Campbell v New York City Health & Hosps. Corp.
2026 NY Slip Op 31421(U)
April 7, 2026
Supreme Court, New York County
Docket Number: Index No. 805308/2023
Judge: Hasa A. Kingo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **65M**

Justice

---X

KEITH CAMPBELL

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Defendant.

---X

INDEX NO. 805308/2023

MOTION DATE 11/14/2025, 01/16/2026

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 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, 93

were read on this motion tor SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion for SUMMARY JUDGMENT.

Plaintiff Keith Campbell ("plaintiff") moves pursuant to CPLR § 3212 for summary judgment on the issue of liability, contending that the record establishes, as a matter of law, that defendant departed from accepted standards of medical care during the July 13, 2022 right upper extremity procedure by failing to identify and protect the radial nerve and by proceeding without consultation from an upper-extremity, hand, or plastic surgery specialist. Plaintiff asserts that, during that procedure, a vicryl suture[1] was placed circumferentially around plaintiff's radial nerve, resulting in an acute right radial nerve palsy that was subsequently identified and relieved during a July 14, 2022, re-exploration.

Separately, Defendant New York City Health and Hospitals ("Bellevue," "defendant") moves for summary judgment dismissing the complaint in its entirety on all causes of action. For

[1] Vicryl (polyglactin 910) is a synthetic, absorbable, usually braided suture manufactured by Ethicon, used for soft tissue approximation and ligation. It provides high tensile strength, holding tissue for 2–3 weeks, and is fully absorbed via hydrolysis within 56–70 days. It is commonly used in general surgery, obstetrics, gynecology, and dentistry.

the reasons that follow, plaintiff's motion is denied and defendant's motion is denied (except that the informed-consent cause of action is dismissed), and plaintiff's cross-motion is denied.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff is a Bellevue patient who was stabbed multiple times on July 11, 2022. Among his injuries was a deep stab wound of the right forearm near the wrist. He underwent emergency surgery that evening (an exploratory laparotomy and repair of abdominal and arm wounds) and returned to the operating room on July 13, 2022, for wound irrigation and closure of the right arm injury. During the post-operative period on July 13–14, plaintiff complained of "right wrist drop" (inability to extend the wrist, fingers, and thumb) and decreased sensation over the radial (thumb) side of the hand. On July 14, 2022, after obtaining consent, the surgeons re-explored the right forearm; they found a buried hematoma and a vicryl suture looped around the radial nerve, which they removed, restoring the nerve's continuity. A hand specialist anticipated that the nerve would recover. Plaintiff was discharged July 20, 2022, with a cock-up splint and hand therapy plan.

On July 22, 2022, plaintiff was brought to Bellevue again after a separate altercation during which he reportedly re-injured his arm. He was briefly taken to another hospital (Mt. Sinai) and then returned to Bellevue. Bellevue records show he described a new knife injury to the right forearm (He was agitated and left against medical advice). In sum, plaintiff's right upper extremity underwent multiple interventions: emergency surgery on July 11, irrigation/closure on July 13, a hand surgery on July 14 (removing the suture from the nerve), and then another traumatic incident on July 22.

Plaintiff commenced this action by summons and verified complaint dated June 28, 2023, alleging that Bellevue negligently cared for his right arm stab wound(s) between July 11 and 20, 2022, resulting in permanent right radial (and ulnar) nerve palsy. The complaint appears to include causes of action for medical malpractice and for lack of informed consent. Defendant answered on July 31, 2023, raising affirmative defenses. Plaintiff thereafter served a bill of particulars (Aug. 30, 2023). Plaintiff now moves for summary judgment on the issue of liability. Separately, defendant moves for summary judgment dismissing all claims.

ARGUMENTS

Plaintiff contends that Bellevue's staff deviated from the standard of care in performing the July 13, 2022 arm surgery. Specifically, plaintiff asserts that the surgeon closed the wound without adequately exploring the deeper tissues and without consulting a hand/upper-extremity specialist. This alleged deviation, combined with the fact that a loop of suture was left around the radial nerve (necessitating the July 14 re-exploration), is said to have caused the permanent nerve palsy. Plaintiff relies principally on the affirmations of his expert, Dr. Omar D. Hussamy, M.D., who examined the patient and opined that the July 13 care "departed from accepted medical standards," leading to hematoma formation and vascular compromise that produced the wrist drop. Plaintiff points to Bellevue's admission note on July 22 (which notes he was "out of it" since the assault) and the July 13 nursing notes as showing his symptoms developed after the 7/13 surgery. He argues these facts plus Dr. Hussamy's expert opinion entitle him to summary judgment on negligence.

Defendant counters that it is entitled to summary judgment. It argues that plaintiff is effectively raising a new theory of liability (improper July 13 surgery) that was not pleaded or supported by the original bill of particulars. Even if considered, defendant proffers expert proof that no malpractice occurred. Bellevue's experts (Dr. Katherine Fischkoff, trauma surgeon, and Dr. Daniel MacGowan, neurologist) opine that the July 13 procedure was properly performed, that the risk of nerve injury had been disclosed, and that plaintiff's own conduct and the subsequent altercation (July 22) more likely explain his palsy. Moreover, defendant notes plaintiff signed an informed consent listing "damage to surrounding structures (including nerves)" as a risk, so any claim for lack of informed consent must fail. Defendant also argues that plaintiff has no evidence of malpractice and fails to meet the standards for using *res ipsa loquitur*.

DISCUSSION

Summary judgment is a drastic remedy that may only be granted if there are no triable issues of fact (CPLR § 3212[b]; *see Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). The burden is first on the movant to demonstrate the absence of any material factual dispute (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Forrest*, 3 NY3d at 305). Thereafter, the burden shifts to the non-movant to show, by admissible evidence, that a triable issue exists (*Winegrad v. New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Alvarez v. Prospect Hosp*., 68 NY2d 320, 324–25 [1986]). In applying these standards, courts do not weigh credibility or resolve conflicting expert opinions; rather, all reasonable inferences and ambiguities are drawn in favor of the non-movant (*Vega v. Restani Constr. Corp*., 18 NY3d 499, 503 [2012]; *DeParis v. Women's Natl. Republican Club*, *Inc*., 148 AD3d 401, 403 [1st Dept 2017]).

I. Plaintiff's Motion

While plaintiff's submissions identify an undisputed intraoperative event—namely, the presence of a suture encircling the radial nerve during the July 14, 2022 re-exploration—those submissions do not eliminate all material issues of fact regarding departure and causation.

Plaintiff's expert opines that accepted surgical practice required the identification, isolation, and protection of the radial nerve during the July 13 procedure. However, the affirmation does not sufficiently delineate the precise operative steps required under the conditions described in the record, including a deep traumatic stab wound accompanied by swelling, clot burden, and altered anatomy. Courts have repeatedly held that an expert's assertion that a defendant deviated from accepted practice is insufficient to support summary judgment where the affirmation fails to articulate the applicable standard with specificity or to explain how the defendant's conduct departed from that standard under the circumstances presented (*Bartolacci-Meir v Sassoon*, 149 AD3d 567, 568 [1st Dept 2017]; *Diaz v New York Downtown Hosp*., 99 NY2d 542, 544 [2002]).

Similarly, plaintiff's causation theory rests heavily on the temporal sequence of events, namely, that neurological deficits were recognized after the July 13 procedure and that a suture was later found around the radial nerve. While that sequence may support a strong inference of causation, it does not establish causation as a matter of law. The record includes evidence that, during the July 14 re-exploration, the radial nerve was found to be in continuity and responsive to

stimulation, findings relied upon by defendant's neurologic expert to conclude that permanent neurological injury would not ordinarily be expected from the July 13 event alone.

Additionally, the record reflects that, following discharge, plaintiff was involved in a subsequent altercation on July 22, 2022, during which he reported reinjury to the same arm and later required additional surgical intervention. Plaintiff's expert opines that earlier surgical trauma contributed to later complications, but that opinion does not conclusively exclude the subsequent altercation and reinjury as potential contributing or superseding causes of plaintiff's ongoing symptoms. Under settled law, where causation depends upon the resolution of competing medical explanations, summary judgment is not appropriate (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]).

For these reasons, plaintiff has not met the stringent burden required to obtain judgment as a matter of law on liability.

Even if plaintiff satisfied his initial burden, defendant's opposition raises multiple triable issues of fact precluding summary judgment.

Defendant has submitted expert affirmations from physicians in trauma surgery and neurology who opine that the care rendered conformed to accepted standards of medical practice and did not proximately cause plaintiff's injuries. These experts assert that the July 13 procedure was performed appropriately under challenging clinical conditions involving a deep traumatic wound, swelling, and bleeding; that the surgical team conducted an appropriate inspection of the operative field; and that consultation with a specialist was not required under the circumstances.

Defendant's experts further contend that the radial nerve remained anatomically intact and functional following the July 14 re-exploration and that plaintiff's subsequent altercation and reinjury may account for later complications and residual deficits. Such opinions directly dispute plaintiff's claims of departure and causation.

Where, as here, the parties submit conflicting expert opinions supported by the medical record, the court may not resolve those disputes on summary judgment. The credibility and weight of competing medical opinions are matters for the trier of fact (*Feinberg v Feit*, 23 AD3d 517, 519 [2d Dept 2005]).

The record, when viewed in the light most favorable to the nonmoving party, presents multiple triable issues of fact that preclude the granting of summary judgment. These issues include whether defendant departed from accepted standards of medical practice in the performance of the July 13, 2022 procedure; whether the circumstances of that surgery required additional identification or isolation of the radial nerve prior to wound closure; whether consultation with a hand or upper-extremity specialist was warranted under the clinical conditions then present; whether the placement of a suture around the radial nerve necessarily reflects negligent surgical technique or, instead, occurred despite otherwise appropriate management in a complex trauma setting; whether the July 13 procedure was a proximate cause of plaintiff's ongoing neurological deficits; whether plaintiff's subsequent altercation and reported reinjury contributed to or caused later complications; and, ultimately, the extent to which plaintiff's alleged

residual impairments are attributable to defendant's care as opposed to subsequent intervening events. Each of these matters is material to the disposition of the claims and defenses asserted, is supported by competent evidence in the record, and turns on the resolution of competing expert opinions and credibility determinations that are properly reserved for the trier of fact rather than for the court on a motion for summary judgment.

II. Defendant's Motion

Defendant's initial burden was to establish that, as a matter of law, its care did not depart from accepted medical practice or was not the cause of plaintiff's injury (*Pullman v. Silverman*, 28 NY3d 1060, 1063 [2016]). Here, defendant submits medical records and expert affirmations asserting that the July 11–13 surgeries were properly conducted. Bellevue's surgical expert (Dr. Fischkoff) explains that the stab wounds were treated in accordance with standard trauma protocols, and that any superficial suturing on July 11 did not encroach on the radial nerve. Dr. MacGowan (neurologist) notes the nerve appeared continuous and recoverable after the July 14 exploration.. Defendant also shows plaintiff was warned of nerve-injury risks in the July 13 consent form. On its face, this proof tends to negate negligence: if no breach of care is demonstrated, plaintiff cannot prevail.

Defendant also emphasizes that plaintiff has failed to allege any negligence in his pleadings with respect to the July 13 surgery. The bill of particulars identifies only the July 11 surgery (by doctors Bukur, Wang, Donnelly) as the basis of negligence, whereas plaintiff's expert now pinpoints the July 13 procedure as the cause of injury. As a matter of law, a new theory of liability not contained in the pleadings generally cannot be raised at summary judgment (*Vega*, 18 NY3d at 503). The Appellate Division, First Department, recently reaffirmed that an opposition to summary judgment that "raises for the first time . . . a new theory of liability that has not been set forth in the bills of particulars" is impermissible (*Cabrera v. Golden*, 231 AD3d 149, 155 [1st Dept 2024]). Thus, even before considering the merits, defendant argues plaintiff is bound by the allegations of his pleadings.

Finally, defendant argues that plaintiff's own proof on the record supports its motion. The only stated factual dispute is the cause of plaintiff's nerve injury. Defendant points to plaintiff's admission on July 22 that he had been stabbed again and an EMG showing a pronator teres injury, suggesting the July 22 event (or the original stabbing) could account for the paralysis. Defendant insists that plaintiff has no competent proof tying the wrist drop to the July 13 surgery. As a result, defendant contends there is no genuine issue of malpractice, and that the complaint should be dismissed as a matter of law. Regarding the informed-consent claim, defendant shows that plaintiff signed a detailed consent form (July 13) that explicitly warned of nerve damage. A patient who consents to a procedure after being informed of its risks cannot later claim lack of consent (Public Health Law § 2805-d[1]; *Briggins v. Chynn*, 204 AD2d 158, 162 [1st Dept 1994]). Defendant thus urges dismissal of that cause of action as well.

In opposition, plaintiff argues he has indeed produced a prima facie showing malpractice. He disputes the way defendant's experts frame the facts. Plaintiff points out that Bellevue's charts and surveillance video indicate he was lucid throughout July 11–13, with no neurological deficits noted until after the second surgery. He also emphasizes that he had no new complaints of injury

until after leaving Bellevue on July 20 and being stabbed again on July 22. Plaintiff's expert, Dr. Hussamy, examined him in 2025 and persuasively concludes that the timing and nature of the deficit (right wrist drop with radial nerve injury) can only be explained by surgical error on July 13 – namely, failure to adequately irrigate the wound, resulting in a compressive hematoma and nerve damage. Dr. Hussamy further opines that nothing in the July 22 incident accounts for this injury. Plaintiff stresses that Dr. Hussamy's opinion is a sufficient sliver of evidence to withstand summary judgment.

With respect to defendant's experts, plaintiff contends that the conflict in opinions merely creates an issue of fact. He argues that Dr. Fischkoff's statements and Dr. MacGowan's scenario of a July 22 cause are speculative. Plaintiff maintains that his expert has more direct knowledge (having examined the patient), and that credibility and the weight of expert evidence must be resolved at trial, not on summary judgment (*see Bradley v. Soundview Healthcenter*, 4 AD3d 194, 194 ["[c]onflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"][1st Dept 2004]). Plaintiff further asserts that defendant's position on informed consent is flawed because, although risks were listed on the consent form, he was not specifically warned of "impropriety of closing without proper visualization" – the very theory he raises. Even if the consent form listed generic nerve-injury risk, plaintiff suggests the nuances of care were not sufficiently disclosed. Lastly, as to the alleged new claim, plaintiff contends that his bill of particulars and sworn complaints indeed encompassed "surgical negligence on July 13" as part of the claim of liability; in any event, he asks the court not to throw out his claim on such a technicality at this stage.

To succeed in a medical malpractice action, a plaintiff ordinarily must prove (1) a departure from accepted professional standards and (2) that the departure was a proximate cause of the injury (*Frye,* 70 AD3d at 24-25). Both elements typically require expert proof. A defendant moving for summary judgment in such an action must show, prima facie, that one of those elements cannot be met (*see Alvarez*, 68 NY2d at 325–26). Courts require the defense expert to explain what was done and why it was proper, not merely offer the unsupported conclusion "there was no malpractice" (*Ocasio-Gary v. Lawrence Hosp. Ctr*., 69 AD3d 403, 404 [1st Dept 2010]; *Arocho v. Kruger, P.A.*, 110 AD3d 749, 750 [2d Dept 2013]). In other words, the movant must "affirmatively demonstrate the merit of [its] prima facie case by identifying the specific factual and legal issues to be resolved." (*Pullman*, 28 NY3d at 1063). Once that initial burden is satisfied, the burden shifts to the plaintiff to rebut with admissible evidence showing a triable fact (*Pullman*, 28 NY3d at 1063; *Katz v. United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]). To defeat summary judgment, the plaintiff's expert must do more than make conclusory or general assertions (*Alvarez*, 68 NY2d at 325–26). He or she must "discernible address the defendant's act and explain why it was negligent" (*Ocasio-Gary*, 69 AD3d at 404).

New York law (Public Health Law § 2805-d[1]) mandates that surgeons obtain a signed informed consent form listing the risks of a procedure. If the patient signed a valid form, a lack-of-consent claim generally fails. Here, the uncontroverted evidence shows plaintiff signed a comprehensive consent before the July 13 surgery listing "damage to surrounding structures" – explicitly including nerve injury – as a risk. A claim for lack of informed consent "must be dismissed" when a reasonable patient in the plaintiff's position would have agreed to the surgery even if all risks were disclosed (*see Briggins v. Chynn*, 204 AD2d 158, 162 [1st Dept 1994]).

Plaintiff offers no evidence that disclosure was inadequate; indeed, the form on its face discloses nerve-damage risk. Plaintiff also does not contend that a reasonable person would have foregone surgery given a stab wound injury. Thus, as a matter of law, plaintiff cannot prevail on any informed-consent cause. Defendant's motion on that cause of action is granted: it is dismissed, and plaintiff's cross-motion on consent is denied.

Plaintiff also purportedly raises issues under 8 NYCRR § 29.2(a), which governs certain formalities (e.g., verification) in malpractice pleadings. Even assuming any minor departures (e.g. typographical errors in medical records) existed, they did not "proximately cause" plaintiff's injuries and are not a proper basis to bar the action. In short, this is not a jurisdictional defect; and any clerical misstatement in a record does not create a triable issue of malpractice. Defendant's motion to dismiss on this ground is denied.

Defendant further contends that plaintiff impermissibly advances a new theory of liability—namely, negligence in connection with the July 13, 2022 procedure—that was not set forth in the pleadings or bill of particulars, and therefore may not be considered on this motion. While it is well settled that a party may not defeat summary judgment by raising a theory of liability for the first time in opposition papers, that principle is inapplicable where the allegedly new theory merely amplifies, clarifies, or more precisely articulates the factual basis of the negligence claim already pleaded (*see Vega*, 18 NY3d at 503–504; *Cabrera*, 231 AD3d at 155; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

Here, the record does not support defendant's characterization of plaintiff's position as a novel or belated theory of liability. The complaint and bill of particulars broadly allege negligent surgical management of plaintiff's right upper extremity injuries during treatment rendered between July 11 and July 20, 2022, including failures to properly identify and protect critical neurovascular structures and to exercise appropriate surgical judgment in the management of a deep stab wound to the arm. These allegations, by their nature, encompass the continuum of operative care provided during that hospitalization, including the July 13 procedure that is now the focus of the parties' expert submissions. Indeed, the gravamen of the malpractice claim has remained constant: that defendant's surgical management of the right upper extremity departed from accepted standards of care and resulted in injury to the radial nerve.

New York courts have repeatedly recognized that a plaintiff is not confined to a rigidly compartmentalized description of medical events in the pleadings, particularly where the alleged negligence arises from a course of treatment spanning multiple procedures or clinical decisions (*see Rivera v Montefiore Med. Ctr.*, 28 NY3d 999, 1001 [2016][holding that a plaintiff may rely on evidence that elaborates on the manner in which negligence occurred so long as it relates to the same transaction or occurrence]; *De Lourdes Torres v Jones*, 26 NY3d 742, 758 [2016][emphasizing that pleadings are to be construed liberally and that the dispositive inquiry is whether the defendant had fair notice of the conduct at issue]).

Applying those principles here, the court finds that defendant was plainly on notice that plaintiff's claim concerned the surgical handling of the right upper extremity wound and the protection of the radial nerve during operative care. The July 13 procedure was not an unrelated or discrete event, but rather an integral component of the same course of treatment that forms the

basis of the malpractice allegations. The fact that plaintiff's expert places particular emphasis on that procedure does not transform the claim into a new theory; rather, it reflects the ordinary process by which expert discovery sharpens the factual and medical issues for trial (*see Ostrov*, 91 AD3d at 154 [holding that an expert affidavit may identify specific departures within the general negligence alleged without constituting a new theory of liability]).

Nor is the court persuaded that the temporal distinction between the July 11 and July 13 surgeries mandates a different conclusion. In medical malpractice actions, liability is frequently predicated on a sequence of clinical decisions occurring over time, and the law does not require a plaintiff to isolate each operative step with surgical precision at the pleading stage (*see* CPLR § 3026 [pleadings shall be liberally construed]). Where, as here, the allegations concern the same anatomical site, the same injury, and the same alleged failure to safeguard a critical structure, the claim constitutes a single theory of negligent treatment, not a newly minted one.

Accordingly, the court concludes that plaintiff's reliance on the July 13 procedure represents a permissible elaboration of the negligence claim previously asserted, and not an impermissible new theory raised for the first time in motion practice. The court therefore considers the parties' submissions on the merits of the alleged departures in connection with that procedure.

Having determined that the challenged allegations fall within the scope of the pleaded claims, the court turns to the substantive question presented on this motion—namely, whether defendant has established its prima facie entitlement to judgment as a matter of law and, if so, whether plaintiff has raised triable issues of fact sufficient to defeat summary judgment.

Defendant has come forward with substantial evidence that the surgical care was proper. Its trauma-surgery expert (Dr. Fischkoff) and neurologist (Dr. MacGowan) explain that the July 13 wound irrigation and closure were performed using accepted technique. Although a vicryl suture was found around the radial nerve on July 14, Dr. Fischkoff states that such suturing was only done to temporarily secure the soft tissues and was consistent with proper wound closure; the nerve itself was never severed or necrosed. Dr. MacGowan notes that reversible nerve dysfunction is a known possible outcome of penetrating arm injuries and of surgical exploration, even when properly done. Crucially, these experts also identify alternative causes for the deficits: the initial hematoma from the stab, and especially plaintiff's second altercation on July 22 (which could have caused or exacerbated the nerve injury). In short, defendant's papers suggest that neither a breach nor causation has been proved.

Plaintiff responds with the sworn affirmation of Dr. Hussamy, who opines that nothing but a deviation on July 13 explains the timing and nature of the injury. He cites the records showing plaintiff had normal movement after the first surgery and only developed paralysis thereafter. These facts, he argues, preclude a second altercation or pre-existing cause as a significant factor. On face, Dr. Hussamy's affidavit raises a colorable issue: if believed, it would establish the requisite departure and causation. He specifically contests Dr. Fischkoff's version of events, concluding that the nerve palsy was iatrogenic.

The fundamental question on summary judgment is not whose expert is "correct," but whether there is any genuine factual dispute. Here, the parties' experts offer directly contradictory

accounts of how the injury occurred. Defendant's motion required it to "explain what defendant did and why" in closing the wound (*see Ocasio-Gary*, 69 AD3d at 404). It has done so, at least to a degree, through Dr. Fischkoff's affirmations. But plaintiff's expert has put forth countervailing opinions. This conflict of expert testimony creates a triable issue (*see Foster-Sturrup v. Long*, 95 AD3d 726, 727 [1st Dept 2012]; *Roques v. Noble*, 73 AD3d 204, 206–07 [1st Dept 2010]). A credibility contest between experts is precisely the sort of dispute that summary judgment cannot resolve (*Vega*, 18 NY3d at 503; *DeParis*, 148 AD3d at 403). Indeed, it is hornbook law that a party's summary judgment motion is defeated if the opposing party presents any expert proof of a breach and causation (*Murphy v. Conner*, 84 NY2d 969, 972 [1994]).

Plaintiff's rebuttal evidence is not merely "general or conclusory"; Dr. Hussamy ties his opinions to the particular facts (i.e. absence of symptoms until after 7/13). Although defendant suggests Dr. Hussamy did not have an orthopedist's level of experience, there is no affirmative evidence that he lacks the competence to opine on this issue, and plaintiff has at least made a prima facie case through his affidavit. Thus, the motion's showing has been met and plaintiff has put forth admissible counter-proof. On this record, summary judgment for defendant must be denied with respect to the malpractice claim.

Defendant also argues that plaintiff cannot invoke *res ipsa loquitur* to avoid expert proof. While *res ipsa* is only triggered in narrow circumstances, this motion does not turn on it: defendant has submitted its own expert testimony (rendering *res ipsa* analysis largely academic). In any event, the doctrine's elements are plainly in dispute. *Res ipsa* requires that the injury not ordinarily occur absent negligence and that it be under the defendant's exclusive control (*Dermatossian v. N.Y. City Transit Auth.*, 67 NY2d 219, 226 [1986]; *Mejia v. New York City Tr. Auth.*, 291 AD2d 225, 228 [1st Dept 2002]). Here, the evidence suggests multiple possible causes (initial trauma and intervening altercation), any of which could explain the nerve palsy. Defendant's experts contend that an innocent explanation exists – in particular, that the wound was properly inspected and only a temporary stitch was used – which undermines the first element. The third element (absence of voluntary act by plaintiff) is also questioned, given plaintiff's later refusal of therapy and his own second confrontation. Because the record does not clearly satisfy all three requirements of *res ipsa*, and because expert evidence directly addresses the care, *res ipsa* cannot per se mandate summary judgment for plaintiff (*Dermatossian*, 67 NY2d at 226; *Stukas v. Streiter*, 83 AD3d 18, 22 [2d Dept 2011]; *Banks v. Barkoukis*, 231 AD2d 598, 598–99 [2d Dept 1996]). In any event, the conflict of expert testimony means plaintiff's entitlement to a *res ipsa* inference is in doubt – and that doubt is for the jury, not the court, to resolve.

In sum, viewing the evidence in plaintiff's favor, the court finds there are triable issues of fact with respect to the alleged surgical malpractice. These include: (a) whether defendant's surgical technique on July 13 deviated from the standard of care (contrasted Dr. Fischkoff's and Dr. Hussamy's versions); (b) whether the suture placement and hematoma were avoidable and constituted medical error; (c) the significance of the July 22 altercation in causing or aggravating the injury (Dr. MacGowan's theory vs. plaintiff's denial); and (d) the credibility of the parties' experts. Each of these is properly decided by a factfinder. Any one of them defeats summary judgment.

For the reasons discussed, defendant's motion is granted only as to plaintiff's lack-of-informed-consent claim, which is dismissed. In all other respects, defendant's summary judgment motion is denied. A trial shall be scheduled forthwith to adjudicate the remaining disputed issues.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Keith Campbell for summary judgment on the issue of liability pursuant to CPLR § 3212 is denied in its entirety; and it is further

ORDERED that the denial of plaintiff's motion is without prejudice to the resolution of the issues of departure, causation, and damages at trial; and it is further

ORDERED that the court finds that triable issues of fact exist concerning the standard of care, proximate cause, and the extent of plaintiff's alleged injuries, precluding the entry of judgment as a matter of law; and it is further

ORDERED that defendant's motion for summary judgment is granted solely to the extent that plaintiff's cause of action sounding in lack of informed consent is dismissed; and it is further

ORDERED that defendant's motion for summary judgment is otherwise denied; and it is further

ORDERED that the remaining causes of action shall continue; and it is further

ORDERED that counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon all parties and upon the Clerk of the Court within twenty (20) days of entry; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant New York City Health and Hospitals Corporation dismissing the cause of action for lack of informed consent, with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that this matter is scheduled for an IN-PERSON settlement and pre-trial conference on:

June 22, 2026, at 10:00 a.m.
Supreme Court of the State of New York, County of New York
80 Centre Street, Room 308
New York, New York 10013

; and it is further

ORDERED that the Plaintiff and counsel on both sides with authority must be present in-person for the settlement; and it is further

ORDERED that all attorneys appearing shall be fully familiar with the facts of the case, the applicable law, and comparable case values sustained by the Appellate Division, First Department; and it is further

ORDERED that all attorneys must be:

1. Authorized to enter into substantive and procedural stipulations on behalf of their clients;
2. Authorized to enter into a disposition of the case; and
3. Prepared to schedule a firm trial date, consistent with 22 NYCRR § 202.26 and applicable court rules;

; and it is further

ORDERED that, prior to the conference, counsel shall consult with their schedules, as well as those of their clients and witnesses, so that meaningful progress toward resolution and trial readiness can be achieved; and it is further

ORDERED that each attorney shall prepare a short settlement memorandum, to be emailed to the court no later than three (3) days before the scheduled conference, setting forth:

1. The anticipated length of trial;
2. The last demand and offer;
3. A brief description of the case, including a list of departures alleged (limited to those anticipated to be charged on the verdict sheet and not the omnibus list from the bill of particulars) and any affirmative defenses anticipated to be raised at trial;
4. A statement listing the major injuries alleged;
5. The number and specialty of all expert witnesses that the party intends to call at trial;
6. A brief analysis of cases, including citations, in which an appellate court discussed the sustained value of similar injuries (non-economic damages); ; and
7. Identification of any evidentiary issues that should be addressed prior to jury selection;

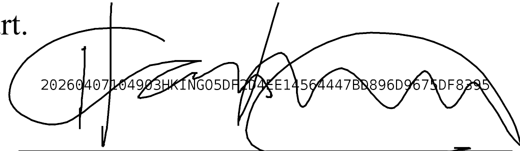
; and it is further

ORDERED that the settlement memorandum shall be submitted no later than three (3) days before the conference; and it is further

ORDERED that counsel shall provide the court with business cards, each including the attorney's cell phone number and the client's name; and it is further

ORDERED that, if this matter has been discontinued or settled prior to the scheduled conference, counsel shall promptly notify the court and file a stipulation of discontinuance or stipulation of settlement.

This constitutes the decision and order of the court.



04/07/2026				HASA A. KINGO, J.S.C.		
DATE						
CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED		☐ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN			☐ FIDUCIARY APPOINTMENT		☐ REFERENCE