

**Xiao-Fang Cen v Brooklyn Gastroenterology &
Hepatology PLLC**

2024 NY Slip Op 34727(U)

December 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 503798/2020

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York on the 3rd day of December 2024.

PRESENT :

Elon. Genine D. Edwards, Justice

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XIAO-FANG CEN and CHAO-WEI TANG,
her Husband,

Plaintiff,

Index No: 503798/2020

- against -

Decision & Order

BROOKLYN GASTROENTEROLOGY AND HEPATOLOGY PLLC, PO CHENG CHU, M.D., TAMARA SHELEVAYA-FAINSHTEIN, M.D., NURSE JANE DOE #1 a/k/a "Winnie", NURSE JANE DOE #2 a/k/a "Christine Lam" and NEW YORK MEDICAL AND DIAGNOSTIC SERVICES, P.C.,

Defendants.

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<u>The following e-filed paper(s) read herein:</u>	<u>NYSCEF Doc. No.</u>
Notices of Motion.....	120, 138
Affirmations in Support and Exhibits.....	122-136, 139-151
Affirmations in Opposition and Exhibits.....	159-165, 167
Reply Affirmations and Exhibits.....	166, 169, 170-172

In this action to recover damages for negligence, lack of informed consent and loss of consortium, Tamara Shelevaya-Fainshtein, M.D. ("Dr. Shelevaya-Fainshtein") moved for summary judgment. Plaintiffs opposed the motion and moved for summary judgment on the

issue of liability as against Brooklyn Gastroenterology and Hepatology, PLLC (“Brooklyn Gastroenterology”), Po Cheng Chu, M.D. (“Dr. Chu”) and Dr. Shelevaya-Fainshtein. In addition, Plaintiffs sought to strike defendants’ affirmative defense of comparative negligence.

Upon due deliberation and consideration, this Court finds that Dr. Shelevaya-Fainshtein established a prima facie case for judgment by establishing that she had no duty of care in the recovery room, inter alia. Plaintiffs’ untimely opposition was speculative and conclusory, failing to raise a triable issue of fact. *Russell v. River Manor Corp.*, 216 A.D.3d 827, 188 N.Y.S.3d 191 (2d Dept. 2023); *Coffey v. Mansouri*, 209 A.D.3d 714, 176 N.Y.S.3d 641 (2d Dept. 2022). Indeed, plaintiff’s expert failed to show that Dr. Shelevaya-Fainshtein deviated from the standard of care after she performed the post-anesthesia assessment. According to the medical records and deposition testimonies, Dr. Shelevaya-Fainshtein performed the post-anesthesia assessment once Dr. Chu completed the surgery and transferred plaintiff’s care to the on-duty nurse at 1:59 P.M. She testified that her custom and practice was to always check if the bedrails were up. Dr. Shelevaya-Fainshtein further testified that she did not complete the discharge assessment prior to plaintiff’s fall. After plaintiff fell, the only assessment Dr. Shelevaya-Fainshtein performed was a transfer assessment so that she could be treated for the fall at Maimonides Medical Center.

However, issues of fact preclude summary judgment as to plaintiffs’ liability claims against Brooklyn Gastroenterology and Dr. Chu, *Arnold v. Shepitka*, --- N.Y.S.3d ---, 231 A.D.3d 1105 (2d Dept. 2024); *Tucubal v. National Express Transit Corp.*, 209 A.D.3d 788, 176 N.Y.S.3d 675 (2d Dept. 2022) as well as plaintiffs’ request to strike defendants’ affirmative defense of comparative negligence. *Lu Yan Li v. Yong Hua Zhen*, --- N.Y.S.3d ---, 2024 WL 4897709 (2d Dept. 2024), *Casimiro Reyes Martinez v. Michael Colonna, et al.*, --- N.Y.S.3d ---, 2024 WL 4897684 (2d Dept. 2024). There is conflicting testimony about plaintiff’s and the

recovery room nurse’s actions leading up to the fall. Plaintiff testified that the nurse lowered the bedrails and walked away, but then later testified that the nurse advised her to hold on to the bedrail. Furthermore, Dr. Chu testified that upon investigation of the incident days later, he spoke to one of his medical assistants who insisted that the bedrails were never lowered, and plaintiff fell after she tried to get up. A trier of fact must resolve the conflict.

Accordingly, it is

ORDERED that Dr. Shelevaya-Fainshtein’s motion for summary judgment is granted, and it is further

ORDERED that plaintiffs’ motion for summary judgment is denied, and it is further

ORDERED that the caption is amended as follows:

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XIAO-FANG CEN and CHAO-WEI TANG,
her Husband,

Plaintiff,

- against -

BROOKLYN GASTROENTEROLOGY AND
HEPATOLOGY PLLC, PO CHENG CHU, M.D.,
NURSE JANE DOE #1 a/k/a “Winnie”, NURSE
JANE DOE #2 a/k/a “Christine Lam” and NEW
YORK MEDICAL AND DIAGNOSTIC
SERVICES, P.C.,

Defendants.

-----X

ORDERED that all remaining parties shall appear for an Alternative Dispute Resolution conference on January 9, 2025, at 11:00 AM, and it is further

ORDERED that plaintiffs are directed to electronically serve a copy of this Decision and Order with notice of entry on counsel for defendants and to electronically file and affidavit of service thereof with the Kings County Clerk.

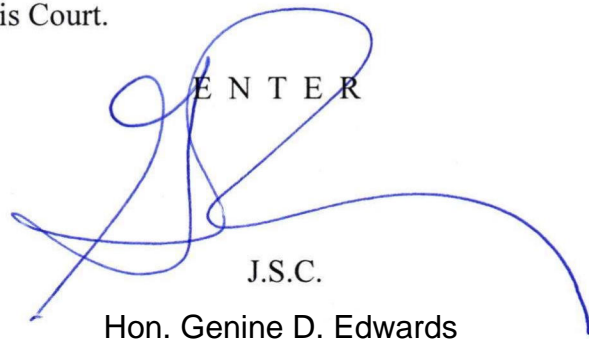
This constitutes the Decision and Order of this Court.

For Clerks use only

MG__

MD__

Motion Seqs. #: 4, 5

E N T E R

J.S.C.
Hon. Genine D. Edwards