

Goddard v Khalil

2024 NY Slip Op 34953(U)

July 2, 2024

Supreme Court, Bronx County

Docket Number: Index No. 28673/2020E

Judge: Michael A. Frishman

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: PART 34

-----X
 SYLVIA GODDARD,

Index No. 28673/2020E

Plaintiff,

- against -

Hon. MICHAEL A. FRISHMAN
 Justice of the Supreme Court

RICHARD KHALIL M.D. and BROADWAY
 MEDICAL SERVICES, P.C.,

Defendants.

-----X
 The following papers numbered, 40-59 and 63-71 were read on these Motions for Summary Judgment (Seq. Nos. 002 and 003).¹

Sequence No. 002	<u>NYSCEF Doc. Nos.</u>
Notice of Motion, Affirmation in Support – Exhibits and Affirmations Annexed	40-48
Affirmation in Opposition - Exhibits and Affirmation Annexed	63-66
Reply Affirmation	69

Sequence No. 003	<u>NYSCEF Doc. Nos.</u>
Notice of Motion, Affirmation in Support, Statement of Material Facts – Exhibits Annexed	49-59
Affirmation in Opposition - Exhibits and Supplemental Affirmation Annexed	67-68
Reply Affirmation – Exhibit Annexed	70-71

The motion of defendants RICHARD KHALIL M.D. and BROADWAY MEDICAL SERVICES, P.C., (hereinafter “defendants” or “Dr. Khalil”), seeking summary judgment dismissing the Complaint against them pursuant to CPLR § 3212 (Motion Seq. No. 002) is denied.

The motion of plaintiff, SYLVIA GODDARD (hereinafter “plaintiff”), seeking summary judgment as to liability against defendants pursuant to CPLR § 3212 (Motion Seq. No. 003) is denied.

Plaintiff commenced this action to recover damages for medical malpractice alleging, generally, that because of plaintiff’s known asthmatic history and allergies, Dr. Khalil’s negligent administration of Toradol on June 26, 2018 resulted in plaintiff suffering acute respiratory failure requiring intubation and

¹ These motions will be consolidated for the purposes of this Decision and Order as they involve the same facts and circumstances.

hospitalization for approximately one week, amongst other injuries. Plaintiff also asserts a cause of action for negligent hiring and retention against Broadway Medical Services, P.C.

Defendants seek summary judgment dismissing the Complaint against them arguing, *inter alia*, that the care and treatment rendered to plaintiff, including the administration of Toradol² to alleviate plaintiff's complaints of pain, was indicated, appropriate, and within the standard of care under the circumstances (Motion Seq. 002). Their motion is supported, among other things, by the affirmation of Dr. Feingold, who is Board Certified in Internal Medicine. Defendants also submit a supplemental affirmation of Dr. Feingold in opposition to plaintiff's motion on liability.

In opposition to defendants' motion for summary judgment, plaintiff asserts that defendants' expert fails to address essential allegations in her pleadings; that defendants' expert affirmation contains only bare and conclusory allegations; and that based upon plaintiff's expert affirmation, conflicting medical opinions exist requiring denial of defendants' motion. In support, plaintiff relies on the affirmation Dr. Gordon, who is Board Certified in Internal Medicine.

Plaintiff also seeks summary judgment as to liability, essentially arguing that Dr. Gordon's affirmation as well as Dr. Khalil's testimony establishes *prima facie* evidence of defendants' negligence (Seq. No. 003). Specifically, that Dr. Gordon opines within a reasonable degree of medical certainty that, as plaintiff's primary care physician, defendant Khalil was required by the standard of care to know what the side effects, contraindications and black box warnings were for Toradol, and that Dr. Khalil's testimony demonstrates a departure from the appropriate standard of care. Defendants oppose plaintiff's motion.

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In a medical malpractice action, a defendant establishes *prima facie* entitlement to summary judgment by showing either (i) that in treating the plaintiff there was no departure from good and accepted medical practice, or (ii) that any departure was not the proximate cause of the injuries alleged (*Bahnyuk v Reed*, 174 AD3d 481, 482 [1st Dept 2019]). "Further, medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish *prima facie* entitlement to summary judgment as a matter of law" (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Once a defendant meets his or her burden, the plaintiff must rebut defendant's *prima facie* showing (*Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). "A plaintiff is only required to raise a triable issue of fact as to causation where the defendant makes a *prima facie* showing that a claimed departure was not a proximate cause of the plaintiff's injuries" (*see Barry v Lee*, 180 AD3d 103, 106 [1st Dept 2019], *affd*, 35 NY3d 1050 [2020]). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Giampa v Marvin L. Shelton, M.D., P.C.*, 67 AD3d 439 [1st Dept 2009]). Further, the plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturup v Long*, 95 AD3d 726, 728-729 [1st Dept 2012]). "Summary judgment is not authorized in a

² Toradol is nonsteroidal anti-inflammatory drug (NSAID). Ketorolac is its generic name, and it works by reducing hormones that cause inflammation and pain in the body (*see Drugs.com, toradol*, <https://www.drugs.com/toradol/html>).

medical malpractice action where the parties adduce conflicting opinions of medical experts” (Severino v Weller, 148 AD3d 272, 273 [1st Dept 2017]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

At the outset, it is undisputed that plaintiff had been Dr. Khalil’s patient for quite some time; that she was asthmatic, and that, prior to date of these allegations, Dr. Khalil’s records note her past medical history to include COPD, Hyperlip, GERD, a moderate allergy to asa (aspirin) causing asthma exacerbation, and a moderate allergy to Motrin causing shortness of breath, copd/asthma exacerbation.

With respect to plaintiff’s asserted claims, defendants have met their *prima facie* burden that the care and treatment they provided to plaintiff was indicated, performed within accepted standards of care, and that Dr. Khalil and staff provided proper care and treatment and that their care did not contribute to plaintiff’s alleged injuries. Specifically, Dr. Feingold opines that, considering that a general NSAID allergy is very rare and plaintiff’s tolerance to some NSAIDS³, it was reasonable and medically indicated for Dr. Khalil to determine Toradol would be unlikely to cross react with plaintiff’s alleged aspirin and Motrin sensitivities under these circumstances, to wit, to alleviate her acute pain.

In opposition, plaintiff raises triable issues of fact as to her claims against defendants. While the Court recognizes defendants arguments that Dr. Gordon’s affirmation must be disregarded because it is based upon outside evidence that cannot establish a standard of care (*see Spensieri v Lasky*, 94 NY2d 231 [1999] [expert testimony based on the Physicians’ Desk Reference alone cannot be the only determinant in establishing the standard of care, but could have some significance]; *see also Thaler v Varlotta*, 194 AD3d 504 [1st Dept 2021] [an opinion premised entirely on a manufacturer’s recommendations as the only determinant of the standard of care fails to raise an issue of fact [internal quotations and citations omitted]; *Hinlicky v Dreyfuss*, 6NY3d 363 [2006] [algorithm was admitted to explain part of doctor’s evaluation process, not to establish a standard of care]), here plaintiff’s expert does not solely base her opinion on what is contained in the black box instructions or the “Epocrates” program to establish a standard of care. Rather, Dr. Gordon also bases her opinions on her training and experience and opines, generally, that Dr. Khalil departed from the appropriate standard of care in injecting plaintiff with Toradol despite her being allergic and/or hypersensitive to aspirin and other NSAIDs which caused a severe allergic reaction, exacerbation of her asthmatic symptoms and acute respiratory failure resulting in her intubation and hospitalization.

Additionally, irrespective of any black box arguments, Dr. Khalil’s testimony establishes that he is not aware that Toradol was contraindicated for asthmatic patients and that he sometimes relies on the Epocrates program as a guide regarding dosages of medications.⁴ In summary, the Court finds that it cannot be known at this stage and on this record whether defendants deviated from accepted standards of care in administering Toradol to an asthmatic patient who did not have a complete allergy to aspirin or NSAIDs, but had previous known reactions, and whether such actions proximately caused the plaintiff’s

³ Dr. Khalil stated that he had previously prescribed plaintiff with other NSAIDs without any known reaction.

⁴ Dr. Khalil’s testimony establishes that he refers to the Epocrates system but did not do so in the instant matter.

alleged injuries. Furthermore, Dr. Khalil states that he was unaware of any contraindications associated with Toradol in its non-chronic use or for use in patients with asthma, and irrespective of any assertions regarding black box warnings in Dr. Gordon's affirmation, Dr. Gordon specifically opines that, based on her training, education, experience, and review of the medical records and deposition testimony, the administration of the Toradol injection on June 26, 2018 was contraindicated based on plaintiff's past medical history.

With respect to defendants' assertion that plaintiff's opposition improperly raises a new theory of liability, to wit, that Dr. Khalil should have, but did not, familiarize himself with the black box warning, manufacturers warning or otherwise failed to know the contraindications for Toradol, the Court finds this argument to be without merit. Here, plaintiff's bill of particulars sufficiently apprises defendants of her claims that the administration of Toradol as to plaintiff constituted negligence and malpractice given her known medical history. Additionally, Dr. Khalil was questioned regarding his familiarity with black box warnings; his use of the Epocrates program; whether he familiarized himself with any outside literature prior to injecting plaintiff with Toradol; and whether he believed Toradol was contraindicated under plaintiff's circumstances (*see e.g. Napolitano v Gustavson*, 190 AD3d 530 [1st Dept 2021] [the injuries set forth in plaintiff's supplemental bill of particulars were not new injuries, but amplifications and elaborations of the injuries set forth initially, or were the anticipatable sequelae thereof [internal citations omitted]]; *see also Hauch v Padula*, 114 AD2d 807 [1st Dept 1985] [holding that a supplemental bill of particulars did not contain a new theory but elaborated upon injuries and no surprise or prejudice where allegation was derived from doctor's deposition]).

Additionally, plaintiff asserts that her expert affirmation submitted in opposition to defendants' motion, as well as Dr. Khalil's testimony, establishes her *prima facie* entitlement to summary judgment on the issue of liability against defendants. Defendant opposes plaintiff's motion and attaches a supplemental affirmation from Dr. Feingold further supporting his opinion that Dr. Khalil's care and treatment, including the administration of Toradol to alleviate plaintiff's complaints of pain, was indicated, appropriate, and within the standard of care under the circumstances in this specific case. Dr. Feingold further avers that after reviewing Dr. Gordon's affirmation, it is his opinion that her analysis and opinion are defective and incomplete. This Court does not find that the record supports a finding of liability as against defendants as a matter of law. Rather, plaintiff's expert has raised triable issues of fact that preclude summary judgment.

The Court has considered the parties' remaining arguments and find them unavailing.

[This part of the decision is intentionally left blank.]

Accordingly, it is hereby,

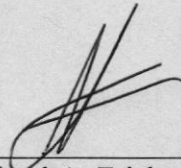
ORDERED that defendants' motion seeking summary judgment is denied, And it is further

ORDERED that plaintiff's motion seeking summary judgment on the issue of liability is denied;
And it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry on
all parties within thirty (30) days of the entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: July 2, 2024



Hon. Michael A. Frishman, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER