

Spence v Bizekis

2024 NY Slip Op 34770(U)

September 27, 2024

Supreme Court, Queens County

Docket Number: Index No. 705417/2020

Judge: Tracy Catapano-Fox

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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
KAESTNER SPENCE and JACQUELINE SPENCE,

Index No. 705417/2020

Plaintiffs,

Part MDP

Motion Date: September 4, 2024

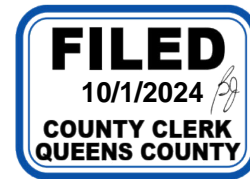
-against-

Calendar No. 23

COSTAS BIZEKIS, M.D., CHARLES MA, M.D.,
and NYU LANGONE TISCH HOSPITAL,

Sequence No. 1

Defendants.
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The following papers numbered EF-12 to EF-42 read on this motion by defendants COSTAS BIZEKIS, M.D., CHARLES MA, M.D., and NYU LANGONE HOSPITALS s/h/a NYU LANGONE TISCH HOSPITAL for summary judgment and dismissal of plaintiffs’ Complaint pursuant to CPLR §3212.

Papers
Numbered

- Notice of Motion, Affirmation, Exhibits.....EF12-EF30
- Affirmation in Opposition, Exhibits.....EF32-EF41
- Reply Affirmation.....EF42

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

Defendants Costas Bizekis, M.D., Charles Ma, M.D., and NYU Langone Hospitals s/h/a NYU Langone Tisch Hospital’s (hereinafter collectively referred to as “defendants”) motion for summary judgment and dismissal of plaintiffs’ Complaint is granted, as defendants eliminated all triable issues of fact regarding whether they departed from accepted standards of care and proximately caused or contributed to plaintiffs’ injuries. (*See generally DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2d Dept. 2017].)

Plaintiffs commenced this action for medical malpractice and lack of informed consent based upon plaintiff Kaestner Spence’s surgery on January 7, 2020 for gastroesophageal reflux disease (hereinafter referred to as “GERD”) and hiatal hernia performed by defendant Dr. Bizekis.

Plaintiff filed the Summons and Complaint on May 25, 2020 and issue was joined by defendants via the filing of their Verified Answers on July 8, 2020.

Defendants argue that they are entitled to summary judgment and present the pleadings, plaintiffs' Bills of Particulars, plaintiff Kaestner Spence's medical records, the parties' deposition testimony, the affidavit of Jeffrey W. Stupak, Esq., and the affirmation of Joshua R. Sonett, M.D. in support of their motion. Defendants argue that the evidence shows they did not depart from accepted standards of care or proximately cause plaintiffs' injuries. They argue that plaintiff Kaestner Spence's surgery was indicated, and post-operative bleeding and subsequent surgery was a known and accepted risk of the surgeries that occurs in the absence of negligence. Defendants also argue that plaintiffs' claim for lack of informed consent must be dismissed because plaintiff Kaestner Spence's informed consent was obtained prior to the surgery. Defendants also argue that defendant Dr. Ma was a fellow training under the supervision of attending physician defendant Dr. Bizekis and is therefore not liable for alleged malpractice and injuries. Defendants also argue that defendant Dr. Bizekis was not an employee of defendant NYU Langone, but rather was an employee of NYU School of Medicine, and defendant NYU Langone therefore cannot be held vicariously liable for defendant Dr. Bizekis' care and treatment. Defendants also argue that the doctrine of *res ipsa loquitur* is not applicable, as post-operative bleeding is a known and accepted risk of all surgeries and was disclosed when plaintiff Kaestner Spence's informed consent was obtained. Defendants also argue that plaintiff Jacqueline Spence's derivative claim must be dismissed because it cannot survive if the direct causes of action are dismissed.

Defendants present the affidavit of Jeffrey W. Stupak, Esq. in support of their motion. Mr. Stupak attested he is the Director of Multiline Claims for NYU Langone Health. Mr. Stupak attested that upon a review of NYU Langone Health's records, defendant Dr. Bizekis was not an employee of NYU Langone Hospitals s/h/a NYU Langone Tisch Hospital from 2018 to 2021, but rather was employed by NYU Grossman School of Medicine, a separate entity.

Defendants also present the affirmation of Dr. Joshua R. Sonett in support of their motion. Dr. Sonett affirmed to being a physician licensed in New York and board-certified in thoracic surgery. Dr. Sonett further affirmed to reviewing the medical records, pleadings, the parties' deposition testimony, and litigation materials in rendering his opinions. Dr. Sonett reviewed plaintiff Kaestner Spence's pertinent medical history and opined to a reasonable degree of medical certainty that defendants rendered care and treatment within the standard of care and did not proximately cause plaintiff Kaestner Spence's injuries.

Dr. Sonett noted that plaintiff Kaestner Spence had a medical history for GERD, obesity, hypertension, asthma, diabetes and hernias. He noted plaintiff had a hernia repair surgery in 2016 but continued to have reflux and was diagnosed with a hiatal hernia in 2019. On April 4, 2019, plaintiff consulted with defendant Dr. Costas Bizekis and complained of chest pain and some

heartburn. Dr. Bizekis referred plaintiff Kaestner Spence to a specialist, and on October 11, 2019, plaintiff returned to Dr. Bizekis complaining of heartburn, chest congestion and cough. Plaintiff and Dr. Bizekis discussed surgery to address plaintiff Kaestner Spence's complaints, and plaintiff acknowledged the risks and benefits of the procedure. Dr. Bizekis testified at his deposition that his practice was to discuss the risks, benefits and alternatives of surgery with patients for about 15 to 30 minutes. Plaintiff Kaestner Spence testified at his deposition that he and Dr. Bizekis discussed the surgery for approximately 30 minutes but could not recall the substance of the conversation. On December 17, 2019, plaintiff Kaestner Spence presented to Dr. Dinh, who performed an examination and opined plaintiff was at low risk for the planned procedure. On January 7, 2020, plaintiff Kaestner Spence presented to NYU Langone Hospital for surgery, where Dr. Bizekis testified he had another informed consent conversation with plaintiff and he signed the form. Plaintiff Kaestner Spence testified he signed the anesthesia form and acknowledged his signature, but could not confirm the surgical consent form included his signature. The surgery was performed without issue and plaintiff Kaestner Spence remained stable until later that evening, when he was returned for surgery to explore a possible bleed. Dr. Bizekis performed the surgery and observed a small vessel bleed that was repaired without incident, and Kaestner Spence was discharged from the hospital on January 11, 2020.

Dr. Sonett stated the surgery was clearly indicated based upon plaintiff Kaestner Spence's clinical condition. He disagreed that Dr. Bizekis should have treated plaintiff Kaestner Spence conservatively, as plaintiff had a four year history of GERD for which he was counseled to stop smoking, change diet and eating habits, which plaintiff failed to follow. Dr. Sonett opined that based upon plaintiff Kaestner Spence's clinical history, it would have been within the standard of care for Dr. Bizekis to offer surgery at the first visit, but noted Dr. Bizekis acted conservatively by first referring plaintiff to gastrointestinal motility expert Dr. Kahn. Dr. Sonett further opined that it was appropriate and within the standard of care for Dr. Bizekis to offer plaintiff Kaestner Spence surgical options on his subsequent visit, as plaintiff had already been counseled about conservative treatment for four years and failed to heed the recommendations.

Dr. Sonett opined within a reasonable degree of medical certainty that Dr. Bizekis obtained appropriate informed consent from plaintiff Kaestner Spence before performing the surgery. He noted that Dr. Bizekis documented and testified to discussing the risks, benefits and alternatives with plaintiff Kaestner Spence, and while plaintiff could not recall the substance of the conversation, he did acknowledge discussing the surgery with Dr. Bizekis. Dr. Sonett also noted that plaintiff Kaestner Spence admitted signing the anesthesia consent prior to surgery which included the risk of bleeding.

Dr. Sonett opined that the surgery was properly performed and defendants met or exceeded the standard of care in incorporating all necessary steps to reduce the likelihood of injury to a blood vessel. He noted that post-operative bleeding and the need for reoperation to repair bleeding are

well known and accepted risks of surgeries that can occur absent negligence. Dr. Sonett noted that Dr. Bizekis' operative report was very detailed and described appropriate surgical technique. He disagreed with plaintiffs' claim that Dr. Bizekis failed to diagnose bleeding during the surgery, and opined that based upon Dr. Bizekis' testimony, he examined the surgical field and there were no signs of bleeding, and therefore there was no intraoperative bleed or further steps necessary during surgery. Dr. Sonett disagreed with plaintiffs' claim that defendant Dr. Bizekis should have called consults, including vascular surgery, or taken additional steps before closure to stop bleeding.

Dr. Sonett opined within a reasonable degree of medical certainty that the vessel bleed did not occur until later in the evening of January 7th, and did not occur intraoperatively. He opined that the vessel that bled was one of the vessels intentionally cut with the Harmonic scalpel to free the surrounding fat pad to perform the hernia repair. Dr. Sonett argued that plaintiff Kaestner Spence was hemodynamically stable throughout the surgery, in the PACU and for nine hours after surgery, which was consistent with a delayed bleed, as an intraoperative bleed would have been evident by plaintiff Kaestner Spence's vital signs and earlier hypotension. Dr. Sonett also opined that if there was an intraoperative bleed, plaintiff Kaestner Spence's CBC would have shown dramatically lower RBC, hemoglobin, and hematocrit, and instead these values were only minimally decreased and inconsistent with prolonged bleeding. Dr. Sonett also opined that Dr. Ma, a fellow, acted appropriately and within the standard of care as a trainee and did not cause the bleed or any injury, as Dr. Bizekis testified he personally performed all of the surgical maneuvers and Dr. Ma acted at his supervision and direction in holding the camera and retractors.

Dr. Sonett also disagreed that there was improper post-operative care and delayed diagnosis of the bleed, arguing defendants complied with the standard of care by performing a proper and thorough workup at the first sign of hypotension. He also argued that the standard of care did not require additional testing or imaging. Dr. Sonett opined within a reasonable degree of medical certainty that plaintiff Kaestner Spence was promptly returned to the operating room, and Dr. Bizekis went above the standard of care to return to the hospital to help with his patient despite the presence of on-call attending cardiothoracic surgeons. He also opined that the failure to return plaintiff Kaestner Spence to the operating room earlier was not the proximate cause of any injuries, as the same surgery would have been performed, plaintiff would have recovered at the same rate, and had the same post-operative course of treatment. Dr. Sonett also opined that the reoperation surgery was performed within the standard of care and permanently stopped the bleeding. He also opined to a reasonable degree of medical certainty that plaintiff Kaestner Spence had no permanent pain or suffering related to the vessel injury, and there was no indication in the medical records that plaintiff's continued complaint of chest pain was related to the surgery or vessel injury. Dr. Sonett opined within a reasonable degree of medical certainty that defendants rendered appropriate care to plaintiff Kaestner Spence and no alleged departure by defendants proximately caused any injury.

Plaintiffs oppose the motion and argue that defendants failed to demonstrate a prima facie case, as there are triable issues of material fact regarding whether defendants departed from accepted standards of care and proximately caused plaintiffs' injuries, and whether plaintiffs' informed consent was obtained prior to the procedure. Plaintiffs present the parties' deposition testimony, plaintiff Kaestner Spence's medical records, and expert affirmation of a physician in support of their opposition. Plaintiffs' expert attested to be licensed in New York and board-certified in vascular surgery. Plaintiffs' expert affirmed to reviewing medical records, the parties' deposition testimony, and the expert affirmation of Dr. Sonett in rendering opinions in this case. Based upon a review of the medical history and above evidence, plaintiffs' expert opined that defendant Dr. Bizekis departed from accepted standards of care and proximately caused plaintiffs' injuries.

Plaintiffs' expert opined that Dr. Bizekis departed from good and accepted medical practice by improperly performing an unnecessary laparoscopic hernia repair, and failing to properly evaluate and assess plaintiff Kaestner Spence's complaints, test results, and imaging to formulate a proper medical treatment plan. Plaintiffs' expert reasoned that performing the surgery on plaintiff Kaestner Spence was not indicated, as treating GERD with surgical intervention should be reserved for patients who fail treatment with optimal medical therapy. Plaintiffs' expert further reasoned that since the introduction of proton pump inhibitors (hereinafter referred to as "PPIs") over thirty years ago, they have been extremely effective in alleviating the symptoms and effects of GERD. Plaintiffs' expert further reasoned that surgery should be reserved for patients who have not had success with PPI administration and lifestyle changes. Plaintiffs' expert opined that defendant Dr. Bizekis failed to ensure plaintiff Kaestner Spence had a proper trial of optimal medical therapy which was unsuccessful prior to performing surgery, and this failure was a departure from the standard of care.

Plaintiffs' expert also opined that Dr. Bizekis departed from good and accepted medical practice by failing to perform a preoperative upper gastrointestinal endoscopy. The expert noted that the endoscopy performed intraoperatively on January 7, 2020 showed no effects of severe reflux such as inflammation, strictures or ulceration of the esophagus. The expert opined that preoperative testing would have confirmed that surgery was not indicated and optimal medical therapy should have been used. Plaintiffs' expert further opined that Dr. Bizekis' departures proximately caused injury to plaintiff Kaestner Spence, who unnecessarily underwent surgery that resulted in complications requiring emergent surgery. The expert further opined that plaintiff Kaestner Spence would have likely responded to medical therapy, given the preoperative findings of minimal symptoms, moderate reflux, and he was asymptomatic if he avoided late meals.

Plaintiffs' expert also opined that Dr. Bizekis departed from good and accepted medical practice in performing the January 7, 2020 surgery, because he failed to properly ensure hemostasis

prior to closure. Plaintiffs' expert reasoned that Dr. Bizekis failed to properly inspect the operative field and confirm that all potential bleeding had been controlled. Plaintiffs' expert further reasoned that based on the quantity of blood – four liters – in the abdominal cavity and the vessel being two millimeters in diameter during the subsequent re-operation, it is more likely than not that the vessel was bleeding intraoperatively and should have been identified and closed by Dr. Bizekis during the first surgery. Plaintiffs' expert further opined that Dr. Bizekis' departure caused the second surgery and consequential scarring.

Plaintiffs' expert also opined that Dr. Bizekis failed to obtain plaintiff Kaestner Spence's informed consent prior to performing the surgery, because there is no indication Dr. Bizekis advised him of the importance of attempting optimal medical therapy prior to surgery. The expert reasoned that plaintiff Kaestner Spence had been compliant with medical treatment for hypertension and asthma, and there is no reason to believe plaintiff would not have been compliant with medical treatment for GERD if the risks, benefits and alternatives were explained to avoid surgery. Plaintiffs' expert reasoned that a reasonable person would have elected optimal medical treatment before proceeding with invasive surgery.

Plaintiffs' expert disagreed with Dr. Sonett's opinion that post-operative bleeding is a well-known and accepted risk of surgery and can occur absent negligence. Plaintiffs' expert explained that while post-operative bleeding may occur absent negligence, here it occurred because Dr. Bizekis negligently failed to inspect the operative field and identify bleeding vessels. Plaintiffs' expert also disagreed with Dr. Sonett's opinion that the surgery was indicated, as plaintiff Kaestner Spence was never treated with or recommended optimal medical therapy, or instructed to make lifestyle changes that would have alleviated his symptoms. Based upon the foregoing, plaintiffs argue that 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. Nicolia & 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 within the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].) However, a parent corporation will not be held liable for the torts or obligations of a subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary. (*Potash v. Port Auth.*, 279 A.D.2d 562, 562 [2d Dept. 2001].)

A medical resident or fellow who is supervised by a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for medical malpractice unless the resident or fellow knows that the supervising doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders, or the resident or fellow commits an independent act that constitutes a departure from accepted medical practice. (*Poter v. Adams*, 104 A.D.3d 925, 927 [2d Dept. 2013].)

To establish a cause of action to recover damages based upon lack of informed consent, a plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury." (*Gilmore v. Mihail*, 174 A.D.3d 686, 688 [2d Dept. 2019].)

To establish liability under the doctrine of *res ipsa loquitor*, a plaintiff must establish that the event must be of a kind that ordinarily does not occur in the absence of negligence, that it must be caused by an agency or instrumentality within the exclusive control of the defendant, and the injury must not be due to any voluntary act or contribution by plaintiff. (*Frank v. Smith*, 127 A.D.3d 1301, 1302 [3d Dept. 2015].)

Defendants Dr. Bizekis, Dr. Ma, and NYU Langone established a prima facie entitlement to summary judgment, as they demonstrated through their production of the documentary evidence and the expert affirmation of Dr. Sonett that they did not depart from good and accepted standards of care and did not proximately cause plaintiffs' injuries. Defendants sufficiently addressed and rebutted the specific allegations set forth in plaintiffs' Bills of Particulars through the documentary evidence and expert testimony. (*See Townsend v. Vaisman*, 203 A.D.3d 1199, 1204 [2d Dept. 2022].) Defendants demonstrated through the deposition testimony and affidavit of Jeffrey W. Stupak that Dr. Bizekis was not an employee of NYU Langone Tisch Hospital during the time of the alleged malpractice, but rather was an employee of NYU Grossman School of Medicine, a separate entity for which it cannot be held vicariously liable. Defendants also demonstrated through the parties' deposition testimony and affirmation of Dr. Sonett that Dr. Ma was a fellow acting under the direction and supervision of defendant Dr. Bizekis, and only held the camera and retractors under Dr. Bizekis' supervision. Therefore, defendants demonstrated prima facie that defendants NYU Langone Tisch Hospital and Dr. Ma are entitled to judgment as a matter of law.

Defendants also demonstrated through the medical records and Dr. Sonett's expert affirmation that the surgery was indicated, Dr. Bizekis properly performed the surgery, he timely and properly diagnosed and repaired the bleed, and plaintiff Kaestner Spence did not suffer permanent injuries. Defendants demonstrated through the expert affirmation of Dr. Sonett that based upon plaintiff Kaestner Spence's medical history and history of complaints of GERD symptoms, the surgery was indicated. Defendants demonstrated that Dr. Bizekis is a cardiothoracic surgeon who initially saw plaintiff Kaestner Spence and referred him to a specialist prior to performing the surgery, and only proceeded with surgery after plaintiff returned to him six months later. Defendants further demonstrated through the deposition testimony and Dr. Sonett's affirmation that plaintiff Kaestner Spence unsuccessfully treated with Pepcid and did not commit to lifestyle changes such as losing weight and quitting smoking, and was therefore a good candidate for the surgery.

Defendants also demonstrated the GERD surgery was properly performed by Dr. Bizekis. They further demonstrated through Dr. Sonett's affirmation that Dr. Bizekis examined the surgical field before closure and observed no sign of bleeding. Dr. Sonett demonstrated that plaintiff Kaestner Spence's bleed occurred after surgery, and sufficiently explained that post-operative bleeding does not mean that the patient was bleeding intraoperatively prior to closure. Defendants further demonstrated through Dr. Sonett's affirmation that plaintiff Kaestner Spence was

hemodynamically stable prior to closure, which would not be his condition if there had been an intraoperative bleed. Defendants further demonstrated through Dr. Sonett's affirmation that Dr. Bizekis correctly chose not to rush plaintiff Kaestner Spence into subsequent surgery because plaintiff's complaints were consistent with a benign reaction to anesthesia. Defendants further demonstrated that the reoperation occurred at an appropriate time and Dr. Bizekis timely and properly diagnosed and repaired the bleeding, after which plaintiff Kaestner Spence suffered no consequences or injuries. Finally, defendants demonstrated that even had the bleed occurred intraoperatively, that is a known risk of the surgery to which plaintiff Kaestner Spence gave his informed consent, both to the surgery and anesthesia consent forms.

Defendants demonstrated that plaintiff Kaestner Spence gave informed consent for the surgery by signing an informed consent form. Defendants further demonstrated through the deposition testimony and medical records that plaintiff Kaestner Spence was apprised of the risks, benefits, and alternatives to the surgery, and he admitted having a conversation with Dr. Bizekis and signing the anesthesia form prior to surgery. They also demonstrated that plaintiff's claims based upon a theory of *res ipsa loquitur* must be dismissed, as there is no competent, admissible evidence to support them. Defendants also argue that plaintiff Jacqueline Spence's derivative claim must be dismissed in light of dismissal of the main action. Based upon the foregoing, defendants demonstrated a prima facie entitlement to summary judgment.

Plaintiffs failed to raise a triable issue of fact with respect to defendant NYU Langone Tisch Hospital and defendant Dr. Ma, as they failed to sufficiently rebut those portions of defendants' motion with competent, admissible evidence. (*See Keun Young Kim v. Lenox Hill Hosp.*, 156 A.D.3d 774, 775 [2d Dept. 2017][holding that in opposing a motion for summary judgment, a 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].) As plaintiffs' expert presented no opinions with regard to defendants NYU Langone Tisch Hospital and Dr. Ma, there are no triable issues of fact in dispute.

Plaintiffs also failed to raise a triable issue of fact with respect to the medical malpractice claims against defendant Dr. Bizekis. Plaintiffs' expert failed to sufficiently rebut Dr. Sonett's affirmation to raise triable issues of fact regarding whether defendant Dr. Bizekis departed from accepted standards of care and proximately caused or contributed to plaintiffs' injuries. Plaintiffs' expert discussed some of the departures alleged in the Bill of Particulars, specifically that Dr. Bizekis improperly performed an unnecessary surgery prior to treating with medical therapy, Dr. Bizekis failed to perform a pre-operative endoscopy, and Dr. Bizekis failed to identify an intraoperative bleed prior to closure. Therefore, plaintiffs abandoned the remaining departures claimed in the pleadings and Bills of Particulars. (*See 114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757 [2d Dept. 2019].)

Plaintiffs failed to raise triable issues of fact regarding whether the surgery was indicated. Plaintiffs' expert opinion that Dr. Bizekis should have explored conservative treatment with plaintiff Kaestner Spence prior to surgery is speculative, conclusory, and unsupported by the weight of the evidence. Plaintiffs' expert failed to rebut Dr. Sonett's opinion that as a cardiothoracic surgeon, Dr. Bizekis sees patients who are ready for surgery, such as plaintiff Kaestner Spence, who had a history of ineffective non-surgical treatment including Pepcid use and recommendations of lifestyle changes that he failed to implement. Plaintiffs' expert further failed to acknowledge that Dr. Bizekis referred plaintiff to a specialist, and plaintiff chose to return to Dr. Bizekis six months later after conservative treatment was unsuccessful in treating his complaints, and therefore the expert's opinion is unsupported by the medical evidence. (*See Mendoza v. Maimonides Med. Ctr.*, 203 A.D.3d 715, 716 [2d Dept. 2022][“General and conclusory allegations of medical malpractice, however, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician’s summary judgment motion.”]; *see also Lowell v. Flom*, 195 A.D.3d 801, 803 [2d Dept. 2021][holding that an expert opinion that is contradicted by the record or relies upon facts that are not supported by the record is speculative, conclusory, and insufficient to defeat summary judgment].)

Plaintiffs' expert also failed to raise triable issues of fact regarding whether Dr. Bizekis should have done a pre-operative endoscopy. Plaintiffs' expert failed to demonstrate that the standard of care required a pre-operative upper gastrointestinal endoscopy, and the opinion that it would have revealed the surgery was not indicated is speculative and unsupported by competent, admissible evidence. (*See Lowell, supra.*) Additionally, this alleged departure was not claimed in the Bills of Particulars and cannot be raised for the first time in opposition to summary judgment. (*Bacalan v. St. Vincents Catholic Med. Ctrs. Of N.Y.*, 179 A.D.3d 989, 992 [2d Dept. 2020][“A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars.”].) Plaintiffs' expert also failed to raise triable issues of fact regarding whether Dr. Bizekis failed to identify an intraoperative bleed. Plaintiffs' expert based this opinion on the amount of blood and size of the blood vessels at the time of the re-operation, but merely stated that it is “more likely than not” that the bleed was present prior to closure. Plaintiffs' expert failed to rebut Dr. Sonett's opinion that based on his deposition testimony, Dr. Bizekis observed the surgical field and did not observe any bleeding. (*See Mendoza, supra.*) Plaintiffs' expert also failed to rebut Dr. Sonett's opinion that even if there had been an intraoperative bleed, it was a known risk of the procedure, as plaintiffs' expert merely conclusively and without explanation stated that while an intraoperative bleed can occur absent negligence, Dr. Bizekis negligently caused the bleed. (*See Lowell, supra.*)

Plaintiffs also failed to raise triable issues of fact regarding their claim for lack of informed consent. Plaintiffs' expert failed to rebut defendants' prima facie showing plaintiff Kaestner

Spence gave informed consent for the surgery based upon the deposition testimony demonstrating he was informed of the risks, benefits, and alternatives of the surgery, and based upon the informed consent form. (*Id.*) Plaintiffs also failed to raise issues of fact under a theory of *res ipsa loquitor*, as plaintiffs' expert presented no opinions or arguments to support the theory.

Plaintiffs also failed to raise triable issues of fact regarding plaintiff Jacqueline Spence's derivative claims for loss of services, as the derivative action cannot be maintained without the main action. (*See Wittrock v. Maimonides Medical Center-Maimonides Hospital*, 119 A.D.2d 748, 748 [2d Dept. 1986].) Based upon the foregoing, plaintiffs failed to rebut defendants' prima facie case.

Accordingly, defendants Costas Bizekis, M.D., Charles Ma, M.D., and NYU Langone Hospitals s/h/a NYU Langone Tisch Hospital's motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted. It is hereby

ORDERED that plaintiffs' Complaint is dismissed as to defendants Costas Bizekis, M.D., Charles Ma, M.D., and NYU Langone Hospitals s/h/a NYU Langone Tisch Hospital.

This constitutes the decision and Order of the Court.

Dated: September 27, 2024



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

