

Kolenovic v Maki

2025 NY Slip Op 35279(U)

May 1, 2025

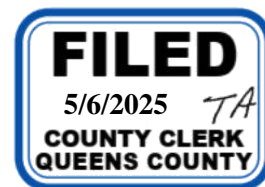
Supreme Court, Queens County

Docket Number: Index No. 718330/2020

Judge: Tracy Catapano-Fox

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

-----X
ZUMRETA KOLENOVIC,

Index No. 718330/2020

Plaintiff,

Part MDP

Motion Date: March 26, 2025

-against-

Calendar No. 13

Sequence No. 4

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., 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.

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The following papers numbered EF-125 to EF-212 read on this motion by defendants ROBERT G. MAKI, M.D., ALEXANDER TRUSKINOVSKY, M.D., XIAOQING LIN O'LEARY, M.D., LENOX HILL HOSPITAL, LONG ISLAND JEWISH MEDICAL CENTER s/h/a MONTER CANCER CENTER – A DIVISION OF LIJ MEDICAL CENTER, and NORTHWELL HEALTH, INC. for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF125-EF160
Affirmation in Opposition, Exhibits.....EF202-EF206
Reply Affirmation.....EF212

Upon the foregoing papers, and after oral argument, it is ordered that this motion is determined as follows:

Defendants Robert G. Maki, M.D., Alexander Truskinovsky, M.D., Xiaoqing Lin O'Leary, M.D., Lenox Hill Hospital, Long Island Jewish Medical Center s/h/a Monter Cancer Center – A Division of LIJ Medical Center, and Northwell Health, Inc.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted with respect to defendants Robert G. Maki, M.D., Alexander Truskinovsky, M.D., and Long Island Jewish Medical Center s/h/a Monter Cancer Center – A Division of LIJ Medical Center, as they eliminated all triable issues of fact regarding whether those defendants departed from accepted standards of care and proximately caused or contributed to plaintiff's injuries. (*See generally DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2d Dept. 2017].) Defendants' motion for summary judgment is denied with respect to defendants Xiaoqing Lin O'Leary, M.D., Lenox Hill Hospital, and Northwell Health, Inc. as they 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. (*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' alleged 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 February 5, 2021.

Defendants argue they are entitled to summary judgment and present the pleadings, the parties' deposition testimony, medical records, and expert affirmations of Allan Schuss, M.D. and Alfred Neugut, M.D. in support of their motion. Defendants argue their care and treatment rendered to plaintiff did not depart from accepted standards of care and did not proximately cause plaintiff's injuries. Defendants argue they appropriately relied on the diagnosis provided by co-defendant Dr. Kay J. Park and therefore appropriately acted within the standard of care, as there was no reason to question Dr. Park's diagnosis of leiomyosarcoma. They further argue Dr. Truskinovsky became involved in plaintiff's care subsequent to the diagnosis of leiomyosarcoma provided by Dr. Park, and it was appropriate for Dr. O'Leary and Dr. Truskinovsky to rely upon the diagnosis by Dr. Park and Memorial Sloan Kettering Cancer Center (MSKCC), the leading authority in cancer in the northeast United States. Defendants argue Dr. Maki became involved after three different pathologists confirmed the diagnosis of leiomyosarcoma, and appropriately determined a treatment plan within the standard of care. Defendants further argue since the individual physicians acted appropriately, the claims of vicarious liability against institutional defendants should be dismissed.

Defendants present the affirmation of Dr. Allan Schuss in support of their motion. Dr. Schuss affirmed he is a physician licensed in New York and board-certified in anatomic pathology. Dr. Schuss further affirmed he is familiar with the standard of care in pathology in New York from 2019 through 2020, and reviewed plaintiff's Bills of Particulars and medical records, as well as

the parties' deposition testimony in rendering his opinions. Dr. Schuss opined within a reasonable degree of medical certainty that defendants Dr. Truskinovsky and O'Leary rendered medical care and treatment in accordance with proper standards of medical care and did not alter plaintiff's prognosis.

Dr. Schuss reviewed plaintiff's medical history, noting 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 that initial staining did not provide a diagnosis so she sought a consultation from MSKCC. Co-Defendant Dr. Park at MSKCC received the slides and performed additional testing that did not include CD117 or DOG1 staining. Dr. Park concluded the findings were consistent with high grade leiomyosarcoma and issued a report noting since the hormone receptors were negative, a non-gynecologic origin should be considered. Dr. Park testified despite the negative hormone receptors, she believed the cancer to be leiomyosarcoma and did not include GIST in her differential diagnosis even in light of the presence of an ileal implant. She further testified CD117 or DOG1 staining was not indicated in May 2019. Dr. Park forwarded the report to Dr. O'Leary, and subsequent diagnosis by Dr. O'Leary and treatment by Dr. Maki, a sarcoma specialist, were based upon Dr. O'Leary's findings and conclusions. Dr. Maki requested a consultation from pathologist Dr. Truskinovsky on May 31, 2019, who reviewed the pathology report and agreed the findings were consistent with a diagnosis of leiomyosarcoma, and not consistent with a classic presentation of GIST, as there was no involvement within the bowel wall. Plaintiff underwent several more imaging studies and an abdominal CT scan on October 11, 2019 that 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. Plaintiff's condition worsened, she entered hospice, and later began treatment with oncologist Dr. D'Angelo. After further testing, on April 24, 2020, it was determined plaintiff did not have leiomyosarcoma and her diagnosis was changed to gastrointestinal stromal tumor.

Dr. Schuss opined within a reasonable degree of medical certainty that defendants Dr. O'Leary and Dr. Truskinovsky's care and treatment of plaintiff in 2019 was appropriate and within the standard of care based upon Dr. Park's diagnosis. He opined Dr. O'Leary appropriately ordered immunohistochemical stains and interpreted them. Dr. Schuss reasoned that based upon Dr. O'Leary's assessment of plaintiff's history and the location of the mass, it was appropriate to believe the tumor was arising from the pelvic mass. Dr. Schuss further reasoned that given Dr.

O'Leary was unable to make a definitive diagnosis based upon the immunohistochemical staining results, it was appropriate for Dr. O'Leary to request a pathology consult from MSKCC.

Dr. Schuss also opined Dr. O'Leary appropriately relied upon the diagnosis provided by co-defendant Dr. Park at MSKCC. Dr. Schuss reasoned Dr. Park performed additional stains which led to findings consistent with high grade leiomyosarcoma, and Dr. Park did not recommend additional staining or pathologic consultations. Dr. Schuss further reasoned that although the ileal implant slides were not sent to Dr. Park at the time of her consultation, she knew they existed and performed her consultation without them, as she had all the necessary information to decide whether testing for a gastrointestinal stromal tumor was indicated. Dr. Schuss further reasoned that one would not be able to differentiate between a leiomyosarcoma and a gastrointestinal stromal tumor based on morphology or immunohistochemical staining, unless DOG1 and/or CD117 staining is performed, which Dr. Park testified was not indicated at that time. He further opined molecular testing was not required by the standard of care. Dr. Schuss opined it was appropriate for Dr. O'Leary not to perform additional testing, obtain any additional consultations or take additional action.

Dr. Schuss also opined defendant Dr. Truskinovsky appropriately evaluated the pathology results and relied on the diagnosis provided by Dr. Park. Dr. Schuss reasoned by the time Dr. Truskinovsky became involved, two board certified pathologists had analyzed the pathology specimen and determined the results were consistent with a high grade leiomyosarcoma. He opined Dr. Truskinovsky was brought in by Dr. Maki for the limited purpose of reviewing the results of the staining and determining whether they were consistent with the working diagnosis of leiomyosarcoma. Dr. Schuss further opined Dr. Truskinovsky acted within the standard of care and had no need to take further action.

Dr. Schuss also opined to a reasonable degree of medical certainty that Dr. O'Leary and Dr. Truskinovsky rendered care and treatment in accord with good and accepted practice and did not alter plaintiff's prognosis. Dr. Schuss reasoned plaintiff's cancer was already stage IV with metastasis to the pelvis and liver at the time of the original diagnosis in May 2019. He further opined Dr. Truskinovsky and Dr. O'Leary appropriately relied upon Dr. Park's diagnosis as she is an expert in leiomyosarcoma. Dr. Schuss opined Dr. Truskinovsky and Dr. O'Leary actions were within the standard of care, as testing for a gastrointestinal stromal tumor, including DOG1 and/or CD117 was not indicated at that time. Based upon the foregoing, Dr. Schuss opined to a reasonable degree of medical certainty that defendants did not depart from accepted standards of care and did not cause injury to plaintiff.

Defendants also presented the expert affirmation of Dr. Alfred Neugut in support of their motion. Dr. Neugut affirmed to be a physician licensed to practice medicine in New York and board certified in medical oncology. Dr. Neugut affirmed to being familiar with the applicable

standard of care in 2019 and 2020, and reviewed plaintiff's Bills of Particulars, medical records, as well as the parties' deposition testimony in rendering his opinions. Dr. Neugut reviewed plaintiff's pertinent medical history and opined to a reasonable degree of medical certainty that defendants Dr. Maki and Monter Cancer Center did not depart from accepted standards of care or cause or contribute to plaintiff's injuries. He opined within a reasonable degree of medical certainty that Dr. Maki acted within the standard of care and had no reason to question plaintiff's diagnosis of leiomyosarcoma. Dr. Neugut reasoned that when plaintiff first presented to Dr. Maki, pathologists from two separate institutions had diagnosed plaintiff with high grade leiomyosarcoma, and Dr. Maki requested a third consultation from Dr. Truskinovsky regarding the leiomyosarcoma diagnosis. Dr. Neugut further reasoned plaintiff's symptoms were consistent with the diagnosis and there was no basis for Dr. Maki to question it or take further action to investigate it. He opined it was appropriate for Dr. Maki to rely on a pathologist's cancer diagnosis to determine an appropriate course of treatment. Dr. Neugut further explained the progression of plaintiff's cancer and overall worsening of her condition still did not provide a basis to question the diagnosis, as both were consistent with advanced leiomyosarcoma and side effects of chemotherapy. Based upon the foregoing, defendants argue they are entitled to summary judgment and dismissal of plaintiff's Complaint.

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. Plaintiff presents expert affirmations in support of the opposition. She argues defendants departed from the standard of care in failing to rule out GIST by performing CD117 and DOG1 staining of plaintiff's tumor. Plaintiff further argues based upon her expert's affirmations, defendants failed to recognize and consider the differences in plaintiff's tumor and that of a classic leiomyosarcoma case, and continued to keep the diagnosis without performing a full workup, and these failures 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 parties' 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. He 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 (GIST) despite clear indications it should have been included in the differential diagnosis. Dr. Hornick further opined defendants failed to perform proper staining and testing to rule out GIST before diagnosing plaintiff with leiomyosarcoma. 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 explained 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 explained that immunohistochemistry, markets 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. After review, he opined 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 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 attested 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 disagreed with defendants' expert Dr. Schuss' analysis regarding positive desmin and opined Dr. Schuss' opinion should be disregarded as unsupported by the medical records.

Dr. Hornick opined defendants departed from the standard of care in not performing immunohistochemical testing, and had this testing been performed, the GIST markers would have been positive, a proper diagnosis would have been made, and plaintiff would have had a very different course of treatment and outcome. He disagreed with defendants' experts and opined performing CD117 and DOG1 immunostains on a suspected leiomyosarcoma of the abdominal cavity or pelvis is a known standard of the profession, and a failure to perform these tests was a departure from the standard of care. Dr. Hornick further opined it is known and accepted that leiomyosarcoma and GIST are different but sufficiently linked requiring the diagnosis of one must first exclude the diagnosis of the other.

Dr. Hornick opined Dr. O'Leary knew or should have known a differential diagnosis was required because of the similarities between the two tumors and therefore departed from the standard of care by failing to consider gastrointestinal stromal tumor and failing to perform the proper pathological testing. He opined his review of the slides showed a tumor consistent with both diagnoses and therefore required GIST to be considered and ruled out by testing. Dr. Hornick reasoned Dr. O'Leary made assumptions based on inconclusive factors including the location of

the tumor, only ran tests that would further support that conclusion, and ignored important differences, such as the absence of desmin. Dr. Hornick further reasoned based upon the medical records, the tumor was always considered by pathology to be gynecologic, and it was a departure from the accepted standard of care to not consider it could be non-gynecologic. Dr. Hornick noted the surgical pathology report explicitly stated that “given the negative staining for hormone receptors, a non-gynecologic origin should be considered.” Dr. Hornick also attested based upon his review of emails between defendants, there was confusion and uncertainty regarding the diagnosis and results which should have led to further testing and including gastrointestinal stromal tumor in the differential diagnosis. Dr. Hornick also opined that although it was common practice and appropriate to send the slides to Dr. Park and MSKCC for further evaluation, Dr. O’Leary departed from the standard of care by failing to order CD117 or DOG1 staining when she saw they were not performed at MSKCC.

Dr. Hornick opined Dr. Truskinovsky departed from the standard of care by relying on Dr. Park’s diagnosis and not differentiating between GIST and leiomyosarcoma using pathological analysis. Dr. Hornick reasoned that as a board-certified pathologist, Dr. Truskinovsky should have known about the similarities between the tumors and failed to exercise professional judgment to make appropriate recommendations. He further opined had Dr. Truskinovsky exercised professional judgment, he would have determined the diagnosis of leiomyosarcoma was too attenuated and relied upon too many assumptions, and recognized CD117 and DOG1 staining had not been performed. Based upon the foregoing, Dr. Hornick opined defendants Dr. O’Leary and Truskinovsky departed from accepted standards of care and therefore caused plaintiff’s injuries. Dr. Hornick explained that had the correct tumor been diagnosed, that would have changed nearly everything that transpired in the time that followed.

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. Schuss and Dr. Neugut and opined they used blanket statements without explaining their reasoning. 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. 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*. (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 affirmations of Dr. Schuss and Dr. Neugut that they rendered care and treatment in accordance with good and accepted standards of care and did not proximately cause or contribute to plaintiff's injuries. Defendants demonstrated through Dr. Schuss' affirmation that Dr. O'Leary ordered appropriate testing and appropriately interpreted plaintiff's results. They demonstrated performing CD117 and DOG1 immunostains was not the standard of care in 2019, and defendants did not depart from the standard of care in failing to perform these tests. Defendants further demonstrated that when unable to make a definitive diagnosis, Dr. O'Leary was within the standard of care in obtaining an evaluation from Dr. Park at MSKCC and relying on the results confirming plaintiff suffered from a leiomyosarcoma. Defendants also demonstrated through Dr. Schuss' affirmation that defendant Dr. Truskinovsky was within the standard of care in relying on Dr. Park's diagnosis and by the time he became involved in plaintiff's care, two board certified pathologists had already confirmed the presence of leiomyosarcoma. Defendants similarly demonstrated through Dr. Neugut's affirmation that Dr. Maki was within the standard of care in relying on the leiomyosarcoma diagnosis, properly sought a third opinion from Dr. Truskinovsky, and provided appropriate treatment for leiomyosarcoma. Defendants further demonstrated through their experts' affirmations that they did not proximately cause plaintiff's injuries, as stage IV cancer was already present in May 2019 and had metastasized. Based upon the foregoing, defendants established a prima facie entitlement to summary judgment.

Plaintiff failed to raise a triable issue of material fact with respect to whether defendant Dr. Maki and defendant Monter departed from accepted standards of care or proximately caused plaintiff's injuries, as plaintiff failed to sufficiently rebut those portions of defendants' motion with competent, admissible evidence. (See *Keun Young Kim v. Lenox Hill Hosp.*, 156 A.D.3d 774, 775 [2d Dept. 2017].)

Plaintiff also failed to raise a triable issue of material fact with respect to whether defendant Dr. Truskinovsky departed from accepted standards of care or proximately caused plaintiff's injuries, as plaintiff's experts' opinions regarding Dr. Truskinovsky were vague and conclusory. (*See Wagner v. Parker*, 172 A.D.3d 954, 955 [2d Dept. 2019])["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'."] Dr. Hornick's opinion was conclusory and insufficient to raise a triable issue of fact, as he opined Dr. Truskinovsky knew or should have known about the similarities between gastrointestinal stromal tumor and leiomyosarcoma and should have made his own determination using his own professional judgment when consulted by Dr. Maki rather than relying on Dr. Park. Dr. Hornick failed to articulate with specificity how Dr. Truskinovsky departed from the standard of care, but rather made general statements mirroring the alleged departures by co-defendants. Plaintiff's other expert similarly failed to demonstrate how Dr. Truskinovsky departed from the standard of care or how his actions or inactions proximately caused plaintiff's injuries. (*See generally Kane v. Ausubel*, 44 A.D.3d 717 [2D Dept. 2007].)

However, plaintiff raised triable issues of material fact with respect to whether defendant Dr. O'Leary departed from accepted standards of care and proximately caused or contributed to plaintiff's injuries. Plaintiff raised triable issues of fact with respect to whether defendant Dr. O'Leary departed from the standard of care by relying on Dr. Park's diagnosis without doing additional testing or seeking further evaluation. Plaintiff demonstrated through Dr. Hornick's affirmation that Dr. O'Leary should have included gastrointestinal stromal tumor in the differential diagnosis, noting Dr. Park's report included a comment about pursuing a non-gynecologic source for the tumor. Plaintiff also demonstrated Dr. O'Leary departed from the standard of care by relying on inconclusive factors such as the location of the tumor and only ran tests that would further support the diagnosis of leiomyosarcoma rather than exploring gastrointestinal stromal tumor. Dr. Hornick further demonstrated Dr. O'Leary ignored the absence of desmin, which he opined was highly indicative of gastrointestinal stromal tumor. Dr. Hornick articulated why Dr. O'Leary should not have relied on Dr. Park's diagnosis and explained her duty as the initial treating pathologist to perform additional testing for an unclear tumor. Dr. Hornick also articulated with specificity that the standard of care requires gastrointestinal stromal tumor be ruled out before proceeding to a diagnosis of leiomyosarcoma because they present in similar ways but require different treatment and have different prognoses. Dr. Hornick also demonstrated the standard of care required Dr. O'Leary to pursue additional testing or evaluation when Dr. Park at MSKCC failed to use CD117 or DOG1 staining, and therefore it was a departure for her to rely on Dr. Park's diagnosis.

Plaintiff's expert demonstrated plaintiff's one-year delay in diagnosis caused her injuries, including a proper course of treatment, pain and suffering from unnecessary treatment, and a lower

rate of survival. Plaintiff's expert demonstrated plaintiff received chemotherapy that was not suitable for gastrointestinal stromal tumor and instead made her condition worsen and led her to palliative care in hospice treatment. 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 significant 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. O'Leary should have included gastrointestinal stromal tumor in the differential diagnosis and whether she should have relied on Dr. Park's diagnosis, there are material issues of fact necessitating a jury determination. (*See Mehtvin v. Ravi*, 180 A.D.3d 661, 664 [2d Dept. 2020][holding that 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' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted with respect to defendants Robert G. Maki, M.D., Alexander Truskinovsky, M.D., and Long Island Jewish Medical Center s/h/a Monter Cancer Center – A Division of LIJ Medical Center. Defendants' motion for summary judgment is denied with respect to defendants Xiaoqing Lin O'Leary, M.D., Lenox Hill Hospital and Northwell Health, Inc. It is hereby

ORDERED that plaintiff's Complaint is dismissed as to defendant ROBERT G. MAKI, M.D., and it is further

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

ORDERED that plaintiff's Complaint is dismissed as to defendant LONG ISLAND JEWISH MEDICAL CENTER s/h/a MONTER CANCER CENTER – A DIVISION OF LIJ MEDICAL CENTER, and it is further

ORDERED that the remaining parties shall appear for a pretrial conference on Wednesday, June 4, 2025 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: May 1, 2025



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

