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| Mackey v Slosar-Cheah |
| 2024 NY Slip Op 35181(U) |
| October 10, 2024 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 813887/2021E |
| Judge: Michael A. Frishman |
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NEW YORK SUPREME COURT – COUNTY OF BRONX

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

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YOLANDA MACKEY,

Index No. 813887/2021E

Plaintiff,

Hon. MICHAEL A. FRISHMAN
Justice of the Supreme Court

- against -

MAGDALENA SLOSAR-CHEAH, M.D., and
MONTEFIORE MEDICAL CENTER,

Defendants.

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The following papers numbered 21-39, 41-45 and 46 were read on this Motion for Summary Judgment (Seq. No. 001).

| Sequence No. 001 | NYSCEF Doc. Nos. |
|---|------------------|
| Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law in Support – Exhibits and Affirmations Annexed | 21-39 |
| Affirmation in Opposition, Counterstatement of Material Facts, Memorandum of Law in Opposition - Exhibits and Affirmation Annexed | 41-45 |
| Reply Affirmation | 46 |
| | |

The motion of defendants MAGDALENA SLOSAR-CHEAH, M.D. and MONTEFIORE MEDICAL CENTER (hereinafter “Dr. Slosar-Cheah,” “MMC,” or collectively as “defendants”), seeking summary judgment dismissing the Complaint against them is granted.

Plaintiff commenced this action to recover damages for medical malpractice alleging that Dr. Slosar-Cheah¹ was negligent in her care and treatment of plaintiff. Generally, plaintiff alleges that during plaintiff’s November 10, 2017 medical visit, Dr. Slosar-Cheah’s failure to counsel plaintiff about her anticoagulant medication and ensure she was taking it resulted in plaintiff suffering a stroke in January 2018 causing her to suffer permanent debilitating injuries.² Plaintiff further alleges, *inter alia*, a failure to order tests; a failure to properly appreciate plaintiff’s condition and medical history; a failure to counsel plaintiff on her prescriptions; and a failure to diagnose as well as follow up on plaintiff’s treatment regarding her pulmonary embolism. Plaintiff also asserts claims for lack of informed consent and negligent hiring and retention.

¹ It is undisputed that defendant doctor was an employee of MMC at the time of the alleged malpractice.

² Plaintiff’s amended Bills of Particulars state dates of negligence as on or about October 4, 2017 and continued through on or about May 9, 2019, as plaintiff was a patient of Dr. Slosar-Cheah throughout this time period.

Defendants seek summary judgment dismissing the Complaint against them generally arguing that plaintiff's case against them is meritless as there exists no question of fact for both the liability and causation elements to a medical malpractice case. Specifically, that plaintiff has erroneously brought this action against her then-primary care provider, Dr. Slosar-Cheah, and the doctor's employer, MMC, essentially alleging that Dr. Slosar-Cheah failed to treat plaintiff's pulmonary embolism and deep vein thrombosis, diagnosed in October 2017 at non-party Interfaith Medical Center (hereinafter "Interfaith"), such that she was caused to suffer a stroke three months later while again a patient at Interfaith. Defendants' motion is supported, among other things, by the affirmations of Alexander McMeeking, M.D., who is Board Certified in Internal Medicine and Infectious Disease; and Stanley Tuhim, M.D., who is Board Certified in Neurology and Vascular Neurology.

In opposition to defendants' motion for summary judgment, plaintiff asserts that her expert has established the existence of material issues of fact because Dr. Slosar-Cheah, as plaintiff's primary care physician (hereinafter "PCP") deviated from the standard of care in November of 2017 in failing to follow up on the care and treatment of plaintiff's life-threatening diagnosis at another facility, and those deviations were causally related to plaintiff's stroke and her other resulting injuries. In support, plaintiff relies on the affirmation of an undisclosed physician, who is Board Certified in Internal Medicine and Pulmonology.

A defendant in a medical malpractice action establishes *prima facie* entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries (*Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 2 [1st Dept 2015]). If a defendant in a medical malpractice action demonstrates *prima facie* entitlement to summary judgment by a showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause the plaintiff's injuries, plaintiff is required to rebut defendant's *prima facie* showing "via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged" (*Ducasse v New York City Health Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017], *citing Anyie B.* at 3). "The plaintiff must rebut defendant's *prima facie* showing without '[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence'" (*Henry v Duncan*, 2018 NY Slip Op 30219[U] at *2 [Sup Ct, New York County 2018] [*citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]]); *affd* 169 AD3d 421 [1st Dept 2019]).

"A plaintiff's expert opinion must demonstrate 'the requisite nexus between the malpractice allegedly committed' and the harm suffered" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 307 [1st Dept 2007] [internal citation omitted]). "With respect to opinion evidence, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming facts not supported by record evidence" (*Henry*, 2018 NY Slip Op 30219[U] at *2, *affd* 169 AD3d 421 [1st Dept 2019] ["[t]he injury itself cannot be the only basis to conclude that a departure occurred" [internal citations omitted]). 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]).

At the outset, it is undisputed that plaintiff was a long-time patient of Internal Medicine and Infectious Disease physician, defendant Dr. Slosar-Cheah and that she served as plaintiff's primary care physician during 2017 and throughout 2018.³ It is also undisputed that in 2017, plaintiff's medical history included, *inter alia*, HIV; asthma; otitis media; candida esophagitis; chronic obstructive pulmonary disease ("COPD"); depression; hepatitis C; history of pneumonia; hidradenitis; MRSA infection; substance abuse; pulmonary hypertension; sarcoidosis; and long-term tobacco use. It is further undisputed, and supported by the records, that plaintiff was admitted to Interfaith on October 4, 2017 during which a chest CT with contrast was conducted which showed a filling defect in her left lower lobe pulmonary artery typical of acute pulmonary embolism ("PE"); an elevated D-dimer level of 15, 686;⁴ as well as a venous doppler of left leg being negative for venous thrombosis, but a high clinical suspicion for deep vein thrombosis ("DVT"). Plaintiff's records support that plaintiff was admitted until October 17, 2017, during which she was given Lovenox (an anticoagulant) and then prescribed Eliquis (another anticoagulant also known as apixaban) to be continued upon her discharge to a subacute rehab center,⁵ and that she was given appointments to follow-up with Interfaith outpatient providers in pulmonology, infectious, and hematology at Bishop Walker Clinic.

Plaintiff's records further support that plaintiff presented at the Montefiore Infectious Disease Clinic on October 25, 2017 for treatment of anal warts and neither informed them of her Interfaith hospitalization for PE and DVT nor that she was on an anticoagulant; that plaintiff followed up with Pulmonology at non-party Bishop Walker Clinic ("Bishop Walker") on November 1, 2017; that plaintiff followed up with Infectious Disease at Bishop Walker on November 8, 2017; that plaintiff followed up with Hematology at Bishop Walker on November 14, 2017 where she was noted to be on Eliquis and at her baseline with only complaint being shortness of breath but otherwise doing well.

The records also support that, on December 25, 2017, plaintiff was again admitted to Interfaith for a syncope episode and that this record references that plaintiff told them she had been unable to continue taking Eliquis due to problems with her insurance and that she had stopped taking it for at least the two weeks prior to this admission, at which time plaintiff was re-started on Eliquis. It is also undisputed and supported by the records that during this admission a CT of plaintiff's head and chest were performed revealing no intracranial concerns but revealing a left upper lobe nodule; that plaintiff was placed on cardiac monitoring; that on December 28, 2017

³ It is undisputed that plaintiff appeared for appointments with Dr. Slosar-Cheah through May 9, 2019.

⁴ D dimer is a clot-dissolving substance in your blood. High levels may suggest an increased likelihood of blood clots, although many other facts can cause high D dimer levels (*see Mayo Clinic*; pulmonary embolism; [www.mayoclinic.org/diseases-conditions/pulmonary-embolism/diagnosis-treatment/drc-20354653#:~:text=High%20levels%20may%20suggest%20an%20increased] free online version).

⁵ Plaintiff's expert asserts that Interfaith did not discuss her anticoagulant medication with her during her inpatient admission, nor at her discharge, as supported by plaintiff's testimony. However, the Court finds that has no bearing on the instant motion against these named defendants.

plaintiff had to be taken off anticoagulants due to bleeding from her right ear; that during this admission on January 2, 2018, plaintiff complained of left sided numbness; that a neurology consult documented that a cerebral vascular accident (“CVA” a.k.a. stroke) was unlikely despite the persistent numbness but that a January 13, 2018 head CT showed multifocal acute ischemic infarcts in the right frontal and parietal lobes suggestive of embolic etiology; that a January 16, 2018 brain MRI showed extensive infarctions involving right cerebral hemisphere and basal ganglia with mass effect and mild right to left midline shift (4mm) with no evidence of acute hemorrhage, while MRA showed occluded right internal carotid artery, and that plaintiff was transferred thereafter to non-party New York Presbyterian Columbia University Medical Center (“NYP”) for observation and given the high risk of herniation. According to the NYP records, plaintiff’s admitting diagnosis was right middle cerebral artery (“MCA”) stroke with left hemiparesis and left sided neglect; that NYP Neurology characterized plaintiff’s condition as a dense right MCA syndrome and providers noted they could not rule out atherosclerosis as a trigger for thrombosis and occlusion but noted that among those with HIV such as plaintiff, a hypercoagulable state is overrepresented. The NYP records further reflect that a hypercoagulable workup was ordered which revealed decreased protein S activity (thought to be related to acute clot); that the stroke mechanism was deemed to be cardioembolic;⁶ and that plaintiff was discharged from NYP on February 8, 2018 in stable condition to non-party Hebrew Home (a skilled nursing facility) and the discharge summary noted that she would need to be placed on Warfarin for anticoagulation.

Although it is undisputed that amidst these appointments at Bishop, plaintiff presented to Dr. Slosar-Cheah on November 10, 2017 for a routine HIV follow-up appointment, it is Dr. Slosar-Cheah’s alleged inactions at this appointment that is at the heart of plaintiff’s allegations in the instant matter.

In opposition, plaintiff asserts that Dr. Slosar-Cheah failed to perform a thorough examination or fully discuss plaintiff’s ongoing HIV treatment as she failed to speak with plaintiff about her Eliquis prescription and the interactions it would have with her current prescription of Norvir; that Dr. Slosar-Cheah should have ensured plaintiff was taking her prescribed Eliquis; and that she should have counseled plaintiff on the importance of taking her Eliquis.

In reply, defendants assert that they have met their *prima facie* burden of entitlement to summary judgment through their two physician affirmations whose opinion are based on competent medical proof and the certified medical record; that plaintiff impermissibly raised a new theory of negligence in opposition; that plaintiff’s expert’s opinion is conclusory, speculative and untethered to the certified medical records and testimony; and that plaintiff’s expert did not adequately rebut defendants’ expert neurologist, Dr. Tuhim’s key points regarding causation.

With respect to plaintiffs’ asserted claims, defendants have met their *prima facie* burden that the care and treatment provided to plaintiff comported with accepted medical practice, and

⁶ A cardioembolic stroke occurs when the heart pumps unwanted materials into the brain circulation, resulting in the occlusion of a brain blood vessel and damage to brain tissue (*see National Library of Medicine; cardioembolic stroke*; [www.ncbi.nlm.nih.gov/pmc/articles/PMC9204115/#:~:text=A%20cardioembolic%20stroke%20occurs%20when%20the] free online version).

that nothing they did or failed to do proximately caused plaintiff's injuries, to wit, her January 2018 stroke and current condition therefrom.

Specifically, Dr. McMeeking, defendants' internist and infectious disease expert, opines that plaintiff's allegations as to Dr. Slosar-Cheah, her long-time primary care and infectious disease provider, are meritless and not supported by the medical records as they show that plaintiff's medical history was appropriately documented by Dr. Slosar-Cheah at each medical visit, including the one at issue on November 10, 2017; that they show a doctor who followed her patient's progress implementing appropriate treatments; that once Dr. Slosar-Cheah learned of plaintiff's hospitalization at Interfaith which she correctly interpreted and noted in her records as having been diagnosed with a PE, as well as a review of the nursing home records where plaintiff resided, which indicated plaintiff's current medications and that she was following with pulmonary, there was clear evidence that plaintiff was under Interfaith's care with respect to the PE, which included prescriptions for appropriate medication and follow up. On this point, Dr. McMeeking opines that Dr. Slosar-Cheah rightfully and properly relied upon this information, as the treatment was within the standard of care, and no other treatment was indicated as plaintiff's symptoms on this date, including coughing, wheezing, and shortness of breath, can be attributable to her COPD and other underlying health conditions. It is also undisputed and Dr. Slosar-Cheah's notes indicate that plaintiff was following with Pulmonary and she additionally would recommend plaintiff to seek out a pulmonary specialist to determine if other adjustments need to be made.

Additionally, Dr. McMeeking opines that Dr. Slosar-Cheah was entitled to rely on and trust the accuracy of the active medication list provided by plaintiff's nursing home, unless told otherwise, which she was not, and that Dr. Slosar-Cheah was aware that plaintiff was taking Eliquis and that plaintiff was being followed by Pulmonology, and therefore she neither had any further responsibilities in this regard nor did the standard of care require her to do anything differently.

Furthermore, Dr. Tuhim, defendants' neurology and vascular neurology expert, opines that not only nothing Dr. Slosar-Cheah did or did not do was the proximate cause of plaintiff's alleged PE, DVT, and stroke, but that there is no relationship between the alleged PE/DVT and the stroke plaintiff experienced. On this point, he explains the two categories of strokes, ischemic and hemorrhage; and three subcategories of ischemic stroke, thrombotic, embolic and systemic hypoperfusion, and states that plaintiff's January 16, 2018 MRA taken at Interfaith indicate her stroke was caused by an occlusion of the right internal carotid artery.⁷ Dr. Tuhim further explains that except in the rarest of circumstances, circumstances which were ruled out as to plaintiff via transthoracic echocardiogram ("TTE") at NYP, it is scientific fact that there is no anatomical connection between PE, DVT, and embolic strokes; that clots in the brain that cause strokes originate from the left side of the heart, rather than in the lungs or other areas such as plaintiff's legs. Based on this, he opines that neither of plaintiff's purported clots causing her October 2017 PE and left leg DVT could have caused the January 2018 stroke and the Eliquis medication could not have prevented the stroke.

⁷ Therefore, based upon the purported definitions therein, plaintiff suffered an embolic stroke, a subcategory of ischemic stroke, which is caused by a wandering clot formed elsewhere, usually in the heart or neck arteries. In the instant matter, as stated, the MRA indicated an occlusion of plaintiff's right internal carotid artery (an artery in the neck).

Dr. Tuhrim further opines that, based upon a review of plaintiff's medical conditions prior to the stroke, plaintiff likely suffered a spontaneous atherosclerotic carotid occlusion, due to the fact that her blood was more prone to clotting, which is referred to as a hypercoagulable state. Dr. Tuhrim explains that atherosclerosis is a thickening or hardening of the arteries, which is caused by a buildup of plaque in the inner lining of the artery.

With respect to plaintiff's allegations that Dr. Slosar-Cheah should have ensured plaintiff was taking her Eliquis on November 10, 2017, according to his review of the records from Montefiore, Interfaith, Brooklyn Center for Rehabilitation, and Bishop Walker Clinic, as well as the deposition transcripts, there is ample evidence that plaintiff was appropriately taking her Eliquis as prescribed until mid-December 2017, after which Interfaith restarted her upon her December 25 admission, and as such, he opines, plaintiff's December 2017 gap in her Eliquis treatment had no relationship to, and did not cause her stroke at Interfaith in January 2018, as is supported by her December 25 doppler which showed no evidence of stenosis.⁸

Importantly, Dr. Tuhrim explains that unlike other anticoagulants, such as Warfarin/Coumadin, Eliquis takes effect essentially immediately after ingested and therefore, even if there was a relationship between PEs/DVTs and embolic strokes, plaintiff would have been fully anticoagulated and no longer at risk for a transient hypercoagulable event within a day, at most, of restarting Eliquis at Interfaith on December 25, 2017, and it is consequently of no moment whether plaintiff was taking her Eliquis on November 10, 2017 (although the Brooklyn Center records demonstrate that she was). Additionally, he opines the fact that plaintiff was put back on Eliquis at Interfaith on December 25, 2017 restarts the clock, so to speak, in terms of her anticoagulation, but plaintiff was taken off Eliquis at Interfaith on December 28, 2017 due to bleeding from her ear after which it was not restarted, followed by plaintiff's stroke diagnosis in January 2018, all unbeknownst to these defendants, as they are not part of Interfaith's institution. Based on the foregoing, Dr. Tuhrim opines that nothing Dr. Slosar-Cheah did or did not do proximately caused plaintiff's stroke and DVT nor is there any relationship between the PE and the stroke and DVT plaintiff experienced.

In opposition, plaintiff has failed to raise triable issues of fact as to her claims against defendants. Consequently, defendants' motion must be granted, and the matter dismissed.

Specifically, plaintiff's internist and pulmonary expert opinion submitted in opposition purports that Dr. Slosar-Cheah, as plaintiff's PCP, was globally responsible for all of plaintiff's treatment and that required her to speak with the medical professionals at an outside facility where plaintiff received her PE diagnosis. Plaintiff's expert further states that it was also Dr. Slosar-Cheah's duty to ensure plaintiff was taking the Eliquis and to counsel her on potential interactions and adverse effects with current medications as well.⁹ However, plaintiff's expert neither acknowledges that plaintiff was taking her Eliquis at the time of her November 10, 2017 appointment as confirmed by plaintiff's medical records and uncontroverted by plaintiff's expert who acknowledges that plaintiff began anticoagulants at Interfaith in October of 2017 and

⁸ Conducted during plaintiff's December 25, 2017 Interfaith admission, plaintiff's Interfaith medical records contain a 12/26/17 Vascular Imaging Report which states that the "patient has no evidence of significant carotid stenosis."

⁹ Plaintiff has submitted no evidence or opinion that any adverse reaction(s) occurred.

continued on them for weeks; and that plaintiff was doing well on the Eliquis as demonstrated by her follow-up visit to Bishop Walker Hematology Clinic on November 14, 2017. This directly contradicts any causal connection between any alleged failure for Dr. Slosar-Cheah to overtly inquire that plaintiff was taking them as it is undisputed she was by both plaintiff's medication list available to Dr. Slosar-Cheah on November 10, 2017, as well as plaintiff's medical records. Additionally, plaintiff's expert opinion that had Dr. Slosar-Cheah counseled plaintiff on the importance of taking Eliquis as prescribed by another provider at a different medical institution, plaintiff would not have suffered a stroke is purely speculative. Furthermore, while the Court recognizes plaintiff's expert's opinion that Dr. Slosar-Cheah's alleged failure of her responsibility to counsel plaintiff, prescribe, and ensure plaintiff remained on her anticoagulants after having been diagnosed with PE and suspected DVT caused a hypercoagulable state thereby causing a clot resulting in plaintiff's embolic stroke, again such opinion is speculative, conclusory, and unsupported by the record. Finally, plaintiff's expert neither acknowledges nor discusses the Brooklyn Rehab records, where plaintiff resided at the time, which show plaintiff's medications included apixaban.¹⁰

While the Court is cognizant of plaintiff's assertion that affirmations submitted in opposition are sufficient and establish issues of fact where they are based upon facts in evidence, such as medical records and deposition testimony, plaintiff's expert fails to directly controvert many of the opinions of defendants' experts that are based on the objective evidence in the record.

In sum, plaintiff has produced no evidence to support her allegations that Dr. Slosar-Cheah deviated from accepted medical care or that any action or inaction of defendants were a proximate cause of plaintiff's alleged injuries. To the contrary, the records support that plaintiff was taking her Eliquis as prescribed in October 2017 by Interfaith until mid-December 2017; that during plaintiff's PE diagnosis at Interfaith in October 2017 through her readmission to Interfaith in December 2017 plaintiff saw Dr. Slosar-Cheah only in November 2017; that from plaintiff's October 2017 Interfaith admission through her December 2017 Interfaith admission plaintiff appeared for pulmonology, infectious disease, and hematology follow-up appointments at Bishop; that Dr. Slosar-Cheah had no involvement or oversight in Interfaith's discontinuance of plaintiff's anticoagulants on December 28, 2017 after she was bleeding from her ear and which were never restarted by Interfaith prior to her stroke.

Consequently, in response to defendants' *prima facie* showing that defendants' actions or inactions were not the proximate cause of plaintiff's stroke and resulting injuries, plaintiff has failed to establish a causal connection (*see Lindsey-Thompson v Montefiore Med. Ctr.*, 147 AD3d 638 [1st Dept 2017] [plaintiff failed to establish any causal connection]; *see also Steinberg v Lenox Hill Hosp.*, 148 AD3d 612 [1st Dept 2017]). Therefore, plaintiff's expert's speculative and conclusory opinions that failed to specifically address the criteria relied upon by defendants' experts are insufficient to raise a triable issue of fact and defendants' motion for summary judgment must be granted (*see Cruz v New York City Health & Hosps. Corp.*, 188 AD3d 692 [1st Dept 2020]).

[This part of the Decision has been intentionally left].

¹⁰ It is unclear from this expert's affirmation whether these records were reviewed by him/her.

The Court has considered the parties' remaining arguments and find them to be without merit.

Accordingly, it is hereby,

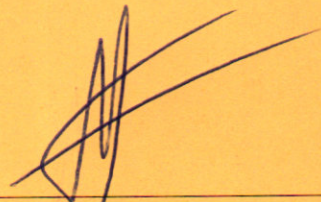
ORDERED that the motion of defendants MAGDALENA SLOSAR-CHEAH, M.D. and MONTEFIORE MEDICAL CENTER seeking summary judgment as to plaintiff's claims against them, is granted; And it is further

ORDERED the Clerk of the Court is directed to enter judgment in favor MAGDALENA SLOSAR-CHEAH, M.D. and MONTEFIORE MEDICAL CENTER; 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: October 10, 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