

Callen v Baer

2025 NY Slip Op 34003(U)

January 24, 2025

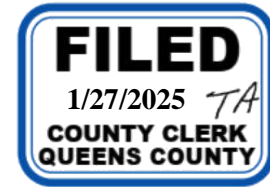
Supreme Court, Queens County

Docket Number: Index No. 715323/2019

Judge: Tracy Catapano-Fox

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Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
MICHELLE CALLEN and WILLIAM CALLEN,

Index No. 715323/2019

Plaintiffs,

Part MDP

Motion Date: January 8, 2025

-against-

Calendar No. 6

Sequence No. 1

ASHER BAER, M.D., MICHAEL SHERMAN, M.D.,
ATIF H. FAROOQI, D.O., SHANNON LANCASTER,
M.D., HANNA CZARKOWSKA, M.D., EBONY
BROMFIELD, P.A., CHRISTOPHER CARLEO, M.D.,
FADI Z. EL-BABA, M.D., VLADIMIR STAMORAN,
M.D., TEHMINA HAQUE, M.D., BRIAN WRIGHT,
M.D., RISHI MEHTA, M.D., and LAMAH
MASSASATI, M.D.,

Defendants.

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The following papers numbered EF-140 to EF-251 read on this motion by defendants FADI Z. EL-BABA, M.D. and TEHMINA HAQUE, M.D. for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF140-EF164
Affirmation in Opposition, Exhibits.....EF250-EF251

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants Fadi Z. El-Baba, M.D. and Tehmina Haque, M.D.'s motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted as to defendant Dr. Haque but denied as to Dr. El-Baba.

Plaintiffs commenced this medical malpractice action arising out of plaintiff Michelle Callen's admission to the emergency room of Stony Brook University Hospital (hereinafter

referred to as “SBUH”) on March 9, 2017, and subsequent admission from March 10, 2017 through March 17, 2017. Plaintiffs filed the Summons and Complaint on September 5, 2019 and issue was joined by moving defendants via the filing of their Verified Answers on November 14, 2019.

Defendants argue they are entitled to summary judgment and present the pleadings, plaintiff Michelle Callen’s medical records, the parties’ deposition testimony, and the expert affirmation of Mark L. Moster, M.D. in support of their motion. Defendants argue Dr. El-Baba and Dr. Haque provided plaintiff Michelle Callen with care and treatment in accordance with accepted standards of care during Dr. El-Baba’s examination at the SBUH Ophthalmological Clinic and Dr. Haque’s care in the emergency room. They further argue none of their acts or omissions were the proximate cause of plaintiff Michelle Callen’s injuries, including blindness.

Defendants present the affirmation of Dr. Mark L. Moster in support of their motion. Dr. Moster affirmed to be a physician licensed in Pennsylvania, New Jersey and Florida who is board certified in Neurology. He affirmed to having over forty years of experience in the field of neuro-ophthalmology and is familiar with the applicable standards of care with regard to the diagnosis and treatment of ischemic optic neuropathy. Dr. Moster reviewed plaintiff Michelle Callen’s medical records, Bills of Particulars, and the parties’ deposition testimony in rendering opinions.

Dr. Moster opined within a reasonable degree of medical certainty that defendants appropriately rendered care to plaintiff Michelle Callen during her emergency room presentment on March 9, 2017 and subsequent presentments to SBUH. He opined to a reasonable degree of medical certainty that Dr. El-Baba acted appropriately by developing a care plan with the on-call ophthalmology resident Dr. Marie Kristine Panganiban, and opined Dr. El-Baba was not required to evaluate plaintiff in person during her evening presentment. Dr. Moster opined in-person evaluations are not always necessary, but depend on the urgency of a patient’s condition. He noted Dr. El-Baba was informed plaintiff Michelle Callen had a history of ulcerative colitis and experienced partial visual loss, but was not informed about bleeding. Dr. Moster noted plaintiff Michelle Callen appropriately had a stroke workup that was negative, and she was medically and visually stable when Dr. El-Baba was consulted by the emergency staff. Dr. Moster opined Dr. El-Baba appropriately relied upon the information provided by the emergency room staff and his consultation with Dr. Panganiban in directing a full examination of plaintiff Michelle Callen in the ophthalmology clinic rather than the emergency room, based upon her stability and presentation with a visual field defect. Dr. Moster noted Dr. El-Baba was not offered information regarding plaintiff Michelle Callen’s flare up of Crohn’s or bloody bowel movements in determining she should report a few hours later to the eye clinic rather than remain in the emergency room for evaluation.

Dr. Moster opined plaintiff Michelle Callen’s ophthalmologic condition in the emergency room did not require immediate in-person attention by Dr. El-Baba, as it was not an emergency.

He noted plaintiff Michelle Callen's MRI and MRA were unremarkable, and her medical and visual condition was stable, so there was no information provided to Dr. El-Baba that demonstrated an emergent condition requiring immediate in-person evaluation. Dr. Moster further opined the four-hour delay in Dr. El-Baba seeing plaintiff Michelle Callen did not exacerbate her vision issues, as her vision remained stable until March 13th, and she testified her vision remained stable and did not worsen until that date. He opined an ischemic optic neuropathy diagnosis was not likely to have been made in the emergency room, as the diagnosis was made after performing a formal visual field test in the ophthalmology clinic which could not have been performed in the emergency room due to lack of tools. He further opined Dr. El-Baba would not have suspected ischemic optic neuropathy before performing an in-person examination of plaintiff Michelle Callen in the clinic, as she was found to be hemodynamically and visually stable in the emergency room.

Dr. Moster opined it was reasonable for Dr. El-Baba to see plaintiff Michelle Callen in the ophthalmology clinic a few hours after presentment in the emergency room based upon the emergency room reports that Ms. Callen was hemodynamically and visually stable, had no abnormal vital signs and he had no knowledge of plaintiff's bleeding. He further opined Dr. El-Baba adhered to the standard of care at all times in treating plaintiff Michelle Callen. Dr. Moster opined Dr. El-Baba had no reason to suspect plaintiff Michelle Callen's vision loss could be tied to her ongoing bleeding until she presented to the clinic, as he was not informed of her bleeding by emergency room staff. He opined Dr. El-Baba appropriately transferred plaintiff Michelle Callen to the emergency room with directions to treat the blood loss, which was in accordance with the standard of care.

Dr. Moster opined within a reasonable degree of medical certainty that Dr. Haque acted appropriately as the on-call ophthalmologist from March 10-13, 2017, and was not required to conduct an in-person evaluation of Michelle Callen during that weekend. He opined a consultant does not need to see a patient every day, and Dr. Haque was made aware when she was on-call that plaintiff Michelle Callen had been diagnosed with ischemic optic neuropathy, and she received treatment, including transfusions, by the medical team. He opined Dr. Haque appropriately relied upon the findings of the on-duty resident, appropriately continued with the resident's recommended plan of care and appropriately made recommendations to the medical team. Dr. Moster noted that during Dr. Haque's care and treatment, plaintiff Michelle Callen's condition was stable, and she had already been diagnosed with ischemic optic neuropathy, and her condition was managed by the internal medicine team. Dr. Moster also noted plaintiff Michelle Callen had another bleed on March 13th, resulting in a complete loss of her vision, after Dr. Haque was no longer on call. He further opined to a reasonable degree of medical certainty that none of plaintiff Michelle Callen's injuries were proximately caused by any malpractice attributable to Dr. El-Baba or Dr. Haque. Dr. Moster opined plaintiff Michelle Callen's vision loss was not directly or indirectly due to any negligence in their treatment, as they acted appropriately and in accordance

with the standard of care in addressing her ischemia by running constant CBCs to monitor her hemoglobin and provide transfusions. He opined that despite defendants' proper care, plaintiff Michelle Callen's vision loss could not be reversed and their treatment only attempted to stabilize her vision. Based upon the evidence presented, defendants argue summary judgment and dismissal of plaintiffs' Complaint is warranted.

Plaintiffs oppose defendants' motion, arguing there are issues of fact in dispute that demonstrate defendants' common departures from accepted medical practice by failing to treat plaintiff Michelle Callen's sudden loss of vision as an ophthalmologic emergency. They rely on the exhibits attached to defendants' motion and submit an expert affirmation in support of their opposition. Plaintiffs' expert affirmed to be a licensed physician in New York, who is board certified in Ophthalmology. The expert reviewed plaintiff Michelle Callen's medical records and defendants' summary motion with expert affirmation in rendering opinions in this case. Plaintiffs' expert noted plaintiff Michelle Callen woke on March 9, 2017 at 9:30pm with a visual change in her left eye, a new and first time occurrence for the 54 year old woman. The expert noted she presented to the SBUH emergency room at 10:42pm, and was treated by various emergency room staff. Plaintiffs' expert noted a discussion took place at 4am on March 10, 2017 between the on-call ophthalmology resident Dr. Marie Panganiban, emergency department staff and defendant Dr. El-Baba. Plaintiffs' expert opined Dr. El-Baba had access to plaintiff Michelle Callen's SBUH emergency room records but did not review them, nor did he perform an in-person examination, and instead relied upon the verbal report from emergency room staff regarding her condition and management plan. The expert noted Dr. Haque was the on-call weekend ophthalmologist during plaintiff Michelle Callen's admission to SBUH.

Plaintiffs' expert opined it is inexcusable and indefensible for Dr. El-Baba not to perform an in-person evaluation of plaintiff Michelle Callen during her presentment to the emergency room on March 9-10, 2017. The expert opined Dr. El-Baba had no reasonable basis to believe plaintiff Michelle Callen was hemodynamically or ophthalmologically stable, as he did not review her medical records and should have considered her visual field defect as suspicious of an ischemic optic neuropathy for which an immediate in-person evaluation and intervention was required. Plaintiffs' expert disagreed that a proper examination could not have been performed in the emergency room for lack of tools, explaining the diagnosis could have been reached by reviewing the medical history and confronting plaintiff Michelle Callen's visual field with fingers and examining her pupils and optic nerve.

Plaintiffs' expert opined after plaintiff Michelle Callen fainted during her eye exam, defendants' management plan was not consistently implemented, permitting uncontrolled hypotension with continued blood loss anemia that posed a great risk of vision loss. The expert opined plaintiff Michelle Callen should have been maintained in a recumbent position while addressing her anemia and hypotension, including transferring her to the clinic by ambulance to

maintain recumbency. Plaintiffs' expert opined plaintiff Michelle Callen's rectal bleeding due to hemorrhoids should have been discovered and promptly corrected. The expert further opined defendants' departures in failing to implement the above was the proximate cause of plaintiff Michelle Callen's bilateral blindness with no light perception. The expert further opined there is no acceptable explanation why defendants characterized plaintiff Michelle Callen as stable without an in-person ophthalmological exam, and no efforts were made to salvage or restore some level of vision on March 10th by ensuring proper blood values and pressures were continuously maintained.

Plaintiffs' expert disagreed with Dr. Moster's opinions as to liability and causation, arguing the standard of care required an ophthalmologist to consult immediately and in-person with a patient complaining of sudden visual loss. Plaintiffs' expert further opined it was a substantial departure from accepted medical practice for Dr. El-Baba not to review plaintiff Michelle Callen's emergency room records before determining she did not require an in-person ophthalmological evaluation and referring her to the clinic. The expert opined Dr. El-Baba could have easily and timely diagnosed plaintiff Michelle Callen with ischemic optic neuropathy secondary to hemorrhage in the emergency room with a slit-lamp, ophthalmoscopes and dilating drops available to ophthalmologists. Plaintiffs' expert further opined a timely diagnosis of ischemic optic neuropathy secondary to blood loss anemia/hypotension in the emergency room would have resulted in a timely formulation of a management plan that included close monitoring of blood pressure, transfusion, restoring hemodynamic stability, and keeping plaintiff Michelle Callen in a recumbent position to ensure appropriate perfusion of the optic nerves, as well as investigation and arresting the source of rectal bleeding.

Plaintiffs' expert opined Dr. Haque departed from accepted medical practice in failing to correlate the consequences of the recurring rectal bleeding episodes with the transfusion efforts, and should have prioritized rectal bleeding in plaintiff Michelle Callen's overall scheme of care. The expert opined Dr. Haque failed to appreciate the detrimental effect that the lack of consistent optic nerve perfusion would have on plaintiff Michelle Callen's already compromised ophthalmological condition and failed to appropriately communicate the gravity of the situation to the other medical care providers. Plaintiffs' expert opined the delay in diagnosis and failure to appropriately treat plaintiff Michelle Callen was so long that it caused severe loss of vision that greatly impacts her quality of life. The expert disagreed with Dr. Moster's opinion that infarction of the optic nerves rendered restoration or salvage of plaintiff Michelle Callen's sight impossible, as the eye clinic records shows she had an unremarkable optic nerve prior to fainting. The expert further opined plaintiff Michelle Callen's condition was in early stages at her presentment to the clinic, and a more aggressive and appropriate care after fainting still carried a reasonable likelihood of salvage of some light perception. Based upon the above, plaintiffs argue summary judgment is not warranted.

Pursuant to CPLR §3212, a motion for summary judgment "shall be granted if, upon all

the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (*Smith v. City of New York*, 210 A.D.3d 53, 68 [2d Dept. 2022].) 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 demonstrate the absence of any material issues of fact. (*Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 [2d Dept. 2023].) If there is any doubt as to the existence of a triable issue of fact, the motion must be denied. (*Id.*) The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers. (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *see also Antonyuk v. Brightwater Towers Condo Homeowners’ Assn., Inc.*, 147 A.D.3d 711, 712 [2d Dept. 2017].) In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party. (*Matter of New York City Asbestos Litig.*, 33 N.Y.3d 20, 25 [2019].) Additionally, the court’s function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. (*Reyes v. S. Nicolina & Sons Realty Corp.*, 212 A.D.3d 851, 852-853 [2d Dept. 2023].) Once the moving party has demonstrated a prima facie entitlement to summary judgment, the burden then shifts to the non-moving party to demonstrate the existence of material issues of fact. (*See generally Coscia v. Mosca*, 203 A.D.3d 695 [2d Dept. 2022].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff’s claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].) In general, a hospital may be vicariously liable for the negligence or malpractice of its employees acting with the scope of employment under the doctrine of *respondeat superior*. (*Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948, 949 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment through their production of the documentary evidence and affirmation of Dr. Moster that they rendered care and treatment within the standard of care and did not proximately cause plaintiff Michelle Callen’s injuries. (*See Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 A.D.3d 1093 [2d Dept. 2017].) They demonstrated Dr. El-Baba properly relied upon emergency room staff’s examination and analysis of plaintiff Michelle Callen’s condition, and Dr. Moster demonstrated he was not required to make

an in-person examination hours prior to her admittance to the eye clinic. Defendants further demonstrate through Dr. Moster's affirmation that they rendered appropriate care and treatment for plaintiff Michelle Callen in the emergency room, as she testified her eye condition was stable until the morning of March 13th, and Dr. El-Baba was not informed of plaintiff's bleeding when developing a differential diagnosis of her condition. They further demonstrated Dr. Haque appropriately and properly treated plaintiff Michelle Callen for the limited time she was on duty during that weekend of plaintiff's admission, and properly relied upon the medical team's evaluation and treatment plan. Defendants further demonstrated through the documentary evidence and Dr. Moster's affirmation that none of their actions or inactions proximately caused plaintiffs' injuries, including blindness.

Plaintiffs failed to raise triable issues of material fact as to Dr. Haque, as they failed to sufficiently rebut defendants' prima facie case. (*See Nasima v. Dolan*, 149 A.D.3d 759 [2d Dept. 2017].) Plaintiffs' expert affirmation was vague and conclusory with regard to departures by Dr. Haque, and failed to rebut the deposition testimony, medical records and Dr. Moster's opinions. Plaintiffs' expert opinion that Dr. Haque's departures proximately caused plaintiff Michelle Callen's worsened condition and blindness is vague and conclusory, and unsupported by the record. (*See Lowell v. Flom*, 195 A.D.3d 801, 803 [2d Dept. 2021][“In order not to be considered speculative or conclusory, expert 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.’”].) Plaintiffs' main argument is that Dr. Haque failed to appreciate the severity of plaintiff Michelle Callen's rectal bleeding and failed to communicate the severity to other medical providers. However, plaintiffs' expert failed to articulate the standard of care, failed to demonstrate what, if anything, Dr. Haque should have done in providing care and treatment to plaintiff Michelle Callen, and how Dr. Haque's actions or inactions proximately caused plaintiff's injuries. Therefore, there are no triable issues of fact with regard to Dr. Haque.

However, plaintiffs raised a triable issue of material fact with regard to Dr. El-Baba, specifically whether Dr. El-Baba departed from the standard of medical care by failing to review plaintiff Michelle Callen's emergency room records and failing to perform an in-person examination before determining she should report to the eye clinic on the morning of March 10, 2017, and whether the departures were a proximate cause of plaintiffs' injuries. (*See generally M.C. v. Huntington Hosp.*, 175 A.D.3d 578 [2d Dept. 2019].) Plaintiffs' expert opined with specificity as to the standard of care for ophthalmologists in performing in-person examinations emergently for patients with vision loss such as plaintiff Michelle Callen. The expert also refuted defendants' expert opinions with regard to the need to perform the in-person examination and review plaintiff Michelle Callen's emergency room records before rendering a differential diagnosis. The expert further demonstrated issues of fact as to whether Dr. El-Baba's departures proximately caused plaintiff Michelle Callen's injuries, as the expert opined the delays in examining and treating plaintiffs' blood loss and rectal condition resulted in injuries, including

plaintiff Michelle Callen's vision loss.

Accordingly, defendants Fadi Z. El-Baba, M.D. and Tehmina Haque, M.D.'s motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is granted as to defendant Dr. Haque but denied as to Dr. El-Baba. It is hereby

ORDERED that plaintiff's Complaint is dismissed as to defendant Tehmina Haque, M.D., and it is further

ORDERED that the remaining parties shall appear on Wednesday, March 5, 2025 at 9:30am in Courtroom 48 for a pretrial conference.

This constitutes the decision and Order of the Court.

Dated: January 24, 2025



Hon. Tracy Catapano-Fox, J.S.C.

