Kolenovic v Maki
2025 NY Slip Op 35278(U)
May 2, 2025
Supreme Court, Queens County
Docket Number: Index No. 718330/2020
Judge: Tracy Catapano-Fox
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

----------X

ZUMRETA KOLENOVIC,

Plaintiff,

-against-

ROBERT G. MAKI, M.D., ALEXANDER TRUSKINOVSKY, M.D., KASTURI DAS, M.D., JEANNINE ANN VILLELLA, D.O., SUSAN H. LEE, M.D., XIAOQING LIN O'LEARY, M.D., SANDRA D'ANGELO, M.D., KAY J. PARK, M.D., LENOX HILL HOSPITAL, MONTER CANCER CENTER – A DIVISION OF LIJ MEDICAL CENTER, NORTHWELL HEALTH, INC. and MEMORIAL SLOAN KETTERING CANCER CENTER,

Defendants.

----------X

Index No. 718330/2020

Part MDP
Motion Date: March 26, 2025

Calendar No. 14
Sequence No. 5

The following papers numbered EF-161 to EF-216 read on this motion by defendants KAY J. PARK, M.D. and MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES, s/h/a MEMORIAL SLOAN KETTERING CANCER CENTER for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits……	EF161-EF195
Affirmation in Opposition, Exhibits……...	EF207-EF211
Reply Affirmation……...	EF216

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

Defendants Kay J. Park, M.D. and Memorial Hospital for Cancer and Allied Diseases, s/h/a Memorial Sloan Kettering Cancer Center (hereinafter known as "MSKCC")'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted only as to plaintiff's claim for lack of informed consent, and denied as to plaintiff's claims for medical malpractice and vicarious liability, as they failed to eliminate all triable issues of fact with respect

to whether they departed from good and accepted standards of care and proximately caused or contributed to plaintiff's injuries. (*See generally M.C. v. Huntington Hosp.*, 175 A.D.3d 578 [2d Dept. 2019].)

Plaintiff commenced this medical malpractice action arising out of defendants' failure to properly diagnose and treat plaintiff's cancer, arguing plaintiff was incorrectly diagnosed with and treated for leiomyosarcoma rather than a gastrointestinal stromal tumor. Plaintiff filed the Summons and Complaint on October 12, 2020 and issue was subsequently joined by moving defendants via the filing of their Verified Answer on November 24, 2020.

Defendants argue they are entitled to summary judgment and present the pleadings, the parties' deposition testimony, medical records, and the expert affirmation of Nora J. Morgenstern, M.D. in support of their motion. Defendants argue Dr. Park acted in accord with good and accepted standards of care at all times and did not proximately cause or contribute to plaintiff's injuries. Defendants further argue there are no triable issues of fact with respect to plaintiff's claims for lack of informed consent and vicarious liability and they should be dismissed.

Defendants present the expert affirmation of Dr. Morgenstern in support of their motion. Dr. Morgenstern affirmed to being a physician licensed in New York and board-certified in anatomic and clinical pathology, cytopathology, and blood bank/transfusion medicine. Dr. Morgenstern reviewed the pleadings, plaintiff's medical records, and the parties' deposition testimony in rendering her opinions. Dr. Morgenstern opined within a reasonable degree of medical certainty that defendants did not depart from accepted standards of care and did not proximately cause or contribute to plaintiff's injuries.

Dr. Morgenstern reviewed plaintiff's medical history and noted plaintiff underwent an abdominal and pelvic CT scan on March 11, 2019 revealing a mass and a pelvic MRI on April 22, 2019 revealing a cyst consistent with ovarian cancer. Plaintiff subsequently presented to Lenox Hill Hospital on May 2, 2019 for exploratory surgery based upon a consultation with co-defendant gynecologic oncologist Dr. Jeannine Ann Villella. During the surgery, Dr. Villella excised a tumor, indicated there was no evidence of disease once the surgery was complete, and directed plaintiff to follow up with her. Co-Defendant pathologist Dr. O'Leary was assigned to evaluate the specimen excised during the surgery and testified the testing did not provide a clear diagnosis. Dr. O'Leary sought a consultation from MSKCC, which co-defendant Dr. Park performed and concluded the findings were consistent with high grade leiomyosarcoma. Dr. Park communicated her findings to Dr. O'Leary, and the subsequent diagnosis by Dr. O'Leary and treatment by Dr. Maki were based upon Dr. O'Leary's findings and conclusions. Plaintiff underwent several more imaging studies and an abdominal CT scan on October 11, 2019 revealed a new mass in the left lower lobe of her liver, a new mass in her spleen, a new peritoneal nodule in the cul-de-sac, and increased ascites in the peritoneal cavity. Dr. Maki changed plaintiff's treatment based upon the

decline in her condition and transferred her care to Dr. Veena John, as Dr. Maki began a new position at the University of Pennsylvania. Plaintiff's condition worsened and she went into hospice care and eventually began to treat with oncologist Dr. D'Angelo. After further testing, it was determined she did not have leiomyosarcoma and her diagnosis was changed to gastrointestinal stromal tumor on April 24, 2020.

Dr. Morgenstern opined leiomyosarcomas and gastrointestinal stromal tumors are both sarcomas, uncommon tumors accounting for less than one percent of all malignancies and with an annual incidence of about fifty cases per one million population in the United States. Dr. Morgenstern further explained that in gynecologic pathology, the most common sarcoma is leiomyosarcoma. However, Dr. Morgenstern went on to explain each type of tumor, how they originate, are identified, and their differences. Dr. Morgenstern also explained that sometimes a primary site for the tumor cannot be identified, and pathologists and treating clinicians will often be guided by the location of the tumor and largest site of tumor to identify the primary site when it is not obvious. Dr. Morgenstern opined it was reasonable to infer plaintiff's tumor was gynecologic in nature because of its location next to her right ovary, and it was reasonable for Dr. Park to conclude the 1.7 cm ileal implant was a tumor coming from the outside, as opposed to a malignancy that arose from inside the ileal wall. She opined Dr. Park's conclusion was consistent with that of co-defendants Dr. Villella, Dr. Maki, Dr. O'Leary, and Dr. Truskinovsky. Dr. Morgenstern reasoned a small stuck-on implant does not suggest a primary site of a gastrointestinal stromal tumor, but rather suggest spreading from the much larger anterior cul-de-sac sarcoma to that location. She further opined it was reasonable for Dr. Park to conclude plaintiff had a high grade leiomyosarcoma based upon Dr. O'Leary's letter and observations under the microscope.

Dr. Morgenstern explained the standard of care for pathologic diagnosis and how it is based primarily on hematoxylin and eosin morphology under the microscope, considering the context of clinical presentation, imaging, operative report, and ancillary tests, such as immunohistochemistry. Dr. Morgenstern further explained pathologic diagnosis is not based on immunohistochemical staining because of the overlaps, false negatives, false positives, unusual immunohistochemical phenotypes, and aberrant expressions of antigens by tumors. Dr. Morgenstern examined the subject slides and opined the features Dr. Park observed were beyond those usually seen in a typical gastrointestinal stromal tumor, but rather consistent with those typically seen in leiomyosarcomas. Dr. Morgenstern also opined Dr. Park was only sent the slides from one part of the specimen and not from the ileal implant, so Dr. Park had no reason to think there were additional slides to be examined. She further opined Dr. Park made an appropriate determination based upon her examination of the slides and materials she was given by Dr. O'Leary. Dr. Morgenstern also opined it was reasonable for Dr. Park to not consider gastrointestinal stromal tumor in the differential diagnosis and the standard of care did not require her to rule it out prior to diagnosing leiomyosarcoma. Dr. Morgenstern also pointed out that co-defendant Dr. Truskinovsky, a very experienced pathologist, reviewed plaintiff's case after Dr. Park and agreed

with the diagnosis, and saw no reason to consider gastrointestinal stromal tumor.

Dr. Morgenstern disagreed with the claim that Dr. Park should have ordered CD117 and DOG1 staining, and opined the standard of care does not require a pathologist to use every possible immunostain without a good reason. Dr. Morgenstern further opined ordering multiple immunostains to pursue even remote or rare malignancies is not the standard of care and "blindly" ordering additional stains could confuse the diagnosis due to overlapping staining patterns, false positives and false negatives, delays in treatment, undermine confidence in diagnoses, and make a diagnosis more difficult to reach. Dr. Morgenstern stated the standard of care requires a diagnosis to be based on the gross H and E microscopic appearance within the clinical, radiologic, and surgical context, and to use only the immunohistochemical stains that are deemed appropriate based on the H and E impression. Dr. Morgenstern opined there was no reason in May 2019 to suspect gastrointestinal stromal tumor when the clinical information, surgical findings, microscopic features, and gross descriptions did not support it. Dr. Morgenstern also reasoned gastrointestinal stromal tumors are very rarely seen without a primary gastrointestinal wall site which was not present here. She opined it is well known that a low grade leiomyosarcoma can look like a gastrointestinal stromal tumor under the microscope and both can have false positives or false negatives for immunostains. Dr. Morgenstern opined CD117 and DOG1 staining would not have even been determinative if they were done in this case. Dr. Morgenstern explained that while DOG1 positivity is often associated with gastrointestinal stromal tumors, they may occasionally have negative DOG1 or CD117 stains. Dr. Morgenstern further opined while DOG1 and CD117 positivity may be indicative of gastrointestinal stromal tumor, they also are present in other types of tumors including leiomyosarcomas. She opined had this staining been done, the diagnosis still could have been the same.

Dr. Morgenstern noted that gastrointestinal stromal tumor was only diagnosed after a KIT mutation was detected during Dr. D'Angelo's molecular testing. She further noted the molecular testing was not done for diagnostic purposes but to determine whether a clinical trial or targeted therapy would help plaintiff based on her genetic makeup. Dr. Morgenstern also opined Dr. Park issuing an amended report in April 2020 does not infer negligence, but explained discovery of the KIT mutation prompted consideration of a gastrointestinal stromal tumor which led to the DOG1 and CD117 testing. When Dr. Park became aware of the new diagnosis, she was required to issue an amended report to reflect it. Dr. Morgenstern opined plaintiff's claims for lack of informed consent are without merit, as Dr. Park neither spoke to nor treated plaintiff. Dr. Morgenstern also opined Dr. Park had no obligation to perform or recommend further diagnostic testing, as it is beyond the purview of her role as a consulting pathologist. Based upon the foregoing, Dr. Morgenstern opined to a reasonable degree of medical certainty that defendant Dr. Park did not depart from accepted standards of care or proximately cause plaintiff's injuries.

Plaintiff opposes the motion and argues defendants failed to eliminate all triable issues of

fact with respect to whether they departed from accepted standards of care and proximately caused or contributed to plaintiff's injuries. She presents expert affirmations in support of the opposition. Plaintiff argues Dr. Park departed from the standard of care in failing to recognize the possibility of GIST and testing for it during her evaluation, and instead allowing confirmation bias to dictate her analysis. Plaintiff further argues based on her experts' affirmations, defendants breached their duty of care to plaintiff and proximately caused her injuries.

Plaintiff presented the expert affidavit of Jason Hornick, M.D., Ph.D., a physician licensed in Massachusetts and board-certified in Anatomic Pathology, in opposition to defendants' motion. Dr. Hornick attested to reviewing the pleadings and deposition testimony, the motion papers including defendants' expert affirmations, and plaintiff's medical records including digital pathology slides from plaintiff's tumor excision in rendering his opinions. Dr. Hornick reviewed plaintiff's medical history and opined to a reasonable degree of medical certainty that defendants failed to appreciate and consider whether plaintiff's cancer could be a gastrointestinal stromal tumor despite clear indications that it should have been included in the differential diagnosis. Dr. Hornick further opined defendants caused plaintiff's worsening condition and deterioration by misdiagnosing her and treating her for leiomyosarcoma.

Dr. Hornick opined leiomyosarcoma and gastrointestinal stromal tumors are both soft-tissue tumors with similar morphologic features, but require very different treatment methods and have different prognoses. Dr. Hornick further attested that although historically both tumors were treated as the same cancer, over the last twenty-five years the standard of care has evolved to require ruling out a gastrointestinal stromal tumor prior to diagnosing leiomyosarcoma. Dr. Hornick opined gastrointestinal stromal tumors are the most common soft tissue affecting the gastrointestinal tract, while leiomyosarcomas are most often found in the uterus or retroperitoneum. Dr. Hornick further opined immunohistochemistry, markers KIT, DOG1, and desmin can be used to differentiate the tumors.

Dr. Hornick examined the digital photomicrographs of plaintiff's pathology slides from Lenox Hill which consisted of three slides from the pelvic mass and one from the ileal implant. Dr. Hornick opined that had he reviewed the slides as the initial or consulting pathologist, he would have considered both gastrointestinal tumor *and* leiomyosarcoma, as the relative uniformity of the nuclei, the predominantly spindle cell and focally epithelioid appearance, and the quality of the cytoplasm all support a diagnosis of gastrointestinal stromal tumor. Dr. Hornick acknowledged there is overlap between the two types of tumors, and opined that is why pathologists must go further than a visual analysis and use immunohistochemistry to check for certain protein markers to distinguish between the tumors for a correct diagnosis and appropriate treatment. Dr. Hornick also reviewed the immunohistochemistry slides in this case and opined the absence of desmin in the slides is much more common in gastrointestinal stromal tumors than leiomyosarcoma and thus additional testing was required.

Dr. Hornick opined to a reasonable degree of medical certainty defendant Dr. Park departed from good and accepted standards of care by failing to recognize the possibility of a gastrointestinal stromal tumor. He opined Dr. Park departed from the standard of care by allowing confirmation basis to dictate her analysis and running tests and considering factors that would confirm the presence of a leiomyosarcoma while ignoring important factors demonstrating an alternative diagnosis. Dr. Hornick opined the negative desmin stain is of extreme significance, and Dr. Park departed from the standard of care in failing to know the sensitivity and specificity of relevant markers in a purported gynecologic tumor. He disagreed with Dr. Morgenstern's conclusions and assessment, and opined confirmatory testing contradicts the responsibility of a pathologist, as they are obligated to diagnose through objective testing. Dr. Hornick also explained that contrary to Dr. Morgenstern's opinion, the standard of care required Dr. Park to perform CD117 or DOG1 staining. He opined Dr. Park noted a non-gynecologic origin was possible, and departed from the standard of care by failing to do additional research or consult with another pathologist to further investigate the nature of the tumor or run additional testing. Dr. Hornick further opined Dr. Park's departure in failing to consider GIST in the differential diagnosis and perform additional testing to rule it in or out proximately caused a delay in plaintiff's proper diagnosis.

Plaintiff also presented the expert affirmation of a physician licensed in Illinois and board-certified in Medical Oncology in opposition to defendants' motion. Plaintiff's expert reviewed plaintiff's medical records, the pleadings and parties' deposition testimony, as well as the motion papers and defendants' expert affirmations in rendering opinions. Based upon the review of the foregoing, plaintiff's expert opined to a reasonable degree of medical certainty that defendants' misdiagnosis and delay in proper diagnosis proximately caused plaintiff's injuries, including unnecessary treatment, prevention of timely and necessary care, and worsening of plaintiff's condition. Plaintiff's expert further opined that had plaintiff received the correct diagnosis in May 2019, she would have been spared a significant amount of suffering and would have received timely and correct treatment. Plaintiff's expert explained that the Doxorubicin and Dacarbazine chemotherapy – while approved and used regularly to treat leiomyosarcoma – are not approved or effective for gastrointestinal stromal tumor. The expert further opined the chemotherapy did not improve her condition but rather caused debilitating side effects such as severe abdominal pain, flank pain, nausea, difficulty swallowing, and fatigue.

Plaintiff's expert opined prognosis for leiomyosarcoma is grim, with a five-year survival rate of 30%, while early-stage GIST has a five-year survival rate of 92% which decreases to 55% for advanced metastatic GIST. The expert opined a year-long delay in treatment for metastatic GIST is significant and can mean additional cancer growth and metastasis, worsening condition and pain, and a shortened lifespan. Plaintiff's expert further reasoned that while on the wrong treatment plan, plaintiff's liver tumors grew in size and number and spread to the peritoneum.

Plaintiff's expert further reasoned that when plaintiff switched to antimetabolite chemotherapy, her condition still continued to worsen because it is not a standard first-line choice of treatment for the type of tumor that she had.

Plaintiff's expert disagreed with Dr. Morgenstern's opinion that defendants' departures did not materially impact plaintiff's prognosis or chance of survival. The expert opined plaintiff's worsening of the disease would likely not have occurred had she received the appropriate diagnosis and treatment from the outset, and there is at least a chance that a more manageable disease and longer life was possible had plaintiff begun receiving Gleevec in May 2019 or shortly thereafter. Based upon the foregoing, plaintiff argues defendants failed to establish a prima facie entitlement to summary judgment and their motion should be denied.

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. Nicolia & 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*. (*See Valerio v. Liberty Behavioral Mgt. Corp.*, 188 A.D.3d 948 [2d Dept. 2020].)

Defendants established a prima facie entitlement to summary judgment. Defendants demonstrated through their production of the documentary evidence and expert affirmation of Dr. Morgenstern that Dr. Park appropriately evaluated and diagnosed plaintiff in accordance with good and accepted standards of care and did not proximately cause or contribute to plaintiff's injuries. Defendants demonstrated through Dr. Morgenstern's affirmation that that Dr. Park did appropriate testing and was within the standard of care in reaching a diagnosis of leiomyosarcoma with the information she had, her observations, and testing. Defendants further demonstrated through Dr. Morgenstern's affirmation that the standard of care did not require Dr. Park to perform CD117 or DOG1 staining, and the diagnosis was proper and confirmed by subsequent pathologists. Defendants also demonstrated through Dr. Morgenstern's affirmation that Dr. Park did not affect plaintiff's prognosis, as she already had stage IV cancer in May 2019. Defendants also established plaintiff's claim for lack of informed consent should be dismissed, as there was no procedure by which Dr. Park treated plaintiff directly or invaded her bodily integrity. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiff failed to raise a triable issue of fact as to the claim for lack of informed consent, as plaintiff presented no evidence in support of this cause of action.

However, plaintiff raised triable issues of material fact in dispute as to her medical malpractice claim and vicarious liability. Plaintiff raised triable issues of fact regarding whether Dr. Park departed from accepted standards of care by failing to perform C117 or DOG1 staining and by failing to consider and include gastrointestinal stromal tumor in her differential diagnosis. Dr. Hornick explained how over the last twenty-five years, the standard of care has evolved to require ruling out gastrointestinal stromal tumor before diagnosing leiomyosarcoma. Dr. Hornick also opined Dr. Park departed from the standard of care to not use CD117 or DOG1 staining or seek consultation to determine the proper diagnosis. Dr. Hornick emphasized Dr. Park performed confirmatory testing to back up Dr. O'Leary's diagnosis and in doing so ignored important factors and signs. Contrary to Dr. Morgenstern's opinion, Dr. Hornick opined negative desmin test was a significant sign that plaintiff could have a gastrointestinal stromal tumor and demanded further testing. Dr. Hornick also articulated that contrary to Dr. Morgenstern's opinion, it is well known a gastrointestinal stromal tumor can be confused as a leiomyosarcoma which is why the standard of care has evolved to require ruling it out first.

Plaintiff also demonstrated through her expert affirmation that the one-year delay in diagnosis caused injury to plaintiff because it delayed a proper course of treatment, including chemotherapy that was not suitable for gastrointestinal stromal tumor. When plaintiff finally received the correct diagnosis, she remained at stage IV cancer but was taken off hospice care. Plaintiff's experts demonstrated that had plaintiff received the correct diagnosis and proper treatment in May 2019, she would have had a different prognosis and would not have been subjected to the pain and suffering she endured over the year of her misdiagnosis. As there are conflicting expert opinions presented by defendants and plaintiff regarding whether Dr. Park should have included gastrointestinal stromal tumor in the differential diagnosis and whether she should have performed CD117 or DOG1 staining or further testing to confirm or reject a GIST diagnosis, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, as issues of credibility are properly left to a jury for its resolution].)

Accordingly, defendants Kay J. Park, M.D. and Memorial Hospital for Cancer and Allied Diseases, s/h/a Memorial Sloan Kettering Cancer Center's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted as to plaintiff's claim for lack of informed consent but denied as to the remaining claims. A pretrial conference is scheduled on Wednesday, June 4, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: May 2, 2025

Tracy Catapano-Fox

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

FILED
5/6/2025 TA
COUNTY CLERK
QUEENS COUNTY