

**Perez v Kai-Ming Fu**

2025 NY Slip Op 31489(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 805370/2018

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

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MARTHA PEREZ,

Plaintiff,

- v -

KAI-MING FU, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Defendant.

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INDEX NO. 805370/2018

MOTION DATE 04/02/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and consistent with the court’s decision which was placed on the record following oral argument of defendants’ summary judgment motion on April 2, 2025, the motion of KAI-MING FU, M.D., and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION is granted to the extent that plaintiff’s “Second” Cause of Action for failure to obtain informed consent is severed and dismissed. The balance of the summary judgment motion is denied, since sufficient triable issues of fact were raised by plaintiff’s neurosurgical expert, Jeffrey M. Dembner, M.D., (see NYSCEF Doc. No. 60).

In this medical malpractice action, plaintiff alleges that the defendants departed from the standard of care with respect to diagnosis and treatment of cervicalgia, and negligently performed on plaintiff an Anterior Cervical Discectomy and Fusion (“ACDF”) on August 22, 2017, which resulted in a post-operative hematoma leading to “acute progressive right sided hemiparesis, significant cord compression” and its sequelae. Defendant, Dr. Fu, concedes that Metropolitan Hospital was not sufficiently equipped to perform a posterior cervical

laminectomy, needed to release pressure from the hematoma due to, *inter alia*, the hospital's lack of a head positioner, certain surgical instruments (drill and Kerrison rongeurs), and anesthesia expertise (*see* Affirmation of Dr. Fu; NYSCEF Doc. No. 56). It appears that Dr. Fu discussed plaintiff's case with New York Presbyterian Hospital, attempting to arrange for immediate transfer of the plaintiff for an MRI and possible revision surgery. The EMS transfer to NYPH occurred some seven hours after the ACDF surgery.

To prevail on a motion for summary judgment the proponent must make *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact (*see Klein v. City of New York*, 89 NY2d 833 [1996]; *Ayotte v. Gervasio* 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

"Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v. Rozbruch* 91 AD3d 147 [1<sup>st</sup> Dept. 2010]).

In support of their motion, the defendants submit the affirmation of an orthopedic surgeon, Matthew Goldstein, M.D., (*see* NYSCEF Doc. No. 47) who opines that there were no departures from the standard of care given to plaintiff (*id.*, para. 25); that any alleged departures were not a proximate cause of plaintiff's injuries (*id.*, para. 41); that the ACDF surgery was appropriate for this plaintiff, and was properly performed (*id.*, para. 31); that there was no delay in identifying any deficits following the surgery (*i.e.*, clinical monitoring of plaintiff occurred every fifteen minutes) (*id.*, para. 34), and that appropriate imaging (CT scan) was timely ordered

and performed, which showed no problem with defendants' placement of the instrumentation (*id.*, para. 35).

"The affirmation of defendants' expert was sufficient to meet movants' *prima facie* burden of establishing the absence of a departure from good and accepted medical practice, or that such departure was not a proximate cause of plaintiff's alleged injuries" (*Einach v. Lenox Hill Hosp.*, 160 AD3d 443 [1<sup>st</sup> Dept. 2018]).

"Where a defendant makes a *prima facie* case of entitlement to summary judgment dismissing a medical malpractice action by submitting an affirmation from a medical expert establishing that the treatment provided to the injured plaintiff comported with good and accepted practice, the burden shifts to the plaintiff to present evidence in admissible form that demonstrates the existence of a triable issue of fact" (*Bartolacci-Meir v. Sassoon*, 149 AD3d 567 [1<sup>st</sup> Dept. 2017]; *see also DeCintio v. Lawrence Hosp.*, 25 AD3d 320 [1<sup>st</sup> Dept. 2006]; *Ducasse v. New York City Health & Hosps. Corp.*, 148 AD3d 434 [1<sup>st</sup> Dept. 2017]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Here, in opposition to the motion, plaintiff submits the affirmation of Dr. Dembner (*see* NYSCEF Doc. No. 60), who opines that the defendants unreasonably delayed management of plaintiff's post-operative neurological deficits and failed to appreciate the time sensitive nature of plaintiff's new post-operative condition (*i.e.*, hematoma). Dr. Dembner specifically delineates four ways in which defendants departed from good and accepted medical practice:

- a. "Delay in obtaining CT of the cervical spine on 8/22/2017 – in response to identifying the new, post-operative neurological deficit, standard of care would dictate STAT imaging.
- b. "Failure to ensure for an expeditious transfer – Ms. Perez was not transferred to Weil Cornell for almost 3 and ½ hours following documentation of the plan to the transfer and approximately 4 and ¾ hours following identification of the new, post-operative neurological deficit.

- c. “Delay in obtaining an MRI – The medical records support that MRI would have been available no later than 15:00-16:00 (3-4 PM). Ms. Perez continued to be at Metropolitan Hospital at that time and was not transferred until 17:47...[plaintiff] could have completed the MRI at Metropolitan Hospital...
- d. “Failure to perform revision surgery at Metropolitan Hospital-accepting the purported limitations at Metropolitan Hospital at the time (the availability of the MRI and the inability to perform a posterior laminectomy as set forth in the medical records...*the standard of care required that defendant take plaintiff back to the operating room to open and explore her prior anterior surgery and perform additional decompression and revision fusion and instrumentation as necessary*” (emphasis supplied).

Here, the Court notes that plaintiff’s Verified Bill of Particulars and Amended Bill of Particulars are sufficiently broad in language, thus placing the defendants on notice of Dr. Dembner’s expert opinions.

Dr. Dembner’s affirmation raises triable questions of fact sufficient to defeat summary judgment. “The medical experts’ conflicting opinions ...raise issues of fact that must be resolved at trial” (*Hendricks v. Transcare New York, Inc.*, 158 AD3d 477 [1<sup>st</sup> Dept. 2018]).

Accordingly, it is

ORDERED that plaintiff’s “Second” Cause of Action for failure to obtain informed consent is severed and dismissed as unopposed; and it is further

ORDERED that the balance of the defendants’ summary judgment motion is denied; and it is further

ORDERED that only the departures as delineated by Dr. Dembner in paragraph 6 of his expert affirmation remain viable in this case, and any additional claims not contained therein are dismissed as unopposed; and it is further

ORDERED that the Clerk enter judgment dismissing the plaintiff's "Second" Cause of Action; and it is further

ORDERED that the parties appear in person in Part 40 on **June 16, 2025, at 9:30 a.m.**

4/3/2025  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SETtle ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

JUDITH N. MCMAHON, J.S.C.

Hon. Judith N. McMahon  
J.S.C.