Xiaoling Wu v New York City Health & Hosps. Corp.
2026 NY Slip Op 31764(U)
April 21, 2026
Supreme Court, New York County
Docket Number: Index No. 162452/2015
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

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XIAOLING WU,

Plaintiff,

- v -

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, BELLEVUE HOSPITAL CENTER, CALVIN JUNG, VASILIKI KARLIS, SAUL BAHN

Defendant.

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INDEX NO. 162452/2015

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 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, 65, 66, 67

were read on this motion for SUMMARY JUDGMENT.

Defendants The New York City Health and Hospitals Corporation s/h/a The New York City Health and Hospitals Corporation and Bellevue Hospital Center, Calvin Jung, M.D., and Vasiliki Karlis, M.D. (collectively "defendants") move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and, to the extent applicable, pursuant to CPLR § 3211(a)(7), for dismissal for failure to state a cause of action. Plaintiff Xiaoling Wu ("plaintiff") opposes the motion and cross-moves for an extension of time to oppose and for summary judgment on liability. Upon the foregoing papers, defendants' motion is granted only to the extent set forth below, plaintiff's cross-motion for an extension of time is granted, and plaintiff's cross-motion for summary judgment on liability is denied.

Defendants seek an order dismissing this dental-malpractice action in its entirety. They contend that the extraction of plaintiff's wisdom teeth on July 23, 2013 was performed in accordance with good and accepted practice, that plaintiff was adequately informed of the reasonably foreseeable risks of the procedure, that the subsequent management of plaintiff's postoperative complaints was appropriate, that any claimed injury was not proximately caused by any departure from accepted practice, and that the doctrine of *res ipsa loquitur* is inapplicable. Defendants further argue that certain theories advanced by plaintiff, including allegations concerning inadequate supervision of Dr. Jung and certain claimed injuries or symptoms beyond those set forth in the notice of claim, are impermissible new theories not fairly encompassed by the notice of claim.

Plaintiff opposes the motion and cross-moves, first, for an extension of time to oppose defendants' motion and, second, for summary judgment on liability. Plaintiff contends that defendants failed to establish prima facie entitlement to judgment as a matter of law and, in any

event, that plaintiff's expert affirmation raises triable issues of fact concerning both departure and causation. Plaintiff further contends that the record demonstrates that the lingual nerve injury was preventable, that it resulted from negligent operative technique and inadequate protection of the tongue and surrounding tissue, and that defendants also departed from accepted practice in failing promptly to identify, assess, document, and treat or refer the injury.

BACKGROUND AND PROCEDURAL HISTORY

This action arises from dental treatment rendered at Bellevue Hospital on July 23, 2013, when plaintiff underwent extraction of wisdom teeth nos. 16, 17, and 32. Plaintiff alleges that, during the course of that procedure, she sustained injury to the lingual nerve, with resulting numbness and altered sensation involving the right side of the tongue. Plaintiff also alleges a failure adequately to diagnose and manage that injury in the postoperative period.

Before commencement of this action, plaintiff sought leave to serve a late notice of claim, and, by order dated March 30, 2015, that relief was granted and the notice of claim was deemed timely served. Plaintiff thereafter commenced this action by summons and complaint dated December 6, 2015. The complaint asserts causes of action sounding in dental malpractice and negligence, res ipsa loquitur, and lack of informed consent. Issue was joined by service of answers on behalf of the municipal and individual defendants. Plaintiff later served bills of particulars. Discovery proceeded over a protracted period, including party depositions and the depositions of Dr. Karlis and Dr. Jung. The matter was at one point stayed due to the death of defendant Dr. Saul Bahn, and, by later order, the action was severed as against him and the stay lifted. Plaintiff filed a note of issue on March 3, 2025, and defendants timely made the instant motion within the applicable post-note period.

The record reflects that plaintiff signed a written consent form before the extraction procedure and that the form identified, among other risks, loss of sensation and function to the tongue. The Bellevue records and testimony also reflect that teeth nos. 17 and 32 were partially erupted, that the procedure lasted approximately twenty-five minutes, and that the contemporaneous record did not document copious blood loss or other intraoperative complication. According to the defense proof, plaintiff first formally presented with complaints of numbness and diminished taste on the right side of the tongue on October 7, 2013, after which she was evaluated, followed, and referred to Dr. Hirsch for further assessment. Defendants further rely upon proof that plaintiff did not return for a scheduled follow-up in February 2014 and was out of the country for a substantial period, after which the opportunity for any earlier surgical intervention had passed.

Plaintiff, however, relies on her own testimony, the Bellevue records, and the affirmation of her expert, Dr. Joseph DiDonato, who opines that the injury was caused during extraction of tooth no. 32 by inadequate retraction and operative protection of the tongue, that the injury was preventable, and that defendants further departed from accepted standards by failing timely to identify, document, assess, inform plaintiff of, and treat or refer the injury in the immediate postoperative period. Plaintiff's expert also emphasizes the asserted lack of detailed operative documentation and opines that, had the injury been timely recognized and appropriately investigated, corrective intervention may have been possible.

ARGUMENTS

Defendants contend that they have established, through the detailed affirmation of their expert oral and maxillofacial surgeon, Dr. David Behrman, that no defendant departed from good and accepted practice. They argue that the extraction of tooth no. 32 was a simple extraction of a partially erupted tooth, performed with accepted instruments and technique, under proper supervision, and with no evidence of excessive force, uncontrolled bleeding, or other occurrence suggestive of negligent laceration of the lingual nerve. Defendants further argue that lingual nerve injury is a known risk of wisdom-tooth extraction that may occur even in the absence of negligence because of anatomic variation in the path of the nerve. Defendants additionally argue that plaintiff was adequately informed of the reasonably foreseeable risks, including tongue numbness, and that a reasonable person in plaintiff's position would have undergone the extraction in light of her symptoms. They also maintain that the postoperative management was appropriate because plaintiff was evaluated, referred to a specialist, and managed conservatively in accordance with accepted practice, and because plaintiff's own nonappearance for follow-up and lengthy absence from the country broke any asserted chain of causation concerning delayed repair. Finally, defendants maintain that *res ipsa loquitur* does not apply and that several theories now advanced by plaintiff exceed the scope of the notice of claim.

Plaintiff counters that defendants' expert proof is itself conclusory in material respects and improperly assumes operative facts that were never documented. Plaintiff emphasizes the asserted absence of a detailed operative report, the evidence that a "flap tray" was present for the procedure, the recorded postoperative tongue laceration, and her expert's opinion that the injury was preventable and resulted from inadequate retraction or other negligent intraoperative technique. Plaintiff also argues that defendants departed from accepted standards in failing promptly to recognize and aggressively evaluate a lingual-nerve injury and in failing adequately to educate plaintiff about the time-sensitive nature of possible intervention. Plaintiff asserts that these conflicts in expert opinion preclude summary judgment for defendants and, indeed, entitle plaintiff to judgment on liability. Plaintiff separately seeks an extension of time to oppose defendants' motion.

In reply, defendants argue that plaintiff's expert opinions are speculative because they posit operative scenarios not grounded in the record, including use of a rotary instrument in a negligent manner, and because they fail adequately to confront Dr. Behrman's anatomical analysis and his opinion that the injury could occur absent negligence. Defendants further contend that plaintiff's expert does not meaningfully refute the defense proof regarding postoperative management, including the significance of plaintiff's delayed presentation of symptoms and failure to return for follow-up.

DISCUSSION

On a motion for summary judgment in a medical or dental malpractice action, the moving defendant bears the initial burden of establishing, prima facie, either that there was no departure from accepted practice or that any such departure was not a proximate cause of plaintiff's injuries (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Roques v Noble*, 73 AD3d 204, 206 [1st

Dept 2010]). If that showing is made, the burden shifts to plaintiff to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact. Where the defendant fails to satisfy the initial burden, the motion must be denied regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). Expert opinion submitted on such a motion must be based on facts in the record or personally known to the expert; an expert affirmation that rests upon unsupported assumptions, misstates the record, or offers only generalized or conclusory assertions is insufficient (*Park v Kovachevich*, 116 AD3d 182, 191-192 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]; *Mignoli v Oyugi*, 82 AD3d 443, 444 [1st Dept 2011]; *Cabrera v Golden*, 231 AD3d 149, 155 [1st Dept 2024]).

As an initial matter, the branch of defendants' motion brought pursuant to CPLR § 3211(a)(7) is academic. Issue has long since been joined, discovery has been completed, a note of issue has been filed, and the parties have submitted a full evidentiary record. Under these circumstances, the motion is properly analyzed under CPLR § 3212.

The court further grants plaintiff's request for an extension of time to oppose defendants' motion. The opposition and cross-motion were interposed in response to the very motion now before the court, defendants have fully replied on the merits, and no prejudice warranting rejection of the opposition has been shown on this record. The court therefore exercises its discretion to consider plaintiff's opposition and cross-motion on the merits.[1]

Turning to the merits, the court finds that defendants met their initial burden on the malpractice claim. Through the affirmation of Dr. Behrman, together with the medical and dental records and deposition testimony upon which he relied, defendants made a prima facie showing that the extraction procedure was performed in accordance with accepted practice, that lingual-nerve injury is a recognized risk of the procedure that can occur absent negligence, and that the subsequent management of plaintiff's complaints, including referral for specialist evaluation, was within the range of accepted professional judgment. Defendants also made a prima facie showing on causation by adducing expert proof that plaintiff's injury did not result from any negligent act or omission on their part and that the later course of treatment was affected, among other things, by plaintiff's own failure to return as directed. That proof was sufficiently detailed and record-based to satisfy defendants' threshold burden (*Alvarez*, 68 NY2d at 324; Roques, 73 AD3d at 206).

The court cannot conclude, however, that defendants are entitled to judgment as a matter of law dismissing the principal malpractice and negligence claims. Plaintiff's expert, Dr. DiDonato, although vulnerable to forceful attack on cross-examination and although not persuasive in all respects, identifies specific claimed departures and ties them to facts appearing in the record, including the documented postoperative tongue laceration, the equipment notation relied upon by plaintiff, the asserted absence of detailed operative documentation, and the subsequent course of postoperative assessment and referral. He opines, within a reasonable degree of dental certainty, that plaintiff sustained a laceration to the right lateral border of the tongue during extraction of tooth no. 32 because of inadequate retraction and protection, that the injury

[1] Notably, following letter submissions dated February 2, 2026 (NYSCEF Doc. Nos. 62–63), the court established a briefing schedule providing that the return date of the pending motion and cross-motion (Motion Sequence 002) was adjourned to March 11, 2026; that any opposition to the cross-motion was to be filed on or before March 10, 2026; and that no reply on the cross-motion would be permitted absent further order of the court.

was preventable, and that defendants further departed from accepted standards by failing timely to identify, assess, document, inform plaintiff of, and treat or refer the injury. He also opines that the delay in recognition and management contributed to plaintiff's claimed permanent sensory loss.

To be sure, significant aspects of plaintiff's expert's reasoning may ultimately be found speculative, especially insofar as he reconstructs the precise instrumentality of injury from an incomplete operative record. Nevertheless, on this record, the court's role is issue finding, not issue determination. The competing expert affirmations present sharply divergent views as to whether the injury was an unavoidable known risk of the extraction or instead the product of negligent operative technique and inadequate early postoperative response. Those disputes go to the heart of departure and causation and are not resolvable as a matter of law on motion practice (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24-25 [1st Dept 2009]; *Roques*, 73 AD3d at 207). The trier of fact, not the court on summary judgment, must determine whether plaintiff's expert's opinions are adequately grounded in the record and whether defendants' expert's contrary explanation is to be credited.

The result is different, however, with respect to the cause of action for lack of informed consent. Public Health Law § 2805-d limits such a claim to a failure to disclose reasonably foreseeable risks, benefits, and alternatives associated with a nonemergency treatment, procedure, or surgery, in a manner permitting a knowledgeable evaluation, and requires proof that a reasonably prudent person in plaintiff's position would not have undergone the procedure if fully informed (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; Public Health Law § 2805-d[1], [3]). Here, defendants established prima facie that plaintiff signed a consent form expressly disclosing, among other risks, loss of sensation and function to the tongue, and that the extraction was recommended to address plaintiff's symptoms. Plaintiff did not submit competent expert proof sufficient to raise a triable issue that the disclosures made were qualitatively inadequate under the statute, or that a reasonably prudent person in plaintiff's position would have declined the extraction had further disclosures been made. Instead, plaintiff's expert largely recasts the postoperative management issues as having deprived plaintiff of later healthcare choices, which is not the informed-consent claim pleaded in connection with the July 23, 2013 extraction procedure itself. On this record, the lack-of-informed-consent claim cannot stand (Public Health Law § 2805-d; *Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]).

The court likewise grants summary judgment dismissing plaintiff's *res ipsa loquitur* cause of action. To invoke that doctrine, plaintiff must show that the event is of a kind that ordinarily does not occur in the absence of negligence, that it was caused by an instrumentality within defendants' exclusive control, and that it was not due to any voluntary action or contribution on plaintiff's part (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Here, the parties' own experts frame the central dispute as whether this lingual-nerve injury represented an unavoidable known risk of the procedure or a preventable consequence of negligent technique. In light of that very dispute, and in light of defendants' unrebutted prima facie showing that such an injury can occur absent negligence because of anatomic variation, plaintiff cannot establish as a matter of law the foundational proposition that this is an occurrence that ordinarily does not happen without negligence. Moreover, plaintiff's theory depends upon contested expert reconstruction of what instrumentality caused the injury. Under these circumstances, the doctrine does not furnish an independent basis for recovery (*Morejon*, 7 NY3d at 209).

The court also agrees with defendants that plaintiff may not expand this action through theories not fairly encompassed by the notice of claim. A plaintiff may not defeat summary judgment by asserting a materially different theory of malpractice or injury against a municipal defendant than that presented in the notice of claim, because the notice must provide the public corporation with sufficient information to investigate the claim and assess its exposure (*see Kisielewska v City of New York*, 211 AD3d 637, 637-638 [1st Dept 2022]). To the extent plaintiff now seeks to proceed on a distinct theory that defendants were negligent in permitting Dr. Jung to perform the extraction without consent to his participation, or on claims of injuries or symptoms beyond those fairly described in the notice of claim, those theories are not properly before the court and may not be pursued as independent bases of liability.

Plaintiff's cross-motion for summary judgment on liability must also be denied. Even assuming the cross-motion is timely or otherwise properly before the court because it addresses issues similar to those raised by defendants' motion, plaintiff plainly has not established entitlement to judgment as a matter of law. The record contains directly conflicting expert opinions on the core questions of operative departure, causation, and postoperative management. Those disputes preclude judgment for plaintiff just as they preclude dismissal of the malpractice claim against her (*see Alvarez*, 68 NY2d at 324; *Park*, 116 AD3d at 191-192).

Accordingly, the court concludes that the malpractice and negligence claims sounding in operative negligence and postoperative management must proceed to trial, but that the causes of action for lack of informed consent and *res ipsa loquitur* must be dismissed, and that plaintiff may not proceed on new municipal-liability theories outside the scope of the notice of claim.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion for an extension of time to oppose defendants' motion is granted, and plaintiff's opposition papers are deemed timely served and filed *nunc pro tunc*; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR § 3211(a)(7) is denied as academic; and it is further

ORDERED that the branch of defendants' motion pursuant to CPLR § 3212 is granted only to the following extent: the second cause of action, sounding in *res ipsa loquitur*, and the third cause of action, sounding in lack of informed consent, are dismissed; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that, to the extent plaintiff seeks to proceed on theories of liability or categories of injury not fairly encompassed within the notice of claim, including any separate theory that defendants negligently permitted Dr. Jung to perform the procedure without plaintiff's consent to his participation, such theories are not permitted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on liability is denied; and it is further

ORDERED that the remainder of the action shall continue as to plaintiff's dental-malpractice and negligence claims consistent with this decision and order; and it is further

ORDERED that the parties are directed to appear for a settlement conference before the court on Thursday, July 16, 2026, at 2:15 PM, in Room 308 of the courthouse located at 80 Centre Street, New York, New York 10013; and it is further

ORDERED that all parties are expected to appear in person. The plaintiff must appear, and counsel appearing on behalf of all parties must have full authority to negotiate and resolve the matter; 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, upon arrival at the conference; and it is further

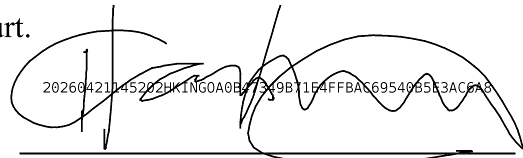
ORDERED that the parties shall kindly confirm their representation and availability for the scheduled conference no later than July 1, 2026, as prompt confirmation assists the court in managing its calendar efficiently; and it is further

ORDERED that counsel shall confer in advance of the conference and be prepared to engage in meaningful settlement discussions, including having knowledge of all relevant facts, damages, liens, and outstanding discovery, if any; and it is further

ORDERED that if the matter is resolved or discontinued prior to the scheduled conference, counsel shall promptly notify the court and file the appropriate stipulation on NYSCEF without delay; and it is further

ORDERED that requests to adjourn the settlement conference shall be made in writing, on notice to all parties, and will be granted only upon a showing of good cause and extenuating circumstances, and must be submitted no later than forty-eight (48) hours before the scheduled conference.

This constitutes the decision and order of the court.



4/21/2026
DATE

HASA A. KINGO, J.S.C.

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