

Biringen v Bochner

2025 NY Slip Op 32127(U)

June 9, 2025

Supreme Court, New York County

Docket Number: Index No. 805413/2019

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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ZEYNEP BIRINGEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SEDAT BIRINGEN, DECEASED, and ZEYNEP BIRINGEN,

Plaintiffs,

INDEX NO. 805413/2019

MOTION DATE 02/11/2024

MOTION SEQ. NO. 005

- v -

BERNARD H. BOCHNER, MARC SIMMONS, MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, TODD J. ALBERT, DEXTER SUN, JOHN A. CARRINO, and HOSPITAL FOR SPECIAL SURGERY

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 217, 219, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233

were read on this motion to/for JUDGMENT – SUMMARY.

Upon the foregoing papers, Defendant, Dexter Y. Sun, M.D., s/h/a Dexter Y. Sun (“Dr. Sun”), moves for summary judgment dismissing all claims against Dexter Y. Sun, M.D., s/h/a Dexter Y. Sun pursuant to CPLR 3212.

Plaintiff, Zeynep Biringen (“Plaintiff”), individually, and on behalf of Sedat Biringen (“decedent”) opposes the motion.

BACKGROUND

On June 20, 2017, decedent, an aerospace professor from Colorado, presented to Defendant in New York for neurological consultation involving the diagnosis and treatment of his worsening pain and left lower extremity weakness since 2016. Decedent was referred to Dr. Sun by Dr. Todd J. Albert, a spinal surgeon at Hospital for Special Surgery (“HSS”), who saw the decedent one day earlier, on June 19, 2017, in consultation for possible spinal surgery.

At his visit with Dr. Albert, a physical examination of decedent was performed which showed abnormal findings of the sciatic nerve on the left in terms of motor and sensory deficits at levels L4, L5, and S1 on the left. Dr. Albert concluded, however, that no spinal surgery was indicated and instead referred the patient for a pelvic MRI to Defendant, a neurologist, to evaluate the cause of his sciatic nerve complaints.

Dr. Sun saw the decedent initially on June 20, 2017, and continued to treat the decedent for five (5) more visits until July 14, 2017, his last visit with Dr. Sun prior to his return home to Colorado. Dr. Sun diagnosed severe sciatic neuropathy of unknown etiology, at his initial consultation with decedent, and noted a history of bladder cancer in 2012. The record shows that Dr. Sun's plan was to determine the cause of the severe sciatic neuropathy which included review of a pelvic MRI performed by a radiologist at Hospital for Special Surgery ("HSS") on June 19, 2017, and to perform a repeat EMG study. On June 21, 2017, Defendant performed a NCV/EMG on both extremities which revealed a severe sciatic neuropathy and inferior gluteal neuropathy on the left. On the same day, the decedent had a bladder cancer follow up at Memorial Hospital For Cancer and Allied Diseases ("Memorial"), after which Dr. Sun spoke to the oncology group and was advised that the oncology work up was negative. Dr. Sun also contacted Dr. Steven Lee to request a nerve biopsy be performed.

On June 23, 2017, Dr. Sun reviewed the results of the NCV/EMG performed two days previously which revealed severe sciatic neuropathy and inferior gluteal neuropathy on the left, and his medical record notes three possibilities for the nerve damage in the left lower extremity. Dr. Sun's plan was to start IVIG treatments while waiting for the nerve biopsy to be performed.

IVIG treatment is an antibody treatment for demyelinating neuropathy. Shortly after starting the IVIG treatment, on July 3, 2017, a Doppler exam of the left lower extremity confirmed decedent had suffered deep vein thrombosis, a known complication of IVIG treatment, and as a result, the IVIG treatment was discontinued. Thereafter, the plan for nerve biopsy was put on hold but then never followed through.

From July 5 through July 12, 2025, decedent consulted physicians at HSS and NY Presbyterian Hospital-Weill Cornell Medicine regarding multiple symptoms and complaints that he was experiencing. Decedent last presented to Dr. Sun on July 14, 2017, for follow up, wherein severe edema was noted in the left foot and ankle. Notably, the decedent had undergone a CT of the pelvis and abdomen without findings of malignancy and a CT angiogram which revealed no evidence of pulmonary embolism, mass, or lesion in the lung. By this last in-person visit on July 14, 2017, Dr. Sun still documented the neuropathy as “etiology unknown.” Thereafter, the decedent returned to Colorado and continued his treatment with various physicians, including general practitioners, oncologist/hematologist, neurologist, orthopedist, orthopedic oncologist, and an infectious disease specialist. In January 2018, the decedent’s wife informed Dr. Sun of a metastatic bladder cancer diagnosis, and the decedent died of metastatic bladder cancer on July 12, 2020.

Plaintiff, Zeynep Biringen, the spouse of decedent, commenced the underlying action by the filing of a Summons and Complaint on December 16, 2019, against the named Defendants,¹ alleging three causes of action including 1) medical malpractice; 2) lack of informed consent; and 3) wrongful death. Plaintiff sues derivatively for loss of consortium arising from the alleged causes of action. Specifically, the Plaintiff alleges, *inter alia*, that Dr. Sun departed from the standard of

¹ The claims against Defendants Todd J. Albert, John A. Carrino, and Hospital For Special Surgery (“HSS”) have been discontinued. The remaining defendants do not seek summary judgment.

neurological care by failing to timely diagnose the alleged reoccurrence of the decedent's bladder cancer from June 20, 2017, through July 15, 2017, resulting in an alleged delay of treatment and demise of decedent.

Defendant served a Verified Answer on February 25, 2020, and issue was joined.

Plaintiff now moves for summary judgment pursuant to CPLR 3212 dismissing the claims in the complaint their entirety.

THE INSTANT MOTION

CPLR 3212 requires that “the proponent of a summary judgment motion make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A defendant physician moving for summary judgment makes a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice, or by establishing that the plaintiff was not injured by such treatment (*see Alvarez*, 68 NY2d at 324; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). To satisfy this burden, a defendant physician must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Joyner-Pack v. Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant physician must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept

2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

In support of the motion, Defendant submits the expert affirmation of Dr. David J. Bronster, M.D. (“Dr. Bronster”), a board-certified Psychiatrist and Neurologist. Dr. Bronster opines, to a reasonable degree of medical certainty, based upon a review of the bill of particulars, decedent’s medical records, and all relevant deposition testimony, that Dr. Sun neither departed from good and accepted standards of care nor caused or contributed to the injuries alleged by the decedent.

Specifically, Dr. Bronster opines that the record does not demonstrate that Dr. Sun failed to provide appropriate examinations or order the proper tests and treatments for decedent. He further opines that there is no evidence to suggest that Dr. Sun failed to diagnose metastatic bladder cancer, misdiagnosed the decedent, failed to obtain appropriate radiological studies or failed to warn the decedent of the potential effects of treatment/non-treatment.

Dr. Bronster opines that diagnosing bladder cancer and determining its recurrence/spread were outside Dr. Sun’s scope of expertise as a neurologist, and he appropriately relied on the decedent’s outside specialists, whose assessments indicated that the decedent was cancer-free as of June 21, 2017. Further, Dr. Bronster opines that even if Dr. Sun had reviewed prior MRIs, he would have still needed to rely on the radiologist’s findings and the oncologists’ interpretations. Dr. Bronster further opines that Dr. Sun appropriately performed an NCV/EMG, discussed the results (enlarged sciatic nerve, possible inflammation/malignant infiltration) with the decedent and Plaintiff, and recommended a nerve biopsy with non-party Dr. Steven Lee. Dr. Bronster concludes that any delay in diagnosis and treatment resulted from the decedent’s own hesitancy due to concerns about further nerve damage. Further, Dr. Bronster emphasizes that the decision of

whether and when to proceed with the nerve biopsy ultimately rested with Dr. Lee and the decedent. Finally, Dr. Bronster opines that after Dr. Sun's final consultation with decedent on July 14, 2017, he had no obligation to follow up with the decedent or his Colorado-based providers, as the decedent returned to their care.

The Court finds that the Defendant has established prima facie entitlement to summary judgment as a matter of law based on the record and the expert affirmations of Dr. Bronster, which demonstrates that Dr. Sun did not depart from good and accepted standards of care in preventing and treating the decedent's bladder cancer and that Dr. Sun's alleged acts and/or omissions did not proximately cause the decedent's alleged injuries and subsequent death (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Obregon v NY & Presbyt. Hosp.*, 2012 NY Slip Op 30681[U] [Sup Ct, NY County 2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Once this prima facie showing is made, the burden shifts to the plaintiff to raise a triable issue of fact, which requires the plaintiff to proffer evidence sufficient to demonstrate that a genuine issue exists regarding the causal connection between the defendant's alleged negligence and the decedent's death (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Obregon v NY & Presbyt. Hosp.*, 2012 NY Slip Op 30681[U] [Sup Ct, NY County 2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In opposition, Plaintiff submits the affirmation of an Expert A, a board-certified neurologist.² Expert A also opines to a reasonable degree of medical certainty, that Defendant Dr. Sun departed from good and accepted standards of medical care and these departures were a substantial factor in causing the Plaintiff's alleged injuries. In this regard, Expert A asserts that the Dr. Sun departed from the standard of care by, *inter alia*, failing to properly diagnose the cause

² Plaintiff has redacted the name of their expert pursuant to CPLR 3101(d). The expert shall be referred to as "Expert A."

of decedent's severe sciatic neuropathy, failing to obtain a nerve biopsy instead of prescribing treatment for an unconfirmed diagnosis, which departures resulted in a delay of at least six (6) months until the proper diagnosis of metastatic bladder cancer Stage IV was made in January 2018, resulting in the decedent's death on July 12, 2020. In a medical malpractice case involving a delayed diagnosis of disease or medical condition, competent evidence that the negligent delay caused the patient additional pain and suffering, further treatment and /or a diminished chance of survival or cure due to progression of the condition or disease is sufficient. See *Polanco v Reed*, 105 AD3d 438 (1st Dept 2013). In this regard, Expert A opines that Dr. Sun's departures arise from his neurological treatment, notwithstanding the care provided by other treating physicians. According to Expert A, Dr. Sun, as a neurologist, was obligated to perform a complete workup to diagnose the decedent's neurological condition, a workup he failed to do, even though this diagnostic process falls squarely within the standards of neurological practice.

The Court finds that the affirmation of Expert A raises genuine issues of material fact regarding whether, *inter alia*, (1) Dr. Sun failed to properly diagnose the cause of the decedent's severe sciatic neuropathy; (2) Dr. Sun failed to obtain a nerve biopsy; (3) inappropriately prescribed treatment for an unconfirmed diagnosis, resulting in a six-month delay in diagnosing metastatic bladder cancer Stage IV, thereby causing the decedent's injuries and ultimately contributing to his death; and (4) Dr. Sun, as a neurologist, was obligated to perform a complete workup to diagnose the decedent's neurological condition, and whether his failure to do so fell below the standards of neurological practice. "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*see Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept

2012] [internal quotation marks omitted]; *see also Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]). “[C]onflicting expert opinions raise credibility issues which are to be resolved by the factfinder” or factfinders (*see Stucchio v Bikvan*, 155 AD3d 666, 667 [2017]).

The existence of material issues of fact with respect to the medical malpractice claim against Dr. Sun necessarily precludes summary judgment on the related wrongful death claim (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Obregon v NY & Presbyt. Hosp.*, 2012 NY Slip Op 30681[U] [Sup Ct, NY County 2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The case law is well settled that “When medical malpractice forms the basis of a wrongful death action, in establishing that ... [the] injuries alleged to have caused plaintiff’s death, a defendant establishes prima facie entitlement to summary judgment as to the wrongful death action as well,” (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]).

Similarly, dismissal is also precluded as to Plaintiff’s cause of action for loss of consortium, since a triable issue of fact exists as to the alleged malpractice of Defendant, and it is derivative of the injured spouse’s right to recover damages (*see Liff v Schildkrout*, 49 NY2d 622 [1980]).

Finally, the Court grants the branch of the motion requesting dismissal of Plaintiff’s claim for lack of informed consent as a matter of law. While Defendant moves to dismiss Plaintiff’s cause of action based on the lack of informed consent, the Court notes that Defendant’s expert affirmation is insufficient to make out a prima facie showing of lack of informed consent since he describes the discussion between Dr. Sun and decedent in general boilerplate language. Notwithstanding this finding, the bill of particulars does not properly set forth a cause of action for the lack of informed consent since the treatment at issue is based on a failure to diagnose.

“The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) nonemergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body” (*see* Public Health Law §2805-d [2]). Here, Plaintiff’s bill of particulars demonstrates that none of the allegations involve any injury arising out of the performance of a medical procedure or a procedure or affirmative invasion or disruption of decedent’s body. Instead, the allegations involve alleged failures to warn, advise, discuss, appreciate, or recommend a procedure (*see Hernandez v The Children's Hosp. at Montefiore Med. Ctr.* [N.Y. Sup Ct, Bronx County 2018]; *see also Janeczko v Russell*, 46 AD3d 324 [1st Dept 2007]).

Accordingly, Plaintiff’s lack of informed cause of action is dismissed as a matter of law.

Based on the foregoing, it is hereby

ORDERED, that the Defendant Dexter Y. Sun, M.D., s/h/a Dexter Y. Sun’s motion for summary judgment is granted to the extent of dismissing the Plaintiff’s lack of informed consent cause of action, and in all other respects the motion is denied; and it is further

ORDERED, that the moving Defendant serve a copy of this order upon the Plaintiff with notice of entry within twenty (20) days of entry of this order; and it is further

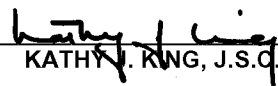
ORDERED, that within twenty (20) days of entry of this order, the Defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED, that service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible a the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED, that the parties are directed to appear for a settlement conference on January 6th, 2026, at 11:30am, in 60 Centre Street, Room #351, New York, NY.

This constitutes the decision and order of the Court.

6/9/2025
DATE


KATHY J. KING, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE