

Kodner v Newman

2025 NY Slip Op 35140(U)

December 30, 2025

Supreme Court, New York County

Docket Number: Index No. 805083/2020

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

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TSILYA KODNER, as the Executor of the Estate of LEN KODNER, deceased, and TSILYA KODNER, individually,

Plaintiffs,

INDEX NO. 805083/2020

MOTION DATE 09/29/2023

MOTION SEQ. NO. 001

- v -

ELLIOT NEWMAN, STEVEN COHEN, NYU LANGONE HEALTH SYSTEM, NYU LANGONE HOSPITALS, and NYU SCHOOL OF MEDICINE,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 76

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and oral arguments having been heard, Defendants Elliot Newman, M.D. ("Dr. Newman"), Steven M. Cohen, D.O. ("Dr. Cohen"), NYU Langone Health System, NYU Langone Hospitals and NYU Grossman School of Medicine, a Division of New York University, s/h/a NYU School of Medicine ("NYU") (collectively, "Defendants"), seek an order, pursuant to CPLR 3212, granting Defendants summary judgment, dismissing Plaintiffs' complaint, and directing entry of judgment in favor of Defendants, or in the alternative, granting defendants partial summary judgment.

Plaintiffs oppose the motion.

BACKGROUND

This medical malpractice action arises from medical care and treatment rendered to Plaintiff's decedent, Len Kodner ("decedent"), by Defendants Dr. Newman and Dr. Cohen at NYU. The gravamen of Plaintiff's allegations is that Defendants were negligent in rendering

treatment to decedent between February 15, 2019, and February 22, 2019. As a result of Defendants' alleged departures from the standard of care, Plaintiff claims that decedent incurred severe pain, suffering, and death.

In November 2018, decedent, then 73 years old, was diagnosed with stomach cancer. Following an endoscopic submucosal dissection in December 2018 which revealed positive margins, decedent was referred to Defendant Dr. Newman, then-Chief of Gastrointestinal Surgical Oncology at NYU, for surgical intervention.

On January 22, 2019, decedent presented to Dr. Newman for an initial evaluation. After a review of the medical records and clinical findings, Dr. Newman recommended a total gastrectomy—the complete removal of the stomach. Dr. Newman's records indicate that he discussed the biology of the cancer and the risks of the procedure with the decedent, including the potential for postoperative bleeding, infection, and anastomotic leaks.

On February 15, 2019, Dr. Newman performed a laparoscopic total gastrectomy. The procedure involved the removal of the stomach and the creation of an anastomosis—a surgical connection—between the esophagus and the jejunum using a mechanical stapling device.

In the immediate postoperative period, decedent was monitored by Nurse Practitioner Karen Tan and Dr. Jason Maggi. On February 16, 2019, Plaintiff was noted to be afebrile with controlled pain levels and was ambulating without adverse events. Although “trickle” tube feedings were initiated that day, it was briefly suspended due to intractable abdominal pain but was restarted on the morning of February 17 after the pain resolved.

On February 17, 2019, decedent exhibited intermittent sinus tachycardia and required supplemental oxygen during exertion. Later that evening, his condition deteriorated. By the

morning of February 18, 2019, decedent showed signs of systemic distress, including increased heart rate, rising lactate, and elevated Blood Urea Nitrogen and creatinine levels.

On the following day, Dr. Newman performed a diagnostic laparoscopy and washout. While he observed exudate around the anastomosis, air insufflation tests did not reveal an active leak. Drains were placed, and decedent was transferred to the Surgical Intensive Care Unit (SICU).

At SICU, Decedent's condition continued to decline, and by February 20, 2019, he was diagnosed with septic shock and persistent hypotension. He was placed on four different vasopressors to maintain blood pressure, a treatment which contributed to the bowel becoming ischemic and necrotic.

On the evening of February 20, defendant Dr. Cohen performed an exploratory laparotomy, finding the right, transverse, and portions of the left colon to be necrotic. The ischemic portions were resected, though no evidence of an anastomotic leak was found at that time. A second re-exploration by Dr. Cohen on February 21 revealed further nonviable small bowel, necessitating additional resection.

Despite these efforts, decedent remained hypotensive with rising lactate levels. At approximately midnight on February 21, 2019, he entered ventricular tachycardia followed by pulseless ventricular fibrillation. Life-saving measures were unsuccessful, and he was pronounced dead at 12:06 a.m. on February 22, 2019.

Plaintiff, Tsilya Kodner, decedent's wife, commenced this action on behalf of the decedent by the filing of a Summons and Complaint on March 13, 2020, asserting causes of action for medical malpractice, wrongful death, lack of informed consent, loss of services and loss of parental guidance. Defendants joined issue by filing a Verified Answer on May 26, 2020.

Defendants now move for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Defendants and dismissing the complaint in its entirety, or, in the alternative, granting partial summary judgment.

Plaintiff, Tsilya Kodner, opposes the motion.

SUMMARY JUDGMENT AS TO MEDICAL MALPRACTICE

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by submitting admissible evidence that demonstrates the absence of material issues of fact that would require a trial (*see Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). In a medical malpractice action, a movant must provide evidentiary proof in the form of expert opinions and factual evidence establishing that the defendant complied with accepted standards of medical care and practice, and/or the defendant's conduct was not a proximate cause of plaintiff's alleged injuries (*see Alvarez v Prospect Hospital*, 68 N.Y.2d 325). To satisfy this burden, a Defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Joyner-Pack v. Sykes*, 54 AD3d 727 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a Defendant must address and rebut specific allegations of malpractice set forth in the Plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Here, in support of their motion, Defendants submit the expert affirmations of surgical oncology expert, Dr. Aaron Sasson, MD (“Dr. Sasson”), and surgical critical care expert, Marc J. Shapiro, MD (“Dr. Shapiro”).

Dr. Sasson opines, within a reasonable degree of medical certainty, that Dr. Newman did not depart from good and accepted standards of medical care in treating decedent, and that no acts or omissions by Dr. Newman caused any of decedent’s claimed injuries. Specifically, he opines that the recommendation and performance of the laparoscopic gastrectomy was entirely appropriate and that the February 15, 2019, surgery was properly performed. Dr. Sasson also opines that Dr. Newman’s treatment of decedent following the surgery (between February 15, 2019, and February 17, 2019) was well within the standard of care in the medical community. Moreover, Dr. Sasson opines that decedent was properly monitored and examined and the treatment was appropriately documented in all stages of decedent’s care. He avers that the complaints, signs, and symptoms decedent experienced over the course of February 16 and 17, 2019 were typical of a patient who recently underwent a total gastrectomy. Dr. Sasson further opines that the February 18th exploratory laparoscopy and washout was appropriately performed. He also opines that treatment administered following the February 18, 2019 surgery was within the standard of care in the medical community, and that the two surgical procedures performed by Dr. Cohen, on February 20 and 21, 2019 were warranted, timely, and properly performed.

Further, Dr. Shapiro concludes, that Dr. Cohen did not depart from good and accepted standards of medical care in treating decedent, and that no acts or omissions by Dr. Newman or Dr. Cohen caused any of decedent’s claimed injuries.

According to Dr. Shapiro, by the time Dr. Cohen became involved in decedent’s care, decedent’s condition was already grave. Dr. Shapiro, thus, concludes that nothing that the

defendants did or failed to do caused decedent's condition or death, since decedent had an unanticipated and unpreventable extreme reaction to a known risk of a gastrectomy.

Based on the expert affirmations of Dr. Sasson and Dr. Shapiro, the Court finds that Defendants have demonstrated their prima facie entitlement to summary judgment as a matter of law (*see Steinberg v Lenox Hill Hosp.*, 148 AD3d 612 [1st Dept 2017]; *Camacho v Pintauro*, 210 AD3d 578 [1st Dept 2022]).

Once the proponent makes a prima facie showing, the burden shifts to the Plaintiff to demonstrate, by admissible evidence, the existence of a material issue of fact that requires resolution at trial (*see Zuckerman v City of New York*, 49 NY2d 557, 558-59 [1980]). “[O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*id.* at 562).

Plaintiff, in opposition, submits the expert affidavit of a board-certified surgeon (“Expert A”),¹ who avers that he is fully familiar with the standard of care as it existed at the time of the alleged malpractice and with respect to post-operative monitoring that must be instituted for patients following a gastrectomy procedure. Expert A opines that Dr. Newman and the medical staff at NYU departed from the accepted standard of care by failing to timely diagnose and treat a postoperative anastomotic leak.

Specifically, Expert A states that the standard of care in 2019 required medical providers to maintain a high index of clinical suspicion for a leak following a total gastrectomy, particularly when a patient presents with the clinical triad of fever, tachycardia, and leukocytosis. According

¹ Plaintiff has redacted the expert's name pursuant to CPLR 3101(d), and the expert shall be referred as Expert A.

to Expert A, Plaintiff began exhibiting these symptoms as early as February 16, 2019—one day after surgery—when he developed a low-grade fever, and an elevated white blood cell count with high neutrophils, which should have been recognized as a significant indicator of an underlying infectious process rather than routine postoperative inflammation.

Expert A further contends that Dr. Newman and the NYU staff deviated from the standard of care by failing to order immediate diagnostic imaging, such as a CT scan of the abdomen or an upper GI series, on February 16 or 17, 2019. Notably, Expert A highlights several missed opportunities for intervention; first, when the decedent experienced "intractable abdominal pain" that forced the cessation of tube feedings on the night of February 16; and second, on February 17, when the decedent's pain persisted at an 8-9/10 level and his white blood cell count rose. Specifically, Expert A notes that the decision to restart tube feedings and the reliance on additional analgesics "masked" the symptoms rather than investigating the cause of the pain. Even when a chest CT was performed on February 18 to rule out a pulmonary embolism, Expert A asserts that the failure to concurrently perform an abdominal CT constituted a departure, especially since the radiologist explicitly noted the chest study could not evaluate for a postoperative leak.

Regarding causation, Expert A opines that the delay in surgical intervention was the proximate cause of decedent's injuries and death. Expert A asserts that had a leak been diagnosed and evacuated on February 16 or 17, the decedent would have likely recovered. Instead, the "offending agent" was allowed to linger, leading to septic shock. Expert A concludes that the failure to operate prior to the morning of February 18 resulted in multi-system organ failure and the decedent's death on February 22, 2019.

Based on the foregoing, Plaintiff has raised triable issues of fact based on Expert A's affirmation as to whether Dr. Newman and the NYU staff departed from the applicable standard

of care by failing to timely investigate clinical signs of an anastomotic leak. Specifically, the expert's opinion creates a factual dispute regarding whether the failure to order abdominal imaging on February 16 or 17, 2019, despite the decedent's intractable pain and rising white blood cell count, constituted a deviation from accepted practice. Plaintiff has further raised a triable issue of fact as to whether this delay was a substantial factor in causing the decedent's septic shock, bowel ischemia, and ultimate death. "Summary judgment is not appropriate . . . [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; see *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

Since Plaintiff has raised triable issues of fact against Dr. Newman, an employee of NYU Grossman, summary judgment is precluded as to NYU Langone Hospitals and NYU Grossman School of Medicine, a Division of New York University, s/h/a NYU School Of Medicine. Where triable issues of fact exist as to the care and treatment by a physician-employee, and whether such treatment proximately caused a plaintiff's alleged injuries, dismissal is not warranted for vicarious liability claim(s) against the employer-hospital (see *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085 [2d Dept 2021]; *Klippel v Rubinstein*, 300 AD2d 448 [2d Dept 2002]; *Rivera v County of Suffolk*, 290 AD2d 430 [2d Dept 2002]; *Mduba v Benedictine Hosp.*, 52 AD2d 450 [3d Dept 1976]).

As to Dr. Cohen, Expert A's affirmation is silent as to treatment rendered by Defendant Dr. Cohen, whose involvement began later during the exploratory laparotomy and bowel resections. As a result, dismissal as to Dr. Cohen is warranted. Similarly, Defendants' motion for

summary judgment is granted as to the negligent hiring claims, since Plaintiff does not oppose that branch of Defendants' motion.

As to NYU Langone Health System, it is undisputed that NYU Langone Health System is an administrative entity, does not provide patient care, and did not employ any clinicians or physicians, including Dr. Newman and NYU staff. Accordingly, NYU Langone Health System cannot be found vicariously responsible for Dr. Newman and NYU staff, and Plaintiff's complaint is dismissed regarding NYU Langone Health System (see *Thomas v Hermoso*, 110 AD3d 984 [2d Dept 2013]).

As to Plaintiffs' cause of action for loss of consortium and loss of parental guidance, dismissal is precluded since it is derivative of the injured spouse's right to recover damages for any injuries sustained as a result of the Defendants' alleged malpractice (see *Liff v Schildkrout*, 49 NY2d 622 [1980]).

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

It is well settled that a defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff-decedent was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]; see also *Smith v. Cattani*, 2 AD3d 259, 260 [1st Dept 2003] [holding that a defendant is entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment].

In support of their motion, the Defendants submit the expert affirmation of Dr. Sasson, who opines that Dr. Newman appropriately advised decedent of the risks associated with the

laparoscopic total gastrectomy. Dr. Sasson points out that Dr. Newman explicitly discussed the risk of infection and a leak. Moreover, Dr. Sasson opines that, even assuming Dr. Newman should have discussed additional alleged risks with decedent, a reasonable person would have chosen to undergo the gastrectomy since it was the only option for a cure.

Defendants have met their burden as to the lack of informed consent claim based on the expert affirmation of Dr. Sasson, which Plaintiff has failed to rebut.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted to the extent of: (1) dismissing the Complaint and all claims as to Defendants Steven M. Cohen, D.O., and NYU Langone Health System; (2) dismissing the lack of informed consent claims as to all of the moving Defendants; and (3) dismissing the negligent hiring claims as to all of the moving Defendants; and it is further

ORDERED that Plaintiff's Complaint is dismissed as against Defendants Steven M. Cohen, D.O., and NYU Langone Health System; and it is further

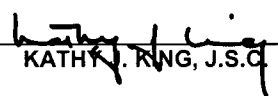
ORDERED that Defendants shall serve a copy of this order upon Plaintiff Tsilya Kodner, with notice of entry within twenty (20) days of entry of this order; and it is further

ORDERED that within twenty (20) days of the date of this Order, the moving Defendants shall serve a copy of this Order upon the County Clerk and the Clerk of the General Clerk's Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the "E-Filing" page on the court's website; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with this Order; and it is further

ORDERED that the remaining parties shall appear for a virtual settlement/pre-trial conference on June 3, 2026, at 12:00pm, after consultation with the Court’s Alternative Dispute Resolution (ADR) department. The ADR Order and specific date, time, and appearance link for the virtual conference shall be set forth in subsequent correspondences by the Court.

This constitutes the Decision and Order of the Court.

12/30/2025 DATE					 KATHY J. KING, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE