Johnson v Schechter
2025 NY Slip Op 34018(U)
May 1, 2025
Supreme Court, Queens County
Docket Number: Index No. 709036/2019
Judge: Tracy Catapano-Fox
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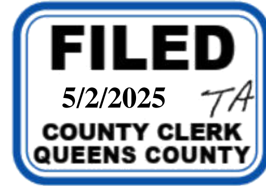

Short Form Order
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
---X
ANGELA JOHNSON,

Plaintiff,

-against-

DAVID Z. SCHECHTER, D.P.M.; NEW YORK PRESBYTERIAN HOSPITAL QUEENS; VISITING NURSE SERVICE OF NEW YORK; ROYAL CARE CERTIFIED HOME CARE,

Defendants.
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Index No. 709036/2019
Part MDP
Motion Date: March 26, 2025

Calendar No. 12
Sequence No. 5

The following papers numbered EF-125 through EF-182 read on this motion by defendant NEW YORK-PRESBYTERIAN/QUEENS s/h/a "NEW YORK PRESBYTERIAN HOSPITAL-QUEENS" for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits..................	EF125-EF143
Affirmation in Opposition, Exhibits........................	EF164-EF174, EF177-EF178
Reply Affirmation, Exhibits................................	EF180, EF182

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

Defendant New York-Presbyterian/Queens s/h/a "New York Presbyterian Hospital-Queens" (hereinafter referred to as "NYPQ")'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Plaintiff commenced this action against defendant NYPQ for podiatric care rendered during plaintiff's admission from April 6-9, 2017. Plaintiff filed the Summons and Complaint on May 23, 2019 and issue was joined by defendant NYPQ on August 1, 2019.

Defendant NYPQ argues summary judgment is warranted, as it argues plaintiff was appropriately evaluated and treated and did not have clinical signs or symptoms of infection during

her admission. Defendant presents the pleadings, medical records, the parties' deposition testimony and affirmation of Dr. Rick J. Delmonte, DPM, FACFAS in support of its motion. Defendant NYPQ argues its care and treatment of plaintiff's right heel ulcer during admission was within good and accepted medical standards, and none of its actions or inactions proximately caused plaintiff's injuries. It argues it appropriately evaluated plaintiff's right heel ulcer and determined it was not infected and superficial, and she was already on broad spectrum antibiotics for leukocytosis. Defendant NYPQ further argues it is not vicariously liable for Dr. Shechter's care and treatment of plaintiff, as Dr. Shechter was her private podiatrist with privileges at NYPQ.

Defendant NYPQ presents the affirmation of Dr. Delmonte in support of its motion. Dr. Delmonte affirmed to be licensed to practice medicine in New York who is board certified by the American Board of Foot and Ankle Surgery. He affirmed to be fully familiar with the standards of care with respect to podiatric evaluation, care and treatment in 2017 and presently. Dr. Delmonte rendered opinions based upon his education, training and experience, and a review of the case materials. Dr. Delmonte opined plaintiff did not have signs or symptoms of a heel ulcer infection during her April 6-9, 2017 admission at NYPQ requiring further work-up or treatment. He further opined to a reasonable degree of medical certainty that NYPQ's care and treatment of plaintiff was within good and accepted standards of medical treatment and care.

Dr. Delmonte opined to a reasonable degree of medical certainty that plaintiff's heel ulcer was appropriately determined to be superficial and not infected during her admission at NYPQ from April 6-9, 2017. He opined NYPQ staff appropriately checked plaintiff's vital signs and performed lab results that showed leukocytosis and elevated inflammatory markers. Dr. Delmonte opined Dr. Cohen appropriately examined plaintiff and determined her right heel ulcer was superficial at the plantar heel with a granular fibrotic base and hyperkeratotic borders. He further opined Dr. Cohen appropriately found plaintiff had a superficial, non-infected, non-healing right heel ulceration that did not probe to the bone and had no erythema or other sign of infection. Dr. Delmonte opined Dr. Cohen properly determined there was no indication that plaintiff's lab findings of leukocytosis and elevated inflammatory markers were related to the foot ulcer. He opined there was no reason to take a wound culture since there was no purulence expressed then and Dr. Cohen appropriately rendered local wound care with wet-to-dry gauze dressing and appropriately ordered Santyl for the dressing change the next day.

Dr. Delmonte opined NYPQ's hospitalist service Dr. Zein and Dr. Rakhvalchuk evaluated plaintiff's heel ulcer in the morning of April 7, 2017, and both determined the heel ulcer was a superficial wound with no erythema or pus, and did not appear to be infected. He opined Dr. Boss of the podiatry team also evaluated plaintiff's heel ulcer on April 8, 2017 and agreed the right heel ulcer was a superficial ulceration to the plantar heel with a granular fibrotic base and hyperkeratotic borders with no undermining, fluctuance, malodor, drainage or tenderness to palpation. Dr. Delmonte opined NYPQ doctors found the ulcer did not probe to the bone and there was no

erythema, and a central darkened eschar that was non-blanchable is not a sign or symptom of infection. Dr. Delmonte agreed with Dr. Boss and the podiatry team and opined it was not likely plaintiff's leukocytosis and elevated inflammatory markers were related to her heel ulcer and no acute podiatric surgical intervention was indicated, and recommendations for off-loading the heel were appropriate. Dr. Delmonte noted Dr. Ahmed of Medicine examined plaintiff's right heel ulcer on April 8, 2017 and found it to be superficial, well-demarcated, with no erythema or pus and did not appear to be infected.

Dr. Delmonte opined there was no reason to consult infectious disease in the absence of any sign or symptom of infection or render treatment other than local wound care. He opined there was no indication for podiatric surgical intervention in the absence of signs or symptoms of infection, and noted plaintiff was already on broad-spectrum antibiotics for leukocytosis. He noted an x-ray of the foot was negative for osteomyelitis and there was no indication to perform an MRI on plaintiff's foot because the heel ulcer did not probe to the bone and there were no signs of infection. Dr. Delmonte opined since the wound did not probe to the bone, a biopsy was not indicated, and a culture was not indicated because there was no drainage or purulence expressed then. He opined there was no reason for NYPQ staff to follow up for Dr. Shechter's culture results as there is no indication the staff knew about the culture. He further opined plaintiff was appropriately discharged from NYPQ on April 9, 2017, noting her white blood count had down-trended to normal values and she was appropriately instructed to follow up with Dr. Shechter.

Dr. Delmonte opined plaintiff was appropriately recommended to have non-invasive vascular studies for the lower extremity and to follow up with vascular surgery as an outpatient. He opined plaintiff's treatment in May 2017 was not any different than it would have been had infection of the right heel ulcer been diagnosed during her April admission, and any purported delay in diagnosis and treatment did not result in a different treatment or outcome. Dr. Delmonte opined NYPQ's podiatric treatment and care during plaintiff's admission from April 6-9, 2017 was appropriate and within good and accepted medical standards of treatment and care at all times, and there was no reason for NYPQ staff to suspect an infection of her heel ulcer. Based upon the above, defendant NYPQ argues its care and treatment of plaintiff was appropriate and within the standard of care and none of its actions or inactions proximately caused plaintiff's injuries.

Plaintiff opposed defendant's motion, arguing there are issues of fact whether NYPQ staff departed from the standard of care in failing to diagnose and treat plaintiff's heel infection, and whether its departures proximately caused her injuries. Plaintiff presents the medical records, photographs, deposition testimony and an expert affirmation in support of her opposition. Plaintiff argues there are conflicting medical expert opinions that warrant denial of the motion.

Plaintiff presents an affirmation from a physician licensed in Pennsylvania in support of the opposition. Plaintiff's expert affirmed to be a board certified podiatrist and reviewed the

parties' deposition testimony and medical records in rendering opinions. Plaintiff's expert opined defendant NYPQ staff was aware plaintiff was on immunosuppressants and should have been vigilant for an infection without the usual signs and symptoms. The expert opined there was no purulence of plaintiff's foot because she had a severely high blood sugar on admission and was a kidney transplant patient who was on immunosuppressants, and the cardinal signs of infection are not always present in these patients. Plaintiff's expert opined plaintiff had redness and increased warmth, a foul smell and elevated white blood cell count of 13 on admission which should have been concerning for a serious infection, and defendant NYPQ's failure to appreciate this was a departure from good and accepted podiatric practice that caused plaintiff's injuries.

Plaintiff's expert opined plaintiff's high white cell count was trending up on April 6, 2017 and was a clear and present sign of an infection that was growing. The expert opined defendant's failure to heed this sign and diagnose the cause of the infection was a departure from good and accepted podiatric practice which caused plaintiff's injuries. The expert disagreed with Dr. Delmonte that plaintiff's foot was infected, and opined her April 6th physical exam showed an ulcerated dry right heel wound, mild surrounding erythema and mildly elevated inflammatory markers. Plaintiff's expert noted the emergency room records indicated plaintiff's prior labial abscess was no longer a concern and the separate right labia inflammation was reduced. Plaintiff's expert opined the only possible infection source was plaintiff's heel, and NYPQ's failure to diagnose and treat her heel was a departure from good and accepted podiatric practice that caused plaintiff's injuries.

Plaintiff's expert opined NYPQ departed from good and accepted podiatric practice by relying upon the X-ray rather than performing a bone scan or MRI, and the emergency room staff's failure to rule out cellulitis was also a departure from good and accepted podiatric practice. The expert opined defendant's expert's claim that plaintiff's wound was superficial ignores the medical records that noted eschar, which was an important sign of infection because it is a scab which signifies deep tissue destruction. Plaintiff's expert opined defendant NYPQ staff departed from good and accepted podiatric practice by agreeing with each other that the heel ulcer was superficial and failing to work up plaintiff and discover the source of her obvious infection. The expert opined defendant's failure to perform a further workup proximately caused plaintiff to sustain an out of control infection, hospitalization, surgery and loss of half her heel.

Plaintiff's expert opined NYPQ staff should have ordered advanced imaging such as a CT scan, MRI or bone scan, and should have taken a wound culture. The expert opined the hospital fellows who examined plaintiff on April 7, 2017 were to follow up on blood cultures and rule out osteomyelitis but failed to do so and plaintiff was discharged on April 8th on an incorrect broad-spectrum antibiotic and referred to Visiting Nurse Services. Plaintiff's expert opined NYPQ placed plaintiff on doxyxicline at admission which did not cover the vancomycin resistant enterococcus (VRE) and allowed the organism to continue to cause and grow plaintiff's heel

infection, and NYPQ put her on cefepime for too short of a time to cover the Citrobacter. The expert opined the microbiology report from co-defendant Dr. Shechter's office showed plaintiff's heel infection would have responded to Ampicillin, amoxycillin/clauvulanac, Gentamicin and over a dozen other targeted antibiotics. Plaintiff's expert opined if defendant had prescribed the correct antibiotics in April, the infection would not have worsened and subsequent surgeries would not have been needed, and she would not have lost half of her heel. The expert opined plaintiff's infection would have resolved without three surgeries or two weeks in the hospital, and defendant's claim that the traumatic treatment would have happened anyway is inconsistent with the facts. Plaintiff's expert noted plaintiff testified that her foot hurts and she has trouble walking, and these injuries were caused by NYPQ's malpractice. Based upon the above, plaintiff argues there are issues of fact that warrant denial of defendant's motion.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

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].)

Defendant NYPQ established a prima facie entitlement to summary judgment based upon the pleadings, the parties' deposition testimony, medical records and Dr. Delmonte's expert affirmation. (*See Longtemps v. Oliva*, 110 A.D.3d 1316 [3d Dept. 2016].) Defendant demonstrated

NYPQ staff provided appropriate care and treatment within the applicable standard of care to plaintiff during her admission from April 6-9, 2017, and none of its actions or inactions proximately caused her injuries. Defendant demonstrated through Dr. Delmonte's affirmation that plaintiff did not have an infected heel ulcer during admission, as she lacked signs and symptoms consistent with an infection. Defendant also demonstrated through the medical records and Dr. Delmonte's affirmation that NYPQ staff properly evaluated her, ordered an X-ray that was negative for osteomyelitis and treated her heel ulcer with wound dress, ointment and antibiotics. Dr. Delmonte also demonstrated there was no indication to perform an MRI on plaintiff's foot because the heel ulcer did not probe to the bone and there were no signs of infection, such as purulence. Dr. Delmonte opined plaintiff did not have signs or symptoms of a heel ulcer infection during her April 6-9, 2017 admission at NYPQ requiring further work-up or treatment, and she was appropriately referred for vascular consults and to Dr. Shachter for further care and treatment upon discharge. Defendant also demonstrated none of its actions or inactions proximately caused plaintiff's injuries, as she would have proceeded with the same surgeries and treatment had an infection been diagnosed in April 2017 instead of May 2017. Based upon the above, defendant NYPQ demonstrated prima facie its care and treatment of plaintiff was within good and accepted standards of medical treatment and care, and none of its actions or inactions proximately caused her injuries.

Plaintiff failed to raise a triable issue of fact in dispute. Plaintiff's expert affirmation was insufficient to raise a triable issue of fact, as the opinions were vague and conclusory, and unsupported by the medical record. (*See Lowell v. Flom,* 195 A.D.3d 801 [2d Dept. 2021].) Plaintiff's expert failed to clearly state a familiarity with the applicable standards of care, and failed to articulate how NYPQ departed from the standard of care and proximately caused plaintiff's injuries. Plaintiff's expert opined as to numerous departures, but failed to articulate the applicable standard of care and how the departures violated the standard of care and proximately caused plaintiff's subsequent injuries and surgeries. The expert's claim that defendant staff should have been vigilant for an infection without the usual signs and symptoms of an infection is conclusory and unsupported by the standard of care. (*See Micciola v. Sacchi*, 36 A.D.3d 869 [2d Dept. 2007].) Plaintiff's expert opinions with regard to indicia that warranted an MRI or bone scan are unsupported by the record or standard of care. Plaintiff's expert opinions with regard to how NYPQ staff's alleged departures were a proximate cause of her injuries were based upon hindsight reasoning, were vague and conclusory and insufficient to raise an issue of fact. (*See Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 A.D.3d 1093 [2d Dept. 2017].)

Accordingly, defendant New York-Presbyterian/Queens s/h/a "New York Presbyterian Hospital-Queens"'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and it is

ORDERED that plaintiff's Complaint is dismissed as to defendant New York-

Presbyterian/Queens s/h/a "New York Presbyterian Hospital-Queens".

This constitutes the decision and Order of the Court.

Dated: May 1, 2025

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