At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of June 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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PETAL JAMES

Plaintiff,

-against-

WILSON C. CHAU, M.D., and WILSON C. CHAU, PPLC,

Defendants.

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DECISION & ORDER

Index No. 528793/2021
Mo. Seq. 1

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: 27 – 28, 29 – 45, 58 – 62, 63 – 65

Defendants Wilson C. Chau, M.D. ("Dr. Chau") and Wilson C. Chau, PLLC move (Seq. No. 1) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff's Complaint. Plaintiff opposes the motion.

Plaintiff commenced this action by filing a Summons and Complaint on November 10, 2021, asserting claims of medical malpractice against Dr. Chau in his individual capacity and as a professional limited liability company. The claims arise from treatment and surgical excision of a ganglion cyst from Plaintiff's left wrist in 2019.

Plaintiff filed a Note of Issue on April 18, 2024. Defendants filed their motion for summary judgment on June 18, 2024. The motion was then adjourned on consent to September 25, 2024.

On September 6, 2024, Plaintiff discharged the attorney representing her. Upon an appearance before the Court on October 30, 2024 by *pro se* Plaintiff and Defendants' counsel,

the summary judgment motion was adjourned to February 26, 2025, to allow Plaintiff to retain new counsel and submit opposition.

On February 26, 2025, the parties appeared again before the Court, and *pro se* Plaintiff made an application to further adjourn the motion. The motion was given an adjournment date of April 2, 2025 for Plaintiff to submit opposition or appear with new counsel.

On April 2, 2025, newly retained counsel appeared on Plaintiff's behalf and requested an adjournment to prepare opposition to the motion. The motion was given a final adjournment date of May 14, 2025.

As an initial matter, Plaintiff argues in opposition that Defendants' summary judgment motion was untimely. Under this court's Part Rules, a motion for summary judgment must be made no later than sixty days after the filing of the Note of Issue. A late motion for summary judgment will only be accepted by stipulation of the parties or with leave of the Court upon good cause shown ("a satisfactory explanation for the untimeliness") pursuant to *Brill v City of New York* (2 NY3d 648, 652 [2004]) and CPLR 3212 (a).

Here, the Note of Issue was filed on April 18, 2024, and the summary judgment deadline was sixty days later: June 17, 2024. The motion filed on June 18, 2024 was therefore one day late. In the initial motion, Defendants incorrectly stated that "the within motion is timely."

After becoming aware of their mistake, Defendants addressed the untimeliness of the motion in reply. Generally, a court should not consider "good cause arguments raised for the first time in [defendant's] reply papers, particularly in the absence of a surreply from the plaintiff" (*St. John's Univ. v Butler Rogers Baskett Architects, P.C.*, 105 AD3d 728, 728-729 [2d Dept 2013]). Plaintiff was therefore permitted two weeks by the Court to file a surreply in response.

In their reply papers, Defendants' counsel states that the one-day delay was inadvertent and due to a "clerical error within the Defendants' law firm file system," calendaring the motion

on June 18 "due to the April 18 Note of Issue date," rather than counting sixty days to June 17. In their surreply, Plaintiff argues that this amounts to a perfunctory claim of law office failure, which does not constitute good cause. However, "the court has discretion to accept law office failure as a reasonable excuse (*see* CPLR 2005) where the claim is supported by a detailed and credible explanation" (*Lanza v M-A-C Home Design and Constr. Corp.*, 188 AD3d 855, 856 [2d Dept 2020]; *see also In re Gilmore*, 131 AD3d 1058, 1058 [2d Dept 2015]).

In consideration of all the parties' papers, the Court finds that Defendants have provided a sufficiently detailed and credible explanation to excuse their late filing of the summary judgment motion. Further, the Court notes that this motion was filed nearly one year ago and adjourned multiple times for reasons not attributable to the moving Defendants. In light of this procedural history, the one-day delay has caused no prejudice to Plaintiff. Therefore, the Court shall consider the substance of the summary judgment motion upon good cause shown pursuant to *Brill.*

In evaluating a summary judgment motion in a medical malpractice action, the Court applies the burden shifting process as summarized by the Second Department: "[A] defendant must make a prima facie showing either that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure" (*Rosenzweig v Hadpawat*, 229 AD3d 650, 652 [2d Dept 2024]). "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Martinez v Orange Regional Med. Ctr.*, 203 AD3d 910, 912 [2d Dept 2022]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden. Summary judgment is not

appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." (*Rosenzweig* at 652 [2d Dept 2024] [internal quotation marks and citations omitted].)

In support of the motion, Defendants submit an expert affirmation from Robert Gluck, M.D., a licensed physician board certified in hand surgery.

The movant's expert opines in detail that Dr. Chau did not depart from the standard of care in his treatment of Plaintiff. Specifically, he opines that Dr. Chau properly evaluated Plaintiff when she was referred to him for "a long-standing and progressively enlarging multi lobulated mass on the dorsal aspect of her left wrist." He opines this mass was "well documented, symptomatic, and consistent with a diagnosis of benign cyst," and removal surgery was indicated due to her symptoms interfering with daily activities.

Based on the operative report, the movant's expert opines that the May 17, 2019 procedure to remove the cyst was routine, uneventful, and performed in accordance with the standard of care. He further opines that she was properly treated in her follow-up appointment with Dr. Chau on May 24, 2019, which included suture removal and wound care instructions.

On the issue of proximate causation, the movant's expert opines that all the medical records indicate Plaintiff did not have a ligament tear during the May 17, 2019 excision surgery. He opines that during the follow-up appointment one week later, she exhibited "no symptoms of instability nor radial sensory or median nerve changes," which would be present if she had a ligament or nerve injury caused by the procedure. He notes that she did not return to Dr. Chau until "approximately six months later" with pain and swelling, and this is not consistent with ligament damage "which would likely cause identifiable symptoms beyond just pain and swelling." She subsequently saw another physician and underwent a follow-up surgery, but the movant's expert opines that a tear observed in that surgery "is indistinguishable from normal

findings after a ganglion cyst removal," which by its nature causes some attenuation, weakness, and damage to a ligament.

He also opines that there is "nothing in the plaintiff's medical record to support her claim of radial nerve injury," and her carpal tunnel symptoms developed "many months after she stopped treating with Dr. Chau."

Finally, he opines that a recurrent ganglion cyst is a known risk and possible outcome of the procedure she underwent, and this occurs in approximately 10% of cases even in the absence of malpractice. In his opinion, it is well documented in Plaintiff's medical records from Dr. Chau and subsequent providers that she had a recurrent cyst despite multiple surgeries, and no departure from the standard of care by Dr. Chau was a proximate cause of that recurrence.

The movants' expert has addressed all the claims against Dr. Chau set forth by Plaintiff in her bill of particulars and offered his opinion that Dr. Chau fully complied with the standard of care in his recommendation and performance of the May 17, 2019 ganglion cyst removal. The movant's expert also established that no claimed injuries were proximately caused by malpractice on Dr. Chau's part. Thus, on both the standard of care and proximate causation, the movants have established prima facie entitlement to summary judgment, and the burden shifts to Plaintiff to raise an issue of fact.

In opposition, Plaintiff submits only an attorney affirmation and no opinion from a medical expert to counter the movant's prima facie showing.

Courts have consistently held that once a movant has established prima facie entitlement to summary judgment with the support of a medical expert, the burden shifts to Plaintiff to rebut their opinions with a qualified expert affirmation. "Mere conclusory allegations of malpractice, unsupported by competent evidence tending to establish the elements of the claim at issue, are insufficient to defeat summary judgment" (*Nelson v Lighter*, 179 AD3d 933, 934-935 [2d Dept

2020], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). "[E]xpert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record" (*Avgi v Policha*, 232 AD3d 838, 840 [2d Dept 2024] [internal quotation marks and citations omitted]).

Plaintiff's opposition papers, lacking any evidence in the form of an expert affirmation, are therefore insufficient to raise a triable issue of fact. Contrary to Plaintiff's argument, citations to the medical record and notes of other treating physicians are not adequate to establish "conflicting medical expert testimony."

Additionally, Plaintiff's reliance on CPLR 3212 (f), which allows denial of summary judgment based on outstanding discovery of "*facts* unavailable to [the] opposing party" is not applicable to Plaintiff's failure or inability to secure an expert affirmation. A thirty-day adjournment for that purpose was already granted by this Court upon the application of Plaintiff's incoming counsel. No further adjournment was ever sought, and the indirect request for more time to submit supplemental papers is not properly before this Court.

Accordingly, it is hereby:

ORDERED that the motion of Defendants Wilson C. Chau, M.D. and Wilson C. Chau, PLLC (Seq. No. 1) seeking an Order, pursuant to CPLR 3212, granting summary judgment in their favor is **granted**, and the action is **dismissed** in its entirety.

The Clerk shall enter judgment in favor of WILSON C. CHAU, M.D. and WILSON C. CHAU, PLLC.

This constitutes the decision and order of this Court.

ENTER.

Hon. Consuelo Mallafre Melendez
J.S.C.