

**Davis v Arya**

2025 NY Slip Op 30457(U)

January 29, 2025

Supreme Court, Kings County

Docket Number: Index No. 502286/21

Judge: Ellen M. Spodek

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29<sup>th</sup> day of January, 2025.

PRESENT:

HON. ELLEN M. SPODEK,  
Justice.

-----X  
ANTHONY DAVIS,  
Plaintiff,

- against -

ARYA, M.D., and  
YORK PRESBYTERIAN BROOKLYN METHODIST  
HOSPITAL,  
Defendants.  
-----X

DECISION, ORDER, AND JUDGMENT

Index No. 502286/21

Mot. Seq. No. 1

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Cross Motion, Affirmations (Affidavits), and Exhibits Annexed . . . . .	26-42
Affirmations (Affidavits) in Opposition and Exhibits Annexed . . . . .	49-55
Reply Affirmations and Exhibit Annexed . . . . .	56-57

In this action to recover damages for medical malpractice, negligent hiring/retention, and negligence, defendants Mukul Arya, M.D. (“Dr. Arya”), and New York Presbyterian Brooklyn Methodist Hospital (“Methodist” and collectively with Dr. Arya, “defendants”) jointly move for summary judgment dismissing the complaint of Anthony Davis (“plaintiff” or “patient”), pursuant to CPLR 3212 (b). Plaintiff opposes the motion.

On October 18, 2019, defendant Dr. Arya, a GI endoscopist, performed an endoscopic retrograde cholangiopancreatography (“ERCP”)<sup>1</sup> on the patient, age 22, for

<sup>1</sup> An “endoscopic retrograde cholangiopancreatography” is “a method of cholangiopancreatography using an endoscope to inspect and cannulate the ampulla of Vater, with injection of contrast medium for radiographic (footnote continued)

removal of his gallstones. During the ERCP, Dr. Arya removed some of the patient's gallstones and placed a plastic biliary stent in his common-biliary duct ("CBD") to relieve the stone obstruction. The stent was to be endoscopically replaced with another stent after the patient underwent a cholecystectomy (a gallbladder-removal surgery) approximately one month later on November 22, 2019.

On January 29, 2020, Dr. Arya performed a follow-up ERCP using a mechanical-type of lithotripsy<sup>2</sup> to break some of the patient's CBD stones. During the follow-up ERCP, Dr. Arya endoscopically removed the extant plastic stent and replaced it with a new plastic stent.

The patient's next ERCP was scheduled for March 23, 2020. For the March 2020 ERCP, Dr. Arya planned a electrohydraulic lithotripsy ("EHL"), rather than the previously tried mechanical lithotripsy, to break the remaining CBD stones. When the Covid-19 pandemic intervened in mid-March 2020, Dr. Arya's office re-scheduled the March 2020 ERCP for June 1, 2020. The patient canceled the June 2020 ERCP.

Dr. Arya's next encounter with the patient was for a 20-minute-long telehealth visit on August 20, 2020. During the telehealth visit, the patient displayed no jaundice and denied suffering from any of the major illnesses that were listed in the Review of Systems

---

examination of the pancreatic, hepatic, and common bile ducts." Stedman's Medical Dictionary, online edition ("Stedman's"), Entry No. 169620. "Cholangiopancreatography" is a "[c]ontrast radiographic examination of the bile and pancreatic ducts after the injection of radiopaque dye." Stedman's, Entry No. 169610. The "ampulla of Vater" or the "hepatopancreatic ampulla" is "the dilation within the major duodenal papilla that normally receives both the (common) bile duct and the main pancreatic duct." Stedman's, Entry Nos. 30500 and 30310, respectively.

<sup>2</sup> "Lithotripsy" is "[t]he crushing of a stone in the renal pelvis, calyces, ureter, or bladder, by mechanical force, laser, or focused sound energy." Stedman's, Entry No. 509680.

section of Dr. Arya's telehealth-visit note. Dr. Arya's plan for the patient following the August 2020 telehealth visit was to "repeat [the] ERCP with [the] EHL. [The] [p]atient will need to be referred to a center with [the] EHL availability [*i.e.*, Brooklyn Hospital]. [We] will contact [the] family members once we arrange[d] for that."<sup>3</sup> As Dr. Arya testified at his pretrial deposition, Methodist did not have the EHL equipment on site, and "the company that provide[d] [the EHL equipment]" was not "allowed into hospitals . . . because of the pandemic."<sup>4</sup> Dr. Arya further testified at his pretrial deposition that: (1) the patient and his mother "were given the information to notify and to call Brooklyn Hospital and [a] Dr. Chung would be the one to see them and then perform the [ERCP with the EHL] procedure"; and (2) he (Dr. Arya) alerted Dr. Chung that he had referred the patient to Dr. Chung.<sup>5</sup> Dr. Arya emphasized in his pretrial testimony that, at the August 2020 telehealth visit, he "reminded [the patient] that he missed the appointment on June 1, 2020, at which time [Dr. Arya] was going to remove the existing stent that had been placed back in January [2020], that [the patient] needed to follow up to have that stent removed[,] and [that] the remaining stones [should be] attempted to be removed using [the] EHL."<sup>6</sup> The patient and his mother both testified that they had no recollection of the August 2020

---

<sup>3</sup> AGA's records for the patient's August 20, 2020 telehealth visit with Dr. Arya.

<sup>4</sup> Dr. Arya's EBT transcript, page 28, lines 6-17.

<sup>5</sup> Dr. Arya's EBT transcript, page 28, line 22 to page 29, line 4.

<sup>6</sup> Dr. Arya's EBT transcript, page 29, line 20 to page 30, line 8.

telehealth visit.<sup>7</sup> On September 2, 2020, Dr. Arya's office relayed to the patient's mother over the telephone the information regarding Dr. Chung at Brooklyn Hospital.

Twelve days later on September 14, 2020, the patient was admitted to Methodist with "acute cholangitis"<sup>8</sup> in "the setting of fever and [the] right upper quadrant pain" "due to [the] partial occlusion of [the January 2020] stent."<sup>9</sup> An abdominal CT scan revealed that "[t]he proximal tip [of the stent] . . . [had] migrated more distally within the [patient's CBD] compared to the prior [CT] exam [of November 13, 2019]. [The] [d]istal tip [of the stent] appear[ed] unchanged in [its original] location."<sup>10</sup>

In the course of the patient's hospitalization at Methodist for cholangitis, Dr. Arya, as a consulting endoscopist, performed an ERCP on September 16, 2020, where the partially occluded stent from the January 2020 ERCP with two straight plastic biliary stents were replaced.<sup>11</sup> Although Dr. Arya found "[t]hree large filling defects consistent with [the] stones," he did not attempt their endoscopic removal "due to the[ir] size . . . and [the] need for surgery [for their removal]."<sup>12</sup> On September 18, 2020, the patient was discharged home from Methodist on a daily oral antibiotic for 14 days. After the patient's discharge from Methodist on September 18<sup>th</sup>, he and his mother ceased all contact with Dr. Arya.

---

<sup>7</sup> Plaintiff's EBT transcript, page 125, lines 15-20; page 143, line 24 to page 144, line 8. Plaintiff's mother's EBT transcript, page 54, lines 9-13.

<sup>8</sup> "Cholangitis" is the "[i]nflammation of a bile duct or the entire biliary tree." Stedman's, Entry No. 169660.

<sup>9</sup> Methodist's records for the patient's September 14, 2020 admission, page 123 of 473 (Consultation Notes); page 22 of 473 (Depart Summaries).

<sup>10</sup> Methodist's records for the patient's September 14, 2020 admission, pages 121-122 of 473 (Consultation Notes).

<sup>11</sup> AGA's records for the patient's September 16, 2020 ERCP, page 1 (Procedure Note).

<sup>12</sup> AGA's records for the patient's September 16, 2020 ERCP, page 1 (Procedure Note).

On October 1, 2020, the patient underwent an “[e]xcision of the extrahepatic bile duct” and the “exploration of the common bile duct . . . with a Roux-en-Y reconstruction” at Methodist.<sup>13</sup> In the course of this hospitalization, the patient was treated for “[m]ultifocal pneumonia with patchy consolidations in [his] lower lungs.”<sup>14</sup> Post-discharge, the patient experienced post-operative complications and was re-admitted to Methodist on October 10, 2020 for an infected abdominal abscess. On the day of his admission, the patient underwent a CT-guided drainage of his peritoneal cavity with the placement of a drain. On October 16, 2020, the drain was removed, and he was discharged home.<sup>15</sup>

In January 2021, plaintiff commenced this action against Dr. Arya and Methodist. The thrust of plaintiff’s claims is that Dr. Arya’s nine-month-long failure to remove/exchange the stent which he had endoscopically placed on January 29, 2020 resulted in [the patient’s] developing a cholangitis and other injuries. According to plaintiff’s expert, “[h]ad the stent been properly removed six weeks after it was placed [on January 29, 2020], it is almost certain that no physical damage would have happened, as [the patient] presented all the symptoms[,] and Dr. Arya could have avoided the [c]linical outcomes of [d]elayed removal of stent and reduced the morbidity of this preventable

---

<sup>13</sup> Methodist’s records for the patient’s October 1, 2020 admission, page 88 of 630 (Operative Report).

<sup>14</sup> Methodist’s records for the patient’s October 1, 2020 admission, page 114 of 630 (Chest X-Ray Results).

<sup>15</sup> Methodist’s records for the patient’s October 10, 2020 admission, pages 16-17 of 421 (Depart Summaries).

disease entity.”<sup>16</sup> Plaintiff did not address his claims of negligent hiring/retention and therefore those claims are dismissed as abandoned.

#### Standard of Review

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury.” *Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715, 716 (2d Dept 2022) (internal quotation marks omitted). “On a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby.” *Hayden v Gordon*, 91 AD3d 819, 820-821 (2d Dept 2012). “Where a defendant makes a prima facie showing as to both elements, the burden shifts to the plaintiff to rebut the defendant’s showing by raising a triable issue of fact as to both the departure element and the causation element.” *Persuad v Hassan*, 220 AD3d 895, 897 (2d Dept 2023) (internal quotation marks omitted). “To rebut the defendant’s prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert’s allegations.” *Pirri-Logan v Pearl*, 192 AD3d 1149, 1150 (2d Dept 2021). “General and conclusory allegations of medical malpractice . . . , unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician’s summary judgment motion.” *Myers v Ferrara*, 56 AD3d 78, 84 (2d Dept 2008). “In order not to be considered speculative or conclusory, [plaintiff’s]

---

<sup>16</sup> Plaintiff’s expert affirmation, ¶ 8.

expert opinions in opposition should address specific assertions made by the [defendant's] experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record." *Tsitirin v New York Community Hosp.*, 154 AD3d 994, 996 (2d Dept 2017) (internal quotation marks omitted).

### Discussion

The Court finds that defendants have established their prima facie entitlement to judgment as a matter of law with respect to the medical malpractice and negligence causes of action by submitting, among other things, the patient's medical records, a transcript of Dr. Arya's pretrial testimony, a witness affidavit of Stephanie Dumorne Chan, R.N., Methodist's Clinical Nurse Manager in Endoscopy, and the expert affirmation of Douglas M. Simon, M.D., a board-certified gastroenterologist. According to Nurse Chan "[t]he postponement of plaintiff[s] . . . ERCP scheduled for March 23, 2020, was in direct response to the New York State declared State of Emergency, the directives in the Executive Order of Governor Cuomo, and [Methodist's] policy mandating the postponement of elective procedures commencing on March 16, 2020."<sup>17</sup> Further, the defense expert opined that any delays following the patient's unilateral cancellation of his next-scheduled June 1, 2020 ERCP at Methodist and his (or his mother's) subsequent failure to schedule a follow-up ERCP at Brooklyn Hospital, were not attributable to defendants, such that they could be deemed a proximate cause of his alleged injuries.<sup>18</sup> See

---

<sup>17</sup> Affirmation of Stephanie Dumorne Chan, R.N., dated May 30, 2024, ¶ 12.

<sup>18</sup> Expert affirmation of defense expert Douglas M. Simon, M.D., dated May 21, 2024, ¶ 53. As the defense expert (footnote continued)

*Bendel v Rajpal*, 101 AD3d 662, 664 (2d Dept 2012); see also *Donohue v Grossman*, \_\_\_ AD3d \_\_\_, 2024 NY Slip Op 06595, \*3 (2d Dept 2024); *Grenyion v Mid-Hudson Comprehensive*, 205 AD3d 610, 612 (1st Dept 2022).

In opposition to defendants' prima facie showing, plaintiff submits the affirmation of David A. Mayer, M.D., a double board-certified surgeon fully familiar with the diagnosis and treatment of Sickle Cell disease and how to perform ERCP procedures, Stent placements and cholecystectomy surgeries. Dr. Mayer has failed to raise a triable issue of fact as to the causation element of the patient's medical malpractice and negligence causes of action. According to plaintiff's expert, "[h]ad the stent been properly removed six weeks after it was placed [on January 29, 2020], it is almost certain that no physical damage would have happened, as [the patient] presented all the symptoms[,] and Dr. Arya could have avoided the [c]linical outcomes of [d]elayed removal of stent and reduced the morbidity of

---

explained (in ¶¶ 69-73 of his affirmation):

[¶ 69] "There is generally no set time period by which a properly placed stent in the common bile duct must be exchanged with the general time frame to be approximately three to six months. Absent any reported symptoms, it was consistent with the standard of care to leave the stent in place during the time of treatment herein and any delay due to COVID or plaintiff's documented cancelation is not attributable to any negligence on the part of Dr. Arya.

[¶ 70] According to the medical records . . . , plaintiff canceled [the June 1, 2020] appointment, and it was not until August of 2020 that Dr. Arya was contacted for a follow[-]up telehealth visit. Importantly, the notes reflect that as of that time, the plaintiff had no complaints, and no abdominal pain.

[¶ 71] Dr. Arya appropriately advised the family that since they no longer had the EHL equipment at Methodist . . . , and it was his belief that another means of fragmenting the stones making it easier to remove them should be implemented, gave the plaintiff's mother information to call Brooklyn Hospital and speak to Dr. Chung to have the procedure performed there.

[¶ 72] Per the [pretrial] testimony of Dr. Arya, he advised Dr. Chung of the referral, and he advised the plaintiff that he missed the June 1, 2020 appointment. . . .

[¶ 73] Despite Dr. Arya having appropriately given information to the plaintiff to contact Dr. Chung of Brooklyn Hospital to have the follow[-]up stone and stent removal performed there, that appointment was not made."

this preventable disease entity.”<sup>19</sup> Plaintiff’s expert relied on the fact that Dr. Arya failed to remove and/or replace the stent in the period of nine months counting from January 29, 2020 to September 16, 2020, but he overlooked three significant intervening events: (1) the enactment of the Emergency or Disaster Treatment Protection Act (Public Health Law former article 30-D, §§ 3080-3082, repealed by L 2021, ch 96 § 1) (“EDTPA”); (2) the patient’s unilateral cancellation of the June 1, 2020 ERCP at Methodist with Dr. Arya; and (3) the patient’s (or his mother’s) failure to schedule an ERCP at Brooklyn Hospital.

Plaintiff’s expert’s affirmation is deficient in its failure to distinguish between the first and second stages of the EDTPA insofar as they relate to the patient’s claims. The first stage of the EDTPA, which was effective from March 7, 2020 through August 2, 2020, defined “health care services” (as immunized by the EDTPA) to encompass those services that related to “the care of any . . . individual who presents at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration” (former Public Health Law § 3081 [5] [c]). In contrast, the second stage of the EDTPA, which was effective from August 3, 2020 through April 5, 2021, immunized only those “health care services” that related to (and were addressed to those patients who were then suffering from) COVID-19.

Dr. Arya’s alleged failure to remove and/or exchange the patient’s stent during the first stage of the EDTPA from March 7, 2020 through August 2, 2020 is undisputedly subject to statutory immunity. *See e.g. Martinez v NYC Health & Hosps. Corp.*, 223 AD3d

---

<sup>19</sup> Plaintiff’s Aff. In Opp., Exh. 1, ¶ 8.

731, 732 (2d Dept 2024); *Highsmith v Woodhull Med. Ctr.*, 83 Misc 3d 1203(A), 2024 NY Slip Op 50646(U), \*4-5 (Sup Ct, Kings County 2024); *Crampton v Garnet Health*, 73 Misc 3d 543, 558 (Sup Ct, Orange County 2021); *Matos v Chiong*, 2021 NY Slip Op 32047(U), \*1 (Sup Ct, Bronx County 2021). Because the complaint, as amplified by the bill of particulars, advances no allegations that defendants' acts and omissions constituted willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm, none of the exceptions to the immunity provisions of the EDTPA apply. *See Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 670 (2d Dept 2023). Furthermore, plaintiff's expert failed to raise an issue of fact as to whether any additional delay by Dr. Arya in removing and/or replacing the January 29<sup>th</sup> stent during the second stage of the EDPTA from August 3<sup>rd</sup> until September 16<sup>th</sup> would not have been barred under the then-effective statutory immunity.

The Court has considered the parties' remaining contentions and found them either academic or without merit in light of its determinations. All relief not expressly granted is denied.

### **Conclusion**

Based on the foregoing, it is hereby

**ORDERED** that defendants' motion for summary judgment dismissing the complaint of Anthony Davis, pursuant to CPLR 3212 (b), is granted, and the complaint is dismissed in its entirety against both defendants with prejudice and without costs or disbursements; and it is further

**ORDERED** that defendants' counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

ENTER,



J. S. C.

HON. ELLEN M. SPODEK

KINGS COUNTY CLERK  
FILED  
2025 FEB -3 A 9:58