

McCann v Hundert

2024 NY Slip Op 34750(U)

November 6, 2024

Supreme Court, Queens County

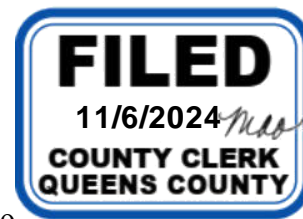
Docket Number: Index No. 714617/2019

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



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KATHLEEN McCANN and BRIAN McCANN,

Index No. 714617/2019

Plaintiffs,

Part MDP

Motion Date: October 9, 2024

-against-

Calendar No. 17

Sequence No. 4

MICHAEL L. HUNDERT, MD, MICHAEL L. HUNDERT, MD, PC, RALPH MASTRANGELO, MD, MICHAEL S. HAN, MD, TERESA M. DEANGELIS, MD A/K/A TRACY DEANGELIS, MD, RAMINDER KAUR PARIHAR, MD, NEUROLOGICAL ASSOCIATES OF LONG ISLAND, P.C., TOUFIC KASSEM SAFA, MD, AAA VASCULAR CARE, PLLC, CRAIG HARVEY SHERMAN, MD, CRAIG H. SHERMAN, MD, PC, DANIEL S. LERNER, MD, ST. FRANCIS HOSPITAL AND CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC.,

Defendants.

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The following papers numbered EF-212 to EF-264 read on this motion by defendants MICHAEL S. HAN, M.D. and NEUROLOGICAL ASSOCIATES OF LONG ISLAND, P.C. for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF212-EF231
- Affirmation in Opposition, Exhibits.....EF252-EF257
- Reply Affirmation.....EF264

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Michael S. Han, M.D. and Neurological Associates of Long Island, P.C.'s motion for summary judgment and dismissal of plaintiffs' Complaint is granted, as defendants eliminated all triable issues of fact regarding whether Dr. Han departed from accepted standards

of care and proximately caused or contributed to plaintiffs' injuries. (*See Galluccio v. Grossman*, 161 A.D.3d 1049 [2d Dept. 2018].)

Plaintiffs commenced this medical malpractice action by filing the Summons and Complaint on August 23, 2019. Issue was joined by defendant Neurological Associates of Long Island, P.C. via the filing of its Verified Answer on September 25, 2019, followed by the filing of defendant Dr. Han's Verified Answer on September 27, 2019.

Defendants argue they are entitled to summary judgment and present the pleadings, plaintiffs' Bills of Particulars, plaintiff Kathleen McCann's medical records, the parties' deposition testimony, and the expert affirmation of Joseph Jeret, M.D. in support of their motion. Defendants argue they have established a prima facie case, as the evidence shows Dr. Han did not depart from accepted standards of care in treating plaintiff Kathleen McCann and he did not proximately cause or contribute to plaintiffs' injuries. They argue Dr. Han exercised appropriate judgment in caring for Ms. McCann, offering appropriate consultation and recommendations, as well as options for treatment. They further argue none of Dr. Han's actions or omissions proximately caused Ms. McCann's 2018 stroke.

Defendants present the affirmation of Dr. Joseph Jeret in support of their motion. Dr. Jeret affirmed to being a medical doctor licensed in New York and board-certified by the American Board of Psychiatry and Neurology. Dr. Jeret further affirmed to reviewing pleadings, plaintiffs' Bills of Particulars, the parties' deposition testimony, and Ms. McCann's pertinent medical records in rendering his opinions. Dr. Jeret also reviewed Ms. McCann's medical history pertaining to the relevant hospital admissions and based upon the foregoing materials, Dr. Jeret opined to a reasonable degree of medical certainty that defendants did not depart from accepted standards of care or proximately cause or contribute to plaintiffs' injuries.

Dr. Jeret noted Dr. Han first observed Ms. McCann on March 1, 2017 for an initial neurological consultation at St. Francis Hospital. Dr. Han reviewed Ms. McCann's medical records and performed a physical examination. Dr. Jeret noted the impression was Ms. McCann had a left frontal acute cerebral vascular accident (CVA), with status post-treatment of tPA at Flushing Hospital and transferred to St. Francis Hospital for 70% left ICA stenosis. Dr. Han ordered a repeat MRI with an MRA of Ms. McCann's head and neck, recommended continued telemetry for assessment of the type of arrhythmia, cleared her for use of aspirin and cholesterol medicine, and recommended deep vein thrombosis (DVT) prophylaxis. Dr. Han testified that at that time, there was no evidence of a significant carotid or vertebral artery disease on any of the studies performed at St. Francis Hospital. Dr. Han saw Ms. McCann again on March 3rd, and planned for further management of her stroke symptoms. He saw Ms. McCann for outpatient treatment on March 15, 2017, and determined the etiology was considered to be embolic based upon cortical localization of the MRI, and Dr. Han appreciated there was no confirmed atrial

fibrillation as of June 15, 2017. On June 15th, Dr. Han advised Ms. McCann to follow up with her primary care physician and non-party electrophysiologist.

Dr. Jeret opined with a reasonable degree of medical certainty that Dr. Han acted properly and appropriately and within the standard of care in treating Ms. McCann. He opined as a consulting neurologist, it was Dr. Han's responsibility to see Ms. McCann upon admission to the hospital and take a full and complete medical history, do a full physical examination, order pertinent testing to learn the potential cause of the stroke, assess Ms. McCann for stability, and make suggestions to the primary care team. Dr. Jeret further opined Dr. Han met the standard of care by completing the foregoing and therefore satisfied his duties to Ms. McCann. Dr. Jeret also explained that based upon his testimony, Dr. Han holds a subcertification in interpreting carotid artery doppler and it was therefore appropriate for him to perform a preliminary reading of the carotid doppler. He further opined Dr. Han properly interpreted the doppler as showing less than fifty percent stenosis bilaterally of the carotid arteries and no high-grade stenosis of the left internal carotid artery, which interpretation was confirmed by Dr. Lerner. Dr. Jeret also explained that based upon his testimony, Dr. Han was aware of the CTA from Flushing Hospital finding approximately seventy percent stenosis and it was therefore appropriate and within the standard of care for him to order an MRI with and without contrast and an MRA. Dr. Jeret reasoned an MRI is a standard and appropriate modality to assess treatment for embolic stroke and MRA is an excellent and standard modality to evaluate for carotid stenosis. Dr. Jeret further noted Dr. Han testified he did not re-order another CTA as Ms. McCann had already undergone several studies involving radiation and he wanted to avoid additional radiation exposure while obtaining diagnostically equivalent data from the MRA.

Dr. Jeret opined Dr. Han's reasoning and decisions were within the standard of care, and Dr. Han appropriately recommended medical treatment and work up guided by Ms. McCann's history. Dr. Jeret also opined that based upon the interpretation of the above testing and Dr. Safa's findings and recommendations, it was appropriate for Dr. Han to recommend the primary team evaluate Ms. McCann for other stroke causes. Dr. Jeret also opined it was within the standard of care for Dr. Han to rely on the tests performed at St. Francis Hospital rather than the outside radiology reports from Flushing Hospital. Dr. Jeret also opined the standard of care did not require a repeat CTA and it was reasonable for Dr. Han to rely upon the testing done at St. Francis Hospital. Dr. Jeret also explained the imaging demonstrated a stroke distribution pattern consistent with a cardioembolic stroke, and it was within the standard of care to consider occult atrial fibrillation as a possible cause and recommend further testing and workup based on that possibility. Dr. Jeret explained what occult atrial fibrillation is and that it is not present at all times but fluctuates. He further opined with a reasonable degree of medical certainty that there was no deviation from the standard of care by Dr. Han that proximately caused the 2018 stroke. Based upon the foregoing, defendants argue they are entitled to summary judgment and dismissal of plaintiffs' Complaint.

Plaintiffs oppose defendants' motion and argue defendants failed to eliminate all triable issues of material fact with respect to whether Dr. Han departed from accepted standards of care and proximately caused or contributed to plaintiffs' injuries. Plaintiffs present the affirmation of a medical doctor licensed in Tennessee, Massachusetts, Alabama, and Kentucky and memorandum of law in opposition to defendants' motion. They argue defendants failed to present a prima facie case as their expert's opinions were conclusory and lack merit. Plaintiffs further argue Dr. Han departed from the standard of care in failing to properly address Ms. McCann's symptomatic severe carotid stenosis, resulting in a 2018 stroke.

Plaintiffs' expert affirmed to holding board certifications from the National Board of Medical Examiners, the American Board of Internal Medicine and in Neurosonology-Cerebrovascular Disease and Physics, American Society of Neuroimaging. Plaintiffs' expert further affirmed to reviewing the motion papers, the parties' deposition testimony, and Ms. McCann's pertinent medical records in rendering opinions in this case. Plaintiffs' expert opined within a reasonable degree of medical certainty that Ms. McCann had symptomatic left internal carotid artery stenosis with stroke on February 26, 2017 and a second symptom, likely transient ischemic attack, occurred while at St. Francis Hospital. Plaintiffs' expert further opined Dr. Han's treatment did not prevent a third event with stroke on May 8, 2018. Plaintiffs' expert further opined the mechanism of the 2017 and 2018 strokes was arterial-to-arterial embolism from activated carotid atherosclerotic plaque. The expert further opined the optimal treatment for symptomatic carotid stenosis consistent with the standard of care is either surgical revascularization or stenting done in a timely fashion, as such treatment is highly effective and durable for secondary stroke prevention.

Plaintiffs' expert opined within a reasonable degree of medical certainty that Dr. Han deviated from the standard of care in the medical management of Ms. McCann's stroke during the 2017 St. Francis Hospital admission. Plaintiffs' expert opined to a reasonable degree of medical certainty that Dr. Han deviated from the standard of care by considering embolism with a cardiac origin, as plaintiffs' expert argues the source of the embolus was symptomatic carotid stenosis. Plaintiffs' expert also opined Dr. Han's failure to pursue and ensure the optimal treatment of revascularization was a deviation from the standard of care and a proximate cause of the second stroke. Plaintiffs' expert disagreed with Dr. Jeret's opinions regarding the treatment Dr. Han rendered in lieu of revascularization. Plaintiffs' expert also disagreed with Dr. Jeret's opinion that it was appropriate for Dr. Han to rely on the imaging done at St. Francis Hospital rather than obtaining imaging from Flushing Hospital CTA or repeating the CTA. Plaintiffs' expert reasoned CTA is a more sensitive and specific study than MRI angiography of the neck for carotid stenosis and can provide better vascular information. Plaintiffs' expert further noted Dr. Han recognized the disparity in the degree to carotid artery stenosis between the Flushing Hospital CTA and St. Francis MRA, and the standard of care required him to order a CTA of the neck or catheter angiography. Plaintiffs' expert further reasoned a repeat CTA would have confirmed severe

carotid artery stenosis resulting in revascularization and prevention of the 2018 stroke. Plaintiffs' expert also affirmed to reviewing the Flushing Hospital CTA and opined the imaging reflected significant severe carotid artery stenosis. Plaintiffs' expert also disagreed with Dr. Jeret's opinion that the imaging demonstrated a pattern consistent with cardioembolic stroke and it was therefore reasonable for Dr. Han to consider occult atrial fibrillation as a possible cause of Ms. McCann's stroke.

Plaintiffs' expert opined the failure to pursue the optimal treatment of revascularization in February and March 2017 was a deviation by Dr. Han that proximately caused the 2018 stroke. Plaintiffs' expert reasoned St. Francis imaging shows an embolic stroke but the source of the stroke cannot be determined from the studies, so it was not appropriate to rely on them to ascertain that it was a cardioembolic stroke. Plaintiffs' expert further reasoned Ms. McCann had symptomatic carotid stenosis and Dr. Han pursued the wrong line of reasoning in his evaluation. Plaintiffs' expert also disagreed with Dr. Jeret's opinion that Ms. McCann was properly administered antiplatelet therapy, anticoagulation, and cholesterol-reducing medication following her discharge. Plaintiffs' expert reasoned the only treatment that would have worked for Ms. McCann was revascularization. The expert opined Dr. Han's ineffective medical treatment for symptomatic severe carotid stenosis was the proximate cause of Ms. McCann's 2018 stroke, as the appropriate therapy options were not recommended or pursued by Dr. Han. Based upon the foregoing, plaintiffs argue defendants' motion should be denied.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners' Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolina & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia*

v. Mosca, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (See *Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948, 951 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment, as they demonstrated through the medical records, deposition testimony and Dr. Jeret's affirmation that Dr. Han did not depart from accepted standards of care or proximately cause or contribute to plaintiffs' injuries. (See *Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].) Defendants demonstrated through Dr. Jeret's affirmation that Dr. Han acted appropriately and in accordance with the standard of care in seeing Ms. McCann upon her admission to St. Francis Hospital, taking a full and complete medical history, performing a complete physical examination, ordering pertinent testing, assessing Ms. McCann for stability, and making suggestion to the primary care team. Defendants further demonstrated through their expert's affirmation that Dr. Han properly interpreted the St. Francis Hospital studies and acted within the standard of care by not ordering a repeat CTA or obtaining the Flushing Hospital CTA. They further demonstrated Dr. Han properly relied upon the interpretation of the studies in pursuing a course of treatment, and was not responsible for whether Ms. McCann had surgery as opposed to medicinal treatment. Defendants further demonstrated it was reasonable for Dr. Han to suspect the stroke source was cardioembolic and to recommend testing and further work-up accordingly, and Dr. Han properly monitored Ms. McCann's stroke symptoms upon release from St. Francis Hospital. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiffs failed to raise triable issues of material fact in dispute. (See *Attia v. Klebanov*, 192 A.D.3d 650 [2d Dept. 2021].) It is noted plaintiffs' expert is not licensed in New York and failed to demonstrate familiarity with the standards of care as they existed in New York during the relevant time period between 2017 and 2018. (See *Roye v. Gelberg*, 172 A.D.3d 1260, 1262 [2d Dept. 2019][holding that plaintiff's expert affirmation lacked probative value because it was unsigned and did not articulate his education, training, or familiarity with the applicable standard

of care].) Plaintiffs’ expert also failed to sufficiently rebut Dr. Jeret’s opinions and findings. (*See Fairchild v. Lerner*, 229 A.D.3d 506 [2d Dept. 7/10/2024]; *Lau v. Wan*, 93 A.D.3d 763 [2d Dept. 2012].) Plaintiffs’ expert’s opinion that Dr. Han deviated from the standard of care by considering embolism with a cardiac origin was vague, speculative, and unsupported by the evidence. (*See Longhi*, 187 A.D.3d at 878 [“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”].) Plaintiffs’ expert’s opinion that Dr. Han departed from the standard of care by failing to ensure that revascularization was done is similarly without merit, as that was the responsibility of the vascular surgeon upon whom Dr. Han properly relied. With respect to plaintiffs’ expert’s opinions regarding the testing, imaging, and post-discharge care, plaintiffs’ expert failed to demonstrate triable issues of fact with respect to causation, as the decision to perform revascularization was within the responsibilities and purviews of the vascular surgeon, not Dr. Han as the attending neurologist. Plaintiffs also failed to present competent, admissible evidence that Dr. Han did not appropriately follow up with Ms. McCann and that any of Dr. Han’s actions or omissions were the proximate cause of the 2018 stroke. Based upon the foregoing, plaintiffs failed to raise triable issues of material fact in dispute.

Accordingly, defendants Michael S. Han, M.D. and Neurological Associates of Long Island, P.C.’s motion for summary judgment and dismissal of plaintiffs’ Complaint pursuant to CPRL §3212 is granted. It is hereby

ORDERED that plaintiffs’ Complaint is dismissed as to defendants MICHAEL S. HAN, M.D. and NEUROLOGICAL ASSOCIATES OF LONG ISLAND, P.C.

This constitutes the decision and Order of the Court.

Dated: November 6, 2024



Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.