At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of November 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MARAT ZHVANETSKIY

Plaintiff,

-against-

YEVGENIY SOROKIN, D.O. and NY UNITED HEALTHCARE, LTD,

Defendants.

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DECISION & ORDER

Index No. 516574/2021
Mo. Seq. 4, 5, & 6

HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 4: 79 – 81, 82 – 93, 111 – 118, 122 – 128
Seq. 5: 94 – 96, 97 – 107, 111 – 118, 136
Seq. 6: 110 – 112, 113 – 118, 129 – 135, 137, 138 – 139

Defendant Yevgeniy Sorokin, D.O. ("Dr. Sorokin") moves for an Order, pursuant to CPLR 3212, granting summary judgment in his favor, dismissing Plaintiff's Complaint against him, and amending the caption accordingly (Seq. No 4).

Defendant NY United Healthcare Ltd. ("NY United Healthcare") separately moves for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff's Complaint against them (Seq. No. 5).

Plaintiff opposes both motions and cross moves for an Order, pursuant to CPLR 3126, sanctioning both defendants for failing to maintain, preserve, and exchange the metadata and audit trail of electronic medical records (Seq. No. 6).

Defendants oppose the cross motion. Defendant NY United Healthcare's additional letter and exhibit, filed as an improper sur-reply after the motions and cross motion were fully briefed and argued, is not considered herein.

Plaintiff commenced this action on July 6, 2021, asserting claims of medical malpractice and lack of informed consent in connection with lower back pain treatment.

Plaintiff was 87 years old at the time of the events at issue. He first presented to Dr. Sorokin, a physician specializing in physical rehabilitation and pain management, at the office of NY United Healthcare[1] on May 29, 2019. Plaintiff had complaints of chronic lower back pain radiating to his legs. Dr. Sorokin reviewed a prior lumbar spine MRI from June 28, 2018, and assessed Plaintiff with lumbar radiculopathy and chronic bilateral lower back pain with bilateral sciatica and lumbar discogenic pain syndrome. Dr. Sorokin referred him for electromyography and nerve conduction study (EMG/NCV) and prescribed a course of gabapentin for pain management.

Plaintiff underwent the EMG/NCV at non-party NYU Langone Health on June 4, 2019. The results were consistent with bilateral lumbar radiculopathy.

On June 17, 2019, Plaintiff returned to Dr. Sorokin and reported increased back pain, weakness in his legs, and difficulty walking. According to Dr. Sorokin's notes, he recommended Plaintiff go to an emergency room and undergo an MRI as soon as possible, but Plaintiff was "apprehensive" to go to the emergency room and requested a steroid injection. Plaintiff disputed this account and testified that Dr. Sorokin recommended the injection and did not advise him to go to the emergency room.

Dr. Sorokin gave Plaintiff a lumbar epidural steroid injection between L4 and L5. Following the injection, Dr. Sorokin documented that Plaintiff's pain and foot strength had improved, but he could not walk, and he gave Plaintiff a wheelchair to get home.

[1] Based on the record, NY United Healthcare Ltd. was a medical office in Kings County, not affiliated with the United Healthcare insurance company.

The following day, June 18, 2019, Dr. Sorokin followed up with Plaintiff by telephone and advised him to go to the emergency room because his leg weakness had not improved. Plaintiff presented to non-party Maimonides Hospital at 1:51 p.m., and an MRI of the lumbar and thoracic spine was performed. He was ultimately diagnosed with a right T11 arteriovenous fistula and arteriovenous malformation (AVM), and he underwent two surgical interventions, an embolization on June 19, 2019 and a laminectomy on July 31, 2019.

Plaintiff alleges that Dr. Sorokin departed from the standard of care by failing to recognize his signs and symptoms of neurologic dysfunction, failing to refer him to a hospital for emergent imaging, and negligently administering a contraindicated steroid injection. Plaintiff further alleges that the steroid injection proximately caused his AVM to rupture, and both the injection and delay in diagnosis contributed to his sequalae of injuries from the ruptured AVM and fistula, including his continued use of a wheelchair and bladder and bowel incontinence.

Plaintiff's claims against NY United Healthcare are based in vicarious liability for Dr. Sorokin's acts and omissions. There are no direct claims asserted against the facility or its staff. Addressing the motion of NY United Healthcare (Seq. No. 5), the movants argue that Dr. Sorokin was an independent contractor of the facility, not an employee, and they are not liable for his alleged acts and omissions under *respondeat superior* or any other theory of vicarious liability.

"As a general rule, a principal is not liable for the wrongful acts of an independent contractor it retains" (*Sampson v Contillo,* 55 AD3d 588, 590 [2d Dept 2008]). "[V]icarious liability for medical malpractice generally turns . . . on agency or control in fact" (*Hill v St. Clare's Hosp.,* 67 NY2d 72, 79-80 [1986]). In the absence of an employee/employer relationship, courts have recognized an "apparent or ostensible agency" exception where a patient seeks emergency treatment from a hospital or clinic, "not from a particular physician of the patient's

choosing" (*Valerio v Liberty Behavioral Mgt. Corp.,* 188 AD3d 948, 949-950 [2d Dept 2020], quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2d Dept 2014]; *see also Mduba v Benedictine Hosp.,* 52 AD2d 450 [3d Dept 1976]).

In his deposition, Dr. Sorokin testified that he was a pain management physician working as an independent contractor within the NY United Healthcare office, not an employee of NY United Healthcare (Dr. Sorokin deposition tr at 31-32). He was the only physician at the facility who ever treated Plaintiff. Additionally, Plaintiff testified that he sought care from Dr. Sorokin through a magazine advertisement. He was not familiar with the name "New York United Healthcare, Ltd." and could not recall if it had appeared in the advertisement. (Plaintiff deposition tr at 193.)

The movants have established prima facie that Dr. Sorokin was an independent contractor, not an employee of NY United Healthcare. Therefore, there is "agency or control in fact" basis for holding the corporation vicariously liable for his alleged malpractice. Further, they have established prima facie that Plaintiff sought treatment from Dr. Sorokin as a private physician of his own choosing, so the *Mduba* or apparent agency exception is not applicable.

Although Plaintiff opposes both motions and refers to alleged departures from the standard of care by "Dr. Sorokin at NY United Healthcare" and "Defendants" collectively, Plaintiff does not raise any genuine issues of fact as to Dr. Sorokin's status as an independent contractor, and they do not offer any argument on the vicarious liability issue.

NY United Healthcare's motion for summary judgment is therefore **granted** as a matter of law, and Plaintiff's Complaint against NY United Healthcare is dismissed in its entirety.

Turning to Dr. Sorokin's motion (Seq. No. 4), the Court applies the burden shifting process for evaluating a summary judgment motion in a medical malpractice action, as summarized by the Second Department: "[A] defendant must make a prima facie showing either

that there was no departure from good and accepted medical practice, or that the plaintiff was not injured by any such departure" (*Rosenzweig v Hadpawat,* 229 AD3d 650, 652 [2d Dept 2024]). "In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's complaint and bill of particulars" (*Martinez v Orange Regional Med. Ctr.,* 203 AD3d 910, 912 [2d Dept 2022]). "Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden. Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." (*Rosenzweig* at 652 [2d Dept 2024] [internal quotation marks and citations omitted].) However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Barnaman v Bishop Hucles Episcopal Nursing Home,* 213 AD3d 896, 898-899 [2d Dept 2023]).

In support of his motion, Dr. Sorokin submits an expert affirmation from Chrstopher Gharibo, M.D. ("Dr. Gharibo"), a licensed physician board certified in pain medicine.

As noted by Plaintiff in opposition, Dr. Gharibo's expert affirmation does not strictly conform with the requirements of CPLR 2106. The statute provides that the affirmation must "substantially" include the language: "I affirm [on this date] under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law." In contrast, Dr. Gharibo's affirmation merely begins with "Christopher Gharibo, M.D., affirms the following."

CPLR 2106 previously applied only to attorneys and physicians but now allows *any person* to make such affirmation "with the same force and effect as an affidavit." Prior to the 2023 amendment, there was no exact language imposed on in-state physicians, only that such

statements were "subscribed and affirmed by him to be true under the penalties of perjury." While the 2023 amendment made the requirements for an affirmation significantly less restrictive, it retained the "in substantially the following form" language for all affiants, to emphasize the legal weight of the affirmation and the consequences of perjury to the person making the statements. Since that amendment, there is no clear authority from appellate courts as to what constitutes "substantively in the form" and whether the defect is fatal.

In reply, the defendant did not cure the affirmation but argued that the mistake should be disregarded as non-prejudicial to the plaintiff's substantial rights (*see* CPLR 2001; *Williams v Light,* 196 AD3d 668, 669-670 [2d Dept 2021]). In the interest of determining the motion on its merits, the Court shall consider the affirmation despite its technical deficiencies.

In his affirmation, Dr. Gharibo opines that Dr. Sorokin complied with the standard of care at all times in treating Plaintiff. First, he opines that Dr. Sorokin properly assessed Plaintiff on his initial visit on May 29, 2019, and appropriately relied on Plaintiff's June 2018 MRI which showed advanced degenerative spine disease. He opines that the standard of care did not require a neurosurgery referral or a new MRI at that time, as the study he reviewed was taken within the previous year.

On the June 17 visit, Dr. Gharibo opines that there was "no reasonable way for [Dr. Sorokin] to know" about the patient's AVM. Dr. Gharibo further opines that the lumbar steroid injection Dr. Sorokin administered was appropriate to "improve pain and function" in an elderly patient with severe stenosis and spondylolisthesis. He opines that the alternative treatment option of physical therapy was unlikely to be effective, opiates and anti-nerve medications were risky for an elderly patient living alone, and surgery was a "poor option for this patient" due to his advanced age.

He also states that "it was a good idea to ask the patient to go to the emergency room" because of his pain, but that "a physician cannot simply call 911 for a patient against their will when the patient is refusing to go to the hospital."

On the issue of proximate causation, Dr. Gharibo notes that the patient's AVM was discovered in the lower thoracic spine, higher than the L4-L5 space where he was given the steroid injection. He therefore opines that the injection performed by Dr. Sorokin could not have caused the patient's AVM to bleed or rupture. He opines a "spontaneous" bleed from the AVM was "the source of the patient's physical complaints" including weakness, numbness, difficulty walking, and loss of bowel or bladder control.

The movant's expert opinions are sufficient to establish that Dr. Sorokin complied with the standard of care on Plaintiff's first office visit on May 29, and that the steroid injection on June 17 was appropriate and not contraindicated.

On the issue of proximate causation, the expert establishes prima facie that the steroid injection by Dr. Sorokin did not proximately cause Plaintiff's injuries. Specifically, the movant's expert opines that Plaintiff's AVM in the thoracic spinal region was not caused by the lumbar spine injection. He also opines that Plaintiff's weakness and neurologic symptoms were caused by the AVM, and that this condition could not have been foreseen or diagnosed by Dr. Sorokin based on his symptoms on June 17. Therefore, the movant made a prima facie showing as to the claims regarding the injection, and he established that Dr. Sorokin's performance of the injection did not proximately cause Plaintiff's ruptured AVM.

Notwithstanding, the movant did not meet their prima facie burden with respect to Plaintiff's claim that Dr. Sorokin failed to refer him to the hospital/emergency room for emergent testing on June 17. The expert states generally that it was "good idea to ask the patient to go to the emergency room," and he relies on assumptions that the patient "refused" to go to

the hospital against Dr. Sorokin's recommendations on June 17. He bases his opinion on the testimony of Dr. Sorokin that he "offered to call an ambulance [and] the patient did not want it." However, Plaintiff testified in his deposition that Dr. Sorokin did not recommend going to the hospital, and he only recalled being given a wheelchair and transportation home. Dr. Sorokin recorded in his chart that he "stressed the need for a new MRI" but the patient was "apprehensive about proceeding to the hospital immediately," but as Plaintiff argues in opposition, that note was not electronically signed until the evening of June 18 (after the patient had been admitted to Maimonides) and it is unknown when the note was created.

Because there are discrepancies in the record as to whether Dr. Sorokin recommended a hospital transfer and whether Plaintiff "refused" to go against medical advice, the expert's opinions on that issue are conclusory, speculative, and not supported by the evidence. This question remains an issue of fact for the jury.

Furthermore, the movant's expert does not establish prima facie that the alleged failure to refer Plaintiff to the hospital on that date was not a proximate cause or substantial factor in Plaintiff's claimed injuries. The expert states in a conclusory manner that all Plaintiff's injuries were caused by his "unrelated bleeding thoracic AVM," but he does not address any of the allegations that the failure to refer him to the hospital for an MRI on June 17 led to a delay in diagnosis and treatment. Thus, the burden shifts to Plaintiff to raise issues of fact only as to the May 29 visit and the performance of the steroid injection on June 17, only (*see Stukas v Streiter,* 83 AD3d 18, 30 [2d Dept 2011]).

In opposition, Plaintiff submits an expert affirmation from a licensed physician [name of expert redacted], board certified in physical medicine and rehabilitation and pain medicine. The signed, unredacted affirmation was presented to the Court for *in camera* inspection. Plaintiff's

expert lays a proper foundation to opine on the issues of this case, including their experience treating patients with chronic back pain and administering steroid injections.

First, Plaintiff's expert opines that on the May 29 visit, Dr. Sorokin failed to take a proper history of Plaintiff's back pain, how long he had undergone "conservative management," and what effect previous treatments had. The expert opines that it was a deviation from the standard of care to fail to obtain adequate history before formulating his own assessment and plan.

Plaintiff's expert also opines that Dr. Sorokin departed from the standard of care by failing to refer Plaintiff "to the hospital for an immediate MRI" on June 17, 2019, when he presented with worsening symptoms. On that date, Dr. Sorokin noted new symptoms of bilateral leg weakness and difficulty walking. The expert opines that it was clear Plaintiff's symptoms had "progressively deteriorated" in the three weeks since his last visit, and he could not rely on his prior MRI from one year earlier. The expert opines the standard of care in these circumstances required an "immediate" referral to the hospital for appropriate MRI study, which would lead to a diagnosis of his condition.

Additionally, Plaintiff's expert opines that the lumbar epidural injection administered by Dr. Sorokin was contraindicated and constituted a departure from the standard of care. As to whether the needle was appropriately placed in the L4-L5 position, the expert states that the fluoroscopic images from the injection are "illegible" and therefore they cannot render an opinion on that issue. However, the expert opines that the injection should not have been performed at all on a patient with severe pain and difficulty walking, which had greatly increased since his last visit, when the physician did not know the etiology of these new symptoms.

The expert further opines that the standard of care required Dr. Sorokin to refer Plaintiff to the hospital immediately when he was completely unable to walk following the steroid injection. Although he was "able to ambulate, albeit with great difficulty" when he presented on

June 17, 2019, Plaintiff testified that he was completely unable to bear weight, stand, or walk after the injection. Dr. Sorokin's own testimony and notes also acknowledge that Plaintiff needed a wheelchair to leave the office. The expert opines this rapid change in his condition "presented a medical emergency that required immediate referral to the hospital for immediate imaging and neurological/neurosurgical evaluation." In the expert's opinion, Plaintiff's condition following the injection could be a sign of "spinal stroke/infarct, hemorrhage, hematoma, [or] spinal dural arteriovenous fistula," and he should have been immediately sent to an emergency department to diagnose or rule out those conditions. The expert opines that Dr. Sorokin simply providing Plaintiff with a wheelchair and taxi home was "a grievous departure from accepted standards of care."

The expert notes that whether Plaintiff "refused" to go to the emergency is disputed, but even if he had, the patient cannot dictate his own treatment plan in this situation. The expert opines that "even assuming [Plaintiff] was reluctant to go to the emergency room, get an MRI or be seen by a neurosurgeon," Dr. Sorokin should not have performed the epidural injection.

On the issue of proximate causation, Plaintiff's expert counters Dr. Gharibo's opinion that the lumbar epidural steroid injection did not cause or contribute to his injuries from the AVM. Plaintiff's expert opines that "epidural steroid injections anywhere in the spine may cause an AVM to rupture causing a spinal arteriovenous fistula." The expert opines that due to the "already weakened tissue" caused by the AVM, the injection directly exacerbated his condition. The expert opines that due to the fact Plaintiff's inability to walk reportedly worsened following the injection, it is "the AVM more likely than not ruptured causing the fistula as a direct result of the epidural injection."

Plaintiff's expert further opines that his delay in diagnosis until the following day deprived him of the opportunity to diagnose the AVM and "repair the fistula as soon as possible

to improve neurologic function." The expert opines his prognosis and chance of recovery was "substantially diminished" by the fact Dr. Sorokin did not refer him to the emergency room immediately on June 17.

Based on these submissions, Plaintiff has raised issues of fact as to Dr. Sorokin's alleged departures from the standard of care, including whether he obtained inadequate history on the first visit and performed a contraindicated steroid injection on June 17. As stated above, the movant did not establish prima facie entitlement to summary judgment on the claims regarding failure to refer Plaintiff to an emergency room on June 17. Regardless, Plaintiff addressed this claim by offering an expert opinion that the standard of care required him to send Plaintiff for an emergent MRI based on his June 17 presentation and his worsened symptoms after the injection.

Plaintiff's expert also sufficiently raised issues of fact to counter the movant's expert on proximate causation, offering a conflicting opinion that the lumbar spine injection may have caused a rupture of the thoracic AVM and arteriovenous fistula. Plaintiff's expert also opines that the delay in timely diagnosing and treating the fistula proximately caused worsened injuries and permanent neurologic dysfunction. As these issues of fact and credibility must be resolved by a jury, Dr. Sorokin's motion for summary judgment is **denied.**

Finally, Plaintiff cross moves (Seq. No. 6) to sanction Defendants in connection with an alleged failure to maintain and turn over metadata and audit information from the medical chart. The determination of sanctions for spoliation is within the broad discretion of the trial court and may include adverse inference jury instructions, a relief best determined at trial (*see S.W. v Catskill Regional Med. Ctr.,* 211 AD3d 890 [2d Dept 2022]; *see also Pegasus Aviation I, Inc. v Varig Logistica S.A.,* 26 NY3d 543 [2015]; *Morales v Delta Air Lines, Inc.,* 297 AD2d 786 [2d Dept 2002]). Accordingly, the cross motion is **denied with leave to refile** at time of the trial of this matter.

It is hereby:

ORDERED that Dr. Sorokin's motion (Seq. No. 4) for an Order, pursuant to CPLR 3212, granting summary judgment in his favor and dismissing Plaintiff's Complaint against him, is **denied;** and it is further

ORDERED that NY United Healthcare's motion (Seq. No. 5) for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing Plaintiff's Complaint against them, is **granted;** and it is further

ORDERED that Plaintiff's cross motion (Seq. No. 6) for an Order imposing sanctions for spoliation is **denied** without prejudice to refiling at time of trial; and it is further

ORDERED that the caption is amended as follows:

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MARAT ZHVANETSKIY

Plaintiff,

-against-

YEVGENIY SOROKIN, D.O.

Defendant.
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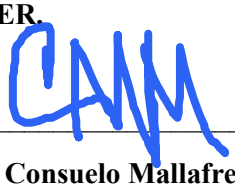
ORDERED that the remaining parties' counsel shall appear for a Settlement Conference on November 19, 2025, at 11:30 a.m., in person at 360 Adams St., Brooklyn, New York, Courtroom 561.

The Clerk shall enter judgment in favor of NY UNITED HEALTHCARE LTD.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafre Melendez
J.S.C.