. At that time, he referred her to Maimonides hospital emergency department due to her lab results indicating decreased kidney function, noting that "hospitalization, intravenous hydration and renal consult will be needed." Plaintiff was admitted to Maimonides on December 20 and was ultimately diagnosed with acute kidney injury/renal failure secondary to lupus nephritis. After failing to respond to other treatment, she began dialysis on December 26. She was discharged on January 5, 2021. She later received a kidney transplant on October 1, 2021.

Plaintiff alleges that Dr. Tenner deviated from the standard of care by failing to timely review Plaintiff's blood results and refer her for a repeat test and hospital admission. Plaintiff alleges this delay was a proximate cause of her condition worsening and progressing to kidney failure, dialysis, and transplant.

In evaluating a summary judgment motion in a medical malpractice case, the Court applies the burden shifting process as summarized by the Second Department:

“The elements of a medical malpractice cause of action are a deviation or departure from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries. When moving for summary judgment, a defendant provider has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. In order to sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars. In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden. General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant's summary judgment motion. Although summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact” (*Barnaman v Bishop Hucles Episcopal Nursing Home*, 213 AD3d 896, 898-899 [2d Dept 2023] [internal quotation marks and citations omitted]).

In support of the motion, Defendants submit an expert affirmation from Michael Frank, M.D. (“Dr. Frank”), a licensed physician certified in internal medicine and gastroenterology. He has provided a proper foundation to opine on the standard of care for a gastroenterologist faced with the issues in this case, as well as a general internal medicine standard of care for ordering and reviewing bloodwork and responding to abnormal BUN and Cr levels.

Dr. Frank opines that all treatment and care rendered by Dr. Tenner from December 7 through December 20, 2020 was within good and accepted medical standards. He opines that on December 7, 2020, Dr. Tenner properly took Plaintiff's medical history and complaints. He opines that her symptoms of recent onset diarrhea and nausea are “extremely common” and often resolve with conservative treatment, and it would be reasonable

for a gastroenterologist to provide “dietary [instructions], supportive care and increased hydration” and instruct the patient to follow up if the symptoms persisted. Dr. Frank also opines that Dr. Tenner appropriately advised Plaintiff to stop taking Cipro, because the antibiotic carries risks and would not be effective on her likely non-bacterial infection. The expert opines that Dr. Tenner exceeded the standard of care by ordering a comprehensive blood panel and stool tests, which were not required at that time, nor were they required to be performed “stat” (immediately).

Dr. Frank further opines that, “regardless of the manner that the lab reports were received by Dr. Tenner’s office,” it was in accordance with the standard of care for the physician to wait for the final report of laboratory tests on December 16. He opines that it is “impractical to review partial lab results immediately upon their release from a lab for every patient,” and also opines that a physician should wait to obtain a “complete clinical picture . . . before coming to a diagnosis and plan of care.” Thus, he opines that Dr. Tenner did not delay or depart from the standard of care by reviewing the final lab results on December 16. He further opines that it was generally appropriate to follow up with the patient within 10 days of her initial appointment, especially as she had no concerning medical history.

The expert opines that upon review of the blood labs, Dr. Tenner appreciated Plaintiff’s elevated BUN and Cr levels and “promptly arranged for plaintiff’s return for repeat testing.” He notes that elevations in BUN and Cr may be caused by dehydration from gastroenteritis and may be antibiotic-induced, so it was the standard of care to order a repeat test to see if they had returned to normal.

Dr. Frank opines that Dr. Tenner appropriately reviewed Plaintiff’s follow-up lab results, at which time he appreciated that the BUN and Cr values had worsened and that she required “immediate care from a nephrologist.” The expert opines that Dr. Tenner acted in accordance with the standard of care by referring her to Maimonides to receive IV fluids in a hospital setting and evaluation by a kidney specialist. As the expert notes, Dr. Tenner’s records reflect that he instructed his assistant to follow up and “verify patient is in hospital [or] the kidney specialist is seeing her.”

On the issue of proximate causation, the expert opines that no treatment or care rendered by Dr. Tenner

led to a worsening of Plaintiff's condition. Rather, the expert opines that her "aggressive form of lupus nephritis" ultimately resulted in renal failure regardless of Dr. Tenner's alleged acts and omissions. The expert also opines that Dr. Tenner's actions did not cause a delay in Plaintiff's diagnosis, but rather hastened her diagnosis because he went "beyond the standard of care" in ordering the December 7 blood panel, and subsequently referred her for a repeat test and to the hospital for kidney evaluation.

Defendants also submit an expert affirmation from Jason Faller, M.D. ("Dr. Faller"), a licensed physician certified in internal medicine and rheumatology. As a specialist in autoimmune disease, he has laid a proper foundation to opine on the diagnosis, treatment, and prognosis of lupus nephritis.

Dr. Faller renders his opinion primarily on the issue of proximate causation. He opines that "there was no departure by Dr. Tenner that was a substantial factor in causing any of plaintiff's alleged harms." The rheumatology expert emphasizes that Plaintiff had no clinical symptoms or history indicating systemic lupus erythematosus/lupus nephritis, nor did Dr. Tenner as a gastroenterologist have reason to suspect this rare disease. He notes that even at the time she arrived at the hospital on December 20, her BUN and Cr levels continued to increase, and a diagnosis linking her kidney failure to an autoimmune disease was not confirmed until after a biopsy was performed on December 22. Dr. Faller opines that Plaintiff had a very rare and aggressive illness that was "not responsive to treatment," and therefore a referral to the hospital before December 20 would not have changed her outcome. The expert notes that "with patients whose lupus is diagnosed at the same time as kidney involvement is diagnosed, the likelihood of saving the kidneys is extremely low." Therefore, the expert opines that no delay in diagnosis attributable to Dr. Tenner was a proximate cause of her renal insufficiency, dialysis, and eventual kidney transplant.

Based on the submissions, the movants have established prima facie entitlement to summary judgment on Dr. Tenner and Brooklyn Gastroenterology's liability. Although there is some dispute in the record as to when and how Dr. Tenner's office received Plaintiff's blood test results from Quest Diagnostics, the gastroenterology expert opines that even if they were available to Dr. Tenner as early as December 8, it is within the standard of care to review a final report of all the ordered tests together. The expert also opines that Dr. Tenner ordering the

blood test at all was above and beyond the standard of care for Plaintiff's initial presentation, and therefore it was not a departure to review the results and schedule a follow-up within 10 days. Further, the expert opines that Dr. Tenner timely reviewed the follow-up blood test, appreciated her increasing BUN and Cr levels, and referred her to the hospital for a higher level of care and nephrology (kidney) evaluation.

Additionally, the movants' rheumatology expert establishes prima facie entitlement to summary judgment on the issue of proximate causation, opining that the course of Plaintiff's autoimmune disease would not have been altered if she had been referred to the hospital and nephrology evaluation prior to her second visit to Dr. Tenner on December 20. The expert's submissions establish that Dr. Tenner's acts and omissions did not proximately cause a delay in diagnosis, worsening of her condition, or her need for dialysis and kidney transplant. The burden therefore shifts to Plaintiff to raise issues of fact on the standard of care and proximate causation.

In opposition to the motion, Plaintiff submits an expert affirmation from a licensed physician, (name of expert redacted), certified in nephrology. The Court was presented with a signed, unredacted copy of this affirmation for *in camera* inspection.

"[W]here a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" (*Hannen v Nici*, 218 NYS3d 127 [2d Dept 2024], quoting *Abruzzi v Maller*, 221 AD3d 753, 756 [2d Dept 2023]). Through their affirmation and the unredacted copy provided to the Court for *in camera* inspection, Plaintiff's expert establishes their qualifications to opine on the issues herein. Firstly, although Plaintiff's expert is not a gastroenterology specialist, the opinions rendered are not specific to gastroenterology training, education, or expertise. Rather, both parties' experts have set forth their qualifications as *internal medicine* physicians to opine on the standard of care for timely review and appropriate response to a patient's abnormal blood test results and elevated BUN/Cr levels.

Further, the expert affirms that they are not only a board-certified nephrologist, but they are specifically experienced and familiar with the standard of care and prognosis for kidney failure secondary to lupus nephritis. Therefore, the Court finds they have laid a proper foundation to counter the movants' experts on the standard of care and proximate causation, including the interaction between Plaintiff's renal insufficiency, timeliness of

diagnosis and treatment, and her underlying illness.

Plaintiff's expert opines that Dr. Tenner departed from good and accepted medical standards by failing to timely diagnose acute kidney injury, and he specifically failed to timely review Plaintiff's blood test results, promptly order a repeat test, and promptly refer her to the hospital after the repeat test.

The expert counters Dr. Frank's opinion that a blood test was not required by the standard of care at the time of Plaintiff's first visit on December 7. Plaintiff's expert opines that the standard of care did require a comprehensive metabolic panel blood test to "evaluate [Plaintiff's] fluid balance, electrolyte levels and kidney function" in light of her symptoms of diarrhea and vomiting. Plaintiff's expert further opines that it was not the standard of care, as stated by the movants' expert Dr. Frank, to await the "final" results of all tests ordered, because some of the cultures and tests would take several additional days to process. The expert notes that the blood panel consistently appeared as "reported" on December 8, December 9, December 11, December 13, and finally December 16 as the other tests' results were added. Thus, the expert opines that Dr. Tenner met the standard of care by ordering the blood test, but he departed from the standard of care by not reviewing the results either the day they became available or the following day, i.e., on December 8 or December 9.

Plaintiff's expert opines that the Plaintiff's December 7 BUN and Cr levels, along with her clinical symptoms, warranted "immediate further testing" to show whether those levels were rising. The expert opines that repeat test should have been performed much sooner "with the results available no later than December 10" if Dr. Tenner had not delayed in reviewing the initial bloodwork. Plaintiff's expert also opines that even after Dr. Tenner reviewed the results on December 16, it was a departure from the standard of care to schedule her repeat test on December 18 and not review those results until her follow-up appointment on December 20. The expert opines that the repeat test, review of the worsening BUN and Cr levels, and referral to the hospital "could and should have all been accomplished within 24-48 hours."

On the issue of proximate causation, Plaintiff's nephrology expert counters the movants' experts that Dr. Tenner's alleged delay in reviewing the blood test and referring Plaintiff to the hospital directly led to a worsening of her condition and loss of kidney function. Plaintiff's expert notes that her initial BUN (24) and Cr (1.58) levels

from December 7 were abnormal but “likely reversible (avoiding renal failure, dialysis and transplantation) with prompt (within 2-3 days) treatment.” The expert notes that within 36 hours of Plaintiff’s admission to Maimonides, she received “an extensive workup . . . IV hydration and the administration of intravenous steroids,” and opines that steroid treatment would likely have been more effective if she had been admitted sooner. The expert opines that by the time she was retested on December 18 and hospitalized on December 20, her BUN (38) and Cr (3.6) levels were “significantly more elevated,” and her underlying illness had progressed to being more resistant to treatment. The expert opines that inflammation of the kidneys caused by lupus nephritis does not inevitably “progress to kidney failure, dialysis and kidney transplant,” but did so because Plaintiff’s diagnosis and treatment was delayed. In the expert’s opinion, “early identification and treatment of acute kidney injury in lupus nephritis patients is critical for avoiding progression to loss of kidney function,” and Dr. Tenner’s alleged failure to timely review the blood test results, order and review the repeat test, and refer her to the hospital was a “substantial contributing cause” of her alleged injuries, including dialysis and kidney transplant.

Plaintiff’s expert has raised issues of fact which preclude summary judgment on behalf of Dr. Tenner and Brooklyn Gastroenterology. Notwithstanding the lack of clarity as to when Dr. Tenner received individual test results and “final” results – which itself may be a factual issue for the jury – there is a clear conflict between the experts as to whether the timeline of Dr. Tenner ordering the comprehensive blood test on December 7, reviewing the results on December 16, ordering a second test on December 18, and referring Plaintiff to the hospital on December 20 was within good and accepted medical standards.

The parties’ respective rheumatology and nephrology experts (both of whom, as discussed above, establish their qualifications to opine on acute kidney injury in the context of lupus nephritis) also offer conflicting opinions on proximate causation. Plaintiff’s expert counters the movants’ argument that her aggressive underlying illness, not any departure from the standard of care by Dr. Tenner, was the cause of her loss of kidney function. Plaintiff’s expert opines that she would have been more responsive to treatment – and thus avoided dialysis and/or transplant – if she had been re-tested and referred to the hospital after her initial blood test results and early signs of kidney failure.

“When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution” (*Stewart v. North Shore Univ. Hosp. at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102 [2d Dept. 2020]). Plaintiff’s expert submissions have sufficiently raised issues of fact on Dr. Tenner’s alleged departures from the standard of care, and whether those departures proximately caused her injuries, which must be resolved by a jury. Accordingly, it is hereby:

**ORDERED** that Defendant Quest Diagnostics’s motion (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor, is **GRANTED** without opposition; and it is further

**ORDERED** that Defendants Dr. Tenner and Brooklyn Gastroenterology and Endoscopy’s motion (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing all claims against them, or granting partial summary judgment for any claims on which there are no triable issues of fact, is **DENIED**; and it is further

**ORDERED** that the caption is amended to read:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY  
OF KINGS

-----X  
ALYSA CAMACHO,  
Plaintiff,

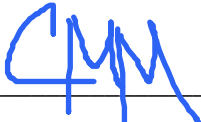
-against-

SCOTT TENNER, BROOKLYN GASTROENTEROLOGY  
and ENDOSCOPY, PLLC.,  
Defendants.  
-----X

The Clerk shall enter judgment in favor of QUEST DIAGNOSTICS INCORPORATED.

This constitutes the decision and order of this Court.

**ENTER.**

  
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**Hon. Consuelo Mallafre Melendez**

**J.S.C.**