

Townson v New York City Health & Hosps. Corp.

2025 NY Slip Op 33649(U)

September 25, 2025

Supreme Court, New York County

Docket Number: Index No. 805111/2016

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X INDEX NO. 805111/2016

JOHN TOWNSON,

Plaintiff,

12/04/2024,
12/04/2024,
MOTION DATE 12/04/2024

- v -

MOTION SEQ. NO. 002 003 004

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, MITCHELL WERTLIEB, JEFFREY
GOLDSTEIN,

DECISION + ORDER ON
MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48,
49, 50, 51, 52, 53, 54, 55, 111, 113, 114, 115, 116, 117, 118,

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60,
61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 120, 121,

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89,
90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 119,

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing documents, for the reasons stated hereinbelow, and after oral argument held
on September 18, 2025, defendants' motions, pursuant to CPLR 3212, for summary judgment
dismissing the action are granted.

Background

On December 12, 2014, plaintiff, John Townson, a left-hand dominant 28-year-old male, cut his
right thumb with a utility knife while he was at work, resulting in a deep laceration of the
thumb's dorsal aspect. NYSCEF Doc. No. 1. Thereafter, plaintiff was brought by the New York
Fire Department to defendant New York City Health and Hospitals Corporation's Bellevue
Hospital ("NYCHHC") where an x-ray of his thumb found "No soft tissue defect is seen
radiographically. No significant soft tissue swelling ... Normal alignment." NYSCEF Doc. No.
52. According to the notes of the attending physician:

pt seen and examined by me. I agree with the Resident's
assessment, plan and any procedures but with the following
exceptions/additions, 28 yo male no pmh, electrician with
laceration to thumb, neurovasc intact, no tendon involvment [sic].

on exam vss, no other injuries noted. pt rue thumb lateral aspect without fb. able to fully range. xr negative. irrigated and closed via primary closure. tdap given. fu with hand clinci [sic] or ER< return precatuions [sic].

Id. at 14. After his wound was closed, plaintiff was discharged from Bellevue. Id. At some point, “like 10, 14 days later,” plaintiff’s sutures were removed, but plaintiff does not recall exactly when or by whom. NYSCEF Doc. No. 49 at 60-61.

On January 8, 2015, plaintiff was treated by defendant Jeffrey Goldstein, M.D., an orthopedic surgeon. NYSCEF Doc. No.74. Dr. Goldstein, inter alia, suggested that plaintiff start physical therapy and see a hand specialist, noting that should plaintiff “schedule an appointment with the hand surgeon prior to follow up he’ll continue his care with the hand surgeon.” NYSCEF Doc. Nos. 74, 69.

On February 5, 2015, plaintiff returned to Dr. Goldstein’s office with some improvement to his hand but still had difficulty bringing his thumb to his palm. NYSCEF Doc. No. 74. Again, Dr. Goldstein advised plaintiff to see a hand specialist. Id.

On March 5, 2015, Gerald Wertlieb, M.D., a hand surgeon, treated plaintiff, ordered an MRI, and directed plaintiff to continue physical therapy. NYSCEF Doc. No. 102. During the pendency of this action Dr. Wertlieb passed away and is sued here through Mitchell Wertlieb as executor of the Estate of Dr. Gerald Wertlieb.

On March 14, 2015, at the request of Dr. Wertlieb, plaintiff underwent an MRI of his thumb, which showed a partial tear of the extensor mechanism at the level of the metacarpophalangeal joint but no evidence of a complete rupture. NYSCEF Doc. No. 102.

On March 19, 2025, Dr. Wertlieb again treated plaintiff, during which time he discussed plaintiff’s MRI results, recommended that plaintiff use a Dynasplit and continue physical therapy. NYSCEF Doc. No. 102. According to Dr. Wertlieb’s notes, “surgical intervention was discussed, but certainly the lack of guarantees in the situation was also discussed with him.” Id. Dr. Wertlieb also suggested plaintiff get a second opinion as to surgery. Id.

On March 30, 2015, plaintiff obtained a second opinion from non-party Peyton Hays, M.D., a hand surgeon, who recommended a nonoperative course of treatment similar to the one Dr. Wertlieb had recommended, the use of a Dynasplint combined with physical therapy. NYSCEF Doc. No. 103.

On May 18, 2025, Dr. Wertlieb saw plaintiff again, finding plaintiff’s wound to be “well healed” but also noted “extensor mechanism restriction of his full motion.” NYSCEF Doc. No. 102.

On June 5, 2015, non-party Adam Wilson, M.D., another hand surgeon, treated plaintiff and noted concern “about the integrity of [plaintiff’s] EPL tendon”; discussed potential surgical options in the future, noting that plaintiff “is also aware that surgery earlier rather than later is beneficial for this and we have missed his early repair window at this point”; and ordered an

ultrasound of plaintiff's hand. NYSCEF Doc. No. 104. Dr. Wilson also ordered an ultrasound of plaintiff's hand. Id.

On July 10, 2025, after plaintiff underwent an ultrasound, plaintiff returned to Dr. Wilson, and they discussed plaintiff's operative and nonoperative treatment options. NYSCEF Doc. No. 104.

On August 18, 2015, Dr. Wilson operated on plaintiff's right hand in an effort to "obtain full flexion" in plaintiff's right thumb. NYSCEF Doc. No. 54. Before the surgery, plaintiff was made "aware that this possibly may be the same or worse or better with surgical intervention. He is aware that tenolysis surgery overall is relatively unpredictable." Id.

Procedural History

On March 11, 2016, plaintiff commenced the instant action against NYCHHC, alleging that, because of NYCHHC's negligence, plaintiff sustained multiple injuries, required surgery to repair a torn tendon, and has a permanently disabled hand and thumb. NYSCEF Doc. No. 1.

On August 1, 2017, plaintiff sued Drs. Wertlieb and Goldstein in Suffolk County, Index No. 616147/2017, alleging that the doctors' negligence caused further damage to plaintiff's thumb, leaving him permanently partially disabled. NYSCEF Doc. No. 4.

In a Decision and Order dated February 14, 2019, upon motion of NYCHHC, Justice George J. Silver, consolidated the two actions under the instant index number. NYSCEF Doc. No. 15.

Plaintiff, in his Notice of Claim, alleges that NYCHHC "misdiagnosed the nature and extent of the injury, failed to properly suture the injury, failed to perform the appropriate diagnostic tests, made an incorrect clinical diagnosis." NYSCEF Doc. No. 118. In his Verified Bill of Particulars plaintiff alleges, inter alia, that NYCHHC "failed to administer an MRI" which "would have revealed the nature and extend of the injury"; "should have had a consultation with an orthopedic surgeon or an orthopedic hand surgeon" and that failure to call a specialist "resulted in the delay in rendering proper treatment"; and reserved the right to amend his Bill of Particulars "up to and including the time of trial to allege further departures." NYSCEF Doc. No. 63. Plaintiff has not amended his Bill of Particulars.

On December 4, 2024, NYCHHC moved, pursuant to CPLR 3212, for summary judgment dismissing the action as against it. NYSCEF Doc. No. 44. In support, NYCHHC submits, inter alia, the affirmations of Saul Melman, M.D., a doctor board certified in emergency medicine, and Robert Pae, M.D., a doctor board certified in orthopedic hand surgery. NYSCEF Doc. Nos. 46, 47. Both of NYCHHC's medical experts affirm to a reasonable degree of medical certainty that, inter alia, NYCHHC's actions were in accordance with the accepted standards of medical practice, and that plaintiff's damages were the result of his underlying injury, sustained at work. Id.

According to Dr. Pae, plaintiff's injury was a "'silent' extensor tendon injury ... where the injury is asymptomatic and has an unnoticeable onset," explaining that:

Common signs and symptoms of an extensor tendon injury, which Plaintiff did not exhibit, include difficulty extending the impacted finger, numbness of the finger, loss of blood flow to the finger or a finger that lies straighter than the adjacent fingers. ... the medical staff at Bellevue Hospital properly examined Mr. Townson, testing his passive range of motion, strength and sensation and properly determined that he did not have evidence of an acute injury requiring emergency medical attention.

NYSCEF Doc. No. 47.

In support of its motion, NYCHHC argues, inter alia, that: it acted in accordance with accepted standards of practice; an MRI was not indicated when plaintiff presented to Bellevue; plaintiff “had a clinically silent flexor tendon injury at the time of his initial evaluation”; NYCHHC was not the proximate cause of plaintiff’s injuries, which occurred at plaintiff’s work; and the fact that after plaintiff left NYCHHC’s care, three doctors, including Drs. Wertlieb and Goldstein, did not recommend surgery further evidences that there was no delay in NYCHHC’s actions. NYSCEF Doc. No. 45.

Also on December 4, 2024, Dr. Goldstein moved, pursuant to CPLR 3212, for summary judgment dismissing the action as against him. NYSCEF Doc. No. 56. In support, Dr. Goldstein submits, inter alia, the affirmation of Paul Cagle Jr., M.D., a doctor board certified in orthopedic surgery. NYSCEF Doc. No. 66.

In support of its motion, Dr. Goldstein argues, inter alia, that he: provided plaintiff proper and reasonable orthopedic care; did not fail to order any diagnostic studies during plaintiff’s two visits; properly recommended physical therapy; did not need to schedule a further follow-up appointment as he instructed patient to see a hand specialist, who would be in a better position to see any progress; and was not the proximate cause of plaintiff’s injury. NYSCEF Doc. No. 57.

Also on December 4, 2024, Wertlieb moved, pursuant to CPLR 3212, for summary judgment dismissing the action as against the estate of Dr. Wertlieb. NYSCEF Doc. No. 85. In support, Wertlieb submits, inter alia, the affirmation of Steven Green, M.D., a board-certified orthopedic surgeon with a certificate of added qualification in hand surgery. NYSCEF Doc. No. 87.

In support, Wertlieb argues, inter alia, that: Dr. Wertlieb did not deviate from the accepted standards of care; Dr. Wertlieb’s proposed course of treatment, aggressive physical therapy, was appropriate; plaintiff’s ultimate outcome would not have differed had the surgery been performed earlier; and, in any event, that any alleged departure from the standard of care was not a proximate cause of plaintiff’s injuries. NYSCEF Doc. No. 86.

In an omnibus opposition to all three motions, plaintiff submits the affirmation of a doctor board certified in emergency medicine only (NYSCEF Doc. No. 114) and photographs of plaintiff’s injuries and bandaging (NYSCEF Doc. No. 115).

In opposing NYCHHC's motion, plaintiff argues, inter alia, that: NYCHHC's experts incorrectly stated that plaintiff "was placed in a soft splint," when he was not, and they are inconsistent as to the hospital records (i.e. saying under plaintiff's circumstances no hand surgery consultation would be necessary when the hospital records recommend "fu with hand clinic or ER"); NYCHHC's failure to "utilize appropriate imaging such as ultrasound" or the "omission of hand clinic referral" from the discharge instructions, were examples of substandard treatment; NYCHHC's did not fail to operate but failed to "diagnose, treat and refer"; NYCHHC's expert opinion that treatment would have been the same is belied by Dr. Wilson's notes that "surgery earlier rather than later is beneficial for this"; NYCHHC breached the standard of care by failing to document the procedure used to treat plaintiff's wound, including the "size, depth and characteristics of the laceration, as well as the procedure performed to clear, explore and close the wound"; and, that NYCHHC failed to provide proper pharmacological management so as to perform and document patient's muscular strength and vascular integrity. NYSCEF Doc. No. 113.

In opposing the defendant doctors' motions, plaintiff argues, inter alia, that: Dr. Goldstein did not do adequate testing; that both doctors departed from the standard of care by not "urgently" directing plaintiff to "undergo an MRI to assess the presence of scar tissue"; and that both doctors' experts misapprehend the record. NYSCEF Doc. No. 113.

In reply, NYCHHC argues, inter alia, that plaintiff improperly premises his opposition on new theories of liability (including failure to perform an ultrasound, failure to properly irrigate the wound, failure to provide proper pharmacological management, and failure to provide a splint) which are barred by his Bill of Particulars, which specifically limits NYCHHC's alleged failure to perform an MRI, states that he has "no claim for the administering of any drug or medication," and is silent as to a splint. NYSCEF Doc. No. 117.

NYCHHC also argues in reply that plaintiff: fails to provide any expert affirmation or hospital policy showing that NYCHHC departed any protocol by not performing an ultrasound; mischaracterizes NYCHHC's expert testimony; and fails to state whether the closure performed at Bellevue, documented or not, deviated from the standard of care and, if it did, how any alleged insufficient documentation proximately caused any injury. NYSCEF Doc. No. 117. Finally, NYCHHC notes that plaintiff's expert fails to indicate when surgery was warranted, relying solely on Dr. Wilson's notation that plaintiff "missed the early repair window," and so fails to establish proximate cause. Id.

Also in reply, the defendant doctors argue that plaintiff's expert: is not qualified to opine on the standard of care for orthopedics or orthopedic hand surgery; fails to identify an appropriate timeframe for surgical intervention; fails to establish that any delay affected the outcome; and fails to establish causation. NYSCEF Doc. Nos. 119, 120.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

A defendant in a medical malpractice action establishes prima facie entitlement to summary judgment by showing that in treating the plaintiff, he or she did not depart from good and accepted medical practice, or that any such departure was not a proximate cause of the plaintiff's alleged injuries. Once a defendant meets that burden, the plaintiff must rebut the prima facie showing via medical evidence attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged.

Generally, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants. To defeat summary judgment, the expert's opinion must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.

Anyie B. v Bronx Lebanon Hosp., 128 AD3d 1, 3 (1st Dept 2015) (internal citations and quotation marks omitted).

However, the affidavit must be by a qualified expert who 'profess[es] personal knowledge of the standard of care in the field of . . . medicine [at issue], whether acquired through his practice or studies or in some other way.'" Nguyen v Dorce, 125 AD3d 571, 572 (1st Dept 2015) (pathologist not qualified to render opinion as to whether defendant deviated from the standard of care in the field of emergency medicine); see also Atkins v Beth Abraham Health Servs., 133 AD3d 491 (1st Dept 2015) (osteopath not qualified to render opinion on treatment of a geriatric patient with diabetes and other conditions); Udoye v Westchester-Bronx OB/GYN, P.C., 126 AD3d 653 (1st Dept 2015) (pathologist not qualified to render an opinion as to the standard of care in obstetrics or cardiology); Mustello v Berg, 44 AD3d 1018 (2d Dept 2007) (general surgeon not qualified to render opinion as to gastroenterological treatment), lv denied 10 NY3d 711 (2008).

Bartolacci-Meir v Sassoon, 149 AD3d 567, 571-72 (1st Dept 2017).

An expert's affirmation that sets forth general conclusions, misstatements of evidence, and unsupported assertions, and which fails to address the opinions of defendant's expert, is insufficient to defeat summary judgment. As is one which raises for the first time in opposition to summary judgment a new theory of liability that has not been set forth in the bills of particulars or in the complaint.

Cabrera v Golden, 231 AD3d 149, 155-56 (1st Dept 2024) (internal citations omitted). Further, a “newly asserted claim [is] properly stricken” if “it was not set forth in the notice of claim.” Kisielewska v City of New York, 211 AD3d 637, 637-38 (1st Dept 2022).

Here, NYCHHC has met its burden of showing entitlement to summary judgment through the medical records and its expert affirmations demonstrating that NYCHHC and its staff acted in accordance with accepted medical care, and that any alleged inactions were not the proximate cause of plaintiff’s injuries. That part of plaintiff’s conclusory and speculative expert affirmation addressing the issues in plaintiff’s Bill of Particulars is insufficient to defeat summary judgment.

Plaintiff’s expert fails to address, inter alia, NYCHHC’s expert opinion that plaintiff’s injury was “silent,” i.e. “one where the injury is asymptomatic and has an unnoticeable onset”; that multiple providers, until Dr. Wilson, saw plaintiff after he left NYCHHC’s care and did not recommend surgery; when the “early repair window” for plaintiff’s treatment closed; or how exactly missing that window, or failing to documenting the suturing process, proximately caused plaintiff’s injuries.

Simply put, plaintiff cut his thumb at work, went to Bellevue for treatment, showed no obvious tendon deficits or lack of range of motion, and NYCHHC has demonstrated, and plaintiff has failed to rebut, that based on his presentation NYCHHC treated plaintiff appropriately.

Plaintiff’s opposition based on new theories, including failing to order an ultrasound, are rejected. “The purpose of a bill of particulars being to amplify the pleadings, limit the proof and prevent surprise at trial, responses to a demand for a bill must clearly detail the specific acts of negligence attributed to each defendant.” Miccarelli v Fleiss, 219 AD2d 469, 470 (1st Dept 1995) (internal citation omitted). Here, plaintiff specifically alleged that NYCHHC failed to administer an MRI, and never mentioned the need for an ultrasound until the instant opposition. At oral argument, plaintiff argued that his Bill of Particular’s allegation that NYCHHC failed to “order appropriate diagnostic tests” sufficiently put NYCHHC on notice as to his claims, but that vague allegation neither amplifies the pleadings nor prevents surprise. Plaintiff had ample time to amend his Bill of Particulars to mention specific diagnostic tests, like an ultrasound, and failed to do so.

Thus, NYCHHC’s motion for summary judgment should be granted.

Finally, the motions of Drs. Goldstein and Wertlieb for summary judgment dismissing the action as against them should also be granted. Plaintiff’s medical expert, only board certified in emergency medicine, fails to profess personal knowledge of, and is therefore unqualified to offer an opinion on, the standard of care pertaining to orthopedic medicine. Further, despite conclusory statements made in plaintiff’s counsel’s affirmation in opposition, plaintiff’s expert fails to identify any act or omission by Drs. Goldstein and Wertlieb that would constitute a departure from the standard of care, nor does it present any evidence establishing causation.

This Court has considered plaintiff’s other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

The motions of defendants, New York City Health and Hospitals Corporation, Mitchell Wertlieb as Executor of the Estate of Dr. Gerald Wertlieb, and Jeffrey Goldstein, for summary judgment dismissing the complaint are granted, and the Clerk is hereby directed to dispose of the complaint accordingly.

HON. ARTHUR F. ENGoron

9/25/2025
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<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