

Biehl v Trustees of Columbia Univ. in the City of N.Y.

2026 NY Slip Op 30407(U)

January 23, 2026

Supreme Court, New York County

Docket Number: Index No. 805381/2019

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING PART 06

Justice

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MARISA BIEHL,

Plaintiff,

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY
OF NEW YORK d/b/a COLUMBIA DOCTORS, LAWRENCE
LUSTIG, MD, and DANIEL PENDER, MD,

Defendants.

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INDEX NO. 805381/2019

MOTION DATE 10/23/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 73

were read on this motion to/for JUDGMENT - SUMMARY & DISMISSAL.

Upon the foregoing documents, and oral arguments having been heard, the Defendant Daniel Pender, M.D. (“Dr. Pender”) moves this Court for an Order pursuant to CPLR 3212, granting summary judgment in favor of Defendant and dismissing all claims, with prejudice; amending the caption to remove Daniel Pender, M.D.; and directing the Clerk of the Court to enter judgment accordingly.¹

Plaintiff submits opposition to the motion.

BACKGROUND

This medical malpractice action arises from Plaintiff’s allegations that former co-Defendant Dr. Lawrence Lustig failed to diagnose and treat a mass at the base of the Plaintiff’s skull from June 2016 to December 2018. Plaintiff contends that Dr. Pender is responsible for Dr. Lustig’s negligence because of the foregoing:

¹ Defendants The Trustees of Columbia University in The City Of New York D/B/A Columbia Doctors, and Lawrence Lustig, MD, (“Dr. Lustig”) were discontinued from the action as per NYSCEF document numbers 38 and 39.

In May 2016 Dr. Pender referred Plaintiff to Dr. Lustig, the Chair of the Columbia otolaryngology (“ENT”) department, for surgical management of her ENT issues, including recurrent sinus infections, hearing loss, and headaches. On June 22, 2016, Dr. Lustig ordered a head CT scan that revealed and reported the presence of a possible sellar/suprasellar mass. According to the record, Dr. Lustig never reviewed the CT scan images or the corresponding report. Consequently, Plaintiff was not informed of these findings, and no medical interventions were initiated to follow up on or address the mass. Furthermore, Dr. Lustig never informed Dr. Pender of the CT results. Plaintiff became independently aware of the finding months after Dr. Lustig ordered the study when she reviewed the report on an online patient portal, however she never discussed the finding with Dr. Lustig.

On February 23, 2017, Plaintiff presented to Dr. Pender complaining of severe pain over her left eye when coughing or blowing her nose, as well as a hearing issue and ear pain. Dr. Pender assessed Plaintiff as having chronic sinusitis and ordered a sinus x-ray and medications. During this visit, Plaintiff showed Dr. Pender a copy of the June 2016 CT scan report performed by Dr. Lustig.

Thereafter, Plaintiff continued to treat with Dr. Lustig and Dr. Pender. On December 12, 2018, the Plaintiff underwent a sinus CT scan at Lenox Hill Radiology. The following day, Plaintiff presented to Dr. Pender reporting intense ear pain during a recent sinus CT scan. This CT scan revealed a lesion in the left sphenoid sinus. Dr. Pender documented that the CT scan showed a lesion in the left sphenoid sinus, which may have caused the vision problems due to nerve compression. He referred Plaintiff to non-party Dr. David Gudis for an ENT surgery consult, and Dr. Lisa Park for an ophthalmologic exam, and advised Plaintiff to return to his office as needed.

On December 17, 2018, a brain MRI ordered by non-party Dr. Jeffrey Bruce identified a mass lesion. Surgery was performed on January 28, 2019, to remove the tumor, after which Plaintiff underwent chemotherapy and radiation. Subsequently, Plaintiff continued to treat with Dr. Pender for generalized ear and sinus issues through January 2020, after which he stopped seeing patients due to his relocation to Pennsylvania.

On November 18, 2019, Plaintiff commenced the within action by filing the Summons and Complaint² and asserts that Dr. Pender failed to follow-up and/or obtain an MRI when he became aware of the June 2016 CT scan results which showed a possible pituitary mass. Specifically, Plaintiff's bill of particulars claims that Dr. Pender failed to timely diagnose a sellar/suprasellar mass and failed to order further studies of the head. Plaintiff claims that the alleged departures by Dr. Pender contributed to a delay in diagnosing Plaintiff's skull-base tumor resulting in exacerbation of the mass. As a result, Plaintiff alleges that she now suffers from temporal lobe seizures because of the tumor growth and removal surgery.

Defendant Dr. Pender now seeks summary judgment, arguing there are no disputed material facts and, consequently, Plaintiff's claims against him should be dismissed.

Plaintiff opposes the motion.

DISCUSSION

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice, or by establishing that the plaintiff was not injured by such treatment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept 2009]; *McGuigan v Centereach Mgt.*

² The Court limits its review to the arguments presented in the moving and opposing papers; as such, the doctrine of res ipsa loquitor pled in the Complaint is not addressed herein.

Group, Inc., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]). 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]).

In support of his motion, Dr. Pender submits the expert affirmation of John Carew, MD ("Dr. Carew"), a board-certified Otolaryngologist. Dr. Carew opines, to a reasonable degree of medical certainty, that Dr. Pender's treatment of the Plaintiff adhered to accepted standards of medical care at all times and that no act or omission by him proximately caused Plaintiff's alleged injuries. According to Dr. Carew, the standard of care required Dr. Pender to refer Plaintiff to an appropriate specialist when her condition exceeded the scope of his general practice; a requirement satisfied on May 24, 2016, when Dr. Pender referred Plaintiff to former co-Defendant Dr. Lustig—a neurotologist and department chair—for the surgical management of her hearing loss.

According to Dr. Carew, the standard of care imposes a non-delegable duty upon the physician who orders a radiological study to review both the images and the official interpretative report. Dr. Carew explains that because Dr. Lustig ordered the June 22, 2016, CT scan, the standard of care required him, and not Dr. Pender, to identify the incidental sellar/suprasellar mass and

arrange for follow-up care. Dr. Carew opines that Dr. Pender complied with the standard of care by focusing his treatment on the Plaintiff's routine otolaryngological complaints, as he appropriately relied on the ordering specialist to manage findings within that specialist's field of expertise.

Regarding Plaintiff's February 23, 2017, visit, Dr. Carew opines that Dr. Pender met the standard of care by performing a thorough HEENT examination and treating the Plaintiff's presenting symptoms of chronic sinusitis. Dr. Carew opines that Dr. Pender met the standard of care by appropriately relying on Dr. Lustig's role as the treating physician to manage the potential mass and by advising the Plaintiff to schedule the recommended MRI after reviewing the 2016 CT report. Dr. Carew clarifies that the standard of care did not require Dr. Pender to order the MRI himself, as he was not the treating physician for the suspected mass, nor did the standard require him to independently inquire into Dr. Lustig's treatment plan. Further, Dr. Carew notes that Dr. Pender acted in accordance with the standard of care on December 4, 2018, when Plaintiff first presented with neurological and vision issues by appropriately investigating these new symptoms. The record indicates that Dr. Pender timely ordered a sinus CT and immediately referred the Plaintiff to a surgical ENT and an Ophthalmologist. Ultimately, Dr. Carew concludes that Dr. Pender's reliance on the ordering physician was reasonable and that the sole responsibility for any delay in diagnosis rests with the physician who failed to review the 2016 radiology report.

Based on the expert affirmation of Defendant, the Court finds that Dr. Pender has satisfied his prima facie showing that the care and treatment rendered was within the standard of care, and did not proximately cause any of the injuries alleged by Plaintiff. It is well settled that once the defendant establishes prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's

affidavit or affirmation attesting to a departure from accepted medical practice and that such departures were a competent producing cause of the plaintiff's injuries (*see Roques*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]).

In opposition, the Plaintiff submits the expert affirmation of a board-certified expert in Neurosurgeon.³ Expert A opines, to a reasonable degree of medical certainty, that Dr. Pender departed from good and accepted standards of medical care as early as February 23, 2017, and that these departures were a proximate cause of the Plaintiff's injuries.

Expert A specifically rejects the Defendant's contention that the duty to act rested solely with the ordering physician. Instead, Expert A opines that when Plaintiff presented to Dr. Pender with the CT report fragment on February 23, 2017, she was "clearly and unequivocally seeking the advice and medical consultation" of Dr. Pender regarding those findings. Expert A asserts that, under the standard of care, this consultation established a physician-patient relationship with respect to the potential mass. Consequently, the standard of care required Dr. Pender to take affirmative steps to ensure the recommended MRI was completed, rather than merely suggesting it to the Plaintiff. According to the Expert A, the standard of care required Dr. Pender to either: (1) order the MRI himself; (2) speak directly with Dr. Lustig to coordinate a plan; (3) obtain a report from Dr. Lustig regarding the plan of care; or (4) inquire of the Plaintiff at every subsequent visit whether the MRI had been performed.

Expert A further opines that Dr. Pender departed from the standard of care by failing to recognize the Plaintiff's recurring headaches as a clinical sign of a "space-occupying lesion." According to Expert A, it is a fundamental medical principle that any physician, regardless of

³ Plaintiff has redacted the name of her expert pursuant to CPLR 3101(d); such expert shall hereinafter be referred to as "Expert A."

specialty, should presume that a patient with a known radiological finding of a skull mass who presents with headaches is experiencing symptoms caused by that mass until proven otherwise. The expert contends that Dr. Pender's failure to equate the Plaintiff's headaches with the identified lesion, or to inquire about the status of the mass during her multiple subsequent visits, constituted a continuing departure from accepted medical and ethical standards.

Regarding causation, Expert A opines that Dr. Pender's "nonfeasance" resulted in a critical delay in diagnosis. Based on a review of the imaging, Expert A asserts that the tumor grew between 2016 and 2018, reaching the size of a macroadenoma. In this regard, Expert A opines that had the tumor been addressed in early 2017, it would have been easily treated with a higher success rate and less risk. Specifically, Expert A concludes that with an earlier diagnosis, the tumor could likely have been fully addressed with stereotactic surgery and, more likely than not, Plaintiff would not have developed a permanent seizure disorder.

The Court finds that Expert A's affirmation raises triable issues of fact, thus, rebutting Defendant's prima facie entitlement to summary judgment. "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]).

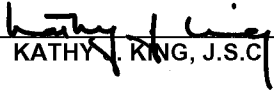
Accordingly, it is hereby

ORDERED that Defendant Dr. Pender's motion is denied in its entirety; and it is further

ORDERED that the Plaintiff is to serve a copy of this order upon counsel for the Defendant Dr. Pender with notice of entry within twenty (20) days of entry of this order; and it is further

ORDERED that all parties shall appear for a virtual settlement/pre-trial conference on July 29, 2026, at 11:00am, 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.

<u>1/23/26</u> DATE					 KATHY KING, J.S.C
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	

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