

Pena v Mir

2025 NY Slip Op 33155(U)

July 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 505585/2019

Judge: Patria Frias-Colón

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 80
HON. PATRIA FRIAS-COLÓN, J.S.C.

-----X
Aleida Pena,

PLAINTIFF,

-against-

Parvez Mir, M.D., Elvita Genelus Dominique,
D.O., Nelli Fromer, D.O., Mahalingam Sivakumar,
M.D., and Wyckoff Heights Medical Center,

DEFENDANTS.
-----X

Elvita Genelus-Dominique, D.O.,

THIRD-PARTY PLAINTIFF,

-against-

Alison Haimes, M.D.,

THIRD-PARTY DEFENDANT.
-----X¹

Index # 505585/2019
Cal. #s 7-11 Mot. Seq. #s 13-17

**AMENDED
DECISION/ORDER**

Recitation as per CPLR §§ 2219(a)
and/or 3212(b) of papers considered on
review of this motion:

NYSCEF Doc. #s 312-328; 443 by D Mir
NYSCEF Doc. #s 329-343; 444 by D Sivakumar
NYSCEF Doc. #s 374-398; 447 by D Elvita
NYSCEF Doc. #s 401-404; 440 by D Wyckoff
NYSCEF Doc. #s 405-417, 427, 445-446 by D Fromer
NYSCEF Doc. #s 422-424, 429-433, 441-442 by Pl.

Upon the foregoing cited papers and after oral argument on June 10, 2025, pursuant to CPLR § 3212(b), the Court issues the following Decision and Order on all Defendants' Motions for Summary Judgment:

- (1) Defendant Mahalingam Sivakumar's Motion for Summary Judgment is DENIED (Mot. Seq. # 14);
- (2) Defendant Elvita Genelus-Dominique's Motion for Summary Judgment is GRANTED (Mot. Seq. # 15);
- (3) Defendant Parvez Mir's Motion for Summary Judgment is GRANTED (Mot. Seq. # 13);
- (4) Defendant Nelli Fromer's Motion for Summary Judgment is GRANTED (Mot. Seq. # 17);
and
- (5) Defendant Wyckoff Height Medical Center's Motion for Summary Judgment is GRANTED to the extent that Plaintiff's claims based on the alleged acts or omissions of

¹ The caption herein reflects dismissal of former Defendant Lenox Hill Hospital from this action by Order dated April 12, 2024 (Genine Edwards, J.) (NYSCEF Doc. #298). It further reflects the pre-RJI dismissal of former Defendant Carlos J. Cebollero, M.D., from this action by stipulation dated May 6, 2019 (NYSCEF Doc. # 15).

Drs. Dominique, Mir, and Fromer, as well as the negligent hiring/retention/supervision claim against Wyckoff, are dismissed with prejudice and without costs or disbursements; otherwise, Wyckoff's motion is DENIED (Mot. Seq. # 16).

BACKGROUND

Between July 11, 2017 through August 2, 2017, Plaintiff Aleida Pena then 36 years old, was hospitalized at Defendant Wyckoff Heights Medical Center ("Wyckoff").² During this period of hospitalization, she underwent a cholecystectomy on July 14, 2017, followed by an exploratory laparotomy on August 2, 2017.³ Between these surgeries, Plaintiff developed acute abdomen and ischemic bowel despite ongoing heparin anticoagulation.⁴ The laparotomy involved extensive washout, resection of necrotic bowel, and application of a wound VAC.⁵ Subsequently, Plaintiff was transferred to Lenox Hill Hospital (a dismissed Defendant), where she received further care, including additional surgeries and treatment.

Plaintiff commenced this medical malpractice and negligence action against, among others, Defendants Drs. Sivakumar, Dominique, Mir, Fromer, and Wyckoff (collectively, "Defendants"), and a negligent hiring/retention/supervision against Wyckoff.⁶ Plaintiff alleges failures to diagnose and timely treat bowel perforations and sepsis, improper monitoring, and negligent supervision⁷

Following discovery and filing of the note of issue, Defendants moved separately for summary judgment. Oral argument was held on June 10, 2025.

STANDARD OF REVIEW

Medical malpractice claims require proof of:

- (1) a departure from accepted medical practice; and
- (2) that such departure proximately caused injury.

Mendoza v. Maimonides Med. Ctr., 203 A.D.3d 715, 716 (2d Dept. 2022)

Defendants bear the initial burden on summary judgment to demonstrate no such departure or causation. *Dye v. Okon*, 203 A.D.3d 702, 703 (2d Dept. 2022). Once met, the burden shifts to Plaintiff to raise a triable issue with expert opinion specifically addressing Defendants' allegations.

² NYSCEF Doc. # 402, Verified Bill of Particulars as to Wyckoff, dated August 26, 2019, ¶¶ 1 and 24.

³ NYSCEF Doc. # 320, Wyckoff's medical records, pages 2167-2168 (Operative Report for Cholecystectomy); pages 2169-2171 (Operative Report for Exploratory Laparotomy).

⁴ NYSCEF Doc. # 320, Wyckoff's medical records, page 2169.

⁵ NYSCEF Doc. # 320, Wyckoff's medical records, page 2169.

⁶ NYSCEF Doc. # 324, Amended Verified Complaint, dated April 17, 2019 (First and Fifth Causes of Action for Medical Malpractice and Negligence, respectively; Second Cause of Action against Wyckoff for Negligent Hiring, Retention, Training, and Supervision).

⁷ NYSCEF Doc. # 319, Second Supplemental Verified Bill of Particulars as to Dr. Mir, dated December 19, 2023, ¶ 3; NYSCEF Doc. # 336, Second Supplemental Verified Bill of Particulars as to Dr. Sivakumar, dated December 19, 2023, ¶ 3; NYSCEF Doc. # 411, First Supplemental Verified Bill of Particulars as to Dr. Fromer, dated November 28, 2022, ¶ 3; NYSCEF Doc. # 402, Verified Bill of Particulars as to Wyckoff, dated August 26, 2019, ¶ 3; NYSCEF Doc. # 377, Verified Bill of Particulars as to Dr. Dominique, dated November 25, 2019, ¶ 3 (identical allegations).

Sunshine v. Berger, 214 A.D.3d 1020, 1022 (2d Dept. 2023); *Pirri-Logan v. Pearl*, 192 A.D.3d 1149, 1150 (2d Dept. 2021). Conclusory or unsupported expert opinions are insufficient to defeat summary judgment. *Simmons v. Brooklyn Hosp. Ctr.*, 74 A.D.3d 1174, 1178 (2d Dept. 2010) *lv denied* 16 N.Y.3d 707 (2011). To avoid being speculative or conclusory, opposing expert opinions should address specific assertions made by the movant's experts with an explanation of the reasoning citing evidence in the record. *Tsitrin v. New York Community Hosp.*, 154 A.D.3d 994, 996 (2d Dept. 2017).

DISCUSSION

Physician Defendants (and Wyckoff's vicarious liability for those physicians) met their *prima facie* burdens by submitting medical records, depositions, and expert affirmations establishing adherence to the standard of care and absence of causation. *Belotti v. North Westchester Hosp.*, 230 A.D.3d 461, 463 (2d Dept. 2024); *Hernandez v. Nwaishienyi*, 148 A.D.3d 684, 686 (2d Dept. 2017), *lv dismissed in part, denied in part* 30 N.Y.3d 1013 (2017).

Plaintiff rebutted the showing only as to Dr. Sivakumar, raising triable issues regarding departure and causation. Plaintiff failed to raise any triable issues as to Drs. Dominique, Mir, and Fromer.

Dr. Sivakumar (Vascular Surgeon)

Dr. Sivakumar, was assigned by Wyckoff to render vascular consultations and recommended heparin treatment for Plaintiff's portal vein thrombosis (PVT), consistent with the standard of care. His expert explained that anticoagulation is the accepted treatment for PVT, with no surgical intervention indicated. When bowel perforation occurred, surgical treatment was performed by a general surgeon.⁸

As Dr. Sivakumar's expert expounded on the medical evidence:

(1) "A portal vein thrombosis was noted on [Plaintiff's] CT scan without evidence [of] thrombosis or intestinal perforation. Of note, [Plaintiff] had a personal and family history of a coagulation disorder. She was seen in consultation by Dr. Sivakumar, an experienced and qualified vascular surgeon. Parenteral heparin was recommended [by Dr. Sivakumar] and started. This is the standard of care for the treatment of portal vein thrombosis. [Plaintiff] was already under the care of a general surgeon [Dr. Dominique]."

(2) "*There is no operative surgical treatment for portal/mesenteric venous thrombosis as opposed to [a] clot in the arterial tree which can be explored surgically. Anticoagulation is the proper treatment.* When [Plaintiff]...developed peritonitis along with a bowel perforation some days later, bowel surgery was required and was done by a general surgeon/gastrointestinal surgeon [Dr. Dominique]."⁹

⁸ NYSCEF Doc. # 331, Expert Affirmation of Alex Michael Stone, M.D., affirmed February 27, 2025, ¶¶ 50-60.

⁹ NYSCEF Doc. # 331, Dr. Stone's Expert Affirmation, ¶¶ 59-60 (italics added).

Plaintiff's expert, vascular surgeon David A. Mayer, M.D., contended Dr. Sivakumar erred by relying solely on IV heparin without timely catheter-based intervention to clear mesenteric venous thrombosis, which allegedly caused bowel necrosis and permanent injuries. Plaintiff's expert opined that:

(1) Dr. Sivakumar "improperly and unsafely rel[ied] on an IV heparin drip, solely, to treat her extensive MVT [mesenteric vein thrombosis] involving her portal vein, which [treatment] was doomed to failure[,] given her massive clot burden and [her] clotting propensity."

(2) "Dr. Sivakumar departed from standard of care, at all times herein mentioned, from July 18-25, [2017,] by failing to offer timely catheter-based endovascular intervention, by either himself or through an order to interventional radiology, to clear her MVT and restore venous drainage to her small intestine before irreversible bowel necrosis occurred."

(3) "Dr. Sivakumar's departures from [the] standard of care were substantial factors and competent producing causes of [Plaintiff's] bowel necrosis, perforation, massive intestinal resection surgery, and other permanent injuries."

(4) "[Plaintiff's] bowel could have been saved during the time of Dr. Sivakumar's involvement [in her care] had he recognized the true severity of her clotting problem and performed a catheter-based mesenteric venous clot clearing procedure, something [that Plaintiff] was never offered during her stay at Wycoff."¹⁰ See *Maestri v. Pasha*, 198 A.D.3d 632, 635 (2d Dept. 2021) ("The plaintiff's expert...opined that the failure to refer the decedent for...diagnostic tests and instead to continue to treat him in the manner which they did during his 13-day hospital stay diminished his chance of a better outcome or increased his injuries."); see also *Clarke v. New York City Health & Hosps.*, 210 A.D.3d 631, 633 (2d Dept. 2022); *Buch v. Tenner*, 204 A.D.3d 635, 638 (2d Dept. 2022); *Powell v. Singh*, 199 A.D.3d 946, 948 (2d Dept. 2021).

This opposing expert opinion raises a triable issue of fact and does not present a new theory, as Dr. Sivakumar's expert affirmatively addressed the issue of operative treatment versus anticoagulation. See *Gardiola v. Sung Chui Park*, 229 A.D.3d 602, 603 (2d Dept. 2024); *Khutoryanskaya v. Laser & Microsurgery, P.C.*, 222 A.D.3d 633, 635 (2d Dept. 2023); *Rich v. Donnenfeld*, 191 A.D.3d 909, 910 (2d Dept. 2021). Although Plaintiff's theory regarding performance of specific vascular interventions to treat her mesenteric venous thrombosis ("MVT") was not pleaded in either her amended complaint or the bills of particulars, this theory was specifically referred to by Dr. Sivakumar's expert in his opening affirmation.¹¹ See *Donohue v. Grossman*, 233 A.D.3d 1003, 1006 (2d Dept. 2024) ("[T]he opinion of the plaintiffs' expert that [Defendant's] staff failed to recognize signs of an infection or conduct adequate testing and treatment relating thereto was not, under the circumstances presented, a new theory of liability improperly asserted for the first time in opposition to [Defendant's] motion for summary judgment [because, among other things]...[Defendant's] expert, in his affirmation, addressed the importance of recognizing the signs and symptoms of infections when rendering wound care, including with regard to the timing of suture removal, and whether any evidence of infection existed here, among

¹⁰ NYSCEF Doc. # 423, Expert Physician[s] Affirmation of David A. Mayer, M.D., affirmed April 14, 2025, ¶¶ 16-18.

¹¹ NYSCEF Doc. # 331, Dr. Stone's Expert Affirmation, ¶ 60 (italics added).

other related topics.”); *Schwartzberg v. Huntington Hosp.*, 163 A.D.3d 736, 738 (2d Dept. 2018) (“The Dowling defendants contend that the plaintiffs asserted for the first time in opposition to the motion for summary judgment that the Dowling defendants were negligent because they failed to order the diagnostic tests and make the referral to a vascular specialist on an emergent basis. However,...the Dowling defendants’ expert physician addressed this issue in his affidavit submitted with the initial motion papers.”).

Further, Dr. Sivakumar conceded in his pretrial testimony that he was treating Plaintiff’s MVT with heparin, as more fully set forth in the margin.¹² See *M.T. v. Lim*, 203 A.D.3d 778, 780 (2d Dept. 2022) (“Although the plaintiffs’ theory regarding administration of the saline solution was not pleaded in either the complaint or the bill of particulars, this theory was referred to during [defendant’s] deposition, and therefore properly raised by the plaintiffs in opposition to his motion for summary judgment.”). See also *Toth v. Bloshinsky*, 39 A.D.3d 848, 849 (2d Dept. 2007) (“There is no need for a plaintiff to set forth the manner in which the physician failed to act in accordance with good and accepted medical practice, since a physician is chargeable with knowing those medically accepted standards applicable to the proper care and treatment of the plaintiff.”). Cf. *Larcy v. Kamler*, 185 A.D.3d 564, 566 (2d Dept. 2020) (“If the theory is discernable from the pleadings, it may be considered, especially if the theory is referred to in the depositions.”) (internal citations omitted).

Dr. Dominique (General Surgeon)

Dr. Dominique performed both surgeries on Plaintiff during her hospitalization at Wyckoff and relied on vascular recommendations regarding anticoagulation. Plaintiff’s expert suggested she had a duty to recognize the need for vascular intervention and to request it.¹³ In particular, Dr. Dominique’s expert noted that:

(1) An inter-operative CT scan, which was performed on July 17, 2017, “reveal[ed] extensive *mesenteric venous thrombosis* involving ileocolic, SMV [superior mesenteric vein], splenic, and portal veins.”

¹² NYSCEF Doc. # 323, Dr. Sivakumar’s EBT transcript, page 39, lines 17-21 (“[Plaintiff] obviously has *mesenteric venous thrombosis*, which she is on treatment [for].”); page 45, lines 7-9 (“I’m a vascular surgeon. I was asked to recommend treatment for the *mesenteric venous thrombosis*....I had given my advice to treat [Plaintiff] with *anticoagulation*....”); page 45, line 25 to page 46, line 3 (“I’m a vascular surgeon. If there was a reason for me to intervene from the vascular point of view, I would do it....”); page 57, lines 8-23 (“From the vascular point of view, I didn’t see anything [concerning about Plaintiff’s medical condition]....[Plaintiff] was on the treatment that I had recommended [*i.e.*, heparin]....She’s on adequate blood thinning medication.”); page 59, lines 8-9 (“[S]he’s adequately treated with [the] blood thinning medication.”); page 64, lines 10-12 (“I was the consulting physician. I was a vascular surgeon and I gave my opinion on what should be done.”); page 66, line 21 to page 67, line 2 (“Q. Did you recommend any further treatment for [Plaintiff] on the 21st [of July 2017]? A. No. I think we just have to make sure she’s anticoagulated and follow her abdominal pain closely. That was my recommendation.”); page 78, lines 13-19 (“The clot is going to be there. Once the vein is clotted, it’s not going to change in any way. [The anticoagulation is the] treatment for [the clot] to stop progressing....[Plaintiff is] therapeutic from the heparin, so she is adequately blood thinned.”); page 79, lines 11-13 (“I recommended that [Plaintiff] should be treated with IV heparin and anticoagulation.”) (italics added in each instance).

¹³ NYSCEF Doc. # 376, Expert Affirmation of Kenneth J. Becker, M.D., dated March 21, 2025, ¶¶ 32-44.

(2) “Due to the *mesentery thrombosis* found, the [P]laintiff is being managed by vascular as well as multiple other specialties, which recommended that [she] be [placed] on anticoagulants because of the presence of these extensive clots that are causing edema in the bowel as reported by the radiologist in [the aforementioned CT scan]. The vascular surgeon who was consulting on the case [*i.e.*, Dr. Sivakumar] recommended no surgical intervention.”

(3) “The cause [of Plaintiff’s bowel perforation] was multiple clots in the *mesentery system* that caused [her] bowel to become edematous and ischemic, and [which, in turn, led] to [the] perforation [of her bowel].”¹⁴

Plaintiff’s expert posited (in ¶ 19 of his affirmation) that “[a]lthough Dr. Dominique was not credentialed to perform the catheter-based procedure, she had [a] duty to recognize the necessity of such intervention, and to timely call in either vascular surgery or interventional radiology to perform it before [Plaintiff’s] bowel died.” However, liability depends on the scope of the physician’s role, and a general surgeon is not required to assume duties of a vascular specialist. *Markley v. Albany Med. Ctr. Hosp.*, 163 A.D.2d 639, 640 (3d Dept. 1990).

Dr. Dominique’s submissions demonstrated: (1) she was a general (rather than a vascular) surgeon; (2) she was entitled to rely on Dr. Sivakumar’s recommendations;¹⁵ and (3) she did not assume a further duty to supervise or participate in the vascular aspects of Plaintiff’s treatment. Plaintiff’s expert opinion was a legal conclusion not supported by the record and insufficient to raise a triable issue of fact. *See Leigh v. Kyle*, 143 A.D.3d 779, 782-783 (2d Dept. 2016). *See generally Burns v. Goyal*, 145 A.D.3d 952, 954 (2d Dept. 2016) (“the question of whether a physician owes a duty to the plaintiff is a question for the court, and is not an appropriate subject for expert opinion.”) (internal quotation marks omitted), *modified on other grounds* 30 N.Y.3d 956 (2017), *rearg denied* 30 N.Y.3d 1038 (2017).

Dr. Mir (Pulmonologist/ICU Intensivist)

Dr. Mir’s involvement was limited to pre- and peri-operative care unrelated to the surgical emergency.¹⁶ Plaintiff’s expert incorrectly identified him as a general surgeon and faulted him for failing to act surgically. As a board-certified pulmonologist, Dr. Mir held the title of Director of Pulmonary Critical Care and was working in the ICU as a physician at the time.¹⁷ Such unsupported expert opinions lack probative value and fail to raise triable issues. *See Diaz v. New*

¹⁴ NYSCEF Doc. # 376, Dr. Becker’s Expert Affirmation, ¶¶ 39, 40, and 44 (italics added).

¹⁵ NYSCEF Doc. # 322, Dr. Dominique’s EBT transcript, page 56, line 17 to page 57, line 3 (“[A] thrombosis issue is a vascular issue, not necessarily a general surgery issue. So we consulted the vascular surgeon...and [the] recommendations at that time was to continue with anticoagulation.”); page 59, lines 14-17 (“We’re doing surgeries for the intestine, not for the underlying problem, which is the vessel. I am not the vascular surgeon.”); page 61, lines 16-21 (“The heparin drip was initiated by the medical team [at] the recommendation from...the vascular surgeon. And as a consultant, my recommendation was to continue with that treatment.”); page 62, lines 4-7 (“As the general surgeon,...[it] wouldn’t be my decision to make...that the blood clots were not breaking [up] with the current management.”); page 79, line 23 to page 80, line 3 (“Q. [H]ave you...surgically...removed the clot that was blocking...a vein, have you ever done that? A. No.”).

¹⁶ NYSCEF Doc. # 314, Expert Affirmation of Umesh Gidwani, M.D., affirmed February 28, 2025, ¶¶ 6, 14-16, 23, 26-40, and 41-45; NYSCEF Doc. # 314, Dr. Gidwani’s Expert Affirmation, ¶ 44.

¹⁷ NYSCEF Doc. # 321, Dr. Mir’s EBT transcript, page 11, lines 9-14; page 12, line 9 to page 13, line 15; page 15, lines 14-18; page 20, line 14 to page 21, line 7.

York Downtown Hosp., 99 N.Y.2d 542, 544-545 (2002); *Weintroub v. Maimonides Med. Ctr.*, 222 A.D.3d 915, 916 (2d Dept. 2023).

Dr. Fromer (Hematologist)

Dr. Fromer's role was limited to hematology consultation regarding heparin reversal. Plaintiff's expert conceded no departures in her care.¹⁸

Opposition papers lacked evidentiary support and were insufficient to create a factual dispute.¹⁹ *Jean-Paul v. Jamaica Hosp. Med. Ctr.*, 208 A.D.3d 464, 466 (2d Dept. 2022) (internal quotation marks omitted).

Wyckoff Heights Medical Center

Wyckoff demonstrated no liability for the physicians who met their burden and, with Plaintiff's abandonment of negligent hiring/retention/supervision claims, summary judgment is warranted as to these causes *Wijesinghe v. Buena Vida Corp.*, 210 A.D.3d 824, 826 (2d Dept. 2022); *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 546 (1980) (a claim of vicarious liability cannot stand when "there is no primary liability upon which such a claim of vicarious liability might rest"), *rearg denied* 52 N.Y.2d 899 (1981). Further, Plaintiff abandoned her negligent hiring/retention/supervision claim against Wyckoff by failing to address it in her opposition papers. *See Powell v. Oudkerk*, 237 A.D.3d 992, 995 (2d Dept. 2025); *Spiegel v. Beth Israel Med. Ctr.-Kings Highway Div.*, 149 A.D.3d 1127, 1130 (2d Dept. 2017).

CONCLUSION

Accordingly:

- Dr. Sivakumar's motion is denied;
- Drs. Dominique, Mir, and Fromer's motions are granted;
- Wyckoff's motion is granted to the extent that claims relating to Drs. Dominique, Mir, and Fromer, as well as negligent hiring/retention/supervision claims, are dismissed with prejudice and without costs/disbursements; otherwise, denied.

Given the dismissal of Plaintiff's claims against Dr. Dominique, her third-party claim against Alison Haimes, M.D., is dismissed with prejudice and without costs/disbursements.

¹⁸ NYSCEF Doc. # 408, Expert Physician's Affirmation of Alfred A. Adamo, M.D., dated April 1, 2025, ¶¶ 61-66.

¹⁹ NYSCEF Doc. # 441, Affirmation of Plaintiff's Counsel in Opposition to Dr. Fromer's Motion, dated June 3, 2025.

The action is severed and continued against remaining defendants Dr. Sivakumar and Wyckoff. The caption is amended to read in its entirety as follows:

-----X
Aleida Pena,

PLAINTIFF,

-against-

Mahalingam Sivakumar, M.D., and Wyckoff
Heights Medical Center,

DEFENDANTS.
-----X

This constitutes the Decision and Order of the Court.

Date: July 24, 2025
Brooklyn, New York



Hon. Patria Frias-Colón, J.S.C.

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KINGS COUNTY CLERK
FILED